THIRTY-SEVENTH PARLIAMENT

REPORT 12

STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES REVIEW

CONSUMER PROTECTION LEGISLATION AMENDMENT AND REPEAL BILL 2005

Presented by Hon Simon O'Brien MLC (Chairman)

June 2006

STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES REVIEW

Date first appointed:

17 August 2005

Terms of Reference:

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

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

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

8.2 The Committee consists of 4 Members.

8.3 The functions of the Committee are -

(a) to consider and report on Bills referred under SO 230A;

(b) of its own motion or on a reference from a Minister, to consider or review the development and formulation of any proposal or agreement whose implementation would require the enactment of legislation made subject to SO 230A;

(c) to examine the provisions of any instrument that the Commonwealth has acceded to, or proposes to accede to, that imposes an obligation on the Commonwealth to give effect to the provisions of the instrument as part of the municipal law of Australia;

(d) to review the form and content of the statute book;

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

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

8.4 For a purpose relating to the performance of its functions, the Committee may consult with a like committee of a House of the Parliament of the Commonwealth, a state or a territory, and New Zealand and similarly, may participate in any conference or other meeting."

Members as at the time of this inquiry:

Hon Simon O'Brien MLC (Chairman)

Hon Donna Faragher MLC

Hon Matt Benson-Lidholm MLC

Hon Sheila Mills MLC

Staff as at the time of this inquiry:

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REPORT OF THE STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES REVIEW

IN RELATION TO THE

CONSUMER PROTECTION LEGISLATION AMENDMENT AND REPEAL BILL 2005

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1 REFERENCE AND PROCEDURE

1.1 On 1 June 2006 the House referred the Consumer Protection Legislation Amendment and Repeal Bill (**Bill)** to the Standing Committee on Uniform Legislation and Statutes Review (**Committee**) for consideration and report by not later than 27 June 2006.

1.2 On 8 June 2006 the Committee conducted a hearing with the following officers of the Department of Consumer and Employment Protection (**Department**):

- Mr Tom Filov, Manager, Policy; and
- Mr Alistair Conwell, Acting Senior Policy Officer, Consumer Protection.

1.3 Details of the Committee's inquiry were also made available on the parliamentary website, www.parliament.wa.gov.au.

2 PURPOSE AND OVERVIEW OF THE BILL

2.1 The Bill proposes the amendment and repeal of a number of Acts (**principal Acts**).

2.2 The Bill proposes the amendment of the following 11 principal Acts:

- *Builders' Registration Act 1939*;
- *Consumer Affairs Act 1971*;
- *Credit (Administration) Act 1984*;
- *Fair Trading Act 1987*;
- *Land Valuers Licensing Act 1978*;
- *Motor Vehicle Dealers Act 1973*;
- *Real Estate and Business Agents Act 1978*;
- *Residential Tenancies Act 1987*;

- *Retirement Villages Act 1992*;
- *Settlement Agents Act 1981*; and
- *Travel Agents Act 1985*.

2.3 The Bill also proposes the repeal of the *Trading Stamp Act 1981*.

2.4 All of the principal Acts that are proposed to be affected by the Bill fall within the consumer protection area of the Government's consumer and employment protection portfolio.

2.5 In the Bill's Second Reading Speech, the Leader of the House stated:

> *"This bill seeks to make amendments to a number of acts within the consumer protection portfolio that of themselves do not justify separate bills. The amendments will correct anomalies, improve consumer protection, streamline administrative practices and remove unnecessary legislation. … The amendments in the bill are considered relatively minor and technical in nature. However, they provide reforms that are important to protect the interests of consumers and improve processes for business in Western Australia."*[1]

3 FURTHER AMENDMENTS TO THE BILL

3.1 The Committee was advised that there were no further proposed Government amendments to the Bill.[2]

4 SPECIFIC CLAUSES OF THE BILL

Clauses 1 and 2 - Preliminary

4.1 Clause 2(2) permits different days to be fixed by proclamation as the commencement dates for different provisions of the Bill.

Clauses 3 and 4 - proposed amendment of the *Builders' Registration Act 1939*

4.2 Clause 4 proposes to amend s 3(1a) of the principal Act to specify that s 4B of the principal Act applies throughout the State. Currently, s 3(1a) provides only that ss

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1 Hon Kim Chance MLC, Leader of the House on behalf of the Minister for Fisheries (representing the Minister for Consumer and Employment Protection), Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 9 November 2005, pp6962-6963.

2 Mr Tom Filov, Manager, Policy, Department of Consumer and Employment Protection, and Mr Alistair Conwell, Acting Senior Policy Officer, Consumer Protection, Department of Consumer and Employment Protection, *Transcript of Evidence*, 8 June 2006, p10.

12A and 12B (relating to the Building Disputes Board and the Building Disputes Tribunal) of the principal Act apply throughout the State.

