SECOND SESSION OF THE THIRTY-SIXTH PARLIAMENT

REPORT OF THE JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

SESSIONAL REPORT JUNE 28 2001 TO AUGUST 9 2002

Presented by Ms Margaret Quirk MLA (Chairman)

and

Hon Ray Halligan MLC (Deputy Chairman)

Report 6
March 2003

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:

Ms Margaret Quirk MLA (Chairman)
Hon Ray Halligan MLC (Deputy Chairman)
Hon Alan Cadby MLC
Hon Robin Chapple MLC
Hon Ljiljanna Ravlich MLC
Mr Rod Sweetman MLA
Mr Terry Waldron MLA
Mr Peter Watson MLA

Staff as at the time of this Report:

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CONTENTS

CHAPTER 1

PARLIAMENTARY SCRUTINY OF SUBSIDIARY LEGISLATION

INTRODUCTION

1.1 Many Acts of Parliament delegate to the executive government the power to make subsidiary legislation defined in section 5 of the *Interpretation Act 1984* as:

> *…any proclamation, regulation, rule, local law, by-law, order, notice, rule of court, town planning scheme, resolution, or other instrument made under any written law and having legislative effect.*

1.2 These various types of instruments give effect to the legislative purposes of the parent Act and have the same legal force. However, these instruments are not passed by both Houses of the Parliament as is primary legislation. To ensure that the Parliament maintains control over the exercise of the power it has delegated to the executive government, the Parliament has:

- legislated for certain procedures to be followed for the valid making of subsidiary legislation;
- granted the power to either House of Parliament to disallow or amend certain types of instruments of subsidiary legislation; and
- established the Joint Standing Committee on Delegated Legislation to assist the Parliament in carrying out its scrutiny of the making of subsidiary legislation by the executive government.

1.3 Part VI of the *Interpretation Act 1984* contains the procedures for the making of subsidiary legislation in Western Australia. All subsidiary legislation must be published in the *Government Gazette*. The Act also requires the tabling of 'regulations' before each House of Parliament within six sitting days following publication in the *Government Gazette*. Failure to comply with these procedures will result in the subsidiary legislation either being void, as would be the case if there is a failure to publish, or ceasing to have effect, in the case of 'regulations' not being tabled. Section 42(8) defines 'regulations' as including:

- rules;
- local laws; and
- by-laws.

SUBSIDIARY LEGISLATION

1.4 A wide range of primary legislation provides that the Governor may make regulations, not inconsistent with the legislation concerned, that carry out or give effect to the legislation. These regulations are generally drafted by Parliamentary Counsel in the Ministry of Justice (Attorney General's Department) and following approval by the Governor in Executive Council, are published in the *Government Gazette*.

1.5 By comparison, local laws made by local governments are drafted by external consultants, administrative officers within local governments or by legal practitioners experienced in local law making. Local laws are often drafted by using *pro formas* provided by the Western Australian Local Government Association ("WALGA") or by adopting or modifying some other local government's local law on a particular subject matter. The standard of drafting of local laws is highly variable.

DISALLOWANCE

1.6 Disallowance is most commonly dealt with under the general procedure provided for in the *Interpretation Act 1984*. However, the Parliament has provided for specific procedures relating to the disallowance of certain instruments of subsidiary legislation such as metropolitan and regional town planning schemes.[1]

1.7 Section 42(2) of the *Interpretation Act 1984* provides:

> *Notwithstanding any provision in any Act to the contrary, if either House of Parliament passes a resolution disallowing any regulations of which resolution notice has been given within 14 sitting days of such House after such regulations have been laid before it or if any regulations are not laid before both Houses of Parliament in accordance with subsection (1), such regulations shall thereupon cease to have effect, but without affecting the validity or curing the invalidity of anything done or of the omission of anything in the meantime.*

1.8 This section allows any Member of a House of the Parliament within 14 sitting days after tabling, to give notice of motion to disallow a regulation. However, in practice it is unusual for regulations and other instruments to be disallowed in the Legislative Assembly because the government of the day commands a majority of votes on the floor of that House. As a consequence, the vast majority of motions to disallow

[1] See section 33 of the *Metropolitan Town Planning Scheme Act 1959* read with section 18 of the *Western Australian Planning Commission Act 1985* and section 43 of the *Land Administration Act 1997*.

regulations are dealt with in the Legislative Council which has introduced standing orders to ensure that such motions are debated and resolved.[2]

1.9 If a motion to disallow a regulation is agreed to by either House, the regulation ceases to have effect from the date of disallowance. If the Parliament is prorogued by the Governor whilst there is a motion for disallowance to be debated in the Legislative Council then the regulation is also disallowed as the motion is deemed to have moved in the affirmative under the Standing Orders of that House.[3]

1.10 The Standing Orders of the Legislative Council also avoid the prospect of a notice of motion not being moved or a motion for disallowance, once moved, not being brought on for debate. This is because:

- notices of motion to disallow are moved automatically at the expiration of two sitting days after notice has been given[4];
- disallowance motions are given priority over all other motions other than condolence motions and motions for leave of absence from the time that they are moved[5]; and
- if not brought on for debate and resolved earlier, the motion for disallowance must be debated and disposed of on the next sitting day following the expiry of 10 sitting days after the motion was first moved.

1.11 Only a suspension of standing orders, which requires an absolute majority of 18 of the 34 members of the Council, would prevent such a debate. The above procedures in the Legislative Council ensure accountability of executive action in the making of regulations because disallowance motions are required to be resolved within a specific period.

1.12 Disallowance has the effect of repealing the regulations and if those regulations repealed all or part of an earlier regulation, then disallowance has the effect of reviving that part of the earlier regulations.[6] The disallowance process in the Legislative Council is presented simplistically below and more extensively in Appendix 1.

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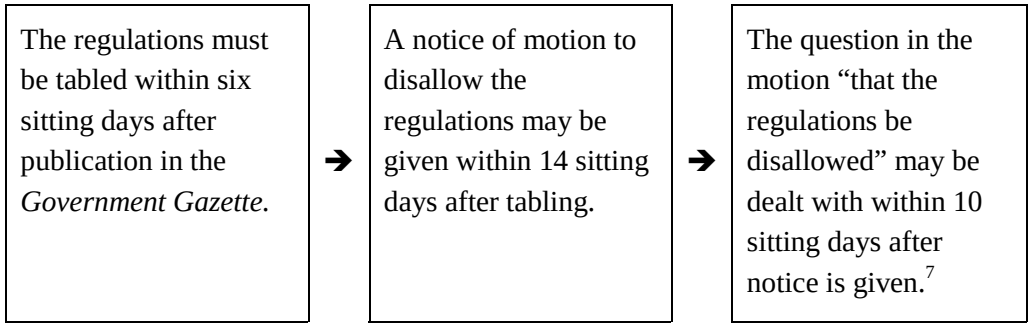
2 See Standing Orders 143, 152 and 153 of the Standing Orders of the Legislative Council.

3 See Standing Order 153(c) of the Standing Orders of the Legislative Council.

4 See Standing Order 152(b) of the Standing Orders of the Legislative Council.

5 See Standing Order 143 of the Standing Orders of the Legislative Council.

6 Section 42(6)(a) & (b) of the *Interpretation Act 1984*.



THE DELEGATED LEGISLATION COMMITTEE

1.13 Each year, hundreds of instruments of subsidiary legislation are made which effect the lives of many Western Australians. They have the same force in law as primary legislation and create legal rights, obligations and duties as well as imposing significant penalties for breach. The Executive Government make most regulations via the Governor in Executive Council. However a significant proportion of subsidiary legislation is made by the councils of the 144 local governments of Western Australia. In addition there are many other instruments generated by statutory bodies and boards.

1.14 The parliamentary function of scrutiny of delegated legislation has been delegated by the Parliament to the Joint Standing Committee on Delegated Legislation ("Committee"). The Committee is an eight-member committee, comprising equal membership from the Legislative Assembly and Legislative Council. All parties, other than One Nation (WA) are represented on the Committee. The Committee's secretariat is based at the Legislative Council Committee Office. This is appropriate, given the Committee's scrutiny function, as historically the Legislative Council is seen to be the House of review.

1.15 The first Committee was established on November 19 1987 following the Report of the Western Australian Legislative Council *Select Committee on a Committee System in the Legislative Council*. Committees were established in every Parliament since that time and operated from 1987 to January 10 2001 on the basis of Joint Rules contained in the Standing Orders of the Legislative Assembly.

