THIRTY-SEVENTH PARLIAMENT

REPORT 22

JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

ANNUAL REPORT 2006

Presented by Mr Paul Andrews MLA (Chairman)

and

Hon Ray Halligan MLC (Deputy Chairman)

March 2007

JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

Date first appointed:

28 June 2001

Terms of Reference:

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

"**3. Joint Standing Committee on Delegated Legislation**

3.1 A *Joint Delegated Legislation Committee* is established.

3.2 The Committee consists of 8 Members, 4 of whom are appointed from each House. The Chairman must be a Member of the Committee who supports the Government.

3.3 A quorum is 4 Members of whom at least 1 is a Member of the Council and 1 a Member of the Assembly.

3.4 A report of the Committee is to be presented to each House by a Member of each House appointed for the purpose by the Committee.

3.5 Upon its publication, whether under section 41(1)(a) of the *Interpretation Act 1984* or another written law, an instrument stands referred to the Committee for consideration.

3.6 In its consideration of an instrument, the Committee is to inquire whether the instrument –

(a) is authorized or contemplated by the empowering enactment;

(b) has an adverse effect on existing rights, interests, or legitimate expectations beyond giving effect to a purpose authorized or contemplated by the empowering enactment;

(c) ousts or modifies the rules of fairness;

(d) deprives a person aggrieved by a decision of the ability to obtain review of the merits of that decision or seek judicial review;

(e) imposes terms and conditions regulating any review that would be likely to cause the review to be illusory or impracticable; or

(f) contains provisions that, for any reason, would be more appropriately contained in an Act.

3.7 In this clause –

"adverse effect" includes abrogation, deprivation, extinguishment, diminution, and a compulsory acquisition, transfer, or assignment;

"instrument" means –

(a) subsidiary legislation in the form in which, and with the content it has, when it is published;

(b) an instrument, not being subsidiary legislation, that is made subject to disallowance by either House under a written law;

"subsidiary legislation" has the meaning given to it by section 5 of the *Interpretation Act 1984*."

Members as at the time of this report:

Mr Paul Andrews MLA (Chairman)

Hon Ray Halligan MLC (Deputy Chairman)

Hon Vincent Catania MLC

Dr Graham Jacobs MLA

Ms Jaye Radisich MLA

Hon Barbara Scott MLC

Mr Tony Simpson MLA

Staff as at the time of this report:

Kerry-Jayne Braat, Committee Clerk

Susan O'Brien, Advisory Officer (Legal)

Anne Turner, Advisory Officer (Legal)

Felicity Mackie, Advisory Officer (Legal)

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

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REPORT OF THE JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

ANNUAL REPORT 2006

1 INTRODUCTION

Scrutiny of Subsidiary Legislation

1.1 The role of the Joint Standing Committee on Delegated Legislation (**Committee**) and its approach to the scrutiny of subsidiary legislation has been discussed in the Committee's Sixth Report.[1]

1.2 The Committee holds a standing referral from the Legislative Council to consider all instruments of subsidiary legislation that are published, [2] whether under s 41(1)(a) of the *Interpretation Act 1984* or another written law. As a result, the Committee is able to scrutinise and report to Parliament on a huge volume of instruments. However, due to the tight deadlines that are statutorily imposed on the Committee and the limited resources available to it, the Committee resolved shortly after its establishment to consider only those instruments that are subject to disallowance pursuant to s 42 of the *Interpretation Act 1984* or another written law, together with any other instruments that were noted by individual members.

1.3 On 18 October 2006, the Committee resolved not to scrutinise fees and charges imposed under s 344C of the *Health Act 1911* for local laws made under that Act. This was an isolated decision based on the particular circumstances outlined in paragraph 1.4 below, and does not indicate an intention to curtail the range of instruments scrutinised by the Committee.

1.4 In reaching this resolution, the Committee noted that although s 344C was inserted into the *Health Act 1911* to provide a less onerous method of fixing fees and charges for the purposes of that Act, whilst retaining the checks and balances previously associated with the making of health local laws that prescribe such fees and charges:

- subdivision 2 of Division 5 of Part 6 of the *Local Government Act 1995* permits local governments to impose fees and charges for services or goods it provides by resolution of the local government, which resolutions are not subject to Parliamentary scrutiny or disallowance;

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1 Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, *Sessional Report June 28 2001 to August 9 2002*, Report No.6, March 2003, Chapters 1-2.

2 As defined in section 5 of the *Interpretation Act 1984*.

- a survey conducted by the Department of Health in 2006 confirmed that local governments were exercising a 'convention and practice' whereby they subsumed their s 344C fees and charges into the one annual budget statement and that many 'health' fees and charges were, in fact, being set under subdivision 2 of Division 5 of Part 6 of the *Local Government Act 1995*;

- the current policy of the Department of Health is to achieve consistency in the method of imposition of local government fees and charges by providing in clause 140 of the Food Bill 2005, and the proposed new Public Health Act, to allow local governments to use the powers in subdivision 2 of Division 5 of Part 6 of the *Local Government Act 1995* to impose any fees and charges required for the purpose of fulfilling their statutory obligations under both of those proposed new legislative schemes; [3] and

- The Uniform Legislation and Statutes Review Committee tabled its Report No. 14 on the Food Bill 2005 on 27 September 2006.

1.5 The Committee will review its resolution in 2007 in light of the progress of the proposed legislation, and the form in which it develops, and will present a report on its conclusions.

Members

1.6 The Committee has been served by the following members this year:

- Mr Paul Andrews MLA (Chairman from 8 March 2006);
- Hon Ray Halligan MLC (Deputy Chairman);
- Hon Barbara Scott MLC;
- Dr Graham Jacobs MLA;
- Mr Tony Simpson MLA;
- Ms Judy Hughes MLA (to 8 March 2006);
- Hon Shelley Archer MLC;
- Hon Vincent Catania MLC;
- Mr Michael Murray MLA (from 24 November 2005 to 8 March 2006); and

[3] Letter from Dr Neale Fong, Chief Executive Officer, Department of Health, 27 September 2006, p4.

- Ms Jaye Radisich MLA (from 8 March 2006).

1.7 The Committee takes this opportunity to acknowledge the contribution of Mr Peter Watson MLA (the Committee's Chairman, who was discharged on 24 November 2005) and Ms Judy Hughes MLA to the work of the Committee and wishes them well.

Staff

1.8 The Committee is assisted by up to three advisers who examine and report to the Committee on every disallowable instrument, provide advice on all correspondence received, write letters, prepare draft reports for consideration by the Committee before tabling in the Parliament, and attend meetings of the Committee. The Committee's advisers during 2006 were:

- Mr Paul Grant, Advisory Officer (Legal) (to 30 May 2006);
- Ms Felicity Mackie, Advisory Officer (Legal); and
- Ms Susan O'Brien, Advisory Officer (Legal) (from 6 February 2006).

1.9 Additional advisory officer support was provided to the Committee in November and December 2006 by Ms Anne Turner, Advisory Officer (Legal) and from time to time by Mr Paul Grant. Ms Kerry-Jayne Braat, Committee Clerk, provided administrative and clerical support. Mrs Kay Sampson, Clerical Assistant, provided technical, Internet and reception services. Mrs Lauri Glocke also provided reception services.

2 COMMITTEE'S ACTIVITIES

Reports Presented to Parliament

2.1 In 2006 the Committee presented the following reports to both the Legislative Council and the Legislative Assembly, in accordance with its terms of reference:

- Report number 16 - *Issues of concern raised by the Committee between 1 May 2005 and 30 April 2006 with respect to local laws* - tabled on 30 May 2006;
- Report number 17 - *City of Subiaco Eating-House Local Law 2005* - tabled on 20 June 2006;
- Report number 18 - *Agricultural Produce (Egg Production Industry) Regulations 2006* - tabled on 24 August 2006;
- Report number 19 - *Oaths, Affidavits and Statutory Declarations (Act Amendment) Regulations 2006* - tabled on 21 September 2006;
- Report number 20 - *Western Australian College of Teaching Rules 2006* - tabled on 23 November 2006; and
- Report number 21 - *Strata Titles General Amendment (No. 4) Regulations 2006* - tabled on 29 November 2006.

Statistics

2.2 The following table provides a purely numerical indication of the Committee's workload in 2006:

	Calendar Year 2006
Total number of instruments scrutinised	452
Total number of local laws scrutinised	68
Percentage of instruments scrutinised that were local laws	15%
Total number of protective notices of motion for disallowance given	18
Total number of notices of motion for disallowance withdrawn	15
Total number of hearings held by the Committee	5
Total number of undertakings provided to the Committee to amend/repeal instrument	29
Total number of reports tabled (information and disallowance)	6

	Calendar Year 2006
Total number of instruments disallowed on recommendation of the Committee	2

2.3 These figures do not demonstrate that many of the instruments considered by the Committee are often lengthy documents. Irrespective of their size, the instruments often involve complex issues that span a diverse range of subject matters.

