



PARLIAMENT OF WESTERN AUSTRALIA

**REPORT OF THE
JOINT STANDING COMMITTEE
ON
DELEGATED LEGISLATION**

IN RELATION TO

**SEVENTH AUSTRALASIAN AND PACIFIC CONFERENCE ON
DELEGATED LEGISLATION AND FOURTH AUSTRALASIAN AND
PACIFIC CONFERENCE ON THE SCRUTINY OF BILLS
JULY 21, 22 AND 23 1999
Sydney, New South Wales.**

Presented by the Hon R L Wiese MLA (Chairman)

JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

Terms of Reference

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 it 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.*

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.

Members as at the date of this report:

Hon Bob Wiese MLA (Chairman)
Hon Nick Griffiths MLC (Deputy Chairman) (to date of resignation 8 September 1999)
Hon Simon O'Brien MLC
Hon Ray Halligan MLC
Hon Jim Scott MLC
Mr Bill Thomas MLA
Mr Iain MacLean MLA
Mr Norm Marlborough MLA

Staff as at the date of this report:

Nigel Pratt, Advisory/Research Officer
Jan Paniperis, Committee Clerk

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**Report of the Joint Standing Committee on
Delegated Legislation**

in relation to

**Seventh Australasian and Pacific Conference on Delegated Legislation and Fourth
Australasian and Pacific Conference on the Scrutiny of Bills
July 21, 22 and 23 1999
Sydney, New South Wales.**

1 EXECUTIVE SUMMARY

- 1.1** The New South Wales Regulation Review Committee hosted the Seventh Australasian and Pacific Conference on Delegated Legislation and Fourth Australasian and Pacific Conference on the Scrutiny of Bills held in the Legislative Assembly Chamber, Parliament House, Macquarie Street, Sydney on July 21, 22 and 23 1999.
- 1.2** The Western Australian Legislative Council and Legislative Assembly were represented at the conferences by members and staff of the Joint Standing Committee on Delegated Legislation and the Standing Committee on Uniform Legislation and Intergovernmental Agreements.
- 1.3** The conferences commenced on Wednesday, July 21 1999 and concluded on Friday, July 23 1999. Delegates from Australian States and Territories attended as well as a delegation from the Commonwealth. In addition delegates attended from Canada, Samoa and the Organisation for Economic Co-operation and Development (“OECD”).
- 1.4** Thirteen formal papers were presented during the course of the conferences. On the final day of the conferences, each of the various chairmen of State, Territory and Federal committees on scrutiny of bills and delegated legislation reported on their committee’s activities since the previous biennial conference in Wellington, New Zealand in February 1997.

2 RESOLUTIONS

2.1 At the conclusion of the conferences, the following resolutions were carried by delegates:

Resolution 1: That this conference resolves that a report be presented at future conferences of Australian scrutiny committees on the approaches of the Commonwealth, States and Territories in respect of regulatory impact assessment, as compared with international best practice.

Resolution 2:

- (a) That this conference establishes a national committee comprised of the chairs of the Australian scrutiny of primary and delegated legislation committees for the purposes of reviewing all aspects of proposed national schemes of legislation, including that proposed at this conference by Peter Ryan of Victoria.
- (b) That the chairs of the Australian scrutiny of primary and delegated legislation committees implement this motion with a view to having the committee not only in place but reporting prior to the next biennial conference.

Resolution 3: That this conference resolves that Australian scrutiny committees report to the next conference on the desirability of a review model which provides that regulations come into force at the expiry of a specified number of days after tabling, unless the parliament resolves otherwise.

Resolution 4: That the question of funding of future conferences be referred to the next conference of Presiding Officers for consideration, and further, that this conference notes that each jurisdiction will in its turn host a biennial conference, and resolves that the host State will meet the costs associated with hosting that conference.

Resolution 5: That Hobart, Tasmania, be the venue for the next conference.

**Report of the Joint Standing Committee on
Delegated Legislation**

in relation to

**Seventh Australasian and Pacific Conference on Delegated Legislation and Fourth
Australasian and Pacific Conference on the Scrutiny of Bills
July 21, 22 and 23 1999
Sydney, New South Wales.**

3 INTRODUCTION

- 3.1** The New South Wales Regulation Review Committee hosted the Seventh Australasian and Pacific Conference on Delegated Legislation and Fourth Australasian and Pacific Conference on the Scrutiny of Bills held in the Legislative Assembly Chamber, Parliament House, Macquarie Street, Sydney on July 21, 22 and 23 1999.
- 3.2** The host committee is a seven member joint committee of the New South Wales Legislative Assembly and Legislative Council chaired by Mr Peter R Nagel MP. Mr Nagel and staff of the Committee organised a full and stimulating program of speakers using the facilities of the New South Wales Parliament. This Committee extends its thanks to the host committee and its staff for their work and hospitality.
- 3.3** The Western Australian Legislative Council and Legislative Assembly were represented at the conferences by members and staff of the Joint Standing Committee on Delegated Legislation and the Standing Committee on Uniform Legislation and Intergovernmental Agreements. The members of this Committee who attended were Hon Bob Wiese MLA, Chairman, Hon Nick Griffiths MLC, Deputy Chairman, and members, Mr Norm Marlborough MLA, Mr Bill Thomas MLA and Hon Ray Halligan MLC. The Committee's Advisory Research Officer, Mr Nigel Pratt, and Committee Clerk, Ms Jan Paniperis, were also delegated by the Committee to attend.
- 3.4** The two conferences were held concurrently due to their overlapping nature and common objectives.
- 3.5** The conferences commenced on Wednesday, July 21 1999 and concluded on Friday, July 23 1999. Delegates from all Australian States and Territories attended as well as a delegation from the Commonwealth. In addition delegates attended from Canada,

Samoa and the Organisation for Economic Co-operation and Development (“OECD”). A list of attending delegates together with the conference program is attached to this report and marked “Annexure A”.