4.3 Section 4B relates to building licence fees, which include a levy to fund the Building Disputes Board and the Building Disputes Tribunal. Section 4B states:

> *"**4B. Building licence fee***
>
> *(1) A person to whom a building licence is issued is to pay to the local government by which the licence is issued at the time of issue such fee as is determined by the Minister.*
>
> *(2) A local government shall within the prescribed period after the end of the month in which a building licence referred to in subsection (1) was issued —*
>
> *(a) furnish to the Board the prescribed particulars in relation to that licence; and*
>
> *(b) remit to the Board the fee referred to in subsection (1) less any amount the Board has agreed to pay to the local government for collection of the fee."*

4.4 Section 4B currently only applies to those specified areas set out in the Schedule to the principal Act. Although the Schedule to the principal Act appears to cover a large section of the State, the Committee was advised that for practical purposes s 4B currently applies to only 125 of the State's 144 local governments, and in the case of 15 local governments it applies only to townsites within the relevant local government area.[3]

4.5 The Department explained that the purpose of the amendment was:

> *"To correct a drafting error so that the building licence levy will apply throughout the State (as was intended by the Building Legislation Amendment Act 2000). Currently, localities outside of the scheduled areas to which the Builders' Registration Act 1939 applies are able to access the Building Disputes Tribunal (BDT) but do not pay the building licence levy which is used in part to fund the BDT."*[4]

4.6 The Committee was concerned that there may have been instances over the past six years where a home owner had paid the building licence levy to a local government

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[3] Ibid, p2.

[4] Department of Consumer and Employment Protection, *Consumer Protection Legislative Amendment and Repeal Bill 2005: Overview of Changes*, 30 May 2006, p1.

pursuant to s 4B when they were not required to do so. The Department provided the following advice to the Committee:[5]

> *"The requirement to pay the building licence levy for each licence issued by a local government authority came into operation on 1 August 2001. Between 1 August 2001 and 12 June 2006, of the 19 local government authorities to which the Builders' Registration Act 1939 does not apply, four have collected and forwarded the levy (less the authorities' administration fees) to the Builders' Registration Board.*
>
> *The four local government authorities are:*
>
> | | | |
> |---|---|---|
> | *Shire of Leonora* | | *$ 34* |
> | *Shire of Mukinbudin* | | *$686* |
> | *Shire of Upper Gascoyne* | | *$ 74* |
> | *Shire of Westonia* | | *$221* |
> | *TOTAL* | *$* | *1,015"* |

Clauses 5 to 9 - proposed amendment of the *Consumer Affairs Act 1971*

4.7 Clause 6 proposes to increase the term of appointment of members of the Consumer Products Safety Committee from 12 months to three years. The reasons given for this proposed amendment is to reduce the administration involved in keeping the membership of the Consumer Products Safety Committee up to date, and to bring about consistency in the term of appointments with other boards and committees within the consumer and employment protection portfolio.[6]

4.8 The Consumer Products Safety Committee consists of seven members who are appointed by the Minister for Consumer Protection.[7] One member must be an officer of the Department, who performs the role of chairman. Deputies are also appointed for each member.

4.9 Clause 7 proposes to amend s 23Q(6) of the principal Act.

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5 Letter from Mr Tom Filov, Manager, Policy, Department of Consumer and Employment Protection, 15 June 2006, attached *Supplementary Information*, p1.

6 Mr Tom Filov, Manager, Policy, Department of Consumer and Employment Protection, and Mr Alistair Conwell, Acting Senior Policy Officer, Consumer Protection, Department of Consumer and Employment Protection, *Transcript of Evidence*, 8 June 2006, p2.

7 Letter from Mr Tom Filov, Manager, Policy, Department of Consumer and Employment Protection, 15 June 2006, attached *Supplementary Information*, p1.

4.10 Section 23Q currently provides that the Commissioner for Fair Trading may make an interim order prohibiting the supply of dangerous goods of the class or description specified, or of any particular goods so specified, for a period not exceeding 28 days. Currently under s 23Q(6) the Commissioner may subsequently revoke such an interim order. Clause 7 proposes to also permit the Commissioner to amend an interim order.

4.11 Clause 8 proposes the amendment of s 23R of the principal Act.

4.12 Section 23R currently provides that the Commissioner may adopt product safety orders or other instruments made by a consumer affairs authority of the Commonwealth or another State or Territory, without the Commissioner making reference to the Consumer Products Safety Committee. The Committee was given the example of flashing electronic toy dummies sold to children at royal shows as the type of product that may prompt the Commissioner to act quickly in response to developments in other jurisdictions.[8]

4.13 Clause 8(1) proposes to address concerns raised in legal advice to the Government that the current wording of s 23R, and in particular the reference to *"consumer affairs authority"*, may not authorise the Commissioner to adopt various product safety instruments made by Governors and Ministers of other jurisdictions or the Governor General.[9] The proposed amendments therefore replace the current references to an order or instrument made by another jurisdiction's consumer affairs authority with a simplified reference to goods prohibited under *"a law of the Commonwealth or another State or a Territory"*. An order made under s 23R is also proposed to be unaffected by any subsequent amendment, repeal or expiry of a law referred to in that section.

4.14 Clause 8(2) proposes to amend s 23R(6) so as to enable the Commissioner to amend an order made under s 23R either on his or her own motion or on the recommendation of the Consumer Products Safety Committee. Currently, the Commissioner may only amend such orders on the recommendation of the Consumer Products Safety Committee.

4.15 Clause 9 proposes to amend s 23U of the principal Act.

4.16 Section 23U currently provides that the Governor may make product safety regulations that adopt either wholly or in part and either specifically or by reference any Australian Standard or any of the standard rules, codes or specifications of Standards Australia. The proposed amendment seeks to clarify that the regulations

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8 Mr Tom Filov, Manager, Policy, Department of Consumer and Employment Protection, and Mr Alistair Conwell, Acting Senior Policy Officer, Consumer Protection, Department of Consumer and Employment Protection, *Transcript of Evidence,* 8 June 2006, p3.

