

STANDING COMMITTEE ON LEGISLATION

TAXATION ADMINISTRATION BILL 2001 TAXATION ADMINISTRATION (CONSEQUENTIAL PROVISIONS) (TAXING) BILL 2001 TAXATION ADMINISTRATION (CONSEQUENTIAL PROVISIONS) BILL 2001

**TRANSCRIPT OF EVIDENCE TAKEN
AT PERTH
ON WEDNESDAY, 15 MAY 2002**

SESSION 7

**Hon Jon Ford (Chairman)
Hon Giz Watson (Deputy Chairman)
Hon Kate Doust
Hon Peter Foss
Hon Bill Stretch (Substituted by Hon George Cash)**

[1.30 pm]

THOMPSON, MS CLARE
President, Law Society of WA,
examined:

PICKERING, MR JOHN,
Taxation Committee Member, Law Society of WA,
examined:

The CHAIRMAN: On behalf of the committee, I would like to welcome you. You have both signed a document entitled Information for Witnesses. Have you read and understood that document?

The Witnesses: Yes, we have.

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 that you refer to during the course of this hearing for the record. Please be aware of the microphones and try to talk into them and ensure that you do not cover them with papers or make noise near them. For your information I remind you that your transcript will become a matter for public record. If, for some reason, you wish to make a confidential statement during today's proceedings, you should request that the evidence be taken in closed session. If the committee grants your request, any public and media in attendance will be excluded from the hearing. Please note that until such time as the transcript of your public evidence is finalised, it should not be made public. I advise you that premature publication or disclosure of public evidence may constitute a contempt of Parliament and may mean that the material published or disclosed is not subject to parliamentary privilege. You can now make a statement.

Ms Thompson: I understand that the committee has received a copy of our submission dated 22 March 2002. That submission has been circulated to both parliamentary leaders with responsibility in this area and, to that extent, it has already been made public. I will not make most of the comments that the Law Society of WA wishes to make this afternoon as Mr Pickering will be doing that. The society has a number of concerns about this Bill, although, on the whole, it is supportive of what the Bill is doing in terms of its attempt to tidy up the various state tax legislation in this State. Our concerns are focused in limited areas, predominantly with respect to company directors' liabilities, legal professional privilege, increases in penalties and checks and balances, which, in our submission, are not properly provided for under the legislation. Subject to any questions that the committee may have this afternoon, we will confine our comments to the difficulties that we foresee as opposed to the many positive things that this legislation seeks to achieve. Mr Pickering will now deal with our more detailed comments.

Mr Pickering: One of the fundamental concerns of the society, which is evident in our submission, is our real concern about the lack of checks and balances in the legislation. We are concerned about the powers that are being provided to the Office of State Revenue without requisite checks and balances by way of an administrative appeals tribunal or some form of administrative review of the decision-making processes with which the commissioner or the office is entrusted. We are aware that the Office of State Revenue is, in some respects, open to challenge in the courts by way of prerogative writ or by declarations. We are concerned with the number of provisions in this Bill in which there is an attempt to exclude review of these matters by the courts. On page 4 of our submission we have alluded to clauses 47 and 48 as two examples of those exclusions. When we

talk to the committee today in terms of clauses 67, 94 and 100, which are the three matters that we believe are before the committee, we still have an overriding concern about the lack of checks and balances to give some sort of balance between the necessary powers of the Office of State Revenue and the rights of the citizens of this State. That is one of the prime concerns that we have on this matter.

I will not take you through our submission ad nauseam. However, our concerns with clause 67 are set out on page 15 of our submission. If the committee refers to page 2, it will see that we allude to the purposes of the particular provision and the defences that are available to any director who receives a notice. We say that the provisions are based on the commonwealth Taxation Administration Act and note that, in its explanatory memorandum, a reference is made to the New South Wales Payroll Tax Assessment Act - as distinct from the various taxing Acts that are covered by this administration Act - as being a similar provision that was introduced in 1999. We are not aware of any other provision within the other state taxing Acts. That is not to say that they are not there, but that we are not aware of them and have been unable to locate them. If someone told us that there was another provision that we had missed, we would accept that. However, at the present time there are no provisions of this nature that cover such a broad array of taxes that are levied by a taxing authority. For example, under the commonwealth taxation Act, the only time that this type of provision is appropriate, or enacted, is in relation to the withholding of wages of employees or what we term, prescribed payments; that is, payments due to contractors that the payer is required to withhold on behalf of the contractors and remit to the taxation office to pay their taxes.