- 3.6** On the final day of the conferences, each of the various chairmen of State, Territory and Federal committees on scrutiny of bills and delegated legislation reported on their committee’s activities since the previous biennial conferences in Wellington, New Zealand in February 1997. The text of this Committee’s report to the conferences is attached and marked “Annexure B”.

4 CONFERENCE PROGRAM

- 4.1** The conferences were opened by the Chief Justice of the High Court of Australia, Hon Murray Gleeson AC, who provided his observations on the need to measure the effectiveness of the courts by qualitative rather than quantitative measures and in a setting where funding and resources allocated by the various parliaments of Australia were a crucial determinant to the effectiveness of the justice system.
- 4.2** Thirteen formal papers were presented during the course of the conferences. The formal papers have been listed in the conference program which is “Annexure A” to this report.

OECD and Regulatory Impact Analysis

- 4.3** The two morning sessions on day one of the conferences involved papers presented by representatives from the OECD. The first paper “Future Challenges in Regulatory Reforms for OECD Countries” by Mr Scott Jacobs, Head of Program on Regulatory Reform, Public Management Service, OECD, touched on the OECD’s experience in examining and reporting¹ on the merits of the NSW statutory scheme governing the making and review of regulations. This report by the OECD focused on the use of Regulatory Impact Analysis (“RIA”) as a principal tool in promoting regulatory quality, that is, to ensure that regulation promotes the basic social welfare criterion of maximising net social benefits. In practical terms, the aim of regulatory reform is to ensure that the costs of each regulation are justified by its benefits and that the regulation chosen yields the highest possible excess of benefits over cost.

¹ Report by the Public Management Service of the OECD on Regulatory Impact Analysis in New South Wales; Regulatory Review Committee, Parliament of New South Wales, Report No 18/51, January 1999.

- 4.4** NSW has a formal RIA requirement under the *Subordinate Legislation Act 1989* (NSW) which sets out procedures that must be followed by Ministers in the making and staged repeal of subordinate legislation. This includes, in circumstances which are not exempt under the Act, the use of Regulatory Impact Statements (“RIS”).
- 4.5** Western Australia has no requirement for RIA nor any formal statutory requirement for Ministers or government departments to provide RIS. The current procedure of supplying an Explanatory Memorandum (“EM”) along with ten copies of the regulations at the time of gazettal was the result of administrative instructions in 1989 and 1990 from the then Premier, Hon Peter Dowding MLA. These administrative instructions have been repeated by the current government.² Although the EM is usually of a high standard and greatly enhances the Committee’s understanding of the regulations, it does not achieve the objects of an RIA.
- 4.6** The second paper by Mr Rex Deighton-Smith, Administrator, Public Management Service, OECD, dealt with the means by which regulatory quality could be improved by a systematic approach to law making. The paper described the main constituent parts of the OECD’s regulatory quality assurance system including the ten principals in the OECD “best practice” processes for developing and implementing new regulations.³ RIA was again seen to be an important tool in aiding decision making by forcing regulators to approach all policy issues with the benefit/cost principle in mind, thereby maximising social welfare, rather than being focused on improving the situation of a specific sector - as was the case in many early regulatory reform efforts.
- 4.7** The use of RIA has rapidly developed in OECD countries. Between 1996 and 1998, the number of member countries using RIA increased from 17 to 23. No country which has adopted RIA has ever subsequently abandoned it.
- 4.8** The Commonwealth has yet to pass legislation which would require a formal statute based RIA for Federal delegated law making. The *Legislative Instruments Bill* has been under consideration by successive federal governments since 1994 but has yet to be made law. The *Legislative Instruments Bill 1996* lapsed in 1998 and has not been re-introduced.

² See Premier’s Circulars to Ministers, Nos 42 of 1994 and 9 of 1996.

³ See generally Organisation for Economic Co-operation and Development Regulatory Impact Analysis: Best Practices in OECD Countries (OECD, 1997).

National Scheme Legislation

- 4.9** The effective exclusion of the various State and Territory Parliaments from review of national scheme legislation arising from intergovernmental agreement has been a concern for many years. National scheme legislation was first put on the agenda for discussion as a result of a resolution passed at the Fourth Conference on Delegated Legislation and the First Conference on the Scrutiny of Bills in Melbourne in July 1993.
- 4.10** The constant complaint from the legislature is that the various governments can come to agreement to put legislation through their respective parliaments and that the success of the whole approach is dependent upon the legislatures of all jurisdictions passing legislation in the form agreed. As a result, the executives advise the various legislatures that the legislation cannot be amended due to the previous agreement and that amendment would breach that agreement. Similarly, parliamentary review committees are told for the same reasons that they cannot press their concerns about national scheme legislation. The end result is that “practically speaking”, it is fair to say that there is effectively no parliamentary scrutiny of national scheme legislation.
- 4.11** The concerns of the Western Australian Parliament regarding national scheme legislation led to the formation of the Standing Committee on Uniform Legislation and Intergovernmental Agreements in August 1993.
- 4.12** This Committee notes that many uniform legislative schemes are intended to operate via uniform regulations so a similar problem is faced by parliamentary committees reviewing subsidiary legislation made under national scheme legislation. Moreover, previous national scheme legislation has by-passed parliamentary scrutiny altogether by using notices or other devices not described as regulations which some scrutiny committees (including this Committee) have no jurisdiction to review.⁴
- 4.13** A paper presented by Mr Peter Ryan MLA from Victoria, “National Scheme Legislation, Episode one - The Phantom Menace”, proposed a national committee comprising the chairmen of the various delegated and legislative review committees to scrutinise national scheme legislation and accompanying regulations.

