



THIRTY-SEVENTH PARLIAMENT

REPORT 6

**STANDING COMMITTEE ON ESTIMATES AND
FINANCIAL OPERATIONS**

**FINANCIAL MANAGEMENT BILL 2006,
FINANCIAL LEGISLATION AMENDMENT AND
REPEAL BILL 2006 AND AUDITOR GENERAL
BILL 2006**

Presented by Hon Giz Watson MLC (Chair)

November 2006

STANDING COMMITTEE ON ESTIMATES AND FINANCIAL OPERATIONS

Date first appointed:

30 June 2005

Terms of Reference:

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

“2. Standing Committee on Estimates and Financial Operations

- 2.1 *An Estimates and Financial Operations Committee* is established.
- 2.2 The Committee consists of 5 Members, 3 of whom shall be non-government Members.
- 2.3 The functions of the Committee are to consider and report on -
 - (a) the estimates of expenditure laid before the Council each year;
 - (b) any matter relating to the financial administration of the State;
 - (c) any bill or other matter relating to the foregoing functions referred by the House;
 - (d) to consult regularly with the Auditor General and any person holding an office of a like character.”

Members as at the time of this inquiry:

Hon Giz Watson MLC (Chair)

Hon Anthony Fels MLC

Hon Ken Travers MLC (Deputy Chair)

Hon Nigel Hallett MLC (participating Member)

Hon Shelley Archer MLC

Hon George Cash MLC
(substitute Member for Hon Nigel Hallett MLC)

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LIST OF ABBREVIATIONS

ACAG	Australasian Council of Auditors-General
AGB	Auditor General Bill 2006
COG	1995 Commission on Government
Committee	Legislative Council Standing Committee on Estimates and Financial Operations
DTF	Department of Treasury and Finance
FAAA	<i>Financial Administration and Audit Act 1985</i>
FLARB	Financial Legislation Amendment and Repeal Bill 2006
FMB	Financial Management Bill 2006
ICAA	The Institute of Chartered Accountants in Australia
OAG	Office of the Auditor General
PAC	Legislative Assembly Public Accounts Committee

CONTENTS

LIST OF ABBREVIATIONS

RECOMMENDATIONS	i
RECOMMENDATIONS	i
CHAPTER 1 INTRODUCTION.....	1
REFERRAL	1
INQUIRY PROCEDURE	1
BACKGROUND TO THE BILLS	2
SCOPE OF THIS REPORT	3
CHAPTER 2 FINANCIAL MANAGEMENT BILL 2006	5
DEFINITION OF ‘ACCOUNTS’	5
CLAUSE 5 - MODIFIED APPLICATION OF ACT FOR CERTAIN PURPOSES.....	5
Clause 5(1) - Independence of Parliament and other Entities	5
Committee Comment	6
CLAUSE 6 - AMENDMENT OF SCHEDULE 1 BY REGULATIONS.....	7
Henry VIII Clause.....	7
Committee Comment	8
CLAUSE 37 - INVESTMENT BY TREASURER.....	8
Delegation of Legislative Power	8
Committee Comment	10
PART 3, DIVISION 5 - RESOURCE AGREEMENTS.....	10
Independence of Parliament and other Entities.....	10
Committee Comment	13
Clause 46(2) - Non-application to Parliament and other Entities	14
CLAUSE 49 - LIABILITY OF OFFICERS FOR LOSSES	14
Reversal of Onus of Proof.....	14
Committee Comment	15
CLAUSE 50 - RECOVERY OF AMOUNTS FOR WHICH OFFICERS ARE LIABLE.....	15
Clause 50(3) - Averment Provision.....	15
Committee Comment	16
CLAUSE 51 - UNDER TREASURER AND ACCOUNTABLE AUTHORITIES MAY DIRECT	
INVESTIGATIONS IN RESPECT OF LOSSES	16
Reversal of Onus of Proof.....	16
Abrogation of Privilege against Self-Incrimination	17
CLAUSE 54 - ACCOUNTABLE AUTHORITIES FOR DEPARTMENTS.....	17
Clause 54(1) as modified by Schedule 2 - Independence of Parliament and other	
Entities.....	17
Committee Comment	18
CLAUSE 60 - INTERPRETATION FOR SECTIONS 60 AND 61.....	19
Clause 60(1) - Absence of Definition of ‘financially dependent’	19

Clause 60(2) - Henry VIII Clause.....	19
Committee Comment	20
CLAUSE 77 - GENERAL PROVISIONS ABOUT DELEGATIONS AND AUTHORISATIONS.....	20
Clauses 77(2) and (5) - Averment Provisions.....	20
CLAUSE 78 - TREASURER’S INSTRUCTIONS	20
Minimal Publication Requirements	20
Committee Comment	21
CLAUSE 82 - MINISTER TO REPORT DECISIONS NOT TO PROVIDE CERTAIN INFORMATION ABOUT AGENCIES	21
Intended Application	22
‘Certain’ Information.....	22
CLAUSE 85 - REVIEW OF ACT	23
‘Minister’	23
Committee Comment	23
Parliamentary Committee Review	23
Recurring Review	24
CHAPTER 3 FINANCIAL LEGISLATION AMENDMENT AND REPEAL BILL 2006	25
GENERAL	25
COMMITTEE COMMENT	25
CHAPTER 4 AUDITOR GENERAL BILL 2006	27
INDEPENDENCE OF THE AUDITOR GENERAL FROM THE EXECUTIVE.....	27
Personal Independence.....	27
Operational Independence.....	28
Parliamentary Oversight (Accountability of the Auditor General. The need for independence should not limit the accountability of the Auditor General)	28
Transitional Arrangements.....	29
REPORTING TO PARLIAMENT	29
CLAUSES OF THE BILL	31
Clause 4 - Terms used in this Act.....	32
Definition of Estimates and Financial Operations Committee.....	32
Definition of the term ‘accounts’	32
Clause 8 - Auditor General to have regard to audit priorities of Parliament	33
Clause 14 - Audits of accounts of agencies	34
Clause 24 - Reports on performance of functions generally	34
Clause 25 - Report on an examination or investigation.....	35
Clause 37 - Powers extend to confidential information.....	35
Clause 43 - Recommendations by the Public Accounts Committee	36
Clause 47 - Review of Act.....	37
Schedule 1, clause 1 - Appointment of Auditor General.....	38
Schedule 1, clauses 7(1) and 7(2) - Removal and suspension from office	40
Schedule 1, clause 8 - Acting Auditor General	40

APPENDIX 1 STAKEHOLDERS TO WHOM THE COMMITTEE WROTE	45
APPENDIX 2 LIST OF CORPORATIONS WHICH ISSUE DEBT SECURITIES IN AUSTRALIA AND THEIR CREDIT RATINGS.....	49
APPENDIX 3 <i>PRO FORMA</i> RESOURCE AGREEMENT SUPPLIED BY THE DEPARTMENT OF TREASURY AND FINANCE.....	53

RECOMMENDATIONS

RECOMMENDATIONS

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

Page 5

Recommendation 1: The Committee recommends that a definition of ‘accounts’ be inserted into the Financial Management Bill 2006 with flexibility to enable additional matters to be prescribed in Treasurer’s instructions.

Page 7

Recommendation 2: The Committee recommends that clause 5(1) of the Financial Management Bill 2006 be amended so that it prescribes within the bill the administration of the listed entities as departments for the purposes of the bill. The amendment to clause 5(1) should ensure that generic descriptions of the listed entities are used in order to minimise the need for amendment Acts whenever changes of titles and/or departmental structures occur.

Page 14

Recommendation 3: The Committee recommends that Part 3, Division 5 of the Financial Management Bill 2006 should be amended so that:

- a) **the Office of the Auditor General and the entities listed in clause 5(1) of the bill are expressly exempted from its operation; and**
- b) **if, despite being expressly exempt from the operation of Part 3, Division 5, those entities voluntarily submit a draft resource agreement, they must use reasonable endeavours to reach agreement with the Treasurer on the draft resource agreement.**

Page 14

Recommendation 4: The Committee recommends that clause 46 of the Financial Management Bill 2006 be amended so that the accountable authorities of the Office of the Auditor General and the entities listed in clause 5(1) of the bill are required to obtain the approval of the proposed Joint Standing Committee on Audit (as recommended by the Committee in Recommendation 8) before reaching agreement with the Treasurer on any draft resource agreements for the relevant entities.

Page 19

Recommendation 5: The Committee recommends that Schedule 2 of the Financial Management Bill 2006 be amended so that clause 54 of the bill prescribes the accountable authorities for the entities listed in clause 5(1) of the bill. For the purposes of the parliamentary departments, the bill should prescribe:

- a) the Clerk of the Legislative Council as the accountable authority of the Department of the Legislative Council;
- b) the Clerk of the Legislative Assembly as the accountable authority of the Department of the Legislative Assembly; and
- c) the Executive Manager of the Parliamentary Services Department as the accountable authority of the Parliamentary Services Department.

The amendment to Schedule 2 should ensure that generic descriptions of the positions and the listed entities are used in order to minimise the need for amendment Acts whenever changes in titles and/or departmental structures occur.

Page 24

Recommendation 6: The Committee recommends that clause 85 of the Financial Management Bill 2006 be amended so that the proposed Joint Standing Committee on Audit (as recommended by the Committee in Recommendation 8) is the parliamentary committee which has the responsibility of conducting a review of the Minister's report on the review of the operation and effectiveness of the proposed Act.

Page 24

Recommendation 7: The Committee recommends that clause 85 of the Financial Management Bill 2006 be amended so that the reviews which are contemplated by that clause occur as soon as practicable after the expiry of every five years after the commencement of the proposed Act.

Page 31

Recommendation 8: The Committee recommends that a Joint Standing Committee on Audit be established.

Page 32

Recommendation 9: The Committee recommends that the definition of ‘Estimates and Financial Operations Committee’ in the Auditor General Bill 2006 be amended to mean the Estimates and Financial Operations Committee of the Legislative Council or such other committee determined by the Legislative Council to be the responsible committee for the purposes of the Auditor General Act 2006.

Page 33

Recommendation 10: The Committee recommends that a definition of ‘accounts’ be inserted into the Auditor General Bill 2006 with flexibility to enable additional matters to be prescribed in Treasurer’s instructions.

Page 33

Recommendation 11: The Committee recommends that clause 8 of the Auditor General Bill 2006 be amended to require that the Auditor General also have regard to the audit priorities as determined by the Estimates and Financial Operations Committee.

Page 34

Recommendation 12: The Committee recommends that clause 14 of the Auditor General Bill 2006 be amended to require that the Auditor General also notify the Estimates and Financial Operations Committee.

Page 35

Recommendation 13: The Committee, by a majority (comprising Hons Giz Watson, Anthony Fels and George Cash MLCs) recommends that the Auditor General Bill 2006 be amended to provide that a report under clause 24 is to include an opinion as to whether a decision by a Minister not to provide information to Parliament concerning any conduct or operation of an agency is reasonable and appropriate.

Page 35

Recommendation 14: The Committee recommends that clause 25 of the Auditor General Bill 2006 be amended to require that a report on an examination or investigation carried out under clause 18 of the Auditor General Bill 2006 also be submitted to the Estimates and Financial Operations Committee.

Page 36

Recommendation 15: The Committee recommends that clause 37 of the Auditor General Bill 2006 be amended to require that where the Auditor General decides to report information, the Auditor General should report to the proposed Joint Standing Committee on Audit (as recommended by the Committee in Recommendation 8) and that the proposed Joint Standing Committee on Audit should determine, in private, whether the information shall be included in a report to be tabled in Parliament.

Page 37

Recommendation 16: The Committee recommends that clause 43 of the Auditor General Bill 2006 be amended to provide that the Treasurer, when determining the budget of the Office of the Auditor General, be required to have regard to the recommendations of the proposed Joint Standing Committee on Audit (as recommended by the Committee in Recommendation 8).

Page 37

Recommendation 17: The Committee recommends that clause 43 of the Auditor General Bill 2006 be amended to provide that regard be given to any recommendation made by the proposed Joint Standing Committee on Audit (as recommended by the Committee in Recommendation 8) regarding organisational structure or resources of the Office of the Auditor General.

