REVIEW OF LEGISLATION.

I. Western Australia.

Introductory.

The third session of the twenty-third Parliament opened on 3rd August and closed at 3.26 a.m. on Thursday 16th November 1961. Once again the session's labours are represented by two volumes of statutes, the second volume containing the new Companies Act (No. 82 of 1961),[1] and once again the indices and tables are relegated to a third small volume. This year eighty-two new pieces of legislation reached the statute-book. Among them were four statutes confirming agreements between the Government and private enterprises for the introduction of new industrial undertakings, all of them the fruit of the Brand Government's vigorous policy of developing to the utmost the natural resources of the State in collaboration with private enterprise.[2] In addition there were five statutes authorizing various projects of railway construction, most of them closely connected with the industrial development of the State;[3] included among them was a statute authorizing the construction of a standard gauge railway from Kalgoorlie to Perth.

Only nine Bills fell by the wayside this year. Of these, three Government Bills, the Mental Health Bill, the Western Australian Marine Act Amendment Bill, and the Kwinana-Mundijong Railway Bill, were not proceeded with. The first was allowed to lapse so that the full import of its provisions, which were intended to consolidate and amend the law relating to the treatment of mental disorder, might be generally examined by members and other interested persons and bodies, so that any imperfections might be overcome.[4] The second,

1 It is hoped to publish a separate review of this piece of legislation.

2 The Acts in question are: Alumina Refinery Agreement Act (No. 3 of 1961); Iron Ore (Scott River) Agreement Act (No. 35 of 1961); Iron Ore (Tallering Peak) Agreement Act (No. 49 of 1961); and Laporte Industrial Factory Agreement Act (No. 39 of 1961).

3 Coogee-Kwinana (Deviation) Railway Act (No. 7 of 1961); Kwinana-Mundijong-Jarrahdale Railway Act (No. 47 of 1961); Spearwood-Cockburn Cement Proprietary Ltd. Railway Act (No. 33 of 1961); Tallering Peak-Mullewa Railway Act (No. 68 of 1961); Railways Standardisation Agreement Act (No. 26 of 1961); and Railways (Standard Gauge) Construction Act (No. 27 of 1961).

4 The Hon. R. Hutchinson (Minister for Health): (1961) 160 PARLIAMENTARY DEBATES (Western Australia) (hereinafter referred to as PARL. DEB.) 2647. This first reference to the Parliamentary Debates for 1961 seems an appropriate place to comment on the new method of indexing. Until 1960 there had been only two indexes, one for subjects (in which Bills found their place

which was designed to confer upon the Harbour and Light Department authority to license privately-owned power-boats, provoked so much discussion among interested parties once the Minister's second reading speech had made its provisions publicly known that nothing more was heard of it. The third was replaced by the Bill which became the Kwinana-Mundijong-Jarrahdale Railway Act (No. 47 of 1961). A Government Bill to remove from natives born after 1st January 1955 the restriction presently imposed on all natives by Western Australian law, the Natives (Citizenship Rights) Act Amendment Bill, was defeated on the third reading in the Legislative Assembly for want of the constitutional majority which, it is submitted with some confidence, was never necessary.[5] The balance of the rejected Bills were introduced by members of the Opposition. There was a renewed assault on the franchise for the Legislative Council, aiming

in alphabetical order) and the other for speeches. Under each heading in the subject-index separate references were made to proceedings in the Assembly and in the Council respectively. The whole conformed very well to the cardinal principle of indexing that as much information as possible be brought together under one entry, to avoid needless turning to and fro of pages. In 1960 a change was made, and separate indexes were compiled for each House; in addition, each subject index was divided into three parts: Bills, Other Subjects, and Questions. Unfortunately, the bound volumes of the Parliamentary Debates became available too late to be used in compiling the Review of Legislation for 1960, and the reviewer had no opportunity of testing the claim of the compiler that the new method of indexing would "facilitate locating of entries." In theory, however, if the user knew that the topic he was interested in had been dealt with in a particular way, by a Bill, a Motion or a Question, he could go at once to the appropriate index, although to find the whole history of the matter he would have to look at two separate indexes instead of finding the entries grouped together, as heretofore. If, however, he knew only that a particular matter had been raised and dealt with, but was uncertain in what form, or in which House, he had six indexes to search instead of merely one. In the 1961 volumes only two groupings are made within the subjects index—Questions, and Bills and Other Subjects; and Bills are grouped together, under that heading, in each of the alphabetical divisions of the latter grouping. The result has certainly been to make the new index very unhandy to use.

No doubt the indexes are compiled with a view to the convenience of members, who may be assumed to know in what way and in which House a particular matter was dealt with, rather than of the general public; but the reviewer finds it difficult to see how their interests are any better served by the new method of indexing than by the old.

[5] The Speaker's ruling is reported at (1961) 159 PARL. DEB. 1622. The whole question is discussed at some length in the course of the Review of Western Australian Legislation for 1958: (1959) 4 U. WEST. AUST. ANN. L. REV. 454-460. It is presumed that successive Speakers persist with rulings which so clearly run counter to broad hints from the High Court as to the true (and restricted) meaning of section 73 of the Constitution Act 1889 because they can foresee that a ruling in the opposite sense will be successfully dissented from (as happened with a President's ruling in the Legislative Council in

this time only at the extension of the franchise to the wives of persons who are qualified to enrol;[6] with a Liberal-Country Party majority in the Council it was a foregone conclusion that it would be defeated. A second attempt[7] was made by the Hon. H. E. Graham to secure the complete abolition of the death penalty, by his introduction on 31st August of the Death Penalty Abolition Bill. On the same day, however, the Government introduced a Criminal Code Amendment Bill intended, *inter alia,* to abolish the death penalty in respect of the crime of murder only, but to retain it in respect of wilful murder.[8] Mr. Graham then introduced, in the Committee stage of the latter Bill, an amendment having substantially the same effect as his own Bill; the amendment being defeated, the Bill was passed. As a second and somewhat tendentious shot in his locker, Mr. Graham then introduced the Criminal Code Amendment Bill (No. 2), proposing to amend section 678 of the Code by adding the requirement that two Ministers of the Crown be present to witness executions. Not surprisingly, this was defeated in the Legislative Assembly on the second reading. The other two rejected Bills comprised first, a second attempt by the Hon. G. E. Jeffrey to secure an amendment to the Industrial Arbitration Act[9] to the same effect as that passed by the Legislative Council and rejected by the Assembly in the 1960 session,[10] imposing minimum penalties for second and subsequent offences, an attempt which this time did not pass the Council; and second, an attempt by the Hon. J. T. Tonkin to secure certain amendments to the Totalisator Agency Board Betting Act 1960 to prevent credit betting, to secure that the Board's books be audited by the Auditor-General, and to ensure that a greater proportion of the money held by the Board be placed on the course totalisator.

1958). Why the majority of the Assembly may be expected to persist with a view of the law which, it is submitted with respect, is clearly incorrect is less easy to say. It may be a continuing assertion of the mastery of Parliament over its own procedure; but one suspects that politicians generally (especially those on the Government side) regard the absolute majority rule, in its extended form, as a useful weapon against attempts, thought to be dangerous to them, to alter the franchise.

6 The Constitution Acts Amendment Bill, introduced by the Hon. E. M. Heenan on 11th October.

7 The first attempt is noted in (1961) 5 U. WEST. AUST. L. REV. 348.

8 "Wilful murder" is defined, by section 278 of the Criminal Code, as occurring when "a person . . . . unlawfully kills another, intending to cause his death or that of some other person."

9 The Industrial Arbitration Act Amendment Bill.

10 Noted (1961) 5 U. WEST. AUST. L. REV. 350.

I. CONSTITUTIONAL.

No legislation falling under this heading was enacted during the session.

II. ADMINISTRATION OF JUSTICE.

Criminal Law.

By section 3 of the Criminal Code Amendment Act (No. 28 of 1961) the death penalty for murder (as distinguished from wilful murder) is abolished and replaced by a mandatory irreducible penalty of life imprisonment with hard labour.[11] Section 6 adds a new section (706A) providing that no person serving a sentence of life imprisonment for murder may be released by the operation of the royal prerogative of mercy until he has served 15 years in respect of the sentence, unless the Governor of the State is satisfied that, either because there has been a miscarriage of justice, or because of the serious ill-health of the prisoner, it is proper to release him before then; in the latter case the Governor must also be satisfied that it is unlikely that the life of any person will be endangered by the release. The Act also repeals and re-enacts section 668A of the Code to make it clear that the Supreme Court has power, when a person is convicted of manslaughter arising out of the driving by him of a vehicle, or of causing death by failing to take reasonable care in the use and management of a vehicle, to impose upon that person, in addition to any other penalty, a licence suspension, or disqualification from holding a licence, for such period as the Court thinks fit; the power is expressed to be in addition to the powers conferred upon the Court by section 33 of the Traffic Act 1919.[12] The Court is also given power, on application by the person in question at any time after six months from the

[11] In the light of the hopelessly inadequate facilities for putting men to hard labour which are at present available at Fremantle Goal, the only maximum security prison in the State, the imposition of hard labour would at present be no more than a pious wish, and certainly does not represent any additional penalty. It is understood that the present policy is that each prisoner shall as far as possible be occupied in useful work: in the light of this, the references to "hard labour" throughout the Code might well be excised by amendment.

[12] The new section expressly confers the power whenever a person is convicted of an offence "defined" in section 277; that section refers to (but does not define) wilful murder (for which the death penalty is still mandatory) and murder (for which life imprisonment is the penalty) as well as manslaughter. It would perhaps not sound too odd to sentence a man to imprisonment for life, and add that his driver's licence was suspended and that he was disqualified from obtaining another; but, even though there is always the possibility of the commutation of a death sentence, it would sound macabre

making of the order, to remove the suspension or disqualification, or to order the issue of an extraordinary licence under section 24A of the Traffic Act.

As a corollary to the abolition of the death penalty for murder, sections 115 and 116 of the Justices Act 1902 are amended, by Act No. 29 of 1961, to ensure that as before only a Judge of the Supreme Court may admit to bail a person charged with murder, notwithstanding that it is no longer a capital crime. Sections 41 and 57 of the Juries Act 1957 are also amended by Act No. 30 of 1961, to ensure that a unanimous verdict is still required on a charge of murder, and that the Court may continue as heretofore to have the power to place restrictions on the publication of reports of the evidence or any of the proceedings at a preliminary hearing.

The Unauthorised Documents Act (No. 8 of 1961) is a piece of legislation, of a type new to Western Australia though not to other States on the mainland of Australia, intended to stamp out the practice adopted by various debt-collecting firms of sending out notices which are colourable imitations of documents issued under the Local Courts Act. Section 4 makes it an offence, punishable with a fine of £20, to use without authority the Royal Arms, or the arms of any part of Her Majesty's Dominions, or any emblems so like any of those arms as to be likely to deceive or to be mistaken for them, in such a manner as to be likely to lead other persons to believe that permission has been given for the use of the arms in question. The burden of proof that authority has been given for the use of the arms in question lies upon the party charged: section 4 (2). Section 5 (1) makes it an offence to send or distribute or deliver to any person, or to print, publish or sell, any paper or writing which, not being a document issued out of or by the authority of any tribunal, is likely to convey the impression that it is such a document. The penalty for this offence is £50. By section 6 a company or body corporate is liable to a penalty for an offence under the Act as if it were a private person, and every director, manager, secretary or officer of a company, or member of

to sentence a man to death and then, as a pendant, suspend his driving licence and disqualify him. But if this is not done by the Court at the time of sentencing him it cannot apparently be done afterwards.

Incidentally, it was said by the Attorney-General, the Hon. A. F. Watts [(1961) 158 PARL. DEB. 938], that the Chief Justice had expressed doubts whether the Court had (before the coming into force of the new legislation) power to suspend a licence for more than three years; there is no such restriction in the relevant section of the Traffic Act 1919, section 33, and it is difficult to perceive the source of the doubt.

the managing body of a body corporate, is liable to the same penalty. By section 7 the consent of the Attorney-General is required before proceedings may be taken under the Act. The Act is declared not to affect any other proceedings, civil or criminal, which might have been taken against any person if the Act had not been passed,[13] but no person is to be put in double jeopardy (section 8).

Power to control slot machines is taken by the Police Act Amendment Act (No. 71 of 1961) which inserts into the principal Act a new section 89A empowering the Governor, on the recommendation of the Commissioner of Police,[14] to prohibit by proclamation the use or possession, either generally or in any place specified by the proclamation or in any place of a class specified by the proclamation, of any slot machine, or any slot machine belonging to a class or classes specified in the proclamation;[15] power is also given to the Governor from time to time to vary or to cancel such a proclamation.[16] Subsection (3) of the new section excludes from the definition of slot machines whose use or possession may be thus prohibited (1) those which give access to any place or convenience; (2) weighing machines or parking meters; (3) vending machines; (4) "juke boxes"; and (5) machines which for the insertion of only one coin or token enable two or more competitors to play a game entirely of skill.[17] The penalty for the use or possession of a slot machine in contravention of any such prohibition is £10 for the use and £25 for possession; in addition a member of the police force finding a prohibited slot machine may seize it and

13 It is exceedingly difficult to see how the Act could affect such proceedings; we appear here to be in the presence of what this reviewer is tempted to call a legislator's chimera.

14 One wonders why this is specifically provided for in the legislation. Would a proclamation be invalid if it were made otherwise than on that recommendation? Must it recite the fact of the recommendation? How would the absence of the necessary recommendation be established if an attempt were made to invalidate a proclamation? It is submitted that the words are otiose.

15 The words of the Act, in point of fact, give power to prohibit by proclamation (*inter alia*) the use or possession in any class or classes of place of any class or classes of slot machine. The vision of a person being in possession of a class of slot machine in a class of place is pure idealism; Plato would no doubt have approved.

16 Since the variation or cancellation need not be on the recommendation of the Commissioner of Police, one's suspicions that the requirement of that recommendation for the issue of a proclamation is otiose are considerably strengthened.

17 Presumably machines which enable only one person to play a game entirely of skill are too readily susceptible of being used for purposes of gaming; but it is difficult to see the reason for taking power to prohibit the use of machines which require the insertion of more coins or tokens than one for their operation.

carry it away, and if any person is convicted of having it in his possession the machine and any money or tokens therein are forfeit to Her Majesty.[18]

Judges' Salaries and Pensions.

An amendment to the Judges' Salaries and Pensions Act 1950 (Act No. 45 of 1961) increases the maximum pension, on retirement, of a judge who has served for not less than ten years and attained the age of sixty years, to 50% of salary. A judge who retires before attaining that age and length of service, by reason of permanent disability or infirmity, will receive 14% of his salary if he has served for less than two years, plus an additional 4% for each completed year of service after the first, but will in no case receive more than 50% of salary. The widow's pension, if a judge dies before retirement, is to be half the pension the judge would have received had he retired for disability on the date of his death instead of dying.

Administration of Estates.

Section 15A of the Administration Act 1903 (which was first enacted by Act No. 62 of 1955) has been repealed and re-enacted (by section 2 of Act No. 57 of 1961) in order to cure the unsatisfactory position whereby the class of persons entitled on intestacy was in a number of cases determined by the net value of the estate at the time of distribution; where the value of the estate at death was close to any of the values mentioned in sections 14 and 15, the assets were of fluctuating value, and realization was a lengthy process, it was impossible to determine until the point of distribution which of the next-of-kin would be entitled to share in the distribution. The net value for the purpose of determining the distribution of the estate under sections 14 and 15 is henceforward to be the net value at the date of death, as finally assessed for duty. Further, where there is any income derived from the property of an intestate it is to be distributed among the persons entitled in the same proportions as those in which they are entitled to share in the distribution of the property. Care has been

[18] It is perhaps unfortunate that "use" of a slot machine is not defined in the new subsection; presumably the person playing the machine is the person whose conduct is contemplated, but one can imagine an argument directed to showing that the "use" contemplated is the use by the person in whose premises the slot machine is situated, or by the person who placed the slot machine in those premises or in some other place, and that "use" in this context is intended to avoid difficulties arising in situations in which it might be difficult to show that either of those persons was in possession of the machine.

taken to insert a saving provision in a new subsection (2) whereby any distribution of the property of a deceased person made prior to the coming into operation of the new legislation, in accordance with the provisions of the former section, is validated; it is not clear why this was really necessary, and if it were necessary it is not clear that it will be effective.

If this validating provision is necessary at all (and the circumstances in which it may be required to operate, and its effectiveness, appear to have been far from clear to the legislators[19]) the necessity would appear to have arisen from the failure of the draftsman of the original section 15A to take account of other provisions of the Administration Act 1903 and of what was apparently current practice in the administration of intestate estates, and possibly from the failure of those concerned in the administration of estates after the coming into force of the original section 15A to appreciate the implication of the new provisions. Section 48 of the Administration Act 1903 specifically empowers a partial distribution of assets. Once the beneficiaries have been ascertained under sections 14 and 15 (and this was possible when the value of the estate for this purpose was the value at the date of death[20]) partial distribution of the assets is perfectly

19 "I am not so certain that subsection (2) of section 15A will work out. Time alone will tell . . . . We can only find out by applying it to practical cases, and it is difficult at the moment to visualize cases which may arise" (Mr. H. N. Guthrie: (1961) 160 PARL. DEB. 2266.) Is Mr. Guthrie contemplating the possibility of retrospective legislation to validate cases which turn out not to be provided for by the subsection?