⁴ In Queensland an amendment to the nationally adopted *Mutual Recognition (Qld) Act 1992* was made by notice published in the *Government Gazette*. This was the procedure allowed under the Act. As the Governor’s notice did not constitute subordinate legislation in Queensland, neither Parliament as a whole nor the subordinate legislation committee of Parliamentarians could scrutinise the notice.

- 4.14** The paper prompted delegates to pass a resolution that the conference establish a national committee comprised of the chairmen of Australian scrutiny of primary and delegated legislation committees for the purpose of reviewing proposed national schemes of legislation and that the chairmen implement the resolution prior to the next biennial conference in 2001.

When to Scrutinise Subordinate Legislation

- 4.15** “Scrutiny When”, a paper presented by Mr Peter R Nagle MP, Chairman of the host committee, dealt with the issue of when is the best time to scrutinise proposed legislation and subordinate legislation in line with OECD best practice.
- 4.16** In relation to delegated legislation, the time for scrutiny proposed by Mr Nagle was prior to the regulations coming into force. This is unlike the current system both in NSW and WA where regulations generally come into force on the date of gazettal or very shortly thereafter. By allowing scrutiny prior to the regulations coming into effect, parliament would have an opportunity to scrutinise the regulations prior to them becoming law and preclude adverse impact on a citizen’s existing rights and liberties by review prior to commencement.
- 4.17** Scrutiny prior to a regulation becoming law was considered to have an advantage due to the fact that the existing system could result in injustices. Even if disallowed, a regulation which was in force can still be valid for the period prior to disallowance if it is otherwise within the power of a valid enabling Act. Technically, a prosecution against a citizen in breach of the regulation would succeed because a breach of the regulation whilst it is still in force is not invalidated by a subsequent disallowance which has no retrospective effect.⁵
- 4.18** It was submitted that a system of review which specifies that regulations come into effect after a specified number of days promotes validity of the law-making process by enabling citizens to know the law prior to it coming into effect. The legal presumption of *ignorantia juris neminem excusat*⁶ in these days of ever increasing regulation places an obligation on the legislature to make every effort to inform citizens of the law of the land prior to it coming into effect.

⁵ See *Interpretation Act 1984 (WA)*, section 42(2).

⁶ Ignorance of the law excuses no one.

- 4.19** The OECD in reviewing RIA in NSW has suggested that the optimal time for the scrutiny of regulations is during the regulation making process rather than the current *ex poste* scrutiny.⁷
- 4.20** This Committee is of the view that the risk of potential injustice to the citizen under the current system is small as government agencies are unlikely to enforce regulations by way of prosecution when the regulations have a notice of motion for disallowance moved against them in the parliament and are subsequently disallowed. The vast majority of regulations which come before this Committee require no action by it. *Ex poste* review also has the advantage of allowing the Committee to take account of the actual impact of the regulation on personal rights and liberties prior to making a decision.

5 TRAVEL EXPENSES

- 5.1** The cost for the Committee and staff to attend the conference was \$20,181.73.
- 5.2** An itemisation of that amount is shown in a table attached to this report as “Annexure C”.

6 OUTCOMES OF THE CONFERENCES

- 6.1** At the conclusion of the conferences, the delegates passed the following resolutions:

Resolution 1: That this conference resolves that a report be presented at future conferences of Australian scrutiny committees on the approaches of the Commonwealth, States and Territories in respect of regulatory impact assessment, as compared with international best practice.

Resolution 2:

- (a) That this conference establishes a national committee comprised of the chairs of the Australian scrutiny of primary and delegated legislation committees for the purposes of reviewing all aspects of proposed national schemes of legislation, including that proposed at this conference by Peter Ryan of Victoria.

⁷ Report by the Public Management Service of the OECD on Regulatory Impact Analysis in New South Wales; Regulatory Review Committee, Parliament of New South Wales, Report No 18/51, January 1999.

- (b) That the chairs of the Australian scrutiny of primary and delegated legislation committees implement this motion with a view to having the committee not only in place but reporting prior to the next biennial conference.

Resolution 3: That this conference resolves that Australian scrutiny committees report to the next conference on the desirability of a review model which provides that regulations come into force at the expiry of a specified number of days after tabling, unless the parliament resolves otherwise.

Resolution 4: That the question of funding of future conferences be referred to the next conference of Presiding Officers for consideration, and further, that this conference notes that each jurisdiction will in its turn host a biennial conference, and resolves that the host State will meet the costs associated with hosting that conference.

Resolution 5: That Hobart, Tasmania, be the venue for the next conference.

7 CONCLUSION

- 7.1** The members and staff of the Joint Standing Committee on Delegated Legislation learnt a great deal from the conferences and extend their appreciation to the host committee, its staff and the NSW Parliament for providing its facilities for conference delegates. The Chairman of the Committee, Hon Bob Wiese and its Advisory/Research Officer, Mr Nigel Pratt, would be pleased to discuss any of the matters raised in this report with interested readers. The Committee looks forward to the next biennial conferences to be held in Hobart, Tasmania in 2001.