In relation to the New South Wales Payroll Tax Assessment Act, there are concerns about the payroll tax, which is an expanding debt and arises every month or every quarter depending on how the matters are taxed. The Office of State Revenue has concerns to ensure that the expanding, or increasing, debt is covered by provisions such as this to force directors to act. We are concerned that it not only covers payroll tax, but also stamp duty and other taxes where the commissioner has served an assessment notice. This is one of our prime sources of concern. This provision takes it further than the other States' legislation and it certainly takes it further than the commonwealth legislation. The effect of a provision such as this is to elevate the position of the State in relation to the company's debts against any other creditor of the company. Although the director, who is being forced to pay this amount of money, has a right of indemnity against the company, I note that he does not have a right of indemnity against the other directors or anyone else. He is then left in a position where he sits as an unsecured creditor against the company. This is unacceptable to us. We have concerns about the legislation for those two reasons: first, that it takes the legislation further than all other States and the Commonwealth; and, secondly, that it elevates the position of the State as against all other unsecured creditors. It is unacceptable to people, and there is no reason that the Office of State Revenue should not take action as a normal unsecured creditor through the Corporations Act or otherwise to enforce payment. There is no justification for payroll tax, stamp duty and other state taxes that are levied to have this elevation.

We have participated in the consultation with the Office of State Revenue and, on behalf of the Law Society of WA, we congratulate the Office of State Revenue and both Governments for the level of consultation that has occurred on this Bill. As a result, it has probably extended the period within which people would have liked to have introduced this Bill into Parliament and to have given it effect. However, it has given us the opportunity to discuss many of the matters that were in the first drafts of the Bill - we first received the eighth draft and the last draft I saw was about the twentieth - and to provide to the Office of State Revenue the views of the professional community as well as other members. This is to be encouraged in terms of the development of revenue laws. Having said that, we certainly do not agree with everything that is ultimately being put forward. This legislation will not resolve the issue of the phoenix companies. It is not a matter of prosecution or directors' liabilities. The people involved in this sort of conduct are people who - I hesitate to use the word - are acting in almost a criminal-like manner. This sort of action will have a limited effect

because the only body that will collect under this legislation is the Office of State Revenue. It is a minor part of the result of the activities of these phoenix companies. The people doing this sort of thing are conscious of these liabilities and will no doubt take steps to avoid being directors on the record, or otherwise, of these phoenix companies. Our submission outlines how the provisions will not produce the result that is intended. Therefore, it leaves us in a position of putting in place legislation that is unnecessary and that will not serve the purpose for which it is allegedly put forward. Whether the State will collect any further revenue from this sort of thing is also doubtful. However, there are inconsistencies in that every director is jointly and severally liable. As committee members would note, there is no specific statutory power for the director who has paid the money to try to recover that from other directors who have not paid. If the committee has a view to recommend this provision, it is something that could be addressed. There is an indemnity against the company, but that would be relatively worthless in most situations.

The second issue that we addressed in our submission was that of legal professional privilege. We had the good fortune to listen to, in the main, Mr O'Connor's submission on behalf of the Law Council of Australia. I do not intend to take the committee through all the cases and the like. However, the Law Society's thoughts in this regard are set out on page 20 of our submission. We have referred to *Laws of Australia* and the definition of legal professional privilege, which is a succinct paragraph in setting out what the current law is. As Mr O'Connor indicated, there are always challenges around the edges of what is legal professional privilege and how statutes impact upon it. However, we do not intend to take the committee through all of those matters. I had the good fortune of hearing Mr Foss ask Mr O'Connor a question about clause 94(3). Our submission notes that that provision seems to serve no relevant purpose.

[1.45 pm]

I must admit that I have not considered the issue of a copy of a document being stamped and the copy becoming subject to legal professional privilege. I have not considered whether clause 94(3) might still have a role to play. It is something that we will consider in the light of the comment; it is something we overlooked in our submission to the committee. In relation to clause 94(4), we do not believe the provision is necessary. In essence, legal professional privilege relates to communications between lawyers and their clients. It is the client's right to claim legal professional privilege; it is not the lawyer's right and it is not someone else's right. Only the client can make the claim. It is only the client who can waive the privilege. When a lawyer claims, on behalf of his client, legal professional privilege, he is acting on behalf of his client; he is not acting in his own right. Similarly, any other person claiming legal professional privilege on behalf of someone else does so on behalf of that person. If it is suggested that someone should be prosecuted because he claimed legal professional privilege but did not have reasonable grounds for doing so, it must be remembered that he is not making that claim on behalf of himself; he is making the claim on behalf of someone else.

