SECOND SESSION OF THE THIRTY-SIXTH PARLIAMENT

REPORT OF THE
STANDING COMMITTEE ON PUBLIC
ADMINISTRATION AND FINANCE
IN RELATION TO THE

ECONOMIC REGULATION AUTHORITY BILL 2002

Presented by Hon Barry House MLC (Chairman)

Report 3
May 2003

STANDING COMMITTEE ON PUBLIC ADMINISTRATION AND FINANCE

Date first appointed:

May 24 2001

Terms of Reference:

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

"**2. Public Administration and Finance Committee**

2.1 A Public Administration and Finance Committee is established.

2.2 The Committee consists of 7 members.

2.3 The functions of the Committee are -

(a) to inquire into and report on the structure, efficiency, effectiveness, and economic management of the system of public administration;

(b) to consider and report on any bill or other matter referred by the House;

(c) to inquire into and report on practice or procedure applicable or relating to administrative acts or decisions (either generally or in a particular case without inquiring into or reporting on the merits of the case);

(d) to inquire into and report on the existence, adequacy, or availability, of merit and judicial review of administrative acts or decisions;

(e) to consult regularly with the Parliamentary Commissioner for Administrative Investigations, the Auditor General, the Public Sector Standards Commissioner, the Information Commissioner, and any person holding an office of a like character.

2.4 Subject to subclause 2.3 (b), the following are excluded from inquiry by the Committee -

(a) the Governor's establishment;

(b) the constitution and administration of Parliament;

(c) the operations of the Executive Council;

(d) a decision made by a person acting judicially;

(e) a decision made by a person to exercise, or not exercise, a power of arrest or detention."

Members as at the time of this inquiry:

Hon Barry House MLC (Chairman)
Hon Ed Dermer MLC (Deputy Chairman)
Hon Murray Criddle MLC
Hon Sue Ellery MLC
Hon John Fischer MLC
Hon Dee Margetts MLC
Hon Ken Travers MLC
Hon George Cash MLC (participating member)

Staff as at the time of this inquiry:

Paul Grant, Advisory Officer (Legal)
Denise Wong, Advisory Officer (Legal)
Sarah Kearney, Committee Clerk

Address:

Parliament House, Perth WA 6000, Telephone (08) 9222 7222
Website: http://www.parliament.wa.gov.au

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List of Abbreviations

Authority	Economic Regulation Authority
Bill	Economic Regulation Authority Bill 2002
Committee	Standing Committee on Public Administration and Finance
EC Act	*Energy Coordination Act 1994* (WA)
ERIC	Economic Regulator Implementation Committee
ESC Act	*Essential Services Commission Act 2001* (Vic)
First Treasury Response	letter from Department of Treasury and Finance to the Standing Committee on Public Administration and Finance, May 9 2003, including attachments
GPA Act	*Gas Pipelines Access (Western Australia) Act 1998* (WA)
IIR Act	*Independent Industry Regulator Act 1999* (SA) (repealed)
IPART Act	*Independent Pricing and Regulatory Tribunal Act 1992* (NSW)
RA Act	*Railways (Access) Act 1998* (WA)
regulated industries	gas, rail, water and electricity industries
Second Treasury Response	letter from the Department of Treasury and Finance to the Standing Committee on Public Administration and Finance, May 16 2003, including attachments, and further information from the Department of Treasury and Finance to the Standing Committee on Public Administration and Finance, May 19 2003
Task Force	Machinery of Government Task Force established in March 2001
Treasury	Department of Treasury and Finance
Treasury Submission	submission from Department of Treasury and Finance to Standing Committee on Public Administration and

Finance, April 30 2003

WSC Act	*Water Services Coordination Act 1995* (WA)

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EXECUTIVE SUMMARY AND RECOMMENDATIONS

EXECUTIVE SUMMARY

1 The Economic Regulation Authority Bill 2002 (**Bill**) was referred by the Legislative Council to the Standing Committee on Public Administration and Finance (**Committee**) on Thursday, April 10 2003, for report by not later than May 16 2003.

2 Pursuant to the Committee's request, the Legislative Council, on May 13 2003, granted an extension of time within which to report on the Bill from May 16 2003 to June 10 2003.

3 The intent of the Bill, as outlined in the Second Reading speech, is to combine existing regulatory and licensing functions in the gas, rail, water and ultimately the electricity industries, which are currently spread across a number of regulators, Ministers and public sector officials, into one, independent body, to be known as the Economic Regulation Authority (**Authority**). This transfer in functions has been achieved largely through consequential amendments to existing Acts. The Bill is intended to implement institutional change and achieve a more appropriate separation of economic regulation from policy-making, rather than effecting significant changes to current regulatory policy settings to achieve the Government's objectives.

4 As the Bill was referred to the Committee prior to the conclusion of the Second Reading stage, the Committee has considered the purpose of the Bill in its inquiry. As a result of consultation with both the public and the Department of Treasury and Finance, the Committee has considered, among other things, the following issues:

- inquiry and reporting power of the Authority;
- cost recovery funding;
- environmental, social welfare and equity concerns;
- the insertion of an objectives clause;
- the definition of 'public interest';
- the allocation of Ministerial responsibilities;
- the Authority's independent licensing function;
- the Authority's lack of ability to set retail prices;

- the interplay of the Authority's role in economic regulation and its assistance with policy-making;
- policy direction for the Authority;
- the Authority's accountability to the Parliament and the Government;
- consumer representation in the process of economic regulation;
- review of the existing regulatory and licensing regimes;
- how the Authority meets best practice regulatory principles; and
- the appointment of alternate members of the governing body of the Authority.

5 In addition, the Committee considered the Bill in light of certain legislative scrutiny principles.

6 The Committee supports the general principles of the Bill, but notes that a number of Committee members may seek to have amendments passed if they consider such amendments appropriate, after having heard explanations given by the Minister to the matters raised in this report.

RECOMMENDATIONS

7 Recommendations are grouped as they appear in the text at the page number indicated:

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Recommendation 1: The Committee recommends that the Economic Regulation Authority Bill 2002 be passed.

CHAPTER 1
INTRODUCTION

REFERENCE AND PROCEDURE

1.1 The long title of the Economic Regulation Authority Bill 2002 (**Bill**) is as follows:

> *A Bill for*
>
> *An Act to establish the Economic Regulation Authority with inquiry, reporting, access regulation, licensing and other functions in respect of certain industries, to make consequential and other amendments to various Acts, and for related purposes.*

1.2 The Bill was referred to the Standing Committee on Public Administration and Finance (**Committee**) on Thursday, April 10 2003, on a motion by Hon Nick Griffiths MLC, Minister for Racing and Gaming, in the following terms:

> *That the Economic Regulation Authority Bill 2002 be discharged and referred to the Standing Committee on Public Administration and Finance and is to report to the House not later than 16 May 2003.*[1]

1.3 Pursuant to the Committee's request, the Legislative Council, on May 13 2003, granted an extension of time within which to report on the Bill from May 16 2003 to June 10 2003.

1.4 As the Bill was referred to the Committee prior to the conclusion of the Second Reading stage, the Committee has considered the purpose of the Bill in its inquiry.

1.5 On April 15 2003 and April 17 2003, the Committee sent letters to approximately 115 parties that the Committee considered would be interested in the Bill. The Committee invited their written submissions on matters relating to the scope, purpose and structure of the Bill, and invited them to register their interest in appearing before the Committee. These parties consisted of government agencies, industry associations, resource providers and users, unions, environmental groups, community groups and other individuals and organisations. A list of the interested parties that were contacted by the Committee is attached to this report as **Appendix 1**.

1.6 The Committee publicly invited written submissions and the registration of interest in appearing before the Committee regarding the scope, purpose and structure of the Bill by advertisement in *The West Australian* newspaper on April 16 2003.

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[1] Western Australia, *Parliamentary Debates (Hansard)*, Legislative Council, April 10 2003, 6545.

1.7 Given the reporting date of May 16 2003, the deadline for lodging all written submissions was set at 5:00pm on April 30 2003, although several submissions that were received after the deadline were accepted by the Committee. In response to the above invitations, the Committee received a total of 28 written submissions from the stakeholders[2] listed in **Appendix 2** of this report. The submission from the Department of Treasury and Finance, April 30 2003 (**Treasury Submission)** is attached to this report as **Appendix 3**. The Committee resolved to make all of these submissions public and copies of submissions may be obtained by contacting Ms Sarah Kearney, Committee Clerk, Standing Committee on Public Administration and Finance, Parliament House, Perth WA 6000, Telephone (08) 9222 7300, Facsimile (08) 9222 7805.

1.8 On May 5 2003, the Committee conducted a public hearing with the following officers from the Department of Treasury and Finance (**Treasury**):

- Mr Mark Altus, Acting Executive Director (Economic);
- Mr Michael Court, Acting Assistant Director Competition Policy; and
- Ms Kristy Eastaugh, Policy Officer.

1.9 During the Committee's inquiry into the Bill, it became apparent that many issues identified by the written submissions required a response from Treasury. The issues raised in the written submissions received from the following stakeholders were considered by the Committee to be representative of the key issues raised in all of the written submissions it had received:

- Australian Pipeline Industry Association;
- Conservation Council of Western Australia;
- Chamber of Commerce and Industry of Western Australia;
- CMS Energy Gas Transmission Australia;
- Western Power;
- WestNetRail; and
- The Western Australian Council of Social Service Incorporated.

1.10 The Committee wrote to Treasury on May 5 2003 enclosing the above submissions and requesting a response to the issues that they raised. The Committee received a

[2] For the purposes of this report, the term 'stakeholders' refers to those parties who provided the Committee with written submissions regarding the Bill.

reply from Treasury on May 9 2003 (**First Treasury Response**), a copy of which is attached to this report as **Appendix 4**.

1.11 After further consideration, the Committee again wrote to Treasury on May 12 2003 enclosing a further three submissions from:

- the Community and Public Sector Union/SPSF Group WA Branch/Civil Service Association of WA;
- the Department of Health; and
- Unions WA.

The Committee also forwarded a list of questions seeking further information on various additional matters. A copy of Treasury's responses, dated May 16 2003 and May 19 2003 to these submissions and the list of questions (**Second Treasury Response**) is attached to this report as **Appendix 5**.

1.12 The Committee has reviewed the written submissions received, the transcript of the hearing with Treasury, and the two responses provided by Treasury.

1.13 The Committee appreciated Treasury's prompt and detailed responses. The Committee also thanks the individuals and organisations that provided evidence and information to the inquiry, particularly in view of the available timeframes.

1.14 The Committee also acknowledges the services of Hansard in the transcription of evidence gathered by the Committee.

BACKGROUND

1.15 According to the Second Reading of the Bill by the Minister for Racing and Gaming, the principal purpose of the Bill is to achieve a more cohesive and efficient regulatory framework for the gas, rail, water and ultimately, the electricity industries. It is aimed at providing an institutional environment that promotes consistent regulatory outcomes across these key utility industries, and which can respond to changing regulatory needs.[3]

1.16 The current Government's aim of establishing a multi-industry regulator was a central feature of its pre-election electricity reform policy statement.[4] The Task Force that was established in March 2001 to review the machinery of Western Australia's Government (**Task Force**) reached a similar view:

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3 Western Australia, *Parliamentary Debates (Hansard)*, Legislative Council, March 18 2003, 5432.

4 Treasury Submission, April 30 2003, 1.

> ***Recommendation 44:*** *A statutory position of "Economic Regulator" should be established to regulate the water, rail, gas and, when reform is complete, electricity industries.*[5]

1.17 The Task Force found that the current regulatory frameworks for these key utility industries was fragmented and administered by a disparate range of Ministers, sector-specific regulators, and public sector officials.[6] It recommended the establishment of a single economic regulator *"…in order to consolidate scarce expertise, promote transparent regulation, achieve operating synergies and recognise the importance of efficient investment and pricing".*[7] More specifically, the Task Force also recommended that the Economic Regulator assume the following functions:

- determine third party access arrangements for significant economic infrastructure, including making determinations on access price and terms of access;
- make recommendations to Government about tariffs and charges for essential services and other referred matters;
- enforce legislation and regulations relating to prices and standards of service;
- issue and enforce industrial licences to supply certain goods and services (such as licences including conditions in relation to prices, service guarantees and standards); and
- conduct inquiries and research into matters referred to it by Government (for example, advising Government on the cost of community service obligations or to conduct price monitoring).[8]

1.18 The Government accepted all of the recommendations that were made by the Task Force[9] and this Bill represents the Government's implementation of Recommendation 44 for the gas, rail, water and ultimately, the electricity industries (**regulated industries**)[10].

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5 The Machinery of Government Task Force, *Government Structures for Better Results*, Ministry of the Premier and Cabinet, Perth, June 2001, 204.

6 See n 5.

7 See n 5.

8 See n 5.

9 Treasury Submission, 1.

10 As per the definition of 'regulated industry' in clause 3 of the Bill.

1.19 The Economic Regulator Implementation Committee (**ERIC**) was convened to oversee the creation of the Economic Regulator and was assisted by industry-specific working groups. In performing this task, the ERIC was guided by:

- primarily, the existing regulatory arrangements in Western Australia, especially the *Gas Pipelines Access (Western Australia) Act 1998* (**GPA Act**) and the *Railways (Access) Act 1998* (**RA Act**), which have already established independent economic regulators in the respective industries;

- the existing licensing arrangements in Western Australia provided for by the *Energy Coordination Act 1994* (**EC Act**) (gas industry licensing) and the *Water Services Coordination Act 1995* (**WSC Act**) (water industry licensing); and

- regulatory frameworks used in other Australian jurisdictions, such as those provided for in the *Independent Pricing and Regulatory Tribunal Act 1992* (NSW) (**IPART Act**), the *Essential Services Commission Act 2001* (Vic) (**ESC Act)**, and the now repealed *Independent Industry Regulator Act 1999* (SA) (**IIR Act**).[11]

1.20 Before finalising the Bill, the ERIC undertook a two-stage public consultation process that began in February 2002. This involved a media statement from Hon Eric Ripper, Treasurer, the release of a public consultation paper, a formal response to submissions, follow-up presentations upon request from interested stakeholders, an advanced draft of the Bill, and ongoing briefings. More detailed information regarding the steps taken by the ERIC to consult the public is available at page 5 of the Treasury Submission and page 3 of the First Treasury Response.

1.21 The Bill is intended to implement institutional change and achieve a more appropriate separation of economic regulation from policy-making, rather than effecting significant changes to current regulatory policy settings to achieve the Government's objectives.[12] It will combine existing regulatory and licensing functions spread across a number of regulators, Ministers and public sector officials, into one, independent body, to be known as the Economic Regulation Authority (**Authority**). This transfer in functions has been achieved largely through consequential amendments to existing Acts. While the Bill will make significant administrative changes, it does not seek to make any significant changes to the existing regulatory or licensing regimes. Such

11 Treasury Submission, 1; *Transcript of Evidence*, Mr Michael Court, Acting Assistant Director Competition Policy, Department of Treasury and Finance, Perth, May 5 2003, 8; the First Department Response, Attachment B.

12 Treasury Submission, 1; Western Australia, *Parliamentary Debates (Hansard)*, Legislative Council, March 18 2003, 5433; *Economic Regulation Authority Bill 2002 Explanatory Memorandum*, 1.

changes to the regulatory or licensing regimes will be the subject of industry-specific reviews that are mandatory under the current Acts.[13]

1.22 By way of summary, the Bill will establish the Authority and provide it with the following roles:

- the regulation of third party access to gas pipelines and railways, which is currently being performed by the Western Australian Independent Gas Pipelines Access Regulator and the Western Australian Independent Rail Access Regulator.[14] If the Government accepts the recent recommendations of the Electricity Reform Task Force,[15] it is anticipated that the Authority will also assume the role of an electricity access regulator;

- industrial gas licensing,[16] which is currently being administered independently by the Coordinator of Energy,[17] and the enforcement of these licences,[18] which is currently performed by the Minister for Energy.[19] It should be noted however, that these functions will only be transferred to the Authority on a future date to be proclaimed.[20] This date is expected to coincide with the commencement of full retail contestability of the gas market, which is scheduled for the second half of 2003[21] or early 2004[22];

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13 Treasury Submission, 3; First Department Response, 7; see section 88 of the GPA Act, section 12 of the RA Act, section 62 of the WSC Act and section 27 of the EC Act.

14 For the transfer of the gas access regulation function see clause 25(c) of the Bill. For the transfer of the rail access regulation function see clause 25(d) and Schedule 2 Division 12 (Item 55 in particular) of the Bill. These two roles are already exercised by one person: Transcript of Evidence, Mr Michael Court, Acting Assistant Director Competition Policy, Department of Treasury and Finance, Perth, May 5 2003, 12.

15 Electricity Reform Task Force, *Electricity Reform in Western Australia 'A Framework for the Future'*, October 2002, 46 and recommendation 79.

16 See clause 25(b) of the Bill.

17 Sections 6(aa) and 10(1a) of the EC Act.

18 See Schedule 2 Division 4 (Item 24 in particular) of the Bill.

19 Part 2A Division 7 of the EC Act.

20 See clause 2(3) of the Bill; Western Australia, *Parliamentary Debates (Hansard)*, Legislative Council, March 18 2003, 5433; *Economic Regulation Authority Bill 2002 Explanatory Memorandum*, 2.

21 Western Australia, *Parliamentary Debates (Hansard)*, Legislative Council, March 18 2003, 5433; *Economic Regulation Authority Bill 2002 Explanatory Memorandum*, 2.

22 Second Treasury Response, Attachment A, 5-6, at question number 6.

- industrial water licensing,[23] which is currently being administered by the Coordinator of Water,[24] and the enforcement of these licences,[25] which is currently performed by the Minister for Environment and Heritage;[26]

- if the Government accepts the recent recommendations of the Electricity Reform Task Force,[27] it is anticipated that the Authority will also assume the role of an electricity licensing body; and

- an inquiry and reporting function on matters referred by the Treasurer.[28]

23 See clause 25(e) of the Bill.

24 Section 5(a) of the WSC Act.

25 See Schedule 2 Division 18 (Item 115 in particular) of the Bill.

26 Part 3 Division 7 of the WSC Act.

27 Electricity Reform Task Force, *Electricity Reform in Western Australia 'A Framework for the Future'*, October 2002, 46.

28 Part 5 of the Bill.

CHAPTER 2
KEY ISSUES

OVERVIEW

2.1 This chapter provides a discussion of what the Committee considers to be key issues raised during the inquiry. It is not intended to be an exhaustive discussion of all the issues that were raised.

RESPONSE TO THE ESTABLISHMENT OF THE AUTHORITY AND THE BILL

2.2 Of the twenty-eight written submissions received by the Committee, a number of stakeholders expressed support for the passing of the Bill in its current format. Reasons include the following:

- clear separation of economic regulation and policy-making functions;
- consistent application of regulation across the regulated industries, while maintaining the existing industry-specific regulatory policy settings;
- consolidation of regulatory skills and support staff into one body;
- reduction in duplication across the existing agencies. For example, one person is currently appointed as both the Western Australian Independent Gas Access Regulator and the Western Australian Independent Rail Access Regulator, due to the difficulty in locating appropriately experienced and qualified regulators. This person must currently divide his time between two offices;
- increased efficiency in the administration of regulatory services;
- increased openness and transparency in the regulation of the regulated industries;
- implementation of best practice regulatory principles that have already been put into practice in other jurisdictions;
- reduction in the risk of regulatory capture by the industry that is being regulated; and
- increased ability to respond to regulatory changes. For example, the Authority would be well placed to receive the functions of electricity access regulation and licensing, following the anticipated reform of the electricity industry, and to respond to the emergence of multi-industry providers.

2.3 Some stakeholders supported the passage of the Bill but raised issues regarding the Bill's framework. Other stakeholders opposed the passage of the Bill in its present format. Issues raised by these stakeholders are discussed in this chapter and Chapter 3.