Hon. Bob Wiese

Chairman

Joint Standing Committee on Delegated Legislation

October 20 1999

Annexure A

Seventh Australasian and Pacific Conference
on Delegated Legislation and
Fourth Australasian and Pacific Conference
on the Scrutiny of Bills

PROGRAM

All sessions to be held in the Legislative Assembly Chamber, Level 7, Parliament House
Macquarie Street, Sydney

DAY ONE - WEDNESDAY 21 JULY 1999

8:00am - 9:00am Registration
Greenway Room, Level 7, Parliament House
Proceed through Legislative Assembly entrance
(coffee and tea available in Jubilee Room opposite)

Morning Session I

9:00 - 9:15am Welcome
Mr Peter Nagle MP, Chairman
Regulation Review Committee, New South Wales

9:15 - 9:30am Official Opening of Conference
The Hon. Murray Gleeson AC
Chief Justice of the High Court of Australia

9:30 - 10:30am Future Challenges in Regulatory Reforms
for OECD Countries
Mr Scott Jacobs
Head of Program on Regulatory Reform
Public Management Service, OECD

Chaired by
Mr Victor Perton MP, Chairman
Law Reform Committee, Victoria

Program

Day One - Wednesday 21 July 1999

10:30 - 11:00am Morning Tea (Jubilee Room)

Morning Session 211:00 - 12:00 noon **Assuring Regulatory Quality - a Systematic Approach**
Mr Rex Deighton-Smith, Administrator
Public Management Service, OECD

Commentators:

Professor Margaret Allars, Faculty of Law
University of Sydney;Mr Jim Booth, Policy Manager
The Cabinet Office, NSW Premier's Department.

Chaired by

Mr Luigi Carbone
Director, Regulation Unit
Department for Institutional Reforms, Italy12:00 - 12:30pm **Official Photograph** (Parliament House steps)12:30 - 2:00pm **LUNCH** (STRANGER'S DINING ROOM, LEVEL 7)Afternoon Session 12:00 - 2:45pm **Competition Policy**
The Hon. Kevin Minson MP, Chairman
Standing Committee on Uniform Legislation and
Intergovernmental Agreements, Western Australia

Chaired by

The Hon John Loone MLC Chairman
Standing Committee on Subordinate Legislation, Tasmania

Program

Day One - Wednesday 21 July 1999

Afternoon Session 2

2:45 - 3:30pm **A Proposal for Scrutiny of National Schemes of Legislation**
Mr Peter Ryan MLA, Chair
Scrutiny of Acts and Regulations Committee, Victoria

Chaired by
Senator Marise Payne, Member
Senate Standing Committee on Regulations and Ordinances
Canberra ACT

3:30 - 4:00pm **Afternoon Tea (Jubilee Room)**

Afternoon Session 3

4:00 - 4:30pm **Scrutiny: when?**
Mr Peter Nagle MP, Chairman
Regulation Review Committee, New South Wales

Chaired by
Ms Linda Lavarch MLA, Chair
Scrutiny of Legislation Committee, Queensland

Notices of Motions by Delegates

4:30 - 5:00pm **Chaired by**
Ms Cherie Burton MP, Member
Regulation Review Committee, New South Wales

5.15pm - 6:30pm **OPENING RECEPTION**
(Adjoining Stranger's Dining Room
Level 7, Parliament House)

END OF DAY 1

DAY TWO - THURSDAY 22 JULY 1999

Morning Session 1

- 9:00 - 10.00am **Policy or Politics ?**
Dennis Pearce, Emeritus Professor of Law
Centre for International and Public Law
The Australian National University, Canberra
- Chaired by**
The Hon Bob Wiese MP Chairman
Joint Standing Committee on Delegated Legislation
Western Australia
- 10:00 - 10:30am **Morning Tea (Jubilee Room)**

Morning Session 2

- 10:30 - 11.30am **Ethics and Law: A Case Study of confusion in the
relationship between the two**
Dr Bernadette Tobin, Director
Plunkett Centre for Ethics, Sydney
- Chaired by**
Ms Monica Holmes MP, Member
Standing Committee on Uniform Legislation and
Intergovernmental Agreements, Western Australia

Morning Session 3

- 11:30 - 12:30pm **A Critique of Criteria and Cases: Parliamentary Scrutiny
of Acts, Regulations and Codes**
Professor Margaret Allars, Faculty of Law
University of Sydney
- Chaired by**
The Hon Janelle Saffin MLC, Vice-Chairman
Regulation Review Committee, New South Wales
- 12:30 - 2.00pm **LUNCH (STRANGER'S DINING ROOM, LEVEL 7)**

Program

Day Two - Thursday 22 July 1999

Afternoon Session 1

2:00 - 3:00pm **Rounding up the Regulators:
Getting Delegated Legislation under Control**
The Right Hon. Jonathan Hunt MP, Chairperson
Regulations Review Committee, New Zealand

Chaired by
The Hon Angus J Redford MLC, Presiding Member
Legislative Review Committee, South Australia

3:00 - 3:30pm Afternoon Tea (Jubilee Room)

Afternoon Session 2

3:30 - 4:30pm **Against what Values is Legislation Scrutinised ?**
Senator Barney Cooney, Chair
Senate Standing Committee on the Scrutiny of Bills
Australian Senate, Canberra ACT