1.16 One impediment facing Committees established in the Parliaments prior to the current Parliament was a restriction in the Joint Rules to scrutinising instruments of subsidiary

[7] However debate about the question in the motion must occur on the next sitting day.

[8] The same process applies to instruments other than regulations.

legislation that were 'regulations' within the definition of section 42(8) of the *Interpretation Act 1984*.[9] This precluded the Committees from scrutinising other forms of subsidiary legislation such as orders, declarations or codes unless a particular instrument was made subject to Part VI of the *Interpretation Act 1984*[10] which includes disallowance.

1.17 The Committee's terms of reference were changed on June 28 2001 when the current Committee was established by the Thirty-Sixth Parliament. The Committee is now subject to the same Standing Orders as other standing committees of the Legislative Council, where the vast majority of motions for disallowance are progressed. The Committee's new terms of reference enable it to consider and report to the Parliament on any instrument that is subsidiary legislation as defined by section 5 of the *Interpretation Act 1984*. This includes many legislative instruments that were previously unable to be scrutinised by the Committee, for example, town planning schemes, orders and codes. However, the Committee can still only recommend to the Parliament disallowance of an instrument that is made subject to disallowance by section 42 of the *Interpretation Act 1984* or some other Act.

1.18 The current Committee scrutinises subsidiary legislation to ensure that it complies with the Committee's terms of reference. Approximately 50% of the Committee's work comprises scrutiny of local law making by local governments and the other 50% with instruments made by government agencies, departments, boards and other entities authorised to make regulations. Once tabled, the instruments stand referred to the Committee for scrutiny and recommendation to Parliament as to any further action including disallowance.

1.19 Under its terms of reference, the Committee scrutinises each instrument and inquires as to whether it:

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

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9 Until 1996 section 42(8) included regulations, rules and by-laws but was amended by No. 14 of 1996 (s. 4) to include 'local laws' following the promulgation of the *Local Government Act 1995*.

10 For example section 44 of the *Fish Resources Management Act 1994* states that section 42 of the *Interpretation Act 1984* applies to orders made by the Minister under Division 1 of Part 5 to that Act.

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.

CHAPTER 2

COMMITTEE SCRUTINY OF SUBSIDIARY LEGISLATION AND STATISTICS

OVERVIEW

2.1 The Committee engages in technical legislative scrutiny. It does not examine the policy issues arising in subsidiary legislation. The Committee considers that questions involving government policy in subsidiary legislation fall outside its scope. Rather, it seeks to ensure the highest possible quality of subsidiary legislation, supported by its power to recommend to the House that a particular instrument or a discrete provision in an instrument be disallowed.

2.2 That power is rarely exercised as Ministers and local governments usually cooperate with the Committee and undertake to amend the subsidiary legislation or take other action to meet the Committee's concerns. However, in this reporting period, two instruments of subsidiary legislation were disallowed. One was the *City of Perth Code of Conduct Local Law* which is discussed at paragraph 3.39. Another instrument, the *City of Wanneroo Private Property Local Law*, was subject to a selective disallowance but because the issues remained unresolved when the Parliament prorogued on August 9 2002, it was automatically disallowed under Standing Order 153(c) of the Standing Orders of the Legislative Council.

THE COMMITTEE'S APPROACH TO SUBSIDIARY LEGISLATION

2.3 The Committee's approach is to first raise any issue of concern with either the local government, agency or government department that prepared the instrument by letter to its Chief Executive Officer. A response to the Committee's concerns is then requested and any other additional information provided is considered.

2.4 Consistently, the issues of concern are generally resolved at this stage. However, at other times, the Committee may resolve to conduct a hearing in which public servants or local government employees are called to give evidence to assist the Committee in determining what further action, if any, is required. This may result in the Committee seeking a written undertaking from the relevant Minister or local government council to amend or repeal an instrument in whole or in part. In the absence of such an undertaking the Committee would recommend to both Houses of Parliament that the relevant instrument or part of it be disallowed.

2.5 The prospect of disallowance is a powerful incentive for Ministers of the Crown and local government councils to comply with the Committee's requests. To date, no

recommendation from the Committee to disallow an instrument has been rejected by the Legislative Council.

2.6 Where more than 14 sitting days from the tabling of an instrument is required by the Committee to conclude its scrutiny, the Committee will give what it terms a 'protective' notice of motion in the Legislative Council to disallow the instrument. The Committee will resolve to give a protective notice of motion so as to protect the Parliament's right to disallow the instrument should the Committee ultimately recommend disallowance.

2.7 Where the Committee recommends disallowance, a matter is of public interest, or as information to assist Members of the Parliament in debating a disallowance motion, the Committee will table a Report. In this reporting period, four Reports have been tabled. These are:

- Report No 1 - Port Authorities Regulations 2000, tabled September 26 2001;
- Report No 2 - Model By-laws Series "A" and Health Local Laws made under the *Health Act 1911*, tabled December 20 2001;
- Report No 3 - Business Names Amendment Regulations (No 2) 2001, tabled March 20 2002; and
- Report No 4 - City of Perth Code of Conduct Local Law, tabled September 26 2002.[11]

MEMBERSHIP

2.8 The Committee has eight members and in accordance with its terms of reference, is chaired by a member who supports the Government. During this reporting period, the membership of the Committee was as follows:

- Ms Margaret Quirk MLA (Chairman)
- Hon Ray Halligan MLC (Deputy Chairman)
- Hon Robin Chapple MLC
- Hon Ljiljanna Ravlich MLC
- Mr Rod Sweetman MLA
- Mr Terry Waldron MLA

- Mr Peter Watson MLA
- Hon Simon O'Brien (to April 10 2002)
- Hon Alan Cadby MLC (from April 10 2002)

2.9 The Committee thanks Hon Simon O'Brien for his work on both the former and current Committee and wishes him well as a member of the Standing Committee on Uniform Legislation and General Purposes.

STAFF

2.10 The Committee is assisted by two legal advisers who examine and report on every disallowable instrument of subsidiary legislation, provide advice on all correspondence received, write letters, prepare draft reports for consideration by the Committee and attend meetings of the Committee. During this reporting period the Committee's legal and other advisers were:

- Mr Nigel Pratt, Clerk Assistant;[12]
- Ms Lyn Zinenko, Advisory Officer; and
- Ms Anne Turner, Advisory Officer (Legal).

2.11 Two Articled Clerks, Ms Norlizzah Fayed and Ms Natasha Firth also assisted the Committee. Ms Jan Paniperis, Senior Committee Clerk, provided administrative and clerical support. Mrs Kay Sampson and Mrs Sheena Hutchison provided technical, internet and reception services.

INITIATIVES IN THIS SESSION

The power of Local Governments to make local laws

2.12 A major initiative of this reporting period was the establishment of a working group of stakeholders ("*Working Group*") involved in local law making. These stakeholders are:

- representatives from the Department of Local Government & Regional Development ("DLGRD");

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11 Tabling occurred after the First Session of the Thirty Sixth Parliament terminated. However, it is included in this first sessional report because the disallowance occurred before prorogation.

12 However, during this reporting period, Mr Pratt's title was 'Principal Advisory Officer'.

- representatives from the Local Government Managers Australia (WA Division) ("LGMA");
- representatives from the WALGA; and
- staff of the Committee.

2.13 Representatives from the above stakeholders attended meetings during this reporting period to discuss a range of issues with the aim of improving the standard of local law making.

2.14 The idea of a working group of stakeholders was first mooted in July 2001 when the Committee requested that the DLGRD's Circular No 120 (concerning the provision of explanatory material to the Committee accompanying a local law), be reviewed with a view to improving the quality of information being provided to the Committee by local governments.

2.15 The *Working Group* discussions resulted in a new and significantly improved Circular No 12-2002, the *Local Laws – Explanatory Memorandum Directions 2002* which has gained widespread acceptance by local governments. The Minister for Local Government and Regional Development, Hon Tom Stephens MLC, published the new Circular, on August 27 2002. Of significance was the requirement to provide the explanatory material to the Committee in electronic form with only one hard copy of the local law and explanatory material instead of the previous requirement for 10 physical copies of all material.