2.4 A number of the issues raised did not fall within the scope, purpose or structure of the Bill.

INQUIRY AND REPORTING POWER OF THE AUTHORITY

2.5 Under Part 5 Divisions 1 and 2 of the Bill, the Authority will be provided with the power to inquire into and report on matters that are referred by the Treasurer.[29] These referrals may relate to a matter in the regulated industries (except for the gas and rail access industries)[30] or a non-regulated industry.[31] The scope of these referrals will be limited to the matters listed in clause 32(2) of the Bill and the inquiry and reporting process will be restricted by the terms of reference that are specified by the Treasurer. The Government will then consider the reports resulting from this process and will have the discretion to act on any of the recommendations that are made.[32]

2.6 Matters pertaining to the gas and rail access industries have been expressly excluded from this inquiry and reporting power,[33] as they are regulated under the GPA Act and the RA Act, respectively. These two Acts implement agreed national codes of regulation and the Committee was advised that it would not be appropriate to introduce these functions into the role of the Authority on a state level without national agreement.[34]

Transparency in Referral

2.7 Some stakeholders voiced concern that while the terms of reference for inquiries into the regulated industries must be published by the Authority in the *Government Gazette*, in a state newspaper and on the Internet,[35] there is no similar obligation to do so for terms of reference regarding non-regulated industries.[36] Given the Authority's stated independence from the Government, the stakeholders considered it crucial that all of the processes of the Authority are open and transparent.

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29 Refer to discussion in paragraph 2.28.

30 Part 5 Division 1 of the Bill.

31 Part 5 Division 2 of the Bill.

32 Treasury Submission, 4.

33 Clause 32(1) of the Bill.

34 First Treasury Response, 4.

35 Clause 34(1) of the Bill.

36 Clause 40 of the Bill.

2.8 The terms of reference will essentially dictate parameters for the Authority's activities during an inquiry and/or reporting process. For example, they may restrict the Authority to a certain nature and degree of public consultation, and they may impose a reporting date.[37] Some of the submissions received by the Committee have indicated that the public would like to be informed of the powers, goals and restrictions that have been set for the Authority when it is inquiring into and/or reporting on a referred matter.

2.9 The Committee raised this issue with Treasury and has considered its reply, which appears in the Second Treasury Response, Attachment A, pages 3 to 4, at question number 2.

Transparency in Reporting

2.10 Several stakeholders also expressed concern that while a report on an inquiry into a regulated industry must be tabled in Parliament,[38] a report into a non-regulated industry is not required to be made public.[39]

2.11 The Committee raised this issue with Treasury and has considered its reply, which appears in the Second Treasury Response, Attachment A, page 4, at question number 3.

COST RECOVERY FUNDING VS CONSOLIDATED FUNDING

2.12 Clauses 61(2) and (3) of the Bill empower the Governor to make regulations that either set a fee or a charge or that provide for a method of calculating a fee or charge, in connection with the performance of the Authority's function. The Government has indicated that this ability to make regulations will be used so as to allow for the Authority to recover its costs of providing regulatory services to the regulated industries, although currently, this cost recovery method of funding only exists in the gas access industry.[40]

Gas Access Industry

2.13 A number of stakeholders, particularly those involved in the gas access industry, have indicated that they believe cost recovery is unfair, inappropriate and lacks transparency. They consider consolidated funding to be far more appropriate. Their arguments are centred on the concern that the industry participants, who are primarily

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37 Clauses 32(4) and 38(4) of the Bill.

38 Clause 36(3) of the Bill.

39 Clause 42(4) of the Bill.

40 See section 5 of the *Gas Pipelines Access (Western Australia) (Funding) Regulations 1999*; Western Australia, *Parliamentary Debates (Hansard)*, Legislative Council, March 18 2003, 5433.

responsible for the regulatory fees, will not be able to pass this additional cost onto its customers, who will ultimately benefit from the Authority's regulation. This, in turn, may discourage potential investors to enter the regulated industries and cause existing participants to leave the industry.

2.14 Some submissions claimed that the actual regulatory charges are difficult to recover from customers due to the fact that the customers are charged according to forecast costs over the access period, which may or may not be accurate. This process has tended to result in the under recovery of actual costs in the gas access industry.

2.15 The Committee refers to pages 10 to 11 of the First Treasury Response and page 9 of the Treasury Submission. While not all members of the Committee fully agree with the arguments for cost recovery, the Committee acknowledges that this is the current method of funding that is employed by the gas access industry. Since the purpose of the Bill is to implement institutional change, the Committee's view is that it would be inappropriate for the Bill to alter this existing arrangement.

Other Regulated Industries

2.16 Cost recovery has not yet been proposed for any other function that the Authority may conduct.[41] However, the Committee notes that the current wording of clauses 61(2) and (3) provide for all of the Authority's roles that are permitted by the Bill, to be funded through cost recovery.

2.17 A number of stakeholders have put forward an argument that the benefits of economic regulation are enjoyed by the community at large, not just the customers of the regulated participants, and that therefore, the costs of such regulation should be borne by the whole of society. The Committee was informed[42] that the practice in other jurisdictions, such as the Commonwealth, Queensland, New South Wales and Victoria, is for economic regulators to be funded from consolidated revenue. However, it should be noted that in some of these jurisdictions, higher licence fees apply[43].

2.18 Some stakeholders have also stated that they are concerned that cost recovery funding may lead to inefficiencies on the part of the Authority, as it will be given no incentive to minimise its costs when it can simply recoup those costs from its customers.

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41 First Treasury Response, 10; Second Treasury Response, Attachment A, 10, at question number 11; Transcript of Evidence, Mr Michael Court, Acting Assistant Director Competition Policy, Department of Treasury and Finance, Perth, May 5 2003, 15; The Economic Regulator Implementation Committee, Department of Treasury and Finance, *Economic Regulation Authority Public Consultation Paper*, February 2002, 31.

42 AlintaGas, Submission number 10, April 30 2003, 2-3.

43 First Treasury Response, 10 to 11.

2.19 The Committee notes the stakeholders' concerns with regard to the potential spread of the cost recovery method of funding into other regulated industries. However, it is satisfied that such an extension can only be brought about by regulations, which will be subject to parliamentary scrutiny by the gazettal, tabling and disallowance procedures in Part VI of the *Interpretation Act 1984* (WA).

ENVIRONMENTAL, SOCIAL WELFARE AND EQUITY CONCERNS

2.20 A number of stakeholders indicated that they are concerned about the lack of a requirement for the Authority to consider environmental, social welfare and equity factors when undertaking its roles in gas and rail access regulation, gas and water industry licensing, and inquiry and reporting. Some of these stakeholders also suggested that the qualifications of the members should include experience in social and environmental policy setting. In this regard, the Committee refers to pages 7 to 8 of the Treasury Submission, pages 5 to 7 of the First Treasury Response, and the Second Treasury Response, Attachment A, pages 2, 3, 6 and 7, at questions number 1 and 7.

2.21 The Committee acknowledges that it is not the intent of the Bill to establish the Authority as a body with specific expertise in environmental, social welfare and equity concerns. Such expertise already exists in Government departments and statutory authorities, and can be relied upon by the Authority when the need arises.[44] Despite this, the Committee notes that the Bill will introduce 'environmental considerations' and 'social welfare and equity considerations' as factors that may be considered by the Authority when deciding to grant, transfer, renew or amend operating licences under the WSC Act.[45] Such factors should already be considered when a decision is made to grant, transfer, renew or amend gas industry licences under the EC Act.[46]

2.22 The Committee also notes that it would be inappropriate for the Bill to alter the factors that must be considered when regulating gas and rail access under the GPA Act and the RA Act, respectively.[47] The Authority will be guided by its terms of reference when exercising its inquiry and reporting power.

OBJECTIVES CLAUSE

2.23 The Committee received some written submissions that expressed a need for a clause to clearly define the Authority's objectives. For example, two stakeholders submitted that it would be important to include the encouragement of efficient investment in essential infrastructure and long term investment as clear objectives of the Authority.

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44 Refer to discussion in paragraph 2.39.

45 Schedule 2 Items 93, 94, 96, 97, 98 and 99 of the Bill.

46 Sections 11H and 11K of the EC Act.

47 Refer to discussion in paragraph 2.6.

In this regard, the Committee has considered the advice provided in pages 4 to 5 of the First Treasury Response and at question 15 on pages 12 and 13 of the Second Treasury Response.

DEFINITION OF 'PUBLIC INTEREST' IN CLAUSE 26(1)(G)

2.24 Clause 26(1)(g) of the Bill provides that in performing its functions in gas and water industry licensing, the Authority must have regard to, among other things, *"…the need to promote regulatory outcomes that are in the public interest"*. The functions of regulating gas and rail access pursuant to the GPA Act and the RA Act, respectively, are expressly excluded from clause 26(1) of the Bill, and the Authority's inquiry and reporting power will be restricted by its terms of reference. A number of stakeholders have submitted that the term 'public interest' should be further defined, either in the Bill or by guidelines issued by the Government.

2.25 After considering the Second Treasury Response, Attachment A, pages 2, 3 and 16, at questions number 1 and 22, the Committee notes that 'public interest criteria' that may be considered by the Authority in:

- gas industry licensing, already exist in the EC Act;[48] and
- water industry licensing, will be introduced by the Bill into the WSC Act.[49]

2.26 The Committee notes further, that clause 26(3) of the Bill provides that nothing in clause 26(1) *"…limits a provision of another written law that requires the Authority, in performing a particular function, to have regard to, or take into account, particular objectives, considerations or other matters."*

MINISTERIAL RESPONSIBILITIES

2.27 Some written submissions received by the Committee indicated that there is a general confusion over ministerial responsibility in the regulated industries, and how those responsibilities will be affected by the passage of the Bill.

2.28 The term 'Minister' is not defined in the Bill. However, sections 5 and 12 of the *Interpretation Act 1984* (WA) provide that a reference to 'the Minister' in an Act is to be interpreted *"…as a reference to the Minister of the Crown to whom the administration of the Act, or the provision of the Act, in which or in respect of which the term is used, is for the time being committed by the Governor"*. The Committee

48 Sections 11H and 11K.

49 Schedule 2 Items 93, 94, 96, 97, 98 and 99 of the Bill.

understands that the administration of the Bill, if passed by the Parliament, will be committed to the Treasurer.[50]

2.29 For an indication of the allocation of ministerial responsibility in the regulated industries after the passage of the Bill, the Committee refers to pages 5 to 6 of, and the Attachment to, the Treasury Submission, and pages 12 to 14 of the First Treasury Response. The Committee understands that these allocations reflect the recommendations of the Task Force.[51]

INDEPENDENCE AND LICENSING

2.30 A number of stakeholders submitted that the relevant industry Minister, rather than the Authority, should be the gas and water licensing authority. In this regard, the Committee refers to page 9 of the First Treasury Response.

LACK OF ABILITY TO SET RETAIL PRICES

2.31 It was argued by some stakeholders that if the Authority has the ability to influence the gas and rail access tariffs, and has the responsibility for ensuring service quality, it should also have the ability to determine the retail prices of goods and services provided by the regulated industries. The Committee was informed[52] that the practice in other jurisdictions, such as South Australia, Victoria, the United Kingdom, and to a lesser extent, New South Wales, is for the economic regulator to be responsible for determining prices.

2.32 The Committee acknowledges that it is the Government's policy to retain retail price-setting powers to ensure that it keeps direct control over the social welfare and equity issues associated with pricing.[53] For example, community service obligations, such as water rebates for pensioners will continue to be determined by the relevant Minister.[54]

ROLES OF REGULATION AND ASSISTANCE IN POLICY-MAKING

2.33 While many stakeholders recognised and supported one of the Bill's main aims of separating economic regulation from policy-making,[55] there were a number of stakeholders who voiced concern over the inquiry and reporting function of the Authority. They perceived this function to be the Authority's potential policy

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50 First Treasury Response, 12; the Treasury Submission, 5.

51 See n 50.

52 Western Power, Submission number 18.

53 First Treasury Response, 6.

54 See n 52.

55 Treasury Submission, 1; Western Australia, *Parliamentary Debates (Hansard)*, Legislative Council, March 18 2003, 5433; *Economic Regulation Authority Bill 2002 Explanatory Memorandum*, 1.

advisory role, and were concerned that there is the possibility for conflict between that role and the Authority's regulatory role. For example, the Treasurer may refer the pricing policy in respect of water services to the Authority for inquiry.[56] The stakeholders are concerned that such a referral may result in a situation where the Authority will in effect be advising the Government on water services policy, which it may also ultimately be implementing and enforcing.

2.34 The Committee reiterates that the Bill seeks to transfer only the existing:

- regulatory functions of the Western Australian Independent Gas Access Regulator[57] and the Western Australian Independent Rail Access Regulator;[58]
- licensing functions of the Coordinator of Energy (gas)[59] and the Coordinator of Water Services;[60] and
- licence enforcement functions of the relevant Ministers,

to the Authority.

2.35 In addition to these regulatory and licensing functions, the Authority is:

- provided with inquiry and reporting functions;[61] and
- imposed with the obligation to monitor the gas and water industry licensing schemes,[62]

for the purpose of providing the Government, via the relevant Ministers, with the necessary information that it requires in setting policy[63].

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56 Clause 32(2)(a) of the Bill.

57 Section 25(c) of the Bill.

58 Section 25(d) of the Bill.

59 See section 25(b) and Schedule 2 Items 10 and 13 of the Bill.

60 See section 25(e) and Schedule 2 Item 92 of the Bill.

61 Part 5 of the Bill.

62 See Schedule 2 of the Bill, Item 13 with respect to gas industry licensing, and Item 92 with respect to water industry licensing.

63 Treasury Submission, 4; First Treasury Response, 6 and 10; Second Treasury Response, Attachment A, 7, at question number 8; Western Australia, *Parliamentary Debates (Hansard)*, Legislative Council, March 18 2003, 5433.

2.36 The Committee notes the recommendations contained in 36th Report of the Standing Committee on Government Agencies.[64]

POLICY DIRECTION

2.37 A number of stakeholders submitted that the Authority will not be subject to adequate policy direction from the Government, and that they were concerned that the Authority may be able to perform its functions in direct conflict with the policy settings in place for each regulated industry. Some of these stakeholders went as far as to suggest that the Government should have the ability to issue directions to the Authority. The Committee raised this issue with Treasury and has considered its reply, which appears in the Second Treasury Response, Attachment A, pages 8 to 10, at question number 9.

2.38 The Committee acknowledges that one of the main aims of the Bill is to appropriately separate economic regulation from policy-making.[65] However, the Committee notes that the relevant Ministers will retain the ability to set the regulatory rules and standards that the Authority will administer.[66] The Bill will introduce the *"…policy objectives of government in relation to water services"* and the *"…supply of gas"*, into the WSC Act and the EC Act, respectively, as a public interest consideration that the Authority may take into account when determining whether to grant, transfer, renew or amend a licence.[67] The Committee understands that the Authority will regulate gas and rail access according to agreed national policies.[68]

2.39 Some of these stakeholders were also concerned that the Government and its various advisory bodies would not be in a position to make fully informed policy decisions with respect to the regulated industries because such information would be held only by the Authority. In this regard, the Committee refers to page 6 of the Treasury Submission, and page 11 of the First Treasury Response.

ACCOUNTABILITY

2.40 The written submissions indicate that there is some concern that the Authority will not be adequately accountable to both the Parliament and the Government. Some stakeholders have suggested that the Authority should be overseen by a parliamentary committee and be obliged to table reports in the Parliament regarding its activities.

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64 Parliament of Western Australia, Legislative Council, Standing Committee on Government Agencies, *State Agencies - Their Nature and Function,* Report Number 36, April 1994.

65 Treasury Submission, 1; Western Australia, *Parliamentary Debates (Hansard),* Legislative Council, March 18 2003, 5433; *Economic Regulation Authority Bill 2002 Explanatory Memorandum*, 1.

66 First Treasury Response, 1.

67 See Schedule 2 Items 14, 93 and 99 of the Bill.

68 Refer to discussion in paragraph 2.6.

The Committee reiterates its acknowledgment that one of the main aims of the Bill is to appropriately separate economic regulation from policy-making,[69] and refers to pages 8 to 9 of the Treasury Submission.

2.41 The Committee queried the effect of clause 23 of the Bill. In particular, the Committee wanted to know why the Authority's obligation to prepare performance indicators will be limited to its management functions,[70] and why the Authority will be exempt from the requirement to submit an annual estimate of its financial operations for forthcoming financial years.[71] The response received from Treasury was that such obligations would facilitate the Authority's intended independence, while ensuring that the Authority was still financially accountable to the Government.[72]

2.42 The Committee notes that its terms of reference provide it with the capacity to inquire into and report on the activities of the Authority.

CONSUMER REPRESENTATION

2.43 Another issue that was raised during the inquiry was that the Bill does not provide for the Authority to inform itself of consumers' needs and concerns. One suggestion was to establish mechanisms through which the Authority could obtain the views of customers and impart those views to the regulated industry participants. The Victorian Customer Consultative Committee was used as an example of such a mechanism.

2.44 The Committee notes that the Authority's information gathering powers with respect to the gas and rail access industries will be governed by the relevant national codes.[73] With regard to the water industry licensing function, the Authority will be prohibited from making decisions that are contrary to the public interest,[74] which may include *"…the interests of water services customers generally or of a class of water services customers"*.[75] It is anticipated that the views of such customers will be obtained during a public consultation process that is to be prescribed in future regulations.[76]

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69 Treasury Submission, 4; First Treasury Response, 6 and 10; Second Treasury Response, Attachment A, 7, at question number 8; Western Australia, *Parliamentary Debates (Hansard)*, Legislative Council, March 18 2003, 5433.

70 Clause 23(2) of the Bill.

71 Clause 23(3) of the Bill.

72 Second Treasury Response, Attachment A, 15-16, at questions 20 and 21.

73 Refer to discussion in paragraph 2.6.

74 Schedule 2 Items 93, 94, 96, 97, 98 and 99 of the Bill.

75 Schedule 2 Item 93 of the Bill.

76 Schedule 2 Item 99 of the Bill. Second Treasury Response, Attachment A, 11, at question number 13.

The Committee notes that this issue could be dealt with under the regulations which deal with public consultation. The Authority will be subject to similar guidelines in gas industry licensing under the EC Act.[77] The nature and degree of public consultation that the Authority will be required to undertake for its inquiry and/or reporting role will be determined by its terms of reference.[78]

2.45 The Committee notes further that one of the provisions that may already be included in a water industry licence[79] is the requirement for the licensee to "*…establish committees of consumers for the purpose of obtaining the opinions of consumers on the prices charged and the standard of service provided by the licensee.*"[80]

REVIEW OF EXISTING REGULATORY AND LICENSING REGIMES

2.46 Many of the written submissions received by the Committee expressed dissatisfaction with the existing regulatory and licensing regimes in the regulated industries, and called for them to be amended in various ways. The Committee acknowledges these concerns but reiterates that the main purpose of the Bill is to effect institutional change in accordance with the recommendations of the Task Force. Each of the existing industry-specific Acts, which establish the regulatory and licensing regimes for gas, rail and water, already feature a review procedure.[81] For example, section 27 of the EC Act requires the Minister to carry out a review of the operations and effectiveness of the Coordinator of Energy[82] and the Director of Energy and table a report before each House of Parliament based on the review as soon as is practicable after the expiry of five years from the commencement of the Act.

2.47 A review of the electricity industry was recently completed in October 2002.[83] For further details of the industry-specific reviews that are currently under way or are anticipated, the Committee refers to page 7 of the First Treasury Response.

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77 Sections 11H(3)(d) and 11K; Schedule 2 Item 18 of the Bill.

78 Clauses 32(4)(c) and 38(4)(b) of the Bill.

79 Known as an 'operating licence': section 3 of the WSC Act.

80 Schedule 1 Item (o) of the WSC Act.

81 Section 88 of the GPA Act; section 12 of the RA Act; section 62 of the WSC Act; section 27 of the EC Act.

82 The advisory role of the Coordinator of Energy will be preserved as the Bill only seeks to transfer the Coordinator of Energy's role in administering the gas industry licensing scheme to the Authority: see section 25(b) and Schedule 2 Items 10 and 13 of the Bill.