9 Ibid, p3.

may adopt the rules, orders or specifications of Standards Australia *"… as in force at the time of adoption or as amended from time to time"*.

Clauses 10 and 11 - proposed amendment of the *Credit (Administration) Act 1984*

4.17 Clause 11 proposes to insert a new Part VA into the principal Act, relating to the establishment of a Consumer Credit Fund.

4.18 The proposed Consumer Credit Fund is to be the fund established and operated for the purposes of section 106 of the *Consumer Credit (Western Australia) Code*. Section 106 deals with the treatment of money received by the Government as a result of a civil penalty being imposed against a credit provider for a breach of the Consumer Credit Code or the *Credit Act 1984*, and states:

> *"**106. Payment of penalty to fund***
>
> *An amount of civil penalty ordered by the Court to be paid on an application for an order made by a credit provider or the Government Consumer Agency must be paid by the credit provider into a fund established and operated under another law of this jurisdiction for the purposes of this section or, if no such fund is established, to the Government Consumer Agency."*

4.19 The Committee sought clarification as to where such monies are currently being held in the absence of a Consumer Credit Fund. The following information was provided by the Department:

> *"**The CHAIRMAN**: … Where do funds collected from civil penalty awards currently go?*
>
> ***Mr Filov**: They are currently awarded to a trust account established under the Financial Administration and Audit Act.*
>
> ***The CHAIRMAN**: Is there already a separate account in that fund?*
>
> ***Mr Filov**: There is that. However, we are responding to a qualified audit from the Auditor General's office. Under the Consumer Credit Code, the payment of a civil penalty that results from a breach of the code, or an action that might have been taken to prosecute a credit provider or a voluntary admittance of a problem by a credit provider, must be paid into a fund established and operated under another law, or if no such fund is established, to a consumer government agency. The qualified audit suggested that, although the department has been operating a trust account arrangement under the Financial Administration and Audit Act, that probably could not be considered*

to be a fund as required under the Consumer Credit Code. Hence, the proposed amendment to establish the consumer credit fund to meet that requirement of the code and remove that uncertainty."[10]

4.20 The Department provided the following supplementary information to the Committee:

"Currently civil penalty monies awarded against credit providers are held in a general Departmental trust fund. The fund is for monies held in suspense pending decisions on how it should be dispersed.

While the current arrangement satisfies the Auditor General's guidelines, the proposal to establish a specific Consumer Credit Fund for civil penalty monies will also meet the requirements of the Consumer Credit Code."[11]

4.21 The Department also drew the Committee's attention to an *Auditor General's Opinion* on the Ministry of Fair Trading's financial statements for the year ended 30 June 2000, which relevantly states:

"An amount of $178 101 resulting from a civil penalty in respect of the Consumer Credit (Western Australia) Act 1996 was credited to the Ministry's Operating Account. This is a departure from section 64 of the Constitution Act 1889 and section 6(2)(a) of the Financial Administration and Audit Act 1985 that requires such moneys to be credited to the Consolidated Fund."[12]

4.22 Proposed new s 44B states that the following are to be credited to the Consumer Credit Fund:

- any amount paid to the fund by a credit provider;
- income derived from the investment of moneys standing to the credit of the Consumer Credit Fund;
- any moneys received by, made available to or payable to the Consumer Credit Fund;
- costs awarded to the Commissioner for Fair Trading in a proceeding under this Act; and

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[10] Ibid, pp3-4.

[11] Letter from Mr Tom Filov, Manager, Policy, Department of Consumer and Employment Protection, 15 June 2006, attached *Supplementary Information*, p1.

[12] Ibid, p2.

- costs awarded to the Commissioner for Fair Trading in a proceeding under the *Credit Act 1984*.

4.23 Proposed new s 44C states that the Commissioner for Fair Trading will be able to apply the Consumer Credit Fund for the following purposes:

a) the payment of such moneys as are approved by the Minister, on the terms approved by the Minister, for the following purposes -

(i) providing financial counselling services to consumers;

(ii) giving legal advice to consumers about consumer credit;

(iii) providing information about consumer credit;

(iv) providing research about the use of credit;

b) the administration of this Act;

c) legal fees incurred by the Commissioner, or costs awarded against the Commissioner, in a proceeding under this Act; and

d) legal fees incurred by the Commissioner, or costs awarded against the Commissioner, in a proceeding under the *Credit Act 1984*.

4.24 Proposed new s 44D states that the administration of the Consumer Credit Fund is to be taken to be, for the purposes of the accountability and reporting requirements of the *Financial Administration and Audit Act 1985*, a service of the department principally assisting the Minister in the administration of the principal Act.

Clauses 12 and 13 - proposed amendment of the *Fair Trading Act 1987*

4.25 Clause 13 proposes the insertion of a new Division 4 into Part II of the principal Act, relating to third party trading schemes.

4.26 Clause 13 must be read with cl 37, which proposes the repeal of the *Trading Stamp Act 1981*.

4.27 Section 3 of the *Trading Stamp Act 1981* contains the following definitions:

> *"**"third-party trading stamp"** means a trading stamp that is redeemable by a person other than —*
>
> *(a) the manufacturer or a vendor of the goods; or*
>
> *(b) the vendor of the services,*

in connection with the sale of which, or for the purpose of promoting the sale of which, the trading stamp is, or is intended to be, supplied;

"trading stamp" *means a stamp, coupon, token, voucher, ticket, or other thing —*

(a) that is, or is intended to be, supplied —

(i) in connection with the sale of goods or services; or

(ii) for the purpose of promoting the sale of goods or services;

and

(b) by virtue of which the purchaser of the goods or services, or any other person, may become entitled to, or may qualify for, a prize, gift, or other benefit (whether the trading stamp constitutes an absolute or conditional entitlement or qualification)."

