



PARLIAMENT OF WESTERN AUSTRALIA

THIRTY-SEVENTH REPORT
OF THE
LEGISLATION COMMITTEE

IN RELATION TO THE

Security and Related Activities (Control) Bill 1994

Presented by the Hon Derrick Tomlinson (Chairman)

37
December 1995

Members of the Committee

Hon Derrick Tomlinson MLC (Chairman)
Hon Bill Stretch MLC
Hon Ross Lightfoot MLC
Hon John Cowdell MLC
Hon Val Ferguson MLC

Staff of the Committee

Mr Stuart Kay (Advisory/Research Officer)
Ms Jan Paniperis (Committee Clerk)

Terms of Reference

A Bill originating in either House, other than a Bill which the Council may not amend, may be referred to the Committee after its second reading or during any subsequent stage by motion without notice... A referral under [this paragraph] includes a recommittal.

The functions of the Committee are to consider and report on Bills referred under this order.

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Report of the Legislative Council Legislation Committee

in relation to the

Security and Related Activities (Control) Bill 1994

1 Introduction

1.1 On 28 September 1995, the House resolved, on a motion by Hon George Cash:

That the *Security and Related Activities (Control) Bill 1994* be referred to the Legislation Committee for consideration of clauses 7, 27, 59, 60, 64, 84 and 90 and report, but consideration of the second reading debate of the *Bill* by the House continue notwithstanding such referral.

1.2 On 26 October 1995, Hon George Cash appeared before the Committee to explain to the Committee the purposes of referral of the relevant clauses to the Committee.

1.3 On 16 and 23 November 1995, the Committee took evidence from members of the security industry and representatives of the Police Force, the Police Department and the Minister for Police.

1.4 The provisions which have been referred to the Committee principally relate to the licensing and control of “crowd controllers” and “crowd control agents”, such as bouncers and their employers. Overall, the *Bill* more extensively relates to other activities including security activities, such as those of security guards and consultants, and inquiry activities, such as those of private investigators.

2 Clause 7

2.1 Clause 7 of the *Bill* provides for the appointment, by the Commissioner of Police, of licensing officers from members of the Police Force or the Police Department.

2.2 Members of the industry who gave evidence to the Committee expressed concern that responsibility for both licensing and policing or enforcement of the *Bill* will be vested in the one authority.

2.3 As was pointed out by representatives of the Police Force, the location of authority for licensing and enforcement in one organisation is already the case with such things as issue of driver’s licences and enforcement of the “road rules”, and issue of firearms licences and enforcement of firearms controls. Furthermore, the security checking procedures in respect of persons who apply for licences would in any event be undertaken by members of the Police Force or officers of the Department. The representatives of the Police Force considered that it would be both undesirable, for privacy and security reasons, and a

duplication of effort, for the licensing function to be undertaken by an independent authority.

2.4 The Victorian *Private Agents Act 1966* (“the Victorian Act”) provides for the appointment, by the Chief Commissioner of Police, of a registrar to perform the general licensing duties prescribed by the *Act* in respect of the Victorian equivalent of crowd controllers. These provisions were not considered in the drafting of the *Bill*.

2.5 The Committee considers that there is merit to the arguments of both the members of the industry and the representatives of the Police Force. Consequently it considers that a separation of functions is desirable, but, for practical reasons, that both functions should remain the responsibility of the Police. A separation of functions could be made by restricting licensing functions to officers of the Police Department, while enforcement remains within the province of members of the Police Force. This can be achieved by a simple amendment to cl 7.

Recommendation 1

That clause 7(1) of the *Bill* be amended by deleting the words “members of the police force or”.

3 Clause 27

3.1 Clause 27 defines “inquiry agent”.

3.2 The definition was raised as a matter of concern by Hon Nick Griffiths who wished to retain a definition of inquiry agent similar to that which is contained in the *Inquiry Agents Licensing Act 1954* (which will be repealed by the *Bill*).