Chaired by
Mr Steve Balch MLA, Chairman
Subordinate Legislation and Tabled Papers Committee
Northern Territory

Afternoon Session 3

4:30 - 5:15pm **Explanatory material for legislative instruments - the
Commonwealth experience**
Senator Helen Coonan, Member
Senate Standing Committee on Regulations and Ordinances
Australian Senate, Canberra ACT

Chaired by
Senator Céline Hervieux-Payette, Co-chair
Standing Joint Committee for the Scrutiny of Regulations, Canada

Program

Day Two - Thursday 22 July 1999

Notices of Motions by Delegates

5:15 - 5:30pm **Chaired by**
Ms Marianne Saliba MP, Member
Regulation Review Committee, New South Wales

7:00 - 11:00pm **CONFERENCE DINNER**
Henry Lawson Room, Renaissance Sydney Hotel
30 Pitt Street Sydney

END OF DAY 2

DAY THREE - FRIDAY 23 JULY 1999

Morning Session I

9:00 am to 12:30 pm

(Morning Tea, Jubilee Room, 10.00am - 10.30 am)

Reports from participating Parliamentary Committees:

1. **Commonwealth Senate -**
Senator Barney Cooney, Chairman
Standing Committee for the Scrutiny of Bills
2. **Commonwealth Senate -**
Senator Helen Coonan, Member
Standing Committee on Regulations and Ordinances
3. **Australian Capital Territory -**
Mr John Hargraves MLA, Deputy Chair
Standing Committee on Justice and Community Safety
4. **New Zealand -**
Ms Annabel Young MP, Member
Regulations Review Committee
5. **Northern Territory -**
Mr Stephen Balch MLA Chairman
Subordinate Legislation and Tabled Papers Committee
6. **Queensland -**
Mrs Linda Lavarch MLA, Chair
Scrutiny of Legislation Committee
7. **South Australia -**
The Hon. Angus J. Redford MLC, Presiding Member
Legislative Review Committee
8. **Tasmania -**
Mr John Loone MLC, Chairman
Standing Committee on Subordinate Legislation

- 9. **Victoria -**
Mr Peter Ryan MP, Chairman
Scrutiny of Acts and Regulations Committee
Mr Murray Thompson MP, Chairman
Subordinate Legislation Sub-Committee
- 10. **Western Australia -**
The Hon Bob Wiese MLA, Chairman
Joint Standing Committee on Delegated Legislation
- 11. **Canada -**
Senator Céline Hervieux-Payette, Co-Chair
Standing Joint Committee for the Scrutiny of Regulations
- 12. **Zimbabwe -**
The Hon Abdul Kassim, Chairman
Parliamentary Legal Committee
- 13. **New South Wales -**
Mr Peter Nagle MP, Chairman
Regulation Review Committee

Chaired by Mr Peter Nagle MP
Chairman, Regulation Review Committee

12:30 - 2:00pm LUNCH (STRANGER'S DINING ROOM, LEVEL 7)

Afternoon Session I

2:00 - 3:00pm **Relative Performance of Committees**
Mr Stephen Argument, Director
Projects and Legal Instruments,
Department of Veterans Affairs.

Chaired by
Senator Barney Cooney, Chair
Senate Standing Committee on the Scrutiny of Bills
Australian Senate, Canberra ACT

3:00 - 3:30 pm **Afternoon Tea (Jubilee Room)**

Concluding Session

3:30 - 4:30pm Resolutions of Conference

Chaired by
Mr Peter Nagle MP Chairman
Regulation Review Committee, New South Wales

4:30 pm **END OF CONFERENCE**

DELEGATES

21, 22 and 23 July 1999

Title	First Name	Last Name	Position	Organisation	Jurisdiction	
Sen	Helen	Coonan	Chair Designate	Senate Standing Committee on Regulations and Ordinances	Commonwealth Parliament	
Sen	Marise	Payne	Member			
Mr	Neil	Bessel	Secretary			
Mr	David	Creed	former Secretary			
Ms	Janice	Paull	Research Officer			
Sen	Barney	Cooney	Chairman	Standing Committee for Scrutiny of Bills	Commonwealth Parliament	
Mr	James	Warmenhoven	Secretary			
Prof	James	Davis	Legal Adviser			
Mr	John	Hargreaves MLA	Deputy Chair	Standing Committee on Justice and Community Safety	Legislative Assembly Australian Capital Territory	
Mr	Harold	Hird MLA	Member			
Mr	Peter	Bayne	Legal Adviser			
Ms	Celia	Harsdorf	Assistant Secretary			
Mr	Steve	Balch MLA	Chairman	Subordinate Legislation and Publications Committee	Legislative Assembly Northern Territory	
Mr	Terry	Hanley	Secretary			
Mr	Peter	Nagle MP	Chairman	Regulation Review Committee	Parliament of New South Wales	
Ms	Cherie	Burton MP	Member			
Hon	Don	Harwin MLC	Member			
Dr	Liz	Kernohan MP	Member			
Ms	Marianne	Saliba MP	Member			
Hon	Janelle	Saffin MLC	Deputy-Chairman			
Mr	Russell	Turner MP	Member			
Mr	Jim	Jefferis	Director			
Mr	Greg	Hogg	Project Officer			
Mr	Jozef	Imrich	Committee Officer			
Mr	Don	Beattie	Clerk			
Ms	Susannah	Dale	Assistant Committee Officer			
Ms	Linda	Foley	Electorate Officer			Mr Peter Nagle MP
Mrs	Linda	Lavarch MLA	Chair			Scrutiny of Legislation Committee
Mr	Christopher	Garvey	Research Director			
Ms	Veronica	Rogers	Research Officer			
Hon	Angus	Redford	Chairman	Legislative Review Committee	Parliament of South Australia	

