



SECOND SESSION OF THE THIRTY-SIXTH PARLIAMENT

**REPORT OF THE
JOINT STANDING COMMITTEE ON
DELEGATED LEGISLATION
IN RELATION TO THE
OVERVIEW OF THE
COMMITTEE'S OPERATIONS:
SECOND SESSION OF THE
THIRTY-SIXTH PARLIAMENT
(AUGUST 2002 TO NOVEMBER 2004)**

Presented by Mr Martin Whitely MLA (Chairman)

and

Hon Ray Halligan MLC (Deputy Chairman)

Report 10
November 2004

JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

Date first appointed:

June 28 2001

Terms of Reference:

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

“6. Delegated Legislation Committee

- 6.1 A Delegated Legislation Committee is established.
- 6.2 The Committee consists of 8 members, 4 of whom are appointed from each House. The Chairman must be a member of the Committee who supports the Government.
- 6.3 A quorum is 4 members of whom at least 1 is a member of the Council and 1 a member of the Assembly.
- 6.4 A report of the Committee is to be presented to each House by a member of each House appointed for the purpose by the Committee.
- 6.5 Upon its publication, whether under section 41(1)(a) of the *Interpretation Act 1984* or another written law, an instrument stands referred to the Committee for consideration.
- 6.6 In its consideration of an instrument, the Committee is to inquire whether the instrument –
- (a) is authorized or contemplated by the empowering enactment;
 - (b) has an adverse effect on existing rights, interests, or legitimate expectations beyond giving effect to a purpose authorized or contemplated by the empowering enactment;
 - (c) ousts or modifies the rules of fairness; or
 - (d) deprives a person aggrieved by a decision of the ability to obtain review of the merits of that decision or seek judicial review; or
 - (e) imposes terms and conditions regulating any review that would be likely to cause the review to be illusory or impracticable;
 - (f) contains provisions that, for any reason, would be more appropriately contained in an Act.
- 6.7 In this clause –
- “adverse effect” includes abrogation, deprivation, extinguishment, diminution, and a compulsory acquisition, transfer, or assignment;
- “instrument” means –
- (a) subsidiary legislation in the form in which, and with the content it has, when it is published;
 - (b) an instrument, not being subsidiary legislation, that is made subject to disallowance by either House under a written law;
- “subsidiary legislation” has the meaning given to it by section 5 of the *Interpretation Act 1984*.”

Members as at the time of this Report:

Mr Martin Whitely MLA (Chairman)	Mr Terry Waldron MLA
Hon Ray Halligan MLC (Deputy Chairman)	Mr Peter Watson MLA
Hon Robin Chapple MLC	Hon Barbara Scott MLC
Mr Rod Sweetman MLA	

Staff as at the time of this Report:

Anne Turner, Advisory Officer (Legal)	Kerry-Jayne Braat, Committee Clerk
Denise Wong, Advisory Officer (Legal)	

Address:

Email: delleg@parliament.wa.gov.au

Website: <http://www.parliament.wa.gov.au>

Parliament House, Perth WA 6000, Telephone (08) 9222 7222

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Government Response

This Report is subject to Standing Order 337:

After tabling, the Clerk shall send a copy of a report recommending action by, or seeking a response from, the Government to the responsible Minister. The Leader of the Government or the Minister (if a Member of the Council) shall report the Government's response within 4 months.

The four-month period commences on the date of tabling.

LIST OF ABBREVIATIONS

ALR	Australian Law Reports
Auditor General's Report	Office of the Auditor General Western Australia, <i>Third Public Sector Performance Report 2004</i> , Report 6, September 22 2004
Circular	Premier's Circular Number 4 of 2002, <i>Subsidiary Legislation - Explanatory Memoranda</i>
CLR	Commonwealth Law Reports
Committee	Joint Standing Committee on Delegated Legislation
Department	Department of Local Government and Regional Development
First Sessional Report	Parliament of Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, <i>Sessional Report June 28 2001 to August 9 2002</i> , Report Number 6, March 2003
MLA	Member of the Legislative Assembly
MLC	Member of the Legislative Council
NZLR	New Zealand Law Reports
RWWA	Racing and Wagering Western Australia
RWWA Act	<i>Racing and Wagering Western Australia Act 2003</i>
Working Group	Representatives from the Department of Local Government and Regional Development, Local Government Managers Australia (WA Division), Western Australian Local Government Association, Department of Health, and Joint Standing Committee on Delegated Legislation

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REPORT OF THE JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

IN RELATION TO THE

OVERVIEW OF THE COMMITTEE'S OPERATIONS: SECOND SESSION OF THE THIRTY-SIXTH PARLIAMENT (AUGUST 2002 TO NOVEMBER 2004)

