



THIRTY-SEVENTH PARLIAMENT

REPORT 18
JOINT STANDING COMMITTEE ON DELEGATED
LEGISLATION
AGRICULTURAL PRODUCE (EGG PRODUCTION
INDUSTRY) REGULATIONS 2006

Presented by Mr Paul Andrews MLA (Chairman)

and

Hon Ray Halligan MLC (Deputy Chairman)

August 2006

JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

Date first appointed:

June 28 2001

Terms of Reference:

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

“3. Joint Standing Committee on Delegated Legislation

- 3.1 A *Joint Delegated Legislation Committee* is established.
- 3.2 The Committee consists of 8 Members, 4 of whom are appointed from each House. The Chairman must be a Member of the Committee who supports the Government.
- 3.3 A quorum is 4 Members of whom at least 1 is a Member of the Council and 1 a Member of the Assembly.
- 3.4 A report of the Committee is to be presented to each House by a Member of each House appointed for the purpose by the Committee.
- 3.5 Upon its publication, whether under section 41(1)(a) of the *Interpretation Act 1984* or another written law, an instrument stands referred to the Committee for consideration.
- 3.6 In its consideration of an instrument, the Committee is to inquire whether the instrument –
- (a) is authorized or contemplated by the empowering enactment;
 - (b) has an adverse effect on existing rights, interests, or legitimate expectations beyond giving effect to a purpose authorized or contemplated by the empowering enactment;
 - (c) ousts or modifies the rules of fairness;
 - (d) deprives a person aggrieved by a decision of the ability to obtain review of the merits of that decision or seek judicial review;
 - (e) imposes terms and conditions regulating any review that would be likely to cause the review to be illusory or impracticable; or
 - (f) contains provisions that, for any reason, would be more appropriately contained in an Act.
- 3.7 In this clause –
- “adverse effect” includes abrogation, deprivation, extinguishment, diminution, and a compulsory acquisition, transfer, or assignment;
- “instrument” means –
- (a) subsidiary legislation in the form in which, and with the content it has, when it is published;
 - (b) an instrument, not being subsidiary legislation, that is made subject to disallowance by either House under a written law;
- “subsidiary legislation” has the meaning given to it by section 5 of the *Interpretation Act 1984*.”

Members as at the time of this inquiry:

Mr Paul Andrews MLA (Chairman)	Dr Graham Jacobs MLA
Hon Ray Halligan MLC (Deputy Chairman)	Ms Jaye Radisich MLA
Hon Shelley Archer MLC	Hon Barbara Scott MLC
Hon Vincent Catania MLC	Mr Tony Simpson MLA

Staff as at the time of this inquiry:

Kerry-Jayne Braat, Committee Clerk	Felicity Mackie, Advisory Officer (Legal)
Susan O’Brien, Advisory Officer (Legal)	

Address:

Parliament House, Perth WA 6000, Telephone (08) 9222 7222

delleg@parliament.wa.gov.au

Website: <http://www.parliament.wa.gov.au>

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EXECUTIVE SUMMARY AND RECOMMENDATIONS FOR THE
REPORT OF THE JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION
IN RELATION TO THE
AGRICULTURAL PRODUCE (EGG PRODUCTION INDUSTRY REGULATIONS) 2006

EXECUTIVE SUMMARY

- 1 For reasons that are set out in this report, the Committee is of the view that no nexus is established between:
- the *Agricultural Produce Commission Act 1988*, which in section 14 requires a charge determined under that section to be determined having regard to the cost, or estimated cost, of the service (or services) to which the charge relates; and
 - regulations 4 and 5 of the *Agricultural Produce (Egg Production Industry) Regulations 2006*, which impose a charge on egg producers calculated on the basis of the number of eggs sold.
- 2 The Committee notes that a charge of “‘x’ cents per dozen eggs sold” bears the prima facie appearance of a tax. No facts or circumstances militating against that characterisation were presented to the Committee.
- 3 The Committee concludes that regulations 4 and 5 of the *Agricultural Produce (Egg Production Industry) Regulations 2006* are not authorised or contemplated by the *Agricultural Produce Commission Act 1988*.¹

RECOMMENDATION

Recommendation 1: The Committee recommends that regulations 4 and 5 of the *Agricultural Produce (Egg Production Industry) Regulations 2006* be disallowed.

¹ Committee’s Term of Reference 3.6(1)(a).

REPORT OF THE JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

IN RELATION TO THE

AGRICULTURAL PRODUCE (EGG PRODUCTION INDUSTRY) REGULATIONS 2006

1 BACKGROUND - AGRICULTURAL PRODUCE (EGG PRODUCTION INDUSTRY) REGULATIONS 2006

1.1 The *Agricultural Produce (Egg Production Industry) Regulations 2006* (“**the Egg Regulations**”) were published in the *Government Gazette* on 31 March 2006.

1.2 After formal provisions, the Egg Regulations provide:

4. *Egg producers to pay charges*

(1) A producer who sells eggs produced in the business of the producer must pay a charge to the Commission within 14 days after the end of each quarter in which the producer sold the eggs.

Penalty: a fine of \$2 000.

(2) The unpaid amount of the charge is a debt due to the State and is recoverable from the producer in a court of competent jurisdiction.

5. *Information to be furnished*

A producer who sells eggs produced in the business of the producer must, not later than 14 days after the end of each quarter in which eggs were sold, furnish to the Commission a return in the form approved by the Commission showing all of the sales in that quarter.

Penalty: a fine of \$2,000

1.3 “Charge” is defined in reg 3 of the Egg Regulations as meaning “a charge imposed on a producer under the Act section 14”. “The Act” is not defined in the Egg Regulations but refers to the *Agricultural Produce Commission Act 1988* (“**the Act**”). The “Commission” is the Agricultural Produce Commission established by s 4 of the Act.

