PARLIAMENT OF WESTERN AUSTRALIA

# JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

## TWENTY-SECOND REPORT:

## *Disallowance Procedures*

Presented by the Hon Robert Laurence Wiese MLA (Chairman)

**22**
**August 1997**

# Joint Standing Committee on Delegated Legislation

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## Terms of Reference

*It is the function of the Committee to consider and report on any regulation that:*

*(a) appears not to be within power or not to be in accord with the objects of the Act pursuant to which it purports to be made;*

*(b) unduly trespasses on established rights, freedoms or liberties;*

*(c) contains matter which ought properly to be dealt with by an Act of Parliament;*

*(d) unduly makes rights dependent upon administrative, and not judicial, decisions.*

*If the Committee is of the opinion that any other matter relating to any regulation should be brought to the notice of the House, it may report that opinion and matter to the House.*

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# Report of the Joint Standing Committee on Delegated Legislation

# in relation to

# Disallowance Procedures

## 1 Introduction

1.1 The procedures for disallowance of subordinate legislation are set out principally in the *Interpretation Act 1984* ("the Interpretation Act"). The Interpretation Act contains a number of provisions in relation to the making and commencement of subordinate legislation. In addition the Interpretation Act provides for Parliament to disallow subordinate legislation in certain circumstances. This enables Parliament to exercise and retain control over the making of subordinate legislation.

1.2 A number of procedural and legal problems with the application of these provisions of the Interpretation Act have become evident. This report is an attempt to define those problems and the Committee's recommended solutions to them. First it is necessary to have an understanding of the provisions themselves.

## 2 Interpretation Act 1984

2.1 Section 41 of the Interpretation Act provides that all "subsidiary legislation"[1] must be published in the *Gazette* and comes into operation on the date of publication (or the day specified in the subsidiary legislation). This reflects a fundamental principle of representative democracy based on the rule of law. The rule of law requires that law must be publicised with sufficient precision.

2.2 Pursuant to subsection 42(1) of the Interpretation Act, following publication in the *Gazette*, all "regulations" must be tabled in both Houses of Parliament within 6 sitting days of their publication. If the regulations are not tabled within the 6 sitting days, subsection 42(2) of the Interpretation Act provides that they thereupon cease to have effect.

2.3 Pursuant to subsection 42(2) of the Interpretation Act, after tabling, either House may then disallow the regulations, provided notice of motion of disallowance is given within 14 sitting days of their tabling in the relevant House. If notice of motion of disallowance is given in the Legislative Council, Standing Order 152 of that House deems such a notice to have been moved at the expiration of 2 sitting days after the day on which the notice was

[1] The *Interpretation Act* refers to subsidiary legislation rather than subordinate legislation. As the Committee noted in its 16th Report, it prefers the term subordinate legislation as this more accurately describes the subordinate nature of subordinate legislation. It is also consistent with the practice adopted in most other parts of Australia.

given. The motion then takes precedence over all other business but the debate may be adjourned or otherwise interrupted, pursuant to Legislative Council Standing Order 153(a). If the matter remains unresolved at the expiration of 10 sitting days, then the question is put and determined without further adjournment (see Legislative Council Standing Order 153(c)). If the matter remains unresolved and Parliament prorogues in the interim, the regulations are disallowed and the question is deemed resolved in the affirmative (see Legislative Council Standing Order 153(c)).

2.4 There are no similar procedures for giving precedence to disallowance motions in the Legislative Assembly. A motion for disallowance takes the ordinary course of a motion under Legislative Assembly Standing Orders. A written notice of the motion must be tabled and read aloud (see Legislative Assembly Standing Order 100). The notice must have been given at a previous sitting of the House and then the motion can be made once it has been duly entered on the Notice Paper (see Legislative Assembly Standing Order 211). Any motion on the Notice Paper that is not called upon is set down on the Notice Paper for the next sitting day (see Legislative Assembly Standing Order 212). There is no requirement for the matter to be put and determined within a certain time and therefore debate may be adjourned indefinitely on any such motion[2].

2.5 Alternatively, subsection 42(4) provides a mechanism to amend the regulations. If both Houses pass a resolution originating in either House, Parliament may amend or substitute the regulations. On passing of such a resolution, a notice must be published in the *Gazette* within 21 days, and the amended or substituted regulations take effect 7 days thereafter.