1 INTRODUCTION

- 1.1 The role of the Joint Standing Committee on Delegated Legislation (**Committee**) and its approach to the scrutiny of subsidiary legislation has been discussed in the Committee's first sessional report¹ (**First Sessional Report**).
- 1.2 The Committee holds a standing referral from the Legislative Council to consider all instruments of subsidiary legislation², and other instruments made under delegated legislative authority that are subject to parliamentary disallowance. As a result, the Committee is able to scrutinize and report to Parliament on a huge volume of instruments. However, due to the tight deadlines that are statutorily imposed on the Committee and the limited resources available to it, the Committee resolved shortly after its establishment to consider only those instruments that are subject to disallowance and any other instruments that were noted by individual members.
- 1.3 Despite that approach being preserved throughout this session, the Committee was still faced with a large and relentless workload.³

2 MEMBERS

- 2.1 The Committee has undergone a number of changes to its member constitution over the last two years. The Committee currently has seven members but has been served by the following members during this session:

- Ms Margaret Quirk MLA (Chairman to August 13 2003).
- Mr Martin Whitely MLA (Chairman from August 13 2003).
- Hon Ray Halligan MLC (Deputy Chairman).
- Hon Robin Chapple MLC.

¹ Parliament of Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, *Sessional Report June 28 2001 to August 9 2002*, Report Number 6, March 2003, Chapters 1 and 2.

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

³ Refer to the table on page 3 of this report.

- Hon Ljiljanna Ravlich MLC (to October 21 2004).
- Mr Rod Sweetman MLA.
- Mr Terry Waldron MLA.
- Mr Peter Watson MLA.
- Hon Alan Cadby MLC (from April 10 2002 to July 2 2004).
- Hon Barbara Scott MLC (from July 2 2004).

2.2 The Committee thanks Ms Margaret Quirk MLA, Hon Alan Cadby MLC and Hon Ljiljanna Ravlich MLC for their work on the Committee and wishes them well.

3 STAFF

3.1 The Committee is currently assisted by two advisers who examine and report to the Committee on every disallowable instrument, provide advice on all correspondence received, write letters, prepare draft reports for consideration by the Committee before tabling in the House, and attend meetings of the Committee. The Committee's advisers, at various times during this session, were:

- Mr Nigel Pratt, Clerk Assistant;
- Ms Anne Turner, Advisory Officer (Legal); and
- Ms Denise Wong, Advisory Officer (Legal).

3.2 From time to time, the Committee's advisers were assisted in their role by Articled Clerks. During this session, the Committee was served by four Articled Clerks: Mrs Peta Kay, Ms Naomi Robinson, Mr Gary Cooper and Mr Anthony Sullivan. Ms Jan Paniperis, Senior Committee Clerk, and Ms Kerry-Jayne Braat, Committee Clerk, provided administrative and clerical support. Mrs Kay Sampson, Clerical Assistant, and Ms Sheena Hutchison, Clerical Assistant/Committee Clerk, provided technical, Internet and reception services.

4 REPORTS PRESENTED TO THE HOUSE

4.1 The Committee presented the following reports to both the Legislative Council and the Legislative Assembly, in accordance with its terms of reference, over the course of this session:

- Report number 4 - *City of Perth Code of Conduct Local Law* - tabled on September 26 2002;⁴
- Report number 5 - *City of Melville Local Law relating to Signs, Hoardings and Billposting* - tabled on December 5 2002;
- Report number 6 - *First Sessional Report* - tabled on March 20 2003;
- Report number 7 - *Powers of Entry and Powers to make Local Laws that affect Private Land under the Local Government Act 1995* - tabled on May 15 2003;
- Report number 8 - *Issues of concern raised by the Committee between June 9 2003 and December 19 2003 with respect to Local Laws* - tabled on April 19 2004; and
- Report number 9 - *Issues of concern raised by the Committee between December 20 2003 and June 30 2004 with respect to Local Laws* - tabled on August 31 2004.

4.2 The Committee notes that most of these reports deal with issues that were raised in relation to local laws, which illustrates the fact that the majority of the Committee's scrutiny time is devoted to local laws.

5 STATISTICS

Number of Instruments considered by the Committee

5.1 The following table provides a purely numerical indication of the Committee's workload during this session:

	Financial Year 2002 to 2003	Financial Year 2003 to 2004	01.07.2004 to 10.11.2004
Total number of instruments scrutinized	482	531	202
Total number of local laws scrutinized	146	168	58
Percentage of instruments scrutinized that were local laws	30%	32%	29%
Total number of notices of motion for disallowance given	19	16	9
Total number of instruments disallowed on recommendation of the Committee	0	0	0

⁴ This report was also listed in the First Sessional Report because it relates to a local law that was disallowed during the First Session of the Thirty-Sixth Parliament: First Sessional Report, p8.