Page 38

Recommendation 18: The Committee recommends that clause 47 of the Auditor General Bill 2006 be amended to provide that the proposed Joint Standing Committee on Audit (as recommended by the Committee in Recommendation 8) carry out a review of the operation and effectiveness of the *Auditor General Act 2006* as soon as practicable after the expiry of every five years from the commencement of the *Auditor General Act 2006*.

Page 38

Recommendation 19: The Committee recommends that clause 47 of the Auditor General Bill 2006 be amended to provide that the proposed Joint Standing Committee on Audit (as recommended by the Committee in Recommendation 8) have the ability to direct, from time to time, that a performance review of the Auditor General's Office be conducted by a person or persons appointed by the proposed Joint Standing Committee on Audit.

Page 39

Recommendation 20: The Committee recommends that Schedule 1, clause 1 of the Auditor General Bill 2006 be amended to require that the Minister also consult with the Estimates and Financial Operations Committee.

Page 40

Recommendation 21: The Committee recommends that Schedule 1, clauses 7(1) and 7(2) of the Auditor General Bill 2006 be amended to delete the words 'made on the recommendation of the Public Accounts Committee'.

Page 40

Recommendation 22: The Committee recommends that Schedule 1, clause 7 of the Auditor General Bill 2006 be amended to provide that either House of Parliament may order the proposed Joint Standing Committee on Audit (as recommended by the Committee in Recommendation 8) to inquire into and report on any motion for suspension or removal of the Auditor General.

Page 41

Recommendation 23: The Committee recommends that Schedule 1, clause 8 of the Auditor General Bill 2006 be amended to require that the Minister also consult with the Estimates and Financial Operations Committee.

CHAPTER 1

INTRODUCTION

REFERRAL

- 1.1 On 24 October 2006, the Legislative Council referred the Financial Management Bill 2006 (**FMB**), the Financial Legislation Amendment and Repeal Bill 2006 (**FLARB**) and the Auditor General Bill 2006 (**AGB**) to the Estimates and Financial Operations Committee (**Committee**) for inquiry with a reporting deadline of 21 November 2006.¹
- 1.2 The Committee is prohibited from inquiring into the policy of the bills by Standing Order 230B.

INQUIRY PROCEDURE

- 1.3 On 29 May 2006, prior to the introduction of the bills into Parliament, the Committee received a briefing on the draft versions of the bills from the Department of Treasury and Finance (**DTF**) and the Office of the Auditor General (**OAG**).
- 1.4 After the referral of the inquiry into the bills, the Committee wrote to, and invited submissions from, a number of individuals and organisations which may have had views on the subject matter of the inquiry. A list of those individuals and organisations is attached as **Appendix 1**. Details of the inquiry were also placed on the Parliament's website (www.parliament.wa.gov.au). Due to the short timeframe of the inquiry, the Committee decided against advertising in a newspaper for submissions.
- 1.5 Written submissions were received from the following organisations:
 - The DTF.
 - The Department of the Legislative Council.
 - The Community and Public Sector Union/Civil Service Association of WA.
 - The OAG.
 - Australasian Council of Auditors-General.
 - The Institute of Chartered Accountants in Australia.

¹ Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 24 October 2006, pp7449-7450.

- 1.6 A briefing on the bills, in the form that they took when they were introduced into the Legislative Council, was held with the DTF and the OAG on 8 November 2006. The short timeframe of the inquiry prevented the Committee from conducting further hearings.
- 1.7 The Committee extends its appreciation to the individuals and organisations which provided evidence and information as part of the inquiry in such a prompt manner.

BACKGROUND TO THE BILLS

- 1.8 If passed, the bills will repeal and replace the *Financial Administration and Audit Act 1985 (FAAA)*, which:

*provides the framework for financial management and accountability for departments and statutory authorities, and establishes the position and powers of the Auditor General.*²

- 1.9 The FAAA was enacted over 20 years ago, with the audit provisions of the Act having operated for 18 years³. The DTF advised the Committee that it began reviewing the FAAA several years ago due to a concern that the legislation was becoming outdated and less suited to the current accounting and financial management environment, which features:

- an increasingly ‘at arm’s length’ relationship between the Executive and government agencies; and
- a shift from cash to accrual accounting methods.⁴

- 1.10 Other major triggers for the review of the FAAA include recommendations by the 1992 Royal Commission into the Commercial Activities of Government and Other Matters⁵ and the 1995 Commission on Government (COG)⁶ to strengthen the independence of the Auditor General and the Auditor General’s relationship with, and accountability to, the Parliament.⁷

- 1.11 As a result of the above processes, it is proposed for the FMB and the AGB to replace the FAAA. As suggested by their respective titles, the FMB will provide for the

² Submission No 1 from the Department of Treasury and Finance, 1 November 2006, p1.

³ Submission No 4 from the Office of the Auditor General, 6 November 2006, p1.

⁴ Mr Michael Barnes, Acting Executive Director, Finance, Department of Treasury and Finance, *Transcript of Evidence*, 29 May 2006, p2.

⁵ Western Australia, Royal Commission into the Commercial Activities of Government and Other Matters (WA Royal Commission), *Report*, 1992, Perth.

⁶ Commission on Government, *Report No 1*, August 1995, particularly Chapter 6.

⁷ Submission No 4 from the Office of the Auditor General, 6 November 2006, p1.

control and management of public sector finances and will outline agencies' reporting obligations, while the AGB will provide for the appointment, functions and powers of the Auditor General. This separation of the two major purposes of the FAAA is consistent with the aim of strengthening the independence of the Auditor General.

- 1.12 Earlier versions of the FMB and the AGB were released for public comment in November 2005.⁸ The Legislative Assembly's Public Accounts Committee (**PAC**) inquired into those versions of the two bills and a report of its findings and recommendations was tabled on 6 April 2006.⁹

SCOPE OF THIS REPORT

- 1.13 The evidence and information received by the Committee raised many issues in relation to both the FMB and the AGB. Due to the limited time available to the Committee in which to report on the bills, the Committee was unable to address each issue comprehensively in this Report. However, the Committee did consider the issues raised in the evidence and information; where the Committee has not commented directly on a particular issue in this Report, it was satisfied that the issues had been considered in the preparation of the bills.

⁸ Submission No 1 from the Department of Treasury and Finance, 1 November 2006, p1.

⁹ Western Australia, Legislative Assembly, Public Accounts Committee, Report 3, *Review of the Financial Management Bill 2005 and the Auditor General Bill 2005*, April 2006.

CHAPTER 2

FINANCIAL MANAGEMENT BILL 2006

- 2.1 The Committee provides the following information and commentary on selective clauses and issues in the FMB to assist the House during debate.

DEFINITION OF 'ACCOUNTS'

- 2.2 The Committee notes that a definition of the term 'accounts' is provided in the FAAA as follows:

“accounts” means the records, however compiled and whether recorded or stored in written or printed form or on microfilm or by electronic process or otherwise, of transactions in respect of public moneys or other moneys or moneys of a statutory authority, or public property, or other property, expressed in money, or in the case of property, expressed in money or other units of measurement, being records required to be established and kept for the purposes of this Act and includes books, documents, writings, monetary forms, abstracts, vouchers and other records of any kind from which accounts as described in this definition have been compiled;

- 2.3 However, the term 'accounts' is not defined in the FMB.
- 2.4 The Committee is concerned that the omission of a definition of 'accounts' in the FMB may lead to some uncertainty as to its meaning, which may, in turn, impact upon the operation of the bill. The Committee is of the view that inclusion of a definition of 'accounts' in the FMB would prevent any uncertainty as to the meaning of the term.
- 2.5 The Committee acknowledges the DTF's desire to ensure that any definition of 'accounts' does not inadvertently narrow its scope of application.

Recommendation 1: The Committee recommends that a definition of 'accounts' be inserted into the Financial Management Bill 2006 with flexibility to enable additional matters to be prescribed in Treasurer's instructions.

CLAUSE 5 - MODIFIED APPLICATION OF ACT FOR CERTAIN PURPOSES

Clause 5(1) - Independence of Parliament and other Entities

- 2.6 The Department of the Legislative Council suggested that the FMB (rather than the regulations made under clause 5(1)) should establish each of the three parliamentary

departments as a ‘department’ for the purposes of the proposed Act.¹⁰ It was concerned by the use of regulations to deem these administrative entities as ‘departments’. In effect, this deeming mechanism would leave the important decision of whether to bring the parliamentary departments under the application of the proposed Act in the hands of the Executive.¹¹ In the Department of the Legislative Council’s submission, clause 5(1) blurs the separation of powers between the Parliament and the Executive and weakens the independence of the Parliament.¹²

- 2.7 Officers of the DTF provided the following justification for employing regulations as the deeming mechanism in clause 5(1):

*The main reason is to provide a degree of flexibility. This was an issue. If we enshrined the issues purely in the act, we would then have to wait for an amendment to the act in order to make an administrative change. This became a real issue for us when the Parliament chose to combine the Joint House Committee and the Library Committee under the Parliamentary Services Department. Under the FAAA we had the Joint House Committee as a separate house of Parliament. When the Parliament changed its administration following the parliamentary services act we were not able to change the name of the appropriation or of the reporting entity from the Joint House Committee. It effectively reported as the Joint House Committee operating under the title of the Parliamentary Services Department. The fact that we needed to amend the act in order to make quite a simple change to meet Parliament’s needs indicated to us that we needed a more flexible approach.*¹³

Committee Comment

- 2.8 The Committee agrees with the concerns of the Department of the Legislative Council and considers that there are similar concerns for the independence of the other entities listed in clause 5(1) of the FMB. The Committee considers that an Act of Parliament, as opposed to regulations, should prescribe the administration of the entities listed in clause 5(1) of the FMB as constituting ‘departments’ for the purposes of that bill. However, the Committee also recognises the need for any prescription of ‘departments’ to be adaptable to changes in titles and/or departmental structures, as suggested by the DTF.

¹⁰ Submission No 2 from the Department of the Legislative Council, 6 November 2006, pp3 and 6.

¹¹ The Committee notes that the current equivalent of clause 5(1), section 3(2) of the *Financial Administration and Audit Act 1985*, also authorises the use of regulations to deem the same entities as ‘departments’.

¹² Submission No 2 from the Department of the Legislative Council, 6 November 2006, p3.

¹³ Mr Michael Jolob, Acting Director, Financial Policy, Department of Treasury and Finance, *Transcript of Evidence*, 8 November 2006, pp3-4.

Recommendation 2: The Committee recommends that clause 5(1) of the Financial Management Bill 2006 be amended so that it prescribes within the bill the administration of the listed entities as departments for the purposes of the bill. The amendment to clause 5(1) should ensure that generic descriptions of the listed entities are used in order to minimise the need for amendment Acts whenever changes of titles and/or departmental structures occur.

CLAUSE 6 - AMENDMENT OF SCHEDULE 1 BY REGULATIONS

Henry VIII Clause

2.9 Clause 6 of the FMB was identified by the Committee as a ‘Henry VIII clause’; that is, a provision in an Act of Parliament (or in this case, a proposed Act) which authorises the Act or other Acts to be amended by delegated legislation, which is made by the Executive. The effect of clause 6 is that Schedule 1 of the FMB, which lists the statutory authorities which will be subject to the provisions of the FMB, can be amended by regulation.

2.10 The Committee notes that Henry VIII clauses have been the subject of concern in reports by past Legislative Council committees.¹⁴ Generally, Henry VIII clauses are considered to be inappropriate delegations of legislative power because they allow for the Executive to override the intention of the Parliament as it is expressed in an Act.¹⁵ Put another way:

*These clauses are sometimes regarded as having insufficient regard for the doctrine of separation of powers and ultimately, for the institution of Parliament.*¹⁶

2.11 However, there are some circumstances in which Henry VIII clauses can be used appropriately; for example, in order to prescribe ‘administrative’ or very routine matters. The Queensland Legislative Assembly’s Scrutiny of Legislation Committee identified four categories of justifiable uses of Henry VIII clauses:

- Urgent Executive action.
- Innovative legislation.

¹⁴ For example, Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purposes, Report 17, *Architects Bill 2003*, June 2004 and Western Australia, Legislative Council, Standing Committee on Public Administration and Finance, Report 1, *Planning Appeals Amendment Bill 2001*, March 2002, pp20 and 50-52.