4.28 Section 4 of the *Trading Stamp Act 1981* establishes the following offences with respect to trading stamps:

*"**4. Offences***

(1) A person shall not supply or offer to supply a third-party trading stamp in connection with the sale of goods or services or for the purpose of promoting the sale of goods or services.

Penalty: $500.

(2) A person shall not redeem a third-party trading stamp.

Penalty: $500.

(3) A person shall not publish or cause to be published an advertisement relating to a third-party trading stamp.

Penalty: $500."

4.29 The Bill proposes to repeal the *Trading Stamp Act 1981*and to regulate third party trading schemes through new provisions to be inserted into the principal Act. A *"third party trading scheme"* is proposed to be defined as:

> *"… a scheme or arrangement under which the acquisition of goods or services by a consumer from a supplier is a condition, or one of a number of conditions, compliance with which gives rise, or apparently gives rise, to an entitlement to a benefit from a third party in the form of goods or services or some discount, concession, or advantage in connection with the acquisition of goods or services."*

4.30 Proposed new s 32B states that a Minister may approve third party trading schemes if he or she is satisfied that the scheme *"… is genuine, reasonable, and not contrary to the interests of consumers"*. It further states that the Minister may give approval to a scheme subject to such conditions as the Minister thinks fit.

4.31 Proposed new s 32C states that the Minister may declare a third party trading scheme to be a prohibited third party trading scheme where:

- the scheme is not an approved third party trading scheme and the Commissioner for Fair Trading is of the opinion that the scheme is not genuine and reasonable or is contrary to the interests of consumers;
- in the case of an approved third party trading scheme, a condition of the approval has been contravened or not complied with; or
- in the case of an approved third party trading scheme, the scheme is conducted in a manner that is not genuine, reasonable or in the interests of consumers.

4.32 Proposed new s 32D establishes various offences relating to the promotion, participation in, and advertising of, a prohibited third party trading scheme. A penalty of $5,000 is proposed.

4.33 Proposed new s 32E states that the Governor may make regulations prescribing codes of practice for promoters of, and parties to, third party trading schemes.

4.34 The Committee noted that the proposed amendments appeared to arise as a result of a proliferation of third party trading schemes in recent years, such as those promoted under the *"Shop-A-Docket"* scheme in supermarkets.[13] The Department advised the Committee that:

> *"The most common example is something like the* [Shop-A-Docket] *scheme, whereby on the back of the receipt from the purchase of groceries a range of discounted products or services is offered, such as getting two coffees for the price of one. Under the present legislation, I should use the vouchers at a business premises that is*

[13] http://www.shop-a-docket.com.au/ (viewed on 14 June 2006).

> *owned by the supermarket from which I received the receipt containing the vouchers in the first place.*
>
> *If I take it to a third party that has no business relationship with the supermarket, or the* [Shop-A-Docket] *is not redeemable at a company that is within the ownership structure of the supermarket, technically that* [Shop-A-Docket] *would be considered to be in breach of the third-party trading legislation. In other words, if the trading stamp, or the* [Shop-A-Docket] *in this instance, is redeemable from another organisation within the supermarket's ownership, that is not a problem, but when it goes to a third party - outside the organisation - it is a problem.*
>
> *… the marketplace has become more sophisticated. People are now exposed to petrol vouchers on* [Shop-A-Dockets]. *Not only supermarkets but also other places have redeemable vouchers on the back of receipts for coffee, sandwiches or whatever the case may be. Most of those schemes are benign and not detrimental to the interests of consumers. However, many of them technically breach the* [*Trading Stamp Act 1981*] *as it is currently drafted. This legislation will remove that doubt but keep in place the ability to approve and prohibit schemes that become detrimental should that evidence come to light."*[14]

4.35 Given the proliferation of third party trading schemes in recent years, the Committee queried the rationale in 1981 for enacting the *Trading Stamp Act 1981*.

History of the prohibition of third party trading schemes

4.36 The first attempt to prohibit trading stamp schemes in Western Australia appears to have been by way of the *Trading-Stamps Abolition Act 1902*. This legislation was based on a New Zealand Act of 1900.[15] The following explanation for the 1902 legislation was given in its Second Reading Speech:

> *"We find, from the experience of Victoria and New Zealand, where these* [trading stamp] *companies started, that there is an increase in the trader's cash turnover at first, but it is only a temporary increase, because the tradespeople who have not the coupons generally cut the prices to meet the other traders who have them. This causes fierce*

[14] Mr Tom Filov, Manager, Policy, Department of Consumer and Employment Protection, and Mr Alistair Conwell, Acting Senior Policy Officer, Consumer Protection, Department of Consumer and Employment Protection, *Transcript of Evidence,* 8 June 2006, pp4 and 6.

[15] Mr Francis McDonald MLA, Member for Cockburn Sound, Western Australia, Legislative Assembly, *Parliamentary Debates (Hansard),* 10 October 1901, p1492.