20 Mr. H. N. Guthrie pointed out (*id.*, at 2265) that for a good many years intestate estates were distributed according to the "realisation figures" and not according to the value at the date of death, and that not until there was a considerable difference between these two values was the practice questioned; it was then found that the law was far from clear, but that the better view was that the value at the date of death, as established by the duty assessment, should be used for the purpose of determining who were the persons entitled. Unfortunately when legislation was brought down for the purpose of putting the matter beyond doubt the value chosen as the basis for distribution was the value at the date of distribution. This, he stated, proved unsatisfactory; and he instanced the situation in which a man might leave an estate of which the sole asset was a house valued at £2,000. The widow might believe that she was the sole owner; but if the house were sold 15 years later for £5,000 she would then find that others were entitled to a share. How this could arise at all is a mystery, for one would think that in those circumstances, if the value of the assets in the estate (including the house) were under £2,500 at the time when all the debts were paid and distribution under section 48 became permissible, the house and any other assets could be transferred to the widow. But Mr. Guthrie went on to say that the Commissioner of Titles (by what authority it was not clear) had stated that in such circumstances he was unable to register

proper. But section 15A as enacted in 1955 defined the net value of the property of the deceased, for the purpose of determining who were entitled to succeed on intestacy, as "the net value thereof at the time the property is in fact distributed pursuant to the provisions of those sections." Overlooking for the moment the circularity of this provision, it clearly implies, when read together with the preceding sections, that there is henceforth to be one single act of distribution only.[21] This being the case, while there is no need for the validation of a distribution of the assets of an intestate estate which, whether single or multiple, was complete before the coming into operation of the new section 15A, the action of an administrator who had distributed some assets but was still holding others at the date when the new section 15A came into force might well be open to question; for the view taken above of the implication of the previous section 15A suggests that an incomplete piecemeal distribution is not, in terms of the new subsection (2), a distribution "in accordance with the provisions of this section as enacted prior to the coming into operation" of the 1961 amendment.[22] But on this view the provisions of subsection (2) will be ineffective in any case, for they purport to validate only a distribution in accordance with the provisions of the previous section, and if there are any distributions which need validating they will not be such distributions.

a transfer in favour of the widow, and that "the law required" that the property must be sold and the realization figures established before the widow's claim could be recognised. What law required this is not stated; and indeed Mr. Guthrie's statement is inconsistent with his explanation of the last two paragraphs further on in his speech (*id.* at 2266):

> "I would point out that the intention of the law is that an intestate's estate shall not be sold. In fact, an administrator has no power to sell without either the leave of the courts (*sic*) or the consent of the beneficiaries. The reason for that is that the administrator is not a person in whom the deceased had reposed any trust. The effect of this is that the estate will pass to the next-of-kin, as near as possible in the form in which is existed at the date of death."

Apparently the Commissioner of Titles did not understand this. One cannot resist a suspicion that nobody connected with the administration of intestate estates really had a good grasp of the principles involved.

21 It must be admitted that it is not certain that this was the legislative intent; the Hon. A. F. Griffith (who must have been instructed by the mover of the Bill in the Assembly) said in the Legislative Council [(1955) 142 PARL. DEB. 1514], "It is considered that the specified sum, being a set figure, should be regarded as a straightforward legacy and therefore deducted from the net value before any fractional shares are arrived at for the future distribution of the estate."

22 It is possible, of course, that any piecemeal distribution, even if complete, was a distribution not in accordance with the provisions of the previous section, and therefore also in need of validation.

III. STATUS.

Registration of Births, Deaths and Marriages.

The purpose of the Registration of Births, Deaths and Marriages Act (No. 34 of 1961) is principally, as stated in the long title, "to consolidate and amend the Law relating to the Registration of Births, Deaths and Marriages." In part the need for this stems from the enactment of the uniform marriage legislation by the Commonwealth (the Marriage Act, No. 12 of 1961)[23], for the provisions of the latter for the registration of ministers of religion authorized to solemnize marriages (Division IV, Part I) rendered otiose corresponding provisions in State legislation.

In general, the pattern of the new Act is that of the old legislation; but there are numerous differences of detail, and some new provisions to meet changes of circumstances occurring since the pattern of the legislation was first laid down. It has been thought desirable to define "birth" or "birth of a child" so as to limit it to "the complete expulsion or extraction from its mother of a product of conception born alive or which is of at least twenty-eight weeks gestation" (section 3), and the obligation to register (section 20 (1)) is imposed upon "the parent of a child born in the State whether when it issued from its mother it was alive or dead."[24] "Parent" is defined so as to impose upon the mother and the guardian, if any, obligations equal to those imposed upon the father; previously the word was defined as including the mother or the guardian only if the father were dead or absent. The power to appoint district registrars and assistant district registrars is now vested in the Registrar-General (section 6); previously it was exercisable only by Order-in-Council. It is no longer necessary for a district registrar or an assistant district registrar to dwell within the district for which he is appointed. Section 17 gives to the Registrar-General power to register a birth, death or marriage occurring in the State which has not been registered by a district registrar; but the penalty imposed on any person who has failed to give notice of a birth, a marriage or a death remains untouched. New and somewhat different provisions for the making of searches of the registers are contained in section 18. The unconditional obligation imposed by the previous legislation on the occupier of any place in which a child was born to give particulars of the birth is now conditioned on the failure of

[23] Reviewed *infra* at 705 *et seq.*

[24] Under the previous legislation the same result was reached, without the need for elaborate definition, by requiring any live birth to be registered, but a still-birth only if it was of seven months gestation.

the parent to comply with his primary obligation to give such notice because of the death, absence, disability or default of the parent; some difficult questions will no doubt arise concerning the extent of any occupier's knowledge of the failure of the parent to fulfil his or her primary obligation.

Section 29 makes some alterations to the provisions for registration of first or Christian names (or the change of a first or Christian name) after the registration of the birth—it need no longer be effected within 60 days after the giving or alteration of the name, but it cannot be done after twelve months from the date of birth. By section 31 the duty to furnish information to the registrar respecting a foundling lies upon the person in whose charge the child is placed, and is no longer imposed upon the chief or head of the police in the district.

The new provisions in Part IV of the Act, dealing with the registration of deaths, include a provision (in section 34) imposing on the person in command or charge of an aircraft which lands in the State carrying the dead body of a person an obligation to report the death similar to that which has long been imposed on the master of a ship on which a death has occurred, except that the report is to be made to the Registrar-General and not to the district registrar. For some reason, however, the person on whom the obligation is laid is required to furnish the district registrar (not the Registrar-General) with a medical certificate as to the cause of death. Again, section 35 imposes on a person in charge of a School of Anatomy the duty to furnish to the Registrar-General within fourteen days particulars concerning the death of a person whose body is delivered to the school for anatomical examination. If it is desired to register a death after the expiration of seven years from its occurrence the authority of both a judge and of the Registrar-General is required; it is not clear why this dual control should be imposed, nor why the Registrar-General is by implication given power to disregard the ruling of a Judge in the matter.

Section 44 imposes upon any medical practitioner who first views a dead body the duty of notifying the coroner of the death if he thinks that the death occurred under conditions of suspicion, or that the death was either violent or unnatural, or if the cause of death is not known to him. The responsibility is then on the coroner either to inquire into the cause of death under the provisions of the Coroners Act 1920 or to furnish the district registrar with the information required by section 43 (3) of that Act. By subsection (2) of section 44 a person finding a dead body exposed is to notify a member of the police force; the responsibility for notifying the Coroner and giving

the necessary particulars of death to the district registrar[25] is then placed on that member of the police force.

Part V, providing for the registration of marriages, is now geared to the provisions of the Marriage Act 1961. A new provision is that in section 49 requiring the Registrar of the Supreme Court to make to the Registrar-General a monthly return of decrees absolute of divorce or of nullity made by the Court during the preceding month. Part VI of the Act introduces new provisions for the registration of children legitimated by the subsequent marriage of their parents, consequent upon the enactment of Part VI of the Marriage Act 1961. If the child was born within the State section 51 imposes a duty upon the parents to inform the Registrar-General that the child has been legitimated, unless the legitimation has already been registered under the Legitimation Act 1909. If the child was born outside the State but is domiciled in the State[26] section 52 provides that application may be made to the Registrar-General to have the birth of the child registered; the application must be accompanied either by a certified copy of the registration of the birth of the child or by an order of the Supreme Court of a State or Territory of the Commonwealth declaring the person in respect of whom the application is made to be legitimate.[27] Section 55 authorizes also the registration (perhaps the better term would be re-registration), by authority of the Registrar-

25 Section 44 (3) in fact states that the member of the police force is to furnish the particulars to "the district registrar or assistant district registrar" for the registry district in which the body is found; but subsection (4) requires the coroner to give the information required by section 43 (3) of the Coroners Act 1920 to the district registrar, without the alternative. Why is the assistant district registrar brought into the matter at all? A similar inconsistency is present in section 41; subsection (1) requires a medical practitioner to give the prescribed medical certificate to "a person required by this Part of this Act to give information concerning the death to the district registrar . . ." while subsection (2) requires that person when notifying the death to give the certificate to the district registrar or assistant district registrar. These are the little inconsistencies in legislation which a vigilant and efficient Upper House might well make it its business to detect and correct.

26 The Legislature has omitted to specify whether the child is to be domiciled in the State at the date of the marriage of his parents or at the date of the application for registration; it is not easy to decide which is intended.

27 The point of this last requirement is not immediately apparent. True, section 92 of the Marriage Act 1961 enables an order to be made declaring that a child is the legitimate child of his parents; but it also specifically provides for the making of an order that the child is a legitimated person. Yet it is an order of the first kind, and not of the second, which by section 51 is to be produced if the birth of the child is to be registered consequent upon its legitimation by subsequent marriage. Something seems to have gone wrong here.

General, of the birth of a child born in the State, whose birth has already been registered, if the child has been declared to be legitimate by an order of Court; even though the birth took place more than seven years before the re-registration the authority of a judge is not necessary. A legitimated child whose birth is registered under Part VI of the Act is to bear the surname of its father.[28]

Part VII of the Act contains the penalty provisions and miscellaneous provisions. The penalty for failing to give the necessary particulars of a birth, a death or a marriage is increased to ten pounds by section 58 (3); and by section 59, where a person is convicted of failing to supply particulars of a birth or a death the court may order him to give those particulars forthwith; failure to comply with the order attracts a penalty of £20 plus £1 a day for as long as the offence continues. Section 60 confers upon the Registrar-General a new power to require any person whom he believes to be acquainted with any of the facts concerning a birth, death or marriage which has either not been registered or registered without full particulars having been given to attend within seven days at his office or the office of the district registrar for the district within which the person resides and to give in writing such information as he possesses. By section 70, sections E, F, G, and H of the Second Schedule to the Interpretation Act 1918 are incorporated in the legislation; section 51 of the repealed Act incorporated also section A of the corresponding schedule of the Shortening Ordinance 1853. Presumably it has been decided that in the light of the provisions of section 20 of the Justices Act 1902-1959 it is no longer necessary to incorporate section A.

IV. PUBLIC HEALTH.

Health Education Council.

In order to correct an anomaly which, according to the Hon. the Minister for Health, had existed ever since the Health Education Council Act 1958 was passed,[29] the Health Education Council Act Amendment Act (No. 4 of 1961) increased the membership of the Council from 17 to 18 by adding a nominee of the Western Australian Branch of the Australian Dental Association.

Registration of Medical Practitioners.

Two amendments were made to the provisions of the Medical

28 Section 57, which begins with the words "Notwithstanding any law". If it is an already existing enactment or rule of law which is contemplated, the words are pointless; if a future one, ineffective.

29 (1961) 158 PARL. DEB. 731.

Act 1894-1956 by the Medical Act Amendment Act (No. 42 of 1961). Persons who are qualified in medicine or surgery and who desire to engage, as their sole professional occupation in the State, in teaching or research or post-graduate study under the direction and control of a teaching or research institution, may be registered as medical practitioners so long as they are engaged exclusively in one of the above activities. They must be persons whose qualifications, in the opinion of the Medical Board, fit them for the occupation in question and for appointment to the position connected therewith; they must satisfy the Board of their good fame and good character; and in the opinion of the Minister (who has an absolute discretion to confer or deny registration) their registration must be desirable in the general interests of the State.

The object of this provision is primarily to enable visiting medical practitioners who are not normally registrable to be registered in this State for the period of a temporary visit. It will be of obvious benefit to the University Medical School in giving it the assurance that visiting research workers and teachers may be enabled to engage, in the course of their study or teaching, in activities which would be classed by the Board as the practice of medicine and surgery, and will not be confined to mere lecturing. It is perhaps unfortunate, however, that the terms of the legislation are such as to empower the Medical Board to differ from, say, the Senate of the University, or the governing board of any research institution, as to the qualification and fitness of a particular person for a post to which he may already have been appointed.

A similar discretion is given to the Minister to register, without payment of any practice fee,[30] anyone who appears in person before the Board and satisfies it that he is registered under any Act of a State or Territory of the Commonwealth as entitled to practise medicine and surgery and is solely occupied as a medical officer in the employment of the Commonwealth or is permanently attached as a medical officer to any of the Armed Services of the Commonwealth. If this is supplemented by corresponding legislation in other States it will relieve Commonwealth medical officers, and those in the Armed

[30] Although the legislation speaks of practice fees only, section 11 (1) (b) of the principal Act provides that an applicant for registration shall pay to the Board with his application his first annual practice fee, which shall be deemed to include a fee for registration. Incidentally, although the word is spelt "practise" in section 11 (1) (b) the draftsman has not hesitated to use the spelling "practice" in the amending Act. Why cannot this be done with "licence"? See (1961) 5 U. WEST. AUST. L. REV. 391, note 18.

Forces, of the burden of paying further fees whenever in the course of their duties they are posted across State borders.

V. CONTROL OF PRICES AND COMMODITIES.

It is no doubt an indication both of the political temper of the State's government and of the economic conditions in the community that no legislation falling under this heading was passed during the session in question.

VI. FISCAL.

It is always pleasing to record the disappearance of a tax; less pleasing, perhaps, to have to record that the tax has not disappeared because the Government's collection of money from the public is adequate to its needs, but for other reasons.[31] The advent of television brought about such a steep decline in attendance at cinema shows that in July of 1960 the Government decided to refund to the proprietors of picture theatres all entertainment tax paid by them up to £20 per week; in January of 1961 the sum was raised from £20 to £30. The only other entertainments subject to tax were horse-racing, dancing, and professional sport, and the Government decided that the tax might well be abolished and the necessary revenue (estimated at £135,000 in a full year) raised in other ways. The abolition is effected by the Entertainments Tax and Assessment Acts Repeal Act (No. 24 of 1961).

Death Duties.

A combination of sections 3 and 5 of the Administration Act Amendment Act (No. 57 of 1961) and the Death Duties (Taxing) Act (No. 66 of 1961) effects a reduction in the amount of probate duty payable on estates passing to the widow or widower, parents, brothers, sisters and children of the deceased if they are domiciled in Western Australia and resident there at the date of death of the deceased. According to the Treasurer (the Hon. D. Brand) the reduction of duty is a uniform £56. 5. 0. on all estates passing to persons of the above classes.[32] Section 6 of the Administration Act Amendment Act adds to the list of "gifts, devises, bequests, legacies or settlements"[33] which are exempt from duty under section 134 of the

31 Whatever the reasons, the Government's action would undoubtedly please Sir Alan Herbert should he come to hear of it; see his comments *per* Plush J. in R. v. Leather, *Misleading Cases in the Common Law* (6th ed., London, 1948) 195, and *per* Wool J. in R. v. Cochran, *id.* at 243.

32 (1961) 160 PARL. DEB. 2170.

33 What is the difference between a bequest and a legacy?

principal Act those made to or in trust for any school included in the list of efficient schools under the Education Act 1928.[34]

[The relevant sections use the formula "a *bona fide* resident of and domiciled in Western Australia." Apart from the question whether this formula accurately represents the legislative intention of the Government in introducing the Bill, for both the Hon. the Treasurer and the Hon. A. F. Griffith, in their second reading speeches in the Legislative Assembly and Legislative Council respectively [(1961) 160 PARL. DEB. 2170 and 2334] stated that the estates on which duty was to be reduced were those passing to persons *domiciled* in Western Australia, it invites once again comment on the unbearably sloppy expression *"bona fide"*, so beloved of legislators. What exactly do they mean? The Hon. A. R. G. Hawke interpreted the phrase as referring to persons "who live genuinely or have been living genuinely in Western Australia at the time of the death of the deceased person" (*id.* at 2266); in these phrases "genuinely" appears as a meaningless appendage, of an expletive nature rather than anything else, like the word "strictly" on the notices "Strictly No Parking" which have appeared in large numbers round one of Perth's major public buildings in recent months. It appears that the expression "bona fide" is increasingly becoming the refuge of those who are either too lazy to work out exactly what they want to say, and put it into precise words, or are desirous of veiling what could be precise statements in a fuzzy cloak of imprecision. To the last category, for example, belongs the accusatory statement of the Hon. A. R. G. Hawke in the Legislative Assembly on 31st August 1961 [(1961) 158 PARL. DEB. 718]: ". . . I have handled many thousands of public documents; and I say that this is not a copy of the *bona fide* papers concerning a supposed analysis that was made . . . ."

It is true that in the only judicial pronouncement in Australia on the meaning of the words "*bona fide* resident" which the reviewer has been able to trace O'Connor J. said, in *Davies and Jones v. Western Australia,* (1905) 2 Commonwealth L.R. 29, at 49-50: ". . .—*Bona fide* resident is an expression frequently used in the Legislation of all

34 Paragraph (a) of section 6 solemnly amends a mildly funny printer's error in the 1958 Reprint of the Administration Act, 1903; section 134 (1) (e) was made to speak of "any pubicly subscribed medical service" but respectability is now restored by the substitution of the word "publicly" for the second word in the above quotation. But was this really necessary? Any further reprint must be made under the authority of the Amendments Incorporation Act 1938, and section 4 (f) of that Act empowers the correction, in any Act reprinted, of any errors in spelling or numbering. It would seem that the Legislature is not familiar with the contents of its own legislation.

the Australian States. It may be said to have acquired a settled meaning as conveying the idea of "habitual physical presence" in a locality, or in other words, "permanent residence"; and at 51, "'*Bona fide* resident' has practically the same meaning as 'domicil' in its popular sense." But there appears to be no other judicial authority for this; the words are adverted to by Lord Watson, enunciating the advice of the Privy Council in *Tooth v. Power,* [1891] A.C. 284, at 291, but no such meaning is attached to them. Further, it is pertinent to ask why, if the Legislature means "habitual" or "permanent" residence, it does not say so.