2.16 Another initiative was the Committee supplying biannual information reports on issues of concern in local laws to the *Working Group*. The issues that arose in this reporting period are discussed in Chapter 3. Distribution of this information to stakeholders and through them to local governments is expected to improve the quality of local law making by reducing the incidence of local governments publishing local laws that include clauses which the Committee has determined breach one or more of its terms of reference.

2.17 Information on issues of concern to the Committee contained in local laws has been further enhanced by the establishment in October 2002 of a *Working Group* e-mail address to disseminate the information reports to stakeholders on issues of concern as they arise.

2.18 One of the most persistent criticisms the Committee has received from local governments in this first session, is the cost incurred by local governments in having to gazette amendments to local laws in response to the Committee's position on a matter in a local law. Although the requirement to gazette amendments will never entirely disappear, these initiatives are aimed at disseminating information on issues

of concern to stakeholders and through them to local governments as rapidly as possible.

2.19 Local governments are required to submit their proposed local laws to the DLGRD prior to publication. Monitoring of the content of local laws by DLGRD staff who are aware of issues that have been of concern to the Committee is expected to reduce the need to publish amendments. This is because a local government relying on another local government's defective instrument can make the necessary adjustments to their proposed local law before gazettal.

Government Departments, Agencies and Others

2.20 A second major initiative was the reviewing of the Premier's Circular 9/96, which concerned the provision of explanatory material to the Committee accompanying instruments drafted, in the main, by Parliamentary Counsel. As a result, a new Circular was issued in April 2002 and again, of significance, was the requirement to provide the explanatory material and regulations to the Committee in electronic form instead of the previous requirement for 10 physical copies of all material.

STATISTICS

	Financial year 1998-1999	**Financial year 1999-2000**	**July 2000 to November 2000[13]**	**Financial year 2001-2002**
Total number of instruments scrutinised	574	512	271 (adjusted for the 2001 election: 578)	912 (adjusted for the 2001 election: 605)
Total number of local laws/by-laws	255	206	96	461
Percentage of all instruments that represented local laws/by-laws	44.4%	40.2%	35.5%	50.6%
Total number of instruments disallowed on recommendation of the Committee	6	2	2	1

What these Statistics Indicate

2.21 These statistics indicate a burgeoning number of disallowable instruments are being made and scrutinised by the Committee.

13 These figures only represent a five-month period of activity because of the election in 2001 and the late commencement of the first session of the 36th Parliament on May 1 2001.

2.22 There is an anomaly for 2000-2001, which produces misleading statistics. This was due to the State general election in February 2001, the late commencement of the first session of the 36th Parliament on May 1 2001 and the fact that the current Committee did not commence its scrutiny work until July 6 2001. The previous Committee finished meeting in November 2000 and did not meet again in the Thirty Fifth Parliament. Following the opening of the Thirty Sixth Parliament, the new Committee was established on June 28 2001 and first met on July 6 2001. The statistics for 2000-2001 therefore only represent a five-month period of activity from July to November 2000.

2.23 A comparison can be made of the financial years 1999-2000 and 2001-2002. From July 1 1999 to June 30 2000, 512 instruments were scrutinised by the previous Committee compared to 912 instruments from July 1 2001 to June 30 2002. This represents a 78% increase in the Committee's workload. The increased workload in the 2001-2002 year was largely caused by a backlog of 307 regulations that were gazetted in a six-month period between the end of October 2000 and the end of April 2001.

2.24 If there had not been a general election and the Thirty Fifth Parliament had continued, the previous Committee would have scrutinised the majority of the 307 instruments backlog by 30 June 2001. If this had been the case, the number of instruments that would have been scrutinised by the Committee in the 2000-2001 financial year would have been approximately 578, a 13% increase in adjusted terms from the 1999-2000 financial year.

2.25 The current Committee has scrutinised 912 instruments from July 6 2001 to June 30 2002. Taking into account the backlog (912 minus 307), the Committee would have scrutinised 605 instruments in a 12-month period. In adjusted terms, this represents an 18% increase when compared to 1999-2000 and a 5% increase when compared to the adjusted 2000-2001 figure of 578 instruments.

2.26 In 1999-2000, local laws and by-laws represented approximately 40% of all instruments scrutinised by the Committee. In 2001-2002, they represented just over 50% of the total instruments scrutinised. This indicates an overall increase in workload as well as a greater proportion of that increase being the scrutiny of local laws compared with other instruments.

What these Statistics do not indicate

2.27 The statistics reflect raw numerical factors. They fail to demonstrate that local law making in particular has required a more intense level of Committee scrutiny compared with instruments from government departments and agencies. Although constituting 50% of the Committee's work, local laws have consumed approximately 90% of the Committee's scrutiny time.

2.28 In the Committee's view, many of the 144 local governments in this reporting period have gazetted local laws of a poor standard with numerous drafting and procedural errors. Several local governments have also demonstrated a fundamental misunderstanding and lack of knowledge concerning the scope of their local law making powers, resulting in, at times, unreasonable legislation.[14]

2.29 This situation appears to have arisen from a misconception in local government circles that local governments are 'sovereign entities', with plenary law making powers that are not subject to the 'interference' of Parliament or its Committees. There have been several occasions during the current reporting period where the Committee had to remind a local government that their local laws are subsidiary legislation and are subject to both the scrutiny and direction of the Parliament.

[14] This is referring to 'legal unreasonableness' in the 'Tanner' (*South Australia v Tanner* (1989) 166 CLR 161) sense of the term.

CHAPTER 3

COMMITTEE SCRUTINY OF INSTRUMENTS

SPECIFIC CONCERNS RAISED IN 2001-2002 IN RELATION TO LOCAL LAWS

Extractive Industries Local Laws

3.1 The Committee first became aware of a trend by some local governments to modify WALGA's proforma *Extractive Industries Local Law* when it scrutinised the Shire of Denmark's *Extractive Industries Local Law* in August 2001. At that time, the Committee observed that the Shire of Denmark had added a new sub-clause 2.3(3) to the WALGA proforma. The clause read:

> *The local government may exempt a person making application for a licence under subclause (1) from providing any of the data otherwise required under subclause (1), if, in the opinion of the local government, the location and size of the proposed excavation are such that no significant adverse environmental affects will result therefrom.*

3.2 The Committee was concerned about the inclusion by the Shire of Denmark of a very broad general exemption in the above clause. For cogent reasons the Committee accepted that some local governments would take the view that the size and impact of an extractive industry would not warrant the expense to the applicant of having to meet every condition for the grant of a licence required by the WALGA proforma. However, the Committee's concern was not with a valid exercise of the discretionary power granted to the Shire of Denmark in the local law but with the lack of any specific criteria in the clause to guide the Council when it exercised its discretion. The Committee considered that the clause was both potentially dangerous to the Council because the power could be exercised arbitrarily, thereby invalidating the clause and is not contemplated or authorised by the *Local Government Act 1995*.

3.3 For example, because clause 2.3(3) permitted a Council to exempt an applicant from providing any of the data otherwise required, the discretion permitted the Council to exempt an applicant from providing:

- a description of the existing site environment and a report on the anticipated effect that the proposed excavation will have on the environment in the vicinity of the land;
- details of the nature of existing vegetation, shrubs and trees and a description of measures to be taken to minimise the destruction of existing vegetation;

- a description of the methods by which existing vegetation is to be cleared and topsoil and overburden removed or stockpiled;

- a description of the measures to be taken to minimise sand drift, dust nuisance, erosion, water course siltation; and

- a description of the measures to be taken to comply with the *Environmental Protection (Noise) Regulations 1997.*

3.4 If the Council was to form an opinion on environmental impacts, so as to exercise its discretion, then the Committee considered it must take into account environmental information. Short of the Council commissioning its own report in relation to the proposed excavation, the local law requires that the applicant provide data relevant to environmental impacts. The broad discretion in clause 2.3(3) enabled the Council to exempt the applicant from providing the very information it would need to form an opinion on environmental impacts.

3.5 The Committee took the view that clause 2.3(3) was neither contemplated nor authorised by the *Local Government Act 1995*. Following discussions with the Shire of Denmark, the offending clause was amended to bring it within the power of the Act. The relevant stakeholder, WALGA is now aware of this modification.

