



THIRTY-EIGHTH PARLIAMENT

REPORT 33

**JOINT STANDING COMMITTEE ON DELEGATED
LEGISLATION**

***STATE ADMINISTRATIVE TRIBUNAL RULES
AMENDMENT (No2) 2008***

Presented by Mr Joe Francis MLA (Chairman)

and

Hon Kim Chance MLC (Deputy Chairman)

May 2009

JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

Date first appointed:

28 June 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 Standing Committee on Delegated Legislation* 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 one is a Member of the Council and one 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 Joe Francis MLA (Chairman)
Hon Kim Chance MLC (Deputy Chairman)
Hon Shelley Eaton MLC
Ms Janine Freeman MLA

Hon Ray Halligan MLC
Mr Paul Miles MLA
Hon Barbara Scott MLC
Mr Andrew Waddell MLA

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REPORT OF THE JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

IN RELATION TO THE

STATE ADMINISTRATIVE TRIBUNAL RULES AMENDMENT (No2) 2008

1 INTRODUCTION

- 1.1 The *State Administrative Tribunal Amendment Rules (No2) 2008* (**Amendment Rules**) were gazetted on 29 August 2008. They are reproduced at **Appendix 1**.
- 1.2 The Joint Standing Committee on Delegated Legislation (**Committee**) raised various concerns about the Amendment Rules with the State Administrative Tribunal the majority of which were resolved through correspondence. However, Amendment Rule 5 remained contentious with the State Administrative Tribunal refusing to provide an undertaking to repeal the offending provision and not rely on it in the interim.
- 1.3 The Committee is of the view that Amendment Rule 5 is not contemplated by the *State Administrative Tribunal Act 2004* and offends the Committee's *Term of Reference* 3.6(b) which states:

In its consideration of an instrument, the Committee is to inquire whether the instrument - "...has an adverse effect on existing rights, interests, or legitimate expectations beyond giving effect to a purpose authorized or contemplated by the empowering enactment".

2 COMMITTEE SCRUTINY

- 2.1 The Committee first scrutinised the Amendment Rules on 9th March 2009. On 2 April 2009 the Committee resolved to move a notice of motion of disallowance of the Amendment Rules for the purposes of preserving its position while giving the Amendment Rules further consideration. The State Administrative Tribunal was advised of that resolution by letter dated 25 March 2009. The Committee's letter of 25 March 2009 is reproduced at **Appendix 2**.
- 2.2 Although the Committee gave notice of motion for disallowance of the whole of the Amendment Rules, it now recommends disallowance of just Amendment Rule 5.

3 AMENDMENT RULE 5

3.1 Amendment Rule 5 states:

Rule 61 amended

(1) *Rule 61(1) is amended by deleting “This rule applies to -“ and inserting instead - “Subrules (2), (3) and (4) apply to -.”*

(2) *After rule 61(4), the following subrule is inserted -*

“(5) Despite rule 26(3), a copy of the application under the Security and Related Activities (Control) Act 1996 section 67(1) or (3b)(a) may be given to the licensee by pre paid post or ordinary service.

4 THE SECURITY AND RELATED ACTIVITIES (CONTROL) ACT 1996

4.1 The *Security and Related Activities (Control) Act 1996* referred to in Amendment Rule 5 (above) licences persons engaged in work relating to property protection, investigation or surveillance and crowd control. It also licences the agents who supply the services of the persons who carry out such work.

4.2 Under section 67 of the *Security and Related Activities (Control) Act 1996*, the Commissioner of Police has the power to take disciplinary proceedings against a licensee to the State Administrative Tribunal, the primary review tribunal for administrative decisions in the State. Subsection 67(1) allows the Commissioner to allege to the State Administrative Tribunal that there is proper cause for disciplinary action on the ground that, in the opinion of a licensing officer, the safety or welfare of members of the public is or may be at risk from the continuance in force of a licence. Subsection (3b)(a) states that the Commissioner must refer the matter to the State Administrative Tribunal within 14 days of a notice being given.

4.3 Rule 26(3) referred to in Amendment Rule 5 (above) states that a copy of an application must be given to a person “*by personal service*”. By the amendment, this provision will not apply, such applications may be given to the licensee by pre-paid post or ordinary service.