83 Electricity Reform Task Force, *Electricity Reform in Western Australia 'A Framework for the Future'*, October 2002.

BEST PRACTICE REGULATORY PRINCIPLES

2.48 Some stakeholders submitted that the Bill does not comply with the best practice regulatory principles that have been espoused in a discussion paper released by the Utility Regulators Forum.[84] According to this discussion paper, the principles that are indicative of an effective regulatory regime are communication, consultation, consistency, predictability, flexibility, independence, effectiveness, efficiency, accountability, and transparency.[85] Pages 7 to 8 of the First Treasury Response provides an explanation of how the Bill meets each of these principles.

ALTERNATE MEMBERS

2.49 Clause 7(3) of the Bill precludes a public sector employee from being appointed as a member of the Authority's governing body. However, clauses 10(3) and 11(3) allow for public sector employees to be eligible to be appointed as an alternate member of the governing body. The Committee raised this issue with Treasury and has considered its reply, which appears in the Second Treasury Response, Attachment A, page 15, at question number 19.

84 Office of Water Regulation, Utility Regulators Forum, *Best Practice Utility Regulation*, July 1999.

85 Office of Water Regulation, Utility Regulators Forum, *Best Practice Utility Regulation*, July 1999, 4-9.

CHAPTER 3

LEGISLATIVE SCRUTINY

CLAUSES 48(A), (B), (C) AND 52(1)

Strict Liability?

3.1 Strict liability clauses provide for people to be punished for doing something, or failing to do something, whether or not they have a guilty intent. Section 23 of the Western Australian *Criminal Code* provides that express words are needed in order for intent to be a necessary element of the offence.[86] That is, where a statutory provision is silent as to an intention to cause a particular result, it is presumed that intent will not be an element of the offence. The imposition of strict liability may be appropriate in some circumstances. For example:[87]

- where the offence is of a regulatory nature;
- where the offence is dealt with under an infringement notice scheme with relatively low penalties. The greater the penalty, the less likely that strict liability may be appropriate; and
- where evidence of the relevant mental elements, such as intent or recklessness, has proven to be almost impossible to obtain in the absence of admissions or independent evidence. For example, where executive officers of a corporation are taken to be guilty of offences committed by the corporation, or a corporation is taken to be guilty of offences committed by its executive officers.

3.2 Clauses 48(a), (b) and (c) of the Bill will impose strict liability on people who fail, without reasonable excuse, to:

- comply with a summons issued by the Authority under clause 47(a);[88]

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86 This is contrary to the common law interpretation of statutes, which presumes that the intention to cause a particular result is a necessary element of an offence, unless stated otherwise: see *Cameron v Holt* (1980) 142 CLR 342 at 346 per Barwick CJ. See also *He Kaw Teh v The Queen* (1985) 157 CLR 523 per Dawson and Brennan JJ.

87 Parliament of Australia, Senate Standing Committee for the Scrutiny of Bills, *Application of Strict Liability Offences in Commonwealth Legislation*, Sixth Report of 2002, June 26 2002, 284-285.

88 Clauses 48(a) and (b) of the Bill.

- swear to truly answer any relevant questions put to them by the Authority pursuant to clause 47(c);[89] and

- answer any relevant questions put to them by the Authority pursuant to clause 47(d).[90]

A conviction under one of these clauses will expose a person to a penalty of $10,000.

3.3 Clause 52(1) of the Bill will impose strict liability on people who fail to comply with a request by the Authority for information or a document pursuant to clause 51. This offence carries a penalty of $10,000 or 12 months of imprisonment.

Reversal of Onus of Proof?

3.4 At common law, it is ordinarily the duty of the prosecution, not the accused, to prove all elements of an offence. A statutory provision will reverse this onus if it requires the person charged with an offence to prove or disprove some matter in order to establish his or her innocence. Generally, a reversal of onus of proof should be opposed unless the subject matter is peculiarly within the knowledge of the accused and it would be extremely difficult, or very expensive, for the prosecution to prove. For example, the relevant fact must be something inherently impractical to test by alternative evidentiary means and the defendant would be particularly well positioned to disprove guilt.

3.5 The Committee notes that clauses 48(a), (b), (c) and 52(1) may effect a reversal of onus of proof by employing the words, *"…proof of which lies upon the person"*. Without those words, it is possible that the prosecution would be responsible for adducing evidence to prove beyond a reasonable doubt that a person failed to do one of the things listed in paragraphs 3.2 and 3.3, and that the failure was without reasonable excuse. The effect of the presence of those words is that the accused will need to prove that he or she had a reasonable excuse for failing to do something.

CLAUSES 49 AND 53 - PROTECTION FROM SELF-INCRIMINATION

3.6 At common law, people can decline to answer a question or produce a thing on the grounds that their reply, the production of the thing, or the thing itself might tend to incriminate them. If, for sufficient reason, a law requires a person to answer a question or provide a thing that incriminates them, the law should generally provide safeguards. One legislative approach has been that a removal of the privilege against self-incrimination may be justified if:

89 Clause 48(c)(i) of the Bill.

90 Clause 48(c)(ii) of the Bill.

- the information required is particularly within the knowledge of the person concerned; and

- the legislation provides an indemnity against the use of:

  a) that information; or

  b) the fact that the information was given as evidence in civil or criminal proceedings against the individual.

3.7 Clauses 49 and 53 of the Bill provide that an individual may not use self-incrimination as an excuse for failing to provide the Authority with an answer to a question, information or a document. These clauses were modelled on section 22D of the RA Act,[91] but are contrary to the approach that is taken in the GPA Act[92] and other jurisdictions.[93]

3.8 In order to protect individuals,[94] clause 53 provides that the 'information' or **the fact** that a document was given or produced to the Authority will not be admissible in proceedings against the individual. 'Information' is wide enough to cover information provided verbally or contained in provided documentation. However, the protection in clause 49 is limited to *"…an answer given by the individual"* and **the fact** that a document was produced by the individual.

3.9 The Committee believes that the Legislative Council's consideration of clauses 49(a) and 53(a) will be assisted by an explanation from the Minister as to the reason for the difference in wording of these clauses.

CLAUSE 55 - PROCEDURAL FAIRNESS

3.10 Depending on the seriousness of a decision made in the exercise of an administrative power and the consequences that follow, it is generally inappropriate to provide for administrative decision-making in a bill without providing for access to reasons for the decision and review and/or appeal rights.

3.11 The principles of procedural fairness also require that something should not be done to a person that will deprive the person of some rights, or interest, or legitimate expectation of a benefit, without the person being given an adequate opportunity to present that person's case to the decision-maker.

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91 First Treasury Response, Attachment B, 5 and 6.

92 Part 6, Division 2, Subdivision 3 does not alter the common law position.

93 For example, sections 37(5), 44(4) and 51(4) of the ESC Act; sections 23(2), 24AC(2) and 24GK(2) of the IPART Act. These sections expressly state that the possibility of self-incrimination is a reasonable excuse for failing to provide information.

94 As opposed to incorporated bodies.

3.12 Clause 55(2) of the Bill prohibits the Authority from disclosing information that is identified by the provider as being of a confidential or commercially sensitive nature, unless the Authority is of the opinion that:

- the disclosure would not cause detriment to any person; or
- although the disclosure would cause a person detriment, the public benefit in disclosing it outweighs that detriment.

3.13 Clause 55 was modelled on section 38 of the ESC Act, section 24AD of the IPART Act, and is similar to Schedule 1 Part 7, Item 42 of the GPA Act.[95] The Committee is concerned that, unlike in the ESC Act and the GPA Act, there is no express requirement in clause 55 to notify the affected persons of:

- the Authority's intent to disclose the information;
- the Authority's reasons for wanting to disclose the information; and
- their rights of review and/or appeal.

3.14 The Committee raised its concerns with Treasury and has considered its response, which appears in the Second Treasury Response, Attachment A, pages 19 to 20, at question number 26.

CLAUSE 56 - IMMUNITY FROM NEGLIGENCE

3.15 One of the fundamental principles of law is that all persons are equal before the law, and should therefore be fully liable for their acts or omissions. A law should not confer immunity on a specified person or class of persons from legal proceedings or prosecution without adequate justification. Where such an immunity is conferred on public sector officials or employees, it has been suggested by some Australian parliamentary committees that:

- the immunity should not extend to negligence; and
- the responsible authority should remain liable for damage caused by its negligence, or the negligence of its officers or employees. That is, while civil liability may not attach to an official or employee, liability attaches instead to the State.

3.16 Clause 56(1) of the Bill will confer immunity from actions in tort on members of the governing body and staff members of the Authority *"…for anything that the person has done, **in good faith**, in the performance or purported performance of a function*

95 First Treasury Response, Attachment B, 6.

under" (emphasis added) the Bill or any other written law. The current wording of this clause suggests that these persons will be protected from being sued for negligence, which is a creature of tort, as long as they have acted in good faith during the performance of the Authority's functions. The Committee acknowledges that it will be essential for the operation of the Authority for the members of its governing body and its staff members to be assured of this protection.

3.17 At common law, where a statute provides a defence for an employee, the statutory body or Crown is not vicariously liable for the actions of the employee. In such cases, express words are needed to impose the liability for the acts or omissions of the employee on the statutory body or Crown. The Committee notes that clause 56(3) expressly provides that despite subsection (1), neither the Authority nor the State is relieved of any liability because of the protection afforded to members of the governing body or staff. For example, where a staff member of the Authority has been negligent, and in doing so, that person had also acted in good faith, clause 56(3) should allow the person who suffered the damage as the result of that negligence to pursue an action against the Authority and/or the State.

CLAUSE 57(2)(D) - DELEGATION OF LEGISLATIVE POWER

3.18 Clause 57(2)(d) of the Bill provides that a member of the governing body or a staff member of the Authority may record, disclose or make use of any information obtained in the course of their duty in 'prescribed circumstances', other than those already listed.

3.19 The Committee believes that the Legislative Council's consideration of clause 57(2)(d) will be assisted by an explanation from the Minister as to the type of circumstances that are likely to be prescribed pursuant to this clause.

CLAUSES 61(2) AND (3) - PARLIAMENTARY SCRUTINY OF LEGISLATIVE POWER

Fees and Charges that are 'Provided For' rather than 'Prescribed' in Subsidiary Legislation

3.20 Clause 61(1) of the Bill empowers the Executive Government to make regulations under the Bill. Clauses 61(2) and (3) state that:

> *(2) Without limiting subsection (1), regulations may **make provision for** and in relation to the imposition and payment of fees and charges in connection with the performance of the Authority's functions.*
>
> *(3) If it is inappropriate to prescribe a set fee or charge in connection with the performance of a particular function, the regulations may **provide for** the method of calculating the fee*

> *or charge, including calculation according to the cost of performing the function.* (emphasis added)

3.21 Where power is conferred by an Act to make subsidiary legislation to **prescribe** certain matters, the Committee understands that it is usual for those matters to be specified and appear in the text of that subsidiary legislation. However, the Committee is also aware that, where an Act confers power to make subsidiary legislation to **make provision for,** or **provide for** certain matters, those matters have been sub-delegated to another person or body.[96]

3.22 The Committee notes the current wording of clauses 61(2) and (3), and believes that this may enable the determination of regulatory fees and charges imposed on regulated industries to be sub-delegated in the relevant regulations to, for example, the chairman of the governing body of the Authority.

3.23 The Committee believes that the Legislative Council's consideration of clauses 61(2) and (3) will be assisted by an explanation from the Minister as to why it is preferable to 'make provision for' or 'provide for' rather than 'prescribe' fees and charges or the method of calculating such fees and charges.

CLAUSE 63

3.24 Clauses 63(1) and (2) provide that Schedules 3 and 4 of the Bill have effect to make transitional and saving provisions to allow for the smooth introduction of the Bill.

Clause 63(3) - Delegation of Legislative Power

3.25 Clause 63(3) of the Bill states that:

> *(3) If there is no sufficient provision in this Act for dealing with a transitional matter, regulations made under section 61(1) may include any provision that is required, or is necessary or convenient, for dealing with the transitional matter.*

3.26 While this power enables an executive instrument (regulations) to alter the application of the Bill and other Acts of Parliament, it is only in relation to a 'transitional matter', as defined in clause 63(4).

Clause 63(5) - Retrospective Operation of Subsidiary Legislation

3.27 Clause 63(5) of the Bill provides that:

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[96] Section 43(8)(c) of the *Interpretation Act 1984* (WA) provides that subsidiary legislation may be made *"…so as to confer a discretionary authority on a specified person or body or a specified class of person or body"*.

> *(5) A regulation including a provision described in subsection (3) may be expressed to have effect before the day on which it is published in the* Gazette.

3.28 This clause provides for the retrospective operation of regulations dealing with transitional matters and is expressed to permit such regulations made under the Bill to come into operation on a date 'before the day' of their publication in the *Government Gazette*.

3.29 The Committee notes that the retrospective operation of subsidiary legislation has been the subject of concern in recent reports by Legislative Council committees.[97] The Committee and the Joint Standing Committee on Delegated Legislation undertook a detailed analysis of clause 20 of the *Planning Appeals Amendment Bill 2001*, which contained provisions that were very similar to clauses 63(5) and (6) of the Bill.[98] The Committee draws these clauses to the attention of the House for its consideration.

SCHEDULE 2 ITEMS 18 AND 99 - PARLIAMENTARY SCRUTINY OF LEGISLATIVE POWER

Procedures that are 'Specified' rather than 'Prescribed' in Subsidiary Legislation

3.30 Schedule 2 Items 18 and 99 of the Bill seek to insert the following clause into the WSC Act and the EC Act:

> *Regulations made under…*[the relevant section]*…may require the Authority, before it makes a decision on any application for the grant, renewal or transfer of a licence under this Division, to undertake public consultation in accordance with the procedure* ***specified*** *in the regulations.* (emphasis added)

3.31 For the reasons stated in the discussion in paragraphs 3.21 to 3.22 of this report, the Committee is concerned that the current wording of the proposed sections may provide for the potential avoidance of parliamentary scrutiny of the Authority's public consultation procedures.

3.32 The Committee believes that the Legislative Council's consideration of Schedule 2 Items 18 and 99 (in relation to proposed section 31B of the WSC Act) will be assisted

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97 For example, Parliament of Western Australia, Legislative Council, Standing Committee on Legislation: *Co-operative Schemes (Administrative Actions) Bill 2001* and the *Agricultural and Veterinary Chemicals (Western Australia) Amendment Bill 2001*, Report Number 2, June 28 2001, 22; *Corporations (Consequential Amendments) Bill (No 2) 2001*, Report Number 12, March 14 2002; and *Corporations (Consequential Amendments) Bill (No 3) 2001*, Report Number 13, March 20 2002. See also Parliament of Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purposes, *Offshore Minerals Bill 2001, Offshore Minerals (Registration Fees) Bill 2001* and *Offshore Minerals (Consequential Amendments) Bill 2001*, Report Number 1, June 2002, 60-64.

98 Parliament of Western Australia, Legislative Council, Standing Committee on Public Administration and Finance, *Planning Appeals Amendment Bill 2001*, Report Number 1, March 2002, 20 and Appendix 4.

by an explanation from the Minister as to the reason why the word ‘specified’ is used rather than the usual term ‘prescribed’.

CHAPTER 4

CONCLUSION AND RECOMMENDATIONS

CONCLUSION

4.1 The Committee supports the general principles of the Bill, but notes that a number of Committee members may seek to have amendments passed if they consider such amendments appropriate, after having heard explanations given by the Minister to the matters raised in this report.

RECOMMENDATIONS

Recommendation 1: The Committee recommends that the Economic Regulation Authority Bill 2002 be passed.

Hon Ed Dermer MLC (Deputy Chairman)

Date: May 30 2003

APPENDIX 1

INTERESTED PARTIES CONTACTED BY THE COMMITTEE

APPENDIX 1

INTERESTED PARTIES CONTACTED BY THE COMMITTEE

Government Agencies	
AlintaGas	1.
Office of Gas Access Regulation	2.
Department of Industry and Resources	3.
Office of Energy	4.
Director of Energy Safety	5.
Western Power Corporation	6.
Water Corporation	7.
Water and Rivers Commission	8.
Office of Water Regulation	9.
Busselton Water Board	10.
AqWest (Bunbury Water Board)	11.
Fremantle Port Authority	12.
Health Department	13.
Rottnest Island Authority	14.
Office of the Rail Access Regulator	15.
WA Government Railways Commission	16.
WestNet Rail	17.
Department for Planning and Infrastructure	18.
Department of Environmental Protection	19.
Department of Local Government and Regional Development	20.
Department of Treasury and Finance	21.
Department of Consumer and Employment Protection	22.

Parliamentary Secretary for Administrative Investigations	23.
Fire and Emergency Services Authority of Western Australia	24.
Environmental Protection Authority	25.
Department of Conservation and Land Management	26.
Pilbara Development Commission	27.
Pilbara Regional Council	28.
Sustainable Energy Development Office	29.
Regional Development Council	30.
Productivity Commission	31.
Australian Competition and Consumer Commission	32.
National Competition Council	33.

Industry Associations	
The Property Council of Australia	1.
Australian Business Council for Sustainable Energy	2.
The Australian Gas Association	3.
Western Australian Farmers Federation	4.
Pastoralists and Graziers Association	5.
Western Australian Fruit Growers Association Inc.	6.
Western Australian Vegetable Growers Association	7.
Wine Industry Association	8.
Chamber of Commerce and Industry of Western Australia	9.
Small Business Institute of Western Australia	10.
The Chamber of Minerals and Energy of WA Inc	11.
The Independent Power Advisory Group	12.
Sustainable Energy Industry Association (Australia) Ltd	13.
Australian Petroleum Production and Exploration Association Ltd	14.
Australian Pipeline Industry Association Inc.	15.
Business Council of Australia	16.
Kalgoorlie-Boulder Chamber of Commerce and Industry	17.
Australian Institute of Energy	18.
Australian Institute of Petroleum	19.
Electricity Supply Association of Australia Ltd	20.
Australian Liquefied Petroleum Gas Association Ltd	21.
Australian Council for Infrastructure Development Limited	22.

Industry - Resource Providers and Users	
Perth Energy	1.
SME Venture Capital / Australian Project Finance	2.
BHP Billiton Limited	3.
BP Australia Pty Ltd	4.
Mobil Oil Australia Pty Ltd	5.
Epic Energy	6.
ARC Energy NL	7.
Woodside Energy Ltd	8.
Metro Brick	9.
Worsley Alumina	10.
Distribution Technology Systems	11.
Bunbury Wellington Economic Alliance	12.
Landfill Gas and Power	13.
Bardak Ventures Pty Ltd	14.
Newmont Australia	15.
North West Shelf Gas Pty Ltd	16.
Metasource Pty Ltd	17.
Edison Mission Energy Holdings Pty Ltd	18.
Energy Visions Pty Ltd	19.
Origin Energy	20.
Duke Energy Australia Pty Ltd	21.
TransAlta Energy (Australia) Pty Ltd	22.
Rio Tinto	23.
Wesfarmers Energy Ltd	24.

The Griffin Coal Mining Company	25.
Alcoa	26.
Advanced Energy Systems	27.
AGL Energy Sales & Marketing Limited	28.
WMC Resources Ltd	29.
CMS Gas Transmission of Australia	30.

Unions	
UnionsWA	1.
Australian Services Union	2.
Construction, Forestry, Mining and Energy Union	3.
Australian Rail, Tram and Bus Union	4.
Communications, Electrical and Plumbing Union (Engineering and Electrical Division) WA	5.
Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers' Union of Australia	6.
Community and Public Sector Union/SPSF Group WA Branch/Civil Service Association of WA	7.
Transport Workers' Union of Australia	8.

Environmental Groups	
Conservation Council of WA	1.
Environmental Defender's Office	2.
World Wide Fund for Nature Australia	3.
Australian Greenhouse Office	4.
Environment Business Australia	5.

Community Groups	
WA Council of Social Service Inc.	1.
Energy Users Association of Australia	2.
Western Australian Local Government Association	3.
Institute of Public Affairs Ltd	4.
WA Water Users Coalition	5.
The Australian Consumers' Association	6.