## 3 What can be disallowed?

3.1 The disallowance provisions in the Interpretation Act are a means for Parliament to retain control over its legislative function. The power to disallow is the most effective means for Parliament to exercise control over the executive to which it has delegated authority to make subordinate legislation. However parliamentary control is limited by the terminology used within the Interpretation Act. The Interpretation Act only grants Parliament the power to disallow "regulations" which, by reason of subsection 42(8) of the Interpretation Act, include "rules", "by-laws" and “local laws”.

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[2] The Legislative Assembly Select Committee on Procedure recommended in its Final Report on 27 June 1996, that the Legislative Assembly Standing Orders and the *Interpretation Act 1984* be amended to have a similar effect to the Legislative Council procedures for disallowance motions. There was one crucial difference. The recommended amendments allowed for a disallowance motion to be carried over to the next session of Parliament in the event of prorogation. In the Council in order to promote certainty, a disallowance motion is deemed to be passed if it has not been debated and prorogation intervenes. As a result the Joint Standing Committee on Delegated Legislation responded to the Select Committee on Procedures Final Report in its 19th Report in September 1996, with a recommendation that the Select Committee’s recommendations in this regard not be proceeded with and the question of procedures regarding motions for disallowance be re-considered after consultation with the Joint Standing Committee.

3.2 Further, while all "subsidiary legislation"[3] must be gazetted, only "regulations" must be tabled in Parliament. Thus parliamentary scrutiny of subordinate legislation can be avoided if it is called something other than "regulations", "rules", "by-laws" or “local laws”. The Committee noted in its 16th Report, *“The Subordinate Legislation Framework in Western Australia”*, that this situation is not satisfactory. There is an increasing array of subordinate legislation that is not described as a regulation, rule or by-law, though formerly it would have been so described. Thus the principal means of control over such subordinate legislation has been bypassed. Subordinate legislation should be defined by reference to its purpose and effect, not by how it is nominally described in a particular case.

3.3 Consequently the Committee repeats its recommendation in its 16th Report, for a new definition of subordinate legislation in order that the principal means of parliamentary control is not subverted by the nominal description given to a piece of subordinate legislation. If the recommended Subordinate Legislation Bill is not proceeded with (and the Committee continues to recommend that it be enacted), the Committee is of the view that section 42 of the Interpretation Act should be amended to allow for disallowance of “subordinate legislation”, and that the definition of "subsidiary legislation" in section 5 of the Interpretation Act be deleted and replaced with the following definition of "subordinate legislation":

> "subordinate legislation" means any rule having legislative effect (howsoever it may be described) authorized or required to be made by or under an Act.

3.4 This definition contains a number of elements. First, it applies to any "rule". The Macquarie Dictionary definition of "rule" includes the following definition:

> a principle or regulation governing conduct, action, procedure, arrangement, etc.

Thus the term "rule" has, and is intended to have, a broad scope.

3.5 Second, for it to fall within the definition of subordinate legislation, a rule must have legislative effect. Thus it must involve the formulation of general rules of conduct, usually operating prospectively, and will usually determine the content of the law rather than merely apply it[4]. In this context the Committee notes that there appears to be much ignorance in some government agencies about the line between rules which have legislative effect and rules which are merely administrative policy. The Committee acknowledges that sometimes the distinction is not clear and that in some cases even senior lawyers may disagree on the character of a particular rule or rules. Consequently it is important that both government agencies and Parliamentary Counsel give consideration to whether or not particular rules have, or are intended to have, legislative effect. "Legislative effect" is the principle criterion to be used in a determination of what must be contained in subordinate legislation and what may be contained in administrative rules.

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[3] s 41, *Interpretation Act 1984*; s5 defines “subsidiary legislation” as any proclamation, regulation, rule, by-law, order, notice, rule of court, town planning scheme, resolution, or other instrument made under any written law and having legislative effect.

[4] See, for example: Australian Administrative Review Council, *Report to the Attorney-General: Rule Making by Commonwealth Agencies*, Report No 35, March 1992, p20; *Commonwealth v Grunseit* (1943) 67 CLR 58, 82; *Queensland Medical Laboratory v Blewett* (1988) 84 ALR 615, 633.