4.4 The Explanatory Memorandum to the Amendment Rules justifies Amendment Rule 5 in the following manner.

The Rules Committee agreed that this was an appropriate measure given the requirement under this Act to inform the Commissioner of any change of address, which would avoid the use of scarce police

*resources in searching for licensees who have changed address without any notification.*¹

5 THE COMMITTEE'S VIEW OF AMENDMENT RULE 5

- 5.1 The Committee is concerned that removal of the requirement for personal service in respect of the application may result in a licensee not receiving notice of an application threatening their livelihood. For example, if the licensee is absent from their address for a temporary period, such as a holiday or stay in hospital, neither of which requires notification of change of address.
- 5.2 The Committee observed that it is an important requirement of natural justice that each party be advised of the case that they must meet. In order to ensure this occurs efficiently, a party is required to provide an address where documents may be served. This is the case, notwithstanding the requirement in respect of notification of change of address in the *Security and Related Activities (Control) Act 1996*.
- 5.3 The Committee is of the view that a successful application under section 67 of the *Security and Related Activities (Control) Act 1996* (the power to revoke a licence) has the potential to ultimately, deprive a person of their livelihood. The Committee has a long-standing view that *Term of Reference* 3.6(b) requires it to consider adverse impacts on the ability of a person to earn a living. Prior to the Amendment Rules, a person had a legal 'right' (founded in the State Administrative Tribunal's rules) to personal service unless the State Administrative Tribunal ordered to the contrary.
- 5.4 Amendment Rule 5 introduces an element of risk in the notification processes that threatens livelihood. The Committee is of the view that this is not authorised or contemplated by the *State Administrative Tribunal Act 2004*.

6 THE STATE ADMINISTRATIVE TRIBUNAL'S RESPONSE TO THE COMMITTEE'S VIEW OF AMENDMENT RULE 5

- 6.1 In its first response to the Committee's view, reproduced at **Appendix 3**, Justice John Chaney, President of the State Administrative Tribunal, explained that the Commercial Agents Unit of the Western Australian Police requested the relaxation of personal service on the following grounds.

Many people working in the security industry do so on a part time basis and usually as a supplementary income stream. The experience of the police was that it was often necessary to attend the respondent's residence on many occasions to effect service;

The requirement in these cases for personal service contrasted with the requirement for prosecution notices under the Criminal

¹ The Explanatory Memorandum to the Amendment Rules, received 5th February 2009, p3.

Procedures Act 2004, which are able to be served by ordinary postal service to the defendant's last known, residential, work or business address;

Licensees under the Act are required to advise of a change in residential address within 14 days;

*The ability of a licensee against whom an order is made in his or her absence to obtain a review under section 84 of the State Administrative Tribunal Act 2004.*²

- 6.2 Justice Chaney said that the relaxation of service requirements under the *Security and Related Activities (Control) Act 1996* is a “sensible response to the problems experienced with the stricter service requirement, which was itself inconsistent with the position in criminal matters”.³

7 THE COMMITTEE'S RESPONSE TO THE VIEW OF THE STATE ADMINISTRATIVE TRIBUNAL

- 7.1 In its response, reproduced at **Appendix 4**, the Committee acknowledged the practical difficulties the Commercial Agents Unit of the Western Australian Police experience in serving applications made pursuant to section 67 of the *Security and Related Activities (Control) Act 1996*. However, the Committee noted that in the event service is proving difficult, it is possible in an appropriate case for the Western Australian Police to apply to the State Administrative Tribunal for an order for postal service.
- 7.2 The Committee is not persuaded by the argument that both a review of an order pursuant to section 84 of the *State Administrative Tribunal Act 2004* or parity with provisions in respect of serving a prosecution notice under the *Criminal Procedure Act 2004* justify Amendment Rule 5(2). Section 26 of the *Criminal Procedure Act 2004* requires a prosecution notice to be given to an accused on request, but by sections 28 to 31 an accused, who is not a corporation, is to be made aware of a prosecution by way of summons, hearing notice or arrest. A summons must be served personally; a hearing notice may be served personally or by post. Section 10 permits service of infringement notices by post. Indeed, the Committee is of the view that the service requirements in respect of the more serious offences not warranting arrest were a better analogy for an application that had potential to impact on livelihood than those in respect of less serious offences and infringement notices.

² Letter from Justice John Chaney, President of the State Administrative Tribunal, 2nd April 2009, p2.

³ Ibid, pp2-3.