Other	
Minerals and Energy Research Institute of Western Australia	1.
Technology and Industry Advisory Council	2.
The Centre for Water Research, University of Western Australia	3.
Australian Bureau of Agricultural and Resource Economics	4.
Mallesons Stephen Jaques	5.
Minter Ellison	6.
Freehills	7.
Allens Arthur Robinson	8.
Mr John Hannan	9.

APPENDIX 2

LIST OF WRITTEN SUBMISSIONS

APPENDIX 2

LIST OF WRITTEN SUBMISSIONS

From	Date	Number
Western Australian Local Government Association	28.04.03	1.
Office of Energy	29.04.03	2.
Busselton Water	29.04.03	3.
AQWEST Bunbury Water Board	30.04.03	4.
Western Australian Sustainable Energy Association (WA SEA)	30.04.03	5.
Fire and Emergency Services Authority of Western Australia	30.04.03	6.
Australian Council for Infrastructure Development Limited	30.04.03	7.
Water Corporation	30.04.03	8.
Department of Consumer and Employment Protection	30.04.03	9.
AlintaGas	30.04.03	10.
Department of Environmental Protection/Water and Rivers Commission	30.04.03	11.
Department of Treasury and Finance	30.04.03	12.
Australian Pipeline Industry Association (APIA)	30.04.03	13.
Conservation Council of Western Australia Inc.	30.04.03	14.
Chamber of Commerce and Industry	01.05.03	15.
CMS Energy Gas Transmission Australia	01.05.03	16.
Department of Conservation and Land Management	01.05.03	17.
Western Power	01.05.03	18.
WestNet Rail	01.05.03	19.
Bunbury-Wellington Economic Alliance	01.05.03	20.
The Western Australian Council of Social Service Inc.	01.05.03	21.

From	Date	Number
Community and Public Sector Union	09.05.03	22.
Australian Manufacturing Workers' Union	09.05.03	23.
Australian Services Union	09.05.03	24.
Unions WA	09.05.03	25.
CEPU Engineering and Electrical Division WA	09.05.03	26.
Department of Health	09.05.03	27.
The Australian Gas Association	21.05.03	28.

APPENDIX 3

TREASURY SUBMISSION

APPENDIX 3

TREASURY SUBMISSION

Department of Treasury and Finance
Government of Western Australia

PUBLIC

RECEIVED
30 APR 2003

Our ref : 200301260
: T.06056
Enquiries : Michael Court
Telephone : 9222 9805

Hon Barry House MLC
Chairman
Standing Committee on Public Administration
and Finance
Legislative Council
Parliament House
PERTH WA 6000

Dear Mr House

ECONOMIC REGULATION AUTHORITY BILL 2002

Thank you for your letter of 14 April 2003 and invitation to provide a submission to the inquiry by the Standing Committee on Public Administration and Finance (Committee) on the Economic Regulation Authority (ERA) Bill.

As requested in your letter, this submission aims to provide information on the scope, purpose and structure of the ERA Bill. In addition, the submission provides comments on issues that have been raised during the debate on the Bill to date.

In this regard, there appears to be a number of misconceptions about the ERA Bill. These, in turn, appear to reflect a surprising and unfortunate lack of understanding of the purpose and content of the Bill by some parties. Fundamentally, this Bill is concerned with institutional change to achieve synergies and improve cost effectiveness, and not a revision of regulatory policy settings.

The ERA Bill is about bringing together existing regulatory functions spread across a number of regulators into the one body. This aims to improve upon the fragmented regulatory framework currently administered by a range of sector-specific regulators, public sector officials and Ministers. Stakeholders have lobbied for a more cohesive and efficient regulatory framework for some time in order to achieve the benefits that have been enjoyed in most other jurisdictions in Australia from such arrangements.

197 St George's Terrace, Perth, Western Australia 6000
Telephone (08) 9222 9222 Facsimile (08) 9222 9117
www.treasury.wa.gov.au

The ERA Bill has therefore been developed to bring benefits over the current arrangements by providing a single economic regulator that:

- achieves synergies while continuing to promote transparent and accountable regulation that is fair to both consumers and to investors in utility industries;
- promotes consistent regulatory outcomes across key utility industries;
- improves the quality of information available to government to assist in decision-making processes; and
- is well placed to respond to changing regulatory needs – such as increased competition in the electricity industry, and the emergence of companies that provide services across multiple industries, such as gas and electricity.

Contrary to comments that have been made, the Bill is not about reviewing existing regulatory regimes and amending current regulatory policy settings. Accordingly, the Bill does not seek to change:

- the current regulatory objectives of the relevant industry specific Acts;
- the current regulatory and policy responsibilities for the environment, social welfare and equity, and regional development which are dealt with in other legislation and/or policy bodies; or
- the current ability for Ministers to set the regulatory rules and standards.

The ERA Bill was developed following broad public consultation. This included the release of a public consultation paper, and a formal response on the matters raised in public submissions. Both documents are available on the Department of Treasury and Finance web site. An advanced draft of the Bill was also released for comment.

The attached submission provides more detailed information on these matters, and I trust it is of assistance to your inquiry.

Yours sincerely

J L Langoulant
UNDER TREASURER

30 April 2003

SUBMISSION TO THE STANDING COMMITTEE OF PUBLIC ADMINISTRATION AND FINANCE

INQUIRY ON THE ECONOMIC REGULATION AUTHORITY BILL 2002

BACKGROUND

Establishment of a multi-industry regulator was a central feature of the Government's pre-election electricity reform policy statement. This was given further impetus in the Machinery of Government Taskforce report which recommended a "statutory position of Economic Regulator should be established to regulate the water, rail, gas, and, when reform is complete, electricity industries." The Government accepted the MoG report recommendations in their entirety.

Subsequently, an interdepartmental committee was convened to guide the creation of the Economic Regulator. Members included the Department of Treasury and Finance (DTF), the Department of the Premier and Cabinet, the Crown Solicitor's Office, the Coordinator of Energy, and the Coordinator of Water Services. In addition, industry-specific working groups were convened to incorporate additional input from the Department of Planning and Infrastructure, Department of Consumer and Employment Protection, Department of Mineral and Petroleum Resources, Department of Environmental Protection, Office of Gas Access Regulator, and Office of Rail Access Regulator.

The interdepartmental committee was guided by existing regulatory arrangements in Western Australia and frameworks used elsewhere in other States. In addition, there were two formal public consultation processes.

It is important to stress that the ERA Bill is primarily aimed at institutional change and achieving a more appropriate separation of regulation from policy-making. It does not incorporate any significant changes to current regulatory policy settings. This has been left to separate review processes.

RATIONALE FOR A SINGLE INDEPENDENT REGULATOR

Utility industries, such as those providing electricity, gas, water and rail services, deliver essential services to businesses and households in Western Australia. These industries are often natural monopolies and have traditionally (although not always) been owned by government. Opening utility industries to competition, together with technological change, has enabled benefits to flow to consumers through lower prices and improvements in the quality and reliability of goods and services.

Ironically, regulation is necessary in order to realise the benefits from competition and to ensure outcomes are achieved that are in the best interests of the community. For example, enabling the use of gas pipelines by users other than the pipeline owner increases competition and has required the establishment of the Independent Gas Pipelines Access Regulator. The Gas Access Regulator promotes fair trade in gas by facilitating access to gas pipelines at a fair price in accordance with the *Gas Pipelines Access (Western Australia) Act 1998*.

Similarly, opening up the rail network to users other than the network owner and lessee so that monopoly owners are subject to competition has required the establishment of the Independent Rail Access Regulator. The Rail Access Regulator oversees, monitors and enforces compliance with the *Railways (Access) Act 1998*. This Act establishes a Rail Access Regime that ensures that any person or entity may negotiate to obtain access on fair commercial terms to the rail network, owned by the Government of Western Australia, and currently being leased to the Australian Railroad Group.

The industry licensing system established under the *Water Services Coordination Act 1995* seeks to ensure consumers enjoy continuity of supply. The licences specify technical standards, standards of service to customers and a requirement to establish asset management systems to ensure infrastructure is properly maintained and funded. Water service providers report to the Coordinator of Water Services against these requirements.

The Coordinator of Energy performs a similar role in the gas industry in accordance with the *Energy Coordination Act 1994*. The Minister for Environment and Heritage and the Minister for Energy also have an enforcement role under the respective licensing regimes.

These examples indicate a somewhat fragmented regulatory framework currently being administered by a range of sector-specific regulators, public sector officials and Ministers. Industry participants have lobbied for a more cohesive and efficient regulatory framework for some time.

The ERA Bill has therefore been developed to provide a single economic regulator that:

- achieves synergies while continuing to promote transparent and accountable regulation that is fair to both consumers and to investors in utility industries;

- promotes consistent regulatory outcomes across key utility industries;

- improves the quality of information available to government to assist in decision-making processes; and

- is well placed to respond to changing regulatory needs – for example, the Government's policy for increased competition in the electricity industry requires an independent regulator to undertake electricity access and licensing functions.

Significantly, multi-utilities are now emerging to provide even greater choice to consumers by supplying services across more than one market. The ERA is progressive in this regard as it will have jurisdiction across the electricity, gas, rail and water industries.

Consistent with the aim of establishing a **single** economic regulator, the ERA Bill is primarily aimed at institutional change and achieving a more appropriate separation of regulation from policy-making. It does not incorporate any significant changes to current regulatory policy settings.

Any changes to regulatory policy settings would be examined through separate processes or statutory requirements to review industry-specific Acts. For example, the Parry review of the *Water Services Coordination Act 1995* (WSC Act); the Council of Australian Governments Energy Market Review; and the expected national review of the gas access regime. In addition, there are processes such as the Gas Retail Deregulation Project Steering Group and Electricity Reform Implementation Unit which are examining further regulatory changes in the gas and electricity industries.

STRUCTURE AND FUNCTIONS OF THE ERA

The Bill establishes the ERA with the capacity for three members to be appointed to the governing body. It also provides generic functions and powers (e.g. information gathering powers). The existing industry-specific legislation outlined above defines the regulatory roles of the ERA for each industry. The key functions of the ERA are to:

- regulate access terms and conditions for significant economic infrastructure under industry specific access regimes. The ERA will **subsume, without change**, the regulatory functions currently performed independently by the Gas Pipelines Access Regulator and the Rail Access Regulator. Electricity access functions will follow the implementation of the Electricity Reform Task Force (ERTF) recommendations;

- administer **existing** industry licensing frameworks. This would initially involve the water industry licensing regime. The gas industry licensing regime will be transferred to the ERA upon the commencement of full retail contestability in the gas market. Electricity licensing functions will follow the implementation of the ERTF recommendations; and

- inquire and report on matters referred by the government. The ERA will be able to conduct inquiries on matters related to the regulated industries and report to the Government on these matters. The Government will initiate these inquiries through issuing terms of reference and any report will be publicly available. A relevant example would be a review of the retail tariffs applying in a regulated industry;

  - the Authority may also conduct inquiries or reports on matters related to non-regulated industries. Possible examples could be public transport fares, or a competitive neutrality matter related to a government business. These reports will be made public at the government's discretion;

It is important to note that it remains for the government to act on any report recommendations. The government therefore retains responsibility for actually setting retail tariffs and charges through the existing regulations and by-laws.

The existing appeal and arbitration processes remain unchanged for the access and licensing functions.

IMPROVEMENTS TO CURRENT REGULATIONS

While the ERA is primarily about institutional change, there are some consequential changes which were progressed as desirable improvements to the regulatory framework. These include:

- the inclusion of a requirement for the ERA to consider the public interest as part of its decision making processes associated with water industry licensing. Public interest matters are defined in the revised WSC Act to include environmental considerations, social welfare and equity considerations including community service obligations (CSOs), economic and regional development, and the policy objectives of government in relation to water services; and

- the inclusion of a requirement to undertake public consultation before making a decision for the grant, renewal, or transfer of a water or gas industry licence. This will ensure the Government, and other interested parties, can provide input to the decision-making process.

The consequential amendments to the water and gas licensing regimes also provide the ERA with enforcement functions. This will avoid the situation where the ERA grants licences and the Minister/policy body enforces licence conditions. The Governor will retain the responsibility for licence revocation.

COMMENTS ON MATTERS RAISED DURING DEBATE

A number of issues or concerns have been raised during parliamentary debate on the ERA Bill.

Public Consultation

Concerns have been raised that about a lack of consultation on the proposal for the ERA. However, two public consultation processes were undertaken.

A media statement from the Treasurer was issued on 21 February 2002 announcing a public consultation process on the framework for the proposed ERA. A consultation paper was released as part of the consultation process to assist interested parties to make a submission. The paper outlined relevant background and identified issues for consideration. The paper was made available on the DTF web site. The paper was also mailed to numerous organisations including the Australian Consumers Association, WACOSS, government departments and agencies, government trading enterprises, other jurisdictions, industry associations and private sector companies. Several presentations and meetings were held upon request.

Twenty six submissions were received and, overall, there was general support for the establishment of a multi-industry economic regulator. Non-confidential submissions were posted on the DTF web site. A formal response was made to all submissions, which was also posted on the DTF web site. Follow-up meetings were undertaken with interested stakeholders.

In October 2002, an advanced draft of the ERA Bill was provided for comment to the industry and consumer associations that provided submissions as part of the public consultation process. The draft Bill was also provided for comment to relevant government agencies, government trading enterprises, several interested private sector companies and other jurisdictions.

In addition, ongoing briefings have been provided on the Bill since its introduction.

Ministerial Roles

Some questions have been raised on Ministerial roles and responsibilities under the framework associated with the ERA. They roles will reflect those envisaged under the Machinery of Government report.

The Treasurer is primarily responsible for the overarching regulatory policy framework and the legislation to establish the ERA (as well as the economic well being of the State). In this capacity, the Treasurer will be responsible for appointments, resources/funding, and coordinating with relevant industry Ministers any terms of reference to the ERA for inquiry and report.

The industry Minister has policy responsibilities that span the industry sector within which the government enterprises and potentially other competitors operate. The industry Minister's responsibilities would include development of strategic policy initiatives and programs impacting on the business environment within the industry, industry coordination, safety policy and setting of technical standards.

The ERA will be required to report to the water and energy Ministers on respective licensing matters. This is in accordance with the relevant legislation. For example, under the amended WSC Act, the ERA will be required to:

- monitor and report to the Minister on the operation of the licensing scheme and on compliance by licensees with their licences;
- inform the Minister about any failure by a licensee to meet operational standards or other requirements of its licence;
- monitor the performance of the water services industry and of those participating in that industry, and the performance of providers of water services; and
- for the purposes of such monitoring, to consult with interested groups and persons.

The ERA will have a similar role in reporting to the Minister for Energy on gas industry licensing matters (and in the future, electricity licensing matters). This ensures the industry Minister is well informed and can take action to revise regulatory rules as appropriate. As is currently the case, this would be done through the Governor making regulations on licensing matters (e.g. new performance standards) or, if necessary, introducing to Parliament appropriate amendments to the relevant Act.

Any inquiry and report by the ERA on a regulated industry matter will be tabled in Parliament. The relevant industry Minister will be responsible for responding to the report. For example, the water industry Minister would consider any report on water industry tariffs and charges and be responsible for bringing into effect any recommendations through amending the Water Agencies (Charges) By-laws.

More specific examples of industry Minister roles and responsibilities are provided in the attachment to this submission, along with information on the Government Enterprises Minister's roles and responsibilities.

Environment

There have been suggestions that the ERA would impact adversely on environmental regulation, or should have a stronger role in this area. However, it is not appropriate for the ERA to have a core environmental regulation role or impact on environmental protection activities, which will continue to be dealt with by other relevant agencies and Ministers. In responding to these concerns it is important to note:

- the ERA is primarily about institutional change and does not alter regulatory policy settings;
- the Water and Rivers Commission (WRC) and Environmental Protection Authority (EPA) will continue their roles and primary responsibility for environmental regulation and assisting the Minister on environmental policy matters;
- in accordance with the current water industry licensing regime, the ERA would not be able to issue a water service licence without the applicant having in place a resource licence from WRC and the necessary EPA permits;
  - section 29 of the WSC Act states that "the grant of a (water service) licence does not affect the licensee's obligations to comply with any other written law in relation to the matters covered by the licence."

In addition, clause 26(1)(g) of the ERA Bill requires the ERA to have regard to promoting regulatory outcomes that are in the public interest. The public interest includes environmental considerations. As noted above, public interest considerations have also been inserted into the water licensing regime.

Social Welfare and Equity and Regional Development

Some stakeholders have expressed a concern that the ERA's functions and powers will have an adverse impact on social welfare and equity and will fail to protect those consumers facing financial hardship. In response:

- social welfare and equity will remain a core government policy issue. CSOs will continue to be the main instrument for the Government to implement social welfare policy through government trading enterprises;
- the ERA will not have deterministic power on debt recovery matters. This will continue to be set by the responsible industry Minister. For example, in the water industry, section 41 of the *Water Agencies (Powers) Act 1984* states that interest on overdue amounts is chargeable, and the Water Agencies (Charges) By-laws 1987 (amended in July 2002) specifies the level of penalty interest to be charged. This Act will not be administered by the ERA; and

- the ERA's inquiry and reporting function will assist government in making decisions on retail tariffs and charges to apply in the regulated industries. An inquiry and report on water tariffs and charges could include reviewing interest charged on overdue accounts, along with CSO matters. Such inquiries provide a formal avenue for public consultation.

It is worth re-iterating that the ERA must take into account public interest considerations as part of its licensing functions. As well as environmental considerations, the public interest is defined in the licensing acts to include social welfare and equity, economic and regional development, and the policy objectives of government in relation to water services / gas supply.

There is a risk that the inclusion of environmental, social welfare and equity, and regional development as **core objectives** of the ERA would detract from the areas currently responsible for these matters and give them a higher priority within the ERA than is warranted. This could lead to confusion about the role of the ERA and ongoing questioning of how it came to a decision. It would also conflict with the objectives of economic regulators in other jurisdictions.

These matters are best left to the domain of the relevant Minister and support agencies, such as the Office of Energy / Sustainable Energy Development Office, the Department of Local Government and Regional Development, and the Water and Rivers Commission.

Accountability

There has been concern that the independence of the ERA is not subject to appropriate accountability provisions. In response:

- The financial administration, audit and reporting requirements for statutory authorities under the *Financial Administration and Audit Act 1985* (the FAAA) apply to the ERA and the ERA's operations;
  - Treasurer's instructions (issued under section 58 of the FAAA) require that the Authority prepare performance indicators in relation to management's functions (including financial management); and
  - consolidated funding is required for all but the gas access function. The budget appropriation process therefore applies to the other functions. Gas access cost recovery regulations require the Treasurer to set a limit on expenditure.
- In relation to the ERA's functions, it is accountable to Parliament on the administration of regulatory rules as they are contained in legislation. The ERA cannot operate outside these functions.

- Industry Minsters will remain responsible for introducing amendments to the regulatory rules contained in legislation. There are also regulation making powers to govern matters covered in the acts (e.g. service standards and enforcement action).

- The independence of the ERA guards against political and industry capture. While the ERA can not be directed by the Minister on its decision-making processes, it is subject to appropriate appeal provisions;

  - for example, under section 44 of the *WSC Act*, a person who is aggrieved by a licensing decision (e.g. refusal to grant or renew a licence; length of licence period; term or condition of a licence) may appeal to the Minister against the decision within 30 days. The Minister, after receiving advice, may confirm, vary or reverse the decision.

As noted previously, the Minister for Environment and Heritage is also responsible for the *Water Agencies (Powers) Act 1984*. This Act governs many of the day-to-day operating powers of water service providers such as the Water Corporation (e.g. capital works, power to enter property etc). The Minister has considerable control to influence the conduct of water service providers under this Act, through for example, setting relevant by-laws (e.g. charging by-laws). This Act is not administered by the ERA.

Cost Recovery

Consistent with the aim of institutional change, the existing cost recovery arrangements applying to gas access regulation are proposed to continue under the ERA. The original intention of cost recovery also remains. Regulation is undertaken on the premise that the benefits to end-users exceed the costs. It is therefore reasonable for the beneficiaries to contribute to the cost of the regulatory framework.

Cost recovery is a more equitable funding solution than consolidated funding. Many communities and households in the State are not connected to gas networks and it would be unfair for them to contribute to funding gas access regulation when they receive no benefit.