2 BACKGROUND - AGRICULTURAL PRODUCE COMMISSION ACT 1988

2.1 Section 14 of the Act provides:

- (1) The Commission, at the request and with the advice of a producers' committee, may determine the cost or estimated cost of providing a service which the producers' committee is authorised to provide and, with the approval of the Minister, may impose a charge for the provision of that service.*
- (2) The Commission is to determine the amount of a charge imposed under this section having regard to the cost or estimated cost of providing the service and any other relevant factors.*
- (3) Notice of a charge imposed under this section is to be published, and the charge is payable, in accordance with the regulations.*

2.2 The Egg Regulations are made pursuant to s 25 of the Act, which relevantly provides:

- (1) The Governor may make regulations prescribing all matters that are required or permitted by this Act to be prescribed or are necessary or convenient to be prescribed for giving effect to the purposes of this Act.*
- (2) Without limiting the generality of subsection (1) the regulations may —*
 - (a) ...*
 - (e) require that for the purposes of this Act information relating to agricultural produce be furnished to prescribed persons or organizations;*
 - (ea) prescribe the manner in which charges imposed under this Act shall be paid and collected and the persons to whom the charges shall be paid or by whom the charges shall be collected; and*
 - (f) prescribing penalties not exceeding \$2 000 for any breach of the regulations.*

2.3 Section 4 of the Act establishes a body known as the Agricultural Produce Commission (“the Commission”), which has power to establish producers’ committees in respect of agricultural produce, including produce of a particular kind such as eggs (ss 6(1)(a) and (2)(a) of the Act).

- 2.4 Prior to establishing a producers' committee, the Commission is required to undertake the steps set out in s 10 of the Act. These include conducting a poll among relevant producers. A committee can only be established if the poll is positive (s 10(7) of the Act).
- 2.5 A poll of egg producers was conducted on 10 May 2002. The result of the poll was 85% support for the establishment of an Egg Producers' Committee.
- 2.6 This poll followed discussions commencing in 2001 with the Poultry Farmers Association concerning, the Explanatory Memorandum to the Egg Regulations (**"the EM"**) states, the *"transfer of levy collection under the Poultry Industry Trust Fund Act 1948 to a "fee for service" under [the Act]"*.²
- 2.7 The gap between the poll for the establishment of the Egg Producers' Committee and the promulgation of the Egg Regulations was caused by the fact that before the Egg Producers' Committee could commence collection of a fee for service, the *Poultry Industry Trust Fund Act 1948* had to be repealed. This did not occur until 31 January 2005.
- 2.8 In the committee's view, all conditions precedent to the making of the Egg Regulations under the Act are satisfied.
- 2.9 Section 12 of the Act sets out the functions of a producers' committee and:
- (3) A producers' committee shall not provide any service or recommend the imposition of any charge for any service or proposed service additional to the service or services for which the producers' committee was established unless the producers' committee has conducted a poll of the producers concerned and the poll is in favour of the proposal.*

3 PRELIMINARY VIEW

- 3.1 The Committee considered the Egg Regulations at its meeting of 10 May 2006. Regulations 4 and 5 appeared to the Committee to be premised on selling eggs, rather than provision of service. The Committee was uncertain as to how *"a charge"* referred to in reg 4 of the Egg Regulations related to a *"charge"* to be calculated by the Commission pursuant to s 14 of the Act.
- 3.2 Having regard to ss 12(3), 14(1), 14(2) and 18(2) and (3) in particular of the Act, the latter provisions stating:

² Explanatory Memorandum to *Agricultural Produce (Egg Production Industry) Regulations 2006*, undated, p1.

(2) Moneys received in payment of charges imposed under this Act shall be applied exclusively for the services in relation to which those charges were imposed.

(3) Despite subsection (2), any amount which is no longer required by a producers' committee —

(a) to be applied for the service in relation to which the charge was imposed; or

(b) to defray the proper costs and expenses of the producers' committee,

may be allocated by the Commission to be applied for the provision of another service that the committee is authorised to provide,

the Committee formed the preliminary view that on a plain reading of the words of the Act, the Act contemplates the Commission calculating, or estimating, the cost of provision of a particular service (or services) and determining that cost as “*a charge*”.

- 3.3 The Committee saw the purpose of regulations as being to allocate any charge within the relevant industry, providing mechanisms for payment etcetera.
- 3.4 However, reg 4 of the Egg Regulations appeared to be made on the assumption that s 14 of the Act contemplates a series of charges being imposed on individual producers (that is, individual levies) rather than “*a charge*” relating to the determined cost of provision of a service (or services) to the industry as a whole.
- 3.5 This assumption did not accord with the Committee’s preliminary reading of s 14 of the Act, which does not appear to contemplate individual costings for the provision of services to individual producers.
- 3.6 In the Committee’s view there appeared to the Committee to be a gap between regs 4 and 5 of the Egg Regulations and the Act in that there was no nexus between the determination of cost of service contemplated by s 14 of the Act and the imposition of a series of charges on individual producers as appeared to be contemplated by reg 4 of the Egg Regulations.
- 3.7 It was not apparent to the Committee what purpose of the Act reg 5 of the Egg Regulations was directed at.
- 3.8 In this respect, the Committee noted that reg 5 did not appear to be directed at s 13 of the Act, which provides for the gathering of statistical information by the Commission, as:

- reg 5 required provision of information without service of a notice, a pre-condition for statistical information to be gathered under s 13 of the Act; and
- reg 6 of the Egg Regulations prescribed information to be provided pursuant to s 13 of the Act.