2.4 The figure in the last row of the above table indicates that only two instrument have been disallowed on the recommendation of the Committee in 2006. However, this figure does not illustrate the process by which the Committee can, and does, obtain undertakings from the responsible Minister, Department or local government to amend or repeal instruments with which the Committee has raised a concern. When such undertakings are given, the Committee usually does not proceed with any motion to disallow that may have been tabled. Should the Committee wish to proceed, it does so by reporting to the Parliament, recommending the disallowance of instruments in the Legislative Council. The Committee only recommends disallowance as a last resort.

3 PREMIER'S CIRCULAR 2005/06 - SUBSIDIARY LEGISLATION - EXPLANATORY MEMORANDA

3.1 While the quality of information provided to the Committee has improved since the Premier's Circular 2005/06 - *Subsidiary Legislation - Explanatory Memorandum* and the Minister for Local Government and Regional Development's Circular 28-2005 - *Minister's Directions - Local Laws Explanatory Memoranda to the Joint Standing Committee on Delegated Legislation*, were issued, the Committee continues to note that a number of agencies are not fully complying with the requirements of the Premier's Circular. In particular, the absence of:

- adequate justifications for the instrument;
- identification of, and justification for, unusual provisions;
- identification of the section(s) of the statutes(s) under which the subsidiary legislation is made;
- advice as to comments made in the consultation process and the response to any comments made; and
- tables providing details of fee changes in subsidiary legislation

are common problems.

3.2 As a consequence, the Committee must devote valuable resources and time to either researching the often complex legal and administrative background or seeking further information in respect of instruments that, on the information available at first scrutiny, raise questions relating to the Committee's Terms of Reference but which questions, in most instances, the further information answers.

3.3 On occasions, these further enquiries reveal that the initial information provided to the Committee was incorrect.

Statistical information

3.4 The following numbers of Explanatory Memoranda received by the Committee in 2006 were deficient in the respects noted:

- 86 had inadequate justification of the instrument or unusual provisions in the instrument; [4]

[4] See paragraphs 3.6 and 3.7 for full text of what is required.

- 103 either had no, or incomplete, references to empowering legislation or no identification of relevant sections when the legislation was identified; and

- 66 either had no information in respect of consultation or failed to provide advice as to comments made and response to those comments.[5]

3.5 The number of Explanatory Memoranda with no, or inadequate, fee tables are dealt with in Section 4 below.

Examples of Inadequate Explanatory Memoranda - justification

3.6 Premier's Circular 2005/06 - *Subsidiary Legislation - Explanatory Memorandum* requires government agencies to provide, inter alia, the following information:

- *A description of the purpose and effect of, and justification for, the subsidiary legislation (or any amendments to or repeals of it); and*

- *Identification of any unusual or controversial provisions, having particular regard to the matters set out in item 6.6 of the Joint Standing Committee's terms of reference (as set out in Schedule 1 of the Standing Orders of the Legislative Council and the Committee's webpage at http://www.parliament.wa.gov.au/).*

3.7 While it does not specifically require the identification of unusual provisions, the Minister for Local Government and Regional Development's Circular 28-2005 - *Minister's Directions - Local Laws Explanatory Memoranda to the Joint Standing Committee on Delegated Legislation* has an equivalent requirement regarding justification.

Navigable Waters Amendment Regulations (No. 2) 2005

3.8 The Explanatory Memorandum accompanying these amendments, which introduced the recreational skipper's ticket scheme (RST Scheme) to the *Navigable Waters Regulations 1958*, contained the following information:

Legislative Authority

Western Australian Marine Act 1982

[5] See paragraphs 3.18 and 3.19 for full text of what is required. Explanatory Memoranda that provided advice solely as to consultation between various government agencies have not been included in this tally. The inference that arose was that there had been no consultation with external stakeholders and the Explanatory Memoranda were taken to have advised to that effect. Nor have Explanatory Memoranda that merely provided generic advice that instruments were "*supported*" by unidentified stakeholders been included.

Purpose

To introduce a Recreational Skipper's Ticket in support of the Cabinet Decision in March 2005 authorising the establishment of compulsory competency training for recreational boaters.

Background

In March 2005, Cabinet approved the Amendment of Western Australian Marine Act 1982 regulations in order to introduce compulsory competency training for recreational boaters.

The proposed amendments to the Navigable Waters Regulations are constructed to meet all of the policy outlines of that Cabinet Decision and are consistent with government policy to improve boating safety.[6]

3.9 There followed an irrelevant statement that the regulations were not considered sensitive to government.

3.10 The gazetted copy of the *Navigable Waters Amendment Regulations (No. 2) 2005* stated that they were made under the *Shipping and Pilotage Act 1967* as well as the *Western Australian Marine Act 1982*. The lack of background information and justification for the *Navigable Waters Amendment Regulations (No. 2) 2005*, and advice as to which specific sections of the *Western Australian Marine Act 1982* the Department of Planning and Infrastructure relied upon to authorise them, meant that the Committee had to engage in lengthy correspondence with the Department to ascertain whether the *Navigable Waters Amendment Regulations (No. 2)* complemented, rather than supplemented, the *Western Australian Marine Act 1982*.[7]

Plant Diseases Amendment Regulations (No. 2) 2006

3.11 These amendments had two aspects, one being to repeal Schedule 10 to the *Plant Diseases Regulations 1989* and insert a new Schedule 10. The new schedule comprised a list of approximately 370 genera and 6,500 species. This was ascertained from the sub-headings in the Schedule, which specified how many genera/species were listed in that subheading. The previous Schedule 10 did not contain these sub-headings or a genera/species count. However, it appeared of comparable length to the new Schedule.

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6 Explanatory Memorandum to *Navigable Waters Amendment Regulations (No 2) 2005*, p1.

7 *Shanahan v Scott* (1957) 96 CLR 245. For a discussion of the distinction between subsidiary legislation addressing what is incidental to an empowering Act, and widening the ambit of that Act, see: Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, *Sessional Report June 28 2001 to August 9 2002*, Report No.6, March 2003, paragraphs 3.59 - 3.73.

3.12 The Explanatory Memorandum did not identify the differences between the two Schedules or comment on whether the changes were minor or extensive. It merely stated:

> *Schedule 10 of the principal regulations sets out a list of the names of secondary host plants of lettuce aphid. The plants listed in Schedule 10 are subject to control measures to limit entry of potential carriers of lettuce aphid into Western Australia. These amendment regulations will effect an update to the list in Schedule 10.*[8]

3.13 The Committee sought advice from the Department of Agriculture as to the extent of the change in content of Schedule 10 effected by these amendments and the justification for the *"update"*.

3.14 The Department responded:

> *The changes reduce hosts of the pest lettuce aphid in Schedule 10 from the whole of the Compositae family to only the liguliferous and latex producing genera of the family Compositae.…*
>
> *Further contact with New Zealand researchers highlighted additional research material … show*[ing] *that the lettuce aphid hosts were restricted to liguliferous and latex producing genera of the family Compositae.*
>
> *Western Australia is required under the Memorandum of Understanding on Animal and Plant Quarantine Measures between the Commonwealth of Australia and other States and Territories to implement phytosanitary measures that are least restrictive to trade while maintaining an appropriate level of biosecurity protection. The original Schedule 10 was highly restrictive to trade and therefore inconsistent with the provisions of the Memorandum.*[9]

City of Subiaco Eating House Local Law 2005

3.15 This local law contained the following provisions:

- clause 4(3), which provided:

> *To the extent that clause 2(4) of The City of Subiaco Health Laws 1999 (published in the government gazette on 1 June 1999) repealed Part 8 of The City of Subiaco Health By-Laws 1994 (published in the*

[8] Explanatory Memorandum to *Plant Diseases Amendment Regulations (No.2) 2006*, p1.

[9] Letter from Mr Ian Longson, Director General, Department of Agriculture, undated but received 21 April 2006, p1.

> *Government Gazette on 11 November 1994) that repeal is repealed and Part 8 is revived with effect from 1 June 1999 until the day prior to the commencement of this Local Law, and on the date of commencement of this Local Law is repealed*; and

- clause 4(4), which ensured that those parts of the schedules to the *City of Subiaco Health By-Laws 1994* that related to Part 8, being forms and fees, were also revived.

