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August 22, 2003

The Honorable Les Ihara, Jr.  
Senator, Ninth District  
Twenty-Second Legislature  
State of Hawaii  
State Capitol, Room 217  
Honolulu, Hawaii 96813

Dear Senator Ihara:

Re: Readings of S.B. No. 1394 and Constitutional Validity  
of Act 172, SLH 2003

This is in response to your request for an opinion on the constitutional validity of Act 172, Session Laws of Hawaii 2003, which was passed during the regular session of 2003 as Senate Bill (S.B.) No. 1394, Senate Draft 2, House Draft 1, titled "A Bill for an Act Relating to the Conformity of the Hawaii Income Tax Code to the Internal Revenue Code."

I. QUESTION PRESENTED

Did S.B. No. 1394 pass three readings in the Senate, on separate days, as required by section 15 of article III of the Constitution of the State of Hawaii?

II. SHORT ANSWER

We believe that S.B. No. 1394 did pass three readings in the Senate and was validly enacted. Although we cannot predict with certainty how a court will rule on this question, we believe that it is probable that a court will find that Act 172, Session Laws of Hawaii 2003, was enacted in conformity with the Hawaii Constitution. Act 172 is presumed to be constitutionally valid and an interpretation that sustains its validity is favored over one that does not. In addition, the Senate President and the Senate Clerk have certified that the bill passed final reading in the Senate, and even if the bill did not pass second reading in the Senate, it did pass three readings on separate days in the Senate on January 22, March 4, and May 1, 2003.

### III. FACTS

S.B. No. 1394 was a "short-form bill" that was introduced and passed first reading in the Senate on January 22, 2003, and was subsequently referred to the Senate Committee on Ways and Means ("WAM"). WAM considered the bill on February 6, 2003, amended the bill to provide the substantive content "in long form," and voted to pass the measure with amendments and recommit the bill. WAM reported out the bill by Senate Standing Committee Report No. 577, dated February 19, 2003.

The Senate's order of business for February 19, 2003, listed three standing committee reports, numbers 575 to 577, with parenthetical notations that each report "Recommends passage on SECOND READING and recommitment to [the specific committee]." The transcript of the proceedings in the Senate on February 19, 2003, indicates that a senator moved for the adoption of the reports, stating, "I move for the adoption of standing committee reports 575 to 577." The motion carried. S.B. No. 1394 was further amended by WAM, was reported out by WAM in an amended form on February 28, 2003, and passed "third reading" in the Senate on March 4, 2003. The Senate President and the Senate Clerk certified that S.B. No. 1394 had passed and on March 5, 2003, sent the bill to the House of Representatives for consideration.

Although the Senate's order of business for February 19, 2003, listed Standing Committee Report No. 577 along with the parenthetical notation "[r]ecommends passage on SECOND READING and recommitment to WAM" (emphasis added, capitalization in original) and the subsequent action of the Senate on S.B. No. 1394 indicates that the Senate believed that the bill had passed second reading on February 19, 2003, Standing Committee Report No. 577 actually recommended only that S.B. No. 1394 be recommitted to WAM and did not recommend passage on second reading. The Senate Journal for February 19, 2003, states that the WAM's Standing Committee Report No. 577 was adopted and the bill recommitted to WAM. Because, contrary to the parenthetical notation on the February 19, 2003 order of business, the committee report recommended only the recommitment of the bill and not passage of the bill on second reading, there is a question of the intent of the Senate in adopting the motion made regarding the three standing committee reports.<sup>1</sup>

<sup>1</sup> Given the parenthetical notation on the order of business, the senator who made the motion for adoption of the committee reports and the senators who voted in favor of the motion may have in good faith believed that the three bills were all being passed on second reading. However, in light of our conclusion, it is not

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Thereafter, the bill passed three readings in the House of Representatives and was returned in an amended form to the Senate on April 8, 2003. The Senate initially voted to disagree with the amendments made by the House, but later reconsidered its vote to disagree and placed the bill on the calendar for final reading on May 1, 2003, when S.B. No. 1394 passed final reading in the Senate.