- 5.2 These figures do not demonstrate that many of the instruments considered by the Committee are often lengthy documents. Irrespective of their size, the instruments often involve complex issues that span a diverse range of subject matters.
- 5.3 The figures in the last row of the above table indicate that no instruments have been disallowed on recommendation of the Committee. However, the figures do not illustrate the process by which the Committee can, and does, obtain undertakings from the responsible Minister, Department or local government to amend or repeal instruments with which the Committee has raised a concern. When such undertakings are given, the Committee often does not proceed with any motion to disallow which may have been tabled. The Committee only recommends the disallowance of instruments as a last resort.

Terms of Reference relied upon by the Committee

- 5.4 In the process of scrutinizing an instrument, the Committee considers whether the instrument offends its terms of reference; that is, whether the instrument:
- (term of reference (a)) is authorized or contemplated by the empowering enactment;
 - (term of reference (b)) has an adverse effect on existing rights, interests, or legitimate expectations beyond giving effect to a purpose authorized or contemplated by the empowering enactment;
 - (term of reference (c)) ousts or modifies the rules of fairness;
 - (term of reference (d)) deprives a person aggrieved by a decision of the ability to obtain review of the merits of that decision or seek judicial review;
 - (term of reference (e)) imposes terms and conditions regulating any review that would be likely to cause the review to be illusory or impracticable; or
 - (term of reference (f)) contains provisions that, for any reason, would be more appropriately contained in an Act.
- 5.5 The Committee has found that, of the 2,040 or so instruments it has scrutinized during this Parliament, term of reference (a) was by far the most often raised issue of concern. Other terms of reference were raised occasionally.

6 CONFERENCES ATTENDED

Local Government Managers Australia (WA Division) 2002 Annual State Conference

- 6.1 Ms Margaret Quirk MLA, the Committee's then Chairman, attended the Local Government Managers Australia (WA Division) 2002 Annual State Conference on

October 24 2002 in Perth and spoke about the role of the Committee in scrutinizing local laws, the Committee's terms of reference, and the parliamentary disallowance procedures.

Eighth Australasian and Pacific Conference on Delegated Legislation and Fifth Australasian and Pacific Conference on the Scrutiny of Bills

- 6.2 The Tasmanian Subordinate Legislation Committee hosted the Eighth Australasian and Pacific Conference on Delegated Legislation and Fifth Australasian and Pacific Conference on the Scrutiny of Bills in the Legislative Assembly Chamber, Parliament House, Hobart, on February 4, 5 and 6 2003.
- 6.3 The Western Australian Parliament was represented at the conferences by the members and staff of the Committee and the Standing Committee on Uniform Legislation and General Purposes. Six members (Ms Margaret Quirk, Mr Terry Waldron and Mr Peter Watson MLAs, and Hon Ray Halligan, Hon Ljiljanna Ravlich and Hon Alan Cadby MLCs) and two staff members represented the Committee.
- 6.4 Delegates from Australian States and Territories attended, as well as delegations from the Commonwealth, Eastern Cape Provincial Parliament South Africa, Western Cape Provincial Parliament South Africa, Tonga and Canada.
- 6.5 Ten formal papers were presented during the course of the conferences, including one that was presented by the Committee's then Chairman, Ms Margaret Quirk MLA, regarding the powers of local governments to enter onto private property.
- 6.6 On the final day of the conferences, each of the various Chairmen of State, Territory and Commonwealth committees on the scrutiny of bills and delegated legislation reported their committee's activities since the previous biennial conference in Sydney in July 1999.
- 6.7 In addition to the main conferences, Ms Margaret Quirk MLA and one member of the Committee's staff attended a half-day meeting of Chairs and deputy Chairs on February 3 2003.

Local Government Managers Australia (WA Division) 2003 Annual State Conference Workshop: 'Local Laws - Getting Them Right'

- 6.8 The Committee was represented at the Local Government Managers Australia (WA Division) 2003 Annual State Conference Workshop: "Local Laws - Getting Them Right", held on October 28 2003 in Perth, by Mr Martin Whitely MLA and two staff members. Mr Martin Whitely MLA delivered a paper on the Parliament's overview of local laws and the role and function of the Committee. He also participated in a panel session during which he and other parties involved in the local law making

process were available for the conference delegates to question on issues related to local laws.

7 INITIATIVES IN THIS SESSION

Local Laws

7.1 One of the major initiatives that the Committee was involved in during the First Session of the Thirty-Sixth Parliament was the establishment of the working group of local law stakeholders (**Working Group**), which are the:

- representatives from the Department of Local Government and Regional Development (**Department**);
- representatives from the Local Government Managers Australia (WA Division);
- representatives from the Western Australian Local Government Association; and
- staff members of the Committee.

7.2 The Working Group continues to meet approximately once every six months and has met four times during this session of Parliament. At the most recent Working Group meeting, the list of participants increased to include one member of the Committee (Hon Ray Halligan MLC) and representatives from the Department of Health, which monitors and vets proposed health local laws.