3.3 The Committee considers that there is no need to alter the definition of inquiry agent as it appears in cl 27.

Recommendation 2

That clause 27 remain in the *Bill* unaltered.

4 Clause 59

4.1 Clause 59 provides:

A licence may be issued or renewed for such period as the licensing officer thinks fit but the period cannot exceed 3 years from the day of issue or renewal of the licence.

It should be kept in mind that this relates to licences for security and inquiry agents and the like as well as to licences for crowd controllers and crowd control agents.

- 4.2 Members of the crowd control industry consider that it is undesirable that licensing officers should have an unfettered discretion to determine the duration of a licence. However, it is necessary that there be some flexibility in determining the duration of a licence, particularly in respect of short term licences for crowd controllers who are employed by a crowd control agent to work at a specific or unusually large event or at a particular time and place.
- 4.3 Representatives of the Police Force consider that the discretion is necessary to enable licensing officers to issue licences of appropriate duration, for example, in respect of single events, or for particular reasons or to particular persons. However, it is anticipated that most licences will be issued for the maximum period of 3 years in order to minimise administrative burdens for both the licensing officers and the licensees.
- 4.4 The Victorian Act provides that licences are issued for a fixed term of 3 years. It also provides for the issue of provisional licences in certain circumstances.
- 4.5 The Committee notes that licensing officers may revoke licences in certain circumstances: cl 66 of the *Bill*.
- 4.6 On balance the Committee considers that it would be preferable for licences to be issued for a fixed term of 3 years. Licences which are issued for such a term could nevertheless be revoked under cl 66, should this be necessary. If licences are generally to be issued for a fixed term of 3 years, it will be necessary also to provide for short term or provisional licences.

Recommendation 3

- (a) That clause 59 of the *Bill* be amended to read:

Subject to section 66, a licence shall be issued for a period of 3 years.

- (b) That a new clause, substantially to the effect of the following clause, be inserted in the *Bill* in an appropriate place:

Provisional licence

- (1) A person may make an application for a provisional licence.
- (2) A licensing officer may issue a provisional licence where the application is accompanied by a statutory declaration of a person employing, or intending to employ, the applicant stating that after making reasonable enquiries the person is satisfied that no objection to the application could be sustained on any of the criteria listed in sections 51(a), (b), (c), (e), (j) and (k), and the licensing officer is not aware of any good reason why the licence should not be issued.
- (3) Sections 47(1)(f), 51 and 59 do not apply to applications for and the issue of a provisional licence.

(4) Subject to section 66, a provisional licence may be issued for a period of up to 28 days.

5 Clause 60

- 5.1 Clause 60 provides that, where a person has been issued with an identity card, the person must immediately produce it for inspection by a police officer or an employer upon demand. A failure to do so could result in a penalty of up to \$2000¹.
- 5.2 Members of the industry are concerned that the penalty is excessive and no provision is made for reasonable excuse for non-production of an identity card. They noted that it is possible that an identity card could be lost in a scuffle 5 minutes before a crowd controller is asked to produce it. Consequently there is a concern that this provision may deter responsible persons from becoming crowd controllers.
- 5.3 Representatives of the Police Force noted that police officers are required to carry identity cards and very few are lost. Regulation 405 of the *Police Force Regulations 1979* requires a police officer to produce her or his certificate of identity when not in uniform and requested to do so by a person in respect of whom the officer is about to exercise a power or duty as a member of the Police Force. A failure to do so may result in a charge for an offence against the discipline of the Police Force in respect of which the Commissioner, or an officer conducting an examination of the offence, may impose penalties including: a reprimand, a fine not exceeding \$200, demotion, reduction in salary, suspension or discharge².
- 5.4 In the case of both drivers' licences and firearms licences, persons have a reasonable time to produce the licence after demand has been made. The penalty for failure to produce a driver's licence or a firearms licence within a reasonable time is \$100 and \$200 respectively³.
- 5.5 The Committee considers, notwithstanding the desirability of tightly controlling the requirement for crowd controllers to carry identity cards, that the penalty for failing to produce such a card on demand is too severe, particularly where there is no provision for reasonable excuse. In any event, the Committee considers that there should be a provision for reasonable excuse as a defence to a charge of failing to produce an identity card.