The Governor's approval under the *Local Government Act 1995*

3.6 During this reporting period, the Committee observed a trend in a number of local governments' *Property Local Laws* whereby the local government failed to obtain the Governor's approval to extend the operation of the local law beyond its district. Such a practice is contrary to section 3.5 of the *Local Government Act 1995*. Sub-section (2) provides that:

> *A local law made under this Act does not apply outside the local government's district unless it is made to apply outside the district under section 3.6.*

3.7 Section 3.6 of the Act states that a local government can only make a local law that applies outside its district if the approval is first obtained from the Governor. Section 3.6(1) provides:

> *Places outside the district*
>
> *(1) If the Governor's approval has been first obtained, a local government may make a local law under this Act that applies outside its district.*

3.8 When the permission of the Governor has not 'first' been obtained, the local law, to the extent that it attempts to apply beyond the boundaries of the district is not contemplated or authorised by the *Local Government Act 1995*.

3.9 The Committee considered that this had important ramifications for the enforcement of local laws in coastal districts. This is because the local laws prohibited activities carried out in the sea which in all cases was beyond the boundaries of the district. These cease at the low water mark. For example, the local law permitted an 'authorised person' to set aside an area of the sea where surfboards or bathing are prohibited. If someone uses a surfboard or bathes in a prohibited area, which is outside the area of the district, that person commits an offence. This was also the case if a person refused to obey the direction of a surf lifesaver, an 'authorised person' under the local law. If the Governor had not first given permission for the local law to apply outside the boundaries of the district, a prosecution for breach of these clauses would fail and possibly expose the local government and the prospective defendant to costly legal actions.

3.10 The Committee informed the local governments concerned of the procedural defect in the making of their local government property local laws and these were subsequently corrected and re-published after receipt of the Governor's approval.

Ouster Clauses in Local Laws

3.11 In this reporting period, the Committee observed a trend by local governments, evident in a number of different types of local laws, to attempt to oust the jurisdiction of the courts by purporting to extinguish the tortious liability of the local government. For example, clause 5.19 of the City of Cambridge *Local Government and Public Property Local Law* stated:

> *A* [golf] *player or other person is not entitled to make any claim by way of damages or otherwise against the local government, an authorised person, local government employee, local government appointed subcontractor or person for whose acts the local government is responsible in law, for any injury or damage sustained by that player or person through any act, default or omission of an authorised or other person.*

3.12 Clause 5.19 is a typical 'ouster' clause. Such clauses by their character seek to oust the jurisdiction of Courts to hear claims or review decisions of inferior courts or tribunals. Clause 5.19 purports to prevent a golf player from bringing an action in tort for damages against the local government as a result of injury sustained on the local golf course. It sought to:

- oust the vicarious liability of the local government for its personnel; and

- oust the tortious liability of the local government.

3.13 Section 9.56 in Part 9 Division IV of the *Local Government Act 1995* protects Councillors, Council employees and agents from personal liability in tort who perform actions or omissions in good faith. However, this protection does not extend to the entity known as 'the local government'.

3.14 The Committee determined that clause 5.19 was inconsistent with section 9.56(4) of the *Local Government Act 1995*. Where such inconsistency occurs, the local law is inoperative under section 3.7 of the *Local Government Act 1995* and void by operation of section 43(1) of the *Interpretation Act 1984.*

3.15 The liability of public authorities in tort is well established and governed by the same principles that apply to private individuals.[15] A public authority such as a local government can be liable, as if it were a private individual, for the torts of negligence, nuisance and breach of a statutory duty. However, the fundamental common law right to bring an action in tort or otherwise against a local authority may be abrogated or modified by statute. Subsidiary legislation may permit abrogation in circumstances where the Act permits it, either expressly or by necessary implication.[16] The High Court of Australia ("High Court") in *Coco v The Queen* made it clear that:

> *The courts should not impute to the legislature an intention to interfere with fundamental rights. Such an intention must be clearly manifested by unmistakable and unambiguous language. General words will rarely be sufficient for that purpose if they do not specifically deal with the question because, in the context in which they appear, they will often be ambiguous on the aspect of interference with fundamental rights.*
>
> *…Unless the Parliament makes unmistakably clear its intention to abrogate or suspend a fundamental freedom, the courts will not construe a statute as having that operation.*[17]

3.16 In *Graham Barclay Oysters Pty Ltd v Ryan*[18], Justice Lee in the Federal Court of Australia summarised the liability of public authorities in tort and reinforced a long held position when he said a public authority is not immune from suit in negligence

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15 *Sutherland Shire Council v Heyman* (1985) 157 CLR 42.

16 *Coco v The Queen* (1994) 179 CLR 427 at 438.

17 *Coco v The Queen* (1994) 179 CLR 427 at 437.

18 [2000] FCA 1099.

unless that immunity is provided by statute. That position remains unaltered by the appeal of that decision to the High Court[19]

3.17 To the extent that tortious liability is not excluded by an Act, private citizens have enjoyed standing to sue local governments and many have done so successfully. In the Committee's opinion, the general legislative making power in section 3.5(1) of the *Local Government Act 1995*, is insufficient to authorise the making of a local law that abrogates the fundamental right to sue a local authority for a cause of action recognised by the common law or statute. In the absence of express words or by necessary implication, the Committee cannot impute an intention to Parliament that it would authorise the making of subsidiary legislation that abrogated this fundamental common law right.

3.18 The Committee considered that clauses like 5.19 are neither authorised nor contemplated by the *Local Government Act 1995.* It will continue to require undertakings that they be repealed, and in the absence of an appropriate undertaking, recommend disallowance.

Verge Treatments and Indemnity Clauses in Local Laws

3.19 In this reporting period, the Committee observed a trend whereby local governments deviated from the WALGA proforma local law dealing with verge treatments by including an indemnity clause.[20] For example, in the *City of Stirling – General Local Laws – Part V* clause 488(a) titled: *Owner's or Occupier's Responsibilities in Relation to Verge Treatments* states:

> *An owner or occupier who installs and maintains a verge treatment shall-*
>
> > *(a) indemnify the Council against all or any damage or injury caused to any person or thing including any street, pavement, footpath or crossover or any pipe or cable and shall make good at such owner's or occupier's expense all such damage caused;*

3.20 Such a clause allows a home owner/occupier to install sprinklers, garden or lawn on the front verge which is Council property. The clause then contemplates that if a passer-by trips over a sprinkler and is injured, then that person might sue the Council, as occupier of the land. If damages are awarded or compensation paid, then the

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19 *Ryan v Great Lakes Council; State of New South Wales* [2002] HCA 54.

20 For example, the Shire of Wyndham-East Kimberley in its - *Consolidated Local Government Laws;* the City of Stirling in its - *General Local Laws Part V* and the City of Cambridge in its *Local Government and Public Property Local Law.*

Council could recover these damages and costs through the indemnity imposed on the home owner/occupier by the local law.

3.21 The Committee has consistently taken the approach that a local law which imposes an indemnity on home owners is inconsistent with the *Local Government (Uniform Local Provisions) Regulations 1996* and more particularly, regulation 17. It states:

> *(2) A local government may —*
>
> > *(a) grant permission to construct anything on, over, or under a …public place that is local government property;*
>
> *(5) A person who constructs anything in accordance with permission under this section is required to —*
>
> > *(a) maintain it; and*
> >
> > *(b) obtain from an insurance company approved by the local government an insurance policy, in the joint names of the local government and the person, indemnifying the local government against any claim for damages which may arise in, or out of, its construction, maintenance or use.*

3.22 The term 'constructs' is not defined in either the *Local Government Act 1995* or the *Local Government (Uniform Local Provisions) Regulations 1996.* High Court Australian case law[21] and the rules of statutory interpretation permit the use of the *Macquarie Dictionary* to ascertain meaning and in this case, 'construct' means to 'build' physical things. The term is clearly referring to a 'structure' of some sort being 'built' on a verge, for example, a decorative wall/fence or fountain that may, potentially, become an obstruction and hence a hazard.

3.23 Verge treatments are usually defined to include:

- reticulation pipes and sprinklers;
- plants, garden, grass; and
- occasionally brick paving.

[21] *State Chamber of Commerce and Industry v Commonwealth* (1987) 163 CLR 329.