8 THE STATE ADMINISTRATIVE TRIBUNAL'S FINAL RESPONSE TO THE COMMITTEE'S VIEW OF AMENDMENT RULE 5

- 8.1 In a second response to the Committee's request for an undertaking to repeal Amendment Rule 5, reproduced at **Appendix 5**, Justice John Chaney, President of the State Administrative Tribunal, again referred to "*considerable police resources ... being expended on attempts to locate and personally serve respondents*".⁴

9 FINDINGS

- 9.1 The Committee finds that Amendment Rule 5 is not contemplated by the *State Administrative Tribunal Act 2004* and has an adverse effect on the existing rights of persons licensed under the *Security and Related Activities (Control) Act 1996*.

10 RECOMMENDATION

- 10.1 The Committee makes the following recommendation:

Recommendation 1: The Committee recommends that Amendment Rule 5 of the State Administrative Tribunal Amendment Rules (No2) 2008 be disallowed.



Mr Joe Francis MLA

Chairman

Date: 21 May 2009

⁴ Letter from Justice John Chaney, President of the State Administrative Tribunal, 6th May 2009, p1.

APPENDIX 1
STATE ADMINISTRATIVE TRIBUNAL RULES AMENDMENT
(No2) 2008

APPENDIX 1

STATE ADMINISTRATIVE TRIBUNAL RULES AMENDMENT (No2) 2008

29 August 2008

GOVERNMENT GAZETTE, WA

4043

— PART 1 —

JUSTICE

JU301*

State Administrative Tribunal Act 2004

State Administrative Tribunal Amendment Rules (No. 2) 2008

Made by the Rules Committee under the *State Administrative Tribunal Act 2004* section 170.

1. Citation

These rules are the *State Administrative Tribunal Amendment Rules (No. 2) 2008*.

2. Commencement

These rules come into operation as follows —

- (a) rules 1 and 2 — on the day on which these rules are published in the *Gazette*;
- (b) the rest of the rules — on the day after that day.

3. The rules amended

The amendments in these rules are to the *State Administrative Tribunal Rules 2004*.

4. Rule 51 amended

After rule 51(4) the following subrule is inserted —

“

- (5) Rule 34(6) and (7) do not apply if the Commissioner for Equal Opportunity, or a counsel or representative of the Commissioner, is the legal practitioner or agent representing the complainant in proceedings relating to a complaint referred to the Tribunal under the *Equal Opportunity Act 1984* section 93(1).

”.

5. Rule 61 amended

- (1) Rule 61(1) is amended by deleting “This rule applies to —” and inserting instead —

“ Subrules (2), (3) and (4) apply to — ”.

(2) After rule 61(4) the following subrule is inserted —

“

- (5) Despite rule 26(3), a copy of the application under the *Security and Related Activities (Control) Act 1996* section 67(1) or (3b)(a) may be given to the licensee by pre-paid post or ordinary service.

”.

6. Rule 63 amended

After rule 63(3) the following subrule is inserted —

“

- (4) Rule 34(6) and (7) do not apply if the State Solicitor is the legal practitioner representing the Western Australian Planning Commission in proceedings under the *Planning and Development Act 2005* Part 14.

”.

7. Rule 64 inserted

After rule 63 the following rule is inserted —

“

64. *Taxation Administration Act 2003*

Rule 34(6) and (7) do not apply if the State Solicitor is the legal practitioner representing the Commissioner of State Revenue in proceedings under the *Taxation Administration Act 2003*.

”.

Dated: 19 August 2008.

Hon. Justice M L BARKER, President

Judge J A CHANEY SC,
Deputy President

Judge J E ECKERT,
Deputy President

M J ALLEN, Senior Member

D R PARRY, Senior Member

T J CAREY, Member

J MANSVELD, Member

M J HARDY

P BAGDONAVICIUS

APPENDIX 2
COMMITTEE'S LETTER DATED 25 MARCH 2009

APPENDIX 2

COMMITTEE'S LETTER DATED 25 MARCH 2009



JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

Our Ref: 3745/22

Hon Justice M L Barker
President
State Administrative Tribunal
Ground Floor,
12 St Georges Terrace
Perth WA 6000

Attn: Mr Alistair Borg

By facsimile: 9202 1180

25 March 2009

Dear Justice Barker,

State Administrative Tribunal Rules Amendment (No 2) 2008

I refer to this instrument, which was recently considered by the Joint Standing Committee on Delegated Legislation.