3.9 On the information available, there was no connection between a charge calculated on the basis of cost of provision of a service and the number of eggs a producer sold in a quarter, so as to justify a requirement for information concerning the latter to be provided for accountability purposes.

3.10 The Committee resolved to write to the Department of Agriculture (**“the Department”**) seeking clarification of regs 4 and 5 of the Egg Regulations.

4 COMMITTEE’S ATTEMPTS TO CLARIFY EGG REGULATIONS

4.1 The Committee wrote to the Department on 10 May 2006 requesting written clarification of its concerns. That letter is Appendix 1 to this report.

4.2 The Department responded by letter dated 19 May 2006 in which it stated:

1) The basis on which the charge imposed pursuant to s14 of [the Act] is to be distributed between producers in the egg production industry?

These funds are not distributed between producers. They are used by Producer’s Committees in the provision of services to producers under section 12 of the Act. This is the purpose of the Act, as stated in its long title.

2) The relationship between r5 of the Egg Regulations and the Commission’s functions as set out in the Act?

This regulation is made pursuant to section 25(2)(e) of the Act. It enables the Commission to reconcile sales of eggs by a producer, as reported in the return, with charges paid by the producer as received by the Commission. This is an accountability measure that protects the revenue base of the Producer’s Committee and therefore bears a direct connection with section 6(1)(g) of the Act.

4.3 The Department’s letter of 19 May 2006 is Appendix 2 to this report.

4.4 The Committee noted that s 25(2)(e) of the Act permitted the Commission to require information be provided to specified persons “for the purposes of” the Act and that, by virtue of s 42 of the *Interpretation Act 1984*, this included the purposes of subsidiary legislation made under the Act.

4.5 The Committee further noted that s 6(1)(g) of the Act states:

(1) Subject to this Act the Commission may-

(g) direct, co-ordinate and supervise the functioning and expenditure of producers' committees; ...

4.6 The Committee accepted that protecting a producers' committee's revenue base might be considered to fall within the ambit of a purpose of the Act.

4.7 However, the Department had not explained how knowing the number of eggs sold in a quarter, whether by a particular producer or the industry as a whole, was relevant to protecting the Egg Producers' Committee's revenue base.

4.8 The Committee was not satisfied with the Department's response and sought:

- further clarification of the purpose of the Act to which reg 5 was directed; and
- the basis of allocation of the charge imposed by s 14 of the Act.

4.9 The Committee resolved to place a protective notice of motion of disallowance on the Egg Regulations pending the Department's further response.

4.10 The Committee's letter to the Department of 24 May 2006 is Appendix 3 to this report.

4.11 The Department responded by stating:

Section 14 of the Act governs the process by which the Commission, with the advice of a producers' committee, estimates the cost of provision of services to producers. This is not a 'total charge' as such and the Act does not make use of that concept although in a sense the 'total charge' will be equivalent to the cost or estimated cost of providing the service. In order to raise the estimated cost, the charge to be imposed upon the relevant producers is calculated.

The Egg Producers' committee has not presently sought to impose such a charge but it would be in the form of 'x cents per dozen eggs sold'. The reason the committee has not imposed a charge is that it presently has sufficient funds to provide the services to producers as a result of the transfer of funds from the Poultry Industry Trust Fund ...

The role of the regulations in this process is to prescribe the manner in which, and to whom, the charges are to be paid and collected (s.25(2)(ea)). See, for example, regulation 4, cf. Agricultural Produce (Beekeeping Industry) Regulations 2003, regulation 5; Agricultural

Produce (Horticultural Industry) Regulations 2001, regulation 5; Agricultural Produce (Pork Production industry) Regulations 2004, regulation 4) [sic].

There is no provision under the Act that envisions the making of regulations setting out, for example, different producers or classes of producers paying different charges and receiving differential services. If different charges were to apply these would be imposed by the Commission under section 14(1).

4.12 In the Committee's view, the Department had:

- rejected the notion of a “total charge” but conceded that s 14 of the Act contemplates the determination of cost of provision of service relates to provision of service to the industry as a whole, not to individual producers;
- acknowledged that s 14 of the Act requires the Commission to determine a charge for a service on a cost recovery basis and that that section anticipates that the charge will be spread equitably across the producers in the industry; and
- not provided a nexus between imposing a charge on producers on the basis of the number of eggs sold and the Act, which requires that the charge relate to cost of a service, or services, provided by the Egg Producers' Committee to the industry as a whole.

4.13 The Committee also questioned how egg producers were to be advised of the basis on which the quantum of the charge imposed on them had been ascertained. The Department said:

The quantum is ascertained in accordance with section 14, which, as noted at 1), relates to the particular charge to be imposed. If a particular producer wanted access as to how a particular charge had been determined, such information may be available via the Commission. However, there is no regulation-making power in the Act that relates to the provision of this information.

4.14 The Committee noted that:

- s 14 of the Act does not provide a basis or mechanism for ascertaining the quantum of a charge imposed on individual egg producers;
- in its view, the Act contemplates regulations providing a mechanism or link between the cost of provision of a service, a charge imposed by s 14 of the Act and a fee or charge imposed on a producer; and

