Joint Standing Committee on Delegated Legislation — Thirty-fifth Report — "Fish Resources Management Amendment Regulations (No. 3) 2009" — Motion

Committee was interrupted after Hon Helen Bullock had moved the following motion —

That the report be noted.

Hon HELEN BULLOCK: Before the debate was interrupted for question time, I had been saying that the Joint Standing Committee on Delegated Legislation comprises eight members. Those members come from both houses of this Parliament. The committee carries out its duties thoroughly and diligently, and it produces a report when concerns are raised. So I hope that the minister will respect the committee's decision by adopting the recommendations contained in the committee's report.

Hon NORMAN MOORE: I read this report with great interest, because it relates to a portfolio for which I have responsibility. The Joint Standing Committee on Delegated Legislation scrutinises requests by government agencies to increase their fees by way of regulation. The Department of Fisheries had sought to increase fees that it has been raising under the Fish Resources Management Act for a very long time. That particular proposal was considered by the committee. It is interesting that when the committee looked at the fees that have been raised by the Department of Fisheries under the Fish Resources Management Act, it took the view that somehow or other one of the funds that receives money from fishermen, the development and better interest fund, known as the DBI fund, is invalid and is a tax.

It is interesting that the committee came to that view. I say that because the DBI fund has been in place since 1995. Those funds are provided to the department by fishermen as part of a cost recovery process, or as an access fee, in a sense. That fund has been considered to be perfectly legitimate since 1995, when it was brought in as part of the Cole–House agreement; that is, as part of the agreement between the then Minister for Fisheries, Monty House, and the chairman of the Western Australian Fishing Industry Council, Mr Cole. Money was paid by fishermen into the DBI fund to enable the department to carry out programs for the development of new processes and to look at innovative ideas. The purpose of the DBI fund was to provide a fund beyond cost recovery that would enable the department to work with the industry and consider a range of initiatives that it might want to implement. Under cost recovery, the department can spend the money that it receives from a fishery only on the management of that fishery. In the rock lobster fishery, to give an example, rock lobster unit holders are required to pay a fee. That fee is then used by the department collectively to manage that fishery. That money can be spent only on managing that fishery. Indeed, there is an unders-and-overs situation whereby if the department spends more than it receives, it can requisition more funds from the industry, but, if it spends less, it has to pay back those funds. It cannot use that money to look at innovative new ideas for fisheries. It was, therefore, agreed between the government of the day and the Fishing Industry Council that the DBI fund would be created, the fishermen would contribute to it, and the money would be spent by the department on what it calls development and better interest. That has been around since 1995 when that particular agreement was made. The application that was put to the Joint Standing Committee on Delegated Legislation by the fisheries department was simply for an increase in the fees. The committee did not say that the fees should not be increased; it said that one of the fees was invalid because it was a tax! The committee sought that advice, which was provided by the State Solicitor, Robert Mitchell. I will read his conclusion in paragraph 64 of his letter to the committee, which is included in the report of the committee. Mr Mitchell says —

> In my opinion none of the above fees are taxes, so that none of the fees can be said to constitute a duty of excise which the State is prohibited from imposing by s. 90 of the Constitution. It is therefore unnecessary to consider whether the fees, if taxes, should be characterised as taxes on the production of fish in a manner prohibited by s. 90 of the Constitution. The fees are otherwise set in a manner which is authorised by the Act.

The Department of Fisheries obtained this advice from the State Solicitor's Office, and so proceeded on the basis of the legal advice that it obtained. I do not know to what extent the committee took notice of the advice of the State Solicitor, but it came to a different conclusion. Whilst I am not going to be critical of either side of the argument, we have a committee taking advice from its legal advisers, which have a view about these things that is contrary to the views of the government's legal officers. I was put in a serious quandary here because the government does not agree with the committee's findings. The development and better interest fund has been around for 15 years. What should the government do in respect of the report? Fortunately, at the same time as the committee was doing this work, the government had already been considering another way in which it would fund the commercial fishing industry; it would go away from cost recovery and, indeed, would go to a system of access fees based upon the gross value of each fishery. That is being put in place at the present time. The DBIF is no longer being collected by the department; but within the access fees there may be funds that can be made

available to do the things that the development and better interest fund enabled the fisheries department to do in the past.