3.16 The Explanatory Memorandum failed to provide an explanation of the purpose and effect of, or justification for, these clauses.

3.17 This local law was the subject of the Committee's Report number 17 - *City of Subiaco Eating-House Local Law 2005* - tabled on 20 June 2006, which sets out the Committee's efforts to clarify the purpose of, and justification for, these clauses. The local law was disallowed by the Legislative Council.

Examples of Inadequate Explanatory Memoranda - Consultation

3.18 Premier's Circular 2005/06 - *Subsidiary Legislation - Explanatory Memorandum* requires government agencies to provide, inter alia, the following information:

> *Details of consultations undertaken including a list of the business and community groups consulted, a précis of their comments and the response to any suggestions put forward.*

3.19 The Minister for Local Government and Regional Development's Circular 28-2005 - *Minister's Directions - Local Laws Explanatory Memoranda to the Joint Standing committee on Delegated Legislation* requires local governments to provide:

> *a summary of any submissions received in response to advertising, public meetings or other public consultation arranged by the local government including the names and addresses of persons providing submissions and the local government's responses to those submissions.*

Road Traffic (Vehicle Standards) Amendment Regulations (No. 3) 2006

3.20 These amendments introduced Class 2 and 3 Restricted Access Vehicle Period Permits.

3.21 The advice as to consultation was:

> *Main Roads undertook a comprehensive 12 month stakeholder consultation process.*

Travel Agents Amendment Regulations (No. 2) 2006

3.22 This amendment was one of a number of amendments to regulations put forward by the Department of Consumer and Employment Protection increasing fees and charges in excess of the Consumer Price Index. In many cases there had not been a fee increase for some years. In others, the increase was justified on cost recovery principles.

3.23 In each case, the advice as to consultation was:

> *Consultation was limited to budget processes with ERC* [Expenditure Review Committee].

3.24 The Committee enquired as to the lack of consultation in respect of this instrument and drew the Department's attention to the general lack of compliance with the Premier's Circular[10] and is pleased to report that the Department's response was to provide the information required and thank the Committee for bringing the matter to its attention.

Mining Amendment Regulations (No. 6) 2006

3.25 The Explanatory Memorandum to this instrument, received by the Committee on 26 July 2006, stated:

> *The Chamber of Minerals and Energy, the Association of Mining and Exploration Companies, the Amalgamated Prospectors and Leaseholders Association and the Australian Mineral and Petroleum Law Association were advised of increases through the Mining Industry Liaison Committee.*[11]

3.26 In the absence of advice as to dissatisfaction or a precis of comments received, as required by the Premier's Circular, this statement implied support.

3.27 During debate in the Legislative Council on 24 August 2006, Hon Ljiljanna Ravlich MLC, Minister for Education, on behalf of the Leader of the House, representing the Minister for Resources and Assisting the Minister for State Development, in answer to the question: "*Has the government sought and received support for the increased*

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[10] Letter from Committee to Director-General, Department of Consumer and Employment Protection, 25 October 2006.

[11] Explanatory Memorandum to *Mining Amendment Regulations (No.6) 2006*, p1.

charges from any industry group; and, if so, which group or groups?",[12] advised: "*No*".[13]

3.28 In later debate, Hon Norman Moore, MLC, advised that the Association of Mining and Exploration companies supported the disallowance motion then being debated.[14]

Electricity Networks Access Code Amendments 2005 and Electricity Networks Access Code Amendments 2006

3.29 The first instrument, amongst other things, deleted s 6.56 of the Access Code, which prevented double counting with respect to capital contributions, to allow network service providers to make a return on future capital contributions. The Explanatory Memorandum advised that s 6.56 not only prevented the use of revenue methodologies to preclude double counting but also prevented methodologies being used which allowed a service provider to make a return on future capital contributions without double counting.

3.30 The Explanatory Memorandum in respect of the first instrument stated that:

- the amendments were made available for public comment on the Office of Energy's website from 3 September to 4 October 2005;
- notices announcing the commencement of public consultation process were published in *The West Australian* and *The Australian* newspapers on 3 September 2005;
- prior to the public consultation process, the proposed amendments were distributed to the following stakeholders: the National Competition Council, Economic Regulation Authority, Western Power Corporation and members of the Access Code Development Committee (including Alinta, Perth Energy, Alcoa, Stanwell Corporation, Wesfarmers Energy, Rio Tinto, TransAlta and the Water Corporation); and
- the Office of Energy had received one submission on the proposed amendments, from Western Power Corporation. There was no comment on the content of that submission, the aspect of the first instrument to which it was relevant or the Office of Energy's response to it.

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12 Hon Norman Moore MLC, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 24 August 2006, p 5175.

13 Hon Ljiljanna Ravlich MLC, Minister for Education, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 24 August 2006, p 5175. The Minister went on to add: *"The Mining Amendment Regulations (No. 6) 2006 increased the Mining Act 1978 fees and charges in line with the consumer price index of 3.6 per cent, which is what it was at that time"*.

14 Hon Norman Moore MLC, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 27 September 2006, p 6727-35.

3.31 The Committee sought further justification for the deletion of s 6.56 from the Office of Energy. In its response, the Office of Energy advised:

- Western Power Networks "*proposed a revenue methodology that was consistent with the high level objectives of the Access Code (to the extent that there is no duplication of return on assets), but was literally inconsistent with clause 6.56.*"[15] The amendments permitted the Economic Regulatory Authority to approve Western Power Network's revenue methodology; and

- in developing the proposed amendments to the Code, the Office of Energy "*undertook extensive consultation*"[16] with the Access Code Development Committee, the industry stakeholder forum responsible for developing the Access Code in collaboration with Government.

3.32 The Explanatory Memorandum to the second instrument advised that the first amendment was "*judged inadequate*" and that further amendment was required to:

> *clarify that any service provider may roll capital contributions into its capital base, while reducing its revenue by a relevant amount to prevent "double dipping".*[17]

3.33 In justifying the second instrument, the Explanatory Memorandum advised that:

> *If these amendments are not put in place, the Authority will not be able to approve Western Power's proposed methodology and an alternative methodology will need to be adopted which is expected to result in significant increase in network access charges in the first few years of the new Access Arrangements.*[18]

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15 Letter from Mr John Bradley, Executive Director, Electricity Reform Implementation Unit, Office of Energy, 22 March 2006, Attachment 1, p1.

16 Ibid, p2.

17 Explanatory Memorandum to *Electricity Networks Access Code Amendments 2006*, p1.

18 Ibid, p1.

4 CONCERNS RAISED IN RELATION TO INSTRUMENTS SCRUTINISED BY THE COMMITTEE: FEES AND CHARGES/COST RECOVERY

Whether an impost is a 'fee' or 'tax'

4.1 The scrutiny of a piece of delegated legislation to determine whether an impost constitutes a 'fee' or 'tax' is a long-standing concern of the Committee.

4.2 Under its Terms of Reference, the Committee is to consider whether an instrument is, amongst other things, "*authorised or contemplated by the empowering enactment*." Other than for the limited exception in s 45A of the *Interpretation Act 1984*, or otherwise authorised by Parliament passing a taxing Act, taxes cannot be imposed by governments via subsidiary legislation.[19] To the extent that a fee is a tax not authorised by Parliament, the fee will be unlawful and should be disallowed.

4.3 The accepted common law position in Australia as to when a fee will constitute a tax was established by the High Court in *Matthews v Chicory Marketing Board (Vict.)*(1938) 60 CLR. A tax is a compulsory impost, for public purposes, enforceable by law, and not a cost recovery payment for services rendered.

4.4 Some guidance was provided by the High Court in *Air Caledonie International v The Commonwealth* (1988) 165 CLR 462 in what is meant by a fee to recover the cost of services. The Court said, at page 470 in referring to s 53 of the Constitution:

> *Read in context, the reference to 'fees for services'* [should] *be read as referring to a fee or charge exacted for particular identified services provided or rendered individually to, or at the request or direction of, the particular person required to make the payment.*

4.5 In Western Australia the common law position in respect to licence fees is modified by s 45A of the *Interpretation Act 1984*, which provides for licence fees to be imposed to recover expenditure that is relevant to the scheme or system under which the licence is issued, not simply for the particular identified service provided or rendered to an individual.

4.6 However, s 45A(2) places limitations on when licence fees may be imposed by providing the circumstances in which expenditure to be recovered by the licence fee will be relevant to the scheme or system under which the licence is issued. It will only be relevant (and lawful) where the expenditure to be recovered:

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[19] This was established in England as far back as 1689 with the *Bill of Rights*. Clause 4 of the *Bill of Rights 1689* states: "*That levying money for or to use of the Crown by pretence of prerogative, without grant of the Parliament, for longer time, or in other manner than the same is or shall be granted, is illegal*."