7.3 To further improve the dissemination of the informal biannual information reports that were prepared by the Committee for the Working Group to identify and discuss issues of concern, the Committee decided to formalize and table those reports in both the Legislative Council and the Legislative Assembly. Whereas those information reports used to be confidential to the Working Group participants, the tabled information reports are now publicly available on the Internet at www.parliament.wa.gov.au. Reports number 8 and 9 of this Parliament are examples of the tabled information reports.⁵

7.4 The Committee is of the view that, since its establishment, the Working Group initiative and the tabling and publication of the information reports have greatly improved the standard of local law making.

⁵ Refer to the list of tabled reports at paragraph 4.1 of this report.

Instruments from Government Departments and Agencies

Imposts constituting a 'Fee' or 'Tax'

7.5 This issue was discussed on page 34 of the First Sessional Report. The Committee continued, during this session of Parliament, to scrutinize instruments from government departments and agencies to determine whether the quantum of an impost prescribed by the instrument and described as a fee is, in reality, a tax. The Committee's scrutiny of fees generally involves identifying whether the prescription of the fee in the instrument is expressly or impliedly authorized by the primary Act. If so, the Committee attempts to identify whether the quantum of the fee:

- (where the fee is to be paid for a service) bears a reasonable relationship to the costs of providing that service; or
- (where the fee is to be paid for a licence) bears a reasonable relationship to the costs incurred in establishing or administering the scheme or system under which the licence is issued, or is incurred in respect of matters to which the licence relates.⁶

7.6 Where the Committee receives evidence that the quantum of the fee does not satisfy the above criteria, it views the fee as being in the nature of a tax. The Committee will recommend disallowance of an instrument if it prescribes a fee which, in reality, is a tax, without the authority of an Act of Parliament.

7.7 Over time, the Committee became concerned by general statements from government departments and agencies that fees or increases in fees were justified under cost recovery principles without any further supporting information. In order to determine how much reliance the Committee could place on those general statements of cost recovery, the Committee was briefed by the following parties:

- Mr Graeme Doyle, Director, Financial Policy, and Mr Adrian Duca, Assistant Director, Agency Resources, Department of Treasury and Finance, on March 19 2003.
- Mr Des Pearson, Auditor General, and Dr Peter Wilkins, Director, Policy, Office of the Auditor General Western Australia, on June 11 2003.

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

⁶ Refer to section 45A of the *Interpretation Act 1984*.

- 7.9 The Committee was briefed on the findings of the Auditor General’s Report by Mr Des Pearson, Auditor General, and Mr Glen Clarke, Acting Executive Director, Compliance and Information Systems Division, Office of the Auditor General, on November 10 2003. The Auditor General’s Report indicates that, at the very least, the Committee should continue to request further information to support general cost recovery justifications for fees or fee increases which are prescribed in instruments of delegated legislation.
- 7.10 The Committee is hopeful that the information, which has been obtained by it during this session regarding the setting of fees by government departments and agencies, will be utilized in the next Parliament.

Explanatory Material Requirements

- 7.11 Premier’s Circular Number 4 of 2002, *Subsidiary Legislation - Explanatory Memoranda (Circular)*, was issued in April 2002 during the First Session of the Thirty-Sixth Parliament. It provides government departments and agencies with instructions on the explanatory material that must be provided to the Committee immediately after a disallowable instrument (for which the department or agency is responsible) is gazetted.
- 7.12 The Circular was amended during this session, in April 2004, to include the requirement for government departments and agencies proposing fee changes to provide the Committee with a ‘fee table’, an example of which appears below:⁷

Type of Fee	Date Last Updated Increase/Decrease	Old Fee (\$)	New Fee (\$)	Increase (%)
Grant or renewal of fishing boat licence for:				
• A boat less than 6.5 metres long	10.09.02 decrease	550.00	85.00	-84.55
• A boat that is 6.5 metres or longer	10.09.02 increase	550.00	315.00	-42.73

- 7.13 The Committee requested this information in an effort to obtain further information that was required to support a government department or agency’s claim that the prescribed fees were justified on cost recovery principles. The information was requested in this format because it allows the Committee to determine, at a glance, the magnitude of fee changes that are being made.

⁷ The Circular is attached to this report as Appendix 1. The Committee notes that the Circular will need to be reviewed in the next Parliament.

- 7.14 Although the requirement for the 'fee table' was inserted into the Circular in April 2004, the Committee has found that there has been a general lack of compliance from most government departments and agencies seeking to impose new fees and charges. Collating this sort of information can be a drain on the Committee's time and resources as the information is not always readily at hand and results in the need for the staff to conduct extensive research. In the Committee's view, the individual departments and agencies themselves would be best placed to collate this information.
- 7.15 Further, it is sometimes the sheer volume of fee changes that can result in the drain on the Committee's resources. The Committee has found that during the months of June, July and August, it can be faced with scores of fee changes in one instrument.⁸

Recommendation 1: The Committee recommends that the Government continually monitor its departments and agencies to ensure that they fully comply with the Premier's Circular Number 4 of 2002, *Subsidiary Legislation - Explanatory Memoranda*.