> *competition. Prices have been cut so fine since these coupon companies have existed in Victoria that there have been more bankruptcies amongst grocers during that period than there has been during any time except when the land boom burst in Victoria."*[16]

4.37 In enacting the *Trading Stamp Act 1948*, similar arguments were raised to support the prohibition of trading stamp schemes. This time, the model for the legislation was existing legislation in South Australia and Queensland.[17] The Second Reading Speech for the 1948 legislation states:

> *"The main reason advanced by Western Australian manufacturers and traders in favour of such legislation is that it would prevent large business houses from again commencing to operate systems of gift coupons, whereby they obtain an undue advantage over small businesses, since the latter cannot offer such a variety of gifts."*[18]

4.38 The 1948 Second Reading Speech also made reference to an inquiry conducted by a South Australian committee into trading stamp schemes operating in that State, which found that:[19]

a) Goods given in exchange for coupons do not represent something for nothing to the consumers, as they are paid for by the consumers in the price paid for the commodities.

b) There is no evidence that coupon systems result in any lessening of the retail prices of commodities.

c) Smaller manufacturers and traders are at a disadvantage to larger (eastern states-based) businesses that are able to conduct a more vigorous coupon system. Such systems tend to create monopolies or small groups of powerful traders in certain commodities, such as tea and soap.

d) By means of a coupon system it is possible for large manufacturers to eliminate or considerably reduce competition, and thereby exert a measure of control over the business of retailers that is not desirable.

4.39 The current *Trading Stamp Act 1981* was enacted to remove some of the previous prohibitions against trading stamp schemes. This was due to an acknowledgement of modern marketing practices and the fact that Western Australian consumers were

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16 Ibid, pp1492-1493.

17 Hon Lindsay Thorn MLA, Minister for Labour, Western Australia, Legislative Assembly, *Parliamentary Debates (Hansard)*, 3 December 1948, p3052.

18 Ibid, p3052.

19 Ibid, pp3052-3053.

increasingly being left out of *"seemingly harmless"* popular national marketing promotions, such as rebates for cash purchases of motor vehicles.[20] However, the prohibition against 'third party' trading schemes remained:

> *"It is considered desirable that third-party trading stamp schemes which are promoted by trading stamp companies continue to be prohibited. No interest has been shown by any party in changing the status quo with respect to such schemes."*[21]

Clauses 14 to 23 - proposed amendment of the *Land Valuers Licensing Act 1978*

4.40 Clauses 15 to 23 propose the amendment of various offence provisions in the principal Act so as to increase the maximum amounts of financial penalties as set out in the following table:

Clause of Bill	Nature of Offence under the *Land Valuers Licensing Act 1978*	Current Penalty ($)	Proposed Penalty ($)
15	s 12(6) - demanding or receiving a fee or reward for representing a party to proceedings before the Land Valuers Licensing Board, unless that person is a legal practitioner	500	5,000
16	s 13(2) - failing to attend before the Land Valuers Licensing Board after being served with a summons; - failing to produce any books, papers or documents as required by a summons; - misbehaving before the Land Valuers Licensing Board, wilfully insulting the Board or interrupting Board proceedings; or - refusing to be sworn in or affirmed, or to answer any relevant question when required to do so by the Land Valuers Licensing Board	500	5,000
17	s 23(1) - being an unlicensed land valuer	500	50,000

[20] Mr Raymond James O'Connor MLA, Minister for Labour and Industry, Western Australia, Legislative Assembly, *Parliamentary Debates (Hansard)*, 6 August 1981, p2559.

[21] Ibid, p2560.

Clause of Bill	Nature of Offence under the *Land Valuers Licensing Act 1978*	Current Penalty ($)	Proposed Penalty ($)
18	s 24(1) - unlicensed person implying that they are a licensed land valuer	500	50,000
19	s 25(3) - licensed land valuer demanding or receiving, in respect of any service rendered, any remuneration exceeding the gazetted maximum amount for that service	500	5,000
20	s 28(1)(b) - maximum fine that may be imposed by the State Administrative Tribunal as disciplinary action following an inquiry by the Land Valuers Licensing Board	500	10,000
21	s 29A(1) - land valuer not giving the Land Valuers Licensing Board notice in writing as soon as practicable after a change in his or her particulars	250	2,000
22	s 33(2) - where current or past member or officer of the Land Valuers Licensing Board breaches the secrecy provisions of the Act	500	5,000
23	s 36(2)(g) - the maximum penalty that may be prescribed for a breach of the regulations	100	1,000

4.41 The Committee was advised that the reason for these increases in penalties was to implement recommendations of the Temby Royal Commission and to complement recent increases in penalties for similar offences under the *Finance Brokers Control Act 1975*.[22]

4.42 The Committee notes the following comments Mr Ian Temby QC in his report:

> *"I have mentioned the fines which can be imposed on unlicensed valuers, or on licensed valuers who misbehave themselves. The maximum in each case is $500, and similar penalties are prescribed for other misconduct in ss24(1) and 33(2). These are unduly low penalties. They should be sharply increased. A figure of $5,000 seems appropriate. That would give an adequate range to choose from when a court is imposing a penalty on an unlicensed valuer, or when the Board is taking disciplinary action. At present, the Board is limited by*

[22] Department of Consumer and Employment Protection, *Consumer Protection Legislative Amendment and Repeal Bill 2005: Overview of Changes*, 30 May 2006, p1.

> *s28 to a reprimand or caution (which many would look upon as nothing much), a relatively small fine, and suspension or cancellation of the licence (heavy consequences by any standards). It is time to explore, and make use of, other possibilities at various points along the way between these opposites of light and heavy consequences - to expand the continuum."*[23]

Clauses 24 and 25 - proposed amendment of the *Motor Vehicle Dealers Act 1973*

4.43 Clause 25 proposes to amend s 32K of the principal Act to correct a drafting error.

4.44 Section 32K deals with the power of the State Administrative Tribunal to make an order freezing the trust account of a motor vehicle dealer. The word *"agent"* currently appears in s 32K(4) where clearly the word *"dealer"* is more appropriate. Clause 25 proposes to replace the word *"agent"* with the word *"dealer"*.