3.6 Third, the rule must be authorized or required to be made by an Act. This gives it its "subordinate" element.

3.7 Finally, the definition applies to rules "howsoever described". This is to avoid the difficulty of anticipating all names by which a rule may be described and thereby to prevent the avoidance of application of the disallowance provisions to subordinate legislation simply by calling it something else. Thus the definition is intended to apply to rules whether they are described as regulations, rules, by-laws, proclamations, orders, notices, schemes, resolutions, policies, codes, guidelines or anything else.

3.8 It may be argued that, in broadly defining "subordinate legislation", some matters which may formerly have been the subject of administrative policies, guidelines or principles may now be considered to be subordinate legislation. However, Margaret Allars notes that "[p]olicies, whether described as guidelines, principles or in some other way are non-statutory rules"[5]. She goes on to say:

> [T]he law/policy distinction has in any event been placed under strain as the scope of procedural fairness has been extended to erode the doctrine that administrators should not be fettered in their exercise of discretion to change policy... Legislation has also made it increasingly difficult to distinguish non-statutory rules from statutory rules, creating a new category of rules, circulars, [guidelines], principles, codes, schemes and determinations lying in the uncharted territory between policy and law, sometimes described as "quasi-legislation[6].

3.9 Thus, the definition of "subordinate legislation" which replaces the definition of "subsidiary legislation" includes all rules having legislative effect. Exceptions (such as for rules of internal agency organisation and procedure) are made in appropriate cases. The proposed Subordinate Legislation Bill achieves the above by amending the *Interpretation Act 1984* to delete the definition of “subsidiary legislation” and replace it with the proposed definition of “subordinate legislation”. The proposed Subordinate Legislation Bill then sets out the various requirements in relation to “subordinate legislation” unless the subordinate legislation is listed in a Schedule to the Bill as being “exempt” from those requirements. In this manner Parliament is given the opportunity to consider whether a particular piece of subordinate legislation should be subject to the same requirements as all other subordinate legislation.

## 4 When can subordinate legislation be disallowed?

4.1 In addition, the above illustrates that use of different terminology throughout the Interpretation Act can lead to problems and confusion. Not only are there questions about what can be disallowed, but when subordinate legislation can be disallowed is a source of some confusion. This stems from the use of different terminology for the commencement of legislation throughout the Interpretation Act. When does an Act commence and what are

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[5] Allars, M, *Introduction to Australian Administrative Law*, Butterworths, 1990, p336.

[6] Allars 1990, p337.

the consequences for the disallowance procedures if the subordinate legislation is made before the enabling Act has commenced?

4.2 It is common for regulations to be drafted at the same time as the enabling Act, in order for the entire body of legislation to become operative at the same time. If the preparatory work results in the gazettal of the regulations before the enabling Act is in force and of effect, then it is usual for a provision of the regulations to specify a time for the regulations to become operative. On occasions the time specified is the date the enabling Act is proclaimed.

4.3 If an Act, which has been passed by Parliament, is not proclaimed and it does not commence until it is proclaimed then, for the purposes of the Interpretation Act, it is:

a. an "Act" ;

b. not a "written law"; and

c. not an "enactment",

so far as these words are defined.

4.4 Section 25 of the *Interpretation Act 1942* provides that where a provision of an "Act" does not commence on the passing of that "Act", and that provision would, if it had commenced, confer power to make an instrument of a legislative or administrative character, then the power may be exercised to the extent that it is necessary or expedient for the purpose of bringing that "Act", or provisions of that "Act" into operation, or giving full effect to that "Act", or provisions of that "Act". Accordingly, once the enabling "Act" is passed by Parliament the power to make regulations may be exercised.

4.5 Once the regulations have been made, then the procedure is to gazette and table them pursuant to the provisions of sections 41 and 42 of the Interpretation Act. However, section 41 requires gazettal of "subsidiary legislation" made under a power conferred by a "written law" (subsidiary legislation is defined as regulations and other instruments made under a written law). As mentioned above, an Act that has not yet been proclaimed is not a "written law". Therefore, arguably any regulations made under such an Act are not "subsidiary legislation" and gazettal at this point is not required.

4.6 However, section 25 gives the provision which confers power to make an instrument of legislative or administrative effect, operative effect, and therefore that provision can be said to be <u>in force</u> to the extent necessary to give effect to that Act or its provisions. Section 29 states that every section of an Act takes effect as a substantive enactment, where an "enactment" is defined as a "written law". Accordingly, the conferring power, on taking effect under section 25, becomes a substantive enactment and hence a written law. Therefore, by section 41 any subsidiary legislation made under that written law must be gazetted.