3.24 In the Committee's opinion these are not 'constructions'[22] for the purposes of Regulation 17 of the *Local Government (Uniform Local Provisions) Regulations 1996* and that the correct source of the power for regulating or prohibiting verge treatments is Regulation 5 titled: '*Disturbing local government land or anything on it'*. It states:

> *A person who, without lawful authority —*
>
> *(a) interferes with the soil of, or anything on, land that is local government property; or*
>
> *(b) takes anything from land that is local government property,*
>
> *commits an offence the penalty for which is a fine of $1 000.*

3.25 There is no express reference in regulation 5 for the need of an owner/occupier to provide an indemnity, just that the person have 'lawful authority', either by express or implied permission of the local government to disturb the soil. By comparison, regulation 17 does require an indemnity because it is dealing with 'constructions' on local government property that may become dangerous impediments to the general public. The indemnity in regulation 17 is only enforceable through a contract of insurance which is required to be taken out by the home owner in the joint names of the home owner and the local government. The indemnity is therefore contractual in nature, not imposed by subsidiary legislation.

3.26 In the Committee's view, the inclusion of indemnity clauses in local laws are a product of an unusual and unexpected use of the powers in the *Local Government Act 1995* and significantly, not part of WALGA's proforma local law in relation to verge treatments. The Committee considers that there is good reason for exclusion. Such clauses are essentially punitive in character, directly impacting on civic-minded ratepayers who maintain front verges at their own expense, thereby saving the local government considerable expense in maintenance costs. These owner/occupiers improve the amenity value of those verges and hence their local community by installing permissible verge treatments.

3.27 The practical effect of such clauses is that if a person installs reticulation on the verge and someone trips over it, and is injured, the home owner/occupier although not found liable or possibly only partly liable, must provide an indemnity to the extent of the

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[22] Although arguably, the laying of paving could be considered a 'construction'. However, in light of *Richmond Valley Council v Standing* [2002] NSWCA 359, a local government's need for an indemnity may now be redundant. There, a pedestrian tripped and fell on an irregular paved concrete surface. The Court said that it was reasonable to expect the plaintiff to have seen what lay ahead as she walked along in broad daylight. The conditions of the site were so obvious and so typical of those commonly to be encountered in daily life that the defendant Council was not under any duty to undertake inspections to identify them. *"Uneven surfaces and differences in level between flagstones of about an inch may cause a pedestrian temporarily off balance to trip and stumble, but such characteristics have to be accepted. A highway is not to be criticised by the standards of a bowling green"*.

local government's liability. By contrast, owner/occupiers who do nothing to the front verge suffer no penalty. In the Committee's view, the clause is unconscionable and discriminates against those persons who improve the amenity of the district at no cost to the local government.

3.28 The Committee considered that such clauses are inconsistent with regulation 17 of the *Local Government (Uniform Local Provisions) Regulations 1996* and will continue to require their repeal or recommend disallowance.

Graffiti clauses in Local Laws

3.29 The Committee observed a small number of local governments attempting to deal with eradicating graffiti by a local law. Typically the clause required a person who lives next to a public place or reserve to treat their newly erected fences with a non sacrificial graffiti protection paint and fix a plate to the wall indicating the name of the anti-graffiti paint. Existing fences may require such treatment when directed by the local government.

3.30 The previous Joint Standing Committee on Delegated Legislation rejected such local laws when it scrutinised the *Town of Vincent Local Law Relating to Fencing, Floodlights and Other External Lights* in October 1999 as being punitive. The previous Committee considered such local laws to be unacceptable in 1999 and the current Committee retains that position. WALGA has also advised its Members against drafting graffiti local laws because the State Government has covered the field.[23]

3.31 In the Committee's view, home owners and occupiers paying for graffiti protection when their actions were not the cause of the graffiti is burdensome. This is particularly so given the compulsory nature of the requirement to apply an expensive graffiti protection coating to an existing fence or when erecting a new fence, structure, building or wall.[24] There may be circumstances where the owner/occupier is not in a position to pay for the work required and this would expose the person contravening the requirement to offences under the local law that impose a modified penalty.

3.32 In 1999, the previous Committee decided that the compulsory nature of these local laws infringed on the home owner's existing rights by requiring that person to remedy and pay for (under threat of penalty) damage to the appearance of their property perpetrated by another.

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23 Section 6 of the WALGA Local Laws Manual.

24 The Committee received evidence of an estimate: $350 for a front fence with the paint lasting between 3 and 5 years.

3.33 In 2002, the current Committee accepts that under section 3.10 of the *Local Government Act 1995*, a local law can create offences and prescribe penalties. However, the Committee considers that Parliament did not contemplate the local law making power in section 3.5 being used to make a local law in which home owners or occupiers are locked into a particular method of dealing with criminal damage to their own property. There are other, less expensive methods of maintaining the amenity of a fence. These include painting over the offending material or planting fast growing ivy or hedges to make the fence less likely to be vandalised.

3.34 The Committee decided that the prescriptive nature of such clauses is neither contemplated nor authorised by the *Local Government Act 1995* on the grounds of unreasonableness. Such clauses:

- expose poorer constituents of the local government to a financial burden; and
- indirectly punish home and business owners/occupiers for the criminal activities of others by making them 'offenders' if they fail to pay the modified penalty.

3.35 At law, there is a presumption against Parliament making unreasonable delegated legislation. The test of 'unreasonableness' is whether the local law is capable of being considered to be reasonably proportionate to the end to be achieved.[25] The local law must be so lacking in reasonable proportionality so as not to be a real exercise of the power.

3.36 In applying this test, the end sought to be achieved by a local government is the removal of graffiti in the district so as to maintain amenity. However, the means of achieving this is disproportionate because its effect is to punish the home owner/occupier who may not be able to pay either for the non sacrificial paint or the modified penalty if there is a failure to comply with the local law. That home owner/occupier has already suffered damage to his property and is not given the option of less expensive means of ameliorating the problem.

3.37 Further, the Committee considers that graffiti eradication requires a 'whole of community' approach, rather than an individual home owner/occupier problem and that the community should bear the cost of graffiti protection and removal. In the Committee's view, such an approach is a more 'proportionate' response to this problem.

3.38 For these reasons, the Committee will continue to require the repeal of such clauses in local laws or recommend that they be disallowed.

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

Codes of Conduct incorporated into a Local Law

3.39 During this reporting period, the Legislative Council disallowed the *City of Perth - Code of Conduct Local Law.*[26] The City of Perth had attempted to incorporate a code of conduct for its elected members and staff into its local law. The Committee after receiving independent legal advice from a barrister considered that such an action was a sub-delegation of power and in any event, unauthorised by the scheme of the *Local Government Act 1995*. That Act stipulated participation of Councillors in meetings rather than their exclusion as provided by this local law.

Health Local Laws

3.40 Following the Childers backpackers fire in Queensland in 2001, the Committee raised concerns about outdated fire safety measures in lodging houses after it discovered that 128 local governments' health local laws contained a provision that permitted the keeper to leave the lodging house unattended for up to 48 hours without the need for a substitute manager.

3.41 Additionally, the Committee considered an outdated Model Health by-law that permitted a medical officer to insist on examining a person without consent and included conducting invasive procedures like collecting bodily specimens.

3.42 The Committee considered three model by-laws, upon which the 128 local governments' health local laws were based and determined that they were neither contemplated nor authorised by the *Health Act 1911*. Following correspondence with the Department of Health and the Minister for Health, Hon Bob Kucera MLA, the Minister agreed to repeal the *Infectious Diseases (Inspection of Persons) Regulations 1971* and to amend those clauses in local laws that contained the flaws relating to fire safety and lodging house keepers.

Powers of entry under the *Local Government Act 1995*

3.43 During this reporting period, the Committee considered the scope of local law making power under section 3.5 of the *Local Government Act 1995* and more particularly, local laws that authorise entry onto private land. Both the Committee and the DLGRD had taken the view that the power to make a local law under section 3.5(1) affecting private land was restricted by sections 3.25, 3.27 as well as Schedules 3.1 and 3.2 of the *Local Government Act 1995*.

3.44 This view was based on an interpretation of that Act in which the general local law making power in section 3.5(1) is constrained by sections 3.25, 3.27 and the specific

[26] Disallowance occurred on June 28 2002. However, the actual report was not tabled during this reporting period. Report No 4 - City of Perth Code of Conduct Local Law, tabled September 26 2002.

matters enumerated in Schedules 3.1 (Divisions 1 and 2) and 3.2. Hence a local law that attempts to deal with matters concerning private land beyond the matters provided for in Schedules 3.1 or 3.2 is neither contemplated nor authorised by the *Local Government Act 1995* because it is:

- inconsistent with the Act under section 3.7; and
- void under section 43(1) of the *Interpretation Act 1984*.