The Committee noted that these amendments remove the requirement that where an applicant is represented by a legal practitioner or agent and that fact - together with an address for service - is not stated on the application, the legal practitioner or agent must within seven days of appointment file and serve on the other party notice of appointment and an address for service:

- in respect of applications made under section 93 of the *Equal Opportunity Act 1984*¹ - in the event the Commissioner for Equal Opportunity (or counsel or a representative of the Commissioner) is the agent in any referral;
- in respect of applications under the *Planning and Development Act 2005* - in the event the State Solicitor is the legal practitioner representing the Western Australian Planning Commission in proceedings; and

¹ Section 93 provides that the Commissioner may refer a matter to SAT where the Commissioner has the view that: the matter cannot be resolved by conciliation; conciliation has not been successful; or the matter is of a nature that makes the referral appropriate..

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- in respect of applications made under the *Taxation Administration Act 2003* - in the event the State Solicitor is the legal practitioner representing the Commissioner of State Revenue.

The requirement for personal service when an application is made under either of subsections 67(1) or (3b)(a) of the *Security and Related Activities (Control) Act 1996* is also removed.

In respect of the amendment concerning notice of the Commissioner for Equal Opportunity acting on section 93 referrals, the Explanatory Memorandum states:

The Rules Committee agreed that this was an appropriate dispensation given the requirement that the Commissioner act in such cases.

However, the Committee notes that section 93(2) of the *Equal Opportunity Act 1984* provides that the Commissioner for Equal Opportunity (personally or by representative) will only act matters referred under section 93 if requested to do so by a complainant. There does not to the Committee appear to be any requirement that this request be made prior to a referral to the Tribunal. In the absence of notification of appointment to act, it appeared to the Committee that there was potential for the Commissioner to be acting on behalf of an applicant without the knowledge of the respondent.

In respect of applications made under both the *Planning and Development Act 2005* and *Taxation Administration Act 2003*, the Explanatory Memorandum states:

The Rules Committee agreed that this was an appropriate dispensation given the expectation that the State Solicitor will act in such cases.

This may be an expectation of the Tribunal but the Committee queries whether it is one that will necessarily be held by the other party to an application. The Committee is not aware of any requirement that the State Solicitor act in such matters and notes that a decision as to whether government entities will have in-house representation, instruct the State Solicitor's Office or instruct a private law firm may vary with government policy or on a case by case basis.

The Committee notes that section 32 of the *State Administrative Tribunal Act 2004* provides:

(1) The Tribunal is bound by the rules of natural justice except to the extent that this Act or the enabling Act authorises, whether expressly or by implication, a departure from those rules.

The Committee observes that it is an important requirement of natural justice that each party be advised of the case that they must meet. In order to ensure this occurs efficiently, parties are required to advise of the appointment of persons acting for them and provide an address where documents may be served. The requirement that a party be notified of the appointment of a specialist advocate, such as the Commissioner for Equal Opportunity or the State Solicitor, appears to have additional natural justice elements as it alerts the other party to the prospect of legal argument in addition to presentation of the circumstances of the case.

The Committee also queries the impact of these amendments on valid service of documents subsequent to the appointment to act. Rule 34(2) and (3) of the *State Administrative Tribunal Rules*

2004 require service on a legal practitioner/agent in the event of representation. Section 32(3) of the *State Administrative Tribunal Act 2004* provides that the tribunal may receive a document into evidence despite non-compliance with the rules of service. However, this would place a party in the position of having to seek an indulgence, rather than having an automatic right to have documents received and is likely to involve delay and expense.

In respect of service of applications made under subsections 67(1) or (3b)(a) of the *Security and Related Activities (Control) Act 1996*, the Explanatory Memorandum states:

The Rules Committee agreed that this was an appropriate measure given the requirement under this Act to inform the Commissioner of any change of address, which would avoid the use of scarce police resources in searching for licensees who have changed address without any notification.

Notwithstanding the requirement in respect of notification of change of address in the *Security and Related Activities (Control) Act 1996*, the Committee is concerned that removal of the requirement for personal service in respect of the relevant applications may result in a licensee not receiving notice of an application threatening their livelihood. For example, if the licensee is absent from the address for a temporary period, such as a holiday or stay in hospital, which does not require notification of change of address.