4.7 Section 42 requires tabling of "regulations" (regulations are defined as regulations made under an "Act"), within 6 sitting days of gazettal. As mentioned above, an Act that has not yet been proclaimed is an "Act" for the purposes of the Interpretation Act. Therefore, any

regulations made under an Act that has not yet been proclaimed, must be tabled if they have been gazetted.

4.8 Once the regulations have been tabled, then under subsections 42(2) and (4) the regulations can be disallowed or amended in accordance with the procedures set down. What of a disallowance motion on the basis the regulations are not within the power conferred to make the regulations? How can such a motion be possible when the enabling Act has not been proclaimed and is not yet operative? The answer to this problem is that section 25 gives the conferring power operative effect, notwithstanding the enabling Act has not yet been proclaimed. Accordingly the regulations can be disallowed on the basis they are *ultra vires* the conferring power.

4.9 What emerges from this discussion, is that an Act once passed may allow for the making of an instrument of legislative or administrative effect before the enabling Act is in operative effect. The instrument (where it conforms with the definition of "subsidiary legislation" in section 5) must then be gazetted and tabled, following which Parliament may disallow or amend, notwithstanding the enabling Act has not yet commenced.

## 5 Publication of Subordinate Legislation

5.1 What can be disallowed and when can it be disallowed are not the only problems facing parliamentarians in the application of the disallowance provisions to subordinate legislation. With the proliferation of instruments, both legislative and administrative, a very real problem arises as to what in fact is the law. Often it is necessary to consult voluminous documentation to ascertain what is the law, and how it is affected by a particular instrument under consideration[7].

5.2 This is not only a problem for parliamentarians, but is a concern for all members of the public. It was earlier mentioned that all "regulations" must be gazetted, and that this reflected the principle known as the rule of law, whereby the law must be publicised with sufficient precision. John Locke said:

> *"For all the power the government has, being only for the good of society, as it ought not to be arbitrary and at pleasure, so it ought to be exercised by established and promulgated laws, that both the people may know their duty, and be safe and secure within the limits of the law, and the rulers, too, kept within their due bounds..."*[8]

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[7] These concerns have been raised and commented on previously: See Second Conference of Delegated Legislation Committees, *Report and Transcript of Proceedings and Conference Papers*, Senate Procedure Office, October 1989, p94. The *Legislative Instruments Bill 1996 (Cth)* is one attempt to address these concerns in Australia.

[8] Locke, J, *Two Treatises of Government*, Book II, para 137, cited in Allan, TRS, "Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism" (1985) 44 *Cambridge Law Journal* 111

And Lord Reid has said:

> *"The acceptance of the rule of law as a constitutional principle requires that a citizen, before committing himself to any course of action, should be able to know in advance what are the legal consequences that will flow from it."*[9]

5.3 With the proliferation of subordinate legislation, a measure is required to enable the public and parliamentarians alike to access and ascertain precisely what the law on a particular subject is, in order that the rule of law can be maintained. In addition without any measures in place to assist in this task, the application of the disallowance procedures may be frustrated by an inability to quickly and accurately determine the law on a particular subject as it stands or as it is affected by a piece of subordinate legislation under review.

5.4 The Commonwealth has already taken legislative action in an effort to address this problem and provide a measure to enable the public to have access to a consolidated set of all legislative instruments. The proposed Legislative Instruments Bill[10], provides for the setting up of a Federal Register of Legislative Instruments. This will provide a complete electronic record of all legislative instruments in force at any one time and will be available for all to consult. Members of the public may scan the register and print out a copy of any legislation. A new legislative instrument will not be able to be enforced unless it is registered. Existing delegated legislation will not be able to be enforced unless registered within a specified time.

5.5 In the context of publication of legislation (including subordinate legislation), the Committee notes and supports the recommendations of the Standing Committee on Constitutional Affairs and Statutes Revision in relation to continual consolidation of legislation and posting of legislation on the Internet[11]. This would enhance the availability of legislation to the public in an accessible form and assist in the maintenance of the rule of law.