… has been or is to be incurred-

(a) in the establishment or administration of the scheme or system under which the licence is issued; or

(b) in respect of matters to which the licence relates.

4.7 Another question that arises is whether, when looking at the true character of an imposition, there is something special about the increase or the circumstances in which it is purportedly exacted which, notwithstanding the presence of the attributes specified in the *Matthews* case, might preclude its characterisation as a tax. Again, case law provides guidance, through examples of what such circumstances might be.[20]

Committee's approach

4.8 The Committee continued, during the Thirty-Seventh Parliament, to scrutinise instruments from government departments and agencies to determine whether the quantum of an impost prescribed by the instrument and described as a fee was, in reality, a tax. The Committee's scrutiny of fees generally involves identifying whether the prescription of the fee in the instrument is expressly or impliedly authorised by the primary Act. If so, the Committee attempts to identify whether the quantum of the fee:

- (where the fee is to be paid for a service) bears a reasonable relationship to the costs of providing that service; or

- (where the fee is to be paid for a licence) bears a reasonable relationship to the costs incurred in establishing or administering the scheme or system under which the licence is issued, or is incurred in respect of matters to which the licence relates.

4.9 The Committee's approach to fees and cost recovery, and the difficulties it experiences when provided with insufficient information, is more fully set out in paragraphs 7.2 to 7.15 of its 10th report - *Overview of the Committee's Operations: Second Session Report to the Thirty-Sixth Parliament.*

Non-compliance with Premier's Circular 2005/06 and Minister for Local Government and Regional Development's Circular 2005-28

4.10 Premier's Circular 2005/06 - *Subsidiary Legislation - Explanatory Memorandum*, which was issued on 13 June 2005 requires government departments and agencies to

[20] For example, in *Harper v Victoria* (1966) 114 CLR 361, a fee that was set with reference to the estimated expenditure for grading eggs was not a tax but rather a fee for service because it was exacted to defray the cost of that service to all payees. In *Harper v Minister for Sea Fisheries* (1989) 168 CLR 314, a licence fee that was set in relation to the commercial value of abalone was a fee and not a tax because it was possible to discern a relationship between the amount paid (for the licence) and the value of the privilege conferred by the licence (the right conferred by the licence to take a valuable commodity).

provide the following information to the Committee concerning fees, charges and penalties:

> *If applicable, reasons justifying any change in fees, charges and penalties and details of the amount of the fee, charge or penalty before the change. This information should be summarised in the Explanatory Memorandum in a table similar to the example below.*

Type of Fee	*Date Last Update Increase/Decrease*	*Old Fee $*	*New Fee $*	*Increase/Decrease %*
Grant or renewal of a fishing boat licence for:				
• *A boat less than 6.5 m long*	*10.09.02 decrease*	*550.00*	*85.00*	*- 84.55*
• *A boat that is 6.5 m or longer*	*10.09.02 increase*	*550.00*	*600.00*	*9.09*

4.11 The Minister for Local Government and Regional Development's Circular No 28-2005 - *Minister's Directions - Local Laws Explanatory Memoranda to the Joint Standing Committee on Delegated Legislation* requires local governments to provide the same information, where available, with respect to proposed fees in local laws.

4.12 In 2007, the Committee scrutinised some 171 instruments involving fees, charges and penalties (37.8% of the instruments before it - note: instruments involving taxes have not been included in this tally). Of those, 49 of the Explanatory Memoranda relating to fees and charges did not comply with the relevant Circular.

4.13 Twenty-five instruments involving fees and charges were accompanied by an Explanatory Memorandum that either did not contain a fee table or contained a fee table that did not state:

- date of last change;
- previous fee, charge or penalty;
- percentage change; or
- any of these facts.

4.14 A further 24 instruments were accompanied by an Explanatory Memorandum that either did not provide any explanation of the change in the fee, charge or penalty or provided incomplete, inadequate or contradictory information.

Examples of non-complying Explanatory Memoranda

Worker's Compensation and Injury Management (Scales of Fees) Amendment Regulations (No. 2) 2005, Worker's Compensation and Injury Management (Scales of Fees) Amendment Regulations 2006 and Worker's Compensation and Injury Management (Scales of Fees) Amendment Regulations (No. 2) 2006

4.15 The Committee scrutinised the first instrument on 8 March 2006, when it noted that no fee table, or information concerning the actual or percentage increases in the scales of fees, had been provided in the Explanatory Memorandum. It wrote to WorkCover on 10 March 2006, requesting a fee table.

4.16 WorkCover sent a fee table under cover of a letter dated 16 March 2006. The Committee considered that table on 29 March 2006, when it noted that the fees for items 55820, 55854 and 57524 had been increased substantially above Consumer Price Index. It sought an explanation from WorkCover.

4.17 In the interim, the Committee scrutinised the second instrument on 5 April 2006. The Explanatory Memorandum stated that fees had increased by 3.77% but, again, did not contain a fee table.

4.18 The Explanatory Memorandum also stated that the increase in the scale of fees paid to health and allied services providers was based on:

> *… a composite index methodology adopted by the former Workers' Compensation and Rehabilitation Commission as a means for annual adjustments to fees for all compensable medical and allied health services. The indexation methodology incorporates movements in the Australian Bureau of Statistics Labour Force Index, Consumer Price Index and the Australian Medical Association's (AMA) Medical Fee Index.*

but made no justification of "*annual*" increases in light of the increases introduced by the first instrument in November 2005.

4.19 The Committee requested a fee table in respect of the second instrument on 5 April 2006.

4.20 WorkCover advised, by letter dated 7 April 2006 that there were "*errors*" in the version of the fee table sent to the Committee in respect of the first instrument in that:

- two of the items queried did not reflect the gazetted fee, which was considerably lower; and

- for one item, 57524, the gazetted fee of $366.45 was incorrect and should have been $66.45.

4.21 WorkCover advised that the latter error had not been identified when the second instrument was gazetted, with the consequence that the error was repeated in that instrument, and that urgent amendments were in process. The Committee sought, and received, an undertaking that that amendment would occur.

4.22 WorkCover provided a fee table in respect of the second instrument by letter dated 11 April 2006, together with the following additional information concerning those fees:

> *There are several new items which are identified in the attached table. In relation to item 57524 the gazetted amount of $366.45* [in fact, $380.25 in the second instrument] *is incorrect, as outlined in my letter of 7 April 2006 …*
>
> *Fees for magnetic resonance imaging (diagnostic imaging services) are unchanged due to …*

4.23 The fee for item 57524 was amended by the third instrument.

Mining Amendment Regulations (No. 2) 2006 and Mining Amendment Regulations (No. 6) 2006

4.24 The first instrument came into effect on 20 February 2006 and the second on 1 July 2006.

4.25 The first instrument, inter alia, amended the Second Schedule to the *Mining Regulations 1981*, which contains fees and charges, by deleting the sub-sections relating to exploration licences and graticular exploration licences and inserting new provisions. For an existing exploration licence, the annual rent for year 8 and beyond was increased from $38.72 per square kilometre to $131.12.

The annual rent for graticular exploration licences was increased:

- for years 4 and 5 - from $101.42 to $157.74 per block;

- for years 6 and 7 - from $101.42 to $214,06 per block; and

- for year 8 and beyond - from $101.42 to $405.46 per block.

4.26 There was no fee table in the Explanatory Memorandum accompanying that instrument. Under the heading "*Reasons justifying any fees, charges or penalties*" the Explanatory Memorandum stated: "*not applicable*".

4.27 The Explanatory Memorandum in respect of the first instrument advised that it supported the provisions of the *Mining Amendment Act 2004* and that the main purpose of that Act was:

- "*to reduce the backlog of mining lease applications by allowing applications to revert back to licence where continuing exploration rather than productive mining was the intention*"; and

- to provide that "*new mining lease applications could only be made when a mineral resource had been identified or mining was ready to commence*"

but provided no further explanation of the purpose of the amendments, which were some 30 pages long and which contained provisions not obviously directed at the identified purposes.