The difficulty which may be expected to arise in interpreting the expression may be illustrated by a concrete case. Take the case of a young man, domiciled in Western Australia, who is studying in a University in one of the Eastern States, either because he has been awarded a scholarship there or because he is pursuing a course of study not available at the University in this State. He is notified that his father has become seriously ill, and returns home just before his father dies; he remains home for two or three weeks and then returns to his University. Can it be said that he is not "a *bona fide* resident of . . . . Western Australia" at the date of death? If his first news was that of his father's death, so that he returned home after the death and then remained for two or three weeks, would he nonetheless be disentitled to the concession?

Incidentally, the possible difference in treatment of these two cases appears to raise again the point whether this provision offends against section 117 of the Commonwealth of Australia Constitution Act 1900, in a form not discussed in *Davies and Jones v. Western Australia* (*supra*). The plaintiff in that case, being domiciled in Queensland, could not establish that he was subject in Western Australia to a discrimination which would not be equally applicable to him if he were resident in Western Australia. But had he been domiciled in Western Australia but resident in Queensland he could surely have brought himself within the terms of section 117. However, as the amount of the discrimination is only £56. 5. 0 (as mentioned earlier) the validity of the present measure appears unlikely to be challenged.]

VII. BUILDING, HOUSING, AND DEVELOPMENT.

Building Societies.

The Building Societies Act Amendment Act (No. 41 of 1961) is designed, in the words of the Chief Secretary,[35] "to improve the

[35] (1961) 159 PARL. DEB. 1155.

Building Societies Act in order to make it function better under modern circumstances." When the Building Societies Act 1920 became law it was designed primarily to regulate permanent building societies and Starr-Bowkett building societies, that is to say, societies which relied primarily on share capital as their source of finance, and only to a lesser extent on loans and deposits. Clause 16 (3) of the Housing Agreement between the Commonwealth and the State, which was authorized by the Commonwealth and State Housing Agreement Act 1956, permitted moneys advanced by the Commonwealth to the State for the provision of finance for home builders to be made available as loans to building societies and other approved institutions, and as a result a number of would-be co-operative building societies came into existence. Strictly, such societies should derive no funds whatever from share subscriptions, but should obtain the whole of their moneys from loans from finance institutions. Unfortunately section 21 of the 1920 legislation prevented any terminating building society (as a co-operative building society must be) from receiving loans exceeding either two-thirds of the amount secured to the society by mortgage or three years' income on the shares for the time being in force; in other words, it was necessary for a society to have share capital before it could begin operations. Some terminating societies, according to the Chief Secretary,[36] were able to secure funds with which to start their activities, and then to enter into further borrowing through normal channels, for "other legislation permitted borrowing from the Housing Commission of Commonwealth-State Housing Agreement money irrespective of the borrowing power conferred on the society by the Building Societies Act." What that legislation was the Chief Secretary did not specify; if, however, his reference was to section 4 of the Commonwealth and State Housing Agreement Act 1956 it is understandable that, as he further informed the Legislative Assembly, "Home lending authorities—banks and insurance companies—were unconvinced of the borrowing rights of terminating societies."[37] Other difficulties soon arose, and it finally became clear that substantial amendments to the legislation concerning building societies had become necessary. The amendments thought necessary, which appear to have been very hastily drafted indeed, are contained in the Act under review.

[36] *Id.*, 1156.

[37] That section gave power to an approved institution (including a building society) to enter into and carry out loan agreements with the State "notwithstanding that the power is not conferred by the instrument of constitution of the approved institution, and notwithstanding any provision of the instrument of constitution to the contrary." These words do not appear apt to exclude the operation of sec. 21 (1) of the Building Societies Act 1920.

The Registrar of Friendly Societies has been relieved of the task of administering the legislation relative to Building Societies, and a new officer entitled the Registrar of Building Societies has come into being.[38] In addition a Building Societies Advisory Committee of five is to be set up by appointment of the Governor; the Registrar is to be chairman, the President for the time being of the Western Australian State Branch of the Commonwealth Institute of Valuers is to be a member, two appointments are to be made from among persons qualified and experienced in building society management and practice, and the fifth appointment is to be of an officer of the Public Service of the State nominated by the Minister.[39] The Committee is to make recommendations and submit proposals to the Minister[40] with respect to various matters concerning the promotion, formation, regulation, and operation of building societies, the promotion of the building of dwelling-houses by co-operative effort, and the determination and specification of minimum standards for dwelling-houses.[41] The Minister may refer matters to the Committee from time to time, and other functions may be prescribed for it by regulation. Finally, by section 4 (1) (b), as re-enacted, the Committee is empowered, in cases in which less than ten adult persons wish to form

[38] One notes with regret that sec. 3C (a) contains the unnecessary statement that the Registrar "has and may exercise the powers functions and duties and is entitled to the immunities prescribed by this Act or by the regulations." Of course he has; this is the point of the Act. Unfortunately the Act contains a number of examples of pointless and unnecessary verbiage; see for another example subsecs. (1) and (2) of the new sec. 3E:

> "(1) *For the purposes of this Act* a body to be called the "Building Societies Advisory Committee" *and having the functions prescribed by this Act* shall be constituted *as provided in this section.*
>
> (2) The Advisory Committee shall consist of five persons appointed *as members for the purpose* by the Governor."

It is submitted that the words italicized are unnecessary, and that the same result could have been achieved by one subsection.

[39] Subsec. (3) says, rather awkwardly, "Of the five members, one shall be the Registrar . . ." What is meant, of course, is that the Registrar shall be one of the members. The awkwardness becomes more apparent to the seeing eye if the full paragraph is quoted: "one shall be the Registrar, who shall be chairman of the Advisory Committee." What would have been wrong with re-casting the subsection so as to begin: "The Governor shall appoint as members of the Advisory Committee"?

[40] In the light of the fact that these recommendations and proposals are to be made to the Minister, why does the section expressly provide that the Advisory Committee is to function "subject to the Minister"?

[41] It is not clear why the Advisory Committee should have been given this last function, in the light of the fact that a new sec. 19A, enacted in the same legislation, forbids lending on dwellings unless they are constructed to the standards required by the uniform building by-laws under the Local Government Act 1960.

a building society, to make a recommendation to the Registrar that they be allowed to do so, and by a new section 33A the Committee is required to scrutinize every application to register a society and advise the Registrar whether or not in its opinion the requirements of the area to be served by the society are adequately and reasonably served by an existing society; if it advises the Registrar that those requirements are so served he must refuse to register the new society, notwithstanding that by section 5 (3), as re-enacted, the Registrar must register any society if he is satisfied that its rules comply with the Act and are adequate to carry out the Society's purpose.[42]

Section 4, as re-enacted, specifies that no society shall be formed with a membership of less than ten adults (subject to the Advisory Committee's consent, as above), and insists that any association or society which is capable of registration under this Act or is intended to carry out the objects specified in the Act as being those of a building society must be registered under this Act. The formation of societies as either permanent societies, Starr-Bowkett societies or terminating societies is expressly authorized, and any society is authorized to raise money in any manner it may think fit, and to secure the money by legal or equitable mortgage charged on the assets of the society; a permanent society may also receive money on deposit. A society may not lend money for a longer period than thirty years, and loans are to be repayable by instalments at intervals no greater than three months, with three-monthly rests for the computation of interest. A new section 4A gives every society power to hold land or any interest therein, with a right of foreclosure;[43] but if it becomes entitled to any land by foreclosure or extinguishment of the right of redemption it must sell it or convert it into money as soon as is convenient. A re-enacted section 5 prescribes a slightly more elaborate procedure for applying for registration; instead of merely allowing persons intending to establish a society to send to the Registrar two copies of the proposed rules, signed by three of them and the intended secretary, the new provisions require that the formation of

42 This imposition of an apparently mandatory duty on the Registrar by sec. 5 of the amending Act, followed by a qualification of it in sec. 30 (which inserts into an inappropriate place in the principal Act the provision that every application for registration is to be referred to the Advisory Committee), bears all the hallmarks of hasty and ill-considered drafting, not revised by any other hand. One supposes that, as is all too often the case, those concerned with the Bill left the request for the draft to the last minute and then required a draft in a great hurry.

43 The section also gives to any society power to raise funds in accordance with the provisions of sec. 4 of the Act which, as indicated, empowers the raising of funds in certain ways. Why repeat the authority?

the society be complete, as the application for registration must state not only where the office of the society is to be situated[44] and the full name of the intended secretary but also the full name of each member of the committee of management. To prevent any further accumulation of inoperative building societies[45] subsection 5 provides that if a society does not commence business within[46] six months from registration, or within such further time as the Registrar may allow, the Registrar shall cancel its registration. The subsection does not specifically say that this provision is to apply to societies registered before the coming into force of the amending Act.

A new section 5A provides that a society formed for any of the objects specified in section 4 (1) (a) is not to be registered under the provisions of any Act other than the Building Societies Act; it is difficult to see why this provision was not incorporated in section 4 (4) (referred to above) to which it would seem to add little. Provision is made, in a new section 8A, for the preparation and gazetting of model rules for building societies; subsection (1) provides that societies already registered may adopt all or any[47] of the model rules, with or without modification, and subsection (2) that the rules of societies registered after the coming into force of the amending Act shall be deemed to incorporate the model rules unless they are expressly excluded or modified.[48] If the model rules as gazetted are subsequently amended (by a gazetted amendment) the rules of societies already registered will be unaffected unless the new rules are adopted by special resolution.[49] Some minor amendments are made to section 9, which prescribes the essential content of the rules. A new section 12A is added, requiring a society to have a committee of management of not less than five directors, who must be members of the society over the age of 21, first elected at the meeting for the formation of the society and thereafter at a general meeting. The committee of

44 This, of course, always had to be stated in the rules submitted for registration.

45 In his second reading speech the Hon. the Minister stated [(1961) 159 PARL. DEB. 1157] that upwards of thirty societies had obtained registration but had not been able to commence business, but that they could not at the time be deregistered except at their own request or upon commission of a specific breach of the Act.

46 The Act says "wihin"!

47 With characteristic verbosity the section says "the whole or any portion (why not 'part'?) of."

48 In the light of this it is difficult to see why subsec. (1) expressly permits a society to be registered to adopt the model rules by resolution, since they are incorporated willy-nilly; this appears to be more unthinking duplication.

49 Why is a special resolution needed for this, but only an ordinary resolution for adopting the model rules *in toto*?

management, which is to elect one of its own members to be chairman, is to meet at least two-monthly. It is the committee of management which exercises the powers of the society, unless expressly provided otherwise by the Act, or by regulations made thereunder, or by the rules.[50] Subsection (4) of section 12A tabulates a number of conditions (apart from any specified in the rules) the happening of any of which will create a vacancy in the office of director. They include the provision (not uncommon in the rules and constitutions of societies, and one which to this reviewer has always appeared fraught with danger) that if a director absents himself from three consecutive meetings of the committee without leave his office is vacant; the apparent danger is that such absences may be fairly frequent and may go unnoticed, together with the vacancy or vacancies so created, and that at some stage it may transpire that a committee has been operating with a majority of persons whose offices have been vacated. If this should happen to a building society subsection (8) of section 12A will not save it, for that subsection only saves the validity of the acts of a director if a defect is subsequently discovered in his appointment or qualification. Condition (g) of the conditions contained in the subsection is subject to a peculiarly worded exception; it vacates the office of a director who or whose partner, employee or employer has a direct or indirect pecuniary interest in any agreement with the society "otherwise than as a member and in common with the other members of another company or body corporate consisting of more

50 Section 12A (1) is incredibly verbose: "For the purpose of managing and controlling its business and operations, every society shall have a committee of management which, except as provided in this section, shall have and may exercise for that purpose all or any of the powers of the society as if those powers had been expressly conferred on the committee of management by a general meeting of the society, but those powers shall be subject to any restrictions imposed by this Act or the regulations, or by the rules of the society."

The following comments may be made: (1) Could the powers of the society be exercised otherwise than for the purpose of managing and controlling the business and operations of the society, and for what other purpose could a committee of management be appointed anyway? (2) If the committee has the powers, surely it may *ipso facto* exercise them? (3) Why, if the powers are fully conferred on the committee by the Act, is it necessary to go on and say that the committee has them as if they were conferred by the general meeting? Does it matter how otherwise the committee might have received them, so long as it receives them effectively and fully? (4) Since the powers are expressly made subject to the restrictions imposed by the Act, why also say "except as provided in this section" especially since the section makes no other contradictory provision? It is a pity that at least those of the members of Parliament with legal training and experience do not attempt to exercise a check on pointless verbosity of this sort.

than twenty persons or a wholly owned subsidiary of such company or corporate body." It is difficult to see how the individuals referred to could be members of a wholly-owned subsidiary of a corporate body. There is a further exception to that condition to provide for any director who has received an advance from the society in accordance with the new section 12B, which requires such an advance to be made by special resolution of the society; if it is not so made the directors who authorized the advance are made jointly and severally liable for any loss suffered by the society in respect of the advance, and of course the director who received it vacates his office. Subsection (7) of section 12A provides that every director acting in the business or operations of the society pursuant to the rules, or to a resolution of the management committee, is deemed to be the agent of the society "for all purposes within the objects of the society."[51] Subsection (9) (b), which forbids a director who has any direct or indirect pecuniary interest in any question, otherwise than as a member of the society and in common with other members, to vote on that question, appears at first to postulate (or require) an almost divine prescience on the part of either the chairman or the secretary, for it provides that "in the event of his so voting his vote shall not be counted." Would it not have been better to have said "his vote does not count"?

By the new section 12C, if any director or other officer of a society wishes to sell land to, or undertake the erection of a house for, a member of the society who proposes to secure an advance from the society to pay in whole or in part for the cost thereof, or wishes to accept from a member as whole or part payment of any moneys owing to him by that member any advance made to the latter by the society, he must be authorized so to do by a special resolution of the society. Section 16 has been repealed and re-enacted to provide that while two or more persons jointly may still hold shares in any society no one corporation or incorporated company[52] may hold, either by itself

[51] It is difficult to see the point of the qualification. So long as a director is acting pursuant to the rules he must be acting for a purpose within the objects of the society. (Incidentally, why is not the reference to acting pursuant to the rules enlarged to include a reference to the Act and the regulations, for some of the operations of the society are subject to restrictions imposed thereby?). Presumably the section is intended to negative the implied agency of a director acting pursuant to a resolution of the management committee but for a purpose not within the objects, or pursuant to an *ultra vires* resolution of the management committee. Would he not, in the latter case, cease to be acting in the business or operations of the society?

[52] The words "corporation or incorporated company" are those of the principal

or by a nominee, more than 10% of the shares of the society; and no more than 40% of the shares may be held by corporations or incorporated companies. Section 17 is amended to make special provision for limiting the liability of members of terminating building societies to the unpaid balance on their shares, unless the rules otherwise provide. Section 18 is amended to provide that the society may make advances to members on the security of their deposits, as well as of their shares; the prior approval of the Registrar is required to the making of advances to other building societies. A new section 18A is added to make it mandatory on any society to obtain a valuation of freehold or leasehold property on which it proposes to make an advance from a valuer approved by the Minister; by virtue of the new section 48A the valuer must not report on the property if he or his spouse[53] or any relative by blood or marriage has any direct or indirect interest in it, and he may be punished by a fine of £100 for contravening this provision or for making a false or fraudulent valuation. To ensure further the security for a society's advances a new section 19A limits a society's advances, if made on the security of premises erected after 23rd March 1962 (the date on which the amending Act came into force), to premises erected in conformity with the minimum standards of construction under the Uniform Building By-Laws under the Local Government Act 1960, whether or not the local authority in whose area the premises are situated has adopted them.[54]

Act; it is a pity that the opportunity was not taken to be more precise. What is a "corporation"? Does the word include an incorporated association? Possibly it may; for subsec. (3) contains a special provision that, subject to the preceding provision, a building society (which though not a company is by sec. 7 of the Act a body corporate) may with the approval of the Registrar hold shares in another building society.

53 Sec. 48A says "wife or husband"—thus contemplating the possibility of women valuers.

54 This appears to be the intention of the section in question; but it refers to the uniform by-laws "as adopted by the council of the municipal district wherein the premises are situated." Sec. 257 (1) of the Local Government Act 1960 empowers the adoption of model by-laws "with or without alterations." Is the position that if the by-laws are adopted with alterations the standard of construction is to be that required by the altered by-laws, but that if the by-laws are not adopted at all the standard of construction is to be according to the model by-laws *simpliciter*? In any case, why say anything about adoption; why not merely require that dwellings on which advances are to be made be constructed in accordance with the uniform building by-laws? Incidentally, there is a bad grammatical construction at the end of the section: "the uniform building by-laws . . . as adopted by the council of the municipal district . . . , or which, if not so adopted, shall for the purposes of this section be deemed to have been adopted . . ."; "which by-laws" should be substituted for "or which."

Section 21 is amended to provide that deposits and loans at interest received by a permanent or Starr-Bowkett society are not to exceed three times the amount actually subscribed by the shareholders, together with the interest and bonuses on that amount, unless the Registrar upon the recommendation of the Advisory Committee agrees to any society receiving a greater amount. The appeal procedure under section 33 is modified; if registration of a proposed society, or registration of any altered or additional rules,[55] is refused the society may issue and serve on the Registrar a summons to show cause without first serving a notice requiring him to set forth the grounds of refusal. The Legislature has also remedied a serious defect which existed in section 33 from its inception; as originally passed that section merely authorized the judge hearing the summons "to make such order thereon as the circumstances of the case may require," but the re-enacted section 33, in addition to taking away any right of appeal, expressly provides that the order is final and "has effect according to its tenor", two important provisions the absence of which must have seriously vitiated the original section for the past 42 years.[56]

Section 36, which empowered the appointment of an accountant or actuary to inspect the books of a society, is repealed, and section 37 is amended to enable the Registrar to appoint an inspector to examine the affairs of a society, or to call a special meeting of a society, whenever he thinks[57] it advisable or necessary; he does not have to wait upon the application of ten members or the happenings specified in the previous section 37 (5).