## 6 Selective Disallowance

6.1 Another question that has arisen from time to time in relation to the disallowance provisions is whether the entire set of regulations must be disallowed or is it possible to selectively disallow particular regulations. Often there is only a concern about a single regulation or a part of the entire set of regulations. Disallowance of the entire set of regulations is not desired in these circumstances. A selective or surgical disallowance is preferable. It is generally accepted that section 42 of the Interpretation Act provides the

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9 *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591, 613

10 This Bill was originally introduced in 1994 but lapsed when Parliament was prorogued before a Federal election on 2 March 1996. Subsequently the Bill was amended and introduced into the new Parliament as the *Legislative Instruments Bill 1996*. This Bill represents the Commonwealth Government's response to a 1992 report from the Administrative Review Council: *Rule Making by Commonwealth Agencies*, Report 35, May 1992. For further comment on the Bill see: Commonwealth Senate Standing Committee on Regulations and Ordinances, *Legislative Instruments Bill 1994*, 99th Report, October 1994. At this point the Bill has completed its Third Reading.

11 Western Australia, Standing Committee on Constitutional Affairs and Statutes Revision, *Electronic Availability of Statutes*, 11th Report, January 1996.

power to selectively disallow regulations. There is clear power within subsection 42(2) to effect a selective disallowance. That subsection refers to disallowance of "regulations". Subsection 42(8) states that a reference to "regulations" shall be construed as including a reference to a "regulation" or part of a regulation[12]. Therefore if "regulations" can be disallowed, so too can a "regulation".

6.2 Some confusion in this regard may be generated by the fact that subsection 42(2) provides for disallowance to be by resolution in either House, whereas subsection 42(4) requires that a resolution for the amendment or substitution of regulations must be in both Houses. The Interpretation Act defines "amend" as: replace, substitute, in whole or in part, add to or vary. Arguably selective disallowance amounts to an "amendment" of the regulations in that they have been varied by the disallowance of a part only of the regulations. If selective disallowance amounts to amendment of the regulations, then an argument could be mounted that the procedure set down by subsection 42(4) should be followed and a motion of disallowance cannot be used to effect such an amendment.

6.3 A question is posed, when disallowing one regulation or a few only, which procedure is to be followed, that set down by subsection 42(2), or that set down by subsection 42(4)? Of course, it may be that either procedure can be followed on the basis that there was no intention on the part of the legislature to limit the procedures available[13]. However, the inclusion of a specific provision setting out the procedure to be followed for disallowance does suggest that that is the procedure to be applied, and not the procedure which is provided in respect of amendment. In practical terms disallowance is a subset of "amendment". This is confirmed by the definition of "amend" in the Interpretation Act, which was discussed in the preceding paragraph. Thus, subsection 42(2) deals with the specific and subsection 42(4) the more general. By providing a procedure specifically for disallowance, which is different to the procedure for other forms of "amendment", arguably the legislature impliedly is excluding the application of those different procedures for amendment for when a regulation or regulations is disallowed. It is a principle of construction that where a particular procedure is designated to achieve something, other procedures are thereby excluded. In the leading authority on this point, Dixon J said:

> *"an enactment in affirmative words appointing a course to be followed usually may be understood as importing a negative, namely, that the same matter is not to be done according to some other course"*[14].

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[12] In addition subsection 10© of the Interpretation Act provides that words in the plural number include the singular.

[13] Per Gibbs CJ, *State Bank of New South Wales v Commonwealth Savings Bank of Australia* (1984) 53 ALR 625. The intention of the legislature is always the basic question - See DC Pearce & RS Geddes, *Statutory Interpretation in Australia*, Third ed., Butterworths, 1988, at p82.

[14] *R v Wallis; Ex parte Employers Association of Wool Selling Brokers* (1949) 78 CLR 529. The facts were that a section that indicated the manner in which an arbitrator was to deal with a particular issue precluded the arbitrators dealing with that matter in accordance with more general procedures provided for in the Act.

6.4 It is also a principle of construction, that where there is a conflict between general and specific provisions, the specific provisions prevail[15]. Courts have expressed that this principle should only be called in aid "where there are two inconsistent provisions which cannot be reconciled as a matter of ordinary interpretation"[16]. Nevertheless it is logical that the legislature intended the general provisions to give way if they deal with the same subject matter as is dealt with specifically elsewhere.