In conclusion, I make the point that this particular committee seems to have a very narrow view of some of these matters, and it has relied to a certain extent on some High Court decisions, which in my humble opinion, it has misinterpreted. I am no legal expert, but I have read a number of opinions on this and I have come to the conclusion that the committee's consideration of this issue is very limited and very narrow, and does not necessarily reflect the High Court's decision upon which it is based. Again, I am not going to be critical of anybody in this case, other than to say that it creates a very difficult situation when we have a fund that has been in place for 15 years and a committee, which has been around for a very long time, all of a sudden decides that a particular fee is invalid when it has been around for all that time. Why is it invalid this year when it was not invalid last year? Why was it not found to be invalid the last time it sought an increase in fees? On top of that, the committee received the State Solicitor's advice, which is quite clear, and that under no circumstances does he consider this to be a tax and therefore the fee is valid. We have avoided having a dispute with the committee over this, which we would have had, had we wanted to continue with the DBIF. That is because we are going to a new funding arrangement within the fisheries department. I make those comments and I ask committees to consider the advice that is provided by the State Solicitor's Office, alongside the advice that is provided to them by their own legal advisers.

Hon ROBIN CHAPPLE: In response to the minister: first off, one of things that we find on the Joint Standing Committee on Delegated Legislation from time to time is that matters do not become apparent to the committee unless there is something that triggers a detailed investigation. We found from time to time with a number of instruments, both within local government and in government, that there is nothing outstanding in a regulation that comes before us that requires our attention, but when a fee or a charge is investigated, sometimes because it has come to our attention, that is when we find out.

The Fish Resources Management Amendment Regulations (No. 3) 2009 amended the Fish Resources Management Regulations 1995. The instrument effected changes to the fees payable for the access licence in relation to seven managed fisheries in 2008–09. The instrument was made purportedly pursuant to sections 256 and 258(zc) of the Fish Resources Management Act 1994. The combined effect of these sections is to authorise the making of regulations which prescribe fees for, among other things, the issue of access licence fees for managed fisheries. The committee has found that managed fisheries access licence fees, which are prescribed by the principal regulations, are taxes and duties of excise because of the component of these fees that is raised for the contribution to the development and better interest fund. Consequently, these fees were considered by the committee as not being authorised or contemplated by the act, and, indeed, if that was the case, breached the committee's terms of reference 3.6(a) and therefore were invalid for breaching section 90 of the commonwealth Constitution. These findings were made after the committee considered the relevant legislation and case law and after consulting with the Department of Fisheries, which obtained advice from the State Solicitor's Office. All of this information is summarised in the committee's thirty-fifth report.

The committee made the decision to table this information report rather than recommend the disallowance of the instrument because the committee's findings have ramifications for managed fisheries. Access licence fees prescribed in the principal regulations are not just those amended by the instrument. The disallowance of the instrument would have little effect on the newly introduced fees because the vast majority of the fees had already been paid and indeed collected. The managed fisheries access licence fees prescribed in the principal regulations have been calculated according to a longstanding fee-setting model introduced in 1995, which was being reviewed at the time of the committee's inquiry. I take on board already what the minister has had to say. The committee therefore made the three following recommendations: first, that the government cease imposing the DBIF component of the managed fisheries access licence fees prescribed in the principal regulations as soon as practicable; second, if the government does not agree with recommendation 1, that schedule 1, part 3, item 3 of the principal regulations be deleted by both houses of Parliament pursuant to section 42(4)(a) of the Interpretation Act 1984; and, third, that the government consider and accept the findings and recommendations of the committee's report as part of its review of the fee-setting models under the document known as the "Future Directions for Fisheries Management in Western Australia" released jointly by the Minister for Fisheries and the chairman of the Western Australian Fishing Industry Council in September 1995. Further to its findings and recommendations, the committee advises the house that it will recommend the disallowance of any future regulations seeking to amend managed fisheries access licence fees prescribed in regulations if the DBIF component of those fees continues to be imposed. The committee report makes no comment as to the validity of any managed fisheries access licence fees prescribed in the management plans or other subsidiary legislation. However, the committee is concerned that the findings in its report may apply to such managed fisheries access licence fees if they also contain a DBIF component.

Question put and passed.