4.28 The Committee wrote to the Department of Industry and Resources referring to its previous reminder to the Department of the obligation to provide a fee table and seeking a justification for the exploration, and graticular exploration, licence rental fee increases.[21]

4.29 The Department of Industry and Resources replied, in its letter dated 20 April 2006 that:

- "*These amendments delivered benefits to the industry in the form of longer terms for exploration licences … and the ability to hold larger areas of land for longer periods through the revised compulsory surrender requirements for new licences … This will deliver long-term benefits to industry members by providing that exploration will be conducted on exploration title rather than on mining leases which attract considerably higher rental and expenditure commitments.… The introduction of rent and expenditure increasing with the maturity of an exploration program becomes the driving mechanism to cause licence holders to undertake exploration early in the term of the title … Rental rates remain unchanged for the first 3 years of the term under the new provisions*"; and

- the application fee for retention status was "*a cost recovery fee*".

[21] Letter from Committee to Director General, Department of Industry and Resources, 24 August 2006.

4.30 While the Explanatory Memorandum accompanying the second instrument did contain a fee table, that table did not advise of the date of the previous update or of percentage increases.

4.31 The Explanatory Memorandum stated:

> *The Amendment Regulations increase mining tenement fees and rents under the Mining Act 1978 and Mining Regulations 1981. The increases are in accordance with Government policy to annually adjust State tariffs, fees and charges in line with movements in the Consumer Price Index for Perth (CPI) of 3.6% ...*
>
> *On 25 May the State Treasurer delivered the State Government's budget for 2006-7. The budget proposed inter alia, an increase in all fees and charges by the percentage rise in the CPI of 3.6% for the Department of Industry and Resources …*
>
> *Fees and rents were increased* ***on average*** *by the CPI of 3.6% ...* (Committee's emphasis).

4.32 The Explanatory Memorandum identified two exceptions to this average, annual increase, one being Warden Court fees, which were "*increased above the CPI index of 3.6% as these fees have not been raised for a number of years*". The Explanatory Memorandum explained that these increases "*were below the total CPI increases for the years the fees were not increased*". However, it also advised that a $5 blanket fee increase had been determined "*for ease of calculating multiple amounts of fees*".

4.33 The Explanatory Memorandum did not:

- refer to the fact that the introduction of a new regime for exploration licences had resulted in a significant increase in fees and rents for those licences in February 2006. Nor did it address how the Committee was to reconcile this increase with the statement made in April 2006 that under the new provisions, rental rates for exploration licences and graticular exploration licences remained unchanged for the first 3 years of the term; or

- relate the Warden Court's fees to cost recovery or s 45A of the *Interpretation Act 1984*.

4.34 The Committee queried these omissions. The Department of Industry and Resources replied:

> *The statement "rental rates remain unchanged for the first 3 years for the term under the new provisions" made in the 20 April 2006 letter referred to the fact that there is no escalation in rental fees for exploration licences in years 1-3. It did not mean to indicate that the annual rental would remain static for the next three years.*
>
> *The Department's submission of 20 April 2006, however, failed to indicate it was intended that CPI would be applied annually to the new rent scale. Prior to the introduction of a new rent scale in February 2006, the per block rental rate for exploration licences was increased at the annual CPI rate. The new rent scale, as at 10 February 2006, did not provide for a CPI increase for 2005/6 …*[22]

4.35 The Department's letter of 4 September 2006 further advised that the increase in Warden Court fees did not achieve cost recovery.

4.36 In each instance, the Committee accepted the further explanation provided.

Land Valuers Licensing Amendment Regulations (No. 2) 2006

4.37 This instrument increased application and renewal fees for a land valuer licence by 30.7% and reduced four administrative charges by between 2.4% and 8.3%.

4.38 The Explanatory Memorandum stated that the fees were applicable to approximately 590 current licences and provided the following justification for the fee increase:

> *Our review found that costs associated with applications and renewals are substantially more than revenues raised by current fees and so increases greater than CPI have been approved to move closer towards costs recovery and to bring these fees into line with other occupational licensing areas within the Department.*
>
> *Fees associated with the inspection of the register and certificates have been decreased to align with fees for comparable services charged under the Finance Brokers General Regulations 2005. These fees generate little activity and their decrease will have little impact on revenue.*

[22] Letter from Dr Jim Limerick, Director General, Department of Industry and Resources, 4 September 2006, p2.

4.39 In addition to the fee table required by the Premier's Circular 2005/06, the Explanatory Memorandum contained the following table:

No of Separate Fees within the Act	*Retained/Non Retained*	*Estimated Revenue from existing charge*	*Estimated Total Cost for Delivering Service*	*Estimated Revenue Including Proposed Increases*
6	*Non Retained*	*$38,016*	*$206,319*	*$50,040*

4.40 The Committee noted that licences under the *Land Valuers Licensing Act 1978* were issued for three year periods. The Explanatory Memorandum did not advise what the annual volume of applications/renewals was or whether the estimated total cost for delivering services was an annual or triennial cost.

4.41 Dividing the estimated total cost for delivering service by the number of advised current licences, a cost of $349 per licence (or renewal) resulted. This was less than the fee of $352 of the 2005/06 financial year.[23] Dividing the estimated revenue figures for the current and proposed charges by the cost of those services, suggested an annual application/renewal rate of 108. Multiplied by three, this suggested the Department would deal with some 324 applications/renewals over three years - significantly less than the 590 current licences advised.

4.42 In light of the percentage and actual increase in fees - from $352 to $460 - the Committee sought clarification of the use that it was to make of the information provided in the table reproduced at paragraph 4.39 above.

4.43 The Department of Consumer and Employment Protection advised that:

> *… the estimated total annual cost for delivering services related to the administration of the Land Valuers Licensing Act 1978 is $206, 319.*
>
> *Land valuers licences are issued on a triennial basis. Consequently a fee of $352 for 590 licensees generates revenue of $207,680, over a three-year period. Clearly the fee of $352 is insufficient to meet the annual costs, of administering the Act on a cost recovery basis.*

[23] The Committee observed that the estimated total cost for delivering service included the cost of the administrative services provided but noted that it had been advised that these fees "*generate little activity*".

> *There are currently approximately 630 licensed valuers. The new triennial fee of $460 generates revenue of approximately $290,000 on a triennial basis, which is still insufficient to meet the annual cost of administering the Act, on a cost recovery basis.*[24]

4.44 There was no explanation for the increase in the number of current licences or the fact that the letter of 20 September 2006 suggested annual estimated revenues well in excess of those advised in the Explanatory Memorandum. However, the Committee accepted the advice that cost recovery was not achieved.

4.45 Given the terms of s 45A of the *Interpretation Act 1984*, the Committee was uncertain that an increase in fees to "*bring those fees into line with other occupational licensing areas within the Department*"[25] was a relevant justification for an increase in fees relating to the *Land Valuers Licensing Act 1978*. In light of the later advice that cost recovery for administering the relevant Act was not achieved, it did not raise that question with the Department of Consumer and Employment Protection.

Strata Titles General Amendment (No. 4) Regulations 2006

4.46 However, the question of the extent to which fees raised in respect of a particular service provided under an Act should reflect - or subsidise - the fees for other services provided under that Act, or similar services provided by the same Department (or other government agency) in respect of other Acts, arose in respect of the *Strata Titles General Amendment (No. 4) Regulations 2006.*

4.47 Information provided by the Department of Land Information and the Western Australian State Planning Commission raised the related, though separate, question of the basis on which cost recovery models are developed.

4.48 The Committee's concerns in respect of this instrument, and its correspondence with the Department of Land Information and the Auditor General are set out in its Report No. 21 - *Strata Titles General Amendment (No. 4) Regulations 2006*, tabled on 29 November 2006. Members are referred to that report for a discussion of the issues.

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[24] Letter from Mr Brian Bradley, Director General, Department of Consumer and Employment Protection, 20 September 2006, p1.

[25] See paragraph 4.38 above.

5 CONCERNS RAISED IN RELATION TO INSTRUMENTS SCRUTINISED BY THE COMMITTEE: NOT AUTHORISED OR CONTEMPLATED BY AN ACT - SUB-DELEGATION

5.1 The Committee has not previously drawn separate attention to the issue of sub-delegation. However, concerns with unauthorised sub-delegation underlay the Committee's Report No. 4 - *City of Perth Code of Conduct Local Law 2002* and its concerns with the *Environmental Regulations (Controlled Waste) Regulations 2004* in its *Report in Relation to the Overview of the Committee's Operations: Second Session of the Thirty-Sixth Parliament* (August 2002 to November 2004).

5.2 In 2006, the Committee considered the question of sub-delegation in respect of a number of government and local government instruments.

Legal background

5.3 In the Westminster system of government, which applies in Western Australia, there is a separation of power between the three arms: the Legislative (Parliament), which makes laws; the Executive (Government), which administers laws; and the Judicial, which interprets laws.