¹⁵ Queensland, Legislative Assembly, Scrutiny of Legislation Committee, Report 3, *The use of “Henry VIII Clauses” in Queensland Legislation*, January 1997, p7.

¹⁶ *Ibid.*

- Consequential amendments.
- Transitional arrangements.¹⁷

Committee Comment

2.12 The Committee considers that the reasons for amending Schedule 1 of the FMB can be, but are not always, routine in nature and do not always fit easily within one of the four categories listed above.¹⁸ Nevertheless, the Committee acknowledges that the current equivalent of clause 6 of the FMB, section 4(2) of the FAAA, has operated effectively for the last 21 years.

2.13 The Committee notes that the effect of some clauses in the FMB can be amended, added to or altered by Executive action which, unlike regulations, will not be published in the *Government Gazette*, tabled in Parliament or subject to disallowance.¹⁹ The Parliament should be vigilant about these ‘Executive devices’ to ensure that they do not amount to an inappropriate delegation of legislative power.

CLAUSE 37 - INVESTMENT BY TREASURER

Delegation of Legislative Power

2.14 Clause 37 allows the Treasurer to invest Public Bank Account money “*in a manner prescribed by the regulations*”. Clause 37 is therefore much less prescriptive than its equivalent in the FAAA, section 38. Among other things, section 38 of the FAAA prescribes the types of investments that the Treasurer can make with money from the Public Bank Account and the manner in which the investments may be made. Presently, the Treasurer is restricted to the following investment classes:

- Cash.
- Bank deposits and bills.
- Government-backed bonds.

2.15 Clause 37 delegates the prescription of these classes of investment to regulations. In order to maintain the “*low risk profile*”²⁰ of Public Bank Account investments, the Government intends to add only debt securities issued in Australia from corporations

¹⁷ *Ibid*, p38.

¹⁸ An example of a routine amendment to Schedule 1 of the Financial Management Bill 2006 may be a consequential amendment to alter the title of a statutory authority. An example of a non-routine amendment would be to introduce a statutory authority to the bill’s regime for the first time.

¹⁹ For example, clauses 8(3)(a), 13(2), 14, 19, 23, 32, 40(1), 43, 45, 53(d), 60(1), 61(1)(d) and (f), 62, 63(1)(b), 70, 72 and 78.

²⁰ Financial Management Bill 2006 Explanatory Memorandum, p5.

listed on a recognised stock exchange and with a credit rating of ‘A’ or better to the existing classes of investments.²¹ A list of corporations which issue debt securities in Australia and their credit ratings is attached as **Appendix 2**.²²

- 2.16 Clause 37(2) restricts the regulations to providing that Public Bank Account money must be invested in a manner that is within the limitations set under Part III of the *Trustees Act 1962*. The Committee notes that while section 17(a) of the *Trustees Act 1962*²³ provides that a trustee may, unless expressly prohibited by the instrument creating the trust, “invest trust funds in any form of investment”, section 19 of that Act²⁴ preserves any rules and principles of law or equity that impose a duty on a trustee exercising a power of investment,²⁵ including rules and principles that impose:

*a duty to invest trust funds in investments that are not speculative or hazardous; ...*²⁶

- 2.17 The DTF advised the Committee that the prescription of permissible investment classes in regulations would serve two purposes: it would provide the Treasurer with greater flexibility in reacting to movements in the financial markets, while still allowing parliamentary scrutiny (and if necessary, disallowance) to occur:

*It provides a degree of operational flexibility. It avoids the need to have to amend the act each time we might want to make a change in the asset mix or the allowable investment classes. We thought that a regulation was a good balance or compromise between prescribing in the act the allowable investment classes, which we thought was overly prescriptive and too inflexible, and doing it under a Treasurer’s instruction, which has no parliamentary scrutiny at all. We thought that a regulation provided a good compromise between flexibility on the one hand and parliamentary oversight on the other.*²⁷

The issue comes down to a trade-off between the degree of flexibility in the portfolio management and the degree of scrutiny by Parliament. We are trying to find an optimal mix between those two.

²¹ *Ibid*, p5.

²² Submission No 1 from the Department of Treasury and Finance, 1 November 2006, Attachment A.

²³ Section 17 of the *Trustees Act 1962* appears in Part III of that Act.

²⁴ This section also appears in Part III of the *Trustees Act 1962*.

²⁵ Provided that those rules and principles are not inconsistent with any Act or the instrument creating the trust.

²⁶ Section 19(1)(b) of the *Trustees Act 1962*.

²⁷ Mr Michael Barnes, Acting Executive Director, Finance, Department of Treasury and Finance, *Transcript of Evidence*, 8 November 2006, p5.

*We thought that the specification through regulation was the right sort of balance in that regard.*²⁸

- 2.18 The OAG recommended that there be regular reviews of the regulations prescribing the manner in which the Treasurer can invest money from the Public Bank Account in order to ensure that the permissible classes of investments remain valid and are either of low or moderate risk.²⁹ It was assumed by the OAG that such a review would be conducted by the administering agency and Minister.³⁰ The Committee notes that regulations are disallowable instruments and will be scrutinised by the Joint Standing Committee on Delegated Legislation as a matter of parliamentary procedure.

Committee Comment

- 2.19 While the Committee would prefer the permissible investment classes to be prescribed in an Act of Parliament, it recognises the need for the Government to be able to react quickly to movements in the financial markets. The Committee accepts the employment of regulations as a reasonable compromise between giving the Executive the flexibility which it requires and maintaining the Parliament's oversight of its delegated legislative powers.

PART 3, DIVISION 5 - RESOURCE AGREEMENTS

Independence of Parliament and other Entities

- 2.20 Part 3, Division 5 of the FMB deals with agencies entering into resource agreements with the Treasurer. This process has been occurring administratively since 1999/2000 but the Bill seeks to elevate it to a legal requirement.³¹ Resource agreements are entered into by the agency's accountable authority, the relevant Minister and the Treasurer as part of the annual budget process. They set out the agreed resource management targets for the agency and other relevant accountabilities.³²
- 2.21 Under clause 41, **if directed in writing by the Treasurer to do so**, an agency must submit a draft resource agreement to the Treasurer. The resource agreement should set out the total amount of resources that are to be expected to be made available to the agency for the relevant financial year and the services that the agency proposes to

²⁸ Mr Timothy Marney, Under Treasurer, Department of Treasury and Finance, *Transcript of Evidence*, 8 November 2006, p6.

²⁹ Office of the Auditor General, *Briefing from the Auditor General for Estimates and Financial Operations Committee*, 29 May 2006, Attachment 2, p3.

³⁰ Letter from Mr Colin Murphy, Acting Auditor General, Office of the Auditor General, 13 November 2006, p1.

³¹ Financial Management Bill 2006 Explanatory Memorandum, pp6 and 18.

³² *Ibid*, p18.

provide in that financial year.³³ The Committee was informed that the DTF routinely sends out a *pro forma* resource agreement to each of the State's agencies.³⁴ A copy of that *pro forma* resource agreement was supplied by the DTF and is attached as **Appendix 3**.

- 2.22 The aim of the resource agreement process is for the agency and the Treasurer to reach a consensus on the matters specified in the resource agreement.³⁵ However, the Treasurer is given the power to request an agency to reconsider matters in, and revise, the draft resource agreement.³⁶ If a consensus is not reached by one month before the start of the relevant financial year, the agency must comply with written directions from the Treasurer to take steps or make modifications to the draft resource agreement as specified in the directions.³⁷
- 2.23 Clause 46(2) also requires an agency to obtain its Minister's approval before entering into a resource agreement. Clause 61(2) then requires an agency which has entered into a resource agreement for a particular financial year to include (in its annual report) a report on the extent to which the agency achieved any objectives described in the resource agreement.
- 2.24 The Committee was advised by the OAG that, for reasons of the operational independence of the Auditor General, it is currently exempt from the administrative resource agreement process. It was assumed by the OAG that this exemption would continue under the FMB.³⁸ The Committee notes that the effect of Part 3, Division 5 may also adversely impact upon the independence of the entities listed in clause 5(1) of the FMB (including the administrative departments of Parliament) as these entities (while they fall under the FAAA regime and that proposed by the FMB) are accountable to the Parliament rather than the Executive. The special position of the OAG and the clause 5(1) entities are recognised by the modifications effected by Schedules 3 and 2 of the FMB, respectively.
- 2.25 The Chief Finance Officer for the three parliamentary departments confirmed with the Committee that these departments have never entered into resource agreements in the past on the basis that they do not report to the Executive:

³³ Clause 43 of the Financial Management Bill 2006.

³⁴ Email from Mr Michel Crouche, Chief Finance Officer, Parliament of Western Australia, 9 November 2006. However, the *pro forma* resource agreements do not appear to be sent to the Office of the Auditor General: Mr Colin Murphy, Acting Auditor General, Office of the Auditor General, *Transcript of Evidence*, 8 November 2006, p2.

³⁵ Clause 44 of the Financial Management Bill 2006.

³⁶ *Ibid*, clause 45.

³⁷ *Ibid*, clauses 45(2) and (3).

³⁸ Office of the Auditor General, *Briefing from the Auditor General for Estimates and Financial Operations Committee*, 29 May 2006, Attachment 2, p3.

*The Parliamentary departments are not part of the State public service and need to maintain their independence and should not be tied to a Government resource agreement that targets Government initiatives and goals.*³⁹

- 2.26 Similarly, the Executive Manager (and the accountable officer) of the Parliamentary Services Department confirmed his view that it is inappropriate for the department to enter into a resource agreement with the Executive.⁴⁰
- 2.27 The Department of the Legislative Council accepted that resource agreements are a mechanism for the formal endorsement of the Budget decisions regarding the outputs that are to be delivered by an agency and the agency's projected financial plans.⁴¹ However, the Department of the Legislative Council, the Department of the Legislative Assembly and the Parliamentary Services Department are not public service departments (which are "*organs of the Executive*"⁴²) and the Department of the Legislative Council was opposed to the notion of the three parliamentary departments entering into resource agreements.
- 2.28 One argument raised by the Department of the Legislative Council was that, under the separation of powers doctrine, the Parliament, as the legislative arm of government, should not be "*financially subordinate*" to the Executive.⁴³ If the Parliament is to properly discharge its constitutional responsibility to hold the Executive to account, it must be able to do so without any Executive interference.⁴⁴ The Department of the Legislative Council voiced a concern that such Executive interference may take the form of reduced or withdrawn funding for the Department of the Legislative Council's future administration if it did not meet its resource agreement objectives in a particular financial year.⁴⁵
- 2.29 The Department of the Legislative Council suggested that an appropriate balance should be struck between the Parliament's operative independence and the need for the Executive to control the State's finances. It submitted that an appropriate balance could be achieved by amending the provisions in Part 3, Division 5 of the Bill so that the parliamentary departments could voluntarily enter into resource agreements when they thought it to be appropriate. If a resource agreement was to be signed

³⁹ Email from Mr Michel Crouche, Chief Finance Officer, Parliament of Western Australia, 9 November 2006.

⁴⁰ Email from Mr Russell Bremner, Executive Manager, Parliamentary Services Department, Parliament of Western Australia, 9 November 2006.

⁴¹ Submission No 7 from the Department of the Legislative Council, 10 November 2006, p1.

⁴² *Ibid*, p2.

⁴³ *Ibid*, p4.

⁴⁴ *Ibid*, p3.

⁴⁵ *Ibid*, pp4 and 6.

voluntarily, the parliamentary departments should be required to make reasonable endeavours to reach a consensus with the Treasurer.⁴⁶

- 2.30 While the DTF did not guarantee that the OAG and the clause 5(1) entities would be exempt from the requirements of Part 3, Division 5 of the FMB, its officers recognised that it would be reasonable to expect the continuance of the current administrative practice under the proposed regime:

*The bill gives the Treasurer the discretion to nominate which agencies will be subject to the requirement to have a resource agreement. I think it is a reasonable expectation that those agencies that are currently exempt from the administrative requirement to have a resource agreement in the first instance would continue to be exempt under this bill or act from the requirement to have a resource agreement. That would be the starting point.*⁴⁷

Committee Comment

- 2.31 The Committee is not satisfied with the DTF's assurance that the OAG and the entities listed in clause 5(1) would be 'administratively' exempt from the requirements of Part 3, Division 5. The Committee believes that it is important for all public entities to be accountable for their management of public funds but that the proposed resource agreements process is not an appropriate accountability mechanism for public entities which operate independently of the Executive. It considers that the OAG and clause 5(1) entities should be expressly exempted from the operation of Part 3, Division 5. However, where those entities voluntarily submit a draft resource agreement, the FMB should provide that they must use reasonable endeavours to reach agreement with the Treasurer on the draft resource agreement.
- 2.32 The Committee considers that it is important for the departments of the Parliament to be accountable for the expenditure of public funds. However, the expenditure of these funds should not be controlled by the Executive to ensure that the independence of the Parliament is not compromised. The Committee strongly encourages the exempted agencies to voluntarily enter into resource agreements.