Title	First Name	Last Name	Position	Organisation	Jurisdiction		
Hon	John	Loone MLC	Chairman	Standing Committee on Subordinate Legislation	Parliament of Tasmania		
Hon	Geoff	Squibb MLC	Vice-Chairman				
Mr	Ken	Bacon MHA	Member				
Hon	Denise	Swan MHA	Member				
Ms	Wendy	Peddle	Secretary				
Mr	Peter	Ryan MLA	Chairman	Scrutiny of Acts and Regulations Committee	Parliament of Victoria		
Mr	Murray	Thompson MP	Deputy Chairman				
Mr	Bob	Cameron MP	Member				
Mr	Carlo	Carli MP	Member				
Ms	Mary	Gillett MP	Member				
Hon	Peter	Katsambanis MLC	Member				
Hon	Maree	Luckins MLC	Member				
Hon	Don	Nardella MLC	Member				
Mr	Tony	Plowman MP	Member				
Mr	Andrew	Homer	Senior Legal Adviser				
Ms	Tanya	Coleman	Legal Adviser				
Ms	Nadia	Krivetz	Legal Adviser				
Mr	Victor	Perton MP	Chairman			Victorian Law Reform Committee	Parliament of Victoria
Mr	Neil	Cole MP	Deputy Chairman				
Ms	Padma	Raman	Director				
Ms	Jenny	Baker	Research Officer				
Hon	Kevin	Minson MLA	Chairman	Standing Committee on Uniform Legislation and Intergovernmental Agreements	Parliament of Western Australia		
Ms	Monica	Holmes MLA	Member				
Mr	Ted	Cunningham MLA	Member				
Mr	William	McNee MLA	Member				
Mr	Peter	Frantom	Executive Officer				
Ms	Melina	Newman	Legal Research Officer				
Hon	Robert	Wiese MLA	Chairman	Joint Standing Committee on Delegated Legislation	Parliament of Western Australia		
Hon	Nicholas	Griffiths MLC	Deputy Chairman				
Hon	Raymond	Halligan MLC	Member				
Mr	Norm	Marlborough MLA	Member				
Mr	William	Thomas MLA	Member				
Mr	Nigel	Pratt	Advisory Research Officer				
Ms	Jan	Paniperis	Committee Clerk				

Title	First Name	Last Name	Position	Organisation	Jurisdiction
Rt Hon	Jonathan	Hunt MP	Chairperson	Regulations Review Committee	Parliament of New Zealand
Ms	Annabel	Young MP	Member		
Ms	Debbie	Angus	Legal Adviser		
Mrs	Shelley	Banks	Clerk of the Committee		
Senator	Céline	Hervieux-Payette	Co-Chair from the Senate	Standing Joint Committee for the Scrutiny of Regulations	Parliament of Canada
Mr	Gurmant	Grewal, MP	Co-Chair from the House of Commons		
Mr	Derek	Lee, MP	Vice-Chair from the House of Commons		
Senator	Normand	Grimard QC	former Co-Chair		
Mr	Tom	Wappel, MP	former Co-Chair		
Mrs	Pierrette	Venne, MP	Députée, Règlementation		
Mr	Jacques	Rousseau	Counsel to the Committee		
Mr	Tônu	Onu	Clerk to the Committee		
Mr	Luigi	Carbone	Director	Regulation Unit, Department for Institutional Reforms	Italy
Hon	Abdul	Kassim	Chairman	Parliamentary Legal Committee	Parliament of Zimbabwe
Hon	Rita	Makarau	Member		
Hon	Michael	Mataure	Member		
Mr	Ozias	Musamirapamwe	Counsel to Parliament		

Title	First Name	Last Name	Position	Organisation	Jurisdiction
Mr	Stephen	Argument	Director, Projects and Legal Instruments	Department of Veterans Affairs	Canberra
Prof	Dennis	Pearce	Professor	Faculty of Law	Australian National University
Mr	Paul	Bek	Deputy Head	Office of Regulation Review	Commonwealth
Mr	Leigh	Schneider	Senior Legislative Counsel	Office of Legislative Drafting	Commonwealth Attorney-General's Department
Ms	Margaret	Lawrence	Principal Legal Officer		
Mr	Manuel	Macasaet	Principal Legal Officer		
Ms	Fiona	Pine	Legal Officer		
Ms	Branka	Seselja	Legal Officer		
Mrs	Lani	Blackman	Legal Policy Officer	Australian Law Reform Commission	New South Wales Government
Mr	Jim	Booth	Policy Manager	The Cabinet Office	
Mr	Dennis	Murphy QC	Parliamentary Counsel	Parliamentary Counsel's Office	
Mr	Don	Colagiuri	Deputy Parliamentary Counsel		
Ms	Angela	Duncan	Manager, Rules	Land Transport Safety Authority	Wellington New Zealand
Mr	Grant	Liddell	Crown Counsel	Crown Law Office	Wellington New Zealand
Dr	Bernadette	Tobin	Director	Plunkett Centre for Ethics	St Vincents Hospital
Prof	Margaret	Allars	Professor	Faculty of Law	University of Sydney
Ms	Nicola	Franklin	Senior Lecturer		
Dr	Kathryn	McMahon	Senior Lecturer		
Mr	Martin	Oakley	Director	Office of Regulation Reform	Victoria
Mr	Greg	Bounds	Senior Policy Officer		
Mr	Scott	Jacobs	Principal Administrator	Public Management Service	Organisation for Economic Co-operation and Development
Mr	Rex	Deighton-Smith	Administrator		