6.5 Therefore, a strict application of these principles of construction is supportive of the generally accepted view that subsection 42(2) provides specific power and a procedure for selective disallowance of a regulation or regulations. However, it is to be appreciated that the principles are only for construction purposes to be used in aid of interpretation and should not be applied as a rule. DC Pearce , in his treatise *Statutory Interpretation in Australia*, when discussing the rule that a specific procedure excludes other procedures, emphasises that the basic question will always be what the intention of the legislature was and that that intention will depend on a range of factors. For instance, has the Act been significantly amended such that the draftsperson has not directed themselves to the potential for conflict. In this regard the history of section 42 may shed some light on the intent of the draftsperson with respect to selective disallowance.

6.6 The *Interpretation Act 1918* contained a provision similar to subsection 42(2) (subsection 36(2) - this referred to disallowance of any "regulation"). By virtue of subsection 26(b) of the *Interpretation Act 1918*, a reference to the singular included a reference to the plural. Accordingly, under the *Interpretation Act 1918* there was power to disallow a "regulation" or "regulations". There was no procedure for "amendment" of regulations. It was not until 1957 that such a procedure was introduced. The equivalent of subsection 42(4) was originally introduced to the *Interpretation Act 1918*, by way of a private member's bill in 1957[17]. The fact that the disallowance procedures were not amended in 1957 indicates that the draftsperson did not intend for disallowance of a regulation or regulations to be by a different procedure. In fact, Hansard records that the bill originally provided for an amendment to the disallowance provisions so that they were the equivalent of the proposed amendment procedures, but that after debate the bill was amended to retain the same disallowance procedures and put in place different procedures for amendment[18]. The introduction of a different procedure for "amendment, variation and substitution", the retention of the disallowance provisions in the same form and the parliamentary debate on the subject, clearly indicates that parliamentary drafters contemplated a more limited definition of these words than would allow for them to usurp the procedures applicable to disallowance. As a matter of construction, what was contemplated by the words "amendment, variation and substitution" in 1957 was the alteration of a regulation by

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15 See *Perpetual Executors and Trustees Association of Australia Limited v FCT* (1948) 77 CLR 1 at 29; *Refrigerated Express Lines (A'Asia) Pty Ltd v Australian Meat and Live-stock Corporation* (1980) 29 ALR 333 at 347.

16 Per Mason ACJ, Wilson, Brennan, Dawson JJ, *Purcell v Electricity Commissioner of New South Wales* (1985) 60 ALR 652 at 657; See also *Reseck v FCT* (1975) 133 CLR 45 at 53; and *Strickland v Killen* [1983] ACLD 385.

17 *Interpretation Acts Amendment Act (No. 2), 1957*, No 34 of 1957. This Act was originally introduced to Parliament as a Private Members Bill by Mr Oldfield MLA.

18 1957 WAPD 772, 996-998, 1433-1438 & 1624-1632

repeal and substitution in whole or in part. When the Interpretation Act was promulgated in 1984, the provisions for disallowance and amendment were adopted with only minor amendment. In substance they are the same provisions and clearly it was the intent of the draftsperson that they have the same construction as they formerly had. The word "variation" has been removed from the provision but a definition of the word "amend" has been included in the Interpretation Act, which definition refers to "vary".

6.7 For the above reasons it is generally accepted that selective disallowance is within the power conferred by subsection 42(2). Motions for the selective disallowance of particular regulations within a set have been tabled in Parliament, but for various reasons these motions ultimately were all withdrawn[19].

6.8 The use of selective disallowance may, however, give rise to some practical problems. Subsection 42(6) provides that where regulations that repeal or amend other regulations are disallowed, the previous regulations are revived. Frequently a regulation will provide for the general repeal of a complete set of regulations and then further regulations provide a new regulatory regime. The selective disallowance of one or part of the new regulations, without disallowance of the repealing regulation, is not contemplated by subsection 42(6). Nor is a new set of regulations which do not repeal or amend any other regulations, but simply create a new regulatory regime over new subject matter. The selective disallowance of any of these regulations does not revive any other regulations, as none existed previously, or those that did have been repealed by a separate regulation that has not been disallowed. A void will be created by the use of selective disallowance in these circumstances. This may create problems when interpreting and applying the regulations that remain. It may also create problems with the rule of law referred to above.