4.45 The Committee was advised that:

> *"This is a straight-out typographical error. ... We inserted some provisions in the 2002 amendments to the Motor Vehicle Dealers Act to implement the requirement for dealers to keep trust accounts when they sell vehicles on a consignment basis. Many of those amendments were lifted from the Real Estate and Business Agents Act 1978. In the course of drafting* [the Department] *did not pick up that the word "agent" was left in rather than "dealer". This amendment will correct that."*[24]

Clauses 26 and 27 - proposed amendment of the *Real Estate and Business Agents Act 1978*

4.46 Clause 27 proposes the amendment of s 4(4) of the principal Act.

4.47 Section 4(4) establishes various exemptions from the principal Act (including the requirement to hold a relevant licence). Clause 27 proposes to add the following further exemption:

> "[A] *person, other than a licensee, when performing a prescribed duty as an agent for the owner of premises ordinarily used for holiday accommodation, whether or not for consideration, in respect of the*

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[23] Mr Ian Temby QC (Commissioner), *Royal Commission Into The Finance Broking Industry: Report*, December 2001, paragraph 22.15, p324. Website: http://www.slp.wa.gov.au/publications/publications.nsf/DocByAgency/B673539087AF8BCC48256B65002D0B2A/$file/Finance+Brokers+Report+(Complete).pdf, (viewed on 14 June 2006).

[24] Mr Tom Filov, Manager, Policy, Department of Consumer and Employment Protection, and Mr Alistair Conwell, Acting Senior Policy Officer, Consumer Protection, Department of Consumer and Employment Protection, *Transcript of Evidence*, 8 June 2006, p6.

right of a person to occupy those premises for a period of not more than 3 consecutive months."

4.48 The reason provided to the Committee for the proposed amendment is set out in the following extract from the Committee's hearing on 8 June 2006:

*"**The CHAIRMAN**: … What is the purpose of that proposed exemption?*

***Mr Conwell**: That is related to a formal review of the department's undertaking that began in 2003. As part of that review, we undertook consultation, which included the release of an issues paper in 2004. On analysis of the submissions we received from stakeholders, it was clear that there was no justification for requiring holiday accommodation managers to be licensed under the act. There seems to be evidence that, given the recent emergence of the industry, the act was probably not intended to regulate this new industry. One of the outcomes of that formal review was a recommendation to exempt holiday accommodation managers from the need to be licensed under that act.*

***The CHAIRMAN**: Can you give us an example of the sort of operation that might be facilitated by a holiday accommodation manager that is proposed to be exempted; that is, the nature of what holiday accommodation managers do?*

***Mr Conwell**: They act as an agent for property owners of holiday accommodation and they arrange for consumers to use that accommodation and apply, effectively, to short-term lease arrangements. That is why, technically, it is considered a real estate transaction, and hence it is captured under the act. An accommodation manager enters into a written agreement with a property owner and leases the property for short terms to consumers. The manager hands over keys, arranges cleaning and sometimes takes a bond.*

***The CHAIRMAN**: One can readily understand a real estate agent performing those duties. However, given what you have described, a neighbour at a holiday home might act to assist his neighbour. Is that at whom the amendment to the act is aimed?*

***Mr Conwell**: Absolutely. Although as you suggested some real estate agents are doing it, albeit very few, a number of private individuals do it, as do a lot of tourist bureaus and visitor centres. That was another reason for the amendment. This industry is also closely*

aligned with the tourist industry and we considered that the best outcome was to exempt it. We are implementing a voluntary accreditation program, which we have set up with a number of key stakeholders, including Tourism Western Australia, the government agency; the Tourism Council Western Australia, the peak tourist industry body; the Visitor Centre Association of WA; and the Western Australian Local Government Association, which manages and operates a number of visitor centres. We now have the minister's endorsement of that accreditation program.

***The CHAIRMAN**: Is the idea of that accreditation to provide some form of qualification to enable an owner to approach a prospective agent with confidence?*

***Mr Conwell**: Absolutely. It is to ensure that some minimum standards are maintained and established in the industry. Given the size of the industry and the low consumer risk we have identified, we think this self-regulatory, voluntary model is the rational first step.*

***The CHAIRMAN**: Could a holiday accommodation manager who is not licensed as a real estate agent have quite a large number of properties under his supervision?*

***Mr Conwell**: Potentially, yes.*

***Hon MATT BENSON-LIDHOLM**: What issues are likely to arise from this self-regulatory model? Surely there would be some legal implications if an impropriety occurred. I do not necessarily question it, but I foresee issues stemming from that. Have those legal implications been entertained?*

***Mr Conwell**: Yes, certainly. As I mentioned, we received a number of submissions as part of the review process. We have identified that the industry is very small. It deals in small amounts of money. From our perspective, the level of consumer risk is very low. As part of the accreditation program, we have established a code of ethics as well as a dispute resolution process. If problems arise, mechanisms are in place to deal with them. If we find that the self-regulatory approach in the first instance does not meet the needs of consumers and businesses, we will consider establishing a more mandatory system of regulation.*

***Hon MATT BENSON-LIDHOLM**: Over what time frame are you considering that?*

> ***Mr Conwell****: We will undertake a 12-monthly review with all key stakeholders after commencement of accreditation to determine whether it is appropriate.*
>
> ***Hon MATT BENSON-LIDHOLM****: Will that review be an ongoing process?*
>
> ***Mr Conwell****: Absolutely. As with all regulatory frameworks, there are ongoing reviews."*[25]

Clauses 28 to 32 - proposed amendment of the *Residential Tenancies Act 1987*

Appeals from decisions of registrars

4.49 Clause 29 proposes to amend the principal Act by inserting a new s 13B that will allow for appeals to a magistrate from the decisions of a registrar made under the principal Act.

