PARLIAMENT OF WESTERN AUSTRALIA

TWELFTH REPORT

OF THE

JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

IN RELATION TO THE

TREATMENT OF SEWAGE AND DISPOSAL OF EFFLUENT AND LIQUID WASTE AMENDMENT REGULATIONS (NO.2) 1993

Presented by the Hon Bruce Donaldson (Chairman)

12

APRIL 1994

Members of the Committee :

Hon Bruce Donaldson, MLC (Chairman)
Hon Tom Helm, MLC (Deputy Chairman)
Hon Reg Davies, MLC
Hon Doug Wenn, MLC
Mr Bob Bloffwitch, MLA
Mr Ted Cunningham, MLA
Mr Ross Ainsworth, MLA (ceased April 7 1994)
Ms Diana Warnock, MLA (ceased March 30, 1994)
Mr Kevin Leahy, MLA (commenced April 7, 1994)
Mrs June van de Klashorst, MLA (commenced April 7, 1994)

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REPORT OF THE JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION IN RELATION TO THE TREATMENT OF SEWAGE AND DISPOSAL OF EFFLUENT AND LIQUID WASTE AMENDMENT REGULATIONS (NO.2) 1993

1. INTRODUCTION

On Wednesday, March 29, 1994, at a meeting of the Joint Standing Committee on Delegated Legislation, the Hon Reg Davies, MLC, moved the following motion, which the Committee passed :-

> "**That the Joint Standing Committee on Delegated Legislation table a report in the Legislative Council to support a motion, of which notice was given by the Hon Doug Wenn, MLC, on Wednesday, March 23, 1994, for the disallowance of the Treatment of Sewage and Disposal of Effluent and Liquid Waste Amendment Regulations (No.2) 1993.**"

2. TERMS OF REFERENCE

The Rules of the Joint Standing Committee on Delegated Legislation provide, inter alia, that :-

> "**7. If the Committee is of the opinion that any other matter relating to any Regulation should be brought to the notice of the House, it may report that opinion and matter to the House.**"

Pursuant to Standing Rule 7, the Joint Standing Committee on Delegated Legislation provides the following opinion to the House in relation to the Treatment of Sewage and Disposal of Effluent and Liquid Waste Amendment Regulations (No.2) 1993.

3. RECOMMENDATION

As a result of its examination of the Treatment of Sewage and Disposal of Effluent and Liquid Waste Amendment Regulations (No.2) 1993 the Joint Standing Committee on Delegated Legislation recommends as follows :-

That the *Health Act 1911* be amended so as to provide for the imposition of fees and charges by a local authority (as defined in section 3(1) of the *Health Act 1911*).

4. COMMITTEE MEETINGS

The Joint Standing Committee on Delegated Legislation met on the following occasions to examine, inter alia, the Treatment of Sewage and Disposal of Effluent and Liquid Waste Amendment Regulations (No.2) 1993 :-

Monday, March 21, 1994 from 2.10 pm to 3.25 pm
Wednesday, March 30, 1994 from 12.35 pm to 1.40 pm
Thursday, April 7, 1994 from 8.35 am to 9.58 am
Tuesday, April 12, 1994 from 10.20 am to 11.30 am

5. WITNESS TESTIMONY

The following witnesses appeared before the Committee and gave oral testimony :-

Mr Brian Devine, Principal Environmental Health Officer, Health Department of Western Australia;
Dr Chris Berry, Principal Policy Officer, Western Australian Municipal Association;

6. TREATMENT OF SEWAGE AND DISPOSAL OF EFFLUENT AND LIQUID WASTE AMENDMENT REGULATIONS (NO.2) 1993

The Treatment of Sewage and Disposal of Effluent and Liquid Waste Amendment Regulations (No.2) 1993 ("Amendment Regulations") were gazetted on November 12, 1993 and tabled on November 18, 1993.

The Amendment Regulations provide that :-

"**Regulation 23 amended**

3. Regulation 23 of the Treatment of Sewage and Disposal of Effluent and Liquid Waste Regulations is amended in subregulation (1) by deleting "$10" and substituting the following -

$25 ".