5.4 However, Parliament may **delegate** its legislation-making authority to other bodies, including the Governor, local governments, the Executive and its departments and agencies, by assenting to legislation authorising that delegation. A common example of such delegation is to be found in s 16 of the *Gas Standards Act 1972*:

> *(1) The Governor may make regulations prescribing all matters necessary or convenient to be prescribed for the purposes of the administration of this Act.*

5.5 Less frequently, Parliament permits those bodies to which it has delegated its legislation-making power to further delegate - **sub-delegate -** that power to other bodies. Examples of such authorised sub-delegation can also be found in s 16 of the *Gas Standards Act 1972*:

> *(2) Without limiting the generality of subsection (1), regulations may be made —*
>
> > *(a) generally as to the standards of gas to be supplied, and in particular authorising the Minister to require undertakers to supply gas having such characteristics as to odour, pressure, specific gravity, flame speed, purity and other matters, as he specifies in each particular case*; …

and

> *(3) Any regulation under this Act may be made so as to require a matter affected by it to be in accordance with a specified standard or specified requirement; or as approved by, or to the satisfaction of, a specified person or body; or so as to delegate to or confer upon a specified person or body a discretionary authority.*

5.6 However, in the absence of a legislative authority to the contrary, there is a common law rule against the **sub-delegation** of legislative power. This rule is based on the principle that a body that has been delegated the power to make legislation cannot itself delegate this power.[26]

5.7 The rule against sub-delegation only applies to legislative powers, not administrative powers.[27] This distinction is not easy to state. At issue is whether regulations are being administered or formulated.

5.8 The wider the field of operation left to the sub-delegate, the more likely it is that a court would take the view that there has been a sub-delegation of legislative, rather than administrative, power.[28] Where it seems that the sub-delegate is merely 'filling in the details or gaps' left in the legislation itself, it is more likely that this would be seen as administrative in nature and therefore valid.

5.9 The Committee noted that the question was whether the legislature had sufficiently circumscribed the way in which the administrative discretion was to be exercised by laying down guidelines within which the administrator must act.

5.10 The comments of French J in *Turner v Owen*, a case in which a regulation which prohibited importation of goods which "*in the opinion of the minister*" were of a "*dangerous character and menace to the community*" was held to be an unlawful delegation to the minister, are helpful. There the judge considered whether administrative guidelines had been imposed, but observed:

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26 *Turner v Owen (1990) 96 ALR 119,* in which a regulation which prohibited importation of goods which "*in the opinion of the minister*" were dangerous was held to be an unlawful delegation to the Minister on the basis that it asked the Minister to do what the Governor-General was supposed to do: that is, determine by prescription which goods were prohibited.

27 *Dainford Ltd v Smith (1985) 58 ALR 285*.

28 Pearce, D and Argument, S, *Delegated Legislation in Australia,* 3rd Edition, LexisNexis Butterworths, Australia, 2005 (**Pearce and Argument**) pp296-7. See also, *Hawkes Bay Raw Milk Producers Co-operative Co Ltd v New Zealand Milk Board* [1961] NZLR 218, where power was given to the Governor-General to fix the price of milk in accordance with recommendations made to the Minister by the Milk Board. A regulation providing that the Minister could, after consultation with the Milk Board, fix the milk price was held to be invalid because the whole power was passed. The Act required the Governor-General, not the Minister, to fix the milk price.

The words 'dangerous character and menace to the community' are not indicative of a factual criterion or class description limited by any intelligible boundary. They are almost entirely normative.[29]

Examples of instruments with unauthorised sub-delegation

Contaminated Sites Regulations 2006

5.11 The Committee scrutinised these regulations at its meeting on 18 October 2006, when it noted that:

- section 36(3) of the *Contaminated Sites Act 2003* provides that:

  "interested person" *means a person who is prescribed as being an interested person for the purposes of this section.*

- who is an "*interested person*" is relevant for the purposes of two sections of the *Contaminated Sites Act 2003*:

  - s 36(2) - that is, persons who can request the contaminated sites committee to make a decision as to responsibility for remediation of a contaminated site; and

  - s 39(1)(f) - that is, persons who must be notified of a decision of the contaminated sites committee;

- section 98 of the *Contaminated Sites Act 2003*, provides:

  (1) The Governor may, on the recommendation of the Minister, make regulations prescribing all matters that are required or permitted by this Act to be prescribed, or are necessary or convenient to be prescribed, for giving effect to the purposes of this Act.

- regulation 23 of the *Contaminated Sites Regulations 2006* provides:

  For the purposes of the Act section 36(3) the following are prescribed as interested persons in relation to a site —

  (a) a person who is an owner or occupier of land that comprises all, or part, of the site;

  (b) a person who was an owner or occupier of land that comprises all, or part, of the site and in respect of whom

[29] p142 quoted in Pearce and Argument, p291.

there are reasonable grounds to suspect may have caused, or contributed to, the contamination of the site;

(c) a person who is, or was, an owner or occupier of land adjoining land that comprises all, or part, of the site and in respect of whom there are grounds to suspect may have caused, or contributed to, the contamination of the site;

(d) a person who is a mortgagee of land that comprises all, or part, of the site;

(e) a person given a notice under the Act section 42(1) in relation to the site;

(f) the CEO;

*(g) **a person who, in the opinion of the CEO, has a particular interest in the site and has been approved in writing by the CEO for the purposes of this section.*** (Committee's emphasis)

5.12 The Committee was concerned that reg 23(g) represented an unauthorised sub-delegation of the power conferred in the empowering Act on the Governor, on the Minister's recommendation, to **prescribe** "*interested persons*" to the CEO to **approve** persons as "*interested persons*" on the CEO's assessment of an undefined "*particular interest*".

5.13 The Committee resolved to draw this, and other concerns that it had with the *Contaminated Sites Regulations 2006*, to the attention of the Department of Environment and, in the interim, moved a protective notice of motion of disallowance in respect of the instrument.

5.14 The Department of Environment responded to the Committee's letter of 18 October 2006 in some detail by letter dated 27 October 2006. The part of that response relevant to the issue of sub-delegation is **Appendix 1.**

5.15 In summary, the Department relied on:

- section 98(3) of the *Contaminated Sites Act 2003*, which adopts s 123(3) of the *Environmental Protection Act 1986*. The Department referred to s 123(3)(b) of the latter Act, providing that regulations:

  may be general or be restricted in operation and time, place persons or circumstances, whether or not any such time, place, persons or

circumstances is or are determined or ascertainable before, at or after the making of those regulations

and asserted that:

Section 123(3)(b) indicates that regulations made under the Act are to operate in a wide variety of ways, including by way of the CEO's approval;

- section 43(8)(b)(ii) of the *Interpretation Act 1984*, which provides:

  Subsidiary legislation may be made —

  (a) …

  (b) so as to require a matter affected by the legislation to be —

  (i) …

  (ii) approved by or to the satisfaction of a specified person or body or a specified class of person or body;

  to assert:

  On reading that provision with the other provisions noted above [that is, s 36(3) and 98(3) of the *Contaminated Sites Act 2003* and s 123(3)(b) of the *Environmental Protections Act 1986*] *it is apparent that the identification of "interested persons" is a matter affected by the Act. Such a matter is one that section 43(8)(b)(ii) of the IA provides for the making of regulations that operate by virtue of the approval of a "specified person". The CEO is such a person because regulation 23(g) identifies him as the person who is to give approval to persons having a direct interest in a site to make a request to the committee* [that is, the contaminated sites committee]; and

- an argument that reg 23(g) was an important provision in terms of protecting members of the public. In that regard, the Department said:

  - *Sub-regulations (a) to (f) of regulation 23 prescribe a relatively narrow range of persons as "interested persons" who may make requests to the committee … ;*

  - *Regulation 23(g) considerably widens the pool of persons who are able to make requests … ;*

- *Adding sub-regulation (g) to regulation 23 promotes good public practice because it gives any member of the public who is directly affected by that committee decision the right to make a request. If regulation 23(g) is removed then this category of person has no right to be heard by the committee;* and

- … *section* [sic] *23(g) requires a person to obtain the CEO's written approval to make a request. This is consistent with Parliament's intention for the committee to identify with certainty who each "interested person" is. This is especially evident on reading section 39(1)(f) which requires the committee to give notice of a decision to "each interested person, within the meaning of section 36(3)".*

5.16 The Department concluded by saying:

> *Consequently, for the reasons given … there is no reason to be concerned that regulation 23(g) is a delegation of delegated power as described at paragraph 1.4 of your letter. Rather, regulation 23(g) should be seen as a provision that the Act contemplates and promotes good public practice.*

5.17 The Committee accepted that s 123(3) of the *Environmental Protection Act 1986* envisaged regulations operating in a wide variety of ways. However, on a plain reading of its terms, the Committee considered that there was no basis to conclude that that section authorised, or envisaged, regulations operating by CEO approval.