3.45 Solicitors advising WALGA, provided WALGA with an opinion dated April 17 1998 in which it argued that despite a contrary view held by the then Department of Local Government, the local law making power under section 3.5 was not limited by sections 3.25, 3.27 and the matters specified in the related Schedules. A copy of this opinion was subsequently included in an edition of the WALGA *Local Laws Manual*.

3.46 Some local governments have relied upon the legal opinion to justify making local laws in respect of private land and authorise entry in circumstances not contemplated by the Schedules. Examples have been:

- a local law in respect of bees that authorises the local government, upon non-compliance with a notice, to enter onto the land and remove hives if the bees become a nuisance and to recover the cost of doing so from the owner or occupier;
- a local law that authorises the local government, upon non-compliance with a notice, to enter onto the land to repair or replace a dividing fence (as opposed to a fence abutting a public place) when it is dilapidated or unsightly and to recover the cost of doing so from the owner or occupier; and
- a local law that authorises the local government, upon non-compliance with a notice, to enter onto the land to prevent light shining into a neighbouring property.

3.47 None of these matters are specified in Schedule 3.1 or 3.2 to the *Local Government Act 1995*.

3.48 The DLGRD advised the Committee that, as part of the current review of the *Local Government Act 1995*, it would seek to have Schedule 3.1 amended by regulation to ensure that there is authority under the Act to make such local laws. That would put beyond question the issue of whether these local laws were in fact, contemplated or authorised by the *Local Government Act 1995.* However, it would not clarify the possibly erroneous view held by many local governments that they can ignore sections 3.25, 3.27 and the related Schedules when making a local law authorising entry to private land or in respect to private land.

3.49 The DLGRD obtained an opinion from the Crown Solicitor on the correctness of the legal opinion provided to WALGA. The Crown Solicitor agreed with the views expressed by WALGA's lawyers.

3.50 The Committee sought its own legal opinion on this matter from Mr Malcolm McCusker QC. That opinion was used in part to support the Committee's and the DLGRD's views. The Committee will shortly be tabling a report in which it will outline its views on the scope of the general local law making power in respect to private land and powers of entry in the *Local Government Act 1995*.

Other Matters

Unsigned explanatory memorandum

3.51 During this reporting period, the Committee noted the prevalence of unsigned explanatory memoranda accompanying local laws. The Committee has always considered it essential that both the Mayor/President and the Chief Executive Officer of the local government sign the explanatory memorandum.

3.52 The Chief Executive Officer is the head of the executive arm of local government, responsible for administering the local law and the Mayor or President is the representative of the legislative arm of local government that enacted the local law. Law making has been described by the Crown Solicitor's Office as a 'grave responsibility' and so the requirement for the Mayor/President and Chief Executive Officer to sign the explanatory memorandum is a matter of proper accountability of local government legislative action.

3.53 The new *Local Laws – Explanatory Memorandum Directions 2002* which came into operation on August 27 2002 clearly require the President/Mayor to sign the Explanatory Memorandum and as such the Committee expects to see a marked improvement in 2003.

Lack of prompt response to Committee inquiries

3.54 During this reporting period, many local governments failed to respond to Committee requests within advised timeframes. Frequently, the Committee was told that the Council would not be meeting for another month or even when given time, would not alter the agenda to deal with a request from the Committee for an undertaking.

3.55 When this occurred the Committee reminded Councils that the Committee must work under strict time limits governed by the *Interpretation Act 1984* and the Standing Orders of the Legislative Council dealing with the disallowance of local laws. Failure to address the Committee's concerns within the timeframes requested would result in the Committee recommending disallowance of the local law. This occurred with the

City of Wanneroo when prorogation of the Parliament resulted in an automatic disallowance of certain clauses in its *Private Property Local Law 2001*.

3.56 The Committee endeavours to check the local government's Website (if available) to ascertain when the next full Council meeting is to be held and stipulates a date to respond to the Committee's request after that meeting. Frequently the matter is not put forward by the Council as an urgent additional agenda item. In such a situation, the Committee then recommends the Council convene a special meeting of Council under Part 5, Division 2 of the *Local Government Act 1995* to resolve the matter. The Council is advised to arrange the meeting so that the Committee is informed of Council's decision about the written undertaking by the requested date, otherwise, this may result in the Committee recommending the local law be disallowed.

Quality of drafting

3.57 The Committee has also observed a diversity of drafting quality amongst local governments. This does not appear to be related to the choice of either 'in house' drafting or external advisers. Many local laws have required amendment to rectify errors resulting from the transmission of errors in one local government's gazetted local law to another. The drafting errors continue to range from the simple numerical, typographical type to incorrect grammatical phrasing, inaccurate numbering and incorrect citation. There does not appear to have been any improvement in the quality of local law drafting from when the DLGRD reported its concerns about this matter to local governments in *Circular Number 34-2000* in December 2000.

3.58 The Committee remains hopeful that the dissemination of the biannual information reports on issues of concern in local laws produced by the *Working Group* will improve the drafting standard of local laws.

SPECIFIC CONCERNS RAISED IN 2001-2002 IN RELATION TO INSTRUMENTS FROM GOVERNMENT DEPARTMENTS AND AGENCIES

The Governor's 'necessary or convenient' power

3.59 A persistent theme during this reporting period has been an increasing number of government agencies and departments using the Governor's 'necessary or convenient' regulation making power to authorise activities beyond that authorised or contemplated by the relevant enabling Act.

Dangerous Goods (Transport) (Dangerous Goods in Ports) Regulations 2001

3.60 One example of this was regulation 44 of the *Dangerous Goods (Transport) (Dangerous Goods in Ports) Regulations 2001*. These were the inaugural regulations accompanying the *Dangerous Goods (Transport Act) 1998*. Essentially the regulations adopted AS 3846-1998 which is the standard for the *Handling and*

Transport of Dangerous Cargoes in Port Areas published by Standards Australia. Regulation 44(1) stated:

> *If a Competent Authority grants an exemption from compliance with a provision of the regulations in relation to the transport of a type of dangerous cargo to a person or a class of people, the Competent Authority may extend the exemption subject to specified conditions to another class of people*.

3.61 The Department relied on the 'necessary or convenient' power to make the regulation. It argued that regulation 44 was 'necessary' to ensure a commercially level playing field between competing stevedoring companies in ports. The Committee disagreed. The 'necessary or convenient' power is the only other source of power for regulation 44 but case law holds that subsidiary legislation cannot be used to widen the purposes of the Act, it only covers what is incidental.[27] It cannot be used to supplement the Act, just complement. In the Committee's view, there was no power, either express or necessarily implied in that Act to extend the exemption from compliance with a provision of the regulations to a class of people who have not applied for an exemption.

3.62 The Act only contemplated that a person or representative of a class of people could apply to the Competent Authority for an exemption and that this should be granted by reference to certain prescribed matters. In contrast, regulation 44 contemplated an exemption being granted by a Competent Authority to another class of people who have neither applied nor furnished the requisite information in order for it to be satisfied that an exemption be granted.

3.63 The Committee queried how the Competent Authority could be 'satisfied' that the requirements of the Act had been met, when no applicant had actually furnished the requisite information. It is only after consideration of this information that the Competent Authority can be satisfied that an exemption should be granted. Evidence received by the Committee suggested that motivation for the offending regulation was:

- the desire for a commercially level playing field between competing stevedoring companies;
- cost effective safety solutions; and
- the desire to achieve maximum productivity for the State.

3.64 The Committee took the view that these motives are contrary to the purposes contemplated by the *Dangerous Goods (Transport) Act 1998* which is best expressed

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27 *Shanahan v Scott* (1957) 96 CLR 245.

in its Long Title. This is: *to provide for the safe transport of dangerous goods by vehicles.* In the Committee's view, the grant of an exemption to another class of people as permitted by regulation 44, may very well create more risk of danger.

3.65 These disclosed motives led the Committee to conclude that the general regulation making power contained in section 8(1) of the *Dangerous Goods (Transport) Act 1998* had also been used for an improper purpose. In the Committee's view, a commercial imperative cannot be the foundation for regulation 44, it must be for the safe transport of dangerous goods. For this reason, the Committee considered that regulation 44 had been made for an improper purpose.