Annexure B

**REPORT BY THE WESTERN AUSTRALIAN PARLIAMENT JOINT STANDING
COMMITTEE ON DELEGATED LEGISLATION**

TO

**THE SEVENTH AUSTRALASIAN AND PACIFIC CONFERENCE ON
DELEGATED LEGISLATION AND FOURTH AUSTRALIAN AND PACIFIC
CONFERENCE ON THE SCRUTINY OF BILLS
SYDNEY, 21 - 23 JULY 1999**

PRESENTED BY

HON BOB WIESE MLA, (CHAIRMAN)

Introduction

One of the important roles of Parliamentary committees in scrutinising subsidiary legislation is to ensure that fees and charges levied by government agencies are reasonably related to the service provided and that the fee or any increase in that fee is at a level which genuinely recovers the costs involved in providing the service rather than to ensure a profit for the agency. In the absence of a clear legislative intent, to allow otherwise would be to impose on licensees by an illegitimate means via regulation, a defacto tax rather than a fee for service.

The importance of this role has increased in recent times given the trend in Government of “corporatising” government agencies and the perceived need to move towards full cost recovery of the services provided by those agencies in administering regulatory schemes involving the issue of licences, permits and the like. Indeed the NSW Parliament’s policy of full cost recovery in relation to this conference has already resulted in some lively debate between the Chairmen of the various committees here this morning.

Unfortunately, in Western Australia, the Legislature has decided to significantly restrict the Committee’s powers of scrutinising fees and increases in fees imposed by regulation by amending the *Interpretation Act 1984 (WA)*. This came about as a direct result of this Committee’s review of several Amendment Regulations which increased licencing fees and its finding that they imposed a fee in the nature of a tax and were therefore *ultra vires*.

A Case Example

The Committee considered regulations 3(c) and (d) of the *Road Traffic (Drivers' Licence) Amendment Regulations (No. 2) 1997* and regulation 3(a) of the *Road Traffic (Licensing) Amendment Regulations (No. 2) 1997*.

The regulations increased the fees for drivers' licences and the recording fee attached to vehicle licences in August. Drivers' licence fees were increased from \$26 to \$29 for a one-year licence and from \$90 to \$92 for a five-year licence. The recording fee was increased from \$12.50 to \$14. The increases had been effective from 1 April 1997. On the basis of information supplied by the Department of Transport to the Committee it was determined that these increases were required to meet the costs of new digital imaging technology which was to be used in the production of a new plastic licence card. The digital imaging technology was to allow for photographs on licence cards to be digitally recorded and for related security features such as holograms and security patterns on the licence.

Regulation 3(a) of the *Road Traffic (Licensing) Amendment Regulations (No. 2) 1997* increased the "recording" fee payable in respect of vehicle licences also effective from 1 April 1997. The Department advised that these increases in the recording fee from \$12.50 to \$14 was required to meet the costs of and to fund WA's commitment to participate in the National Exchange of Vehicle and Driver Information Systems (NEVDIS). The NEVDIS initiative was to provide a better interchange of information between States resulting in cost savings of approximately \$20 million.

The Department advised the Committee that the NEVDIS initiative was a five-year program which has an estimated total cost of \$12.5 million. The increase of \$1.50 in the recording fee was on the basis that it would bring into the Consolidated Fund that \$12.5 million over the five-year period.

The major concern that the Committee had was that the new technology was not in place and that WA would not be participating fully in an exchange of driver and vehicle information in 1997. As from 1 April 1997 vehicle drivers had been paying the higher fees but no improved benefit or service had been provided. The Committee was concerned that the increase in each impost was a tax, for which there was no legislative authority for the Department to levy.

The Legal Position

An increase in a fee charged by an agency of Government may not be a fee at all but amount to an unauthorised tax. The accepted attributes of a tax, as referred to by Latham C.J. in *Matthews v. Chicory Marketing Board (Vict.)* (1938) 60 CLR 263 at 276 are:

1. The impost is compulsory,
2. for public purposes,
3. enforceable by law, and
4. not a payment for services rendered.

The only question that arises is whether, when looking at the true character of the exaction, there is something special about the increase or the circumstances in which it is purportedly exacted which, notwithstanding the presence of these attributes, might preclude its characterisation as a tax.

In this regard the Committee noted that the courts have recognised that a “fee for service” may not be a tax, although the other positive attributes of a tax are present. The observation of the High Court in respect of section 53 of the Constitution in *Air Caledonie International v. The Commonwealth* (1988) 165 CLR 462 at 470 is relevant in this regard -

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

For a charge otherwise meeting the qualifications of a tax, to be classified as a “fee for services”, it is not enough to say that the person paying it is deriving some general benefits in return from the government or other body receiving the fee. That the fee is paid in return for public services in this general, impersonal sense, is not enough. What is required is a fee or charge exacted for particular identified services provided or rendered individually to, or at the request or direction of, the particular person required to make the payment. To qualify as a fee for services, the benefit to the payer must be *direct* and *proportionate to the charge paid*.