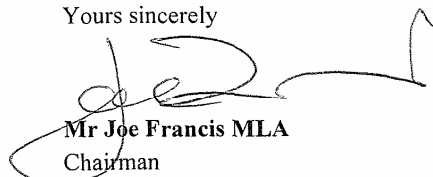
The Committee is concerned that these amendments are not authorised or contemplated by the *State Administrative Tribunal Act 2004* (Term of Reference 3.6(a)), have an adverse effect on existing rights beyond that contemplated by empowering legislation (Term of Reference 3.6(b)) and oust or modify the rules of fairness (Term of Reference 3.6(c)). It enquires the purpose of the *State Administrative Tribunal Act 2004* to which these amendments are directed.

The Committee requires a written response to its concerns by **5pm on Thursday, 2 April 2009**.

In accordance with its usual practice when it considers that it is unlikely to have an opportunity to consider any further information prior to the last date for giving notice of a motion for disallowance of an instrument, the Committee resolved to move a protective notice of motion for disallowance of this instrument. In the event the Committee's concerns are addressed by provision of further information, it will seek leave to withdraw that motion prior to it being debated in the Parliament.

If you have any queries in respect of the matters raised in this letter, please contact the Committee's Advisory Officer (Legal), Ms Susan O'Brien on 9222 7428.

Yours sincerely



Mr Joe Francis MLA
Chairman

Note that this document (including any attachments) is privileged. You should only use, disclose or copy the material if you are authorised by the Committee to do so. Please contact Committee staff if you have any queries.

APPENDIX 3
STATE ADMINISTRATIVE TRIBUNAL LETTER DATED
2 APRIL 2009

APPENDIX 3

STATE ADMINISTRATIVE TRIBUNAL LETTER DATED 2 APRIL 2009



Hon Mr Joe Francis MLA
Chairman
Joint Standing Committee on
Delegated Legislation
Parliament House
PERTH WA 6000

Dear Mr Francis

State Administrative Tribunal Rules Amendment (No 2) 2008

I refer to your letter dated 25 March 2009 to my predecessor, Justice Barker. I make the following comments in response to the issues raised by the Committee.

Dispensation of notices of representation

The requirement for a notice of representation in cases where the representative is not nominated in the application document was introduced by an amendment proposed by the Rules Committee (amended in *Gazette* 13 Apr 2007 p 1684). One object of that amendment was to streamline the process of documents being sent to parties by the Tribunal, so that where a party was represented, the documents would be sent only to the representative and not the party (or, as had occurred, many parties). The amendment was therefore one primarily concerned with the efficient procedures of the Tribunal, and not, as your letter suggests, on the basis that the notices are a requirement of procedural fairness.

The main objective of the amendments to dispense with the notice of representation in the three cases the subject of the rules amendment was to remove what was perceived to be a bureaucratic burden having little or no benefit. This was seen as consistent with the Tribunal's charter under s 9 of the *State Administrative Tribunal Act 2004* (WA). Although it is true that things do not necessarily remain constant, as things currently stand, the Commissioner for Equal Opportunity always provides some preliminary advice, at the very least, when she refers a matter to the Tribunal under s 93 of the *Equal Opportunity Act 1984* (WA), and the Commissioner for Equal Opportunity is always sent a notice of the directions hearing. Similarly, in applications under both the *Planning and Development Act 2005* (WA) and the *Taxation Administration Act 2003* (WA), the State Solicitor is automatically sent a copy of applications and directions hearing notices. These procedures are aimed at streamlining the process in high volume areas, and avoiding an unnecessary and burdensome requirement in each case for a notice to be filed. They were introduced at the request of the departments concerned and the State Solicitor's Office on the basis that the State Solicitor's Office is invariably instructed, and time is saved by

giving that office immediate notice of an application. This avoids delay in dealing with a matter where, as not infrequently occurred, an applicant failed to serve the application promptly or at all.

In nearly all cases where the dispensation arises there will have been correspondence between the parties prior to commencement of the Tribunal proceedings, and the non-government party will be aware that the Commissioner or State Solicitor will be acting. In any case where this is not so, the non-government party will be so apprised at the initial directions hearing held within 2 or 3 weeks of the application being filed or referred.

It is the Tribunal's practice to list all new applications for an initial directions hearing within 2 to 3 weeks of filing. The directions hearing serves the purpose of identifying the issues and determining the most efficient way of proceeding. In the unusual case where an applicant in the three areas identified does not expect representation of the respondent they will know of that at the initial directions hearing. There is no prejudice to an applicant and certainly no denial of procedural fairness in that arrangement.