5.18 An illustration of the circumstances which s 123(3) of the *Environmental Protection Act 1986* in fact envisaged was *Croft v Rose*[30], in which a regulation prohibiting driving 30 miles per hour on part of a highway defined by means of a restriction sign was held to be valid:

> *If a law is so expressed that it will be without any subject matter upon which it can operate unless and until certain acts are done or circumstances created by others, it surely cannot be said that those others are the lawmakers or their delegates.*[31]

5.19 The Committee noted that in respect of that case, Pearce and Argument had commented that it was important to note that the power conferred by the relevant Act

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30 [1957] ALR 148.

31 P163, quoted in Pearce and Argument p294.

was to fix speed limits for specified roads, not to specify what the roads should be, and the speed limits were to be fixed by having regard to specified criteria.[32]

5.20 The Committee noted the full text of s 43 of the *Interpretation Act 1984* and was not persuaded that, in itself, that section conferred a regulation-making power. The Committee considered that there was an alternate argument that it merely provided how a power might be exercised in the event it had been conferred.

5.21 The Committee was not persuaded that s 123(3) of the *Environmental Protection Act 1986*, when considered together with s 43(8)(b)(ii) of the *Interpretation Act 1984*, did any more than reflect the common law position that administrative functions may be delegated.

5.22 The Committee noted that neither the *Contaminated Sites Act 2003*, nor the *Contaminated Sites Regulations 2006* provided guidelines under which the CEO would act in approving "*interested persons*". The Committee was of the opinion that a decision by the CEO that a person had a *"particular interest"* was, to use Justice French's words, *"purely normative"*.

5.23 Further, in the Committee's opinion, s 48 of the *Interpretation Act 1984* did not address the fundamental problem that s 36 of the *Contaminated Sites Act 2003* required "*interested persons*" to be **prescribed** and s 98 of that Act required that prescription to be by the Governor: whereas reg 23(g) purported to confer power on the CEO to **approve** persons as interested persons.

5.24 The fact that reg. 23(g) was important, and considerably widened the pool of *"interested persons"* on the basis of unfettered CEO discretion was, in the Committee's opinion, reason to ensure that it was authorised, rather than reason to dismiss concerns.

5.25 In any event, in the Committee's opinion, it was questionable that "*good public practice*" would be served by an unfettered administrative discretion that someone does or does not have a right to bring, or be involved in, what is essentially a legal claim.

5.26 It would be impossible for a member of the public to judge with any certainty whether or not they had a right to bring, or be heard on, a remediation application. The Department's letter of 27 October 2006 acknowledged that Parliament had evidenced a desire for certainty in identifying "*interested persons*". In the Committee's view, that desire is not limited to the perspective of the contaminated sites committee.

5.27 Importantly, the Committee noted that the CEO might well be an "*interested person*" in any particular matter (reg 23(f)) and that, in those circumstances, potential for an

[32] Pearce and Argument, p294.

actual or perceived conflict of interest arose. This could, or could be perceived to, affect the CEO's decision as to whether or not a person was an "*interested person*".

5.28 The Committee further noted that there was no review of, or appeal from, the CEO's decision as to whether or not a person was an "*interested person*".

5.29 The Committee did not accept the Department's assertion that removal of the sub-regulation would mean that persons interested in the subject matter of a matter before the contaminated sites committee would have no right to be heard. It noted that if it were considered appropriate to extend the range of persons who may bring an action or be heard, the Governor could do so by regulation.

5.30 Finally, the Committee observed that Parliament had a number of options available to it in deciding who should be able to bring an application for, or be notified of, a remediation decision. This could have been stipulated in the *Contaminated Sites Act 2003*. The contaminated sites committee could have been given power to decide whether or not a person had sufficient interest or the *Contaminated Sites Act 2003* could have provided that the decision would be made by CEO approval. Parliament had chosen a particular method for the determination of "*interested person*[s]". That method could not be set aside by regulation.

5.31 In light of the Department's response, the Committee wrote to the Minister for the Environment on 2 November 2006, setting out its concerns, attaching the correspondence and inviting the Minister to respond.

5.32 The Minister's response, by letter dated 10 November 2006, was:

> *The State Solicitor's Office (SSO) has considered the issues raised in your letter. In SSO's view, whilst it is **possible** that regulation 23(g) is **arguably valid**, it is conceded that the validity of regulation 23(g) would be **debatable**.* (Committee's emphasis)

5.33 The Minister offered an undertaking to repeal reg 23(g) and not to enforce it in the event the repeal had not occurred prior to the *Contaminated Sites Regulations 2006* taking effect, observing, inter alia:

> *Further classes of "interested person[s]" may be prescribed under regulation 23 in the future, as the criteria for objectively identifying such persons emerge.*

The Committee resolved to accept the undertaking offered by the Minister (and other undertakings that had been provided by the Department in its letter of 27 October 2006) and sought leave to withdraw its protective notice of motion of disallowance from the Legislative Council. Leave was granted.

Mining Amendment Regulations (No. 3) 2006

5.34 The Committee scrutinised this instrument on 5 April 2006, when it noted that:

- sub-regulation 84C(c) provided for a register to contain:

  such other particulars relating to a mining tenement or an application for a mining tenement as the Director General of Mines considers necessary;

- however, ss 103F(1) and (2) of the *Mining Act 1978* required the Director General to keep a register containing such particulars relating to mining tenements, and applications for mining tenements as were "*prescribed*";

- subsections 103F(1) and (2) could be contrasted with ss. 103F(3) of the *Mining Act 1978*, which provided that the register was to be compiled and maintained in such form and manner as the Director General determined;

- section 162 of the *Mining Act 1978* provides that the Governor may make such regulations as are contemplated by the Act and that regulations may confer a discretionary authority on a prescribed person;

- However, in the Committee's opinion, sub-reg 84C(c) did not purport to confer a discretionary authority: Sub-regulation 84C(c) purported to delegate responsibility for determining which particulars will be recorded in the register to the Director General.

5.35 The Committee wrote to the Department of Industry and Resources on 6 April 2006, requesting an undertaking that:

- sub-regulation 84C(c) would be deleted as soon practicable; and

- the Director General of Mines would not require any details additional to those validly prescribed in the Regulations concerning mining tenements to be recorded in the register pending deletion of the regulation.

5.36 The Department responded by letter dated 20 April 2006, stating:

> *The Matter has been discussed with both Parliamentary Counsel and the State Solicitor's Office and the advice is that there is sufficient power to include a provision* ***similar*** *to subregulation 84C(c). It is acknowledged however that the current regulations should be redrafted to better reflect the regulation making provisions in the Act.*

5.37 The Department provided the undertakings sought.

The Western Australian College of Teaching Rules 2006

5.38 The question of sub-delegation was integral to the Committee's recommendation that *The Western Australian College of Teaching Rules 2006* be disallowed and members are referred to Committee's Report No. 20 for the issues arising in that instrument.

6 FOLLOW-UP HEARINGS WITH THE AUDITOR GENERAL

6.1 The Committee has a long-standing concern regarding the reliability of general statements from government departments and agencies that fees or increases in fees were justified under cost recovery principles without any further supporting information.

6.2 The concerns raised by the Committee during a hearing with the Auditor General in 2003 were, in part, the catalyst for the Office of the Auditor General Western Australia's - *Third Public Sector Performance Report 2004*, Report 6, September 22 2004, with regard to the discussion under the heading, 'Setting Fees - The Extent of Cost Recovery', at pages 4 to 15.

6.3 The Committee held further hearings with Mr Des Pearson, Auditor General, and Mr Glen Clarke, Executive Director, Office of the Auditor General, in 2004 and 2005 to discuss the Auditor General Western Australia's *Third Public Sector Performance Report 2004*. At the hearing in 2005, the Committee requested that the Auditor General report back to the Committee in June 2006 with more detailed information as to whether agencies have been calculating costs and fees in a manner that complies with the recommendations set out in the *Third Public Sector Performance Report 2004*.

6.4 The Committee met informally with Mr Des Pearson, Auditor General; Mr Glen Clarke, Executive Director, Office of the Auditor General; and Mr Joel Mendelson, Compliance Analyst, Office of the Auditor General, on 21 June 2006 to discuss the status of the follow-up audit *"Setting Fees - The Extent of Cost Recovery"*.