The second issue we wish to raise is that the provision attempts to make an offence of claiming - with reasonable, justifiable grounds - legal professional privilege. A person who claims it is a person who owns a document; that is, taxpayers in general. They would be the clients of the people concerned. As Mr O'Connor pointed out, it is a rather difficult position that they have. If someone from the Office of State Revenue seeks, under warrant or otherwise, to take a document, he is in a position in which he has to act very quickly. In the event that he does not act and the officer takes the document, obviously, the privilege no longer exists because the officer concerned has access to the document. That concerns us considerably. The society made submissions about taxpayers being given the reasonable opportunity to take legal advice or otherwise to ascertain whether the documents or communications being sought by the Office of State Revenue are privileged. As the Bill is drafted at present, it does not provide that. I note what was stated in the explanatory memorandum in that regard.

The society's submission is that there is no real need for a provision of this nature. If someone claimed legal professional privilege and the privilege is not reasonably open to be claimed or it is not proper to claim it, clear provisions in the Bill apply. We have alluded to clauses 90, 96, 98 and 99, all of which relate to hindrance, obstruction and other matters. It seems to us that there is no pressing reason to have a particular provision that deals with legal professional privilege. It is equally valid to suggest that every other provision in the legislation, such as clause 94(1), can apply. That is perhaps a bad example as privilege is abrogated in relation to criminal matters. It is equally valid to suggest that for every other type of offence, it should be dealt with under the Bill. The penal provisions clearly cover this sort of thing. If one makes a claim in those circumstances there is a clear path to prosecution.

The explanatory memorandum, in our view, does not accurately reflect the facts. The memorandum has a reference to an existing system whereby documents that are claimed under privilege are sealed and delivered to the Law Society of WA. Subsequently, they are adjudicated upon. The Law Society has sought to ascertain the documents upon which this assertion is based and has not been able to. A number of us have recollections from the early 1990s of discussions occurring along these lines in relation to visits to lawyers' premises and claims of legal professional privilege. We are not aware of any system in place. Over the past five years we have been 99.9 per cent certain that no documents have ever been delivered to the Law Society for which legal professional privilege has been claimed and disputed. To suggest - as the explanatory memorandum does - that there is a system in place, and by implication, operating, is incorrect. That is not to say that the society would not like to see a system in place. We would like to see in place the system we have suggested in the wording to our amended clause 94(4); that is, if there is a claim for privilege, that the documents are sealed and delivered to the Supreme Court for adjudication. It would then require that the person claiming privilege commence an action. If that person did not commence an action within a month, the documents would be released to the commissioner. That overcomes the fundamental concerns, as we understand them from consultations with the Office of State Revenue, that people are claiming legal professional privilege when it is not reasonably claimable. Given that the documents are sealed immediately and delivered to the court and that the onus is on the taxpayer to commence an action to test whether they are subject to legal professional privilege, it would resolve the issue and remove the specific prosecution offence. This is what the Law Society has submitted in its paper to the Parliament.

We can see no real reason for a prosecution offence. We believe the real concerns of the Office of State Revenue can be remedied by a simple administrative remedy such as the one we propose. It gives the person concerned a month to make a decision as to whether he wishes to claim legal professional privilege and bear the costs of taking the matter to court. It also gives the Office of State Revenue a period in which to make a decision as to whether it wishes to contest the argument, particularly once the action commences, because it will become further aware of the claims the taxpayer will make. In the main, it will not see the document, but counsel will in the course of the litigation.

The final matter at which the society took umbrage is clause 100, which deals with offences by a body corporate. It vicariously attributes offences to a director of a body corporate. I should apologise to the committee because our paper stated that the society was not aware of other provisions in other revenue Acts. It has been brought to my attention that there is a similar offence provision in a New South Wales administration Act. That is not to say that the provisions should be enacted as proposed. We have real concerns about liabilities being passed vicariously onto innocent directors and forcing them to prove their innocence to the Office of State Revenue and ultimately to the courts. In our paper we suggested that if a person is knowingly concerned or concerned with the commission of an offence, that person should certainly be prosecuted. That is not at issue as far as the society is concerned. The society is concerned about relatively innocent directors of a body corporate. Bodies corporate do not necessarily have to be private companies; they can include

public companies. A director or a de facto director could be liable for any manner of body corporate, when, in fact, he has done nothing and, to the best of his knowledge, he has done everything he needs to do to ensure that the body corporate is complying with the provisions of the Act. That is what concerns us; an onus of proof rests on every director of a company whenever a company or a body corporate deliberately or otherwise - through omission - does something that may give rise to an offence. Such directors are liable and they have to prove their innocence. That seems to be using a sledgehammer to crack a walnut. I have heard that phrase used before. The society's view is that the appropriate offence is one in which a person is knowingly concerned in an offence or when a person has acted with gross negligence in respect of his duties. To suggest that the offence exists without having to do anything is incorrect in our view. Those are the three main issues that the society is prepared to address the committee on today. As I have said, the society has provided a paper that analyses and comments on each clause of the Bill. The society does not back away from those comments at all.