Service requirements in applications under *Security and Related Activities (Control) Act 1996 (WA)*

The amendment allowing service by post to the last known address of the respondent was agreed by the Rules Committee on the basis of a submission from the Commercial Agents Unit of the Western Australia Police. Specifically, the relaxation of the previous requirement for personal service in relation to applications concerning the licences of persons licensed under the Act was considered reasonable in light of the following:

- Many people working in the security industry do so on a part-time basis and usually as a supplementary income stream. The experience of the police was that it was often necessary to attend the respondent's residence on many occasions to effect service;
- The requirement in these cases for personal service contrasted with the requirement for prosecution notices under the *Criminal Procedures Act 2004*, which are able to be served by ordinary postal service to the defendant's last known residential, work or business address;
- Licensees under the Act are required to advise of a change in residential address within 14 days;
- The ability of a licensee against whom an order is made in his or her absence to obtain a review under s 84 of the *State Administrative Tribunal Act 2004*.

General

Having taken the opportunity provided by your letter to review the Rules Committee's reasons for the amendments in question, I consider that the amendments are certainly capable of justification for the reasons referred to in this letter. In particular, the expressed concern regarding the rules of procedural fairness is in my view misplaced. The notice of representation is not concerned with procedural fairness but with administrative efficiency, and the relaxation of the service requirements under the *Security and Related Activities (Control) Act 1996 (WA)* is a sensible response to the problems experienced with the stricter service requirement, which

was itself inconsistent with the position in criminal matters. Especially having regard to s 84 of the *State Administrative Tribunal Act 2004* (WA) the relaxation of the requirement does not, in effect, have the effect of depriving a respondent under the *Security and Related Activities (Control) Act 1996* (WA) of an opportunity to be heard.

The amendments are entirely consistent with the Tribunal's objectives specified in s 9(b) of the *State Administrative Tribunal Act 2004* (WA).

Please let me know whether the protective notice of motion for disallowance will be withdrawn.

Yours sincerely



Justice John Chaney
PRESIDENT

2 April 2009

APPENDIX 4
COMMITTEE'S LETTER DATED 8 APRIL 2009

APPENDIX 4

COMMITTEE'S LETTER DATED 8 APRIL 2009



JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

Our Ref: 3745/22

Hon Justice John Chaney
President
State Administrative Tribunal
Ground Floor,
12 St Georges Terrace
Perth WA 6000

By facsimile: 9202 1180

8 April 2009

Dear Justice Chaney,

State Administrative Tribunal Rules Amendment (No 2) 2008

I refer to your letter of 2 April 2009, responding to the Joint Standing Committee on Delegated Legislation's letter of 25 March 2009 in respect of this instrument. The Committee had concerns with two aspects of this instrument: dispensation from requirement of notice of representation in respect of certain applications and provision for service of certain applications under the *Security and Related Activities (Control) Act 1996* by post. At its meeting of 8 April 2009, the Committee reached the following conclusions:

Dispensation from requirement of notice of representation

The Committee continued to have reservations as to whether unrepresented persons accessing the State Administrative Tribunal, or responding to an application made by an applicant under the *Equal Opportunity Act 1984* or a government entity under the *Planning and Development Act 2005* or the *Tax Administration Act 2003*, would be disadvantaged in not being aware until attendance at a directions hearing of the appointment of legal practitioners to represent the other party.

However, the Committee accepts your assurance that there is no prejudice flowing from this circumstance and, on the basis of that assurance, resolved that the relevant amendments to the principal regulations did not offend its Terms of Reference.

Service of certain applications under the Security and Related Activities (Control) Act 1996 by post

The Committee acknowledges the practical difficulties that may be experienced in serving applications made pursuant to section 67 of the *Security and Related Activities (Control) Act 1996*. However, the

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Committee notes that in the event service is proving difficult, it is possible in an appropriate case for the Western Australian Police to apply to the Tribunal for an order for postal service.

The Committee notes that a successful application under section 67 has potential to deprive a person of their livelihood. The Committee's Term of Reference 3.6(b) requires it to consider whether a provision in an instrument:

has an adverse effect on existing rights, interests or legitimate expectations beyond giving effect to a purpose authorised or contemplated by the empowering enactment.