In considering the meaning of the provision in s 53 of the Commonwealth Constitution that a proposed law shall not be taken to impose taxation by reason only of its providing for the payment of fees for services, Mason CJ, Deane, Toohey and Gaudron JJ in *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176CLR 555 stated that legislation will not impose "a fee for services" if it does not -

"... by its terms establish **any sufficient relationship** between the liability to pay the charge and the provision [of the relevant service] by the ultimate expenditure of the

money collected to regard the liability to pay the charge as a fee for services or as something akin to a fee for services." (176 CLR at 568) (Emphasis added).

On the basis of the above principles the Committee formed the view that the fees exacted by the regulations were not for identified services that were rendered to the customer. The increases applied notwithstanding that digital imaging technology was not available until the end of 1997 and WA would not be a full participant in NEVDIS for 5 years. These "improved services" were not yet rendered or tangible to those who were currently paying the fee for these future services. Accordingly the Committee was of the view that the imposts were not "fees for services", did not constitute an exception to the concept of a tax and as nothing in the *Road Traffic Act 1974* authorised the imposition of any charge amounting to a tax, recommended disallowance of the regulations. The Legislative Council disallowed those regulations on 26 August 1997.

This was not the first occasion that the Committee had recommended disallowance on the ground that the "fee" amounted to an unauthorised tax. Numerous other subordinate legislative instruments had forced the Committee to ask the question " what costs are recoverable under a legislative provision which authorises a fee for service or a fee for licence?"

The Legislative Response

The legislative response to the Committee's scrutiny of fees raised for the "recovery" of future expenditure was swift. The *Interpretation Act 1984* (WA) was amended in 1997 by introducing Section 45A which provides for a power to prescribe or impose a fee that will allow recovery of expenditure that is relevant to the scheme or system under which the licence is issued. This includes expenditure which has been **or is to be** incurred, therefore validating the recovery of expenditure which will be incurred in the future. The full text of Section 45A reads as follows:

"Fees for licences

- 45A. (1)A power conferred by a written law to prescribe or impose a fee for a licence includes power to prescribe or impose a fee that will allow recovery of expenditure that is relevant to the scheme or system under which the licence is issued.
- (2) Expenditure is not relevant for the purposes of subsection (1) unless it has been or is to be incurred --
- (a) in the establishment or administration of the scheme or system under which the licence is issued; or

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

(3) The reference in subsection (1) to a fee for a licence includes reference to a fee for, or in relation to, the issue of a licence and a fee payable on an application for the issue of a licence.

(4) In this section --

"fee" includes charge;

"issue" includes grant, give or renew;

"licence" includes registration, right, permit, authority, approval or exemption."

The Effect of the Amendment

Section 45A of the Interpretation Act 1984 (WA) does not completely restrict the Committee's activities in reviewing a licence fee imposed by regulation. However, a Government agency can now effectively make a profit from providing the service of issuing a licence, the fee for which may be greater than the current cost of providing that service. The fee will be legitimately raised in circumstances where the agency can establish that the fee is to recover the current costs **or** future costs of providing the service. Future costs could include the capital cost of new technology or other infrastructure for the "establishment or administration of the scheme or system under which the licence is issued". In at least one case an agency's "profit" from administering a scheme has been deposited in consolidated revenue rather than going to defray the cost of providing the service or apparently to provide for the administration of the scheme. The case in point is WA's Ministry of Fair Trading's Business Names Register.

In his report "Weighing Up The Market Place"⁸, the Auditor General of Western Australia found that the service of providing business names and a business names register produced an annual net income of almost \$5 million for the government. There are approximately 30 000 new business names registered annually plus the renewal of existing business names which is required every three years. Registration fees go direct to consolidated revenue.⁹ The profit in my view is an illegitimate tax on business.

⁸ Weighing Up The Market Place; The Ministry of Fair Trading, Report No. 4 - June 1998

⁹ Ibid p19

Conclusion

The question of when is a fee raised by a agency of Government a tax is still a live one in the courts with the High Court having heard on 3 May 1999 (but not yet handed down its decision) an appeal from a decision of the Full Court of the Federal Court in *Airservices Australia (formerly Civil Aviation Authority) v Monarch Airlines Ltd* [1998] 79 FCA (18 February 1998). In the Federal Court case Monarch and other airlines successfully complained that a statutory levy charged for air traffic services amounted to a tax and therefore was not authorised by Section 67 of the Civil Aviation Act 1988 (Cth).

Unfortunately, the Committee's role of scrutinising licencing fees imposed by regulation has been significantly restricted by the amendments to the *Interpretation Act 1984 (WA)*. Section 45A of the Act leaves the door open for government agencies to impose fees and increases in fees in the nature of a *defacto* tax for claimed improvements in services yet to be (and possibly never to be) provided. By largely removing effective scrutiny by the Committee, individual citizens who do not have the means to challenge the legitimacy of a licence fee, will be exposed to being illegitimately taxed by government agencies who are required under legislation to provide the necessary licensing services under compulsory licensing regimes. Unless properly seen as a payment for services rendered, charges for licences and the like should be characterised as a tax, since licensees under such schemes do not have any real choice about whether or not to utilise the services.

Hon Bob Weise MLA
Chairman
Joint Standing Committee on Delegated Legislation

Annexure C

TRAVEL EXPENSES

Food and accommodation for Members and Staff (7 people)	\$7,471.30
Airfares (Perth-Sydney return) (7 people)	\$11,751.70
Conference Dinner (7 people)	\$630.00
Cabcharge	\$328.73
TOTAL	\$20,181.73 =====