The Commonwealth and State Housing Agreement Act (No. 38 of 1961) authorizes the execution of an agreement which in amending

55 The new sec. 33 speaks also of a failure to register the original rules; the original sec. 33 spoke only of failure to register an alteration of or an addition to the rules. The new sec. 5 (3) empowers the Registrar to register the society if he is satisfied with the rules, and says nothing about registering the rules themselves. How could the Registrar register a society and fail to register the original rules? Moreover, the new sec. 33 itself begins: "If upon an application to register a society under this Act, or to register any alteration or addition to or rescission of the rules of a society . . ." and therefore does not contemplate the registration of the original rules. Incidentally, is not a rescission of the rules of a society a rescission of the whole of the rules? Was it intended to say "rescission of any of the rules of a society"?

56 The new phrase has been inserted in spite of the provision in section 49 that "All orders made by the Supreme Court or a judge under this Act may be enforced in like manner as any other judgment or order of the court of the like nature or to the like effect may be enforced."

57 The statute uses the somewhat archaic (in this sense) "deems."

those already in force takes account of the place of building societies in financing the erection of homes. Clause 6 of the Agreement replaces the existing provision that moneys in the Home Builders' Account are to be used to provide finance for home builders by means of loans by the State (with the approval of the Commonwealth Minister) to building societies and other approved institutions with a new provision that, if a loan is to be made to an institution other than a building society, not only is the Minister's approval required, but that in considering whether to give that consent he is to take into account the promotion of the maximum development of building societies and the amounts they can raise from private sources.[58]

Housing Loan Guarantees.

Act No. 43 of 1961 is the fourth amendment in four years to the Housing Loan Guarantee Act 1957.[59] It changes the pattern under which the flow of money into housing is encouraged by State guarantees against loss. The new pattern recognises, and will no doubt encourage the growth, of "middlemen" in the business of housing finance, in the shape of "approved lending authorities."[60] An approved lending authority is defined as "an institution, body or person[61] ap-

[58] The Hon. Mr. Hutchinson (Chief Secretary) said [(1961) 160 PARL. DEB. 2364]: " . . . whereas it was necessary in the past for the State to obtain the approval of the Commonwealth Minister before the allocations were made to building societies, the State may now make the allocation without Commonwealth approval." This may be so, but since the operative words of the substituted clause 16 (3) are exactly the same as those of the sub-clause which it replaced it is difficult to see exactly how this interpretation is reached.

[59] The original legislation is reviewed in (1958) 4 U. WEST. AUST. ANN. L. REV. 287.

[60] Will it also encourage a growth in the rate of interest demanded of the ultimate borrower?

[61] What is an institution? The word is not defined either in the principal Act or in the Interpretation Act 1918. It appears to be wider than the expression "body corporate." Lord MacNaghten in Manchester Corporation v. McAdam, [1896] A.C. 500, at 511, said that the word was difficult to define but supposed that it meant "an undertaking formed to promote some defined purpose", limiting this by adding, "having in view generally the instruction and education of the public." In Minister of National Revenue v. Trusts and Guarantee Co. Ltd., [1940] A.C. 138, at 149, the Judicial Committee speaks of "institutions in the sense in which boards of trade and chambers of commerce are institutions." Again, what is meant by "body"? Surely by the omission of the word "corporate" the legislature does not contemplate that an unincorporated body might receive and lend moneys under the Act. Why was the phrase "any person or body corporate" not used in the principal Act, or in this? "Institution, body, or person" is the language of a layman, not of a lawyer, certainly not of a lawyer who remembers that "person" is defined in the Interpretation Act 1918 as including a body corporate. The expression "lending institutions" is a layman's expression.

proved under this Act by the Minister for the purpose of making loans to an approved institution to be used by the approved institution for the purposes of this Act"; and the definition of "approved institution" is now restricted to an institution which lends money to borrowers to enable them to build or purchase new houses. If an approved lending authority makes a loan to an approved institution a re-enacted section 7 empowers the Treasurer to guarantee to the approved lending authority the repayment of the loan, on the institution executing such securities as the Treasurer thinks fit; the securities are to create a floating charge over the undertaking and all the property and assets of the institution, unless a lesser security is accepted;[62] the charge is to be a first security unless there is already in existence a floating charge under the Commonwealth and State Housing Agreement Act 1956. A re-enacted section 7A specifies the conditions under which such a guarantee may be given.[63] When an approved institution makes a loan to a borrower on a new house, or sells a new house on terms as to the repayment of the purchase price, the Treasurer, instead of guaranteeing the repayment of part or the whole of the loan or purchase price, as before, is authorized under a new section 7B to indemnify the institution, to a limited extent, against the loss it may sustain in respect of the loan or contract of sale. The Treasurer is to declare from time to time what maximum amount may be advanced on loan, or left unpaid on sale, by an approved institution; the indemnity is then to be limited to the amount (plus interest thereon) by which the loan or unpaid purchase money exceeds that maximum amount, but may not in any case exceed the difference between the maximum amount and 95% of the value of the new house, where it does not exceed £3,000, 90% of that value if between £3,000 and £4,500, and 80% of that value if between £4,500 and £6,000. A new section 7C specifies conditions under which such an indemnity may be given; they include a provision that the maximum rate of interest is not to exceed that declared from time to time by the Treasurer under section 7F, a section which also authorizes the Treasurer to declare from time to time the maximum amounts which the Treasurer may guarantee, or in respect of which he may enter into contracts of indemnity, during any specified period. Section 7D then forbids him to execute guarantees or enter into contracts of indemnity if they would take the aggregate amounts above the maxima so set; but with

[62] Sec. 9 (5) is appallingly ungrammatical; the Treasurer may require an approved institution to execute "such securities . . . as creates (*sic*!) a charge . . . and which (!) sufficiently secures (*sic*) the Treasurer."

[63] It seems a pity, since both sec. 7 and sec. 7A were re-enacted, that opportunity was not taken to consolidate them into one new sec. 7.

a curious lack of faith in the efficiency of the Treasury then proceeds to validate in advance guarantees or indemnities entered into in defiance of this or any other provision of the Act. For some reason it has been thought necessary to add a new section 7E whereby the State in effect guarantees the Treasurer's guarantee or indemnity; perhaps it was thought a necessary preamble to the appropriation of "public moneys"[64] to payments under any guarantee or indemnity.

A new section 8A provides that the Minister may determine that any particular house be treated as a "new house" for the purposes of the Act even though it has been occupied for more than six months by the borrower or purchaser.[65] Section 9 is repealed and re-enacted so as to abolish the Housing Loan Guarantee Fund Account, and therefore the requirement that it be funded by a charge of ¼ per cent. of the amount guaranteed, a charge which was ultimately added to the interest payable by the borrower; the interest on existing loans is to be reduced accordingly. The reason assigned for this concession was partly the fact that no other State, with the exception of South Australia under some old legislation, levies such a charge, and partly that few claims under guarantees have been made.

Registration of Builders and Painters.

When the registration of builders in the metropolitan area was introduced, in 1939, provision was made for only two classes of builders: registered builders, who had either completed a prescribed course of training and passed a prescribed examination, or had had at least two years practical experience as builders or supervisors of building work, and unregistered builders, who were limited to undertaking work to a value not exceeding, initially, £400.[66] In 1953, when there was a great shortage of houses and of builders, provision was made, by section 8 of the Builders' Registration Act Amendment Act 1953, for a third class, known as conditionally registered builders. Any person of good character over 21 might be registered as a builder on condition that he did not execute work likely to cost more than £4,000; it was not required that such persons should have any experience of building in order to be registered. In 1956, when the shortage of

64 As defined in sec. 4 of the Audit Act 1904.

65 The section says, "The Minister may from time to time in relation to any particular dwelling-house" determine that the period in question be extended. The words "from time to time" were left in *per incuriam* (*Anglice,* through sheer carelessness) when the section was amended in the Legislative Council to make it clear that it was desired to confer the power in relation to specific houses, and not to enable the Minister to extend the term generally; see (1961) 160 PARL. DEB. 2054-2055.

66 A figure which has over the years been increased to £800.

houses had to a large extent been overcome, the power to register persons conditionally as builders was taken away by Act No. 63 of 1956, and in its place a scheme for dividing registered builders into two classes, class A and class B, was introduced. The legislation envisaged separate examinations for each class, and required a period of training to include seven years' practical experience for Class A builders and five for Class B. Class B builders were limited to undertaking work intended to cost no more than £5,000.

Towards the end of the 1960 session of Parliament the Hon. N. E. Baxter moved the Legislative Council for the appointment of a Select Committee to inquire into and report on the application, and the effect on building, of the Builders' Registration Act, and to make such recommendations as it considered necessary.[67] He alleged, among other things, that the standard of workmanship among builders was deteriorating, and that the operation of the Act was precluding some good builders from working to their full capacity. The motion was adopted, and the Select Committeee appointed, on 22nd November, only three days before the end of the session; but the Government coverted the Select Committee into an Honorary Royal Commission during the recess. The principal recommendations of the Honorary Royal Commission were (1) that there should be only one class of registered builder, that is, that B-class registration should be abolished, and (2) that partnerships, companies, and other bodies corporate should be registered and should be subject to the same penalties as individual builders. It also recommended that the Act be extended as quickly as possible to cover the whole State.

The Builders' Registration Act Amendment Act (No. 54 of 1961) has given substantial effect to the recommendations of the Honorary Royal Commission. Section 3 amends the definition of "person trading as a builder" in section 2 of the principal Act to include any partnership or any company or other body corporate[68] that is engaged in the work referred to in the definition, and section 4 removes from section 4 of the principal Act the provisions exempting partnerships and companies or other bodies corporate from registration under the Act. By section 10 registration as a B-class builder is abolished, but any person who at the coming into force of the amendment was registered as a B-class builder becomes a journeyman builder,[69] and he may at

67 (1960) 157 PARL. DEB. 2559.

68 Why not say simply "partnership or body corporate"? The latter expression would include a company.

69 The new sec. 10A (2) says that such a person "shall be *and be deemed to be*" a journeyman builder. It is a little odd for a statute to say that a person

any time thereafter apply for registration as a builder if he is able to satisfy the Board that he has been actively engaged in building or in supervising building work for not less than five years, and that during that period he has built or supervised buildings of an average aggregate annual value of not less than £12,500 (section 10 (1a)). A person who at the coming into force of the amendment had passed the prescribed examination for registration as a B-class builder (or has taken that examination in November 1961)[70] is entitled to be registered as a journeyman builder upon completing the course of training prescribed for B-class builders, but apparently cannot at any time apply for registration as a builder unless he complies with the requirements of section 10 (1) of the Act.[71] A person who at the date of coming into force of the amending Act is not registered under the principal Act but is a builder or a supervisor of building work may secure registration if he can show among other things that he has been actively engaged in the trade for a period of five years, that he has during that period carried out or supervised the construction of buildings of an annual aggregate value of not less than £12,500, and that he is in the opinion of the Board sufficiently competent as a builder to merit registration without being resuired to complete the prescribed course of training and pass the necessary examination. Any person who at the above date is actively engaged as a builder or supervisor but cannot fulfil the above requirements may within three months give notice to the Board of his intention to apply for registration if and when he can fulfil those requirements, and is then given five years in which to do so (section 10 (1c)). No provision is made for registration as a journeyman builder other than for the persons

shall be a journeyman builder when it has not previously defined or set up the class of journeyman builder; it is even more odd that the Legislature, not content with the concept of being, should try to reinforce it with asserting that a person who is shall be deemed to be. All that is meant by this extraordinary verbiage, of course, is that such persons shall henceforth be *called* journeyman builders (or should it be journeymen builders?).

70 A special provision is made for those who may have sat the examination in November 1961 and not passed the whole; the setting of supplementary examinations is expressly provided for.

71 This is surely an oversight—what good reason could there be for keeping a way open for registration as builders for journeyman builders who were actually registered as B-class builders at the date of commencement of the amending Act, and closing that way to those journeyman builders who secured registration as such after the date of commencement of the Act, because, though they had sat their examination, they had not yet completed their term of training? Yet the opening words of sec. 10 (1a) are quite clear: "Any person who immediately prior to (why not "before") the coming into operation of the Builders' Registration Act Amendment Act, 1961, was registered as a builder—class B . . ."

mentioned in section 10A. A journeyman builder is subject to the same limitations as was a B-class builder; in particular he cannot undertake work which is to cost more than £10,000, and must on demand supply the board with particulars of any contract or engagement entered into by him, or work executed by him.

A partnership, company or body corporate must, if it is to secure registration, have a partner, a director, a member of the board of management or an employee registered under the Act, and if that person ceases to hold any of those positions, or ceases to be registered, the registration of the partnership, company or body corporate may be suspended or cancelled.

The Painters' Registration Act (No. 61 of 1961), which resulted from a private member's Bill introduced by the Hon. H. E. Graham, the Opposition member for East Perth, provides that in future before a person can engage in the painting trade otherwise than as an employee he must be registered, and before he may be registered he he must be qualified. The Hon. Mr. Graham explained that the object of the Bill was to provide protection for the public rather than simply to impose more restrictions, and he (and later, members of the Legislative Council who spoke in support of the measure) gave instances of defective painting done by men who professed to be competent painters. Those who voted for the Bill's passage into law were clearly of the opinion, expressed by the Hon. G. E. Jeffery in the Legislative Council,[72] that in future persons who employed "master painters" would be assured of a good standard of workmanship, and would be protected against malpractice by the existence of the power to suspend the registration of any registered painter for such malpractice. The reviewer would merely comment that to require a certain standard of competence from a man before he is licensed to practise a particular trade (or, for that matter, a profession) does not in the least guarantee that he will continue to match that standard in his subsequent activities; further, sanctions such as de-registration are only as effective as the registering authority will allow them to be, and in general registering authorities or professional bodies are inclined to be very tender indeed in the matter of withdrawing registration, except in the most flagrant cases of incompetence or dishonesty. The public may perhaps hope for more protection from the provision empowering the Board to order a registered painter against whom a complaint of malpractice has been made to make good the defective work.

The Act by section 2 applies only within the metropolitan area

72 (1961) 160 Parl. Deb. 2145.

as defined by the 2nd schedule to the Metropolitan Water Supply, Sewerage and Drainage Act 1909.[73] Within that area no person, after six months from the date of commencement of the Act, is to carry out painting for a fee, charge or reward exceeding £50 unless he is a registered painter, or is an employee.[74] Section 4 (2) contains provisions aimed at defeating attempted evasions of the primary prohibition by splitting contracts to paint one building or structure into a number of separate contracts to paint separate parts of the building or structure; if this is attempted each of the separate contracts is to be deemed to be an undertaking to carry out work in respect of which more than £50 is payable, so that the offender will be liable to multiple penalties.

Painters are to be registered by a Painters' Registration Board of three members;[75] the Chairman for the time being of the Builders' Registration Board, as Chairman, one member of the Master Painters, Decorators, and Signwriters' Association, nominated by the Association, and one nominee of the West Australian Chamber of Manufacturers

[73] It was originally intended that the Act should apply to the whole State, but the area of its operation was confined by an amendment moved in the Legislative Assembly by the Hon. Mr. Wild [(1961) 159 PARL. DEB. 1761]. The reason given for the amendment was a curious one; namely, that the farmer or the man in the country may continue to be able to do his own painting. But the Bill did not prevent him from doing so, either himself or by his employees; it merely prevented him from doing someone else's painting by contract for reward. It is unfortunate that, if the metropolitan region must be defined, it was not defined by reference to the local authorities whose districts make it up, as, for example, in the Third Schedule to the Town Planning and Development Act 1928.

[74] Sec. 4, as might be expected, says "*bona fide* employee." The persons responsible for this might well take to heart the observations of Jacobs J. in the Supreme Court of New South Wales, in Walton v. Regent Insurance Ltd., (1961) 79 W.N. (N.S.W.) 644; discussing the argument that the words "*bona fide*" referred to the motive with which, or purpose for which, an activity was carried on, he said (at 647): "If the legislature had wished to make the test an intention to defeat or evade the operation of the Act, I would expect to find some express provision to that effect . . ." The intention of the Legislature here was presumably that an unregistered painter should not, for example, accept temporary employment at £20 per week in order to do a painting job which would take three weeks. Will it be effective? Incidentally, there appears to be nothing to stop an unregistered painter being employed at £20 a week for two weeks, with the employer agreeing to supply all paint, even though the paint would cost £100 and the job if done by a contractor would cost £140 or more.

[75] Thus the Hon. A. F. Griffith, in (1961) 160 PARL. DEB. 2329; but the relevant section (sec. 7) contains an ambiguity, taken by itself: "two members appointed by the Governor, one member nominated by the Association . . . and one member nominated by the West Australian Chamber of Manufacturers (Inc.) . . ." The ambiguity can be resolved only by reference to sec. 5, which says that the Board is to be appointed by the Governor.

(Inc.).[76] In default of a nomination[77] by the latter body, the Governor may appoint any person "eligible to be recommended."[78] The qualifications for registration are (1) that at the date of commencement of the Act an applicant for registration was "engaged in the occupation of a painter or as a supervisor of painting as the whole or a part of his means of livelihood,"[79] or (2) that he has completed a prescribed course of training and passed a prescribed examination,[80] or (3) that he is a member of an association of painters recognised by the Master Painters' Association of Australia, or (4) that elsewhere than in Western Australia he has attained a degree of proficiency as a painter which the Board considers comparable with that ordinarily attained by persons who are qualified for registration under (2) above.