8 SPECIFIC CONCERNS RAISED IN RELATION TO LOCAL LAWS

- 8.1 The Committee refers to its reports number 8 and 9 of this Parliament,⁹ which provide a summary of the main issues of concern raised by the Committee in relation to local laws between June 9 2003 and June 30 2004.
- 8.2 Of the issues that are discussed in the Committee's reports number 8 and 9, the Committee has found that the following issues continue to recur in local laws:
- The unauthorized incorporation into local laws, by reference to the title or description, of internal policies and codes of local governments.
 - The unauthorized provision of a power to amend the local law by simple majority resolution of the council rather than through the process that is provided for in section 3.12 of the *Local Government Act 1995*.
 - Drafting errors ranging from simple typographical errors and references to repealed and obsolete legislation or superseded standards, to clauses that are ambiguously drafted or that do not make sense.
 - Inconsistency with other written laws, such as Acts or regulations, which generally render the local laws void and inoperative pursuant to section 43(1)

⁸ For example, the *Jetties Amendment Regulations (No 2) 2004* gazetted on June 25 2004 contained over 300 individual fee changes in the one instrument.

⁹ Refer to the list of tabled reports at paragraph 4.1 of this report.

of the *Interpretation Act 1984* and/or section 3.7 of the *Local Government Act 1995*.

- In a small minority of local governments, a failure to provide in a timely manner the explanatory material required under the Department’s Circular Number 12 of 2002.¹⁰

9 A SAMPLE OF THE SPECIFIC CONCERNS RAISED IN RELATION TO INSTRUMENTS FROM GOVERNMENT DEPARTMENTS AND AGENCIES

Not authorized nor contemplated by the Empowering Act

Litter Amendment Regulations 2004

9.1 The effect of these amendments was to increase the modified penalties that are payable for certain types of littering, as summarized in the table below:

Section/ Reg	Offence	Old Penalty (\$)	New Penalty (\$) Individual	New Penalty (\$) Body Corporate
s 23	Littering - cigarette butt	50	75	75
s 23	Littering - any other litter	50	200	400
s 24	Breaking glass, metal or earthenware	50	200	400
s 24A(1)	Bill posting	100	200	400
s 24A(2)	Bill posting on a vehicle	50	200	400
reg 6	Depositing domestic or commercial waste in a public litter receptacle	50	200	400
reg 8	Transporting load inadequately secured	100	200	400

9.2 As a result of the amendments, the *Litter Regulations 1981* imposed different modified penalties for individuals as opposed to bodies corporate.

9.3 Section 33(2)(h) of the empowering Act, the *Litter Act 1979*, provides that regulations may be made:

prescribing for the purposes of section 30 [infringement notices] in respect of any offence prescribed for the purposes of that section -

(i) *a penalty not exceeding \$200; or*

¹⁰ The Committee notes that this circular will need to be revised following the amendments to the *Local Government Act 1995* that received the Governor’s assent on November 12 2004, but are yet to be proclaimed.

(ii) *different penalties, none of which exceeds \$200, according to the circumstances by which the offence is attended.*

9.4 The penalties listed in the table in clause 4 of the amendment regulations relate to offences that are prescribed for the purposes of section 30 of the empowering Act.¹¹ The Committee considered that all of the \$400 modified penalties payable by bodies corporate via infringement notices exceeded the maximum limit set by the Act. Accordingly, in the Committee's view, those modified penalties were inconsistent with, and not authorized nor contemplated by, the empowering Act.

9.5 The modified penalties that were prescribed for bodies corporate have since been repealed in accordance with the Minister for the Environment's undertaking to the Committee. There is now one set of modified penalties that is prescribed for both individuals and bodies corporate.

Environmental Protection (Clearing of Native Vegetation) Regulations 2004

9.6 These regulations were made pursuant to sections 123 and 51A, 51C(c), 51E(1)(c) and (4)(c), 51H(2), 51M(1)(b) and 51Q of the *Environmental Protection Act 1986* and sections 110(2), (3) and (4), and 119(5) of the *Environmental Protection Amendment Act 2003*. They support the newly inserted Part V Division 2 of the *Environmental Protection Act 1986*, which establishes the offence of clearing native vegetation without a permit.

9.7 The clearing activities that are prescribed in regulation 5 (as long as they are done in a way that limits the damage to neighbouring native vegetation) are exempt from the requirement to obtain a clearing permit unless done in an environmentally sensitive area. Item 2(b) in the Table to regulation 5(1) prescribes the following clearing activity as being exempt:

Clearing -

...

(b) *for the purposes of preventing imminent danger to human life or health or irreversible damage to a significant portion of the environment,*

if the circumstances giving rise to the clearing or the need for the clearing were not caused by the negligence of the person clearing or the person who authorised the clearing. [emphasis added]

¹¹ Regulation 9(2) and Schedule 1 of the *Litter Regulations 1981*.