- the Department had, once again, provided no nexus between the charge to be imposed on an egg producer and the “charge” determined under s14 of the Act as the cost of a service (or services).
- 4.15 The Committee was unable to determine from correspondence with the Department the way in which the cost for service is to be translated into a charge imposed on a producer.
- 4.16 The Department also stated:
- ... the Commission generally imposes a charge on producers (whether it be horticultural produce, honey, pork, etc.) based on quantity of produce. In the case of eggs, as noted at 1) above, if the Egg Producers’ Committee were to recommend to the Commission to impose a charge it is likely that it would be in the form of ‘x’ cents per dozen eggs sold.*
- 4.17 The Department further stated that:
- the concept of a ‘total charge’ is not used. There are no regulation-making powers in the Act that touch on a circumstance where funds raised by way of a charge exceed or fall short of the cost estimated under s.14 to provide services. In practice, if this happened the charge would be decreased or increased.*
- 4.18 In the Committee’s view, the Department did not consider how ss 18 and 25 of the Act combined to provide regulation-making powers that “touch on” the relevant circumstances.
- 4.19 The Department’s letter of 1 June 2006 is Appendix 4 to this report.
- 4.20 The Committee was concerned that the Department’s response suggested that, in addition to there being no express legislative connection, there was no administrative connection, or reconciliation, between the charges intended to be imposed under the Egg Regulations and the cost of services to be determined under s14 of the Act.
- 4.21 The Committee explored its concerns further by letter dated 14 June 2006, which is Appendix 5 to this report.
- 4.22 The Department responded by letter dated 29 June 2006, which is Appendix 6 to this report, stating:

Sales figures do not relate at all to the determination of the cost of service ... section 14(2) of the Agricultural Produce Commission Act

1988 expressly requires that the Commission determine the amount of the charge by reference to the cost of the services to be provided.

Regulation 5, ... only has work to do once the charge has been calculated, imposed and is being collected. It is simply a mechanism by which the Commission can check, from time to time, that a particular producer is remitting the correct amount due to the Commission.

5 REGULATIONS 4 AND 5 - WHETHER CHARGE AN IMPOSITION OF A “FEE FOR SERVICE” OR TAX

- 5.1 Under its Term of Reference 3.6(1)(a), the Committee is required to consider whether the charge imposed by r4 is “*authorised or contemplated by the empowering Act*”.³ This necessarily involves consideration of whether the charge is a “*fee for service*” or a tax.
- 5.2 It is a general principle of English constitutional law received into Australia that there be no taxation except under authority of an Act of Parliament.⁴
- 5.3 While this common law principle has been amended in Western Australia in respect of licence fees (s 45A of the *Interpretation Act 1984*), and licence fees are broadly defined to include fees or charges for registration, right, permit, authority, approval or exemption, it remains the law for other types of fees and charges.
- 5.4 Clear express language is required to confer on the Executive what is in effect a taxing power through delegated legislation.
- 5.5 It appears to the Committee that the “*charge*” contemplated by the Egg Regulations is a levy, based on number of eggs produced, whereas s 14 of the Act contemplates a charge to be imposed on industry participants for services rendered on the basis of the cost of rendering those services albeit it, and the Egg Regulations, are silent as to how that cost is to be allocated between the industry participants.
- 5.6 Given the ambiguity about what is required by s 14 of the Act, the Committee considered the Second Reading speech for the *Horticultural Produce Commission Amendment Bill 1999*, which inserted s 14 into the Act. It relevantly stated:

The Bill has a redraft of the provisions for the imposition of charges for services provided by a producers’ committee. The Horticultural Produce Commission Act was reviewed for compliance with the competition principles agreement and the review concluded that the

³ See inside cover of this report.

⁴ *The Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421, per Isaacs J, at 433-4.

imposition of a compulsory levy would be in conflict with the competition principles agreement.

There was also a danger of infringement of section 90 of the Constitution which prohibits the imposition of excise duties except by the Commonwealth. The section for setting and imposing charges requires the commission, in setting a charge, to link the charge for the service provided with the cost, or estimated cost of providing the service. The minister must approve the charge which is payable in accordance with the regulations.⁵

- 5.7 The Explanatory Memorandum to the *Horticultural Produce Commission Amendment Bill 1999* provided further information about the competition concerns leading to the amendment of s 14 of the Act, being:

When [the Act] was reviewed for compliance with the competition principles agreement (CPA) the review concluded that the imposition of a compulsory levy would be in conflict with the CPA unless the services provided were of sufficient public benefit and the charges were assessed in accordance with a government approved cost/benefit analysis. There was also a danger of infringement of section 90 of the Constitution which prohibits the imposition of excise duties except by the Commonwealth.⁶

- 5.8 Section 14 of the *Horticultural Produce Commission Act 1988* previously provided:

14(1) The Commission on the recommendation of the relevant growers' committee may determine the cost or estimated cost of providing any service which the relevant growers' committee is authorised under this Act to provide, and with the approval of the Minister, may impose on the growers in relation to whom the growers' committee is established a charge for the provision of any such service.

(2) A charge imposed under subsection (1) -

(a) shall be at the same rate in relation to all relevant growers of horticultural produce of the kind in question in the State or only in the area in relation to which the growers' committee is established;

⁵ Hon Murray Criddle, Minister for Transport, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 20 October 1999, p2322.

⁶ Explanatory Memorandum to *Horticultural Produce Commission Amendment Bill 1999*, pp 1-2.

(b) may be at different rates in relation to relevant growers in different parts of the State or in different parts of the area in which the growers' committee is so established if the growers' committee has taken a poll on that proposal of the growers of the horticultural produce of the kind in question, or, if the committee is appointed only in relation to a part of the State, then only among the growers of the horticultural produce in that part of the State;

(c) may be fixed having regard to the frequency or cost of the service provided to the grower;

(d) may be fixed having regard to any other factors that the growers' committee considers relevant.

(3) A charge imposed under this section becomes due and payable by a grower not earlier than 14 days after the day on which notice of the charge has been published in accordance with the regulations and not later than the day specified in the notice.