Importantly, the Treasurer sets a limit on cost recovery funding to ensure appropriate accountability and efficiency, and that the independence of the regulator is maintained.

ATTACHMENT

INDUSTRY MINISTER

In relation to the water and energy industries, the Industry Minister's role would include:

- responsibility for the industry licensing policy to which the ERA adheres in granting licences;
- industry-specific policy development and coordination, such as industry structure and planning processes, sustainable industry policy;
- development of strategic initiatives and programs impacting the business environment (e.g. competition policy);
- setting of retail tariffs through industry specific regulations and by-laws (and therefore responding to an ERA inquiry and report on pricing matters);
- safety policy (in conjunction with other relevant ministers);
- technical standards (in conjunction with other relevant ministers);
- encouragement of waste water reuse and developing policies for sustainable water use;
- identifying the State's water and energy service needs and developing long term infrastructure development plans, including updating planning studies;
- ensuring customers have access to services at reasonable prices (for example, advising the Government on uniform pricing policy and funding Community Service Obligations); and
- identifying where new services are needed (such as infill sewerage program or the Goldfields water supply project).

The relevant industry minister's role is to bring their industry perspective to regulatory policy formulation, assist the Treasurer in coordinating the regulatory policy role and have a broad responsibility for the industry. In this way, an appropriate balance can be struck between consistency in regulation and recognising the regulatory and policy needs of specific industries. It also achieves separation of the policy/framework setting role from the ERA's regulatory role.

GOVERNMENT ENTERPRISES MINISTER

The role of the Government Enterprises Minister is appropriately focussed on the performance of commercial activities of government. As such, the Minister would not have a regulatory policy role in the proposed framework. However, the relevant enterprises would have the ability, as would any industry participant, to influence the development and maintenance of the framework through formal consultation processes. Moreover, the Government Enterprises Minister would have an obvious interest in Cabinet's deliberations over price setting for government monopoly services and the impact of regulation on the government enterprise.

APPENDIX 4

FIRST TREASURY RESPONSE

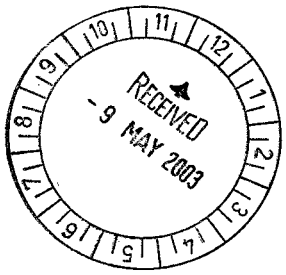
APPENDIX 4

FIRST TREASURY RESPONSE

Department of **Treasury and Finance**
Government of **Western Australia**

PUBLIC

Our ref : 200301260
: T.06056
Enquiries : Michael Court
Telephone : 9222 9805



Hon Barry House MLC
Chairman
Standing Committee on Public Administration
and Finance
Legislative Council
Parliament House
PERTH WA 6000

Dear Mr House

ECONOMIC REGULATION AUTHORITY BILL 2002

Thank you for the opportunity to appear before the Standing Committee on Public Administration and Finance (the Committee) to provide information on the Economic Regulation Authority (ERA) Bill 2002.

The subsequent opportunity to respond to some of the submissions the Committee has received is also appreciated. As a general comment, submissions raise a number of concerns that are outside the primary scope, intent or purpose of the Economic Regulation Authority Bill. This is institutional change - bringing together existing industry specific regulators into the one body – rather than changes to regulatory-policy settings.

Many of the assertions in the submissions appear to be inaccurate, or to reflect dissatisfaction with regulatory-policy settings. As explained previously, decisions to amend existing regulatory-policy settings (e.g. incentives for investment, cost recovery) are appropriately left to separate processes or statutory requirements to review industry-specific Acts. It follows that the ERA Bill has not attempted to amend regulatory and policy responsibilities for the environment, social welfare, or regional development.

Some submissions also argue that the independence of the ERA may affect the ability of Ministers to implement policy. However, as is the case with existing regulators, the relevant Minister will remain responsible for setting the regulatory rules and standards that the ERA administers.

197 St George's Terrace, Perth, Western Australia 6000
Telephone (08) 9222 9222 Facsimile (08) 9222 9117
www.treasury.wa.gov.au

On this point it is worth noting that the independence clause in the ERA Bill is taken from the legislation governing the existing regulators. The aim of independence is to ensure that regulatory decisions are not unduly influenced by vested interests. In turn, this provides for regulatory rules to be applied consistently and fairly across the regulated industries. Independence is accompanied by public consultation processes, transparent decisions (i.e. publicly available), and the right of appeal.

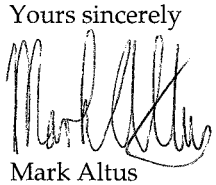
Attachment A provides specific comments on the main issues raised in the submissions. In developing these comments there has been no liaison with the parties concerned due to the Standing Committee's desire for confidentiality on this matter.

Attachment B provides the Standing Committee with guidance on the origin of each clause in the ERA Bill. As you are aware, the ERA Bill provides for the establishment of the governing body and its generic functions and powers. The clauses in the ERA Bill are taken from, or based upon, the existing powers of the current Western Australian regulators, or modelled on the economic regulators in Victoria, South Australia and New South Wales.

Finally, it is encouraging to note that many submissions provide significant support for the ERA, and explicitly state it will provide for improved administration of the current regulatory regimes.

I trust these comments are of assistance to the inquiry.

Yours sincerely



Mark Altus
A/EXECTIVE DIRECTOR (ECONOMIC)

9 May 2003

ATTACHMENT A

COMMENTS ON SPECIFIC ISSUES RAISED IN SUBMISSIONS

SUPPORT FOR THE ECONOMIC REGULATION AUTHORITY

Many submissions note considerable support for the Economic Regulation Authority (ERA). This is consistent with the views raised in consultation processes undertaken by the interdepartmental committee tasked with guiding the establishment of the ERA.

Submissions from the Chamber of Commerce and Industry (CCI), Western Power, WestNetRail, and, albeit to a lesser extent, CMS Energy, acknowledge the purpose, scope and intent of the ERA Bill which is to create a single body with the responsibility for existing economic regulatory functions across the electricity, gas, rail and water industries. These submissions support this objective because it will achieve benefits over the current fragmented administration of regulation through:

- consistent application of regulation and consolidation of regulatory skills and support staff in the one body;
- efficiencies in the administration of regulatory services and a reduction in duplication across agencies;
- reducing the risk of regulatory capture by the industry it is intended to regulate; and
- the ability to respond quickly to regulatory changes, such as new arrangements proposed for the electricity industry.

POLICY BASIS FOR THE ECONOMIC REGULATION AUTHORITY

The purpose of the Economic Regulation Authority Bill 2002 is one of institutional change. This policy objective stems from the Machinery of Government Taskforce (MoG) report which recommended:

> **Recommendation 44:** A statutory position of "Economic Regulator" should be established to regulate the water, rail, gas and, when reform is complete, electricity industries.

The MoG report envisaged that the Economic Regulator could be in place by 2002. In order to provide for public consultation and drafting of legislation, the target for the ERA to commence operation became 1 January 2003, and then 1 July 2003. This latest commencement date is now in danger of slippage.

Repeal of the Coordinator of Water Services

WACOSS' submission raised concern about the repeal of the Coordinator of Water Services, and notes that the Coordinator of Energy position remains at this point in time. This reflects the following MoG recommendation:

> **Recommendation 45:** The current industry policy, service availability and resource use functions of the Office of Water Regulation be transferred to the Environment portfolio. When electricity reforms are complete, these same functions should be transferred from the Office of Energy to the State Development portfolio.

The Coordinator of Energy's position and the Office of Energy remain at this stage to finalise electricity reform. This reflects the fact that new regulations governing electricity access and industry licensing need to be put in place. The intention is to provide the ERA with responsibility for administering the new regulations to apply to the electricity industry in Western Australia.

It is also important to note that the Coordinator of Energy is currently chair of the Gas Retail Deregulation Project Steering Committee (GRDPSG), which is overseeing the implementation of further reforms to the gas market. This process is expected to be completed early next year.

While the Coordinator of Water Services position will be repealed, the responsibility for water industry policy and related functions remains with the Minister for Environment and Heritage, who would receive assistance from the Department of Environment and Water.

Similar arrangements apply in other jurisdictions which have an independent regulator and separate policy department. It is generally not appropriate or necessary to prescribe in legislation the policy functions of the water industry Minister. Moreover, it is not desirable for legislation to limit or in any way define the policy functions of any Minister or supporting policy office. This reflects standard legislative practice.

The policy functions of Ministers are taken to be broad, and in most cases appear only to be defined through the allocation of statutes to ministerial portfolios. Even this may not limit the scope of issues that Ministers could address, for example in contemplating new legislation for their portfolio. As noted above, in the absence of a Coordinator of Water Services and associated office, the Minister would be supported in policy matters by the appropriate department.

It is envisaged that one-third of the Coordinator's staff and resources in the Office of Water Regulation would be transferred to the ERA to undertake licensing and associated functions (benchmarking etc). The remaining two-thirds would continue policy and planning roles under the supervision of a Chief Executive Officer appointed under the *Public Sector Management (PSM) Act*. (While the Coordinator of Water Services is a statutory position, the appointment is made under the PSM Act.)

PUBLIC CONSULTATION

Many submissions assert that public consultation on the ERA proposal has been inadequate. However, it is hard to avoid the conclusion that these assertions largely reflect dissatisfaction that the ERA process has not led to amendments to regulatory rules in line with the proponents vested interests, and a reluctance to accept that the process is only about institutional change.

In relation to consultation, a media statement from the Treasurer was issued on 21 February 2002 announcing a public consultation process on the framework for the proposed ERA. A consultation paper was released as part of this process. The paper outlined relevant background and identified issues for consideration to assist interested parties make submissions and inform them about the proposed changes.

The consultation paper was mailed to numerous organisations including the Australian Consumers Association, WACOSS, government departments and agencies, government trading enterprises, other jurisdictions, industry associations and private sector companies. The paper was also made available on the Department of Treasury and Finance (DTF) web site. Several presentations and meetings were undertaken, including presentations to the CCI's industry regulation forum and the GRDPSG.

Twenty six submissions were received and, overall, there was general support for the establishment of a multi-industry economic regulator. Non-confidential submissions were posted on the DTF web site. A formal response was made to all submissions, which was also posted on the DTF web site (and where it remains contrary to a comment by WACOSS). Follow-up meetings were undertaken with interested stakeholders.

In response to concerns from certain stakeholders that the ERA Bill would result in more than institutional change, it was decided to release an advanced draft of the Bill. The target date for establishment of the ERA was also delayed until 1 July 2003.

In October 2002, an advanced draft of the ERA Bill was provided for comment to the industry and consumer associations that provided submissions as part of the public consultation process. The draft Bill was also provided for comment to relevant government agencies, government trading enterprises, several interested private sector companies and other jurisdictions.

Four submission were received - from CCI, Australian Pipeline Industry Association (APIA), CMS Energy, and the Australian Council for Infrastructure Development (AusCID). A response to these submissions was provided (see example attached in Appendix 1). A meeting was held with CMS Energy, and telephone discussions with the other interested parties. Furthermore, DTF is a member of the GRDPSG, which has provided some stakeholders with another opportunity to discuss the ERA Bill.

Ongoing briefings have been provided on the ERA Bill since its introduction to Parliament. This includes meetings with the Conservation Council of Western Australia and UnionsWA. Other meetings have been offered to various organisation who did not respond (including WACOSS).

OBJECTIVES

Some submissions argue for the ERA to contain explicit objectives rather than the current clause 26 (Authority to have regard to certain matters). This current clause is consistent with South Australia (see section 5(2) of the *Independent Industry Regulator Act 1999* (SA). It gives a flavour to the role of the ERA rather than setting specific objectives.

More specifically, it has been suggested that clause 26 of the ERA Bill should include new or revised regulatory objectives, including objectives relating to environmental, social welfare and regional development (to reflect the Government's draft sustainability policy).

However, it is important to make it clear that the objectives in industry specific Acts take precedence over clause 26 (see clause 26(3) and 26(4) of the ERA Bill). This is consistent with the institutional change objective of the ERA Bill, rather than revising regulatory policy settings.

Gas and Rail Access Objectives

Clause 26 is excluded from applying to the gas access and rail access function because the Gas Access Code and Rail Access Code contain objectives that are agreed nationally. These cannot be changed without national agreement. A national review of the Gas Access Regime is soon to commence and this will review the Gas Code and recommend any changes.

This review process is likely to take some time, but should any changes be made to the Gas Code this can be accommodated through amendments to the *Gas Pipelines Access Act 1998* and Gas Code (without affecting the ERA Bill / Act).

In relation to perceived concerns over regional development and economic regulation, the Standing Committee should be made aware that a number of small and regional pipelines have been revoked from coverage under the Gas Code. This includes the Parmelia Pipeline owned by CMS Energy.

It is also worth pointing out that the information powers in the ERA Bill do not apply to the gas and rail access functions. The ERA will rely upon the information powers contained in the Gas and Rail Codes. Otherwise national agreement would be required to amend the Code.

Trade Practices Act 1974

The information from WestNetRail regarding the *Trade Practices Act 1974* (TPA) is not factually correct. WestNetRail states the ERA Bill is not consistent with the TPA and:

> "Examples of that inconsistency [with the TPA] include:
>
> - The TPA requires consideration to be taken into account "the legitimate business interests of investors and service providers in relevant markets."

However, clause 26(1)(b) of the ERA Bill explicitly requires the ERA to have regard to "the legitimate business interests of investors and service providers in relevant markets."

In any case, the Standing Committee should be assured that the ERA Bill does not conflict with Part IIIA of the TPA, which deals with access to services. It appears WestNetRail is referring to Division 3 of Part IIIA which specifies matters that the Australian Competition and Consumer Commission must take into account when arbitrating on an access dispute. The ERA Bill maintains the current objectives and arbitration processes under the Gas and Rail Codes, which have been certified by the NCC as complying with the national agreements.

Other jurisdictions have been consulted on the initiative to establish the ERA, and have been provided with copies of the ERA Bill. No concerns have been raised.

Sustainability, Environmental, Social Welfare and Equity, Regional Development

Some submissions have argued that the ERA Bill should contain objectives related to the environment, social welfare and equity, and regional development. Some are also concerned that the ERA Bill will override regulation in these areas, and does not take account of the Government's draft sustainability policy (or 'triple bottom line' accountability). However:

- Clause 26(1)(g) requires the ERA to have regard to regulatory outcomes that are in the public interest.

  - Public interest considerations are already in the gas licensing regime contained in the *Energy Coordination Act 1994* (EC Act), and are being inserted into the water licensing regime under the amended *Water Services Coordination Act 1995* (WSC Act);

  - Public interest is defined to include environmental, social welfare and equity, regional development, and the policy objectives of government in the supply of water.

- The EC Act and WSC Act specifically state that "the grant of a licence does not affect the licensee's obligations to comply with any other written law in relation to the matters covered by a licence."

- Given that the Government's sustainability policy is still draft, decisions on the implementation of 'triple bottom line reporting' have not been made. Should industry licences be the means for this, then this would be accommodated. However, it is likely that broader regulations than those administered by the ERA would be more appropriate to ensure all government departments and agencies are required to meet any future reporting requirement in this area.

  - Industry licences to be administered by the ERA may not cover many service providers that would warrant inclusion in triple bottom line reporting. For example, the Rottenest Island Authority has an exemption from the requirement for a gas industry licence.

- There is a risk that the inclusion of environmental, social welfare and equity, and regional development as core objectives of the ERA would detract from the bodies currently responsible for these matters;

  - it could lead to confusion about the role of the ERA and ongoing questioning of how it came to a decision. It would also conflict with the objectives of economic regulators in other jurisdictions; and

  - at worse it could mean the ERA could override regulations made in these areas by the appropriate regulator.

- The policy for the Government to retain price setting ensures direct control over social welfare and equity issues. Interest charged on overdue accounts is specified in the charging by-laws set by the Minister. Community Service Obligations also remain to be determined by the Minister.

  - However, the option for inquiries and reports on pricing matters by the ERA will improve the information available to the Government to assist in its decision-making processes.

To ensure clear roles and responsibilities and accountability, it is considered essential that environmental, social welfare, and regional development matters are left to the domain of the relevant Minister and support agencies, such as the Office of Energy / Sustainable Energy Development Office, the Department of Local Government and Regional Development, the Water and Rivers Commission, and the Department of Environmental Protection.

Furthermore, the ERA's requirements for public consultation, ability to publish guidelines on its operation (such as memoranda of understanding with other regulators), and transparent decision-making processes should ensure better coordination between economic, environmental and social welfare regulators and policy-makers than currently exists.

Director of Energy Safety

The ERA Bill does not affect the core roles and responsibilities of the Director of Energy Safety who administers energy safety and technical standards. Close coordination and consultation between the ERA and the Director will be required.

Establishment of the ERA should assist in this regard as the Director will only have to consult with one economic regulator, rather than the current two (Gas Access Regulator and Coordinator of Energy).

Other Review Processes

Other processes or statutory requirements to review the industry specific Acts that effectively define the ERA's functions are the more appropriate forum for the review of regulatory objectives and policy settings. Example in this respect include the Parry review of the *Water Services Coordination Act 1995* (WSC Act); the Council of Australian Governments Energy Market Review; and the forthcoming national review of the Gas Access Regime. In addition, there are forums such as the GRDPSG and Electricity Reform Implementation Unit which are examining further regulatory changes in the gas and electricity industries.

BEST PRACTICE REGULATORY PRINCIPLES

Some submissions attempt to assess the ERA Bill against best practice regulatory principles. WACOSS lists these as communication; consultation; consistency; predictability; flexibility; independence; effectiveness; efficiency; accountability; and transparency.

It is considered that the ERA Bill contains significant improvements against these principles over the current fragmented administration of regulation. Some examples include:

- Public **consultation** processes will be core to all of the ERA's functions. This is not a feature of the current industry licensing regimes nor retail price setting. The regulations for public consultation relating to licensing could require 'Consultative Committees' to be established as WACOSS suggests. In any case, industry licences currently require licensees to establish customer committees to gauge customer satisfaction, and this will remain under the ERA. References will specify the nature and degree of public consultation the ERA must undertake as part of an inquiry.

- Bringing together regulatory functions into the one body will promote more **consistent** and **predictable** regulatory outcomes than the current administration arrangements with six bodies responsible for regulatory functions.

- The ERA is **flexible** to respond to changing regulatory needs. New electricity regulatory functions can be provided to the ERA, and multi-utilities are emerging across the gas and electricity industries. Amendments to industry specific Acts can be made without changing the ERA Bill / Act;

- Consolidation of scarce regulatory expertise into the one body will promote more **effective** regulatory outcomes and reduced duplication will provide for more **efficient** administration of regulatory rules compared to multiple regulatory bodies.

- **Accountability** is provided for through the ERA being a statutory authority (agent of the State); *Financial Administration and Audit Act 1985* reporting requirements; the ability to dismiss members for misconduct; regulatory rules being defined in industry-specific Acts; and the right of appeal against the ERA's decisions.

- **Transparency** is provided for by the requirement for the Authority to have regard to "transparent decision making processes", prescribed public consultation processes, and the tabling of inquiry reports in Parliament. All decisions of the current gas and rail regulator are publicly available. All industry licences are also publicly available. These arrangements will continue under the ERA.

Some of WACOSS' suggested changes to the ERA appear to be inconsistent with their claims regarding best practice regulatory principles. For example, on page 10 of their submissions they argue that the independence of ERA on its decision-making processes is of concern, yet this is a central best practice principle.

WACOSS also suggest the ERA be empowered to impose significant penalties for licence breaches and participate in modification, monitoring and enforcing of licence conditions. The ERA is in fact provided with these functions under the Bill.

It is important to note that the 'umbrella framework' involving the ERA Bill establishing the governing body with generic functions and powers, and industry specific Acts defining the functions for each industry was a key issue for public consultation in the process to establish the ERA. It is modelled on approaches taken in other jurisdictions and received significant support in public submissions.

INDEPENDENCE AND LICENSING

The CCI and some other submissions suggest the Minister should be the licensing authority and take advice from the ERA on licensing matters. In response, the following should be noted:

- The Coordinator of Energy and Coordinator of Water Services currently grant, amend and transfer licences – not the Minister. Section 10A of the EC Act states "The Minister must not direct the Coordinator with respect to the performance of the Coordinator's functions under Part 2A [the gas licensing regime] in respect of a particular person or application."