- 9.8 In the Committee's preliminary view, the condition (relating to the negligence of the person clearing or the person who authorized the clearing) placed on the exemption prescribed in regulation 5(1), table item 2(b) has the potential to produce unreasonable consequences, and may therefore not be authorized nor contemplated by the *Environmental Protection Act 1986*.
- 9.9 As an example, a driver who negligently hits a native tree situated just off the road could weaken that tree sufficiently for it to amount to an imminent danger to the other users of the road. The Committee was concerned that such a driver would be committing an offence under section 51C of the *Environmental Protection Act 1986* (clearing native vegetation without a clearing permit) if he or she immediately cut down the weakened tree. However, the driver could avoid committing an offence under that section if he or she waited for a third party to remove the weakened tree. During that time, the weakened tree could fall onto a passing motor vehicle, pedestrian or bicycle rider.
- 9.10 In the Committee's view, the condition placed on the exemption would unreasonably expose the otherwise responsible act of the driver (clearing a weakened tree in the interests of the safety of the other road users) to a penalty under the *Environmental Protection Act 1986*. In the Committee's view, the Parliament could not have intended for the regulation making power to be exercised in this way. At law, there is a presumption against Parliament authorizing the making of unreasonable delegated legislation. The test of 'unreasonableness' is whether the delegated legislation is capable of being considered to be reasonably proportionate to the end sought to be achieved.¹² In order to be unreasonable, the delegated legislation must be so lacking in reasonable proportionality that it cannot be a real exercise of the delegated legislation making power.
- 9.11 In applying this test, the end sought to be achieved by regulation 5 appears to be the limitation of the clearing of native vegetation without a clearing permit to situations where the clearing is absolutely necessary. However, in the Committee's view, the means of achieving this end in regulation 5(1), table item 2(b) is disproportionate because that item has the effect of potentially:
- punishing a person who is attempting to minimize the effects of their own negligence for the benefit of other humans and/or the environment; and
 - extending the length of time that:
 - a) human life or health is exposed to danger; or
 - b) a significant portion of the environment is exposed to damage.

¹² *South Australia v Tanner* (1989) 166 CLR 161.

- 9.12 The Minister for the Environment accepted that regulation 5(1) Table item 2(b), as drafted, “...*does not give effect to the drafting instructions of the DoE* [Department of Environment]...”¹³ and undertook to the Committee that the item would be amended as soon as practicable. The Minister also assured the Committee that, in the interim, the Department of Environment would take account of the “...*public interest considerations that impact upon the taking of enforcement action.*”¹⁴

Transfer of Land Regulations 2004

- 9.13 Regulation 6(2) of these regulations states that:

Despite the Interpretation Act section 32(2), the headings of the Divisions into which Schedule 1 is divided form part of these regulations.

- 9.14 The effect of regulation 6(2) is that a particular section of the *Interpretation Act 1984*, which is a primary Act, is not to apply to the *Transfer of Land Regulations 2004*, a subsidiary instrument. The Committee’s preliminary view was that regulation 6(2) is not authorized by the *Transfer of Land Act 1893*.

- 9.15 The *Transfer of Land Regulations 2004* were made pursuant to section 181 of the *Transfer of Land Act 1893*, which provides the Commissioner with a ‘necessary or expedient’ regulation making power. In the Committee’s view, a ‘necessary or expedient’ regulation making power cannot authorize the exclusion of specific provisions of the *Interpretation Act 1984*.

- 9.16 The Committee’s concern was that if various provisions in the *Interpretation Act 1984* could be excluded by a subsidiary instrument, then, taken to its extreme, a regulation could state, for example, that various provisions in Part VI (the disallowance procedure) did not apply to the regulations.

- 9.17 The Committee’s view is that if Parliament intended section 32(2) of the *Interpretation Act 1984* not to apply to a subsidiary instrument, such as these regulations, then it would have expressly provided for this in the *Transfer of Land Act 1893* as it has done so in section 181(3), relating to fees:

Section 45(1) and (2) of the Interpretation Act 1984 apply in respect of fees prescribed under this Act notwithstanding sections 3(3) and 45(3) of that Act.

- 9.18 The Committee considered whether section 3(1)(a) of the *Interpretation Act 1984* might authorize regulation 6(2). It states that:

¹³ Letter from the Minister for the Environment dated October 15 2004, p2.

¹⁴ *Ibid.*

The provisions of this Act apply to every written law...unless in relation to a particular written law -

(a) *express provision is made to the contrary.*

9.19 The definition of 'written law' in the *Interpretation Act 1984* includes subsidiary legislation such as a regulation. However, the Committee considered that section 3(1)(a) alone could not authorize regulation 6(2) because that would run contrary to the basic rule of interpreting subsidiary legislation, which is that it must be authorized by the Act under which it is made.