⁴⁶ *Ibid*, pp5-6.

⁴⁷ Mr Michael Barnes, Acting Executive Director, Finance, Department of Treasury and Finance, *Transcript of Evidence*, 8 November 2006, p4.

Recommendation 3: The Committee recommends that Part 3, Division 5 of the Financial Management Bill 2006 should be amended so that:

- a) **the Office of the Auditor General and the entities listed in clause 5(1) of the bill are expressly exempted from its operation; and**
- b) **if, despite being expressly exempt from the operation of Part 3, Division 5, those entities voluntarily submit a draft resource agreement, they must use reasonable endeavours to reach agreement with the Treasurer on the draft resource agreement.**

Clause 46(2) - Non-application to Parliament and other Entities

- 2.33 This clause requires the accountable authority of an agency to obtain their Minister's approval before reaching agreement with the Treasurer on a draft resource agreement. As the OAG and the entities listed in clause 5(1) are not accountable to any members of the Executive, clause 46(2) should not apply to them.

Recommendation 4: The Committee recommends that clause 46 of the Financial Management Bill 2006 be amended so that the accountable authorities of the Office of the Auditor General and the entities listed in clause 5(1) of the bill are required to obtain the approval of the proposed Joint Standing Committee on Audit (as recommended by the Committee in Recommendation 8) before reaching agreement with the Treasurer on any draft resource agreements for the relevant entities.

CLAUSE 49 - LIABILITY OF OFFICERS FOR LOSSES

Reversal of Onus of Proof

- 2.34 For the purposes of aiding the debate of the FMB in the House, the Committee notes that clause 49(3) contains a reversal of onus of proof⁴⁸ in a civil context. It requires an officer who has allegedly lost 'official money' or 'official property' to show⁴⁹ that he or she took all reasonable steps to prevent the loss in order to avoid the liability for repaying the loss.
- 2.35 The Committee was advised by the DTF, after consultation with the Parliamentary Counsel's Office, that this clause is consistent with section 46(9) of the FAAA when

⁴⁸ The topic of reversing the onus of proof in a criminal context is discussed in detail by the former Legislation Committee (2001 to 2005): Western Australia, Legislative Council, Standing Committee on Legislation, Report 23, *Road Traffic Amendment (Dangerous Driving) Bill 2004*, October 2004, pp32-36.

⁴⁹ The Committee interprets 'show' to mean 'prove'.

read with section 49 of that Act.⁵⁰ To the best of the officers' knowledge, the equivalent sections of the FAAA had never been utilised:

*As I say, I am only hazarding a guess that it relates to moneys. I am not aware of this provision having been employed. During my career there have been many instances whereby deficiencies in cash have occurred and the agency concerned has dealt with the issue by talking with the officer concerned. We have never resorted to this provision. Clause 49 would only be used in extreme situations where we could have a significant loss.*⁵¹

2.36 The DTF provided the following additional information on clause 49(3):

*a person who may be the subject of an adverse finding as the result of an administrative decision-making process should be given the opportunity to state his or her case and make submissions. There is no denial of that opportunity in clause 49(3), which enables the officer concerned to show that he or she took reasonable steps to prevent the loss. These are not criminal proceedings and no prosecution is involved in the process.*⁵²

Committee Comment

2.37 The Committee notes the advice of the DTF as set out in paragraphs 2.35 and 2.36 above.

CLAUSE 50 - RECOVERY OF AMOUNTS FOR WHICH OFFICERS ARE LIABLE

Clause 50(3) - Averment Provision

2.38 In order to assist the debate of the FMB in the House, the Committee notes that clause 50(3) is an averment provision in the context of civil proceedings. 'Averment provisions' generally allow statements of fact made by the applicant of the proceedings to be accepted as proved unless the defendant brings evidence before the court to rebut them.⁵³

⁵⁰ Letter from Mr Timothy Marney, Under Treasurer, Department of Treasury and Finance, 13 November 2006, Attachment, p3.

⁵¹ Mr Michael Jolob, Acting Director, Financial Policy, Department of Treasury and Finance, *Transcript of Evidence*, 8 November 2006, pp8-9.

⁵² Letter from Mr Timothy Marney, Under Treasurer, Department of Treasury and Finance, 13 November 2006, Attachment, p3.

⁵³ 'Averment provisions' and the issues surrounding them were discussed by the former Uniform Legislation and General Purposes Committee (2002 to 2005): Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purposes, Report 25, *Petroleum Legislation Amendment and Repeal Bill 2005*, June 2005, pp12-14.

Committee Comment

2.39 The Committee considers that this clause falls within a class of averment provisions which are acceptable because it relates to the proof of a relatively straight-forward matter; that is, the amount for which an officer who lost ‘official money’ or ‘official property’ is liable.

CLAUSE 51 - UNDER TREASURER AND ACCOUNTABLE AUTHORITIES MAY DIRECT INVESTIGATIONS IN RESPECT OF LOSSES

2.40 Clause 51(3) provides the person authorised to conduct an investigation into losses of ‘official money’ or ‘official property’ with the same powers and protections as a special inquirer under the *Public Sector Management Act 1994*. These powers and protections are considerable⁵⁴ and are incorporated into the FMB by mere reference to the relevant provisions of the *Public Sector Management Act 1994*⁵⁵.

2.41 Officers of the DTF advised the Committee that the powers and protections provided to these authorised persons:

- are “*necessary to undertake a full and thorough investigation to ensure that that investigation is not constrained in any way*”;⁵⁶ and
- were not prescribed in the FMB in order to avoid an unnecessary lengthening of the bill and to ensure that any changes to special inquirers’ powers under the *Public Sector Management Act 1994* would automatically “*flow*” to the authorised persons under the FMB.⁵⁷

Reversal of Onus of Proof

2.42 Schedule 3, clause 4(2) of the *Public Sector Management Act 1994* (which is incorporated into the FMB by reference) contains a reversal of onus of proof in a criminal context.⁵⁸ A person who is prosecuted for failing to provide documents as required by a summons would, without reasonable excuse, commit an offence and be liable to a penalty of \$1,000. In order to avoid liability, once the prosecution has

⁵⁴ They include the power to summons witnesses and documents, the power to examine witnesses on oath or affirmation and the same protection and immunity as a Judge: Schedule 3 of the *Public Sector Management Act 1994*.

⁵⁵ Sections 12 and 13, and Schedule 3.

⁵⁶ Mr Timothy Marney, Under Treasurer, Department of Treasury and Finance, *Transcript of Evidence*, 8 November 2006, p10.

⁵⁷ Mr Michael Barnes, Acting Executive Director, Finance, *Transcript of Evidence*, 8 November 2006, p10.

⁵⁸ The topic of reversing the onus of proof in a criminal context is discussed in detail by the former Legislation Committee (2001 to 2005): Western Australia, Legislative Council, Standing Committee on Legislation, Report 23, *Road Traffic Amendment (Dangerous Driving) Bill 2004*, October 2004, pp32-36.

proven every other element of the offence, that person must prove that the documents required by the summons were not relevant to the inquiry.

- 2.43 According to the former Public Administration and Finance Committee (2001 to 2005), a reversal of onus of proof should generally be opposed unless the subject matter is peculiarly within the knowledge of the accused and it would be extremely difficult, or very expensive, for the prosecution to prove. For example, the relevant matter must be something inherently impractical for the prosecution to test by alternative evidentiary means and the accused would be particularly well-positioned to disprove guilt.⁵⁹

Abrogation of Privilege against Self-Incrimination

- 2.44 Schedule 3, clauses 3(6) and 4(4) of the *Public Sector Management Act 1994* (which are incorporated into the FMB by reference) provide that a person may not use self-incrimination as an excuse for failing to provide the authorised person conducting an inquiry with an answer to a question or documents.
- 2.45 In order to protect a person who is answering questions under a summons, Schedule 3, clause 3(6) provides that the answer is not admissible in evidence against that person in any proceedings. However, Schedule 3, clause 4(4) does not provide any protection to a person who is producing documents under a summons.
- 2.46 In contrast, the Committee notes that clause 36 of the AGB provides wider protection for people who give information, explanations, answers or documents to the Auditor General (at the direction of the Auditor General) than people who give answers or documents to a person authorised under the FMB to conduct inquiries into lost 'official money' or 'official property'. Under clause 36(3) of the AGB, both the **giving**, and **anything obtained as a direct or indirect result** of the giving, of the information, explanation, answer or document are not admissible in evidence against the person in any proceedings, except in limited situations.

CLAUSE 54 - ACCOUNTABLE AUTHORITIES FOR DEPARTMENTS

Clause 54(1) as modified by Schedule 2 - Independence of Parliament and other Entities

- 2.47 Clause 54(1) of the FMB deems the chief executive officer of a department as the accountable authority of the department,⁶⁰ that is, the officer who is responsible for the financial management of the department.

⁵⁹ Western Australia, Legislative Council, Standing Committee on Public Administration and Finance, Report 3, *Economic Regulation Authority Bill 2002*, May 2003, p22.

⁶⁰ The term 'accountable authority' will replace the current terms 'accountable officer' (in relation to departments) and 'accountable authority' (in relation to statutory departments) as a result of the removal of the distinction in the *Financial Administration and Audit Act 1985* between departments and statutory authorities.

2.48 In recognition of the special position of the entities listed in clause 5(1) of the FMB, Schedule 2 modifies the operation of various clauses as they would apply to those entities.⁶¹ Clause 54(1) is modified to read as follows:

The Treasurer is to appoint, in writing, a person to be the accountable authority of an agency.

2.49 The Committee notes that the modified version of clause 54(1) is identical in effect to the modified version of section 52(2) of the FAAA. Nevertheless, the Committee queried whether it was appropriate for a member of the Executive to appoint the accountable authorities for independent public organisations and office holders.

2.50 The Department of the Legislative Council considered that the current appointment procedure is inappropriate and suggested that the appointment should be made by the Parliament instead. It was submitted that the FMB should prescribe each of the Clerks as the accountable authority for their respective Houses, and the Executive Manager of the Parliamentary Services Department as the accountable authority for that department.⁶² This recommendation reflects the current accountable officer appointments for the parliamentary departments under the FAAA.

2.51 When the Department of the Legislative Council's proposal was put to the DTF, its officers could see no reason why the suggestion could not be accommodated.⁶³

Committee Comment

2.52 The Committee agrees with the views of the Department of the Legislative Council on this issue but also recognised the need for any prescription of accountable authorities to be adaptable to changes in titles and/or departmental structures.

⁶¹ Financial Management Bill 2006 Explanatory Memorandum, p32.

⁶² Submission No 2 from the Department of the Legislative Council, 6 November 2006, pp3 and 7.

⁶³ Mr Michael Jolob, Acting Director, Financial Policy, Department of Treasury and Finance, *Transcript of Evidence*, 8 November 2006, p11.

Recommendation 5: The Committee recommends that Schedule 2 of the Financial Management Bill 2006 be amended so that clause 54 of the bill prescribes the accountable authorities for the entities listed in clause 5(1) of the bill. For the purposes of the parliamentary departments, the bill should prescribe:

- a) **the Clerk of the Legislative Council as the accountable authority of the Department of the Legislative Council;**
- b) **the Clerk of the Legislative Assembly as the accountable authority of the Department of the Legislative Assembly; and**
- c) **the Executive Manager of the Parliamentary Services Department as the accountable authority of the Parliamentary Services Department.**

The amendment to Schedule 2 should ensure that generic descriptions of the positions and the listed entities are used in order to minimise the need for amendment Acts whenever changes in titles and/or departmental structures occur.