4.50 Currently, the Magistrates Court has exclusive jurisdiction to hear and determine disputes under the principal Act. Section 26(1) of the principal Act provides that:

> *"**26. Finality of proceedings***
>
> *(1) An order made by a court under this Act, or by a registrar acting under section 13A(2), is final and binding on all parties to the proceedings in which the order is made and on all persons who under this Act could have become entitled to be joined as a party to the proceeding in which the order is made, and no appeal shall lie in respect thereof."*

4.51 Clause 30 proposes a consequential amendment to s 26 (following on from the proposal in cl 29) to make it clear that only the decisions of magistrates will be final.

4.52 The reason given to the Committee for these proposed amendments is to ensure consistency with s 29 of the *Magistrates Court Act 2004*, which provides:

> *"**29. Appeal from decisions of registrars***
>
> *(1) A person dissatisfied by a decision made by a registrar in the exercise of any of the Court's jurisdiction or powers delegated to the registrar under section 28 may appeal to a magistrate.*

[25] Ibid, pp7-8.

(2) The appeal must be commenced within 21 days after the date of the registrar's decision and be conducted in accordance with the rules of court.

(3) A magistrate may extend the period in subsection (2) and may do so even if it has elapsed.

(4) The appeal is to be by way of a new hearing of the issue that was before the registrar."

4.53 The Committee had some concerns that the proposed amendment would provide an additional layer of administration and expense to what is otherwise a relatively expeditious and low-cost dispute resolution process for landlords and tenants. However, the Committee noted the existing anomaly that for all other purposes, decisions of registrars of the Magistrates Court may be appealed to magistrates.[26]

Removal of standard forms from the regulations

4.54 Clause 31 proposes to amend s 29 of the principal Act so as to effectively remove Form 1 of Schedule 4 of the *Residential Tenancies Regulations 1989* (that is, the *Record of Payment of Security Bond*) from those regulations. This form will no longer be a *"prescribed form"* in regulations made by the Governor, but rather a *"form approved by the Minister"*. The Committee assumes that the reason for this proposed amendment is to allow greater flexibility in amending the form, and to avoid the need to amend the form by way of amending regulations where minor amendments only are required.

4.55 Clause 32 proposes identical amendments in relation to a similar form (that is, the *Joint Application for Disposal of Security Bond*) referred to in various parts of Schedule 1 of the principal Act.

4.56 Although these proposed amendments effectively remove the Parliament's ability to scrutinise (and disallow) subsequent amendments to the relevant forms, the Committee notes the perceived administrative efficiencies that have prompted the proposed amendments.

Electronic lodgement of documents

4.57 Clause 32 also proposes to amend Schedule 1 of the principal Act to permit the electronic lodgement of security bonds, and the electronic or facsimile lodgement of applications for the disposal of a security bond to the bond administrator.

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[26] Ibid, p8.

Clauses 33 and 34 - proposed amendment of the *Retirement Villages Act 1992*

4.58 Clause 34 proposes the insertion of a new s 5(2) into the principal Act.

4.59 The proposed amendments seek to exempt certain residents, prospective residents and administering bodies, of retirement villages from the principal Act. The Committee was advised that the proposed amendments are designed:

> *"To amend the definitions of 'residential premises' and 'retirement village' in order to exempt residential aged care facilities that achieve and maintain Commonwealth certification or accreditation under the provisions of the Aged Care Act 1997 (Cth), from the provisions of the Retirement Villages Act 1992. The proposed amendment will remove confusion and dual compliance for operators of retirement villages that have Commonwealth accredited hostel accommodation on their premises, having to comply with the* [*Retirement Villages Act 1992*] *and the* [*Aged Care Act 1997* (Cth)] *for hostel residents. Operators of villages in this situation will only have to comply with the* [*Aged Care Act 1997* (Cth)] *for hostel residents. Residents of the village not in hostel care will continue to be covered by the* [*Retirement Villages Act 1992*]*."*[27]

4.60 As well as issues of administrative inefficiency and duplication of services, the proposed amendment is also in accordance with s 109 of the *Commonwealth Constitution*, which states:

> *"When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid."*

4.61 The Committee was advised that consultation took place with respect to the issue sought to be addressed by the proposed amendment during a review of the principal Act in 2002, and that at that time no concerns were expressed.[28]

Clauses 35 and 36 - proposed amendment of the *Settlement Agents Act 1981*

4.62 Clause 36 proposes to amend the principal Act by the insertion of new subsections 49(5a) and (5b).

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[27] Department of Consumer and Employment Protection, *Consumer Protection Legislative Amendment and Repeal Bill 2005: Overview of Changes*, 30 May 2006, p2.

[28] Mr Tom Filov, Manager, Policy, Department of Consumer and Employment Protection, and Mr Alistair Conwell, Acting Senior Policy Officer, Consumer Protection, Department of Consumer and Employment Protection, *Transcript of Evidence*, 8 June 2006, p9.