Recommendation 4

- (a) That the penalty specified in clause 60 be reduced to \$200.**
- (b) That a new sub-clause (3) be added to clause 60 substantially to the effect that:**

¹ Note that s 70 of the *Interpretation Act 1984* provides that where a penalty is prescribed for an offence, it is the maximum penalty which may be imposed.

² *Police Act 1892*, s 23

³ *Road Traffic Act 1974*, s 53; *Firearms Act 1973*, s 24.

It is a defence to a charge under sub-section (2) that the person can, at the time a request for production of an identity card is made:

- (a) prove her or his identity;**
- (b) prove that he or she is a licensed crowd controller; and**
- (c) has a reasonable excuse for not producing the card.**

6 Clause 64

6.1 Clause 64 provides that a licence is not transferable.

Recommendation 5

That clause 64 remains in the *Bill* unaltered.

7 Clause 84

7.1 Clause 84 relevantly provides:

- (1) A member of the police force may without a warrant enter any premises where there are records that are required to be kept for the purposes of section 77 or 83.
- (2) Where a member of the police force has entered such premises, the member may require a person who at the time is apparently in charge of the premises to produce for inspection -
 - (a) any relevant licence; and
 - (b) any record referred to in subsection (1).

7.2 Hon George Cash stated that the power to enter premises without a warrant may not be necessary for the purpose of undertaking random inspections. If the police suspected unlawful activity was occurring on relevant premises, then they could seek a warrant. A submission received by Mr Cash suggested that 24 hours' notice of an inspection should be given.

7.3 Members of the industry expressed concern that this provision "is too broad, open to abuse, and is liable to lead members of the police force into conflict with owners and occupiers of premises and other members of the public". Additionally, some smaller members of the industry have their business offices at their residential address; this provision would give the police the power to demand records from their young children.

7.4 Representatives of the Police Force consider that the power to enter premises without a warrant to inspect records is necessary. In evidence to the Committee representatives of

the Police Force indicated that the purpose of the power is “simply... to make sure the business is running” and “that it would be during business hours and it would be... authorised... people to go out and do their checks under normal working conditions and normal working hours, as we do currently with the second-hand dealers”. Under police guidelines, a child generally would not be required to produce business records.

- 7.5 In these circumstances the Committee considers that it is unnecessary for the *Bill* to confer on the police force the broad powers currently contained in cl 84. The Committee considers that powers similar to those currently conferred on the Police Force under s 34(7) of the *Security Agents Act 1976* would be adequate to deal with the stated requirements of the Police Force in respect of the inspection of records.

Recommendation 6

That clause 84 of the *Bill* be amended by deleting sub-sections (1) and (2) and substituting:

- (1) Records required to be kept for the purposes of sections 77 and 83 must be available for inspection at the premises at which they are kept.**
- (2) When required to do so by a licensing officer or a member of the police force, the licensee, or an agent or employee of the licensee who is at the time in charge of the premises, shall produce for inspection:**
 - (a) any relevant licence; and**
 - (b) any record referred to in sub-section (1).**