6.9 The practical problems that are presented may be compounded, should selective disallowance be taken one step further, by attempting to disallow part of a regulation[20]. By the use of selective disallowance in this manner it might be possible to create a nonsense where the regulations that remain do not make any sense in the absence of that part of the regulation disallowed. However, this is a practical problem that is easily overcome by sensible application of the disallowance provisions. The Committee will exercise extreme caution before moving to disallow a part only of a regulation. This would prevent the creation of nonsensical regulations, as part of a regulation is often dependant on the other parts of the regulation. The same may apply in respect of a regulation where it is dependent

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[19] Motion for disallowance of regulations 4, 6, 7(b) and 7(c) of the *Health (Meat Inspection and Branding) Amendment Regulations 1991* on 17/9/91 in the Legislative Council, discharged from the notice paper on 5/11/91- 1991 WAPD 4649-4650 & 5888-5889; Motion for disallowance of all by-laws excepting Schedule 1, Part 2, clause 1(a) and Schedule 2 of the *Water Authority (Charges) Amendment By-laws 1993* on 11/8/93 in the Legislative Assembly, negatived on 11/8/93 - 1993 WAPD 2294-2323; Motion for disallowance of regulations 4, 5 and 6 and the Schedule of the *Freedom of Information Regulations 1993* on 6/4/93 in the Legislative Assembly, negatived on 6/4/93- 1993 WAPD 11553-11563

[20] It is interesting to note that prior to the promulgation of the *Interpretation Act 1984*, the old *Interpretation Act 1918* did not contemplate disallowance of part of a regulation only. The parliamentary debates in respect of the 1957 amendment to that Act (referred to at footnote 14 above), reflect this where various members refer to the problems experienced in being unable to disallow part only of a regulation. The idea of being able to disallow part only of a regulation arises from the inclusion of subsection 42(8) in the *Interpretation Act 1984*. This provision states that a reference to a regulation shall be construed as a reference to a regulation or part of a regulation.

on other regulations in the set. The disallowance of such a regulation may create a nonsense. However this eventuality is less likely as modern drafting techniques mean that, generally, each regulation deals with a separate concept, and therefore disallowance of one regulation may not cause any interpretative problems with other regulations. However, there may be a regulatory void on a particular aspect of the subject matter which is being regulated.

6.10 Sensible application of the disallowance provisions simply requires the Committee and members of Parliament to consider the implications of the particular disallowance motion for the practical operation of the remaining regulations. It is the Committee's practice that whenever a motion for disallowance is moved due consideration is given to the practical operation of the remaining regulations, in addition to the alleged evil which is being addressed by the motion for disallowance. The Committee recommends that individual members who move for disallowance follow the same practice.

## 7 Summary of recommendations and comments

7.1 That the Parliament enact the proposed Subordinate Legislation Bill annexed to and the subject of the Committee's 16th Report, *"The Subordinate Legislation Framework in Western Australia"*.

7.2 If no Subordinate Legislation Bill is enacted then, that section 42 of the Interpretation Act be amended to allow for disallowance of "subordinate legislation", and that the definition of "subsidiary legislation" in section 5 of the Interpretation Act be deleted and replaced with the following definition of "subordinate legislation":

> "Subordinate legislation" means any rule having legislative effect (howsoever it may be described) authorised or required to be made by or under an Act.

7.3 If an Act that has been passed by the Parliament confers power to make an instrument of legislative or administrative effect, that instrument can be made before the Act itself has commenced pursuant to section 25 of the Interpretation Act. Each House of Parliament has the power to disallow or amend such an instrument (if it is described as a "regulation, rule, by-law or local-law") pursuant to section 42 of the Interpretation Act.

7.4 The Committee notes and supports the recommendations of the Standing Committee on Constitutional Affairs and Statutes Revision in its 11th Report, *Electronic Availability of Statutes*, January 1996 in relation to continual consolidation of legislation and posting of legislation on the Internet.

7.5 Section 42 of the Interpretation Act provides power for the selective disallowance of a single regulation or part of a set of regulations. Sensible application of this power is called for to avoid practical problems with the creation of unworkable and nonsensical regulations as the result of disallowance of regulations or part of regulations that other regulations are dependent upon. Whenever the Committee or an individual member moves for disallowance due consideration should be given to the practical operation of the remaining regulations, in addition to the alleged evil which is being addressed by the motion for disallowance.