- The Minister is responsible for hearing appeals against water licensing decisions. If the Minister became the licensing authority then there would only be the right of civil appeal, which can be a costly option. In relation to gas industry licences, the Gas Review Board would become responsible for appeals against the Minister's gas licensing decisions.

- The Minister is more likely to be subject to industry capture when making a regulatory decision than an independent regulator. This could be to the detriment of small service providers and individual consumers.

- This 'Ministerial model' would be against best practice regulatory principles and the aim to provide for a more appropriate separation of regulation from policy-making.

- The EC Act and WSC Act outline licence terms and conditions, state the ERA is to have regard to government policy objectives, and enable the Minister to set regulations prescribing standards of performance for individual licensees and to guide enforcement action (see section 33 of the WSC Act).

  - Customer protection and complaints handling processes remain a key aspect of the licensing regimes under the ERA. There are no amendments to standard terms and conditions in the licensing regimes.

INQUIRY AND REPORT

The inquiry and reporting function has been criticised by some submissions, particularly by WACOSS and the Conservation Council. The inquiry and reporting function is actually based on the Essential Services Commission which WACOSS suggests the ERA should follow (see Part 5 of the *Essential Services Commission Act 2001 (Vic)*. In relation to other concerns regarding this function it is important to note the following:

- The function is not deterministic. The ERA can only act within the terms of reference issued by the Minister.

- Information on retail pricing in the regulated industries will be significantly improved to assist the Government in its decision-making processes. For example, the ERA will be able to report more thoroughly on the impacts of other regulations on retail prices (e.g. environmental, health standards, quality and reliability of goods and services, community service obligations).

  - In addition, there is currently no public consultation process, the Coordinators of Energy and Water Services have limited ability to request information, and GTE price submissions are not publicly available (whereas ERA reports will be tabled in Parliament).

- While the Treasurer would sign the terms of reference for inquiry and report, there would be a Cabinet process involving relevant industry Ministers to determine the ERA's inquiry program (i.e. a forward work program for 12 months). This will ensure appropriate coordination takes place with other Ministers and that the ERA has the capacity and funding to undertake its work program.

- A reference for inquiry and report can specify that the inquiry be conducted on an annual or other periodic basis (see clause 32(4) of ERA Bill) which avoids the need to continually issue terms of reference as argued in the WACOSS submission. References can be amended (see clause 33 of ERA Bill) which provides the flexibility to ensure issues of the day are taken into account.

COST RECOVERY

As previously stated, the current funding applying to the existing regulators would remain in place under the ERA. This means the gas access cost recovery regulations continue to apply. There is no cost recovery proposed for other ERA functions.

The original intention of cost recovery is that regulation is undertaken on the premise that the benefits to end-users exceed the costs. It is therefore reasonable for the beneficiaries to contribute to the cost of the regulatory framework.

Cost recovery for gas access regulation is considered a more equitable funding solution than general budget funding. Many communities and households in the State are not connected to gas networks and it would seem unfair for them to contribute to funding gas access regulation when they receive no direct benefit.

Importantly, the Treasurer sets a limit on cost recovery funding to ensure appropriate accountability and efficiency, and that the independence of the regulator is maintained. The ERA Bill requires that separate records are kept of the ERA's expenditure on each of its function.

Other jurisdictions fund their regulatory activities through much higher licence fees. The gas and water licence fees in Western Australia are very low compared to other jurisdictions, and do not reflect the costs of administering the schemes. In Victoria, retailer licence fees were $45 000 last year, and distributor licence fees $250 000. Fees are similar, or even greater in New South Wales (depending on the length of pipeline).

COORDINATION WITH POLICY BODIES

There appears to be some confusion that the ERA will be an isolated body that no one can communicate with. It is not clear why this impression exists. The current gas and rail regulators have good records in responding to correspondence.

Clause 27(2) of the ERA Bill provides for the ERA to publish information on matters related to its functions. Like the current gas and rail regulators, and regulators in other jurisdictions, the ERA would produce information relating to its mission, roles, and functions, and well as enter into memoranda of understanding with other regulators and policy bodies.

Standing Committee Members are encouraged to view each regulator's web site to gain an appreciation of what the current regulators do, and what the ERA will continue to do.

These are: www.offgar.wa.gov.au; and www.railaccess.wa.gov.au. Information on gas and water industry licences (including actual licences) can be found at: www.energy.wa.gov.au/html/licensing_and_authorisation.html; and

www.wrc.wa.gov.au/owr/content/industryLicensing/default.cfm?section=industryLicensing.

Regulatory Policy Steering Committee

A Regulatory Policy Steering Committee (RPSC) has been proposed to assist in ensuring the greater coordination of regulatory policy settings. In response to concerns from WACOSS that provisions establishing the RPSC are not included in the ERA Bill, the intention has always been that this will be a committee of policy bodies, and it therefore does not require legislative backing.

Members would include Department of the Premier and Cabinet; Department of Planning and Infrastructure; Department of Mineral and Petroleum Resources; the Office of Energy; the Department of Environment and Water; the Department of Consumer and Employment Protection; and the Department of Treasury and Finance.

A key role for the RPSC would be to develop a forward work program for the ERA's references for inquiry and report. The Committee would also assist the Government in responding to report recommendations and their implementation. It would also assist Ministers in considering amendments to regulatory rules or standards administered by the ERA.

Ministerial Roles

Some confusion appears to remain over Ministerial roles with respect to the ERA and the industries it regulates. These are in accordance with the framework recommended by the Machinery of Government report, and reflect the allocation of Acts to Ministers. They are:

Treasurer

The Treasurer is primarily responsible for the overarching regulatory policy framework and the legislation to establish the ERA (as well as the economic well-being of the State). In this capacity, the Treasurer will be responsible for appointments, resources/funding, and coordinating with relevant industry Ministers any terms of reference to the ERA for inquiry and report.

Industry Minister

In relation to the water and energy industries, the Industry Minister's role would include:

- responsibility for the industry licensing policy to which the ERA adheres in granting licences (WSC Act and EC Act);
- industry-specific policy development and coordination, such as industry structure and planning processes, sustainable industry policy;
- development of strategic initiatives and programs impacting the business environment (e.g. competition policy);
- setting of retail tariffs through industry specific regulations and by-laws (and therefore responding to an ERA inquiry and report on pricing matters);
- safety policy (in conjunction with other relevant ministers);
- technical standards (in conjunction with other relevant ministers);

- encouragement of waste water reuse and developing policies for sustainable water use;
- identifying the State's water and energy service needs and developing long term infrastructure development plans, including updating planning studies;
- ensuring customers have access to services at reasonable prices (for example, advising the Government on uniform pricing policy and funding Community Service Obligations); and
- identifying where new services are needed (such as infill sewerage program or the Goldfields water supply project).

The relevant industry Minister's role is to bring their industry perspective to regulatory policy formulation, assist the Treasurer in coordinating the regulatory policy role and have a broad responsibility for the industry. In this way, an appropriate balance can be struck between consistency in regulation and recognising the regulatory and policy needs of specific industries. It also achieves separation of the policy/framework setting role from the ERA's regulatory role.

ERA and the Industry Minister

The ERA will be required to report to the water and energy industry Ministers on respective licensing matters. This is in accordance with the relevant legislation. For example, under the amended WSC Act, the ERA will be required to:

- monitor and report to the Minister on the operation of the licensing scheme and on compliance by licensees with their licences;
- inform the Minister about any failure by a licensee to meet operational standards or other requirements of its licence;
- monitor the performance of the water services industry and of those participating in that industry, and the performance of providers of water services; and
- for the purposes of such monitoring, to consult with interested groups and persons.

The ERA will have a similar role in reporting to the Minister for Energy on gas industry licensing matters (and in the future, electricity licensing matters). This ensures the industry Minister is well informed and can take action to revise regulatory rules as appropriate. As is currently the case, this would be done through the Governor making regulations on licensing matters (e.g. new performance standards) or, if necessary, introducing to Parliament appropriate amendments to the relevant Act.

Government Enterprises Minister

The role of the Government Enterprises Minister is appropriately focussed on the performance of commercial activities of government. As such, the Minister would not have a regulatory policy role in the proposed framework. However, the relevant enterprises would have the ability, as would any industry participant, to influence the development and maintenance of the framework through formal consultation processes. Moreover, the Government Enterprises Minister would have an obvious interest in Cabinet's deliberations over price setting for government monopoly services and the impact of regulation on the government enterprise. This role is provided through the allocation of GTE enabling legislation to the Minister (e.g. *Water Corporation Act 1995*).

APPENDIX 1

Department of Treasury and Finance
Government of Western Australia

Our ref : T.04032
Enquiries : Michael Court
Telephone : 9222 9805

Dr A Beasley
Executive Director
Australian Pipeline Industry Association
1st Floor, 7 National Circuit
BARTON ACT 2600

Dear Dr Beasley

ECONOMIC REGULATION AUTHORITY BILL 2002

On behalf of the Economic Regulator Implementation Committee I would like to thank you for your submission as part of the public consultation process on the draft Economic Regulation Authority Bill 2002.

The Treasurer has been provided with a copy of all the public submissions received on the draft Bill. The issues raised in the submissions have also been considered by the Committee and a number of amendments to the draft Bill are being progressed. These changes seek to provide greater clarity that the primary aim of establishing the Authority is one of institutional change, and not change to current regulatory policy settings.

The more significant amendments include making it explicit that the objectives in the *Gas Pipelines Access (Western Australia) Act 1998* and *Railways (Access) Act 1998* apply exclusively in undertaking the gas and rail access functions respectively. This will strengthen the current intention in the Bill that the "matters the Authority can have regard to" (clause 26) are not to prevail over the objectives in any written law.

As noted previously, the various reviews on access regulation that are currently underway will be the process through which reforms to access regulation will be agreed on a national basis. Any reforms would then be incorporated into the relevant legislation (i.e. the *Gas Pipelines Access (Western Australia) Act 1998* and *Railways (Access) Act 1998).*

In relation to other amendments, the draft Bill is to specify that the inquiry and reporting function cannot override, or be a substitute for, any functions provided to the Authority under another written law, namely the *Gas Pipelines Access (Western Australia) Act 1998* and the *Railways (Access) Act 1998.*

197 St George's Terrace, Perth, Western Australia 6000
Telephone (08) 9222 9222 Facsimile (08) 9222 9117
www.treasury.wa.gov.au

In addition, clause 51(2) will be strengthened to ensure that when performing the gas and rail access functions the information gathering powers of the Authority will be restricted to those contained in the *Gas Pipelines Access (Western Australia) Act 1998* and the *Railways (Access) Act 1998* respectively.

The intention remains for the Bill to be ready for introduction to Parliament in the current sitting. This reflects the priority the Government has assigned to the Bill.

Once again, thank you for your contribution.

Yours sincerely

David Morrison
DIRECTOR (STRUCTURAL POLICY)

11 November 2002

ATTACHMENT B

CLAUSES IN THE ECONOMIC REGULATION AUTHORITY BILL 2002

Each clause in the Economic Regulation Authority Bill 2002 (ERA Bill) is taken from an existing Act in Western Australia and/or is similar to legislation for economic regulators in other jurisdictions. This is considered to be a very important point in reassuring the Standing Committee that the purpose of the ERA Bill is institutional change.

This attachment therefore highlights the origin of each clause in the ERA Bill. Existing industry specific Acts define the ERA's functions for each industry.

The following abbreviations are used:

ESC Act - *Essential Services Commission Act 2001* (Victoria)
ECA - *Energy Co-ordination Act 1994* (Western Australia)
GPAA - *Gas Pipelines Access (WA) Act 1998*
IIRA - *Independent Industry Regulator Act 1999* (South Australia)
IPART Act – *Independent Pricing and Regulatory Tribunal Act 1992* (NSW)
WSC Act - *Water Services Coordination Act 1995* (WA)
RAA - *Railways Access Act 1998* (WA)

ECONOMIC REGULATION AUTHORITY BILL 2002

PART 2 – ECONOMIC REGULATION AUTHORITY

Clause 4 – Economic Regulation Authority established

This is a standard clause for statutory authorities. (For example the Lotteries Commission of Western Australia, Insurance Commission of Western Australia).

Clause 5 – Status

The ERA is an agent of State and this is a standard clause for statutory authorities. (For example the Lotteries Commission of Western Australia, Insurance Commission of Western Australia).

Clause 6 – Management of Authority

See section 17 of ESC Act and section 6 of IPART Act.

The ERA Bill provides for up to three members. This reflects the multiple number of appointments to the governing body of regulators in other jurisdictions.

Clause 7 – Members

This is taken from section 18 of the ESC Act and section 6 of the IPART Act.

Clause 8 – Term of office

This is taken from section 29 of the GPAA, and section 15 of the RAA.

Clause 9 – Casual vacancy

This is taken from sections 30 and 31 of the GPAA and section 16 of the RAA.

Clause 10 – Alternate chairman

This is taken from section 35 of the GPAA and section 19B of the RAA.

Clause 11 – Alternate members

This is taken from section 35 of the GPAA.

Clause 12 – Remuneration and conditions of members

This is taken from section 33 of the GPAA, and section 19 of the RAA.

Clause 13 – Meetings of governing body

This clause refers the reader to the Schedule dealing with meetings.

PART 3 – ADMINISTRATION

Division 1 – Chief employee

See section 13 of RAA, and section 27 of GPAA. The Gas and Rail Regulators are currently the chief employee for the purposes of the *Public Sector Management Act*.

Providing for an independent chief employee to assist the governing body seeks to satisfy industry suggestions that key staff of the ERA should also be independent. However, the bulk of the other support staff for the ERA will be public servants (see next clause). This ensures existing staff and their expertise can be transferred to the ERA.

Division 2 – Other staff and facilities

Clause 19 – Other Staff

This is taken from section 42 of the GPAA and is similar to section 23A of the RAA and section 24 of the ESC Act.

Clause 20 – Use of government staff and facilities

This is taken from section 44 of the GPAA, and section 23C of the RAA.

Division 3 — Financial provisions

Clause 21 - Bank account

This is taken from section 23D of the RAA and section 45 of the GPAA.

Clause 22 - Borrowing from Treasurer

This is taken from section 23E of the RAA and section 46 of the GPAA.

Clause 23 - Application of Financial Administration and Audit Act 1985

This is taken from section 23F of the RAA and section 47 of the GPAA.

Clause 24 - Separate financial records

This ensures the ERA is accountable for expenditure for each of its functions.

PART 4 — FUNCTIONS OF AUTHORITY

Clause 25 – Functions

This is taken from section 10 of the ESC Act.

Clause 26 - Authority to have regard to certain matters

This is taken from section 5(2) of the IIRA, and is similar to section 8 of the ESC Act, and section 20(4) of the RAA.

Clause 27 – Powers

This is taken from section 36(3) of the GPAA.

Clause 28 - Independence of Authority

This is taken from section 20A of the RAA, section 10(1a) of the ECA and section 37 of the GPAA. Similar to section 12 of ESC Act.

Clause 29 – Delegation

This is taken from section 40 of the GPAA and section 9 of the ECA, and section 7 of WSC Act.

Clause 30 - Conflict of interest

This is taken from section 41 of the GPAA and section 20C of the RAA.

PART 5 — REFERENCES

Division 1 — References on regulated industries

Clause 32 – References

Subsection (1) is taken from section 48 of the ESC Act.

Subsection (2) sets out matters which references can be made in relation to and these are similar to matters in Part 3 of the ESC Act.

Subsection (3) is taken from section 40 of the ESC Act.

Subsection (4) is taken from section 41 subsections (3) and (4) of the ESC Act.

Clause 33 - Amendment or withdrawal of reference

This is taken from section 41(5) of the ESC Act.

Clause 34 - Notice of reference, amendment or withdrawal

This is taken from section 42 of the ESC Act.

Clause 35 - Authority to conduct inquiry

This is taken from section 43 of the ESC Act.

Clause 36 – Reports

This is taken from section 33 of the IIRA and section 45 of the ESC Act. Subsection (1) is also similar to section 41 subsection (4) of the ESC Act.

Division 2 — References on other industries

The ability for the ERA to inquire or report on other industries is consistent with regulators in other jurisdictions. Examples of inquiries undertaken by ESC, IIR and IPART include:

- Review of the Effectiveness of Full Retail Contestability for Electricity;
- Costs/Benefits of Installing Interval Meters for all Customers;
- Review of Natural Gas Prices for Regional Consumers;
- Inquiry into Standing Electricity Contact Prices;

- Performance of Utility Firms;
- Review of Sydney Water Corporation's Stormwater Charges and Expenditure;
- Review of the Taxi-Cab and Hire Car Industry;
- Inquiry on Demand Side Management;
- Inquiry into Gaming in New South Wales; and
- Various general Industry Reports.

Division 3 — General

Clause 46 - Conduct of inquiry

This is taken from sections 43 and 49 of the ESC Act.

Clause 47 - Powers relating to inquiry

This is taken from sections 44 and 50 of the ESC Act and section 58 of the GPAA.

Clause 48 - Offences in relation to inquiry

This is taken from section 51(3) of the ESC Act.

Clause 49 - Incriminating answers or documents

This is taken from section 22D of the RAA.

Clause 50 - Protection for person assisting Authority

This is taken from section 52 of the ESC Act and similar to section 40 of the IIRA.

PART 6 — COLLECTION AND USE OF INFORMATION

Clause 51 - Power to obtain information and documents

This is taken from section 21 of the RAA and section 21 of the ECA, and similar to Schedule 1, Part 7 provisions in the GPAA.

Clause 52 – Offences

This is taken from section 23 of the ECA, section 23 of the IPART Act, and similar to Schedule 1, Part 7 provisions in the GPAA.

Clause 53 - Incriminating information or documents

This is taken from section 22D of the RAA.

Clause 54 - Protection for person giving information or document

This is taken from Schedule 1, section 41(8) of GPAA.

Clause 55 - Restriction on disclosure of confidential information

This is taken from section 38 of the ESC Act and section 24AD of the IPART Act, and similar to Schedule 1, Part 7 provisions in the GPAA..

PART 7 — MISCELLANEOUS

Clause 56 - Protection from liability for wrongdoing

This is taken from section 60 of the ESC Act.

Clause 57 – Confidentiality

This is taken from section 23 of the RAA and section 24 of the ECA.

Clause 58 – Intimidation

This is similar to Schedule 1, Part 7. section 41(7) of the GPAA, and section 44(6) of the ESC Act.

Clause 59 - Execution of documents

This is a standard clause for statutory authorities (see also section 7(2) of the ESC Act.)

Clause 60 - Supplementary provision about laying documents before Parliament

This is similar to section 14 of the WSC Act.

Clause 61 – Regulations

This is taken from section 87 of the GPAA.

Clause 62 - Amendments to other Acts

This clause refers the reader to the schedule dealing with consequential amendments.

Clause 63 - Transitional and saving provisions

Provides for the 'seamless transition' from existing regulators to the ERA.

Clause 64 - Review of Act

All legislation has a standard review clause. See section 44 of the IIR Act, section62 of the WSC Act, section 12 of the RAA, section 66 of the ESC Act, section 27 of the ECA Act and section 88 of the GPAA.

SCHEDULE 1 — MEETINGS OF GOVERNING BODY

Clause 2 - Application

This clause states that the Schedule applies if the governing body has more than one member.

Clause 3 - General procedure

This is similar to (though difference in that it refers to chairperson rather than the governing body) section 28(1) of the ESC Act.

Clause 4 - Presiding member

This is similar to section 28(2) of the ESC Act and Schedule 3 section 12 of the IPART Act.

Clause 5 - Quorum

This is similar to Schedule 3 section 11 of the IPART Act.

Clause 6 - Voting

This is similar to Schedule 3 section 13 of the IPART Act.

Clause 7 - Minutes

This is similar to Schedule 3 section 14 of the IPART Act.

Clause 8 - Resolution without meeting

This is similar to Schedule 3 section 6 of the IPART Act.