- 5.9 Both the current and previous s 14 require a charge to be calculated having regard to the cost, or estimated cost, of provision of a service. Although both contained “*any other matters*” caveats.
- 5.10 In the Committee’s view, the salient distinction between the sections appears to be that the previous s 14 specifically provided that a charge imposed under that section was imposed on an individual grower and, while providing that in general the charge would be the same for all growers, there was scope for variation in individual circumstances. (For example, the previous s 14(3) allowed consideration of frequency of provision of the service to a grower in setting the charge). Whereas the current s 14 contemplates that a charge imposed under that section is a charge imposed on the industry as a whole.

The Law

- 5.11 The Committee noted that a ‘fee for services’ is payment for services rendered to, or at the direction or request of, the person required to make the payment.
- 5.12 The relationship between the fee and cost of delivering the service is an important consideration in determining whether or not a ‘fee’ (or “*charge*”) is a ‘tax’.

- 5.13 Difficulty in ascertaining the cost of provision of services to an individual user can be overcome by fixing fees (or charges) by reference to the cost of delivering services to all of the users of the service rather than by the cost of delivering to a particular user.⁷
- 5.14 In the Committee's view, this is the mechanism adopted by the Act, in particular s 14.
- 5.15 While there were comments in the Australian Airline case that the relationship between fees and cost of delivery did not need to be exact, those comments had to be considered with caution given that the Civil Aviation Authority (the body imposing fees in that case) was obliged by statute to provide services on a commercial basis, generating some return for the government.
- 5.16 Fees can be fixed differently for different classes of users as long as there is a rational basis for the distinction, aimed at a legitimate public purpose.
- 5.17 A charge can consist of a component that is a fee for service and a component that is a tax. If this is the case, unless limited exceptional circumstances (such as those set out in s 45A of the *Interpretation Act 1945*, which permits licence fees to include certain matters in addition to cost recovery) apply, the Committee will recommend that the charge be disallowed.
- 5.18 If the Executive wants to impose a tax, it must generally do so under a separate Bill.⁸ Further, clear words must be used to authorise a tax:

*A subject is only to be taxed on clear words, not on the intendment or on the equity of an Act ... What are clear words is to be ascertained on normal principle; these do not confine the court to a literal interpretation. There may, indeed should, be considered the context and scheme of the relevant Act as a whole, and its purpose may, indeed should be regarded.*⁹

- 5.19 An excise is a particular form of tax, being an inland tax on goods¹⁰ "*Its essential distinguishing feature is that it is a tax imposed "upon" or "in respect of" or "in relation to" goods*".¹¹ "Goods" signifies articles of commerce or things which may be

⁷ *Airservices Australian v Canadian Airlines International Ltd* (1999) 167 ALR 392 ("the Australian Airline case").

⁸ Section 46(7) of the *Constitution Amendment Act 1899*.

⁹ *WT Ramsey Ltd v IRC* [1982] AC 300, per Lord Wilberforce, at 325.

¹⁰ P Lane, *Lane's Commentary on the Australian Constitution*, LBC Information Services, Sydney, NSW, 1997, p 661-2.

¹¹ *Brown's Transport Pty Ltd v Kropp* (1958) 100CLR 117, 129 quoted in Lane p 668

the subject of trade or commercial transactions.¹² A levy that is imposed on a commodity as a subject of production, manufacture or commerce is an excise.¹³

Conclusion

- 5.20 Neither the Egg Regulations nor the Department had satisfactorily explained how a charge of “‘x’ cents per dozen eggs sold” equated to a charge based on cost of provision of services, whether calculated as a cost to an individual producer or as a cost of provision to the industry as a whole. A charge of “‘x’ cents per dozen eggs sold” bears the prima facie appearance of a tax.

6 COMMITTEE’S CONCLUSION

- 6.1 In the Committee’s view, s 14 of the Act requires a charge determined under that section to be determined having regard to the cost, or estimated cost, of the service (or services) to which the charge related.
- 6.2 This requirement was an important feature of the amendment to s 14 of the Act as it was intended to minimise the possibility that a charge was a tax and, in particular, an excise.
- 6.3 The Act is ambiguous as to whether a charge determined under s 14 is to be a charge equating with the cost of provision of the service imposed on the industry as a whole that then is to be allocated across egg producers, or whether s 14 contemplates a series of charges imposed on individual producers that cumulatively equate with the cost of provision of the service(s) to the industry.
- 6.4 The plain language of s 14, and the Act as a whole, coupled with the amendments to the previous s 14 of the Act, favours the first interpretation. The Department and custom favour the latter interpretation.
- 6.5 As it was the interpretation most supportive of the Regulations, the Committee adopted the latter interpretation without deciding whether it was correct.
- 6.6 Regulation 4 of the Egg Regulations does not reveal how a charge imposed on an egg producer derives from the cost of services provided to the industry as a whole. Regulation 5 implies that a charge required to be paid by reg 4 is derived in a manner not contemplated or authorised by the Act - that is, it is to be based on quantum of eggs sold by a producer, not on the cost of service(s) provided.
- 6.7 Correspondence from the Department advised that the “charge” to which reg 4 refers is in fact a formula for collecting revenue on the basis of number of eggs produced.

¹² *Mutual Pools & Staff Pty Ltd v Commissioner of taxation* (1992) 173 CLR 450, 453 quoted in Lane p 668.

¹³ Lane p 679.