CLAUSE 60 - INTERPRETATION FOR SECTIONS 60 AND 61

Clause 60(1) - Absence of Definition of ‘financially dependent’

2.53 The term ‘financially dependent’ appears in the definitions of ‘affiliated body’ and ‘related body’, which are phrases that are currently used in, and defined in section 3(1) of, the FAAA. The Committee notes that ‘financially dependent’ is not defined in the FMB although it is defined in section 3(1) of the FAAA as follows:

when used concerning the relationship of a body to a department or statutory authority, means that the body receives more than half of its funding and resources from a department or statutory authority that is obliged to provide funding and resources to the body;

2.54 When the Committee queried why this definition of ‘financially dependent’ had not been transferred from the FAAA to the FMB, the DTF agreed that the clarity of the term “*could be improved by inserting the existing definition from the FAAA*”⁶⁴.

Clause 60(2) - Henry VIII Clause

2.55 Clause 60(2) is a Henry VIII clause because regulations made under its authority would reverse the effect of clause 60(1). For example, regulations made under clause

⁶⁴ Letter from Mr Timothy Marney, Under Treasurer, Department of Treasury and Finance, 13 November 2006, Attachment, p4.

60(2) could provide that an entity that would otherwise satisfy the definition of an ‘affiliated body’ under clause 60(1) is not an ‘affiliated body’.

Committee Comment

2.56 As the definitions for ‘affiliated body’ and ‘related body’ have reporting implications for the agencies that will be caught by the FMB, the Committee considers that the Government should advise the House of the circumstances in which clause 60(2) would be utilised.

CLAUSE 77 - GENERAL PROVISIONS ABOUT DELEGATIONS AND AUTHORISATIONS

Clauses 77(2) and (5) - Averment Provisions

2.57 In order to assist the debate of the FMB in the House, the Committee notes that clauses 77(2) and (5) are also ‘averment provisions’ of an acceptable class.⁶⁵

CLAUSE 78 - TREASURER’S INSTRUCTIONS

Minimal Publication Requirements

2.58 There are some instances in the FMB where matters of detail are proposed to be transferred from a primary Act (in the FAAA) to Executive documents (Treasurer’s instructions in the FMB); for example, refer to clauses 32 (manner of authorising regulated payments and regulated transfers)⁶⁶ and 36 (information that is to be contained in a trust statement)⁶⁷. However, only notice of the issue, amendment or revocation of Treasurer’s instructions are required to be published in the *Government Gazette*, as opposed to publication of the full text of the instruction, amendment or revocation.

2.59 The Committee considered whether the Treasurer’s instructions should be subject to full publication and tabling requirements, especially given that one of the objectives of the FMB is to enhance accountability for financial practices and outcomes in the State’s public sector. It is noted by the Committee that clause 78 of the FMB would be continuing the publication requirements of section 58 of the FAAA, although the new provision expressly states that a failure to publish the notice would not invalidate the relevant Treasurer’s instruction.

2.60 Officers of the DTF informed the Committee of the current publication procedures for Treasurer’s instructions:

⁶⁵ Refer to paragraphs 2.38 to 2.39 in this Report regarding another ‘averment provision’, clause 50(3) of the Financial Management Bill 2006.

⁶⁶ This clause appears to be equivalent to sections 30, 32 and 33 of the *Financial Administration and Audit Act 1985*.

⁶⁷ This clause appears to be equivalent to section 36 of the *Financial Administration and Audit Act 1985*.

- Treasurer's instructions can either be purchased from the State Law Publisher or downloaded from a web-based information source known as the 'WA Financial Administration Bookcase'.⁶⁸
- The DTF notifies all FAAA agencies whenever a Treasurer's instruction has been introduced, amended or revoked.⁶⁹
- The notice published in the *Government Gazette* would merely identify that certain Treasurer's instructions have been issued, amended or revoked:

*If a member of the public were to go to either our web site or to the State Law Publisher web site, and ask for the amendments, we have a covering sheet that explains each of the Treasurer's instructions that have been amended and the basis of the amendments. We provide an explanatory memorandum that assists users to understand what the amendments are about.*⁷⁰

- The full text of Treasurer's instructions and/or their amendments and revocation can often be voluminous. Full-text publication of the instructions would therefore result in a significant increase in the size of relevant volumes of the *Government Gazette* and be a significant cost to the Government.⁷¹

Committee Comment

- 2.61 The Committee accepts the information that was provided by the DTF and is satisfied with the level of publication and notification of Treasurer's instructions under the FAAA and continued under the FMB.

CLAUSE 82 - MINISTER TO REPORT DECISIONS NOT TO PROVIDE CERTAIN INFORMATION ABOUT AGENCIES

- 2.62 Clause 82 of the FMB clarifies and makes explicit a Minister's discretion to withhold information from the Parliament - a discretion which is implied under the current equivalent provision, section 58C of the FAAA:

We had the State Solicitor, and I think also the Solicitor General, saying the FAAA did what we thought it did, and the Commission on Government had a different point of view. That confusion arose out

⁶⁸ Mr Michael Barnes, Acting Executive Director, Finance, and Mr Michael Jolob, Acting Director, Financial Policy, Department of Treasury and Finance, *Transcript of Evidence*, 8 November 2006, p12.

⁶⁹ Mr Michael Barnes, Acting Executive Director, Finance, *Transcript of Evidence*, 8 November 2006, p13.

⁷⁰ Mr Michael Jolob, Acting Director, Financial Policy, Department of Treasury and Finance, *Transcript of Evidence*, 8 November 2006, p13.

⁷¹ Mr Michael Barnes, Acting Executive Director, Finance, and Mr Michael Jolob, Acting Director, Financial Policy, Department of Treasury and Finance, *Transcript of Evidence*, 8 November 2006, p13.

*of the wording in the FAAA that tried to make it clear that notwithstanding that there is no contractual impediment to the minister's providing information to the Parliament, this piece of legislation in no way would limit the minister's discretion to exercise his prerogative to say he is not willing to give the Parliament that information.*⁷²

- 2.63 Clause 82 also introduces a requirement for the Minister to inform Parliament and the Auditor General of his or her decision to withhold information from the Parliament. When informing the Parliament of his or her decision, the Minister must also include his or her reasons for making that decision. It appears as though this new requirement to notify the Parliament and the Auditor General of the Minister's decision was proposed in order to comply with the COG's recommendation at section 5.1.2.5 of its first report.⁷³ The effect of this clause is related to the operation of clause 37 of the AGB.⁷⁴

Intended Application

- 2.64 During the briefing with the DTF on 8 November 2006, the Committee was advised that the intent of clause 82 was that Ministers could rely on the clause in order to withhold information that would otherwise appear in an annual report. In fact, the clause would apply in any circumstances in which a Minister decides to withhold information about any conduct or operation of an agency from the Parliament:

*The genesis for this provision was parliamentary questions and when a minister is asked a question in Parliament and refuses to provide the information. That is the primary objective of it. I understand though that the provision is framed broadly enough to capture any circumstance in which a minister decides not to provide certain information. It is couched in very broad terms. I think it would capture the scenario you just raised [to withhold information that would otherwise appear in an annual report].*⁷⁵

'Certain' Information

- 2.65 The Committee was also advised by the DTF, after consultation with the Parliamentary Counsel's Office, that the word 'certain', in the context of clause 82, meant 'particular'; for example, information of a 'particular' kind or relating to a

⁷² Mr Michael Jolob, Acting Director, Financial Policy, Department of Treasury and Finance, *Transcript of Evidence*, 29 May 2006, p12.

⁷³ Commission on Government, *Report No 1*, August 1995, p188.

⁷⁴ Refer to the discussion in Chapter 4 at paragraphs 4.37 to 4.40 in this Report.

⁷⁵ Mr Michael Barnes, Acting Executive Director, Finance, *Transcript of Evidence*, 8 November 2006, p13.

‘particular’ subject matter. When asked if the word could be omitted, the DTF advised that clause 82(1):

*could be read as referring to a decision of the Minister that all information concerning any conduct or operation of an agency is not to be provided to Parliament, which was not the intention in drafting the provision.*⁷⁶

CLAUSE 85 - REVIEW OF ACT

2.66 This clause provides for the review of the proposed Act as soon as practicable after the expiry of five years after the commencement of the Act.

‘Minister’

2.67 ‘Minister’ is defined in clause 3 of the FMB by ‘linking’ the term to the relevant agency in the circumstances. However, that definition does not operate clearly in clause 85. The DTF advised, after consultation with the Parliamentary Counsel’s Office, that the interpretation of the word is governed by section 12 of the *Interpretation Act 1984*⁷⁷; that is, ‘Minister’ means the Minister to whom the administration of the proposed Act is committed by the Governor.⁷⁸ Under the current arrangements, the relevant ‘Minister’ is the Treasurer.

2.68 The Committee considers that the definition of ‘Minister’ in clause 3 of the FMB would override that provided in the *Interpretation Act 1984*. However, it also notes that all defined terms in legislation are to be read, either expressly or impliedly, as subject to the qualification, ‘unless the contrary intention appears’.⁷⁹

Committee Comment

2.69 While the Committee accepts that the context of clause 85 supported the DTF’s interpretation of ‘Minister’, the Committee believes that the intent of the clause would be clarified if that interpretation was expressly stated.

Parliamentary Committee Review

2.70 For the reasons discussed in Chapter 4, paragraphs 4.5 to 4.11 in this Report, the Committee recommends that the review of the Minister’s report, produced pursuant to

⁷⁶ Letter from Mr Timothy Marney, Under Treasurer, Department of Treasury and Finance, 13 November 2006, Attachment, p3.

⁷⁷ This interpretation differs from the clause 3 definition of ‘Minister’ in the Financial Management Bill 2006.

⁷⁸ Letter from Mr Timothy Marney, Under Treasurer, Department of Treasury and Finance, 13 November 2006, Attachment, p4.

⁷⁹ Pearce, DC and Geddes, RS, *Statutory Interpretation in Australia*, Butterworths, Australia, 2001, p198.

clause 85(4), should be conducted by the proposed Joint Standing Committee on Audit referred to in Chapter 4, paragraphs 4.12 to 4.16 in this Report.

Recommendation 6: The Committee recommends that clause 85 of the Financial Management Bill 2006 be amended so that the proposed Joint Standing Committee on Audit (as recommended by the Committee in Recommendation 8) is the parliamentary committee which has the responsibility of conducting a review of the Minister's report on the review of the operation and effectiveness of the proposed Act.

Recurring Review

2.71 The DTF provided the Committee with the Government's rationale for a single review of the proposed Act, as opposed to recurring reviews:

*If, at that time [of the single review], and depending on the outcomes of the first review, Parliament wished to amend the Financial Management Act to provide for subsequent reviews, the opportunity would be available to do so at that time. However, if the first review raises no significant issues or concerns, there would not seem much point in requiring rolling reviews every five years. Also, should any one-off issues emerge after completion of the first review, DTF would expect the Treasurer of the day to introduce any necessary amendments into Parliament to deal with those issues.*⁸⁰

2.72 However, in order to ensure the continuing effectiveness and relevance of the proposed Act, the Committee recommends that the reviews contemplated by clause 85 should occur as soon as practicable after every five years after the commencement of the proposed Act.

2.73 The Committee notes that there are a number of other Western Australian Acts which allow for recurring reviews.⁸¹

Recommendation 7: The Committee recommends that clause 85 of the Financial Management Bill 2006 be amended so that the reviews which are contemplated by that clause occur as soon as practicable after the expiry of every five years after the commencement of the proposed Act.

⁸⁰ Letter from Mr Timothy Marney, Under Treasurer, Department of Treasury and Finance, 13 November 2006, Attachment, p4.

⁸¹ For example, *Terrorism (Extraordinary Powers) Act 2005*, *Medical Act 1894*, *Local Government Grants Act 1978*, *Coroners Act 1996*, *Commercial Tenancy (Retail Shops) Agreements Act 1985*, *Children and Community Services Act 2004*, *Tobacco Products Control Act 2006*, and *Energy Coordination Act 1994*.