8 Clause 90

- 8.1 Clause 90 essentially provides that a crowd controller and her or his employer (the crowd control agent) are to be jointly and severally liable for damages in tort for any physical injury caused by the crowd controller in the performance of her or his duties if an action for damages in tort would lie against the crowd controller.
- 8.2 Members of the industry expressed concern that this clause extends the liability of employers to all acts and omissions of their employees, regardless of whether the employers would be so liable under the common law. This may have the effect of deterring reputable persons from becoming crowd control agents. They also were concerned that it may make insurance premiums for crowd control agents prohibitively expensive for all but the largest crowd control agents.
- 8.3 Representatives of the Police Force gave evidence that the intention of this clause was to make clear that the civil liability of employers at common law extends to matters within the scope of the *Bill*.
- 8.4 Legal advice to the Committee supports the contention of members of the industry that cl 90 extends the liability of employers for the acts of their employees beyond their liability at common law. Clause 90 provides that an employer is liable for acts of her or his

employees done in the course of performing their functions under the *Bill* if the employee would be liable in an action for damages in tort. This takes no account of the common law requirements relating to the vicarious liability of employers and imposes on them a strict liability where their employees are liable.

8.5 A classic statement of the common law position is:

A master is not responsible for a wrongful act done by his servant unless it is done in the course of his employment. It is deemed to be so done if it is either (1) a wrongful act authorised by the master, or (2) a wrongful and unauthorised mode of doing some act authorised by the master... On the other hand, if the unauthorised and wrongful act of the servant is not so connected with the authorised act as to be a mode of doing it, but is an independent act, the master is not responsible: for in such a case the servant is not acting in the course of his employment, but has gone outside of it.⁴

From this it can clearly be seen that employers are not liable for all of the acts of their employees for which their employees may themselves be personally liable.

8.6 One of the problems of the common law position is that courts have been reluctant in many circumstances to impute liability to employers for the acts of their employees. It is true that it should not be sought to make an employer liable for the intentional wrongdoing of her or his employees merely because the employer is perceived to have greater financial resources. However, there is some difficulty in the application of common law tests to the facts of particular cases.⁵

8.7 The common law tests have been stated in a number of ways.⁶ A recent statement of a test was made by Mahon J of the Supreme Court of New Zealand when he said:

In the area of intentional torts the real test of vicarious liability, in my opinion, lies in an assessment of the motivation of the actual wrongdoer. Was he impelled in his conduct, however mistakenly, by allegiance to the interests of his employer or was he predominantly actuated by personal motives unconnected with his employer's business? It is only in the first of those situations that the employer will be held liable.⁷

8.8 The Committee considers that it is conceivable that an irresponsible employer could seek to escape liability for the tortious actions of her or his employees, for example, by encouraging or intimidating the employees to lie about their motivations for acting. In

⁴ *Salmond on the Law of Torts*, 16th Edition, 1973, p474.

⁵ Rose, FD, *Liability for an Employee's Assaults* (1970) 40 Mod LR 420.

⁶ See, for example, *Bayley v Manchester, Sheffield & Lincolnshire Railway* (1872) LR 7 CP 415, 420; and *Deatons Pty Ltd v Flew* (1949) 79 CLR 370, 381.

⁷ *Auckland Workmen's Club v Rennie* [1976] 1 NZLR 278, 284; see also, Trindade, F & Cane, P, *The Law of Torts in Australia*, 2nd Edition, 1993, p721.

these circumstances, the imposition of strict liability on employers would be desirable. However, in theory such irresponsible employers could not obtain an agent's licence in the first place, or could have their agent's licence revoked in appropriate circumstances. Furthermore, as was suggested by the members of the industry who gave evidence to the Committee, the provision may deter, or at least make it difficult, for responsible agents to enter or remain in the industry.

- 8.9 The Committee considers that neither the common law position nor the proposed statutory provision satisfactorily address the relevant problems. Consequently, the Committee suggests an alternative test adapted from the common law position stated by Mahon J and based on the reasonable belief of the employee. This should provide a clearer test which the courts can apply to relevant facts, without detracting from the common law position.

Recommendation 7

That clause 90 of the *Bill* be amended by:

- (a) adding at the beginning of sub-clause (1) the words “Without limiting an employer’s vicarious liability at common law,”; and**
- (b) deleting paragraph (1)(b) and substituting:**
 - (b) the crowd controller reasonably and honestly believed that he or she was acting in the interests of the employer.**



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