Regulation 23 stated, prior to amendment by the Amendment Regulations, that :-

"**(1) The fee referred to in regulation 4(1) to be paid to the Executive Director, Public Health is $10.**"

Regulation 4 states :-

> "**(1) The owner or person authorised to act on behalf of the owner, of any premises whereon it is intended to construct or install an apparatus shall apply to the Executive Director, Public Health on a form approved by the Executive Director for permission to construct or install the apparatus, and shall pay the fee specified in regulation 23(1).**"

The term "apparatus" is defined to mean that meaning given by section 3 of the *Health Act 1911*, namely :-

> "**... any apparatus for the bacteriolytic or aerobic treatment of sewage or any other apparatus for the treatment of sewage approved by the Executive Director, Public Health and includes any buildings, fittings, works, or appliances used or required in connection with the bacteriolytic or aerobic treatment of sewage, and the disposal of effluent or any residue of such treatment.**"

6. REGULATION 23(1)

The Committee requested the attendance of Mr Brian Devine, Principal Environmental Health Officer, Health Department of Western Australia and Dr Chris Berry, Principal Policy Officer, Western Australian Municipal Association, for the purpose of justifying the fee increase. Mr Devine and Dr Berry appeared before the Committee on Wednesday, March 29, 1994.

The fee prescribed in sub regulation 23(1) ("application fee") has stood unaltered since December 1957, it being the maximum fee that could be charged in accordance with section 107(7) of the *Health Act 1911* ("Act") which, prior to amendment in 1992, provided that :-

> "**The Governor may make regulations for the purpose of carrying this section into effect, and may thereby prescribe such rules as may be necessary or convenient for achieving its objects. A regulation made under this power may fix the fee, not exceeding $10 and not less than $1, which shall be paid on the submission of any plans and specifications, and may provide that half of such fee shall be paid to the local authority.**"

The Western Australian Municipal Association has, over a number of years, raised concern about the inadequate fee for septic tank installations and has requested various amendments to the *Health Act 1911* for the purpose of giving local government greater control over approval and installation requirements.

Dr Berry provided the Committee with evidence to suggest that during the 37 year period from 1957 to 1994 the Western Australian Municipal Association has approached, on an annual basis, both the Health Department and the Minister for Health, in an attempt to seek a review of the *Health Act* fees and charges. It was not until 1991 that the *Health Amendment Act 1991* removed the financial limitation placed upon the local government to increase the fee in regulation 23(1). Section 20(a) of the *Health Amendment Act 1991* ("Amendment Act"), proclaimed on January 24, 1992, removed the maximum and minimum charges so fixed by section 107(7) of the Act.

Evidence from Mr Devine suggested that the Health Department has been fully supportive of the Western Australian Municipal Association's attempt to gain greater control over approval and installation requirements pertaining to septic tanks. In 1992, when the *Health Act 1911* was amended and such fees were to be set by regulation, the Health Department sought approval to increase the fee to $102, of which local government was to receive $90. However, the Expenditure Review Committee, to which increases in fees must be submitted for approval, did not support the increase and the fee remained at $10. In 1993 a request for a similar increase was made but approval was only granted for an increase to $25.

The application fee increase to $25 was justified by the Health Department on the following grounds :-

> "**The fee provides a marginal increase to offset a proportion of the costs associated with the initial assessment of the application and the inspection of the apparatus during and after construction/installation. It is intended that the fee be progressively increased until full cost recovery is attained.**"

Dr Berry advised the Committee that, in the opinion of the Western Australian Municipal Association, the maximum fee for inspection and approval of septic tanks, calculated on a cost recovery basis, is $90. This figure is based on three inspections, being a total of three hours work and, according to the Western Australian Municipal Association, should be exclusive of any fees sought by the Health Department.

The maximum fee of $102, submitted by the Health Department, incorporated two components, one being the local government fee of $90, the other being a fee of $12 to be paid to the Health Department.

There appears to be no logical explanation justifying the payment of any fee to the Health Department when in fact all practical work undertaken for the purpose of approving and inspecting septic tanks is performed by the local government. Upon what basis should the Health Department receive a proportion of the application fee?