9.20 The Committee received a written undertaking from the Department of Land Information to repeal regulation 6(2).

Matters more appropriately contained in an Act

Environmental Regulations (Controlled Waste) Regulations 2004

9.21 These regulations are concerned with tracking, from the point of generation to the point of disposal, the movement of specified waste types called 'controlled wastes' which may have environmental harm or health risks associated with their transportation or disposal (for example, sewage and tyres).

9.22 Schedule 1 of these regulations prescribe the types of waste that are considered to be 'controlled wastes', and seek to regulate and control the transport, storage and disposal of controlled wastes. However, regulations 3(1) and (2) of these regulations provide the Chief Executive Officer of the Department of Environment with the power to decide whether the regulations will apply to a controlled waste, and if so, which provisions will apply and under what conditions (if any):

(1) *The CEO may, by order published in the Gazette, direct that all or any of the provisions of these regulations do not apply according to the order in respect of a controlled waste.*

(2) *An order made under subregulation (1) may be -*

(a) *subject to such conditions as the CEO specifies in the order; and*

(b) *revoked or varied by a subsequent order.*

9.23 Theoretically, the Chief Executive Officer could completely reverse the effect of the regulations by publishing an order that provides that none of the provisions in these regulations apply to any of the controlled wastes. The Chief Executive Officer may also direct that, for example, a carrier of sewage is exempt from the requirement to be

licensed, as long as certain conditions (specified in the Chief Executive Officer's order) are met.

9.24 The effect of regulations 3(1) and (2) is that the Chief Executive Officer would be regulating and controlling the transport, storage and disposal of controlled wastes outside of the system that is established under these regulations. The legislative power, which was delegated by the Parliament to the Governor, to regulate and control these activities through regulations is effectively subdelegated to the Chief Executive Officer. However, the *Environmental Protection Act 1984* does not appear to authorize this subdelegation. Without the required authority, the Committee was of the view that the Governor cannot subdelegate his already delegated regulation making power to another person.¹⁵

9.25 The Committee notes that section 6(1) of the *Environmental Protection Act 1984* empowers either the Minister or the Environmental Protection Authority (with the approval of the Governor) to declare by order that all or any provisions of the Act or an approved policy do not apply in respect of:

- (a) any specified area of the State;
- (b) any specified premises, act or thing; or
- (c) all premises, acts or things comprised in a specified class thereof or situated in a specified area of the State.

9.26 An order made pursuant to section 6(1) of the *Environmental Protection Act 1984* must be published in the *Government Gazette* and is subject to the tabling and disallowance procedure provided in section 42 of the *Interpretation Act 1984*.

9.27 The *Environmental Protection Act 1984* does not appear to provide the Chief Executive Officer, with respect to regulations made under the Act, with a power that is similar to the one provided in section 6(1). Further, the orders that are made by the Chief Executive Officer under regulations 3(1) and (2) are not disallowable instruments and will not, as a matter of course, be subject to the scrutiny of the Parliament via the Committee.

9.28 In the Committee's preliminary view, regulations 3(1) and (2) are:

- not authorized nor contemplated by the *Environmental Protection Act 1984*;
and

¹⁵ For example, see *Hawke's Bay Raw Milk Producers Co-op Co Ltd v New Zealand Milk Board* [1961] NZLR 218; *Turner v Owen* (1990) 96 ALR 119; Parliament of Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, *Report in relation to the City of Perth Code of Conduct Local Law*, September 2002, Report Number 4, p43.

- provisions that would be more appropriately contained in an Act.

9.29 The Department of Environment provided the Committee with a written undertaking to delete regulations 3(1) and (2) as soon as possible and ensure that those regulations would not be enforced in the meantime.

Instruments that are no longer disallowable

Rules of Racing

9.30 Prior to August 1 2003, the:

- *Greyhound Racing Rules* (made by the Western Australian Greyhound Racing Authority);
- *Rules of Harness Racing* (made by the Western Australian Trotting Association); and
- *Rules of Racing of the Western Australian Turf Club* (made by the Western Australian Turf Club),

were disallowable instruments as they were subject to section 42 of the *Interpretation Act 1984*. These rules generally provided for the control, regulation and supervision of thoroughbred, harness and greyhound racing in the State.

9.31 With the establishment of the new Racing and Wagering Western Australia (**RWWA**), the rules were continued under section 11 of the *Racing and Gambling Legislation Amendment and Repeal Act 2003*¹⁶, as if the rules were made by the RWWA under section 45(1) of the *Racing and Wagering Western Australia Act 2003* (**RWWA Act**). The rules then expired on August 1 2004¹⁷ and were replaced, respectively, with the *Rules of Greyhound Racing 2004*, *Rules of Harness Racing 2004* and *Rules of Thoroughbred Racing 2004*. These 'new rules of racing' were made by the RWWA under section 45(1) of the RWWA Act and represent an amalgamation of the 'old rules of racing' with national rules of racing.¹⁸

9.32 Section 45(10) of the RWWA Act expressly states that sections 41, 42 and 43(6) of the *Interpretation Act 1984* do not apply to the rules of racing made by the RWWA. That is, after August 1 2003, the 'rules of racing' are no longer required to be tabled in Parliament and are no longer disallowable instruments.