6.5 The Auditor General's Report - *Second Public Sector Performance Report 2006* was tabled on 30 August 2006. That report noted that:

- Changes were yet to be made to the government guidelines on *Costing and Pricing Government Services* which are a key component of the whole-of-government policy framework for setting fees and charges;

- Agencies are now required to certify to the Department of Treasury and Finance (**DTF**) that their fee setting practices are materially accurate and the fees reasonably reflect costs. DTF does not test the reliability of these certifications as part of its oversight role;

- Of the current sample of six categories of fees, only probate fees significantly over-recovered costs (by almost 200 per cent). No clear justification was available for this level of over-recovery; and

- Only half of the 20 sampled agencies met annual report disclosure requirements for their fee setting policies. However, this was an improvement on the 2004 finding when only one of six agencies was compliant.[33]

6.6 The Committee had a further briefing with the Acting Auditor General, Mr Colin Murphy, and the Deputy Auditor General, Mr John Doyle, on 1 November 2006 to discuss issues emerging from the Office of Auditor General's current and recent audit work relevant to the Committee's oversight of delegated legislation and the then *Auditor General Bill 2006.*

6.7 On 15 November 2006, the Committee wrote to the Acting Auditor General requesting him to undertake an audit of the cost recovery model on which the fees introduced by the *Strata Title General Amendments (No. 4) 2006* were based.[34]

6.8 The Acting Auditor General's response was:

- the office's resources were fully committed through to the second half of 2007; and

- further, he had concerns about the value of a further audit by his office in the area. He noted that some investigations could be more effectively pursued through Parliamentary or public sector forums.

The Acting Auditor General offered to assist the Committee in conducting its own inquiry.[35]

6.9 The Auditor General's Report - *Second Public Sector Performance Report 2006* indicated that, at the very least, the Committee should continue to request further information to support general cost recovery justifications for fees or fee increases which are prescribed in instruments of delegated legislation.

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33 Summary Report No 8 *Second Public Sector Performance Report 2006* http://www.audit.wa.gov.au/reports/report2006_08.html.

34 Letter from the Committee to Acting Auditor General, 15 November 2006.

35 Letter from Mr John Doyle, Acting Auditor General, 17 November 2006. See Committee's Report No. 21 - *Strata Titles General amendment (No. 4) Regulations 2006* - for the full text of both pieces of correspondence.

7 ISSUES THE COMMITTEE WILL CONSIDER IN 2007

Issues Arising in Local Laws

7.1 The Committee tabled an information report on the issues arising from its scrutiny of local laws between 1 May 2005 and 30 April 2006 on 31 May 2006.

7.2 The Committee intends to present a report in early 2007, specifically addressing issues that have arisen since 1 May 2006 with respect to local laws.

Other matters

7.3 A number of issues arising for the Committee's consideration in 2006 reflect long-standing concerns as to whether a particular instrument is authorised or contemplated by an empowering Act. Amongst those concerns are:

- transparency and consistency in respect of cost recovery models adopted by government departments and agencies;
- various issues arising from the provisions of the *Interpretation Act 1984*, in particular s 43 of that Act; and
- the ramifications of primary legislation requiring matters to be "*specified*" or "*provided for*" (or other similar term), rather than "*prescribed*", in subsidiary legislation for Parliamentary control and scrutiny of delegated legislation-making power.

7.4 The Committee will continue to closely monitor instruments raising these issues in 2007 and report to Parliament when appropriate.

Mr Paul Andrews MLA
Chairman

28 March 2007

APPENDIX 1

PAGES 1 AND 2 OF LETTER FROM THE DEPARTMENT OF ENVIRONMENT AND CONSERVATION, 27 OCTOBER 2006

Department of
Environment and Conservation

Your ref:
Our ref: 3717/40
Enquiries: CEO844/06, 1219/05-02, 998/05
Phone: Kerry Laszig
Fax: 6467 5350
Email:

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

RECEIVED
27 OCT 2006

Dear Mr Andrews

Contaminated Sites Regulations 2006 **("Regulations")**

Thank you for your letter faxed to this office on 18 October 2006. Legal officers of this Department and the Parliamentary Counsel's Office (PCO) have had in depth communications concerning each of the issues raised your letter. Those communications included a review of all known written legal opinions received from the State Solicitor's Office in relation to the making of the Regulations and the *Contaminated Sites Act 2003* (**"Act"**).

Each issue raised in your letter is answered as follows.

A. Regulation 23(g)

1. Regarding the view put forward at paragraph 1.4 of your letter, regulation 23(g) must be read in the context of other (relevant) provisions concerning the making of regulations that operate by way of the approval of a person (in this case, the approval of the CEO). In that respect:

   (a) It is clear from reading section 36(3), that the Act contemplates that regulations are to be made prescribing who is an "*interested person*" for the purposes of requesting the Contaminated Sites Committee (**"committee"**) to make decisions concerning the responsibility for remediation (**"request"** or **"requests"**).

   (b) Section 98(1) enables the Governor to make such regulations on the basis that they concern matters "*that are required or permitted by this Act to be prescribed, or are necessary or convenient to be prescribed, for giving effect to the purposes of this Act*".

   (c) Section 98(3) adopts section 123(3) of the *Environmental Protection Act 1986* (**"EP Act"**) which relevantly provides (see regulation 123(3)(b)) that regulations "*may be general or be restricted in operation in respect of time, place, persons or circumstances, whether or not any such time, place, persons or circumstances is or are determined or ascertainable before, at or after the making of those*

DIRECTOR GENERAL AND ENVIRONMENTAL SERVICES DIVISIONS: The Atrium, 168 St Georges Terrace, Perth, Western Australia 6000
Phone: (08) 6364 6500 Fax: (08) 6364 6520 TTY: 1800 555 630

PARKS AND CONSERVATION SERVICES DIVISIONS: Executive: Corner of Australia II Drive and Hackett Drive, Crawley, Western Australia 6009
Phone: (08) 9442 0300 Fax: (08) 9386 1578 Operations: 17 Dick Perry Avenue, Technology Park, Kensington, Western Australia 6151
Phone: (08) 9334 0333 Fax: (08) 9334 0498 TTY: 9334 0546

POSTAL ADDRESS FOR ALL DIVISIONS: Locked Bag 104, Bentley Delivery Centre, Western Australia 6983
www.dec.wa.gov.au

regulations". Section 123(3)(b) indicates that regulations under the Act are to operate in a wide variety of ways, including by way of the CEO's approval.

(d) Importantly, section 43(8)(b)(ii) of the *Interpretation Act 1984* ("**IA**") provides that:

"*Subsidiary legislation may be made so as to require a matter affected by the legislation to be approved by or to the satisfaction of a specified person or body or a specified class or person.*"

On reading that provision with the other provisions noted above, it is apparent that the identification of "*interested persons*" is a matter affected by the Act. Such a matter is one that section 43(8)(b)(ii) of IA provides for the making of regulations that operate by virtue of the approval of a "*specified person*". The CEO is such a person because regulation 23(g) identifies him as the person who is to give approval to persons having a direct interest in a site to make a request to the committee.

2. Regulation 23(g) is an important provision in terms of protecting members of the public. In that regard:

(a) Sub-regulations (a) to (f) of regulation 23 prescribe a relatively narrow range of persons as "*interested persons*" who may make requests to the committee. Those persons are owners, occupiers, mortgagees, recipients of regulatory notices under Part 4 Division 1 of the Act, and the CEO.

(b) Regulation 23(g) considerably widens the pool of persons who are able to make requests to include persons who in the CEO's opinion, have a particular interest in a site.

(c) Adding sub-regulation (g) to regulation 23 promotes good public practice because it gives any member of the public who is directly affected by a committee decision the right to make a request. If regulation 23(g) is removed then this category of persons would have no right be heard by the committee.

(d) As stated above, section 23(g) requires a person to obtain the CEO's written approval to make a request. This is consistent with Parliament's intention for the committee to identify with certainty who each "*interested person*" is. This is especially evident on reading section 39(1)(f) which requires the committee to give notice of a decision to "*each interested person, within the meaning of section 36(3)*".

3. Consequently, for the reasons given at A1 and A2, there is no reason to be concerned that regulation 23(g) is a delegation of delegated power as described at paragraph 1.4 of your letter. Rather, regulation 23(g) should be seen as a provision that the Act contemplates and promotes good public practice.

B. Regulations governing the Contaminated Sites Committee's procedures

1. We accept the views expressed at paragraphs 1.5 to 1.7 and 1.10 of your letter.