3.66 The High Court case of *R v Toohey*[28] is authority for the proposition that a regulation which appears on its face to be made for a purpose that was not authorised by the empowering statute under which it purports to be made will be invalid. The reason for this was best expressed by Chief Justice Gibbs when he said:

> *It would be anomalous if a regulation which bore the semblance of propriety would remain valid even though it should be shown in fact to be made for an unauthorised purpose; that would mean that a clandestine abuse of power would succeed when an open excess would fail.*[29]

3.67 Regulation 44 was later repealed.

Perth Passenger (Transport) Regulations 2001

3.68 Another persistent side effect of government agencies using the 'necessary or convenient' regulation making power is the erosion of fundamental common law rights. An example of this was regulation 29 of the *Perth Passenger (Transport) Regulations 2001*.

3.69 Regulation 29 concerned the ability of an authorised person to seize or take possession of anything that afforded evidence of a commission of an offence. However, there is no express power in the *Transport Coordination Act 1966* to source such a regulation and so the Department of Transport relied upon the Governor's 'necessary or convenient' regulation making power.

3.70 The Committee took the view that the 'necessary or convenient' regulation making power will not authorise regulations like regulation 29 because the phrase 'necessary or convenient' only authorises subsidiary legislation which:

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28 (1981) 151 CLR 170.

29 (1981) 151 CLR 170 at p. 192.

> *"carries into effect what is enacted in the statute itself. It covers what is incidental to the execution of its specific provisions".*[30]

3.71 In the Committee's view regulation 29 went beyond what was enacted in the *Transport Coordination Act 1966* on the subject matter of 'powers for authorised persons'. Regulation 29 had to be limited to the subject matter in section 49 of the *Transport Coordination Act 1966*.

3.72 *Shanahan and Scott* is the seminal case on the subject of the scope of the 'necessary and convenient' regulation making power. The High Court said:

> *Powers of this kind have been discussed in more than one case in this court: see Carbines v Powell (1925) 36 CLR 88; Gibson v Mitchell (1928) 41 CLR 275; Broadcasting Co of Australia Pty Ltd v The Commonwealth (1935) 52 CLR 52; Grech v Bird (1936) 56 CLR 228; Morton v Union Steamship Co of New Zealand Ltd (1951) 83 CLR 402 at 409, 410.*
>
> *The result is to show that such a power does not enable the authority by regulations to extend the scope or general operation of the enactment but is strictly ancillary. It will authorise the provision of subsidiary means of carrying into effect what is enacted in the statute itself and will cover what is incidental to the execution of its specific provisions. But such a power will not support attempts to widen the purposes of the Act, to add new and different means of carrying them out or to depart from or vary the plan which the legislature has adopted to attain its ends.*

3.73 The Committee's view was that because there is no express or necessarily implied power in the *Transport Coordination Act 1966* to make regulation 29, the 'necessary and convenient' regulation making power could not be extended to deal with a disparate matter not contemplated by the Act.

Matters more appropriately contained in an Act

3.74 The Committee scrutinised the *Port Authorities Regulations 2001*, made under the *Port Authorities Act 1998* which is *"An Act about port authorities, their functions, the areas that they are to control and manage, the way in which they are to operate, and related matters".*[31]

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30 *Shanahan v Scott* (1957) 96 CLR 245.

31 *Port Authorities Act 1999* (WA) long title.

3.75 The *Port Authorities Act 1998* consolidated a large body of legislation dealing with port authorities, which had been enacted over many years. Previously, each of the seven major ports in Western Australia had its own legislation, which outlined its duties, functions and powers. The plethora of Acts made it difficult to facilitate trade in a commercial manner and this was the catalyst for reform.

3.76 Schedule 7 of the Act empowers the Governor to make regulations in specific areas. It contains 42 items, which deal with areas such as signals, control of traffic, overloading, supervision of staff and other general matters. There are also five items dealing with the exemption or the limiting of liability, and one item granting power to deal with offences.

3.77 Parliamentary records indicated that Schedule 7 was not debated in either House of Parliament during the passage of the Bill.

3.78 The *Port Authority Regulations 2001* were inaugural and developed to support the *Port Authorities Act 1998.* Approximately 1,500 old regulations made under several different empowering Acts were examined during the development of the regulations. Previously, each port had its own regulations, some of which were common to all ports and some of which were peculiar to specific ports. In drafting the regulations, attempts were made to bring together the important parts of the previous regulations and also to introduce new ones in support of the Act.

3.79 The Committee's view was that five of the regulations were of such fundamental importance that they should not be dealt with by regulation, but be dealt with expressly in the primary legislation. The Committee considered that the five regulations were repugnant to fundamental common law rights. These regulations included :

- a limitation of the liability of a port authority for damage or loss either generally or in circumstances specified in the regulations;
- an exemption of a port authority from liability for damage or loss in circumstances specified in the regulations;
- a limitation of the time for making a claim against a port authority for loss or damage;
- the powers of members of staff and police officers in relation to persons who are committing or have committed or are believed to be committing, or to have committed, offences under the Act; and
- liability for loss or damage occurring because of obstruction of or interference with the operation of a navigational aid.

3.80 Some regulations sought to limit port authorities' liabilities or totally exempt port authorities from liability and appeared to impinge on the common law right of the public to access the courts. Another eroded the common law right of property owners or occupiers to exclude others from entry onto premises unless permitted by law. This principle reflects the policy of the law to protect the possession of property and the privacy and security of the occupier.

3.81 The Committee considered that if fundamental common law rights were to be abrogated, then Parliament should do so expressly within the *Port Authorities Act 1998* rather than in a schedule to it permitting the making of regulations. The Committee contended that by doing so, Parliament re-affirms the legal doctrine that any abrogation of rights acquired under the common law must be found in the primary enactment rather than being left to the discretion of the Executive through a regulation making power. The Committee was of the view that by placing these matters within the *Port Authorities Act 1998* and expressing an unambiguous intention to abrogate or curtail a fundamental common law right, the parliamentary process will be enhanced by securing a greater measure of attention to the impact of legislative proposals on fundamental rights.[32]

3.82 Another regulation supplemented the extent of the power to enter premises by including a third class of person (persons other than staff or police) not provided for in the regulation making power. The regulation also went beyond what was permitted by authorising entry for the purposes of determining whether an offence may have been committed without the need to form a belief or have knowledge that an offence has been, will be or is being committed. This regulation overrode the fundamental common law right that a person is entitled to the enjoyment of his or her property without unauthorised intrusion. [33]

3.83 Excluding others from entry onto premises is a fundamental common law right that has been, for hundreds of years, the subject of a number of judicial pronouncements. In Australia, the courts' approach is that any attempted abrogation of fundamental common law rights must be unmistakable and unambiguous.[34] The committee determined that there is no clear expression in the *Port Authorities Act 1998* of a power to enter private property. Given the judicial pronouncements in *Coco v The Queen*, (discussed at paragraph 3.15), the Committee considered that there was significant doubt as to whether the *Port Authorities Act 1998* authorised a power of entry onto private property.

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32 *Coco v The Queen* (1994) 179 CLR per Mason CJ, Brennan Gaudron and McHugh JJ at para 11.

33 *Dillon v Plenty* (1991) 171 CLR 635.

34 p. 427.

3.84 The Committee did not dispute that there may be a need to enter vessels in a port for a variety of operational reasons. However, the Committee considered that the subject matter of the regulations was more appropriately placed in the substantive part of the *Port Authorities Act 1998*.

3.85 The Committee tabled a report on the matter in the Parliament.[35]

Inconsistency between an Act and its regulations

3.86 The *State Superannuation Amendment Regulations (No. 2) 2002* contained regulation 219(1) which provided that if a retirement access member died the Board *"…is to pay a benefit of an amount equal to the balance of the account to the executor or administrator of the Member's estate."* Regulation 219(2) then stated that the balance formed part of that Member's estate but was *"…not an asset in the Member's estate that is applicable in payment of the Member's debts and liabilities"*.

3.87 The Committee's view was that regulation 219(2)(b) was inconsistent with section 10 of the *Administration Act 1903* which states that the *"…real as well as the personal estate of every deceased person shall be assets in the hands of the executor to whom probate has been granted or administrator, for the payment of all duties and fees and of the debts of the deceased in the ordinary course of administration"*.