- 6.8 The High Court case of *R v Toohey*¹⁴ is authority for the proposition that a regulation which appears on its face to be made for a purpose that was authorised by the empowering statute under which it purports to be made will be invalid if it is, in fact, made for an unauthorised purpose. The reason for this was best expressed by Chief Justice Gibbs when he said:

*It would be anomalous if a regulation which bore the semblance of propriety would remain valid even though it should be shown in fact to be made for an unauthorised purpose; that would mean that a clandestine abuse of power would succeed when an open excess would fail.*¹⁵

- 6.9 In the Committee's opinion, s 14 of the Act requires the Commission to calculate the cost, or estimated cost, of provision of a service, or services, by the Egg Producers' Committee and to impose a charge on industry participants that derives from and, so far as practicable, equates with that cost subject to the consideration of "any other relevant factors".
- 6.10 Regulations 4 and 5 of the Egg Regulations set up a regime to impose a charge on producers calculated on the basis of the number of eggs sold.
- 6.11 No satisfactory explanation was provided to the Committee as to how a charge based on the number of eggs sold is derived from, or relates to, the cost of provision of service(s) by the Egg Producers' Committee.
- 6.12 The Committee noted the principle that clear and unambiguous language in a statute is required to authorize the imposition of charges upon a subject.¹⁶ The Committee considered that this principle is equally applicable to subsidiary legislation.
- 6.13 For the reasons set out above, the Committee concluded that regs 4 and 5 of the Egg Regulations are not authorised or contemplated by the Act.

Recommendation 1: The Committee recommends that regulations 4 and 5 of the Agricultural Produce (Egg Production Industry) Regulations 2006 be disallowed.



Mr Paul Andrews MLA
Chairman

24 August 2006

¹⁴ (1981) 151 CLR 170.

¹⁵ (1981) 151 CLR 170 at p 192.

¹⁶ *Dowling v Commissioner of Water Resources* [1993] 1 Qd R 70, per Derrington J, at p 78.

APPENDIX 1

LETTER TO DEPARTMENT OF AGRICULTURE 10 MAY 2006



JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

Our ref: 3712/32

Ms S Beale,
Ministerial Support Officer,
Ministerial Business Group,
Department of Agriculture,
Locked Bag 4, Bentley Delivery Centre
WA 6983

BY FAX: (08) 9368 1205

Dear Ms Beale,

Agricultural Produce (Egg Production Industry) Regulations 2006

The Committee considered this instrument at its meeting of Wednesday, 10 May 2006.

The Committee noted that there was no provision in the regulations for the basis upon which the charge imposed pursuant to section 14 of the *Agricultural Produce Commission Act 1988* ("the Act") was to be distributed between producers in the egg production industry. The Committee also noted that regulation 5, requiring an egg producer to provide the Commission with details of sales in a quarter, did not appear to relate to any of the Commission's functions set out in section 6 of the Act.

The Committee requests the Department to provide written clarification of:

- the basis upon which the charge imposed pursuant to section 14 of the *Agricultural Produce Commission Act 1988* ("the Act") is to be distributed between producers in the egg production industry; and
- the relationship between regulation 5 and the Commission's function as set out in the Act

by 5 pm on Monday 22 May 2006.

The Committee also draws the Department's attention to the following matters:

- the phrase "*the Act*" is used in the regulations but has not been defined; and
- the phrase "*Egg Producer's Committee*" has been defined in the regulations but is not used in any substantive provision.

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If you have any queries, please telephone the Committee's Advisory Officer (Legal), Ms Susan O'Brien, on 9222 7418.

Yours sincerely



Paul Andrews MLA
Chairman

10 May 2006

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APPENDIX 2

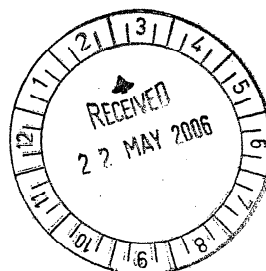
LETTER FROM DEPARTMENT OF AGRICULTURE 19 MAY 2006



Department of Agriculture and Food
Government of Western Australia



Your Ref: 3712/32
Our Ref: AB 02001
19 May 2006



Mr Paul Andrews MLA
Chairman
Joint Standing Committee on Delegated Legislation
Parliament House
PERTH WA 6000

Dear Mr Andrews

AGRICULTURAL PRODUCE (EGG PRODUCTION INDUSTRY) REGULATIONS 2006

Thank you for your letter dated 10 May 2006 in which you requested further information on behalf of the Committee in relation to certain aspects of the above Regulations.

As requested, please find below responses to each of the queries posed by the Committee:

1) The basis upon which the charge imposed pursuant to section 14 of the Agricultural Produce Commission Act ("the Act") is to be distributed between producers in the egg production industry?

These funds are not distributed between producers. They are used by Producers' Committees in the provision of services to producers under section 12 of the Act. This is the purpose of the Act, as stated in its long title.


2) The relationship between regulation 5 and the Commission's function as set out in the Act?

This regulation is made pursuant to section 25(2)(e) of the Act. It enables the Commission to reconcile sales of eggs by a producer, as reported in the return, with charges paid by the producer as received by the Commission. This is an accountability measure that protects the revenue base of the Producers' Committee and therefore bears a direct connection with section 6(1)(g) of the Act.

You have also drawn the attention of the Department to the absence in the Regulations of a definition for "the Act". My advice is that section 44(2) of the *Interpretation Act 1984* makes the inclusion of such a definition superfluous. If this explanation is not satisfactory to you please advise me so we can consider this matter further.

Should you have any further queries, do not hesitate to contact me.

Yours sincerely


Ian Longson
DIRECTOR GENERAL

OFFICE OF THE DIRECTOR GENERAL

3 Baron-Hay Court, South Perth, Western Australia 6151 (Locked Bag 4, Bentley Delivery Centre WA 6983)
Telephone: (08) 9368 3236 Facsimile: (08)9368 1205

APPENDIX 3

LETTER TO THE DEPARTMENT OF AGRICULTURE

24 MAY 2006



JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

Our ref: 3712/32

Mr I Longson,
Director General,
Department of Agriculture and Food,
Locked Bag 4,
Bentley Delivery Centre,
WA 6983

By Facsimile: 9368 1205

Dear Mr Longson

Agricultural Produce (Egg Production Industry) Regulations 2006 ("the Regulations")

The Committee considered your letter of 19 May 2006 at its meeting on Wednesday, 24 May 2005.