CHAPTER 3

FINANCIAL LEGISLATION AMENDMENT AND REPEAL BILL 2006

GENERAL

- 3.1 The FLARB will make amendments to existing legislation which are consequential to the enactment of the FMB and the AGB. In addition, the FLARB will:
- amend various pieces of legislation in order to “*better align government business enterprises’ internal business processes with the Government’s budget process*”⁸²; and
 - contain provisions, and the powers to make legislation, which are aimed at enabling the smooth transition between the current and proposed financial management and audit regimes.

COMMITTEE COMMENT

- 3.2 Due to the limited time available to the Committee in which to report on the bills, the Committee was unable to consider the provisions of the FLARB in any detail.

⁸² Financial Legislation Amendment and Repeal Bill 2006 Explanatory Memorandum, p1.

CHAPTER 4

AUDITOR GENERAL BILL 2006

INDEPENDENCE OF THE AUDITOR GENERAL FROM THE EXECUTIVE

4.1 The Auditor General assists Parliament in its role of overseeing the performance of the executive government, through the provision of independent and accurate information on the performance and financial management of public sector agencies and bodies.

4.2 As stated in the second reading speech to the AGB:

*As the external auditor of government, the Auditor General requires the highest degree of independence from executive government.*⁸³

4.3 The Australasian Council of Auditors-General⁸⁴ (ACAG) have put forward the following Statement of Principles - Independence of the Auditor General:

Personal Independence

- i) The Auditor General should be an Officer of the Parliament. The Auditor General should not be subject to direction in the execution of audit responsibilities.
- ii) Parliament should select and recommend the Auditor General for appointment by the Governor.
- iii) Parliament should be responsible for the Auditor General's termination of appointment.
- iv) The Auditor General should be responsible administratively to the Parliament.
- v) The Auditor General should not be subject to direction by the Executive. However, if in any jurisdictions such directions are made, mechanisms should be established so that absolute transparency and reporting is ensured.
- vi) Tenure should be a non-renewable fixed term of between seven and 10 years.

⁸³ Hon Ljiljanna Ravlich, Minister for Education and Training, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 18 October 2006, p7141.

⁸⁴ The Australasian Council of Auditors-General provides arrangements for the sharing of information between members, supports the development of effective and efficient auditing methods and practices by members, and represents externally, where appropriate, the collective opinion of the Auditors-General on financial accounting and auditing standards and related issues: (<http://www.acag.org.au/acabout.htm> viewed on 7 November 2006).

-
- vii) The Auditor General's remuneration should be determined by a remuneration tribunal.

Operational Independence

- viii) The Auditor General should have the sole power to carry out, or designate an auditor to carry out, the external audit on all public sector agencies over which the government has control, significant influence or to which it has financial exposure.
- ix) The audit mandate should be extensive and include financial statements and controls; compliance with legislation; the efficiency and effectiveness of the use of public monies, as approved by the Parliament in each jurisdiction; performance indicators (the relevance of the indicators and/or the accuracy of performance indicator information).
- x) The Auditor General should not be subject to any direction in how to carry out these audits; the Auditor General will be free to determine the audit programme, including the bodies to be audited, the nature and scope of audits, who will carry out the audits and the priorities for audit.
- xi) The Auditor General should have access to all information necessary to carry out audits. This access should be subject to strict confidentiality requirements to ensure that all information is used only for the purposes set out in the Auditor General's legislation.
- xii) The Audit Office should be either a statutory authority or established by separate legislation. The Auditor General should be responsible for the resourcing decisions within the office.
- xiii) In cases where the Audit Office does not raise revenue (through say audit fees), the resourcing of the Audit Office should be by means of a parliamentary allocation determined following consultation between the Executive and Parliament (or its representative).

Parliamentary Oversight (Accountability of the Auditor General. The need for independence should not limit the accountability of the Auditor General)

- xiv) The Auditor General should report annually to Parliament. The Audit Office's financial statements should be subject to independent external audit and included in the annual report. The external auditor should be appointed by the Parliament.

- xv) All Auditor General reports should be tabled in Parliament. Legislation should set out the minimum reporting requirements and time limits for reporting.
- xvi) The performance of the Audit Office should be subject to periodic external review at an interval of between three and five years. The external reviewer should be nominated by the Parliament or Parliamentary committee.

Transitional Arrangements

- xvii) Consistent with precedent when amending core accountability provisions, transitional arrangements between old and new legislation should ensure that the independence of incumbent Auditors General is not compromised.

4.4 The Committee notes that the AGB incorporates many of these principles, however, a number of the principles have not been incorporated. For example, principle ii) Parliament should select and recommend the Auditor General for appointment by the Governor and principle xvi) the performance of the Audit Office should be subject to periodic external review at an interval of between three and five years, have not been incorporated into the AGB. Where the Committee takes issue with how the AGB incorporates these principles, this is noted at the relevant sections below.

REPORTING TO PARLIAMENT

- 4.5 The Auditor General is recognised as an officer of the Parliament. As stated above, the Auditor General assists Parliament in its role of overseeing the performance of the executive government, through the provision of independent and accurate information on the performance and financial management of public sector agencies and bodies.
- 4.6 The Western Australian Parliament is a bicameral Parliament following the Westminster system. The Legislative Assembly is the house where government is formed and the place where government puts forward its policies and major legislative initiatives. The Legislative Council referred to as the Upper House, has the primary function of reviewing and scrutinising legislation and the activities of government.
- 4.7 The Western Australian Parliament currently has two committees with the responsibility for the financial accountability of Government: The PAC being a committee of the Legislative Assembly; and the Estimates and Financial Operations Committee being a committee of the Legislative Council.
- 4.8 The Committee notes that the AGB provides for a strong involvement of the PAC with the Auditor General in a number of different areas.⁸⁵ However, this involvement has not been extended to this Legislative Council committee, a committee which also

⁸⁵ Refer to clauses 8, 14, 25, 37, 43, 47 and Schedule 1 clauses 1, 7 and 8 of the Auditor General Bill 2006.

has responsibility for the financial scrutiny of the Government and whose terms of reference provide that it is “*to consult regularly with the Auditor General ...*”.

4.9 The Committee was advised that the direct involvement of the PAC reflects a desire that the Auditor General have a single ‘window’ into Parliament. In the absence of a joint committee dealing specifically with Auditor General matters, the PAC was considered the most appropriate committee given its oversight responsibility for the OAG.⁸⁶

4.10 Consistent with the view of the COG⁸⁷, the Committee is of the view that it is essential that the Legislative Council, as a house of review, play a key role in the oversight of the Auditor General and in ensuring independence from the executive.

4.11 The Committee notes that the COG recommended that a joint committee of both houses of Parliament should:⁸⁸

- participate in the appointment of the Auditor General;
- determine the budget of the OAG;
- approve the strategic plan of the OAG;
- appoint the external auditors for the purposes of conducting the audit of the OAG;
- review the Audit Reports on the OAG; and
- review annually a report by the Auditor General on the recruitment and staffing policy of the OAG.

4.12 The Committee is of the view that a joint standing committee should be established to undertake functions required under the AGB, and any other function directed by Parliament, including to:

- i) participate in the appointment of the Auditor General;
- ii) make recommendations regarding the budget of the OAG;
- iii) undertake a review of the Act;
- iv) appoint a person to review the performance of the OAG;

⁸⁶ Letter from Michael Megaw, Chief of Staff, Office of the Treasurer, 4 October 2006, p1.

⁸⁷ See Commission on Government, *Report No 1*, August 1995.

⁸⁸ Commission on Government, *Report No 1*, August 1995, pp219-224.

- v) make determinations on confidential information reported to it by the Auditor General;
- vi) inquire into and report on any motion moved in either House of Parliament for the suspension or removal of the Auditor General; and
- vii) to review and provide approval for resource agreements entered into by the OAG and entities listed in clause 5(1) of the FMB with the Treasurer.
- 4.13 The Committee considers that such a joint committee will considerably strengthen parliamentary involvement with, and oversight of, the Auditor General and maintain the independence of the Auditor General.
- 4.14 The joint standing committee should comprise four Members who are to be selected as follows:
- two Members (one Government Member and one non-Government Member) should be appointed from each House;
 - the Members appointed from the Legislative Assembly should be Members of the PAC or its equivalent;
 - the Members appointed from the Legislative Council should be Members of the Committee or its equivalent; and
 - the Chairman of the committee should be a Member of the Legislative Council.
- 4.15 The joint standing committee should operate under the Standing Orders of the Legislative Council.
- 4.16 The joint standing committee should be called the Joint Standing Committee on Audit.

Recommendation 8: The Committee recommends that a Joint Standing Committee on Audit be established.

CLAUSES OF THE BILL

- 4.17 The Committee makes comment on selected clauses of the AGB.

Clause 4 - Terms used in this Act*Definition of Estimates and Financial Operations Committee*

4.18 The AGB at clause 4 defines the Estimates and Financial Operations Committee as follows:

“Estimates and Financial Operations Committee” means the Estimates and Financial Operations Committee of the Legislative Council or, if it is renamed, that committee as so renamed;

4.19 The Committee is concerned that should significant changes to the Committee be made such that the functions of the Committee are assumed by two or more committees, there may be confusion as to which committee will be the responsible committee for the purposes of the AGB.

Recommendation 9: The Committee recommends that the definition of ‘Estimates and Financial Operations Committee’ in the Auditor General Bill 2006 be amended to mean the Estimates and Financial Operations Committee of the Legislative Council or such other committee determined by the Legislative Council to be the responsible committee for the purposes of the Auditor General Act 2006.

Definition of the term ‘accounts’

4.20 The Committee notes that a definition of the term accounts is provided in the FAAA (see Chapter 2, paragraph 2.2 in this Report). However, the term ‘accounts’ is not defined in either the FMB or the AGB.

4.21 The AGB provides, amongst other things, that the Auditor General:

- audit the accounts of an agency (clause 14);
- prepare an opinion on whether the financial statements are based on proper accounts (clause 15(3)(a));
- audit the accounts of a local subsidiary (clause 16(3));
- audit the accounts of a related entity (clause 17(2));
- investigate any matter relating to the accounts of the Treasurer, an agency or an audited local subsidiary (clause 18(2)(b));
- audit any accounts that the Treasurer requests the Auditor General to audit (clause 19); and

- have access to all accounts that the Auditor General considers to be relevant to an audit (clause 35(2)(a)).

4.22 The Committee is concerned that the omission of a definition of ‘accounts’ in the FMB and AGB may lead to some uncertainty as to its meaning, which may, in turn, impact upon the operation of the FMB and AGB.

4.23 The Committee notes that both the ACAG and The Institute of Chartered Accountants in Australia (ICAA) in their submissions expressed concern that the term ‘proper accounts’ in clause 15(3)(a) is not defined within the AGB, the FMB or Australian Accounting Standards.⁸⁹ As stated by the ICAA:

*This suggests that ‘proper accounts’ does not form part of the applicable financial reporting framework. Accordingly, what the Auditor General is to attest to is not clear.*⁹⁰

4.24 The Committee is of the view that inclusion of a definition of the term ‘accounts’ in the AGB would prevent any uncertainty as to the meaning of the term under the AGB.

4.25 The Committee recommends that the AGB be amended to include a definition of the term ‘accounts’.

Recommendation 10: The Committee recommends that a definition of ‘accounts’ be inserted into the Auditor General Bill 2006 with flexibility to enable additional matters to be prescribed in Treasurer’s instructions.

Clause 8 - Auditor General to have regard to audit priorities of Parliament

4.26 Clause 8 provides that the Auditor General must have regard to the audit priorities of Parliament as determined by either House of Parliament or the PAC.

4.27 The Committee notes that Auditor General is not required to also have regard to the audit priorities as determined by the Estimates and Financial Operations Committee.

Recommendation 11: The Committee recommends that clause 8 of the Auditor General Bill 2006 be amended to require that the Auditor General also have regard to the audit priorities as determined by the Estimates and Financial Operations Committee.

⁸⁹ Submission No 5A from the Australasian Council of Auditors-General, 6 November 2006, p3 and Submission No 6 from The Institute of Chartered Accountants in Australia, 7 November 2006, p3.

⁹⁰ Submission No 6 from The Institute of Chartered Accountants in Australia, 7 November 2006, p3.

Clause 14 - Audits of accounts of agencies

- 4.28 Under clause 14, if the Auditor General does not undertake an audit of an agency's accounts, the Auditor General is required to notify the PAC.
- 4.29 The Committee notes that the Auditor General is not required to notify the Estimates and Financial Operations Committee.