4.63 The proposed amendment will facilitate the payment of a real estate agent's commission on the sale of a real estate property or a business at the time of the settlement of the sale transaction. The proposed amendments will override the current s 49(4) and (5) of the principal Act, which provide that:

> *"(4) Settlement moneys received by a settlement agent in the course of arranging or effecting a settlement shall not be withdrawn from a trust account except for the purpose of completing the settlement, or in accordance with the contract entered into between the parties to the transaction, or as otherwise authorised by this Act, or by the prior written consent of all parties to the transaction involved.*
>
> *(5) A settlement agent shall pay moneys withdrawn from a trust account to the person or persons lawfully entitled or authorised to receive them."*

4.64 The Committee was advised that the purpose of this proposed amendment is:

> *"To provide certainty for settlement agents who have completed settlements of real estate or business transactions and received moneys in the course of effecting settlements, that they are able to withdraw trust moneys after settlement to pay the commission, or balance of the commission, of the real estate agent in accordance with the written authorisation of the vendor."*[29]

Clause 37 - proposed repeal of the *Trading Stamp Act 1981*

4.65 See the above discussion with respect to cl 13 at paragraph 4.25 onwards.

Clause 38 - proposed amendment of the *Travel Agents Act 1985*

4.66 Clause 38 proposes to amend s 5(2) of the principal Act so as to make non-prescribed statutory corporations subject to the licensing requirements of the principal Act.

4.67 Currently, s 5(2) provides that any statutory corporation representing the Crown does not need to hold a licence under the principal Act. The reason for the proposed amendment was explained to the Committee as follows:

> *"**Mr Filov**: I understand that it simply flows from the national competition policy review of the Travel Agents Act. One of the recommendations, among others, was repeal of the exemption for crown-owned business entities under the Travel Agents Act. The main effect will be that crown-owned business entities will have to obtain a*

[29] Department of Consumer and Employment Protection, *Consumer Protection Legislative Amendment and Repeal Bill 2005: Overview of Changes*, 30 May 2006, p2.

travel agent's licence if they write a level of business above the exemption threshold, which is currently $50 000. The practical effect will be that organisations such as Tourism WA will have to obtain a travel agent's licence and participate in the travel compensation fund.

***Hon MATT BENSON-LIDHOLM**: As a member for the South West Region, I have a fair amount to do with the Albany Visitor Centre. Would it operate under the auspices of the Crown in Western Australia or are you talking about a separate entity in terms of its capacity to operate?*

***Mr Filov**: I understand that visitor centres are separate entities in their own right in many instances. Some may be attached to local governments, but some are operated just as separate businesses. Local authorities operating visitor centres will be required to also obtain a travel agent's licence.*

***Hon MATT BENSON-LIDHOLM**: Will they be required to have that particular licence?*

***Mr Filov**: Correct. Once again, that will be the case if they write that level of business that will bring them over the threshold exemption, which is currently $50 000.*

***Hon MATT BENSON-LIDHOLM**: That would certainly be the case in a city like Albany.*

***Mr Filov**: Two local authorities that operate visitor centres and are licensed under the Travel Agents Act are the City of Mandurah and Fitzroy Crossing. There are 20 visitor centres run by community-based or incorporated authorities and these are not affected by the bill as they are already licensed. There are examples of them taking that action themselves because of the activity."*[30]

4.68 The proposed amendments include a provision to exempt *"prescribed"* statutory corporations *"… as a safeguard against unforeseen consequences"*.[31]

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30 Mr Tom Filov, Manager, Policy, Department of Consumer and Employment Protection, and Mr Alistair Conwell, Acting Senior Policy Officer, Consumer Protection, Department of Consumer and Employment Protection, *Transcript of Evidence*, 8 June 2006, pp9-10.

31 Department of Consumer and Employment Protection, *Consumer Protection Legislative Amendment and Repeal Bill 2005: Overview of Changes*, 30 May 2006, p3.

5 SCRUTINY OF THE BILL IN THE CONTEXT OF FUNDAMENTAL LEGISLATIVE SCRUTINY PRINCIPLES

5.1 The Committee notes that the only clauses of the Bill that raise issues relating to fundamental legislative scrutiny principles are clauses 31 and 32, which propose to amend the *Residential Tenancies Act 1987*.[32] In effectively removing various forms from regulations made by the Governor and having them henceforth *"approved"* by the Minister, Parliament's oversight of the contents of those forms has been removed.

5.2 Clauses 31 and 32 therefore appear to breach the thirteenth fundamental legislative scrutiny principle as applied by the Committee:

> *"Does the Bill sufficiently subject the exercise of a proposed delegated legislative power (instrument) to the scrutiny of the Legislative Council?"*[33]

5.3 The Committee brings cll 31 and 32 to the attention of the Legislative Council.

Hon Simon O'Brien MLC
Chairman

27 June 2006

[32] For a list of the fundamental legislative scrutiny principles see, for instance, the Committee's Report 11, *Terrorism (Preventative Detention) Bill 2005*, June 2006, Appendix 3.

[33] This specific principle has been previously considered in the following reports: Western Australia, Legislative Council, former Uniform Legislation and General Purposes Committee: Report No 6: *Terrorism (Commonwealth Powers) Bill 2002* (December 2002); Western Australia, Legislative Council, former Uniform Legislation and General Purposes Committee: Report No 1: *Offshore Minerals Bills*, June 2002, pp60-66.