#### IV. DISCUSSION

Legislative enactments are presumptively constitutional. SHOPO v. Soc'y of Prof'l Journalists, 83 Haw. 378, 389, 927 P.2d 386, 397 (1996). A "party challenging a statutory scheme has the burden of showing unconstitutionality beyond a reasonable doubt . . . and . . . the constitutional defect must be clear, manifest, and unmistakable." Id.

Section 15 of article III of the Hawaii Constitution provides, "No bill shall become law unless it shall pass three readings in each house on separate days." This provision was a part of Hawaii's original state constitution (in section 16 (since renumbered) of article III). Committee reports from the 1950 Constitutional Convention indicate that the provision was taken from section 46 of the Organic Act.<sup>2</sup> Hawaii has no reported cases involving the three-reading requirement. Senate Rule 49 states that "[a] bill upon its second reading may be read by its title only. It then shall be subject to a motion to commit." One treatise discusses the typical three-reading requirement as follows:

When literacy was not widespread, it was common practice to read bills aloud to the assembled legislature. Some members would not have had any other means of knowing what they were deciding. Since it seems unlikely that an illiterate person would ever again be elected to the legislature, the historic need for reading aloud no longer exists. The underlying

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necessary to resolve the uncertainty whether the bill passed second reading in the Senate on February 19, 2003.

<sup>2</sup> Section 46 of An Act to Provide a Government for the Territory of Hawaii, Act of April 30, 1900, ch. 339, 31 Stat. 141, provided: "That a bill in order to become law shall, except as herein provided, pass three readings in each house, on separate days, the final passage of which in each house shall be by a majority vote of all the members to which such house is entitled, taken by ayes and noes and entered upon its journal."

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policy, that legislators be informed about what they must vote on, would be served as well by a construction of the reading requirements allowing each member to read silently and at his own convenience.

The practice of having bills read on three different days also serves the function of providing notice that a measure is progressing through the enacting process, enabling interested parties to prepare their positions. Only a meaningful identifying reference rather than a verbatim recital is necessary for that purpose.

1 Norman J. Singer, Sutherland Statutory Construction § 10:4 (6th ed. 2002) (footnotes omitted).

An Ohio court decision suggests that the purpose of the three-reading rule is "to prevent hasty action and to lessen the danger of ill-advised amendment at the last moment. The rule provides time for more publicity and greater discussion and affords each legislator an opportunity to study the proposed legislation, communicate with his or her constituents, note the comments of the press and become sensitive to public opinion. Adherence to this rule will help to ensure well-reasoned legislation." Hoover v. Bd. of Comm'rs, 482 N.E.2d 575, 582 (Ohio 1985) (Douglas, J., concurring).

Some jurisdictions follow the enrolled bill doctrine. Under this doctrine, once the Speaker of the House of Representatives and the President of the Senate certify that the procedural requirements for passing a bill have been met, a bill is conclusively presumed to have met all procedural requirements for passage. See, e.g., Friends of Parks v. Chicago Park Dist., 786 N.E.2d 161 (Ill. 2003). We found no Hawaii case where the doctrine has been applied, and in our Opinion No. 81-7 we espoused the view that permitting courts to look behind the enrolled bill was the better view, because the enrolled bill doctrine was conducive to fraud, corruption, or wrongdoing.

Irrespective of whether the enrolled bill doctrine would be recognized by Hawaii courts, we believe that the bill is constitutionally valid, because, even if it did not pass second reading on February 19, 2003, S.B. No. 1394 still passed three readings, on separate days, in the Senate, with the third coming when the bill passed its final reading on May 1, 2003, after the Senate reconsidered its disagreement with the House amendments.

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This interpretation is consistent with the presumption of validity, with the plain language of the constitution, and with the purposes underlying the three-reading requirement, to prevent hasty action and to provide for an informed legislative body and notice to interested parties.

V. CONCLUSION

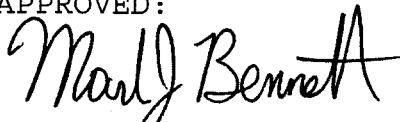
Therefore, we conclude that this bill was validly and constitutionally enacted, as it did pass three readings, on separate days, in the Senate, as required by the Hawaii Constitution.

Very truly yours,



Hugh R. Jones  
Deputy Attorney General

APPROVED:



Mark J. Bennett  
Attorney General