Recommendation 12: The Committee recommends that clause 14 of the Auditor General Bill 2006 be amended to require that the Auditor General also notify the Estimates and Financial Operations Committee.

Clause 24 - Reports on performance of functions generally

- 4.30 Clause 24 provides that the Auditor General has a responsibility to report to the Parliament on matters arising out the performance of the Auditor General's functions that are, in the opinion of the Auditor General, of such significance to require reporting. This must be done at least once in each year.⁹¹
- 4.31 The FMB at clause 82 provides that if the Minister decides that it is reasonable and appropriate not to provide to Parliament certain information concerning any conduct or operation of an agency, then the Minister is to cause written notice of the decision to be given to Parliament and to the Auditor General. The Minister's reasons for making that decision are to be provided to Parliament.
- 4.32 The Committee accepts that there may be instances that warrant that information not be disclosed publicly by the Executive. However, the Committee is of the view that there is a need to ensure that there is proper accountability when a claim for confidentiality is made by the Government.
- 4.33 The majority of the Committee (comprising Hons Giz Watson, Anthony Fels and George Cash MLCs) note that at present when the Minister makes a determination not to provide the Parliament with information, there is no independent assessment undertaken of whether such a decision is reasonable and appropriate. The majority of the Committee is of the view that in order to strengthen the existing accountability mechanisms, the Auditor General should be required to undertake such an assessment.
- 4.34 The minority of the Committee comprising Hons Ken Travers and Shelley Archer MLCs are concerned that this has the potential to politicise the position of the Auditor General.

⁹¹ Auditor General Bill 2006 Explanatory Memorandum, p6.

Recommendation 13: The Committee, by a majority (comprising Hons Giz Watson, Anthony Fels and George Cash MLCs) recommends that the Auditor General Bill 2006 be amended to provide that a report under clause 24 is to include an opinion as to whether a decision by a Minister not to provide information to Parliament concerning any conduct or operation of an agency is reasonable and appropriate.

Clause 25 - Report on an examination or investigation

- 4.35 Clause 25(1) provides that a report on an examination or investigation carried out under clause 18 may be submitted to both Houses of Parliament or to the PAC.
- 4.36 The Committee considers that the report should also be submitted to the Estimates and Financial Operations Committee.

Recommendation 14: The Committee recommends that clause 25 of the Auditor General Bill 2006 be amended to require that a report on an examination or investigation carried out under clause 18 of the Auditor General Bill 2006 also be submitted to the Estimates and Financial Operations Committee.

Clause 37 - Powers extend to confidential information

- 4.37 The FMB (clause 82) requires the Minister to cause written notice of the decision not to provide certain information to Parliament, to be laid before each House of Parliament and be given to the Auditor General.
- 4.38 Where the Minister decides that disclosure of particular information would be contrary to the public interest and advises the Auditor General of that decision, the Auditor General must not include that information in a report to Parliament. However, the Auditor General may report the information to the PAC.⁹²
- 4.39 The Committee notes that the COG recommended that the Auditor General should present a report containing confidential information to a Legislative Council Standing Committee. The Legislative Council Standing Committee would then ‘in camera’ make a determination on whether to report the information to Parliament.⁹³
- 4.40 The Committee is of the view that in order to improve parliamentary oversight, where the Auditor General decides to report information, the Auditor General should report to the proposed Joint Standing Committee on Audit rather than to the PAC. The proposed Joint Standing Committee on Audit should determine, in private, whether the information shall be included in a report to be tabled in Parliament.

⁹² Auditor General Bill 2006 Explanatory Memorandum, p9.

⁹³ Commission on Government, *Report No 1*, August 1995, p188.

Recommendation 15: The Committee recommends that clause 37 of the Auditor General Bill 2006 be amended to require that where the Auditor General decides to report information, the Auditor General should report to the proposed Joint Standing Committee on Audit (as recommended by the Committee in Recommendation 8) and that the proposed Joint Standing Committee on Audit should determine, in private, whether the information shall be included in a report to be tabled in Parliament.

Clause 43 - Recommendations by the Public Accounts Committee

- 4.41 Clause 43 provides that in the determination of the budget of the OAG for a financial year regard is to be had to any recommendation as to that budget, made to the Treasurer by the PAC. Regard is also to be had to any recommendation as to organisational structure or resources of the OAG made by the PAC.
- 4.42 The ACAG submitted that they supported the proposed involvement of the PAC in the determination of the OAG budget and its organisational structure.⁹⁴
- 4.43 The Committee notes that both the COG and the WA Inc Royal Commission recommended that a joint parliamentary committee have the role of making recommendations on the Auditor General's budget.
- 4.44 The COG recommended that:
5. *The budget of the Office of the Auditor General should be the subject of a permanent appropriation. The proposed Joint Audit Committee should determine the budget of the Office on an annual basis with consideration being given to any advice from the Treasurer. In circumstances where additional funding is required to complete the Office's work program, the Joint Audit Committee should consider the Auditor General's request. If the Joint Audit Committee determines that additional funding is warranted, a request for additional funds, to be drawn from the Treasurer's Advance Account, should be submitted to the Treasurer.*⁹⁵
- 4.45 The Committee is of the view that for effective parliamentary input, the proposed Joint Standing Committee on Audit should be the body to make recommendations to the Treasurer on the budget of the OAG.

⁹⁴ Submission No 5A from the Australasian Council of Auditors-General, 6 November 2006, p6.

⁹⁵ Commission on Government, *Report No 1*, August 1995, p241.

Recommendation 16: The Committee recommends that clause 43 of the Auditor General Bill 2006 be amended to provide that the Treasurer, when determining the budget of the Office of the Auditor General, be required to have regard to the recommendations of the proposed Joint Standing Committee on Audit (as recommended by the Committee in Recommendation 8).

Recommendation 17: The Committee recommends that clause 43 of the Auditor General Bill 2006 be amended to provide that regard be given to any recommendation made by the proposed Joint Standing Committee on Audit (as recommended by the Committee in Recommendation 8) regarding organisational structure or resources of the Office of the Auditor General.

Clause 47 - Review of Act

- 4.46 Clause 47 provides for a review of the operation and effectiveness of the Act by the PAC as soon as practicable after the expiry of five years from the commencement of the Act, and a report to the Legislative Assembly by the PAC relating to whether, amongst other things, the legislation is achieving its intended purpose.⁹⁶
- 4.47 The Committee supports the inclusion of this clause in the AGB, however, is of the view that the review should be undertaken by the proposed Joint Standing Committee on Audit (see paragraphs 4.5 to 4.16).
- 4.48 The Committee is also of the view that a review of the Act should be conducted after the expiry of every five years after the commencement of the proposed Act, not just after the expiry of the first five years from commencement of the Act.
- 4.49 The Committee recognises that it is important to ensure that the Auditor General is fully accountable to Parliament. The Committee notes that the AGB provides for the independent audit of the financial statements of the OAG. However, the AGB does not provide for independent performance audits to be undertaken.
- 4.50 The Committee notes that audit legislation of other jurisdictions require that external reviews of audit offices be conducted periodically.⁹⁷ The Committee further notes that the COG recommended that “*the performance of the Office of the Auditor General should be subject to triennial external reviews, ... in accordance with the directions of the proposed Joint Audit Committee*”.⁹⁸

⁹⁶ Auditor General Bill 2006 Explanatory Memorandum, pp10-11.

⁹⁷ For example, New South Wales, Victoria, Queensland and the Commonwealth.

⁹⁸ Commission on Government, *Report No 1*, August 1995, p245.

4.51 The Committee is of the view that the AGB should provide the proposed Joint Standing Committee on Audit with the ability to direct that a performance review of the Auditor General's Office be conducted, by a person or persons appointed by the joint committee, from time to time.

Recommendation 18: The Committee recommends that clause 47 of the Auditor General Bill 2006 be amended to provide that the proposed Joint Standing Committee on Audit (as recommended by the Committee in Recommendation 8) carry out a review of the operation and effectiveness of the *Auditor General Act 2006* as soon as practicable after the expiry of every five years from the commencement of the *Auditor General Act 2006*.

Recommendation 19: The Committee recommends that clause 47 of the Auditor General Bill 2006 be amended to provide that the proposed Joint Standing Committee on Audit (as recommended by the Committee in Recommendation 8) have the ability to direct, from time to time, that a performance review of the Auditor General's Office be conducted by a person or persons appointed by the proposed Joint Standing Committee on Audit.

Schedule 1, clause 1 - Appointment of Auditor General

4.52 Schedule 1, clause 1 provides for the Governor to appoint an Auditor General on the recommendation of the Minister. Prior to making a recommendation to the Governor, the Minister must consult the parliamentary leader of each political party with party status within Parliament and with the PAC. The Minister must also consult with the PAC as to the appropriate selection criteria for appointment before applications are sought for appointment.⁹⁹

4.53 The COG recommended that a joint parliamentary committee submit a shortlist of candidates to the Premier.

2. *The proposed Joint Audit Committee should participate in the selection of the Auditor General (as recommended in Section 5.3). The process for selecting the Auditor General should be detailed in the proposed Auditor General Act, as follows:*

(a) *the Commissioner for Public Sector Standards should administer the selection process;*

(b) *the Commissioner for Public Sector Standards should submit a list of applicants for the position of Auditor General to the proposed Joint Audit Committee;*

⁹⁹ Auditor General Bill 2006 Explanatory Memorandum, p11.

- (c) *the proposed Joint Audit Committee should submit a short list to the Premier of suitable candidates chosen from the Commissioner for Public Sector Standards' list;*
- (d) *the Premier, making a selection from the Joint Audit Committee's short list, should advise the Governor of the preferred candidate;*
- (e) *the Governor should appoint the Auditor General; and*
- (f) *the Auditor General should be appointed for a non-renewable term of ten years.¹⁰⁰*

4.54 The ACAG Statement of Principles - Independence of the Auditor General state that Parliament should select and recommend the Auditor General for appointment by the Governor.

4.55 The ACAG in their submission stated that:

The mechanism by which the Auditor-General is appointed is acceptable. However, as documented in the ACAG's "Statement of Principles - Independence of the Auditor-General", we prefer the model whereby the Parliament should select and recommend the Auditor-General for appointment by the Governor. As a minimum, the appointment of the Auditor-General should require explicitly the approval of the nominee by the Public Accounts Committee, as in the Commonwealth Auditor-General Act 1997.¹⁰¹

4.56 The Committee is of the view that the Minister should also be required to consult with the Estimates and Financial Operations Committee.

Recommendation 20: The Committee recommends that Schedule 1, clause 1 of the Auditor General Bill 2006 be amended to require that the Minister also consult with the Estimates and Financial Operations Committee.

¹⁰⁰ Commission on Government, *Report No 1*, August 1995, p241.

¹⁰¹ Submission No 5A from the Australasian Council of Auditors-General, 6 November 2006, p6.

Schedule 1, clauses 7(1) and 7(2) - Removal and suspension from office

- 4.57 Clause 7(1) provides that the Auditor General may be removed or suspended by the Governor on addresses from both Houses of Parliament but only on the recommendation of the PAC.
- 4.58 Clause 7(2) provides that if the Auditor General has been suspended under clause 7(1), the suspension has effect until the Auditor General is restored or removed from office by the Governor on addresses from both Houses of Parliament made on the recommendation of the PAC.
- 4.59 The Committee considers that it is not appropriate that the ability for Parliament to remove or suspend the Auditor General be contingent upon the recommendation of the PAC.
- 4.60 The Committee is of the view that any Member of Parliament should be able to move for the removal or suspension of the Auditor General. If required, either House of Parliament still retains the power to order the proposed Joint Standing Committee on Audit to inquire into the matter before it votes on the motion.

Recommendation 21: The Committee recommends that Schedule 1, clauses 7(1) and 7(2) of the Auditor General Bill 2006 be amended to delete the words ‘made on the recommendation of the Public Accounts Committee’.

Recommendation 22: The Committee recommends that Schedule 1, clause 7 of the Auditor General Bill 2006 be amended to provide that either House of Parliament may order the proposed Joint Standing Committee on Audit (as recommended by the Committee in Recommendation 8) to inquire into and report on any motion for suspension or removal of the Auditor General.