¹⁶ The relevant parts of that Act commenced operation on August 1 2003.

¹⁷ Section 11(5) of the *Racing and Gambling Legislation Amendment and Repeal Act 2003*.

¹⁸ http://www.rwwa.com.au/integrity_rwwaRules.html (current at November 15 2004).

10 THIRTY-SEVENTH PARLIAMENT

- 10.1 The Committee is of the view that the persons or bodies delegated by the Parliament to make instruments with legislative effect hold a serious responsibility, and it is a responsibility that should not go unchecked.
- 10.2 The Committee is of the view that there is a very important role for a parliamentary committee to fulfil in relation to the scrutiny of delegated legislation. The Committee considers that it has performed an effective role in providing such scrutiny and urges the House to ensure that the scrutiny remains part of the mandate of a parliamentary committee.
- 10.3 The Committee considers that the role of the Committee, as established by its terms of reference, should continue into the next Parliament. Should the Legislative Council review the committee system, then the Committee recommends that the House ensure that the Committee's mandate is reflected in a joint parliamentary committee.



Hon Ray Halligan MLC
Deputy Chairman

November 19 2004

APPENDIX 1
PREMIER'S CIRCULAR NUMBER 4 OF 2002, *SUBSIDIARY*
LEGISLATION - EXPLANATORY MEMORANDA

Premier's Circular

Number:	2002/04
Issue Date:	01/03/2002
Review Date:	01/03/2006

TITLE

SUBSIDIARY LEGISLATION – EXPLANATORY MEMORANDA

POLICY

The Joint Standing Committee on Delegated Legislation scrutinises all regulations, by-laws, rules, local laws and other subsidiary legislation by government departments and agencies made subject to disallowance on behalf of the Parliament of Western Australia.

The Joint Standing Committee on Delegated Legislation requires in respect of all such subsidiary legislation:

- One hard copy and one electronic copy of the subsidiary legislation as it appears in the *Government Gazette*;
- One hard copy and one electronic copy of the explanatory memorandum, signed by the CEO and initialled or signed by the relevant Minister; and
- An electronic copy of the principal subsidiary legislation consolidated with all amendments up to the date immediately before the most recent amendments take effect.

BACKGROUND

In order to assist the Parliament of Western Australia, the Joint Standing Committee on Delegated Legislation examines all regulations, rules, by-laws and other subsidiary legislation made subject to s42 of the *Interpretation Act 1984* or other written law.

Further information is provided in the attached guidelines.

DR GEOFF GALLOP MLA
PREMIER

For enquiries contact:	Mrs Jan Paniperis 9222 7400 Senior Committee Clerk Joint Standing Committee on Delegated Legislation
Other relevant Circulars:	
Circular/s replaced by this Circular:	9/96, 37/93

ATTACHMENT TO PREMIER'S CIRCULAR NO 2002/04

EXPLANATORY GUIDELINES

Immediately following the publication in the *Government Gazette* of subsidiary legislation or other instrument that is subject to disallowance, Ministers must ensure that an explanatory memorandum, signed by the Chief Executive Officer of the Department or Agency and initialled or signed by the responsible Minister, is provided to the Joint Standing Committee on Delegated Legislation.

The explanatory memorandum must contain the following information:

- The title of the subsidiary legislation;
- Identification of the section(s) of the statute(s) under which the subsidiary legislation is made;
- A description of the purpose and effect of, and justification for, the subsidiary legislation (or any amendments to or repeals of it);
- Identification of any unusual or controversial provisions;
- Details of consultations undertaken including a list of the business and community groups consulted, a précis of their comments and the response to any suggestions put forward;
- If applicable, reasons justifying any change in fees, charges and penalties and details of the amount of the fee, charge or penalty before the change. This information should be summarized in the explanatory memorandum in a table similar to the example below.

Type of fee	Date Last Updated Increase/Decrease	Old Fee (\$)	New Fee (\$)	Increase/ Decrease (%)
Grant or renewal of fishing boat licence for				
• A boat less than 6.5 metres long	10.09.02 decrease	550.00	85.00	-84.55
• A boat that is 6.5 metres or longer	10.09.02 increase	550.00	600.00	9.09

- The name and telephone number of a person whom the Committee can contact regarding the subsidiary legislation;
- The printed names and the signature of the CEO and printed name and signature or initial of the responsible Minister;
- A disclaimer to the effect that the explanatory memorandum is only an aid to understanding and must not be substituted for the subsidiary legislation or other instrument gazetted, or made available to the public in any way; and
- Where relevant, confirmation that a National Competition Policy Review has been conducted and the outcome of that review.