The important part of the Act, from the point of view of the public, is section 16. If a complaint is made to the Board that a registered painter has been guilty of negligence, incompetence, or fraudulent conduct in carrying out painting, the Board is to hold a full inquiry into the complaint. Before doing so it must give to the person against whom the complaint is made a notice containing a copy of the complaint, stating the date, time, and place fixed for the holding of the inquiry. At the inquiry the person against whom complaint is made is to have a reasonable opportunity of giving either personally or in writing[81] any explanation he may wish to give in

76 The latter "shall be a representative of the Australian Paint Manufacturers' Federation (W.A. Branch)." Must he be a member of that Federation or of that Branch? If so, why not allow that Branch (or Federation) to make the nomination itself?

77 Sec. 7, in both sub-secs. (2) and (5), uses the word "recommendation." This is an instance of what was criticised by Bentham long ago as "Unsteadiness in respect of expression" (BENTHAM, NOMOGRAPHY, cited in Driedger, *Legislative Drafting,* (1949) 27 CAN. BAR REV. 291, at 294).

78 This phrase suggests that the representative of the Western Australian Branch of the Australian Paint Manufacturers' Federation must in fact be a member of it—see note 76 above.

79 The use of this phrase suggests that it is not necessary to use "*bona fide*" as a qualifier in such situations. But it might have been better if "part" had been qualified by "substantial."

80 There is another ambiguity in this sub-section, arising from an amendment in the Legislative Council; the course of training and examination are to be those laid down by the Board for "persons other than apprentices who have had five years practical experience in the painting trade." Commas round the phrase "other than apprentices" would have resolved the ambiguity; and that this is the intended meaning appears from subparagraph (4): "persons who have completed the course of training, passed the examinations, and worked as mentioned in subparagraph (1) . . ."

81 By inference, a painter against whom a complaint has been made is not entitled to legal representation before the Board. No specific provisions are made for the calling or adducing of evidence before the Board either by the person making the complaint or by the person against whom it is made;

respect of the complaint. If the Board finds the complaint proved to its satisfaction it may cancel or suspend the registration of the painter in question, and in addition may require that painter to make good, within a specified time, faulty or inferior work the subject of the complaint. If he fails to do so the Board may itself take steps to make the work good at his expense. The Board may also cancel or suspend the registration of a painter if a complaint is made to it that he obtained his registration by fraud or misrepresentation, or that a partnership or body corporate which is a registered painter has ceased to have any qualified person as a member of the partnership or as a director or member of the board of management of the body corporate or an employee and may do so on its own motion (section 17). An appeal against any decision of the Board lies to the Local Court within one month (section 18).

A partnership, or a company or other body corporate, may be registered under the Act if it satisfies the board that at least one partner, one director, one member of the board of management or one employee, whose duty it is to manage or supervise painting carried out by the partnership, company or body corporate, is already registered as a painter (section 14).

Town Planning and Development.

From 1st January 1962 (the date on which the Town Planning and Development Act Amendment Act (No. 64 of 1961) came into force) the functions of the Town Planning Board, under section 7A of the principal Act, in respect of the interim development of the metropolitan region are taken over by the Metropolitan Region Planning Authority which was established by the Metropolitan Region Planning Scheme Act 1959. The period during which any interim development order remains effective is further extended to 31st December 1962.[82] A new section 28A imposes upon a person who subdivides land in a municipality which in whole or in part fronts on or abuts a road that was constructed and surfaced wholly or partly at the expense of a previous subdivider of other land[83] a liability to

perhaps it is thought that the Board can determine questions of trade practice and the like from its own expert knowledge.

82 The original legislation set the expiry of its term as 31st December 1957 "unless extended by a resolution adopted by both Houses of Parliament." But the practice has generally been to extend by statute, as other amendments have been required year by year, and the simpler procedure has not been used.

83 Having said this, the Legislature goes on, *ex superabundanti cautela,* to exclude from its application roads constructed or surfaced, or both, at the cost of a municipality!

pay to the municipality on written demand half of the cost of that portion of the road onto which the land he is subdividing fronts or abuts. The municipality is to pay the money (or, if the road was constructed half at its cost and half at the cost of the previous subdivider, half of the money) into its Trust Fund, and is to pay it out of the Trust Fund to the owners of those lots forming part of the previous subdivision which front or abut on the road, according to the proportion the frontage of each of their lots bears to the length of the portion of road in respect of which payment was made. There is provision for an appeal to the Minister by a person aggrieved by a demand upon him; the Minister's decision is final.[84] The half-cost of surfacing the road fronting any lot in a subsequent subdivision is a charge against the lot, which is to be entered by the municipal council in the register kept under section 694 of the Local Government Act 1960, and may be protected by caveat under that section of the Act.

VIII. GENERAL.

Agriculture and Primary Production.

The Banana Industry Compensation Trust Fund Act (No. 77 of 1961) sets up a fund for compensating growers of bananas, under section 25 of the Act, in respect of the whole or part of any losses suffered by them as the result of cyclones, storms, or floods, or of any natural cause, pest, or disease which in the opinion of the Minister constitutes a serious threat to the existence of the industry. Compensation is to be based on the acreage of land on which the destruction of bananas in the course of production occurred and on the "weighted average production" of bananas per acre of that land. The fund is to be established and maintained by contributions from growers at the rate of two shillings for every case of bananas sold or exported to be sold (section 19), which by section 20 are to be deducted by every wholesaler from moneys payable by him to each grower whose bananas he receives for sale or export, and is to be subsidised to the extent of 50% by the Government (section 23). For the first seven years the possibility is envisaged that the fund may be insufficient to meet in full all claims upon it, and section 29 accordingly makes provision for *pro rata* payment of claims. The compensation scheme is to be administered by a committee of three—an officer of the Department of Agriculture, an officer of the State Treasury (each nominated by the Minister in charge of administration of the Act) and a representa-

84 As might be expected from the last preceding note, the subsection goes on with the pointless words "and effect shall be given to the decision according to its tenor." By whom?

tive of the growers elected by the growers (section 7 (2)); the appointment of each member is to be made by the Governor. The Committee is not, however, given any responsibility for the assessment of claims; this is to be done (under section 26) by a person representing the growers, nominated by a majority of the growers, and an officer of the Department of Agriculture appointed by the Director, and if they do not agree the final determination is to be by a competent and impartial person "nominated and appointed"[85] by the Minister.

Section 37 of the Act provides, in rather curious terms, for a general penalty not exceeding fifty pounds for an offence against it; an offence consists in doing what is forbidden, or not doing what is required or directed to be done, or otherwise contravening or failing to comply with any provisions (*sic*) of the Act. It would be interesting to know how a person can contravene or fail to comply with a provision of this, or for that matter, any statute, and at the same time neither do what is forbidden nor fail to do what is directed.[86]

The Pig Industry Compensation Act Amendment Act (No. 2 of 1961) adds to the principal Act a new section 14A enabling any processing company which buys pigs from the owners thereof to apply for a permit allowing it to make periodic returns of sale in lieu of furnishing stamped statements in respect of each sale. The legislation follows (and in part incorporates) an earlier amendment, passed in 1957,[87] enabling this permission to be given to agents who sell pigs (or pig carcasses).

Betting and Gambling.

In order to facilitate the discovery and punishment of unlawful betting, whether it is an offence against sections 23 and 24 of the Betting Control Act 1954 or sections 45 and 46 of the Totalisator Agency Board Betting Act 1960, Acts Nos. 14 and 15 respectively of 1961 insert into the two principal Acts new sections (28A and 28B in the first case, and 46A and 46B in the second) authorizing a Justice of the Peace to give to any member of the police force a search warrant, if it appears to him on complaint made upon oath that there are reasonable grounds for suspecting that unlawful betting is or is about to be carried on in or upon any place or public place. The warrant will authorize the officer to enter the place (or public place) and search it and all things and persons found there, to arrest such

85 Why "nominated and appointed"? Why not "appointed" merely?

86 Compare sec. 24 of the Welfare and Assistance Act 1961, whose draftsman did not think the third provision necessary. It is a pity that some uniformity in drafting style cannot be achieved.

87 Reviewed in (1958) 4 U. West. Aust. Ann. L. Rev. 288.

persons and bring them before a stipendiary magistrate or two justices, and to seize all betting material found there or upon those persons that may reasonably be supposed to have been used, or designed for use, in relation to unlawful betting. "Betting material" means lists, cards, books, tickets, vouchers, papers and other documents, money, machines and devices, tables, and blackboards. Material seized under a warrant issued under the Totalisator Agency Board Betting Act Amendment Act 1961 is to be detained by the police officer until the owner or owners thereof appear before a stipendiary magistrate or two justices to claim it and to satisfy him or them "how and for what use or purposes it was intended"; something has gone wrong with the construction of this phrase. If the owner or owners of the material do not appear to claim it within 21 days of seizure, or if on appearance he or they do not show that the material was in the place in which it was found for some purpose other than unlawful betting, it may be confiscated. Material seized under a warrant issued under the Betting Control Act Amendment Act 1961 is to be detained until dealt with under section 28 of the principal Act, which provides for its destruction, or (if it is money) its forfeiture to the Crown, if it is produced in evidence at the hearing of a charge which results in conviction. No provision is made concerning its fate if it is not so produced in evidence. Sections 28B and 46B, which are identical in terms, are apparently intended to provide that if any complaint is made against any person for unlawful betting in any place, and the Court is of opinion that any betting material found in that place under the search warrant was intended for use in unlawful betting, the fact that the material was found in that place is *prima facie* evidence of the commission by the accused of the offence charged in the complaint. Unfortunately the sections are very badly drafted; they each refer to "betting material or money", although "betting material" is defined in the preceding section as including money; in each the singular verb "raises" follows the plural subject "circumstances" (the second instance of this grammatical error that has been noted in the 1961 statute book);[88] and neither of them limits the use of the finding of the material as *prima facie* evidence to cases in which a complaint is made against a person for an offence committed in the place where the material was found.

Civil Aviation.

The Civil Aviation (Carriers' Liability) Act (No. 69 of 1961)

[88] The other example is in sec. 9 (5) of the Housing Loan Guarantee Act Amendment Act 1961, noted above at 631, note 62.

is a necessary supplement to the Commonwealth legislation (the Civil Aviation (Carriers' Liability) Act 1959) noted in a previous number of this Review;[89] it adopts the provisions of that Act (other than sections 27, 40, and 41) and those of the Regulations made thereunder, and applies them to intra-state flights other than those made by Trans-Australia Airways.[90]

Companies.

The draft uniform Companies Bill, preparation for which was begun at a conference of Commonwealth and State Ministers at Melbourne on 18th June 1959, was adopted during this session,[91] with certain modifications to meet local conditions; it is hoped to be able to publish a comprehensive review of this at a later date. During the discussions on the Bill an anomaly in the existing Western Australian legislation was uncovered; in Western Australia, alone of the States, foreign banking and life assurance companies have been able to carry on business without being registered. There could have been no logical justification for continuing this exemption from registration when the new Companies Bill was under consideration; but had established banking companies been required to register for the first time under the new legislation they would have been faced with registration fees of up to £40,000, according to the Hon. Mr. Watts.[92] The Companies Act 1943 was therefore amended (for the last time before its demise) by Act No. 10 of 1961, which made foreign banking and life assurance companies registrable, on payment of a fee of £100, and carefully provided that if any such companies had already been registered[93] the registration should be valid.

Explosives and Dangerous Goods.

Until 1961 the law relating to explosives in the State was contained in the Explosive Substances Act 1894 and the Explosives Act 1895; the first-mentioned Act had never been amended and the second had been amended only once, and that in 1902. Further, in spite of the increase in the number and range of dangerous and inflammable goods brought about by the growth of modern science and technology, no legislation providing for the control of such goods had ever been

89 (1960) 5 U. WEST. AUST. L. REV. 201 *et seq.*

90 By virtue of sec. 27 (2) of the Commonwealth Act referred to, that Act applies to such flights.

91 Companies Act (No. 82 of 1961).

92 (1961) 158 PARL. DEB. 936.

93 How this could have come about, in the light of the statement by the Hon. the Attorney-General [(1961) 158 PARL. DEB. 937] that the legislation had hitherto not enabled such companies to register, is a mystery.

enacted. The Explosives and Dangerous Goods Act (No. 38 of 1961), therefore, performs the dual function of bringing up to date one branch of the law and filling a gap for which no provision was previously made. The Act, section 5 of which repeals the earlier legislation referred to,[94] is expressed in section 6 (1) as being in addition to and not in substitution for the provisions of any other legislation, such as the Criminal Code, the Police Act 1892, and the Western Australian Marine Act 1948 which relate to explosives or dangerous goods, but by section 6 (2) is to prevail over that legislation in the event of inconsistency.[95] Section 6 (4) recites that nothing in the Act shall prejudice or otherwise affect any by-law[96] not inconsistent with it, and subsection (5) expressly saves powers of inspection and regulation of explosives in any mine under the Coal Mines Regulation Act 1946 or the Mines Regulation Act 1946.

The Act, which by section 8 is to be administered[97] by the Minister in charge of it, through the Mines Department, provides for the

94 Sec. 5 (2) expressly (and quite unnecessarily) states that the provisions of secs. 15 and 16 of the Interpretation Act 1918 apply in respect of these repeals, although by no stretch of the imagination could they fail to apply unless excluded expressly or by necessary implication, and then, mindful of the maxim *"expressio unius est exclusio alterius"*, goes on to recite that the express reference to those sections does not exclude the application of other provisions of the Act. In other words, seven lines and fifty-three words are taken to say, "The provisions of the Interpretation Act 1918 apply to this Act", a statement which in any case is unnecessary. Further, sec. 5 (3) in effect repeats, or attempts to repeat, the provisions of sec. 14 of the Interpretation Act. Why not "go the whole hog" and set out the whole Interpretation Act *in extenso* in the new legislation or in a schedule to it?

95 Sec. 6 (3) again repeats, although this time with additions, the provisions of sec. 14 of the Interpretation Act 1918; it provides that reference in subsec. (1) to the provisions of any Acts includes reference to the provisions of Acts amending or in substitution for them and also to the provisions of delegated and sub-delegated legislation of various kinds authorized by them. But this express provision makes no reference to subsec. (2); so, if the maxim *"expressio unius . . ."* (of which the draftsman was so afraid in sec. 5 (2)) applies, the provisions of the present Act will prevail over those of the original Act but not over those of any amending, substituted, or delegated legislation! It is not the first time in local legislation that the meticulous (in the strict sense of the word) draftsman has in effect fallen over his own feet.

96 The subsection refers to by-laws made under or pursuant to (surely one of those expressions would be sufficient) the provisions of (three more unnecessary words!) the Municipal Corporations Act 1906, the Road Districts Act 1919 or the Local Government Act 1960. But the two first Acts have been repealed by the last-mentioned, and by sec. 15 of the Interpretation Act 1918 by-laws made under the earlier Acts subsist as if they had originated under the repealing Act. Why then refer to the earlier Acts at all?

97 Sec. 8 begins with another extraordinary phrase, "Subject to its provisions, this Act shall be administered . . ." Words fail the reviewer.

appointment of a Chief Inspector of Explosives and other inspectors and officers (section 9). Wide powers are given by section 12 to every inspector under the Act; for example, he may enter without warrant any premises (other than a dwelling-house, for which a search warrant is required, unless there is reason to believe that there is imminent danger to the public) or any magazine, vehicle, vessel, or aircraft where he has reason to believe there are explosives or dangerous goods; he may take without payment samples of any substance which he believes is an explosive, or an ingredient of an explosive, or dangerous goods, for testing and examination; he may seize, remove or detain any explosives or dangerous goods as well as any container, vehicle, vessel or aircraft in which they are being kept or carried, if he has reason to think that there has been a breach of the Act; and he may, with the consent of the Minister (necessary unless the case is one of imminent danger) destroy or render harmless any explosives or dangerous goods, at the cost of the owner or person in possession. If he exercises this last power no action is to lie against him or against the Crown in respect thereof[98] (section 12 (3)).

Part III of the Act, comprising in seven divisions sections 13 to 41, deals with explosives. Division 1 provides for the classification of explosives into the classes set out in the Second Schedule, namely, gunpowder, nitrate mixture, nitro-compound, chlorate mixture, fulminate, ammunition, and firework (*sic*); these classifications may be amended from time to time by the Governor by order (section 13). Explosives are further divided, for the purpose of the Act, into authorized and unauthorized explosives, and section 14 gives the Governor power by order in council[99] both to classify explosives, according to the above classes, and to declare any specified explosive to be an authorized explosive; an authorized explosive must at all times correspond in composition, quality, and character with the definition in the order. Division 2 deals with the importation of explosives, imposing the requirements of a licence for the import of authorized explosives and a permit for the import of unauthorized explosives (section 15).[1] Section 16 lays down certain conditions for

98 In the light of sec. 60, which provides a blanket protection for the Crown, the Minister, the Chief Inspector, and inspectors, as well as members of the police force, in terms not dissimilar to those in paragraph H of the Second Schedule to the Interpretation Act 1918, this subsection would appear to be unnecessary, and, so far as it is inconsistent with the later provision, ineffective; *lex posterior derogat priori.*

99 Note that sec. 13 says "by order" and sec. 14 "by order in council." This is a further example of unsteadiness of expression; see note 77 at 637 above, and *cf.* sec. 23 of the Interpretation Act 1918.

1 Unfortunately, the symmetrical pattern of the Act is spoilt by the provisions

the import of explosives, the first of which, characteristically, merely repeats what has already been said in the preceding section; subsection (2) empowers the Minister by notice in the Gazette to exempt any explosives from the requirement of a licence or permit. Section 17 lays down certain requirements, as to notice, manner of unloading, etc., to be observed when explosives have been imported into the State. Notwithstanding that both section 15 and section 16 state that no person shall import any explosive without a licence or a permit, and section 56 expressly makes it an offence against the Act for a person to do what he is forbidden by the Act to do, section 18 (a) expressly makes it an offence against the Act to import any explosive other than an exempted explosive, without a licence or permit. Comment would be superfluous!