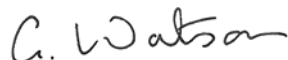
Schedule 1, clause 8 - Acting Auditor General

- 4.61 Clause 8 provides for the Governor, on the recommendation of the Minister, to appoint an appropriately qualified person as an Acting Auditor General during a period when the office of Auditor General is vacant or the Auditor General is absent from duty, suspended from that office or is unable to perform the functions of Auditor General for any other reason. However, prior to making a recommendation to the Governor, the Minister must consult with the parliamentary leader of each political party with party status within Parliament and the PAC.¹⁰²

¹⁰² Auditor General Bill 2006 Explanatory Memorandum, pp12-13.

4.62 The Committee notes that the Minister is not required to consult with the Estimates and Financial Operations Committee.

Recommendation 23: The Committee recommends that Schedule 1, clause 8 of the Auditor General Bill 2006 be amended to require that the Minister also consult with the Estimates and Financial Operations Committee.



Hon Giz Watson MLC

Chair

Date: 21 November 2006

APPENDIX 1
STAKEHOLDERS TO WHOM THE COMMITTEE WROTE

APPENDIX 1

STAKEHOLDERS TO WHOM THE COMMITTEE WROTE

NAME	ORGANISATION
Ms Maria Saraceni President	The Law Society of Western Australia
Dr Harry Phillips Parliamentary Fellow (Education)	Adjunct Professor, Edith Cowan University Adjunct Professor, Curtin University of Technology
Ms Toni Walkington Branch Secretary	Community and Public Sector Union Civil Service Association of Western Australia
Mr Dave Robinson Secretary	Unions Western Australia
Mr Timothy Marney Under Treasurer	Department of Treasury and Finance
Professor Greg Craven Executive Director	John Curtin Institute of Public Policy
Dr Bruce Stone Chair	Political Science and International Relations (M259) (School of Social and Cultural Studies) The University of Western Australia
Mr Anthony Smith State Manager	Australian Institute of Company Directors
Dr Penny Flett President	Chamber of Commerce and Industry of Western Australia
Mr Con Abbott FCA General Manager, Western Australia	The Institute of Chartered Accountants in Australia
Mr Frank McGuiness Chairperson	ACAG Financial Reporting Group Australasian Council of Auditors-General
Mr Aidan O'Grady Director, Western Australia Branch	Certified Practising Accountants Australia
Mr Colin Murphy Acting Auditor General	Office of the Auditor General

APPENDIX 2
LIST OF CORPORATIONS WHICH ISSUE DEBT SECURITIES IN AUSTRALIA
AND THEIR CREDIT RATINGS

APPENDIX 2

LIST OF CORPORATIONS WHICH ISSUE DEBT SECURITIES IN AUSTRALIA AND THEIR CREDIT RATINGS

ATTACHMENT A

CORPORATIONS THAT ISSUE DEBT SECURITIES IN AUSTRALIA WITH A LONG-TERM CREDIT RATING FROM STANDARD & POOR'S OF 'A' OR HIGHER (HIGHLIGHTED)

GE Capital	AAA
Toyota Finance Australia	AAA
Nestle Australia	AA+
CBFC Ltd	AA-
CUSCAL - (Credit Union Services of Australia Ltd)	AA-
Esanda Finance Corporation Ltd	AA-
Paccar Financial Pty Ltd	AA-
Queensland Sugar Ltd	AA-
NRMA Insur. Group Fin. Ltd - (Parent Guarantee)	AA
Cargill Australia Ltd - (Parent Guarantee)	A+
Colonial Finance Ltd - (Parent Guarantee)	A+
Commonwealth Property Fund	A+
Merrill Lynch Finance (Australia) Pty Ltd - (Parent Guarantee)	A+
Morgan Stanley Dean Witter (Australia) Finance Ltd - (Parent Guarantee)	A+
Commonwealth Property Office Fund	A-
John Deere Ltd - (Parent Guarantee)	A-
Mitsubishi Development Pty Ltd - (Parent Guarantee)	A-
Mitsui & Co Financial Services (Australia) Ltd - (Parent Guarantee)	A-
PowerCor Australia	A-
Stockland Trust Group	A-
Volkswagen Financial Services Australia - (Parent Guarantee)	A-
Wesfarmers Ltd	A-
Westfield Trust	A-
Woolworths Ltd.	A-
AMP Group Finance Services Ltd - (Parent Guarantee)	A
Arnotts - (Parent Guarantee)	A
Britannia Building Society	A
Caterpillar Financial Australia Ltd - (Parent Guarantee)	A
CFS GANDEL Retail Trust	A
CIT GROUP (Australia) Ltd - (Parent Guarantee)	A
Ecolab Finance Pty - (Parent Guarantee)	A
SPI Australia Finance Pty Ltd - (Parent Guarantee)	A
SPI Electricity & Gas Holdings P/L	A
SPI PowerNet Pty Ltd	A
Sumitomo Mitsui	A
Telecom New Zealand	A
Telstra Corporation Limited	A
General Property Trust	BBB+
Investa Property Group	BBB+
Newcastle Permanent Building Society	BBB+
Orica Finance Ltd	BBB+
Origin Energy	BBB+
Qantas Australia Ltd	BBB+
Santos Ltd	BBB+
Cadbury Schweppes Australia Ltd - (Parent Guarantee)	BBB
Coles Myer	BBB
Daimler Chrysler Australia/Pacific Pty Ltd	BBB
CATS Trust	Not Rated
Colonial Geared Share Fund	Not Rated
Spipower Utilities	Not Rated
Volvo Treasury Australia Proprietary Ltd - (Parent Guarantee)	Not Rated

Note: There is no comprehensive or definitive reference source for corporate issuers of debt securities in Australia. This list was produced from the Western Australian Treasury Corporation's market contacts who have regular dealings with corporate issuers. As such, the list may not be exhaustive.

APPENDIX 3

***PRO FORMA* RESOURCE AGREEMENT SUPPLIED BY THE DEPARTMENT OF
TREASURY AND FINANCE**

APPENDIX 3
***PRO FORMA* RESOURCE AGREEMENT SUPPLIED BY THE**
DEPARTMENT OF TREASURY AND FINANCE

RESOURCE AGREEMENT

between the

MINISTER FOR X (name of Ministry)

the

DIRECTOR GENERAL OF X (name of agency)

and the

TREASURER

For the financial year ending 30 June 2007

TABLE OF CONTENTS

1.0 INTRODUCTION 1

 1.1 Purpose 1

 1.2 Term and Scope 1

 1.3 Signatures of the Parties 2

2.0 STRATEGIC CONTEXT 3

 2.1 Relationship to Government Goals 3

 2.2 Performance Monitoring 3

 2.3 Significant Issues and Trends 3

 2.4 Whole-of-Government Initiatives 3

3.0 RESOURCE MANAGEMENT 4

 3.1 Responsibility for Resource Management 4

 3.2 Resource Management Targets 4

 3.3 Ownership Interest 4

 3.4 Reporting 5

 3.5 Administered Transactions 5

4.0 AMENDMENTS TO THE AGREEMENT 5

1.0 INTRODUCTION

1.1 Purpose

This agreement records undertakings by:

- the Minister - that the agency level desired outcomes and financial targets identified in the Budget Statements are consistent with the broader strategic policy direction and priorities of the Government;
- the Director General - to efficiently deliver the services and to achieve the desired outcomes and financial targets specified in the Budget Statements, while ensuring the development and maintenance of high quality human and capital resources of the agency; and
- the Treasurer - subject to Parliament's approval, to provide financial resources to facilitate achievement of the outcomes and targets referred to in the Budget Statements.

These undertakings are made to allocate accountabilities under the Budget, including for achieving the agreed expense limit and other budget targets. Breaches of the agreed expense limit are to be reported to Cabinet's Expenditure Review Committee.

1.2 Term and Scope

This agreement primarily covers the period from 1 July 2006 to 30 June 2007, as well as information on forecast outcomes and targets in future years (where appropriate). References to the Budget and Budget Statements are to the 2006-07 Budget and Budget Statements, unless the context implies otherwise. All parties recognise the importance of ongoing review to ensure:

- targeted outcomes represent maximum benefit to the community;
- optimal combination of services to achieve the identified outcomes;
- services are delivered at least cost; and
- there is co-ordinated effort (where appropriate) to facilitate whole-of-government initiatives.

1.3 Signatures of the Parties

The contents of this agreement have been discussed and agreed by the parties.

Minister
Dated

Director General
Dated

Treasurer
Dated

2.0 STRATEGIC CONTEXT

2.1 Relationship to Government Goals

The Budget Statements identify links between the Government’s goals articulated in the document ‘Better Planning: Better Services’, the agency level Government desired outcomes and the services to be delivered.

2.2 Performance Monitoring

Progress towards the agency level Government desired outcomes will be monitored with the assistance of audited key effectiveness indicators. Key efficiency indicators will be used to assist in monitoring service delivery. These performance indicators will be published in the Budget Statements and agency annual reports.

2.3 Significant Issues and Trends

All parties recognise that this section of the Budget Statements describes:

- the key external influences (including risks) which impact on operations;
- past and present trends in those influences; and
- potential future trends in the operating environment, including the
 - effect on demand; and
 - effect on cost.

2.4 Whole-of-Government Initiatives

The parties acknowledge that there is a shared accountability for the successful implementation of whole-of-government reform initiatives, including procurement reform and corporate services reform.

In addition to the preceding whole-of-government initiatives, X (name of agency) also contributes to the following key cross agency initiatives (where applicable):

Initiative	Related outcome	Contributing agencies	Financial commitment	Target result for the Budget year

Drafting note: The Minister and lead agency with responsibility for co-ordinating the delivery and reporting on each of the preceding State Government cross agency initiatives, are to be identified.

3.0 RESOURCE MANAGEMENT

3.1 Responsibility for Resource Management

This agreement recognises the shared resource management responsibilities of the parties. In broad terms the Treasurer, as representative of the State, represents the State's ownership interest in X (name of agency). It is the Minister and the Director General's role to agree to work to achieve resource management targets as specified in section 3.2.

3.2 Resource Management Targets

The Minister and the Director General, subject to changes in Government policy, undertake to ensure that the total amount of resources disclosed in the Budget Statements for the Budget year is managed to achieve:

- the endorsed expense limit, identified as the total cost of services in the Budget Income Statement (which impacts on the Government's expense growth target for the general government sector). The expense limit is a critical parameter within which the budget must be managed. Approval of the Expenditure Review Committee is required to spend beyond this limit in the Budget year or the forward estimate years;
- the net cost of services in the Budget Income Statement (which impacts on the Government's net operating balance target for the general government sector);
- the equity target in the Budget Balance Sheet (which impacts on the Government's net worth target);
- net cash movements in the Budget Cash Flow Statement (which impact on the Government's net debt target); and
- consistency between X's internal asset management plan and the capital works program disclosed in the Budget Statements.

3.3 Ownership Interest

X (name of agency) must account for capital contributions included in the appropriation process as equity contributions by the State.

The State is entitled to make such decisions as it sees fit concerning X's (name of agency) capital, defined as assets less liabilities (equity) as per the Australian Accounting Standards. These decisions include those regarding:

- equity contributions;
- distribution of net proceeds of asset disposal; and
- treatment of operating surpluses.

The agency shall calculate the capital user charge liability on an annual basis and make the required payments to the Department of Treasury and Finance.

3.4 Reporting

X (name of agency) will provide information to the Department of Treasury and Finance to enable compliance with the requirements of the *Government Financial Responsibility Act 2000*, together with financial data in accordance with existing reporting arrangements.

3.5 Administered Transactions

The Budget Statements disclose any expenses/income planned to be incurred/received on behalf of the State, as well as any assets and liabilities on behalf of the State. The Minister and the Director General undertake to ensure the effective management of these administered items on behalf of the Government.

4.0 AMENDMENTS TO THE AGREEMENT

This agreement may be amended with the consent of all parties. Amendments shall become a written attachment to the agreement.

Renegotiation of this agreement may be a consequence of changes to:

- Government policy;
- economic parameters;
- demand for services; and/or
- administrative arrangements that have a material impact.

Where there is a function transfer, the Director General shall provide sufficient information to enable all relevant agencies to report on the transferred functions and associated assets and liabilities during the year.