Ms Thompson: The only thing I would add is a reference to *Hansard* for Tuesday, 19 February 2002. At page 7533 the Treasurer, Mr Ripper, is recorded as speaking on legal professional privilege. It is clear from his comments that his prime concern is the protection of the revenue and that he believes it is proper for courts to make the determination as to whether legal professional privilege exists in any situation. We agree with the Treasurer's views in that respect; it is quite proper for the Parliament to seek to protect the revenue. Secondly, it is the courts' jurisdiction to determine whether a claim of legal professional privilege is made properly. In that regard, our suggested amendment enhances that end by providing a much speedier mechanism for the determination of claims of legal professional privilege than the proposed penalty provision. It will take some considerable time from the time a privilege claim is made to a prosecution being brought and a determination being made. It may take 12 or 18 months. The provision suggested by the society, which is an immediate referral of the documents to court with a subsequent application being made for privilege to be upheld for the documents, gives 30 days, which is clearly in the interests of the protection of the revenue in having the matter determined quickly rather than further down the track. As Mr Pickering has pointed out, the penalty provision that clause 94(4) seeks to impose does not resolve the question of privilege.

[2.00 pm]

It is merely a penalty provision. We suggest that penalty provisions that are in place elsewhere in the Act cover the situation adequately. In the event that the provision that we suggest is adopted, being an immediate application to the Supreme Court to uphold privilege in relation to documents, if that claim were rejected, the commissioner would still be at liberty to prosecute under the more general prosecution powers that he or she may have under the Act. We are not suggesting that those provisions should not be used in appropriate circumstances. We simply consider it to be looking at the problem in the wrong way. If a problem needs to be resolved, a mechanism should be put in the legislation to resolve the problem.

The CHAIRMAN: Thank you.

Hon GEORGE CASH: From the initial comments you both made, I gathered that the general thrust of the legislation showed a lack of checks and balances and that you believe that there is a need for fairer and more equitable legislation to be put in its place. For example, you have provided some specific recommendations for possible amendments to clause 94, which is helpful. Ms Thompson has just run through those. It would be helpful if you could also provide us with some specific amendments for other areas of the Bill, so that the committee can make some recommendations to the House. We can judge for ourselves whether the amendments are in the proper parliamentary format or perhaps need to be amended to take into account other submissions that may be made to the committee. That would be helpful to us. Your submission also referred to the non-reviewable decision provision and stated that this should be removed from the Bill. I happen to agree with you. Again, it would be helpful if you were to provide us with specific

amendments that deal with the clauses, so that we can go straight to them and make whatever recommendations to the House that are deemed appropriate. I do not need to raise any other issues save one; that is, you have made a recommendation in relation to clause 100, which states -

Offence by body corporate - See previous comments. In sub-clause (1) insert at the start: "Subject to sub-section (2),".

I am interested in why that is necessary. We can look at it later, but if you have a response available, it would be helpful to me.

Mr Pickering: To be honest, I do not. It is unfortunate that you have raised this point with us, because the author of that comment was the previous witness. It was a drafting issue that he was concerned about.

Hon GEORGE CASH: We will look at it. You mentioned that the recommendation was drafted by Mr Rob O'Connor, QC, which was helpful. I will look further into the recommendation to see whether a benefit might be derived from that proposed amendment.

Mr Pickering: If it would assist, I will take note of the question and raise it with him. Perhaps the Law Society of Western Australia would like to respond.

Ms Thompson: I will respond generally. We would of course be happy to provide this committee with more information in relation to proposed amendments to deal with the checks and balances issue, and particularly the supervisory questions that we have raised. One relates to whether the Government will proceed with the proposed administrative appeals tribunal. Mr O'Connor alluded to that in his evidence. We consider that the proposed administrative appeals tribunal would provide a mechanism in that regard. Our amendments would deal with that question and would be supportive of it.

Hon PETER FOSS: We cannot send it to something that does not exist.

Ms Thompson: That is correct. I suggest that if an administrative appeals tribunal were put in place, it might be an appropriate place for certain types of decisions to go, as opposed to the Supreme Court.

The CHAIRMAN: Thank you very much.

Committee adjourned at 2.05 pm