Clause 9 - Holding meetings remotely

This is similar to Schedule 3 section 6 of the IPART Act.

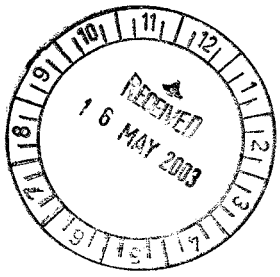
APPENDIX 5

SECOND TREASURY RESPONSE

APPENDIX 5

SECOND TREASURY RESPONSE

Department of Treasury and Finance
Government of Western Australia



PUBLIC

Our ref : T.06056
Enquiries : Michael Court
Telephone : 9222 9805

Hon B House MLC
Chairman
Standing Committee on Public Administration
and Finance
Legislative Council
Parliament House
PERTH WA 6000

Dear Mr House

ECONOMIC REGULATION AUTHORITY BILL 2002

I refer to the letter dated 12 May 2003 from Ms Denise Wong, Advisory Officer (Legal), to the Under Treasurer listing additional questions from the Standing Committee on Public Administration and Finance (the Committee), and inviting comment on a further three submissions from stakeholders regarding the Economic Regulation Authority (ERA) Bill 2002.

Responses to the specific questions raised in Ms Wong's correspondence are included in Attachment A. Comments on the main issues raised in the additional submissions are included in Attachment B. Again, in developing these comments there has been no liaison with the parties concerned due to the Standing Committee's desire for confidentiality on this matter.

I trust that these comments are of assistance to the inquiry.

Yours sincerely

Mark Altus
A/EXECTIVE DIRECTOR (ECONOMIC)

16 May 2003

197 St George's Terrace, Perth, Western Australia 6000
Telephone (08) 9222 9222 Facsimile (08) 9222 9117
www.treasury.wa.gov.au

ATTACHMENT A

RESPONSES TO QUESTIONS RAISED BY THE STANDING COMMITTEE

Following are responses to the specific questions raised by the Standing Committee in Ms Wong's correspondence of 12 May 2003.

TRANSPARENCY

	QUESTIONS
1.	What may/must the Authority take into account when making a decision? **Response**: As noted previously, existing industry-specific legislation defines the regulatory functions of the ERA, including what the ERA must take into account when making a decision. The industry specific Acts are the *Gas Pipelines Access (Western Australia) Act 1998*; the *Railways (Access) Act 1998*; Part 2A of the *Energy Coordination Act 1994* (gas industry licensing); and part 3 of the amended *Water Services Coordination 1995* Act (water industry licensing). These Acts are unchanged in relation to the issues the Authority must take into account when making a decision, except for the insertion of public interest criteria in the water licensing regime (which are already contained in the gas industry licensing regime), and a regulation-making power for public consultation processes that must be undertaken by the Authority before making a decision to grant, renew or transfer a gas or water industry licence. Public consultation is an important mechanism in determining the public interest. It should be remembered that the primary aim of the ERA Bill is to effect institutional change and achieving a more appropriate separation of regulation from policy-making, not revision of existing regulatory-policy settings. In relation to references for inquiry and report, the ERA will be guided by the matters outlined in the terms of reference. In any case, this function is not deterministic. Furthermore, clause 26(1) of the ERA Bill states that "in performing its functions, other than gas and rail access, the Authority must have regard to: a) the long-term interests of consumers in relation to the price, quality and reliability of goods and services provided in relevant markets; b) the need to encourage investment in relevant markets; c) the legitimate business interests of investors and service providers in relevant markets; d) the need to promote competitive and fair market conduct;

	QUESTIONS
	e) the need to prevent misuse of monopoly or market power; f) the need to promote transparent decision-making processes that involve public consultation; and g) the need to promote regulatory outcomes that are in the public interest." The matters are excluded from applying to the gas and rail access functions as the legislation defining these functions contains specific objectives that have been agreed nationally. This exemption was an important consideration for industry during public consultation. Clause 26 also provides for the objectives in other relevant legislation to prevail over these matters. This means the objectives in the water and gas licensing legislation have primacy over these matters. Further information on the gas and rail access functions is provided in response to question 23.
2.	Clauses 34 and 40 Terms of reference for inquiries into regulated industries must be published in the Government Gazette, in a state newspaper and on the internet. Why isn't there a similar obligation for non-regulated industries? **Response**: The regulated industries are the core area of operation for the ERA. However, in developing the Bill the interdepartmental committee considered that it would be desirable for the Government to utilise the expertise of the ERA on economic issues relevant to other industries, as appropriate. This is also consistent with economic regulators in other jurisdictions such as the Essential Services Commission (Victoria) and the Independent Pricing and Regulatory Tribunal (IPART) of NSW. Therefore, the ERA Bill provides for the Government to issue terms of reference for inquiry or report on issues related to non-regulated industry matters – for example, passenger transport fares, taxi-deregulation, competitive neutrality review of a government business. This would obviously provide for improved information to government to assist its decision-making processes. The inquiry or reporting function of the ERA is not deterministic. The Government may or may not act on any report recommendations. Providing discretion to the Government on the extent of public information associated with a non-regulated industry inquiry or report will ensure the ERA can be used without concerns over unnecessary public debate.

	QUESTIONS
	For example, if the Government used the ERA for an important inquiry and report on taxi-industry deregulation and intended to act on the recommendations, it would be expected the Government would make the terms of reference public and table the report in Parliament. However, if the Government wanted a quick analysis of public transport fares over the last 10 years but did not have any intention of changing fares, then to avoid unnecessary debate it may choose not to make public the terms of reference. Nevertheless, the ERA's annual report will identify all its activities over 12 months and inquiry/report information is subject to the *Freedom of Information Act.*
3.	Clauses 36(3) and 42(4) Why is it that a report on an inquiry into a regulated industry must be tabled in Parliament, but a report into a non-regulated industry does not have to be made public? **Response**: As noted in response to question 2, the regulated industries are the core area of operation for the ERA and it is desirable for complete transparency. The intention behind leaving it to the discretion of the Minister to table reports on non-regulated industry matters is to ensure that the expertise and independence of the ERA would be used to investigate non-regulated industry matters where appropriate. This would enable government decision making processes to be better informed. If the government did not want to act on a report it would not necessarily have to table it, and could therefore avoid unnecessary debate. Otherwise references on non-regulated industry matters may be unlikely to be undertaken. Nevertheless, the inquiry/report would be subject to the *Freedom of Information Act.* The ERA's annual report would also provide information on all inquiry and report activities.

POLICY

	QUESTIONS
4.	This Bill proposes to centralise the regulatory functions and powers in the water, gas and rail industries. Is this the best mechanism to achieve the policy goals of the government?

	QUESTIONS
	Response: Policy remains to be set by Ministers with support from policy departments. These bodies will be separate from the ERA. Centralising the administration of regulatory functions that apply similarly across utility industries provides a number of advantages over the current fragmented administration. These advantages have already been outlined to the Committee and include: • more consistent application of regulation; • consolidation of scarce regulatory expertise; • reduced likelihood of "industry capture"; • efficiencies in the administration of regulatory services and a reduction in duplication across agencies; and • flexibility to respond quickly to changing regulatory needs (such as competition in electricity industry and the emergence of multi-utilities).
5.	Did the government consult with the Commonwealth or other States when it formulated this regulatory scheme? If so, what has been their experience? **Response**: As noted previously, other jurisdictions have been consulted in the development of the ERA framework and were provided with a draft of the ERA Bill. No concerns or objections have been raised. Economic regulators have been operating in other Australian jurisdictions for some time and the key attributes of these models have been drawn upon in developing the Authority for Western Australian. In particular the frameworks developed for Victoria and New South Wales, whom have consolidated regulatory operations and expertise under a single economic regulator.

GAS INDUSTRY

	QUESTIONS
6.	The Authority's role in gas industry licensing is expected to be transferred to the Authority when the gas market has reached "full retail contestability".

	QUESTIONS
	What is meant by the phrase "full retail contestability"? Why should the commencement of this function be delayed until the gas market reaches "full retail contestability"? **Response**: Full retail contestability refers to the establishment of a competitive gas market in Western Australia, under which all customers will be able to choose their preferred gas supplier. Competition in the provision of service to all customers (i.e. including those at the small business and household level) is designed to ensure the benefits of upstream efficiency gains are passed though to end users. Full retail contestability in the gas market is expected to commence in the latter half of 2003 or early 2004. The decision to transfer gas licensing to the ERA around the commencement of FRC was taken some time ago because a separate process (Gas Retail Deregulation Project Steering Group) was in the early stages of examining the administrative and operational arrangements required for a competitive gas market. The transitional provisions in the ERA Bill provide the flexibility to proclaim the transfer of the gas licensing function to the ERA at a time the Government (and stakeholders) consider appropriate. It is worth noting that AlintaGas, the main gas licence holder (the only other being Wesfarmers in Margaret River), has indicated that it would prefer the transfer of this function to the ERA once it is established.

WATER INDUSTRY

	QUESTIONS
7.	Please explain the meaning of "Triple Bottom Line Principles". Did the government consider these principles when formulating the Bill? **Response**: Triple bottom line reporting essentially refers to providing information or reporting on the economic, social and environmental performance of an entity. Sustainability is sometimes described as the triple bottom line. The Government is developing a "Western Australian State Sustainability Strategy" which is currently in draft form.

	QUESTIONS
	The ERA Bill has been developed as a separate process to the sustainability strategy. The ERA is about institutional change – a machinery of government initiative. It is worth noting, however, that the ERA process considered it appropriate to insert public interest considerations into the water licensing regime (see clauses 93, 94, 96 and 98 of the ERA Bill). This provides for consistency with the gas licensing regime. It also reflects a response to public submissions commenting on these issues. In this regard, the public interest is defined to include environmental considerations, social welfare and equity consideration (including community service obligations), and economic and regional development (including employment and investment growth). Clause 26(1)(g) of the ERA Bill also requires the Authority to have regard to "the need to promote regulatory outcomes that are in the public interest."
8.	A recent review of the *Water Services Coordination Act 1995* has recommended the establishment of a body to advise the Minister responsible for water services on water services policy and planning. Will the Authority have the ability to share information with this body? **Response**: The final report of the review of the Water Services Coordination Act (the "Parry Review") has not yet been released. However the draft Parry Review recommended that the Water Industry Minister establish a water services policy and planning body that reports directly to the Water Industry Minister; and consults relevant agencies and service providers in developing policy. This recommendation is consistent with the relevant Machinery of Government report recommendations: **Recommendation 44**: A statutory position of Economic Regulator should be established to regulate the water, rail, gas and when reform is complete, electricity industries. **Recommendation 45:** The current industry policy, service availability and resource use functions of the Office of Water Regulation be transferred to the Environment portfolio. In relation to ERA information-sharing, as noted at the public hearing, the Committee is referred to clause 92 of the ERA Bill which requires the ERA to report to the water industry Minister on the water licensing scheme. This clause states "the functions of the Authority under the [water licensing] Act are:

	QUESTIONS
	• monitor and report to the Minister on the operation of the licensing scheme and on compliance by licensees with their licences; • inform the Minister about any failure by a licensee to meet operational standards or other requirements of its licence; • monitor the performance of the water services industry and of those participating in that industry, and the performance of providers of water services; and • for the purposes of such monitoring, to consult with interested groups and persons." The Minister (policy maker) therefore is informed by the ERA on licensing matters. The Minister can refer this information to the proposed policy body for supporting advice. It is also important to note that the ERA must consider the government policy objectives in relation to the supply of water services as a public interest consideration in clause 93. It would also be expected that the ERA would liaise directly with the policy body and where appropriate enter into memoranda of understanding to formalise information exchanges etc. This would be much like the current Gas Access Regulator's relationship with the Office of Energy, and Rail Access Regulator with the Department for Planning and Infrastructure.
9.	Will the Minister responsible for water services be able to require the Authority to impose certain licence conditions that will assist policy development and planning? **Response**: As noted previously, industry Ministers remain responsible for the regulatory rules the ERA administers. The water industry Minister has the following options for imposing certain licence conditions: • The ERA must have regard to public interest criteria, which includes the "policy objectives of government in relation to water services" in making a decision to grant, amend or transfer a licence. • Section 62 of the *Water Services Coordination Act 1995* (the Act) remains under the ERA Bill to enable "any regulations prescribing all matters that are required or permitted by this Act to be prescribed or are necessary or

	QUESTIONS
	convenient to be prescribed for giving effect to the purposes of this Act." • Section 33 of the Act remains so that "regulations made under section 61 may a) Prescribe standards of performance that are to be achieved in individual cases in the provision of water services; and b) Provide that if a licensee fails to meet such a standard, the licensee is to pay a prescribed amount to any person affected by the failure who comes within a prescribed description". The regulations may — a) include a requirement for a licensee, in prescribed circumstances, to inform a person of his or her rights under the regulations; b) provide for any dispute under the regulations to be referred to the Coordinator for determination; c) make provision for the procedure to be followed in connection with any such reference and for the enforcement of the Coordinator's determination; and d) provide for exemptions from the requirements of the regulations." • The Minister can move to amend the water licensing regime by amending the Act. • The Minister is responsible (through the Governor) for making orders for controlled areas (i.e. water supply areas where licences are required), as well as for exemptions for licences, and revoking or cancelling a licence. • Section 44 of the Act provides for the Minister to hear appeals against licensing decisions. The Minister may confirm, vary or reverse the decision. It has also been noted previously that the *Water Agencies (Powers) Act 1984* is administered by the water industry Minister (not the ERA). It outlines the powers provided to water service providers. The Minister can move for regulations to cover many service provision issues – such as water tariffs and charges. In addition, the main water service providers are Government Trading Enterprises – the Water Corporation, Bunbury Water Board (Aquest) and Busselton Water Board. As shareholder or owner of these GTEs the government administers the GTE enabling legislation (i.e. *Water Corporation Act 1995*) and sets the corporate strategies, through

	QUESTIONS
	Strategic Development Plans and Statements of Corporate Intent. The above illustrates the many avenues open to the Minister to ensure water **industry** policy objectives are met.

COSTS/LICENCE FEES/CHARGES

	QUESTIONS
10.	Will the Authority be expected to comply with the "Costing and Pricing Government Outputs: Guidelines for use by Agencies" prepared by the Department of Treasury and Finance, in relation to its regulatory functions? **Response**: As already noted, the ERA is guided by industry specific legislation that defines its regulatory functions, and the terms of reference for inquiry and report. The Costing and Pricing Government Outputs: Guidelines for use by Agencies prepared by the Department of Treasury and Finance are guidelines to assist agencies prepare information about the costs of their outputs (i.e. the price of the goods or services they deliver). Should an inquiry and report on a regulated industry's tariff and charges be undertaken, the ERA may find the guidelines useful. As this question is under the heading Costs/Licence Fees/Charges, it is worth noting that the enabling power for gas and water industry licence fees and cost recovery for gas access is set by the Governor in regulations (not the ERA). The Minister sets an annual limit on expenditure for each regulatory function.
11.	Will the cost recovery method of funding ever be used to fund the Authority's regulatory function in any other industry apart from the gas industry? **Response**: As noted previously, there is currently no decision to extend the cost recovery method of funding to other industries. Should the Government seek to do so, this would need to be implemented through regulations, which would be developed through public consultation and are a disallowable instrument.

GENERAL

	QUESTIONS
12.	What is the difference between a 'person employed in the public sector' and a 'public service employee'? **Response**: There is no difference, nor intended difference, between a 'public sector employee' as defined in the ERA Bill and an 'employee' as defined in the *Public Sector Management Act 1994*. Further information is provided in response to question 17.
13.	Your submission states on page 4 that there will be the inclusion of a requirement to undertake public consultation before making a decision for the grant, renewal or transfer of a water or gas industry licence. The Bill proposes the insertion of a new section 31B into the *Water Services Coordination Act 1995* and a new section 11WA into the *Energy Coordination Act 1994*, which provide that regulations may be made to require the Authority to undertake public consultation in accordance with the specified procedure, when making such a decision. Why wasn't this requirement to undertake public consultation placed in the Bill or inserted in the affected Acts rather than in regulations that may not be drafted? **Response**: It would not be appropriate for public consultation processes for licensing to be specified in the ERA Bill. The power for public consultation processes related to licensing decisions should be in the licensing Acts as they define the power to grant, transfer and amend a licence. Prescribing these process in regulations (rather than in the licensing Acts) gives more flexibility to amend the consultation processes as necessary. In addition, regulations can be more specific on the consultation processes to be followed in relation to the particular industry licensing regime. If there was no intention to draft the regulations then it would not be clear why a regulation-making power for public consultation would be inserted into the Acts. Parliamentary process require regulations to be drafted once the Bill has some certainty for passage. It is therefore premature for Parliamentary Council's Office to give priority to drafting these regulations. Finally, it should be noted that clause 26(1)(f) of the ERA Bill requires "the Authority

	QUESTIONS
	to have regard to the need to promote transparent decision-making processes that involve public consultation."
14.	Clauses 42(2) and 51(2)(b) Where the Minister refers to the Authority an inquiry relating to either a regulated or non-regulated industry, the Authority will have the ability to request information and significant powers to enforce those requests. Why won't the Authority have the power to enforce a request for information when the Minister has asked the Authority to report on a matter relating to a non-regulated industry? **Response**: The power to enforce a request for information accompanies the inquiry process. References on non-regulated industries can specify an inquiry **or** report. A report must be made on the outcome of an inquiry. References on regulated industries must be for inquiry **and** report. The ability for report only on a non-regulated industry matter gives the flexibility for the government to request a quick report to be made without the inquiry process (and its associated expense). Reports prepared by an independent body with economic expertise provides for the government to be better informed in its decision-making processes.
15.	Would the government consider inserting an objectives clause into the Bill, especially since the Productivity Commission recommended this in its *Review of the National Access Regime*? **Response**: The Review of the National Access Regime by the Productivity Commission was a review of Part IIIA of the *Trade Practices Act 1974 (Cwth).* The review found that: *...ideally an 'effective' access regime should include [inter alia] an objects clause (specifying that the objective of the regime is to promote the efficient use of, and investment in, the essential infrastructure facilities concerned)...* and recommended that: *...an objects clause be included in the Part IIIA of the Trade Practices Act 1974 referring to the need to promote the efficient use of, and investment in, essential infrastructure facilities and to recognise the regime's role in discouraging unwarranted divergence in industry regimes.*

	QUESTIONS
	The Commonwealth is responsible for responding to the Productivity Commission review and for initiating amendments to the TPA. As noted in our submissions to the Committee, objectives for the Western Australian access regimes are included in respective industry-specific legislation. For the Gas Access Code and Rail Access Code, the objectives contained within the access regimes are agreed nationally and cannot be changed without national agreement. It is also not appropriate for a specific 'objectives clause' to reside in the ERA Bill – the objectives would cover the regulatory functions defined by each industry-specific Act and some of the objectives may not be entirely suitable for each function. Any revisions to the objectives of an access code can be easily accommodated within the respective industry-specific Acts. A review of the Gas Access Regime is expected to commence shortly. Once again, if an objects clause for access regimes was to be inserted into the ERA Bill it would require national agreement (which is unlikely given a separate review process is under way for the gas access regime and this will take some time before recommendations are implemented).
16.	Why didn't the government wait for the Energy Reform Task Force Report before introducing this Bill? **Response**: The Electricity Reform Task Force (ERTF) reported 15 October 2002. The ERA Bill was introduced on 4 December 2002. Key ERTF recommendations are for an electricity access regime and electricity licensing regime to be established and for them to be administered by an independent economic regulator. These recommendations are in the process of being implemented. The ERA Bill provides the flexibility for new regulatory roles to be transferred to the ERA at a later date (whether they are related to the electricity industry or another). For the same reasons that it is desirable to establish a single economic regulator (i.e. consolidation of expertise and consistency in the application of regulation), it is not desirable to delay the capturing of such benefits from the consolidation of the other regulated functions merely to await the outcomes of the electricity reform process (for example the current Gas Access Regulator is also the current Rail Access Regulator, but must perform these functions from separate offices). There has always been little risk that the review of the electricity industry would

	QUESTIONS
	recommend against economic regulation *per se*, and hence the issue is one of ensuring the appropriate institutional arrangements are in place to support these functions in an effective way.