It appears from your letter that the Committee's enquiry as to the basis on which the charge imposed pursuant to section 14 of the *Agricultural Produce Commission Act 1988* ("the Act") is to be distributed between producers in the egg production industry has been misconstrued. The Committee understood that funds raised as a consequence of the charge would be used by the relevant Producer's Committee.

The Committee's concern was, and remains, that the Regulations make no provision for how the total charge, determined under s14 of the Act as the cost of the Egg Producer's Committee services, is to be allocated between egg producers.

Is the charge imposed on each egg producer to be the same or will it vary depending on some criteria? If the latter, what is the criteria? How are egg producers to be advised of the basis on which the quantum of the charge imposed on them has been ascertained?

Your answer to the second question asked by the Committee suggests that there may be some connection between the charge imposed on an egg producer and the number of eggs sold. Is this the case?

If so, what is to occur in the event funds raised by way of charge exceed the total charge determined under section 14 of the Act? What is to occur in the event that funds realised do not meet that total charge?

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The Committee notes that section 18 of the Act permits the Commission to retain revenue raised in excess of that actually required by a Producer's Committee to perform its services.

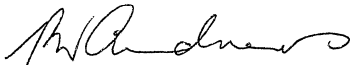
If there is no connection between the number of eggs sold and the charge imposed on individual producers, what is the basis for the alleged "accountability" role of regulation 5? What is the accountability process for the determining of individual egg producer charges?

What scope is there for an egg producer to object that the charge imposed on him/her is excessive?

As its concerns had not been addressed, the Committee resolved on 24 May 2006 to place a protective notice of motion of disallowance on the Regulations.

Please provide a written response to the questions raised in this letter by **5pm on Friday 9 June 2006**. If you have any queries, please contact the Committee's Advisory Officer (Legal), Ms Susan O'Brien, on telephone number: 9222 7428.

Yours sincerely



Paul Andrews MLA
Chairman

24 May 2006

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APPENDIX 4

LETTER FROM THE DEPARTMENT OF AGRICULTURE

1 JUNE 2006

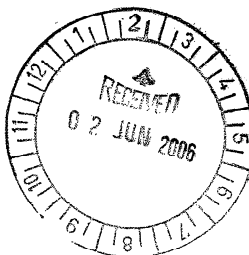


Department of Agriculture and Food
Government of Western Australia

3712/32

Your Ref: 3712/32
Our Ref: AB 02001
1 June 2006

Mr Paul Andrews MLA
Chairman
Joint Standing Committee on Delegated Legislation
Parliament House
PERTH WA 6000



Dear Mr Andrews

AGRICULTURAL PRODUCE (EGG PRODUCTION INDUSTRY) REGULATIONS 2006

I refer to your letter dated 24 May 2006 in which a number of questions have been posed on behalf of the Committee in relation to some aspects of the above Regulations and some aspects of the operation of the *Agricultural Produce Commission Act 1988* ('the Act').

Please find below responses to the Committee's concerns and questions:

1) The Committee's concern was, and remains, that the Regulations make no provision for how the total charge, determined under s.14 of the Act as the cost of the Egg Producer's Committee services, is to be allocated between egg producers. Is the charge imposed on each egg producer to be the same or will it vary depending on some criteria?

Section 14 of the Act governs the process by which the Commission, with the advice of a producers' committee, estimates the cost of the provision of services to producers. This is not a 'total charge' as such and the Act does not make use of that concept although in a sense the 'total charge' will be equivalent to the cost or estimated cost of providing the service. In order to raise the estimated cost, the charge to be imposed upon the relevant producers is calculated.

The Egg Producers' committee has not presently sought to impose such a charge but it would be in the form of 'x cents per dozen eggs sold'. The reason the committee has not imposed a charge is that it presently has sufficient funds to provide services to producers as a result of the transfer of funds from the Poultry Industry Trust Fund following the repeal of the *Poultry Industry (Trust Fund) Act 1948*.

The role of the regulations in this process is to prescribe the manner in which, and to whom, the charges are to be paid and collected (s.25(2)(ea)). See, for example, regulation 4, *cf. Agricultural Produce (Beekeeping Industry) Regulations 2003*, regulation 5; *Agricultural Produce (Horticultural Industry) Regulations 2001*, regulation 5; *Agricultural Produce (Pork Production Industry) Regulations 2004*, regulation 4).

There is no provision under the Act that envisions the making of regulations setting out, for example, different producers or classes of producers paying different charges and receiving differential services. If different charges were to apply these would be imposed by the Commission under section 14(1).

OFFICE OF THE DIRECTOR GENERAL

3 Baron-Hay Court, South Perth, Western Australia 6151 (Locked Bag 4, Bentley Delivery Centre WA 6983)
Telephone: (08) 9368 3236 Facsimile: (08) 9368 1205

2) How are egg producers to be advised of the basis on which the quantum of the charge imposed on them has been ascertained?

The quantum is ascertained in accordance with section 14, which, as noted at 1), relates to the particular charge to be imposed. If a particular producer wanted access to details as to how a particular charge had been determined, such information may be available via the Commission. However, there is no regulation-making power in the Act that relates to the provision of this information.

3) Your answer to the second question asked by the Committee suggests there may be some connection between the charge imposed on an egg producer and the number of eggs sold. Is this the case?

Yes, the Commission generally imposes a charge on producers (whether it be horticultural produce, honey, pork etc.) based upon quantity of produce. In the case of eggs, as noted at 1) above, if the Egg Producers' Committee were to recommend to the Commission to impose a charge it is likely it would be in the form of 'x' cents per dozen eggs sold.