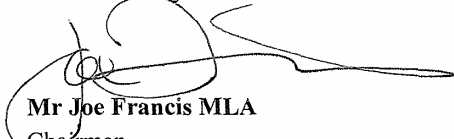
The Committee has a long-standing view that this Term of Reference requires it to consider adverse impact on ability to earn a living. Prior to this instrument, a person had a legal 'right' (founded in the Tribunal's rules) to personal service unless the Tribunal ordered to the contrary. The amendment introduces an element of risk in notification of an application that threatens livelihood, which risk the Committee considers is not authorised or contemplated by empowering legislation.

The Committee was not persuaded that its concerns were met by the prospect of review pursuant to section 84 of the *State Administrative Tribunal Act 2004* or parity with provisions in respect of serving a prosecution notice under the *Criminal Procedure Act 2004*. The Committee observes that section 26 of the *Criminal Procedure Act 2004* requires a prosecution notice to be given to an accused on request, but by sections 28 to 31 an accused who is not a corporation is to be made aware of a prosecution by way of summons, hearing notice or arrest. A summons must be served personally; a hearing notice may be served personally or by post. Section 10 permits service of infringement notices by post. The Committee was of the view that the service requirements in respect of the more serious offences not warranting arrest were a better analogy for an application that had potential to impact on livelihood than those in respect of less serious offences and infringement notices.

The Committee remains of the view that regulation 5 of the *State Administrative Tribunal Rules Amendment (No 2) 2008* is not contemplated by the *State Administrative Tribunal Act 2004* and also offends against its Term of Reference 3.6(b). The Committee requires an undertaking that this provision will be repealed and will not be relied upon in the interim. In accordance with its usual practice, the motion for disallowance will be withdrawn by the Committee upon receipt of the required undertaking.

Your written undertaking is required by **5pm on Wednesday, 28 April 2009**. If you have any queries, please contact the Committee's Advisory Officer (Legal), Ms Susan O'Brien, on 9222 7428.

Yours sincerely



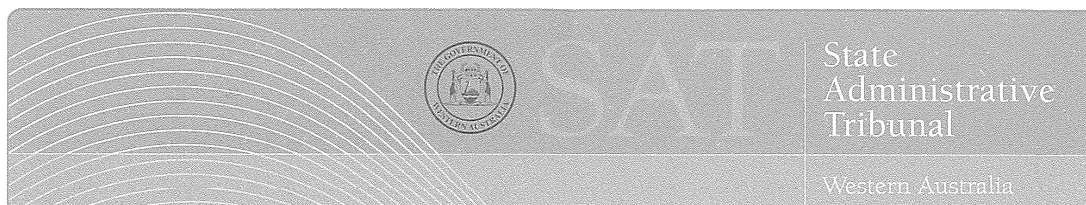
Mr Joe Francis MLA
Chairman

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APPENDIX 5
STATE ADMINISTRATIVE TRIBUNAL LETTER DATED
6 MAY 2009

APPENDIX 5

STATE ADMINISTRATIVE TRIBUNAL LETTER DATED 6 MAY 2009



President's Chambers	Level 4, 12 St Georges Terrace	Telephone 08 9219 3096
State Administrative Tribunal	PERTH Western Australia 6000	Facsimile 08 9202 1180

Hon Mr Joe Francis MLA
Chairman
Joint Standing Committee on
Delegated Legislation
Parliament House
PERTH WA 6000

Dear Mr Francis

State Administrative Tribunal Rules Amendment (No 2) 2008

I refer to recent correspondence and in particular my letter dated 20 April 2009.

I apologise that I have not been able to report to you further prior to 28 April 2009.

The Rules Committee has now met to consider the matters raised by you. The Committee noted the concerns expressed by the Joint Standing Committee but, for the reasons expressed in my letter to you of 2 April 2009, did not consider that repeal of the rule was an appropriate course. It resolved, however, that I should speak to the representative of the Commissioner who regularly appears on security agent's matters in the Tribunal to ascertain whether the problems which first prompted the Commissioner to seek an amendment to the Rules in 2007 remained as much of concern now as they were when the request was made. I have since spoken to the Commissioner's representative, who has advised that up until the Rule was changed, considerable police resources were being expended on attempts to locate and personally serve respondents. He indicated that the transient nature of many of the participants in the security industry frequently led to difficulties with service. Frequently, when service is ultimately affected, the respondent took no part in the proceedings. He was anxious that the amendment be maintained.

The Committee obviously accept that it is a decision for Parliament as to whether the Rule should remain or be disallowed, and we will await your advice as to the outcome of the motion for disallowance in due course.

Yours sincerely

Justice John Chaney
PRESIDENT

6 May 2009