3.88 Although the now repealed *Government Employees Superannuation Act 1987* contained specific provisions about how accounts were to be dealt with upon death, including the Board's consideration of nominated beneficiaries, those provisions were deliberately omitted from the new *State Superannuation Act 2000* and relocated into the regulations. The rationale was that it would be easier, quicker, and more efficient to be able to amend the regulations (the need for which occurs frequently) than seek amendments to the *State Superannuation Act 2000*, which would require the passing by Parliament of an amendment Bill.

3.89 The Committee accepted that any Act which contains mere governance provisions and powers of a Board is, by its very nature skeletal, with the detail intended to be left to regulations. The difficulty in this instance was that by placing matters that were previously contained in an Act into subsidiary legislation, there is a risk, that was realised in this instance, of invoking section 43(1) of the *Interpretation Act 1984.* This provides that *"…subsidiary legislation shall not be inconsistent with the provisions of the written law under which it is made, or of any Act, and subsidiary legislation shall be void to the extent of any such inconsistency"*.

3.90 The Board accepted that there was a clear inconsistency between the regulation and the requirements of the *Administration Act 1903* and provided an undertaking to seek

35 Report No 1 - Port Authorities Regulations 2000, tabled September 26 2001.

an amendment to the *State Superannuation Act 2000* so that any regulations made under it would not be void for inconsistency with the *Administration Act 1903*.

Imposts constituting a 'fee' or 'tax'

3.91 Previous Committees have, on many occasions during the past decade, scrutinised instruments to determine whether the quantum of what is described in regulations as a fee is in reality a tax. Fees may be lawfully imposed to recover the cost of services or in relation to specific matters where this is expressly provided for in primary legislation. Taxes on the other hand can only be authorised by the Parliament. Any imposition via regulation of what is in reality a tax without the authority of Parliament is therefore unlawful. During this reporting period, the Committee considered whether increased fees imposed by the *Business Names Amendment Regulations (No 2) 2001* constituted a tax. Although the Committee, by majority, concluded that the quantum was a fee, the Legislative Council disallowed the regulations on the grounds that it constituted unlawful taxation.

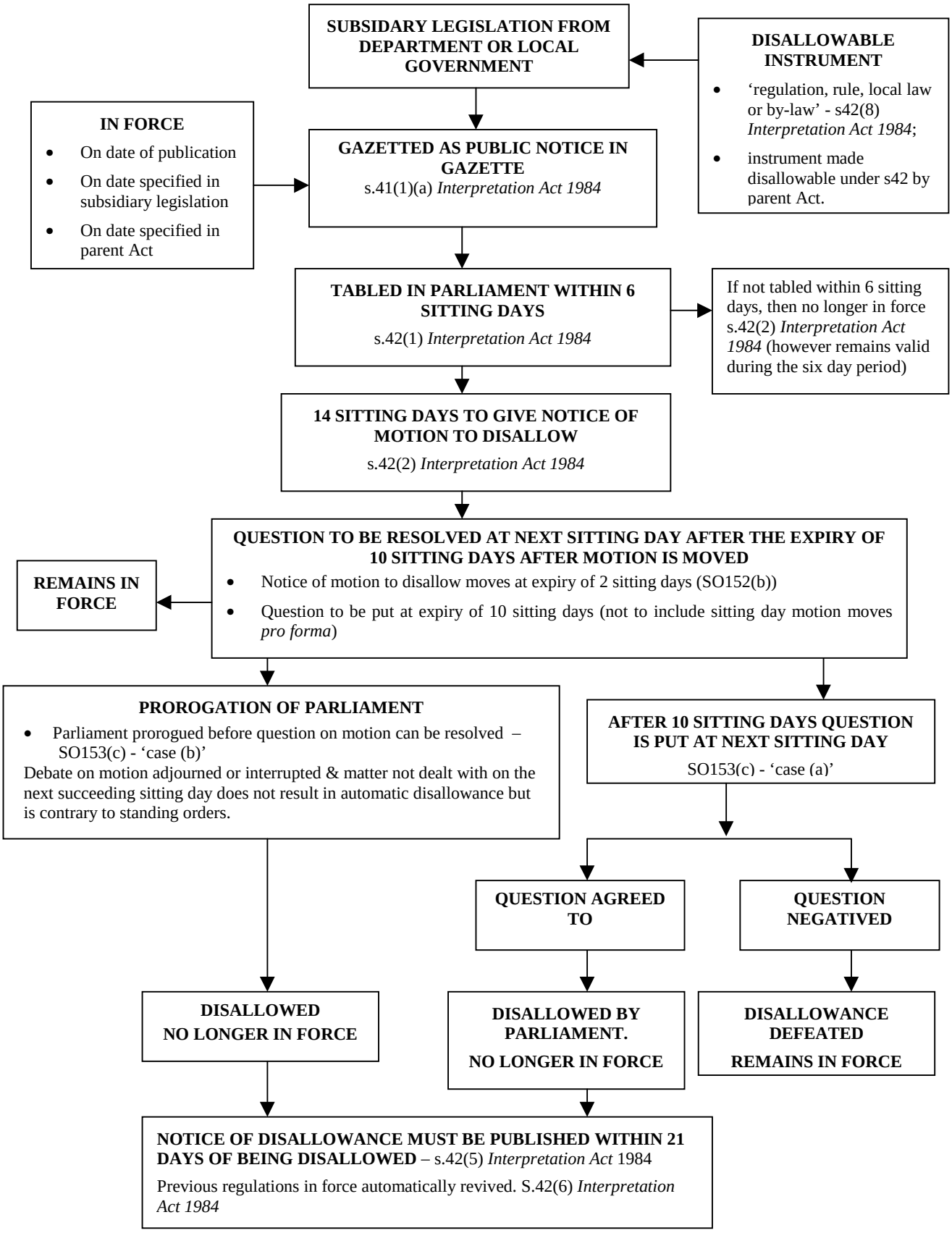
PLANS FOR THE NEXT SESSION

3.92 The Committee intends to further progress its initiatives regarding local law making during the course of the Second Session of the Thirty Sixth Parliament, continue its scrutiny of subsidiary legislation and deal with any other matters that fall within its terms of reference.

Margaret Quirk MLA **Date: March 20 2003**
Chairman

APPENDIX 1

DISALLOWANCE PROCEDURE IN THE LEGISLATIVE COUNCIL


SUBSIDARY LEGISLATION FROM DEPARTMENT OR LOCAL GOVERNMENT
DISALLOWABLE INSTRUMENT
• 'regulation, rule, local law or by-law' - s42(8) Interpretation Act 1984;
• instrument made disallowable under s42 by parent Act.
IN FORCE
• On date of publication
• On date specified in subsidiary legislation
• On date specified in parent Act
GAZETTED AS PUBLIC NOTICE IN GAZETTE
s.41(1)(a) Interpretation Act 1984
TABLED IN PARLIAMENT WITHIN 6 SITTING DAYS
s.42(1) Interpretation Act 1984
If not tabled within 6 sitting days, then no longer in force s.42(2) Interpretation Act 1984 (however remains valid during the six day period)
14 SITTING DAYS TO GIVE NOTICE OF MOTION TO DISALLOW
s.42(2) Interpretation Act 1984
QUESTION TO BE RESOLVED AT NEXT SITTING DAY AFTER THE EXPIRY OF 10 SITTING DAYS AFTER MOTION IS MOVED
• Notice of motion to disallow moves at expiry of 2 sitting days (SO152(b))
• Question to be put at expiry of 10 sitting days (not to include sitting day motion moves pro forma)
REMAINS IN FORCE
PROROGATION OF PARLIAMENT
• Parliament prorogued before question on motion can be resolved – SO153(c) - 'case (b)'
Debate on motion adjourned or interrupted & matter not dealt with on the next succeeding sitting day does not result in automatic disallowance but is contrary to standing orders.
AFTER 10 SITTING DAYS QUESTION IS PUT AT NEXT SITTING DAY
SO153(c) - 'case (a)'
QUESTION AGREED TO
QUESTION NEGATIVED
DISALLOWED NO LONGER IN FORCE
DISALLOWED BY PARLIAMENT. NO LONGER IN FORCE
DISALLOWANCE DEFEATED REMAINS IN FORCE
NOTICE OF DISALLOWANCE MUST BE PUBLISHED WITHIN 21 DAYS OF BEING DISALLOWED – s.42(5) Interpretation Act 1984
Previous regulations in force automatically revived. S.42(6) Interpretation Act 1984