Division 3 deals with the manufacture of explosives, forbidding such manufacture without a licence, except for experimental purposes; certain other operations are also exempt from licensing by section 19. Application for such a licence is to be made in accordance with section 20. Division 4 imposes restrictions on the storage of explosives, section 20 specifying the places where explosives may be stored under licence or approval, and section 21 exempting from the requirement of such licence or approval the storage of explosives for private use, in such limited quantities as may be prescribed by regulations. By section 24 it is not only the person who stores an explosive in contravention of the Act who commits an offence, but also the occupier of the place where the explosive is stored and the owner of the explosive. The section also makes it an offence (a) to store any explosive[2] in any manner otherwise than that prescribed by regulations, and (b) to fail or refuse to produce a licence or permit to store explosives when requested to do so. Power is given to the Minister to appoint any place, building, cave or floating vessel as a public magazine (section 25) and to the Chief Inspector of Explosives to license the storage of explosives in private magazines (section 26 (1)); this licence is referred to in subsection (2) as a licence to *establish* a private magazine, another instance of "unsteadiness of expression."[3] Division 5 (sections 28 to

of sec. 15 (2), which imposes the requirement of a permit not only on the importation of unauthorized explosives but also on the manufacture, storage, conveyance, sale, or use of them in the State, notwithstanding that succeeding divisions deal with each of these topics in turn.

2 For some strange reason the section, which elsewhere speaks of storing "an explosive" or "any explosive", here refers to "any quantity of explosive."

3 See note 77 at 637 and note 99 at 644 above. The original fault was, however, that of the draftsman of the corresponding New Zealand statute, the Explosives Act 1957, which in this particular instance has been copied uncritically.

35) restricts in various ways the sale of explosives; certain licences are necessary, certain records must be kept, explosives are not to be hawked or sold upon the street, or exhibited, or exposed for sale on any premises, and may not be sold to any person apparently under 18 or to any other person who is not the holder of a mining tenement, or of a licence to store explosives in a private magazine,[4] or of a blasting permit, or who is not a contract worker or piece worker buying explosive from the owner of a mine for use in that mine. Section 33 (b) enables the Minister to exempt any transaction from the provisions of Division 5; apparently the exemption must be given in respect of each individual transaction and cannot be given in respect of a class or classes of transactions.

Division 6 restricts the use of explosives to use by or under the supervision of the holder of a blasting permit or a magazine licence, or in a mine, quarry, or similar place subject to inspection and regulation under some other Act, or by a person approved and authorized by any lawful authority of the Commonwealth or the State. Division 7 imposes certain restrictions on the carriage of explosives, which must, by section 41, be packed and marked in a prescribed manner.

Part IV of the Acts deals with dangerous goods, which are to be classified into the classes set out in the Third Schedule to the Act, in a similar manner to explosives (section 42). The classes, which may be amended by order in council,[5] are as follows: (1) Liquid substances and mixtures, solutions or emulsions having a flashpoint of less than 73° Fahrenheit; (2) liquid substances and mixtures, solutions or emulsions having a flashpoint of less than 150° but not less than 73° Fahrenheit; (3) flammable oils, liquids or substances whose flashpoint is 150° Fahrenheit or over; (4) solid substances which may inflame or explode but are not classed as explosives; (5) substances which may contribute to the combustion, fire or explosion of other substances with which they may come into contact; (6) acid or corrosive substances not included in previous classes; (7) compressed, liquefied, or dissolved gases in cylinders or other containers. The criteria for declaration that a substance is "dangerous goods" and for classification as above are (a) that it is considered by the Minister to be a danger to public safety because of explosive, flammable, or cor-

4 Sec. 30 (3) (b) says, "in private magazines."

5 *Cf.* the provision in sec. 13 (2), referred to above in note 99 at 644. An order amending the classification in the Second Schedule is to take effect, if no day is specified, seven days after publication in the Gazette; but in the absence of a specified day an Order in Council under sec. 42 (2) is not to take effect until three months after the date of publication. Why the difference?

rosive properties, (b) that it may, because of its properties, be likely, during storage, conveyance, or use, to contribute to the danger of explosion or fire, or (c) that it can be used to manufacture any explosive or flammable substance which would endanger life or property. The principal restrictions in the Act, in Division 2 of Part IV, are on the storage of dangerous goods, which (by section 43) must be stored either in premises licensed for their storage under section 45 or in a public place of deposit for dangerous goods under section 46, or else only in prescribed quantities and manner and under prescribed conditions. Section 44 also contains certain provisions forbidding the packing of dangerous goods except in a prescribed manner. Division 3 of Part IV contains certain miscellaneous provisions relating (according to the heading) to dangerous goods; but while section 47 constitutes the Chief Inspector and every inspector of explosives, inspectors of dangerous goods, and makes provision for the appointment by the Chief Inspector (with the approval of the Minister) of other persons to act as inspectors of dangerous goods, section 48 gives inspectors certain powers to order the remedying of defects in premises used for the storage of both explosives and dangerous goods, in vehicles used for their carriage, and in any matter, thing or practice connected with their manufacture, storage, carriage or use.

Part V of the Act contains the general provisions. These include a provision that any person aggrieved by any decision of the Chief Inspector in relation to a licence or permit may appeal within 14 days after receiving notice in writing of that decision to a stipendiary magistrate sitting in a court of petty sessions, whose decision shall be final (section 52).[6] Section 53 empowers a justice of the peace, if he is satisfied by information on oath that there is reasonable ground for suspecting that any breach of the Act or regulations has been, is being, or is about to be committed in any dwelling-house, to issue a search warrant authorizing a named inspector, together with a police constable, to enter the dwelling-house in question and to search it. Section 55 provides for the reporting to the Chief Inspector and the investigation of any accident, by explosion or fire, involving any explosive or dangerous goods. By section 62 the Governor is given extensive powers of making regulations for giving effect to the Act. Section 63 contains a list of exemptions from the provisions of the Act: It does not apply (a) to explosives or dangerous goods which are the property of the Armed Forces or of the Police Force; (b) to safety cartridges or other small arms ammunition licensed under or

[6] The customary incantation providing that the magistrate's decision "shall be given effect according to its tenor" has been overlooked.

controlled by any other Act; (c) to the possession or conveyance by an inspector of any explosives or dangerous goods for the purposes of the Act; (d) to "fireworks of the shopgoods class", except insofar as they may be controlled by regulations under the Act; (e) to safety fuse, or small explosive devices so constructed or packed as not in the opinion of the Minister to be a danger to life or property, and declared exempt in writing by the Minister or the Chief Inspector; (f) to the conveyance of explosives or dangerous goods on the railways by the Commissioner of Railways, where the Chief Inspector has approved of the mode of conveyance.[7]

Fencing.

Until the beginning of 1962 the law in Western Australia concerning the obligations of adjoining landowners in respect of dividing fences has substantially been that first enunciated in an Ordinance of 1834,[8] which, in spite of a degree of modernization effected by supplementary legislation of 1882,[9] has seemed more suited to the hardy pioneering days, when almost every man was his own fence builder, than to the twentieth century; it is rather surprising that the legislation in question has lasted so long.[10] It has now been swept away by the Dividing Fences Act (No. 44 of 1961) which, though it has retained some of the provisions of the previous legislation (which it has repealed) has borrowed largely from the legislation in force in New South Wales.[11] The new Act, which does not bind the Crown (section 4), does not affect any obligation to fence arising under the Vermin Act 1918.

7 Sec. 63 (f) says in fact, "where the Chief Inspector has approved of the manner of conveyance and is satisfied that adequate safety measures are being taken." This means that it must be shown not only that the Chief Inspector has given the necessary approval (which is objective) but also that he is satisfied that adequate safety measures are being taken (which is subjective); so that as the legislation stands, even if the Commissioner has secured the Chief Inspector's approval to the mode of conveyance, the Chief Inspector may say, if anything goes wrong, that he was not satisfied with the safety precautions. No doubt what was meant was that the Chief Inspector is to approve the manner of conveyance only if he is satisfied with the safety measures that are being taken. Why not say so? Why were the members of the Legislature not more vigilant in detecting this and the many other infelicities of drafting in the Act?

8 Fencing of Town and Suburban Allotments (Trespass) Ordinance 1834.

9 Cattle Trespass, Fencing and Impounding Act 1882.

10 The Hon. L. A. Logan in his second reading speech [(1961) 158 PARL. DEB. 590] said: "At the present time there is an unsatisfactory method of fencing control in this State." The sentence was repeated, to the letter, by the Hon. Mr. Perkins in the Legislative Assembly [(1961) 159 PARL. DEB. 1608].

11 Dividing Fences Act 1951.

Section 7 of the Act imposes the obligation to join in, or contribute to, the construction of a dividing fence upon the owners of the parcels of land which are to be divided by that fence. "Owner" is defined, by section 5, as including a beneficial owner, a trustee, a mortgagee in possession or other person entitled to receive the rents and profits of the land, and a lessee whose term has not less than five years to run at the relevant times; provision is made in section 19 for the apportionment of the cost of construction or repair of a dividing fence between tenant and landlord. The obligation arises only when a specified procedure has been followed; the first step is that one owner of land with an unfenced boundary serves on the other a notice to fence, under section 8, specifying the boundary or fence line and the kind of fence which he proposes should be constructed.[12] By section 9, if within twenty-one days from the service of that notice the two do not reach agreement on the need for a fence, the boundary or line, or the kind of dividing fence which should be erected, the matter in dispute is to be settled by a stipendiary magistrate sitting in a court of petty sessions;[13] that court's order is final. The court may if it thinks fit determine the line which the fence should follow, and if that line does not correspond with the true boundary, may order one owner to compensate the other by an annual payment; but the occupation by the first-mentioned owner of land between the fence and the true boundary is not to amount to adverse possession and not to affect title. On the question what type of sufficient fence it should order to be constructed the court is to take into account the type of fence usually constructed in the locality, the purpose for which the land in question is used, and the type of sufficient fence (if any) prescribed by the by-laws in the locality[14] (section 9 (3)). It would appear that nothing less than positive agreement will suffice to avert court proceedings, for section 10 empowers either of the two owners, if the other is in default in performing his part of any agreement to fence, or in complying with any court order, within the time specified (if any), or if no time is specified, within three months,

12 The section provides, unnecessarily, it is submitted, that the notice shall also contain a proposal for fencing the common boundary or other line.

13 The power to prescribe by by-laws a sufficient fence (for purposes of the Cattle Trespass, Fencing and Impounding Act 1882) was conferred upon local authorities by sec. 210 (e) of the Local Government Act 1960. During the Committee stage of the Bill in the Legislative Council a new clause (now sec. 24) was introduced by Government amendment imposing upon a local authority a duty to make a by-law prescribing what should be a sufficient fence when required so to do by the Minister of Local Government.

14 Thus removing from justices of the peace the jurisdiction which they possessed under the preceding legislation.

to construct the whole fence himself; he may then recover half the cost from the other. No provision is therefore made for the case in which the owner receiving the notice simply ignores it; would it not have provided a simpler procedure to copy in this respect the New Zealand legislation rather than the New South Wales?[15]

If the owner of adjoining land cannot be found, after reasonable inquiries have been made, the owner desiring to fence the boundary may apply to a court of petty sessions for an *ex parte* order authorizing the construction of a dividing fence of the type set out in the application (section 11). A copy of the order, which is to specify the kind of fence authorized to be erected and the boundary or line on which it is to be erected, is to be filed within twenty-one days of its making with the clerk of the municipality in which the parcels of land in question are situated, and recorded by him in the register kept under section 694 of the Local Government Act 1960.[16] If at any time during the lifetime of the fence so constructed an owner of the adjoining land is found (whether he was the owner of the land when the fence was constructed or not) the order may be served on him, and he then becomes liable to pay to the other owner half of the value of the fence at the date of the service of the order. If he considers the order inequitable he may complain to a court of petty sessions within one month, and it may either relieve him from the payment of part of the sum claimed, or order that the position of the fence be shifted.[17]

Section 12 provides a procedure for defining the boundary line between two parcels of land by a survey. The procedure begins with a notice, given by one owner to another, of his intention to have the line defined by a surveyor. The owner receiving the notice may then either himself employ a surveyor to define the boundary or, if he is satisfied that he knows accurately where the boundary line is, define it himself by pegs. He then gives notice to the other owner of what he has done. If, however, within one month of receiving the first notice he has

15 Sec. 13 of the Fencing Act 1908 (N.Z.) provides that if the person who receives a notice to fence wishes to object to it he must serve a cross-notice on the giver of the first notice within twenty-one days; if he does not do so he is deemed to have agreed to the proposals contained in that notice.

16 That register, known as the "register of orders", is intended as a record of orders made by the local authority in question; but sec. 11 (7), requiring the registration of an order made under the preceding provisions of that section by a court of petty sessions, adds that it is to be registered "as if the order were an order relating to the land . . . made by the council under the provisions of that Act" (*i.e.*, the Local Government Act 1960).

17 The relevant subsection (4) appears to make these two remedies not alternative but concurrent; presumably however this is another instance of the several "and"—see (1961) 5 U. WEST. AUST. L. REV. 369-370.

defined the boundary line by pegs or has failed to have it surveyed, the first-mentioned owner may have the line defined by a surveyor.[18] If pegs have been placed and the survey discloses that they have been placed on the correct boundary line, the survey is to be at the cost of the owner first giving notice;[19] otherwise the costs of any survey are to be shared.

Section 13 provides, as did section 25 of the Cattle Tresspass, Fencing and Impounding Act 1882, that an owner of adjoining land "coming to" a fence already erected, by building on that land or occupying a building on it, may be required to contribute towards the cost of the fence notwithstanding that it was erected without notice to him. The amount of his contribution is limited to one-half of the value of the fence at the time when he so "comes to" the fence. The owner seeking contribution is to give notice to the other; the latter may, by cross-notice within one month of receiving the first-mentioned notice, dispute the need for a fence, or the need for a fence of a particular type, or the desirability of the fence erected,[20] or the estimated value of the fence as set out in the notice. In default of agreement thereafter the dispute may be settled by a stipendiary magistrate sitting in a court of petty sessions.[21] Part III of the Act (sections

18 What is to happen if he has neither placed pegs nor had a survey done?

19 Sec. 12 (4) provides, in point of fact, that the owner who placed the pegs on the boundary "is entitled to recover any costs of the survey, if any, incurred by him from the owner giving the notice." As the section stands, however, he is entitled under subsec. (2) to place pegs, or to employ a surveyor, but not to do both, and it is hard to see the point of the provision. Surely it would have been better to say, simply, that the costs of any survey are to be met wholly by the owner giving the notice? But again the initial fault is with the draftsman in another State, in this instance South Australia, from whose Fences Act 1924 sec. 16 was borrowed (at one remove, through the New South Wales legislation already referred to). A few small emendations have been made locally, including the insertion of the words "if any" after survey; if they refer to the word "survey" they are nonsensical, for the operation of the section is conditioned on a survey having been made; if they refer to "costs" they are otiose.

20 Presumably what this provision contemplates is a situation in which it is impossible to dispute the need for a fence, and equally impossible to dispute the need for a fence of the type that has been constructed, but the fence is badly constructed and therefore dangerous or an eyesore.

21 Subsec. (7) of sec. 13 contains a curious provision, to the effect that if the owner of adjoining land on whom has been served a notice claiming the payment does not pay the claim within one month *and* give notice of his intention to dispute the claim, he is liable to pay the amount of the claim to the owner serving the notice. This would appear to derogate from the power conferred by subsec. (5) on the court of petty sessions hearing a dispute to determine the amount, if any, to be paid by the owner receiving the notice to the other, for if in the event of non-payment of the amount claimed the former is liable to pay the whole amount to the latter, even if

14, 15, and 16) deals with the repair of fences; any owner of land separated from adjoining land by a dividing fence may give notice to the other owner, requiring that owner to assist in repairing the fence and stating whether he is prepared to repair the fence himself, at a cost to be shared equally, or is prepared to let the other repair the fence at a cost to be shared equally, or is prepared to bear half the cost of having the fence repaired by a third party. The owner receiving the notice may either notify the other that he is prepared to join in repairing the fence in the manner suggested, or that he disputes the need for the repair; the dispute may be settled by a court of petty sessions on complaint by the owner giving the first notice. If the owner receiving the notice to repair does not respond to it the owner giving it may immediately repair the fence and recover from the other one half of the cost. There are certain exceptions to the above provisions, somewhat inelegantly contained in sub-paragraphs in subsection (7):[22] If any dividing fence has been constructed partly by one owner and partly by another, each shall bear the cost of repairing the part constructed by him;[23] if any dividing fence is damaged

he has also disputed the claim, subsec. (7) would appear to make it mandatory on the court in these circumstances to order that the full amount of of the claim be paid. Even if the court is still empowered to determine in the course of settling the dispute that a lesser amount than that claimed ought to be paid, the full amount claimed will already have been paid to the owner giving notice, and no provision is made whereby the court may order or the payer claim a refund of any part. Is it possible that "and" has been inserted, *per incuriam,* for "or"; and if so why was this not noticed when the Bill was on its way through Parliament?

22 Subsec. (7) contains the special provision for the case when an owner receiving a notice to repair fails to advise the owner giving the notice, within fourteen days, whether he is prepared to join in the repair, or disputes the need for it; but the exceptions contained in the sub-paragraph refer to the primary obligation to contribute to the repair of a dividing fence, and should have been in a separate subsection. The trouble is that, although the balance of the section is (by inference from the absence of any comparative reference in the marginal note to any other legislation) a piece of original drafting, subsec. (7) reproduces (with minor alterations) sec. 14 (2) of the Dividing Fences Act 1951 (N.S.W.); but what was permissible in that subsection is clearly wrong in the present one.