TECHNICAL SCRUTINY

	QUESTIONS
17.	Clause 3 The Bill defines 'public sector employee' as "an employee as defined in section 3(1) of the *Public Sector Management Act 1994*". There is no such definition in that Act, but there is a definition for 'employee'. Did the government intend to incorporate the definition of 'employee' in the *Public Sector Management Act 1994*? **Response**: The Government does need to incorporate the definition of 'employee' in the *Public Sector Management Act 1994* as it is already there. Clause 3 of the ERA Bill defines "public sector employee" to mean an "employee as defined in section 3(1) of the *Public Sector Management Act 1994*". Section 3(1) of the *Public Sector Management Act 1994* defines an "employee" to mean a 'person employed in the Public Sector by or under an employing authority'. There is no difference, nor intended difference, between a 'person employed in the public sector' and a 'public sector employee'.
18.	Clause 3 - definition of 'regulated industry' What is the justification for being able to add another industry to the 'regulated industries' by regulation? Does the government have plans to extend the scope of the Authority's functions to any other industries, besides water, gas, rail and electricity? **Response**: This provides flexibility for potential new industry specific legislation to define functions for the ERA without the need to amend the ERA Act. For a hypothetical example, if a new port access regime was established in a Port Access Act the ERA could be provided the administration of this regime by simply being defined as the regulator in the Port Access Act.

	QUESTIONS
	The Government has no plans to extend the scope of the ERA's functions. This would only be revisited if the need for a new regulatory function arose. (There is no proposal for a Port Access Act.)
19.	Clauses 7(3), 10(3) and 11(3) Why will a public sector employee be eligible to be appointed as an **alternate** member of the governing body of the Authority, if s/he is not eligible to be appointed as a regular member? **Response** To ensure that an appropriately skilled and experienced person can be appointed for a short acting term until a permanent member can be appointed. It may be the case that the most appropriate person is a public service employee. While the intention would always be to appoint a permanent member as soon as a vacancy arises, it is prudent to provide arrangements to cover any potential short term vacancy.
20.	Clause 23(2) Why should the Authority's obligation to prepare performance indicators be limited to its management functions? **Response** The ERA must prepare performance indicators related to management functions (including financial administration). The exemption from other performance indicators reflects the ERA is required to perform regulatory functions defined in legislation, and it cannot be directed in the performance of these functions (i.e. independent). This clause is taken from existing legislation. In order to protect the independence of regulatory bodies the original intent was to have a total exclusion from the requirement to prepare performance indicators. The requirement for performance indicators in the limited circumstances (financial management) was introduced at Treasury's request. Following discussion with the Office of Auditor General, action is now in train to amend this requirement in all similar legislation by inclusion of the words "and need only be complied with to the extent practicable." (see Machinery of Government Miscellaneous Amendments Bill).
21.	Clause 23(3) Why should the Authority be exempt from the requirement to submit an annual estimate of its financial operations for forthcoming financial years?

	QUESTIONS
	Will the Authority still be required to submit an annual report to Parliament? **Response:** While the ERA does not submit an annual estimate, it is subject to the Minister setting an annual expenditure limit on its functions under 23(3). Clause 23(3) of the ERA Bill provides the power for the Minister to authorise annual expenditure limits which provides a more appropriate accountability arrangement for an independent body. It enables the Minister to assess the reasonableness of the Authority's total expenditure (for each regulatory function), while not being able to alter or affect the way the Authority conducts its functions (consistent with its independence). As noted previously, like every statutory authority the ERA will be required to submit an annual report to the Minister who must table it in Parliament in accordance with the requirements of the FAAA.
22.	Clause 26(1)(g) Would the government consider specifying what factors may be considered by the Authority when it considers what is in the 'public interest' under this subclause? For example, the factors contained in section 11H(3) of the *Energy Coordination Act 1994* and the proposed section 19(1)(b) of the *Water Services Coordination Act 1995* may be reproduced in Clause 26. **Response** This would be unnecessary. Clause 26 is precluded from applying to the gas and rail access functions and from overriding provisions in the *Energy Coordination Act 1994* and *Water Services Coordination Act 1995.* The ERA must therefore consider the defined public interest criteria contained in these Acts before it considers Clause 26(1)(g).
23.	Clause 28(3)(b) What sort of operational directions or guidelines will apply to the Authority under the *Gas Pipelines Access (Western Australia) Law* and the *Railways (Access) Code 2000*? **Response** As noted at the public hearing and in our submissions, the operational guidelines defined in the respective Gas and Rail Codes are unchanged by the ERA Bill. Examples of issues in this respect include:

	QUESTIONS

	Gas Law and Code:
	
	The process whereby a compulsory Access Arrangement is approved can be summarised as follows:
	
	• The Service Provider submits a proposed Access Arrangement, together with the Access Arrangement Information, to the Regulator.
	
	• The Regulator may require the Service Provider to amend and resubmit the Access Arrangement Information.
	
	• The Regulator publishes a public notice and seeks submissions on the application.
	
	• The Regulator considers the submissions, issues a draft decision and then, after considering any submissions received on the draft, makes a final decision which either:
	
	  • approves the proposed Access Arrangement; or
	
	  • does not approve the proposed Access Arrangement and states the revisions to the Access Arrangement which would be required before the Regulator would approve it; or
	
	  • approves a revised Access Arrangement submitted by the Service Provider which incorporates amendments specified by the Regulator in its draft decision.
	
	• If the Regulator does not approve the Access Arrangement, the Service Provider may propose an amended Access Arrangement which incorporates the revisions required by the Regulator. If the Service Provider does not do so, the Regulator can impose its own Access Arrangement.
	
	• The Gas Pipeline Access Law provides a mechanism for the review of a decision by the Regulator to impose an Access Arrangement.
	
	A similar process applies in relation to voluntary Access Arrangements, except that the Service Provider may withdraw the application at any time prior to approval of the Access Arrangement and the Regulator may only approve or disapprove the Access Arrangement; it may not impose its own Access Arrangement.
	
	An Access Arrangement must include a date for review. In addition, changes to an Access Arrangement may be made before a review date if the Regulator and the Service Provider agree. In either case if revisions to the Access Arrangement are proposed, a process of public consultation and approval by the Regulator, similar to that followed for approving a compulsory Access Arrangement, must be followed. The Regulator may, however, dispense with public consultation if changes proposed between reviews are sufficiently minor.
	
	Rail Code
	
	The Regulator's main role is to oversee, monitor and enforce compliance with the Act and the Code. The Regulator is required to:
	
	▪ Approve and/or determine the Costing Principles and Over-payment Rules that should underpin third party access charges (Section 46 and 47 and Schedule 4 of the Code);
	
	▪ Approve and/or determine the floor and ceiling costs that should apply to certain routes, on a segment by segment basis as specified by the Railway Owner (Clause 9, Schedule 4 of the Code);

	QUESTIONS
	▪ Approve and/or determine the "ring fencing" or segregation arrangements that should apply to the railway owners (Section 28 - 34 of the Act); ▪ Approve and/or determine the Train Management Guidelines (Section 43 of the Code) and Statement of Train Path Policy (Section 44 of the Code) that should apply to the railway owners; and ▪ Review and, if appropriate, approve the negotiation of access arrangements that may preclude other entities from access (Section 10 of the Code). Prior to approving or determining the floor and ceiling costs, segregation arrangements, Train Management Guidelines, Train Path Policy and approving the negotiation of access that may precludes other entities from access, the Regulator must publish public notices and seek public submissions. Other duties of the Regulator include the need to: ▪ Provide advice, on request, to access seekers that the price offered is consistent with access prices charged to the railway owner or its associates; ▪ Maintain a public register of access arrangements (although the access arrangements themselves are not public); ▪ Obtain information and documents from the railway owners and in so doing the Regulator has power of entry, if required; ▪ Release information that will benefit negotiations (other than commercially confidential information), if appropriate; ▪ Determine the weighted average cost of capital, annually as at 30 June of each year; ▪ Apply penalties for breaches of the Act; and ▪ Upon recommendation of the Chairman of the WA Chapter of the Institute of Arbitrators and Mediators, establish panels of arbitrators who could be appointed to resolve disputes that may arise during the negotiation of an access agreement. Although not directly involved in the arbitration process, the Regulator may provide information or advice to the arbitrator, if requested.
24.	Clauses 48(a), (b) and (c), and 52(1) These clauses contain strict liability offences and a reversal of onus of proof. What are the justifications for this? **Response** The clause reflects the drafting standards overseen by Parliamentary Council's Office. Similar provisions exist in: • Section 13(2) of the *Land Valuers Licensing Act 1978*

	QUESTIONS
	• *Section 29(2)* of the *Land Valuation Tribunal Act 1978* • Section 17 of the *Real Estate and Business Agents Act 1978* • Schedule 2.5 section 15 of the *Local Government Act 1995*
25.	Clauses 49 Why doesn't the protection against admissibility also extend to the contents of a document that has been produced by an individual? **Response** Clause 49 does extend to a document produced by an individual.
26.	Clause 55(2) What comments do you have regarding these suggestions? Allowing a person who is adversely affected by a disclosure of information by the Authority to: • be notified of the intention of the Authority to disclose the information; • express their thoughts on why the information should or should not be disclosed; • have access to the Authority's reasons for disclosing the information; and • have a merits-based appeal from the decision of the Authority to disclose the information. This may involve an internal review and/or a subsequent right of appeal to a court or tribunal. **Response** The ERA Bill already provides for the first three points. For example, the person would be aware of the intention to disclose the document and the reasons why because the ERA would have to consult with them in order to establish the requirements under clause 55(2), that is, that disclosure would: a) not cause detriment to the person giving the information or another person; b) although the disclosure of the information would cause detriment to the person giving it, or another person, the public benefit in disclosing it outweighs that detriment.

	QUESTIONS
	Appeal provisions may result in every information request becoming subject to costly appeal. Appeal provisions against the ERA following due process in its decision making already exist, and any law can be subject to judicial challenge. Furthermore, a member can be removed from office in the grounds of misconduct etc. It is important to note that clause 51 of the ERA Bill specifies that information can only be requested to assist the ERA in the performance of its functions, and the request for information must be made in a written notice.
27.	Clause 56 If the actions of members or staff members of the Authority will not be protected from wrongdoing if those actions are performed without good faith, why should they be protected if they act negligently? **Response** This clause only applies when a staff member acts in good faith. Members are not protected if they act negligently. Clause 9 of the ERA Bill provides for the Governor to remove a member from office on the grounds of neglect of duty, misconduct, incompetence, absence etc. The *Public Sector Management Act 1994* also provides for public service employees to be dismissed for neglect of duty.
28.	Clause 57 Clause 57 contains a strict liability offence and a reversal of onus of proof. What justification is there for this? What is the justification for being able to add circumstances to the list of defences by means of regulation? What other circumstances that amount to a defence will be prescribed by regulations? Will they be similar to the exceptions provided in the Information Privacy Principles and the National Privacy Principles that operate in the *Privacy Act 1988 (Cth)*? **Response:** It is not clear that the first part of this question relates to section 57. In any case, see response to question 24 regarding onus of proof. The second part of the question about the ability to prescribe circumstances where information should not be disclosed is a standard "catch all" clause. It enables

	QUESTIONS
	unforseen circumstances to be covered as they arise where is it appropriate to define them as situations where information should not be disclosed. It is not possible to answer the third question as these circumstances are, by definition, unknown.
29.	Clause 64 Why isn't there a suggested time-frame for the conduct of the review of the Act? **Response** This is a standard clause providing a review of the effectiveness of the Act after 5 years, and most legislation does not provide a limit on the timeframe for review. In addition, a timeframe for the review could limit flexibility to ensure appropriate matters are included. For example, it may be appropriate to tie in a review of the ERA Act with a statutory review of one or more of the industry-specific acts that define the ERA's functions.
30.	Schedule 2 Clause 96 - amends section 28 of the *Water Services Coordination Act 1995* When considering whether to renew a water licence, why won't the Authority have to consider whether the licence-holder is likely to continue to have the financial and technical ability to provide the water services covered by the licence? **Response** The ERA consequential amendments do not change the existing requirements for the renewal of a licence, except for requiring that the Authority is not to renew a licence unless the Authority is satisfied that it would not be contrary to the public interest to do so. This provides for consistency with the gas licensing regime. Financial and technical ability is assessed before the granting a licence. These abilities are then monitored on an ongoing basis throughout the term of a licence (whether the initial term or subsequent term following renewal) by the mandatory licence condition requiring asset management systems to be in place and independent operational audits to be performed (see section 36 and 37 of the *Water Services Coordination Act 1995*).

ATTACHMENT B

COMMENTS ON SPECIFIC ISSUES RAISED IN SUBMISSIONS

The following provides a number of specific comments on the main issues raised in the additional submissions to the Standing Committee from the CPSS, Department of Health and UnionsWA.

CPSS - Employment arrangements for public servants employed within the Economic Regulation Authority

The ERA is a Machinery of Government initiative. All regulatory and policy functions currently being undertaken will continue under the Economic Regulation Authority. There are no job losses. The funding and resources of existing agencies will be allocated to the ERA or remain with the relevant policy body. The budget allocations and staffing numbers for these agencies are contained in the 2003-04 Budget papers.

Despite the independence of the governing body, it should be noted that the ERA Bill provides for the employment of existing public service employees who can be appointed under part 3 of the *Public Sector Management Act 1994* (see clause 19 of the ERA Bill).

A working group has been established to oversee the administrative arrangements required for the smooth transition to the ERA. Obviously, the working group is constrained in how far it can go until there is certainty to the structure of the ERA Bill. Nevertheless, consultation with public sector unions and relevant staff is a priority on the working group's project plan.

Consideration of public health matters in relation to water services providers' licenses

Existing operating licences issued by the Coordinator of Water Services under the *Water Services Coordination Act 1995* include guidelines for drinking water quality. The Health Department sets these standards for drinking water supplied by service providers. The creation of the ERA will not affect the existing obligations on water services providers under the existing licensing regime. The power for these standards as licence conditions is provided for under schedule 1 of the *Water Services Coordination Act 1995* – licence terms and conditions – and this remains unchanged under the ERA Bill.

In relation to the Department of Health's comment on the public interest criteria it is worth noting that the public interest criteria are already broad. For example, they include the interests of water service customers generally or a class of water service customers; the policy objectives of government in relation to water services; and any other matter that is considered relevant.

Given the ability for exemptions to water industry licences, the Department of Health's concerns would be more appropriately dealt with through amendments to the *Health Act 1911*. This is supported through the Parry Review of the Water Services Act which has recommended the *Health Act 1911* be amended, such that drinking water quality standards and the regulation of drinking water quality to protect human health becomes an obligation under the *Health Act 1911* rather than a licensing condition under the *Water Services Coordination Act 1995*.

UnionsWA

The submission from UnionsWA raises many issues that have already been commented upon – public interest, accountability, policy direction and consultation/transparency.

In summary, the ERA is about institutional change. It will perform regulatory functions that already exist in industry specific legislation. The ERA will be required to have regard to public interest considerations which includes environmental, social welfare and regional development issues. These matters are left to be set by the responsible Ministers and departments and agencies such as the Water and Rivers Commission and the Department of Environmental Protection.

The Government retains responsibility for regulatory policy settings. In addition, Ministers (or the Governor) remain responsible for defining licence areas, the revocation of licences, the coverage of specific infrastructure under access regimes, and setting retail tariffs and charges. This provides the ability to ensure regulation does not unintentionally inhibit regional development or social welfare policies.

For example, in relation to regional issues some regional pipelines have been revoked from coverage under the national gas code and the Rottnest Island Authority is exempt from requiring a gas industry licence. On social welfare issues, the Minister sets water tariffs and charges through by-laws, which includes specifying the rates of interest on overdue accounts, and sets community service obligations.

The ERA must also report to the existing industry Ministers in relation to the operation of its regulatory functions. This means industry Ministers will remain adequately informed in order to make policy decisions.

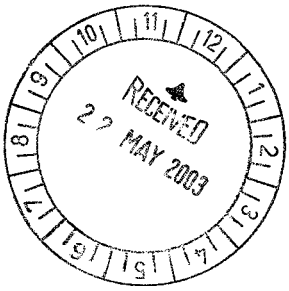
The ERA is subject to appropriate accountability provisions of the *Financial Administration and Audit Act 1985*. Expenditure limits are set for each of its regulatory functions and it is required to table an annual report.

The ERA must also operate in manner that promotes transparent decision making that involves public consultation. All regulatory decisions are subject to consultation processes and decisions are publicly available. All reports on regulated industry matters must be tabled in Parliament.

Department of **Treasury and Finance**
Government of Western Australia

PUBLIC

Our ref : T.06056
Enquiries : Michael Court
Telephone : 9222 9805



Hon B House MLC
Chairman
Standing Committee on Public Administration
and Finance
Legislative Council
Parliament House
PERTH WA 6000

Dear Mr House

ECONOMIC REGULATION AUTHORITY BILL 2002

Please find attached some additional information to that provided to you on 16 May 2003 in relation to the Economic Regulation Authority Bill 2002.

I trust that the information is of assistance.

Yours sincerely

Michael Court
A/ASSISTANT DIRECTOR (COMPETITION POLICY)

19 May 2003

197 St George's Terrace, Perth, Western Australia 6000
Telephone (08) 9222 9222 Facsimile (08) 9222 9117
www.treasury.wa.gov.au

ATTACHMENT

ECONOMIC REGULATION AUTHORITY BILL 2002

This attachment provides supplementary information to that provided on 16 May 2003 to the inquiry by the Standing Committee on Public Administration and Finance on the Economic Regulation Authority Bill 2002.

GAS ACCESS

In relation to questions about the Gas Code and "objectives", it is worth noting section 2.24 of the current Gas Code, which states:

"In assessing a proposed Access Arrangement, the relevant regulator must take the following into account:

(a) the Service Provider's legitimate business interests and investments in the Covered Pipeline;

(b) firm and binding contractual obligations of the Service Provider or other persons (or both) already using the Covered Pipeline;

(c) the operational and technical requirements necessary for the safe and reliable operation of the Covered Pipeline;

(d) the economically efficient operation of the Covered Pipeline;

(e) the public interest, including the public interest in having competition in markets (whether or not in Australia);

(f) the interests of Users and Prospective Users;

(g) any other matters that the Relevant Regulator considers are relevant."

RAIL ACCESS

In relation to the *Railways (Access) Act 1998* and "objectives" it is worth noting section 20(4) of the Act states:

"In performing functions under this Act or the Code, the Regulator is to take into account –

(a) the railway owner's legitimate business interests and investment in railway infrastructure;

(b) the railway owner's costs of providing access, including any costs of extending or expanding the railway infrastructure, but not including costs associated with losses arising from increased competition in upstream or downstream markets;

(c) the economic value to the railway owner of any additional investment that a person seeking access or the railway owner has agreed to undertake;

(d) the interests of all persons holding contracts for the use of the railway infrastructure;

(e) firm and binding contractual obligations of the railway owner and any other person already using the railway infrastructure;

(f) the operational and technical requirements necessary for the safe and reliable use of the railway infrastructure;

(g) the economically efficient use of the railway infrastructure; and

(h) the benefit to the public from having competitive markets."

COMMUNITY AND PUBLIC SERVICE UNION

The submission from the Public Service Union notes the following points:

- the lack of clarity on the status of the Authority within the Public Sector Management Act as to whether it will operate as a Schedule 1 or Schedule 2 organization;
- the contractual arrangements to be used to establish employment;
- questions about access to the Public Sector Management Redeployment and Redundancy Regulations 1994; and
- potential loss of coverage by an existing industrial agreement and the need for a new award or agreement.

The following comments are made on these points.

- Schedule 2 clause 52 of the Economic Regulation Authority Bill provides for amendments to include the Economic Regulation Authority in Schedule 2 of the Public Sector Management Act (PSM Act) as an SES organisation;
- the Chief Employee is not a CEO under the PSM Act, however all other permanent staff are public service officers and any above level 9 may be included in the SES;
- existing rights of permanent employees as they relate to redeployment and redundancy do not change; and
- there is no change to existing industrial arrangements.