4) If so, what is to occur in the event funds raised by way of charge exceed the total charge determined under section 14 of the Act? What is to occur in the event that funds realised do not meet that total charge?

As mentioned at 1) above, the concept of a 'total charge' is not used. There are no regulation-making powers in the Act that touch upon a circumstance where funds raised by way of a charge exceed or fall short of the cost estimated under s.14 to provide services. In practice, if this happened the charge would be decreased or increased.

5) If there is no connection between the number of eggs sold and the charge imposed on individual producers, what is the basis for the alleged "accountability" role of regulation 5?

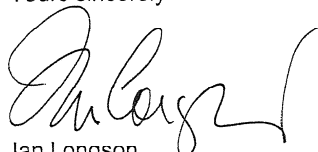
Not applicable, see 3) above in conjunction with the second answer provided in my letter dated 19 May 2006.

6) What scope is there for an egg producer to object that the charge imposed on him/her is excessive?

There is non-statutory recourse to the Commission or the Minister and possibly legal avenues at common law or in equity. The Act does not contain any regulation-making powers that touch upon this subject matter.

Should you have any further queries, please contact me.

Yours sincerely

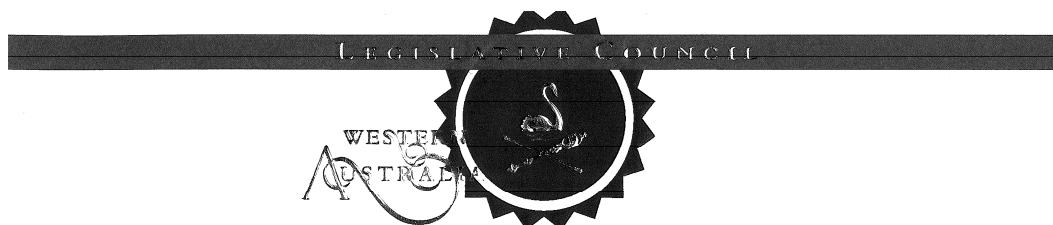


Ian Longson
DIRECTOR GENERAL

APPENDIX 5

LETTER TO THE DEPARTMENT OF AGRICULTURE

14 JUNE 2006



JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

31/12
312/32

Mr I Longson,
Director General,
Department of Agriculture and Food
Locked Bag 4,
Bentley Delivery Centre,
WA 6983

By Facsimile: 9368 1205

Dear Mr Longson,

Agricultural Produce (Egg Production Industry) Regulations 2006 ("the Regulations")

The Committee considered your letter of 1 June 2006 at its meeting Wednesday, 14 June 2006, when it resolved to seek further clarification.

The Committee noted that:

- section 14(1) of the *Agricultural Produce Commission Act 1988* (the Act) empowers the Commission to determine the cost, or estimated cost, of providing a service that a producer's committee is authorised to provide. With the approval of the Minister, it may impose a charge for the provision of that service;
- section 14(2) of the Act requires the Commission to determine the amount of a charge imposed having regard to the cost, or estimated cost, of providing "the service" (presumably to which the charge relates);
- the EM to the Regulations advises that they set out "information required to be furnished by producers to the Agricultural Produce Commission for the purposes of accountability". (Committee's emphasis);
- As the other regulations deal with the other matters set out in the EM, this justification appears to relate to regulation 5; and
- Your letter of 19 May 2006 advised that regulation 5 enabled the Commission to reconcile sales of eggs by a producer, as reported in the return, with charges paid by the producer as received by the Commission and that this was an accountability measure that protects the revenue base of the producer's committee.

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The Act requires a charge imposed under section 14 to be determined having regard to the cost of services provided.

The Committee enquires as to the relevance of an egg producer's sales figures to a charge that is to be determined having regard to the cost of services?

Yours sincerely



Paul Andrews MLA

14 June 2006

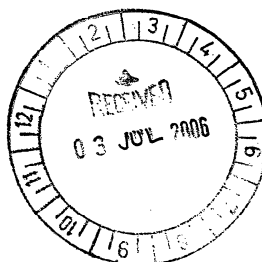
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APPENDIX 6
LETTER FROM THE DEPARTMENT OF AGRICULTURE
29 JUNE 2006



Department of Agriculture and Food
Government of Western Australia

Your Ref: 312/32
Our Ref: AB 02001
29 June 2006



3712/32
(A)

Mr Paul Andrews MLA
Chairman
Joint Standing Committee on Delegated Legislation
Parliament House
PERTH WA 6000

Dear Mr Andrews

AGRICULTURAL PRODUCE (EGG PRODUCTION INDUSTRY) REGULATIONS 2006

Thank you for your letter dated 14 June 2006 in which further clarification is sought as to one aspect of the above Regulations. You have posed the following query:

The Committee enquires as to the relevance of an egg producer's sales figures to a charge that is to be determined having regard to the cost of services.

Sales figures do not relate at all to the determination of the cost of services. As you have pointed out in your letter, section 14(2) of the *Agricultural Produce Commission Act 1988* expressly requires that the Commission determine the amount of the charge by reference to the cost of the services to be provided.

Regulation 5, to which you have also referred, only has work to do once the charge has been calculated, imposed and is being collected. It is simply a mechanism by which the Commission can check, from time to time, that a particular producer is remitting the correct amount due to the Commission.

Should you require further information, please contact Damen Keevers on 9368 3854.

Yours sincerely

Ian Longson
DIRECTOR GENERAL

OFFICE OF THE DIRECTOR GENERAL

3 Baron-Hay Court, South Perth, Western Australia 6151 (Locked Bag 4, Bentley Delivery Centre WA 6983)
Telephone: (08) 9368 3236 Facsimile: (08) 9368 1205