23 This provision, copied (as indicated in the preceding note) from corresponding legislation in New South Wales, and perhaps copied uncritically, seems on the face of it absurd. If adjoining owners work together in constructing the whole of a dividing fence, or if they engage a contractor and meet the expense jointly, each is liable for half the cost of repairing any part of the fence; but if they agree that one man shall build the fence from the back boundary half-way along the common boundary, and the other shall finish the fence to the street boundary, each is responsible for the repair of his part, although it may happen that chance, or the ravages of white ants, or other causes (not being those mentioned in sub-paragraph (b)) cause one-half to fall into disrepair more quickly or more frequently than the

or destroyed by natural forces (flood, fire, etc.) or accident either owner may repair it immediately without notice and recover half the expenses of doing so from the other; and if any dividing fence is damaged by fire, or by the falling of a tree or a limb, and either of these was caused through the neglect of one of the owners, that owner is bound to repair the whole damage; if he does not do so the other owner may do so and recover the whole cost from him.[24] Section 16 imposes liability on a person who adopts any means whereby his land is in any way enclosed by a fence which has been constructed by another owner on the boundary between his land and a road which bounds it, or avails himself of that fence or makes it of beneficial use to himself, to join in or contribute in equal proportions to the repair of so much of the fence as encloses his land or is availed of, or made beneficial use of, by him.[25]

By section 17 the court which is called upon to settle any dispute may award costs against either party; and by section 18 any moneys payable under the Act may be recovered in any court of competent jurisdiction. Section 19, already referred to, provides for the apportionment of the cost of contributing to or erecting a dividing fence between the landlord and the tenant of any parcel of land if the interest of the tenant at the date of construction or repair of the fence is for

other. It is thought that it is equitable that each man shall be solely responsible for any defects in construction attributable to him alone?

24 This provision, more inelegantly still, is embodied in a separate subsec. (8), though in the model subsec. referred to in note 21 above the corresponding provision is found in a more correct position at the end of sub-paragraph (c).

25 This is at first sight a very puzzling provision indeed. It would seem that the only way in which an owner of land divided from another's land by a road could use the fence originally built by the latter between his land and the road to enclose his (the former's) land would be by acquiring the road after it had been closed; in that case the fence would become a dividing fence, to which an obligation to join in repairing would automatically attach. True, sec. 334 of the Local Government Act 1960 permits the temporary closure of a road, and the subsequent letting of it, on a weekly tenancy, by public tender; but should an owner whose land borders the road become the tenant of the closed road, and take down the fence between his land and the road, he would not be the "owner" of the road, and it is difficult to see how he could be said to be using the fence on the other side of the road to enclose "his" land, unless "his" is given a very loose meaning indeed. An owner may, it appears, "avail himself" or make beneficial use of a fence dividing another person's property from the road if he pulls down his own roadside fence and then, under sec. 335 of the Local Government Act 1960, places a gate, or a motor traffic pass, or both, across the road at each of his side boundaries; but in that case his obligation to contribute to half the cost of repair of the fence, as well as to pay interest on half the value for the time being of the fence is already imposed by sec. 335 (12), and there seems little point in the duplication.

a term of more than five years but not more than twelve years;[26] if the term is between five and seven years the landlord is to pay three-quarters and the tenant one-quarter; if it is between seven and twelve years the landlord is to pay one-half and the tenant one-half; if the term is over twelve years the tenant is to meet the whole cost. Section 21 gives power to persons constructing or repairing a dividing fence to enter upon adjoining land for the purpose. Any notice to be given under the Act must be in writing, signed by the person giving it or his attorney or agent; it is to be served either by personal delivery (if the recipient is a corporation delivery may be made to the principal office in the State of the corporation) or by registered mail addressed to the last-known address of the recipient or to the principal office of a corporation.

Fisheries.

The principal function of the Fisheries Act Amendment Act (No. 20 of 1961) is to tidy up, and tighten up, the amendments to the principal Act passed in the 1960 session.[27] The definition of "crayfish tail" is again altered (by section 2); it now means the whole or part of the abdomen of a crayfish when severed from the carapace. The amendment was introduced because the Government had had legal opinion to the effect that if any portion of the flesh could be shown to be missing from an abdomen so severed from the carapace it ceased to come within the previously enacted definition. It has been decided that the minimum size of crayfish tails is to be determined henceforth by weight alone, not by the combination of weight and length, although entire crayfish are still measured by length alone; accordingly the power conferred upon the Governor by section 6 (mi) to prescribe the minimum length and minimum weight of crayfish becomes a power to prescribe the minimum weight alone.[28] Section 18 is amended to make it mandatory to furnish the returns referred to therein, as may be prescribed by regulations; power to make such regulations is conferred by a new sub-paragraph (mj) added to section 6. An

[26] As noted above at 650, a tenant whose term has more than five years to run at any date relevant under the Act is included in the definition of "owner."

[27] Noted in (1961) 5 U. WEST. AUST. L. REV. 388-390. The Hon. the Minister for Fisheries, in his second reading speech, said: "In the main it [the Bill] tidies up the errors which I am afraid were incorporated in the measure I brought before the House last year, and which secured the approval of the House": (1961) 159 PARL. DEB. 1415. Did the Hon. the Minister really mean that "and which"?

[28] But was this amendment ever necessary? Surely the "and" in subparagraph (mi), as enacted in 1960, was the "several" and. See above at . . . note 17.

additional subject concerning which returns must be made is the processing, filleting, and packing of fish. Subsections (1a) and (3a) of section 24 and subsection (2) of section 24A are replaced by new subsections providing that fish, and crayfish tails, when seized by any inspector, are forfeited to the Crown.[29] Section 24A (3) is amended to mitigate somewhat the penalties originally provided, so that the monetary penalty in respect of each crayfish tail seized is now to be imposed only in respect of each underweight crayfish tail seized. Subsection (4) of section 24B is repealed but re-enacted as section 43, and in its place is inserted a provision enabling the Minister to exempt any person or class of persons from the provisions of section 24B (1) requiring receptacles containing fish to be labelled; the Minister's power may, by subsection (4a), be delegated to the Chief Inspector of Fisheries. Finally, a small addition to section 41 authorizes a fisheries inspector or a police officer to exercise his powers under that section to search for any explosive substance which he has reason to believe has been used[29a] or is intended to be used for the taking or attempted taking of fish.

Industrial Arbitration.

The amendments made to the Industrial Arbitration Act 1912-1952 by Act No. 62 of 1961 are intended to provide for the Civil Service Association of Western Australia the same protection against "breakaway" groups seeking registration as separate industrial unions as is accorded to other unions. A new section 150A empowers the Arbitration Court to declare, on application made to it on behalf of two-thirds of the members of a particular class of government employees, that members of that class of persons are henceforth not to be "government officers"; but on the hearing of that application the Civil Service Association is entitled to appear and be heard, and the application is not to be granted unless the Court is satisfied that persons of the class in question cannot conveniently be members of that Association. Further, the definition of "Government Officer" in section 143 is amended so that it no longer excludes persons who (although not members of registered unions nor eligible and qualified to be so) are either subject to an award or agreement which has been declared a common rule or are members of any society, distinct from the Civil Service Association, which is eligible and qualified to be registered as an industrial union.

29 See (1961) 5 U. West. Aust. L. Rev. 391, note 17.

29a These are the words of the legislation; but if the explosive substance has already been used, what will be left for the inspector or police officer to find?

Licensing.

Only a handful of amendments were made to the Licensing Act 1911-1960 by Act No. 53 of 1961. The terms of "restaurant licences" are varied, by section 3 of the amending Act, to permit the sale of liquor with meals (on premises other than those the subject of a publican's general licence) between twelve o'clock noon and two o'clock in the afternoon of the same day, and also to permit the sale of liquor under such licences until half-past twelve in the morning, notwithstanding that it may be the morning of Anzac Day, Good Friday, Christmas Day or a Sunday; moreover, liquor served before that time may lawfully be consumed up to thirty minutes after that time. An occasional licence granted to the holder of a restaurant licence in respect of Anzac Day may likewise authorize the sale of liquor up till half-past twelve on the following morning; but no occasional licence is to be granted to the holder of a restaurant licence (other than one in respect of premises the subject of a publican's general licence) for Good Friday, Christmas Day or any Sunday.[30] The licensing year north of the twenty-sixth parallel is henceforth to run from the 1st July to the 30th June; elsewhere the year will continue to run from the 1st January to the 31st December. The Governor's power under section 121 (2), to extend or reduce the week-day hours within which licensed premises may be open or liquor sold in any licensing district within the Goldfields District, is extended in order that he may, if thought desirable, vary those hours, and a similar power is written into section 122, dealing with the licensing hours on a Sunday. Perhaps the most important of the additions to the Act is the new section 149A, which prohibits persons under the age of twenty-one from consuming liquor in any public premises, and prohibits the supply of liquor to such persons in public premises. "Public premises" is defined as premises not licensed under the Act, where meals or refreshments are ordinarily served to the public for consumption thereon, or in or on which any dance or other entertainment is being held, but the section expressly excludes from the definition those premises or any separate part of them while being used for a function or entertainment that is private and not open to the public and is under the control[31] of a person of 21 years of age or over. The intention

30 The first and last restrictions (which are new) are understandable enough; but in view of the well-established habit of a great many families of eating their Christmas dinner at an hotel or restaurant, why did the legislature not permit the granting of occasional licences to restaurants (other than those in public hotels) for Christmas Day? Oddly enough, no Member speaking to the Bill took the point.

31 The legislation says "control, direction, and supervision." Could a party be

of the exclusion was to permit the supply of liquor to "teen-agers", and its consumption by them, at wedding breakfasts, birthday parties, and like functions under the control of adults, even if held on premises normally open to the public, or on some separate part of such premises while the balance remains open to the public.[32] It permits such activities also at dances or other entertainments in private homes so long as they are not opened to the public.

Finally, the licensing hours in railway refreshment rooms are now brought into line with those in other licensed premises in the State (since 1959, by an oversight, they have been 9.00 a.m. to 9.00 p.m. while the hours elsewhere have been 10 a.m. to 10 p.m.), and the deletion of one word from section 162 allows barmaids to be employed on Sundays.

Mining.

Section 136 of the Mining Act 1904-1957 is amended by Act No. 23 of 1961 so as to bring all minerals, and not only those defined or proclaimed under the provisions of that section, within the provisions of Part VII of the Act, which deals with mining on private land, and (by section 138) vests gold, precious metals, and minerals in the Crown.

Of the amendments to the Mine Workers' Relief Act 1932-1958 contained in Act No. 79 of 1961 the most noteworthy is perhaps the re-enacted section 14, which substitutes for the appeal board constituted under the repealed section an *ad hoc* Medical Board whose function is not only to hear appeals against diagnoses made under the Act, whether by a medical officer or medical practitioner appointed under section 7 of the Act or by the State X-ray Laboratory at Kalgoorlie,[33] but also to determine for the purposes of the Act whether tuberculosis found in any person at any time during the second year

under the control of a person without also being subject to his direction? Could either control or direction be exercised without supervision? Is it possible that the "and" should have been "or"?

32 See the speech of the Hon. the Attorney-General: (1961) 159 PARL. DEB. 1822. The excluding words referred to were the result of an amendment brought down in the committee stage in the Legislative Council: (1961) 160 PARL. DEB. 2339; there was some debate whether a reserved table in a restaurant could be a "separate part of the premises" and some hon. members appear to have thought that "separate part" should be further defined so as to be limited to a part of the premises screened off from the balance (*id.* at 2132-2133). In the end, however, the legislature appears to have been content to enact the doubt.

33 The definition of the word "Laboratory" was altered by sec. 5 of the amending Act to refer to the State X-ray Laboratory instead of to the Commonwealth Health Laboratory at Kalgoorlie.

of his ceasing to carry on operations in a mining industry resulted from his employment in that industry. The Board is to comprise three medical practitioners; one is to be nominated by the Commissioner of Public Health, one is to be nominated by the appellant, and the third is to be the medical officer, appointed under section 7, who gave the certificate showing the diagnosis against which the appeal is made. Quite apart from the undesirability, from a lawyer's point of view, of including among the members of an appellate board, even a medical appellate board, a person involved in the decision appealed against, the last named provision appears to create other difficulties. The Act, as indicated above, contemplates diagnoses either by an appointed medical officer or medical practitioner, or by the Laboratory; it may be that in practice certificates given by the Laboratory are signed by an authorized medical officer or practitioner (though the Act itself does not require it),[34] but if this is not so who is to be the third member of the board? Again, the determination of the source of infection in the case of a person suffering from tuberculosis after he has ceased work in a mining industry does not appear from the legislation itself to be by way of appeal from any previous diagnosis (although sub-section (12) and the amendment to section 13 (2) both contemplate that the Laboratory may itself make a determination in this matter); again, how is the third member of the board to be determined, and what is to be made in this case of the direction that one member of the board is to be nominated by the appellant?

The provision that a person formerly employed in the mining industry who is found, during the second year after his leaving the industry, to have contracted tuberculosis, may have it determined that his illness resulted from his employment in that industry is a preliminary to, first, an amendment to section 13 (2), re-defining the circumstances in which a person may be deemed to be a mine worker so as to be entitled to benefits under the Act, by including the circumstance that such a determination has been made (as well as the circumstance that he is found within three years after ceasing to be employed in the mining industry to be suffering from silicosis with tuberculosis, or silicosis in the advanced stage); and second, to a re-enacted section 57 (4) which entitles him and his dependants, if he has been permitted to contribute under that section to the Mine

34 The Hon. the Minister for Mines stated that the Kalgoorlie X-ray Laboratory is under the superintendence of an appointed medical officer (presumably he meant "appointed under section 7") [(1961) 160 PARL. DEB. 2604]; he did not indicate whether that officer signs all certificates issued by the Laboratory.

Workers' Relief Fund, to benefits from that Fund as if he were a mine worker. This second entitlement is also extended to persons who, while still engaged in prospecting, or within three years after ceasing to be engaged in prospecting, are found to be suffering from tuberculosis with silicosis, or from silicosis in the advanced stage.

The Act contains also a variety of other amendments, almost all directed towards extending the scope and availability of benefits under the Fund.

Superannuation.

The principal object of the Superannuation and Family Benefits Act Amendment Act (No. 50 of 1961) is to amend the conditions on which the Provident Account,[35] which was first set up in 1947, is to be administered. Certain employees may henceforth be required by the conditions of their employment to contribute to the Account (contribution hitherto having been purely voluntary), and on retirement after age 60, or death before retirement, there shall be paid to such employee, or to his widow if he died before retirement, or (if he left no widow but a child or children under 16) to that child or children a sum equal to three times the amount of his contributions to the Provident Account plus compound interest on those contributions; two-thirds of this sum is payable by the State. On the death of such a contributor who is a female, or a widower without children under 16, or a male who has never married, or whose marriage has been dissolved or annulled and who has not re-married,[36] the amount of

[35] Sec. 2 of the amending Act inserts into sec. 3 of the principal Act a new heading "PART VA.— . . . 83A-83L—THE PROVIDENT FUND" but the heading inserted by sec. 6 immediately before the new sec. 83A reads "PART VA—THE PROVIDENT ACCOUNT". Surely this is so obvious a discrepancy that it should have been detected, and the necessary steps for correction taken, by some member of the legislature.

[36] The relevant provisions of the new sec. 83G are somewhat clumsy:
"Where a contributor . . . who is—
(a) an unmarried male (including such a person whose marriage has been dissolved or annulled but not including a widower with children under the age of sixteen years).
(b) a widower without children under the age of sixteen years; . . ."
The expression "unmarried male" is ambiguous; it may mean either a male who has never married or a male who was once, but is not now, married. The draftsman defines the expression as including persons whose marriages have been terminated, but, in order to make it clear that he does not include persons in that class who have remarried, uses the expression "such a person." This, however, refers to the very phrase that is being, but has not yet been, defined. Further, by expressly saying that "unmarried male" does not include a widower with children under 16 the draftsman has already indicated that the expression does include a widower; the express provision in subparagraph (b) is therefore tautologous. Finally, no provision has been made here or in sec. 83F (2) for the case of the man whose marriage has

contributions plus compound interest is paid to the personal representatives, if any. If any compulsory contributor resigns or is discharged or dismissed, he is to receive his contributions together with interest.

Traffic and Transport.

A few small amendments were made to the Traffic Act 1919-1960 by the Traffic Act Amendment Act (No. 65 of 1961). The definitions of "taxi-car" and "private taxi-car" in section 4 are amended; previously a vehicle came within one or other definition only when actually plying for hire; now all vehicles licensed to ply for hire come within the definition, whether or not they are actually plying for hire at any given time.[37] Section 3 of the amending Act amends section 8 of the principal Act so as to provide assurance to taxi proprietors that the Government will not overcrowd the taxi business; it cannot lawfully issue further taxi-plates until the number of taxi-cars falls below one for every seven hundred persons in the metropolitan area (the previous figure was one in six hundred). Section 16 of the principal Act is amended so as to give to a court which convicts a person of failing to apply for a transfer of a vehicle licence to him immediately on becoming owner of the vehicle power to order (in addition to any other penalty it may impose) that he pay the transfer fee at once. The regulation-making power of the Governor under section 47 (1) (i) (y) is enlarged to enable him by regulation to provide for signs and markings prohibiting or restricting parking or standing, as well as lights, signs, and markings for the control and direction of traffic; he is further empowered to authorize by regulation the Commissioner of Main Roads, or any other person, to exercise any of the powers conferred by that sub-paragraph; a new subsection (2a) added to section 47 expressly validates any traffic signs, lights, directions or markings already erected or placed by the Commissioner.