Mr Devine informed the Committee of the Health Department's role in approving and inspecting septic tanks and upon what grounds the Department justifies the fee of $12, namely :-

> "**The Health Department has a very simple role in that we receive an application, we look at the detail that is required under the plan lay-out and we check to see whether it is caught up in any government sewerage policies or other matters like that, so it is a fairly administrative role we take there.**"

Section 107(7) of the *Health Act 1911* provides that one half of the fee for the approval and inspection of septic tanks shall be paid to the local authority, the other half being paid to the Health Department. Consequently, the Health Department will receive $12.50 from every $25 paid to local government for the approval and inspection of septic tanks. Given the effect of section 107(7) it follows that local government only has authority to procure one half of the proposed $102 fee, unless there is amendment to the *Health Act 1911*. Ipso facto, the application fee would have to be increased to $180 before the local government can recover a fee of $90.

The fee increase has been justified on the grounds of cost recovery. The Committee has no objection to any government department or instrumentality increasing fees to offset costs of providing goods and services to the public. However, it does object to situations where a particular fee has not been increased for many years and is subsequently increased on the basis of cost recovery when in fact, the department or instrumentality has been absorbing the shortfall elsewhere in its budget. That is, if the fee is to be increased to recover costs, which up until the increase have been absorbed elsewhere in the system, for example, as a component of another fee, then logically, that other fee should be reduced to offset the fee increase. If there is no corresponding decrease in the other fee(s) one could logically argue that the fee being increased is not being increased on the grounds of cost recovery because the cost of that particular good or service is already offset by the department or instrumentality.

The Committee is concerned that although the current component ($12.50) of the application fee being levied by the Health Department is justified on the basis of cost recovery, any future increases over and above cost recovery may be challenged on the basis that it constitutes a tax rather than a fee. The purpose of this report is not to decide such questions of law, that is a matter for the courts to determine. However, the Committee is mindful of the fact that such questions need to be addressed by the Government.

7. CONCLUSION

For reasons outlined in this report the Committee recommends that the Government make the necessary amendments to the *Health Act 1911* for the purpose of facilitating the imposition of local government fees and charges by the relevant local government, as opposed to the Health Department, in circumstances where it is appropriate for such a body to levy those fees and charges. Furthermore, the Committee is of the opinion that such amendments should be introduced by the Government in the spring session of Parliament.

The Committee's terms of reference preclude it from recommending or supporting the notice of motion for disallowance moved by the Hon Doug Wenn, MLC. The terms of reference, pursuant to which a motion for disallowance can be moved by the Committee state that :-

> "**5. It is the function of the Committee to consider and report on any regulation that:**
>
> **(a) appears not to be within power or not to be in accord with the objects of the Act pursuant to which is purports to be made;**
>
> **(b) unduly trespasses on established rights, freedoms or liberties;**
>
> **(c) contains matter which ought properly to be dealt with by an Act of Parliament; or**
>
> **(d) unduly makes rights dependent upon administrative, and not judicial, decisions.**"

The Amendment Regulation does not contravene the provisions of Standing Rule 5, consequently, it is beyond the Committee's jurisdiction to move for a disallowance of the Amendment Regulations, or in fact support the notice of motion moved by the Hon Doug Wenn, MLC.

Much of the Committee's scrutiny of delegated legislation involves the review of increases in fees and charges. In many instances the increase, such as the application fee increase in the Amendment Regulations, should be disallowed for reasons outlined in this report. However, the terms of reference preclude the Committee from taking any such action, save the tabling of a report pursuant to Standing Rule 7, or any individual member of the Committee to moving a motion for disallowance.

The parliamentary function of legislative scrutiny of subsidiary legislation, delegated by the Parliament to this Committee, is tempered by the very terms of reference pursuant to which it derives its jurisdiction. That is, the Committee is precluded from effectively scrutinising increases in fees and charges which may not breach Standing Rule 5 but nonetheless should be disallowed on grounds such as those alluded to in this report. Therefore, it is imperative, if the Parliament is to remain accountable to the people of Western Australia, that the terms of reference of the Joint Standing Committee on Delegated Legislation be amended with a view to maintaining that accountability.