The principal object of the Bill which became the State Transport Co-ordination Act Amendment Act (No. 59 of 1961) was to

been dissolved, but who dies leaving dependent children under sixteen. Would it not have been better to avoid circularity and tautology and provide for all possible cases, thus:

"Where a contributor . . . who

(a) is a male who has never married; or

(b) is a male whose marriage (or whose last marriage) has been dissolved or annulled or whose wife (or last wife) has died, and who has not thereafter remarried, and has no children under the age of sixteen years dependent on him; . . ."?

[37] The purpose of the amended definition is to bring within the purview of the regulations which restrict the movement of taxis within certain streets in the city at certain times even those taxi-cars which are not plying for hire, but are being used for the drivers' private business.

abolish the State Transport Board, with its part-time members, and in its place create a full-time Commissioner of Transport (appointed under a new section 4D) for seven years, assisted by a Deputy Commissioner of Transport and a Transport Advisory Board of five, including the Commissioner or, in his absence, his deputy (re-enacted section 5 (1)). Section 27 of the amending Act, in sub-paragraph (a), consigns to the limbo of precedents rendered nugatory by statute the decision of Virtue J. in *Bilney v. State Transport Board*,[38] by inserting into clause 3 of the First Schedule (which authorizes the carriage of livestock or farm produce and the back-loading of requisites for the farm) a provision that the value or quantity of livestock or produce so carried is to be irrelevant; but the produce must now be carried for sale, or the livestock for sale or agistment.

The Metropolitan (Perth) Passenger Transport Trust Act Amendment Act (No. 9 of 1961) adds to the principal act a section 75A empowering the Trust to sell any non-perishable thing left in or on its property, after giving 21 days notice of its intention so to do by publication in the Gazette. A perishable thing may be sold or, if it causes offence or creates a nuisance, destroyed at the expense of the owner without notice. The net proceeds of the sale, after payment of expenses, are to go to the person entitled to the proceeds of sale on his establishing his claim; if the claim cannot be so established the net proceeds are to be paid to the Trust's General Fund Account.

Welfare and Assistance.

The Welfare and Assistance Act (No. 22 of 1961) empowers the Minister in charge of the Child Welfare Department to make advances for the purpose of giving[39] financial assistance to, or on behalf of, or for the transport of, indigent persons; or for the payment of funeral expenses[40] (not exceeding £35 in any one instance) for any person

38 [1960] WEST. AUST. R. 70. The decision of Virtue J., and that of the magistrate which he upheld, illustrate rather interestingly the fact that it is not really necessary to use the sloppy expression *"bona fide"* (as to which see above, at . . . , note . . .) to encourage the courts to strike at efforts to comply with a statute which are merely nominal. The appellant in that case had conveyed one bag of oats to Albany, a carriage which, he admitted, would by itself not have made the journey economical; he "back-loaded" five tons of superphosphate. The learned judge had no difficulty in holding that the words, "The carriage of . . . oats from the place where they are produced to any other place," meant in the context a carriage which was not merely colourable, and which had some reasonable economic justification.

39 The section in question says, "rendering and affording." Why two words when one will do? What is wrong with "giving"?

40 The section says "in respect to (*sic*) the burial of." Presumably paupers are not to be cremated.

dying a pauper[41] (section 8). Applications for assistance are to be made to and investigated by the Child Welfare Department, and a report on the investigation, together with any recommendation and advice, made to the Minister (section 9); if he is satisfied that in the circumstances of the case such assistance should be given he may grant that assistance in accordance with a scale of rates determined by him, unless he thinks a greater measure of assistance is warranted, and subject to such terms as to payment, expenditure, and repayment as he thinks necessary (section 10).[42] The Minister may delegate this and any other of his powers under the Act to the Director of Child Welfare (section 7).

Assistance given towards the funeral expenses of a person who dies a pauper may be recovered from certain relatives by action in the Local Court (section 11); and assistance given to a married woman, whether for herself, or her child or children, or both or all, pending the making of an order for maintenance, or where maintenance has been ordered to be paid but has not been paid,[43] may in certain circumstances be recovered from the husband (section 12).[44] If, however, the husband is able to satisfy the Court that although he and his wife were living apart the other circumstances were not sufficient to entitle her to pledge his credit for necessaries, only that part of the assistance so given as was expended for maintenance of the child or children (if any) is recoverable from him. Again, if the indigence by reason of which a person secures assistance arises from non-payment to him or her of a debt lawfully due, or of maintenance (whether ordered to be paid or not yet so ordered), or from failure to pay or transfer to him or her any property or money to which he or she is lawfully entitled, the Minister may order that the debt, maintenance money or property be assigned to him until the assistance has been repaid; the order shall have the effect of an assignment (section 13). Section 19 also empowers the Minister to recover the amount of any financial assistance granted to any person from any compensation or

[41] Or, as mealy-mouthed verbosity would have it, "in necessitous circumstances."

[42] Sec. 10 repeats, with greater detail, what has already been said in sec. 8, concerning the Minister's power to make advances; more verbosity!

[43] True to form, the Act says "duly paid."

[44] For some curious reason, not content with simply authorizing the Minister to recover from the husband the amount of advances made to or on behalf of the wife (subsec. (2)), the draftsman has provided in subsec. (1) that the amount of the advances "shall be deemed to have been expended in supplying necessaries for the use of the wife" and she "shall be presumed to have authority to pledge the credit of her husband." What is the point of introducing this fantastically unnecessary complexity?

damages, from the proceeds of any policy of insurance or life assurance, or from any share in the estate of any deceased person to which the assisted person is entitled.

Any person who has applied for, or is receiving assistance under the Act, whose financial position is bettered, must give the Child Welfare Department full particulars of that improvement (section 20); and the Minister or the Director of Child Welfare may by notice in writing require any person to furnish within fourteen days a report concerning any matter which might affect the granting of assistance to any indigent person or the recovery of any advances made under the Act (section 31). False reports under that section are punishable: and so (under section 21) are false statements in any other document or any application under the Act.

IX. MISCELLANEOUS.

Among other pieces of legislation passed during the session the following may be noted:

(1) The Bulk Handling Act Amendment Act (No. 25 of 1961) added a new section 11A to the principal Act providing that any poll of growers taken for any purpose under the Act and Regulations must be by secret ballot (under section 26A). It also increased the maximum foundation toll per bushel of wheat to four pence, limited the term of debentures issued after 1967 in respect of foundation tolls and port equipment tolls to 10 years, and provided that if in any year after 1967 the Company was obliged to make a further issue of debentures in respect of foundation tolls, and in the same year a further issue of debentures in respect of port equipment tolls, the issues were to be merged and one debenture only issued to each grower.

(2) The Education Act Amendment Act (No. 40 of 1961) amends the new appeal provisions introduced into the Act in 1960, substituting for the provision that an appeal against promotion may be made "on the grounds of seniority to the teacher who is promoted" a provision that the grounds of appeal may be "(i) Superior efficiency to that of the teacher promoted; or (ii) equal efficiency and seniority to the teacher promoted"; 'efficiency' is given the same meaning as it has in Part XIV of the Education Act Regulations 1960, and in determining seniority account may now be taken of a period spent as a science teacher-exhibitioner at the University of Western Australia.

(3) Section 72 of the Fire Brigades Act 1942 which begins, "Any person disobeying or failing to comply with any provisions of this Act or the regulations shall be guilty of an offence," is amended by section

2 of Act No. 5 of 1961, which inserts after "regulations" the words "or failing to do that which by or under this Act he is required or directed to do." The intention of the amendment was to ensure that it should be possible to prosecute any persons who failed to comply with a direction made under section 25A, which was inserted into the Act in 1959. It appears unnecessary to make it an offence for a person to fail to do anything he is directed to do by the Act; this is surely already covered by a "failure to comply with a provision of the Act." But the balance of the amendment is no doubt in the interests of clarity. Nevertheless there is not wanting authority for the proposition that breach of an order made under the authority of a statute may be treated as breach of the statute: In *Willingale v. Norris*,[45] Lord Alverstone L.C.J. (with whom Bigham and Walton JJ. agreed) said, ". . . , I certainly should have held, apart from any decision, that where an Act enables an authority to make regulations, they become, for the purpose of obedience or disobedience, provisions of the Act," and the decision he referred to, *Reg. v. Walker*,[46] clearly holds that disobedience to an order of the Epping Forest Commissioners under section 5 of the Epping Forest Amendment Act 1872 is a misdemeanour notwithstanding that that section contained no provision penalising breach of the order.

(4) An interesting little problem is created by the Fruit Cases Act Amendment Act (No. 6 of 1961). The Fruit Cases Act Amendment Act 1932 inserted in section 8 of the principal Act[47] a new subsection (1) to the effect that except as therein provided no person should put fruit intended for sale or export into an already used case. The provision then set out a number of conditions under which a used case might be used for containing fruit; the condition numbered (ii) was that a case prescribed as being a standard case for carrying bananas or pineapples might be used again for containing bananas, pineapples, or vegetables (not being fruit)[48] after it had undergone a prescribed inspection and treatment. The condition numbered (iii) permitted a second-hand case to be used for containing fruit intended for sale or for conveying fruit to a packing shed, so long as it was clean and free from disease, and the brands and marks of previous packers or growers were removed from it. The amending Act merely

45 (1908) 72 J.P. 495, at 497.
46 (1875) L.R. 10 Q.B. 355.
47 Fruit Cases Act 1919.
48 These are the words of the original Act; but what is included in the class of vegetables which are fruit? Tomatoes perhaps—the Act specifically defines fruit as including tomatoes. What about peppers, aubergines, cucumbers, marrows, pumpkins? Even peas and beans are the fruit of the plant.

repeals the condition numbered (ii), the legislative intent being that cases which have been used for carrying bananas and pineapples should be able to be used for any fruit, subject to the provisions in condition (iii) regarding cleaning and brands.[49] But this simply will not do. The reference to "bananas, pineapples or vegetables (other than fruit)" in the condition numbered (ii) indicates that fruit other than bananas and pineapples is not to be carried and packed in used banana or pineapple cases. Therefore "second-hand cases" in the condition numbered (iii) must mean second-hand cases other than used banana and pineapple cases. Repealing condition (ii) will not of itself enlarge the meaning of "second-hand cases" in condition (iii), for a statute which at one time had one meaning cannot by the repeal of some one provision in it gain some other meaning.[50] Not only does the Act not make lawful what it intended to make lawful, but it also makes unlawful what was previously lawful, the use of banana and pineapple cases to carry bananas, pineapples or vegetables. But no doubt nobody will care.

(5) A defect in the Gold Buyers Act Amendment Act 1948 has been cured after 14 years by the Gold Buyers Act Amendment Act (No. 19 of 1961). When the principal Act[51] was amended to extend its provisions to "gold matter" as well as gold those words were inserted after the word "gold" everywhere except in the second paragraph of section 36. The insertion has now been made.

X. NOTE ON 1962 LEGISLATION.*

Trusts and Perpetuities.

In the session of Parliament for 1962, a number of statutes were enacted which make important and detailed changes in both trusts and property law. These bills had been prepared by a Law Reform Committee of the Law Society,[52] with the object of bringing these branches of law up to date in the light of modern social and economic

49 The Hon. C. Nalder: (1961) 158 PARL. DEB. 755.

50 See CRAIES, STATUTE LAW, (5th ed., London, 1952) 382, citing Attorney General v. Lamplough, (1878) 3 Ex. D. 214. Surely it is the business of any members of either House who are members of the legal profession to watch out for points like this.

51 Gold Buyers Act 1921.

* Contributed by D. E. Allan.

52 The work done by the Law Society's Law Reform Committee served an additional purpose in demonstrating the desirability of having an official Law Reform Committee that would consider any topics referred to it by the government and whose reports would be published. The Minister for Justice said that he hoped to bring down special legislation next year to establish such a committee: (1962) PARL. DEB. 1608.

conditions, and they were accepted by the Government and were introduced in Parliament as government measures. It is intended to publish a detailed review of these Acts in the Law Review next year, but in the meantime the purpose of this note is to draw attention to the areas in which changes have been effected.

The provisions are contained in the following 8 Acts:

(1) Trustees Act (No. 78 of 1962);

(2) Married Women's Property Act Amendment Act (No. 79 of 1962);

(3) Administration Act Amendment Act (No. 80 of 1962);

(4) Testator's Family Maintenance Act Amendment Act (No. 81 of 1962);

(5) Charitable Trusts Act (No. 82 of 1962);

(6) Law Reform (Property, Perpetuities, and Succession) Act (No. 83 of 1962);

(7) Adoption of Children Act Amendment Act (No. 84 of 1962);

(8) Simultaneous Deaths Act Amendment Act (No. 85 of 1962).

The first, third, and fourth of these Acts come into operation on 1st January 1963; the remainder took effect immediately on receiving assent. The main changes are introduced by the Trustees Act, the Charitable Trusts Act, and the Law Reform (Property, Perpetuities, and Succession) Act. The remaining Acts are chiefly concerned to make ancillary amendments.

The Trustees Act replaces the Trustees Act 1900-1957 and the Settled Land Act 1892-1909, so that in future all trusts, whether they be trusts of land or of personalty or of mixed funds, will be subject to the same provisions. For similar reasons the definition of 'trust' includes the duties of the office of personal representative, so that many of the purely administrative provisions of the Administration Act have been transferred to the Trustees Act and made available for all types of trusts. Extensive alterations have been made to the investment power, and trustee investments will now include certain classes of equities, but without any requirement to split the trust fund as under the English legislation. Part IV of the Act confers very broad and general powers (including a power of sale) on trustees in connexion with the management and administration of trusts, which will apply to all trusts unless excluded or modified by the trust instrument. However, the exercise by the trustee of any of the statutory powers may be challenged before the Court by any persons interested. Wide powers of maintenance and advancement are created, and also a

statutory form of protective trust. Part VI introduces a new scheme to enable the trustee to make a distribution, by assisting him in the determination of possible claimants and creditors, and by protecting him against their claims if he follows the prescribed procedure. The Supreme Court is given extensive powers to supervise and vary trusts, to assist generally in their administration, and to provide for the remuneration of trustees. The apportionment rules of *Howe v. Lord Dartmouth*[53] and *Allhusen v. Whittell*[54] are abolished.

The Charitable Trusts Act, which is based largely on New Zealand legislation, recognizes recreational trusts as charitable, extends the *cy-près* doctrine, lays down a statutory procedure for *cy-près* applications, and authorizes the Attorney-General to investigate and supervise the affairs of charitable trusts.

The Law Reform (Property, Perpetuities, and Succession) Act[55] is principally concerned to reform the rule against perpetuities along lines similar to those suggested by the English Law Reform Com-

[53] (1802) 7 Ves. Jun. 137, 32 E.R. 56.

[54] (1867) L.R. 4 Eq. 295.

[55] The reforms introduced by the Law Reform (Property, Perpetuities, and Succession) Act are the most far reaching in any of the eight Acts. In particular this is the first Act in any jurisdiction which gives effect to the recommendation of the Fourth Report of the English Law Reform Committee on the rule against perpetuities or which tackles the perpetuity problem in such detail. Drafting a bill of this nature proved to be no easy task, and the draft of the bill that was finally introduced into Parliament was the result of the labours of many minds. Early drafts of the bill had been widely circulated among both practising and academic lawyers of many jurisdictions, and the many criticisms and suggestions that were received helped in the preparation of the final draft. The text of the bill was, with the consent of the Attorney-General and of the Law Society, published as an appendix to the second edition of THE RULE AGAINST PERPETUITIES by MORRIS AND LEACH. In these circumstances it was perhaps a little unfortunate that Mr. Guthrie, the only legal practitioner in the Legislative Assembly, after giving a careful analysis of the other bills on their second readings, saw fit to introduce a number of his own amendments (both drafting and substantial) to this bill in the committee stage. Mr. Guthrie's attention was concentrated for the most part on inconsequentials, *e.g.*, amending the long title, substituting "pre-emptive right" for "rights of first refusal" in sec. 14 (3), and substituting "legacy" for "bequest" in one of the several places in which it occurs in sec. 21. It is also slightly ironic that, in a bill making such sweeping reforms, Mr. Guthrie's fire should have been drawn by the proposal to abolish existing restraints upon anticipation. Some damage was done by these amendments to sec. 20 (wills in contemplation of marriage), sec. 21 (statutory substitutionary gift), and sec. 24 (payments made under mistake of law or fact not always recoverable). Unfortunately the Law Reform Committee found itself in the position in which disagreement with these amendments might have endangered the whole bill. However, it is highly likely that further legislation will be found necessary in the near future if these three sections are to be workable.

mittee.[56] Hence, it introduces a "wait-and-see" rule, an 80-year period as an alternative to "lives plus 21", presumptions as to the age of procreation and child-bearing, and special rules for age contingencies, class gifts, "unborn widows", dependent limitations, options, possibilities of reverter and rights of entry, and powers of appointment.[57] The rule in *Whitby v. Mitchell*[58] is abolished, and special provision is made for superannuation funds. The Act goes further than the recommendations of the English Law Reform Committee and abolishes the Accumulation Act 1800, substituting only the rule against perpetuities as reformed. Other sections of the Act deal with wills in contemplation of marriage, substitutional gifts in place of lapsed gifts to children (replacing section 33 of the Wills Act 1837), and the intermediate income of contingent gifts. Provision is made for the recovery of property paid under a mistake of law in the same manner as if the mistake were one of fact. Restraints on anticipation are abolished.

Pending the preparation of a detailed review and full evaluation of these reforms, the Editorial Committee would be very glad to hear from Western Australian practitioners of any interesting problems or difficulties that may arise in connexion with the new legislation. Information and comments should be sent to the editor.

E.K.B.

56 *Law Reform Committee, Fourth Report (The Rule against Perpetuities)*; Cmnd. 18.

57 Powers ancillary to valid trusts, administrative powers, and provisions for the remuneration of trustees are exempted from the application of the rule by sec. 29 of the Trustees Act.

58 (1890) 44 Ch. D. 85.