



THIRTY-EIGHTH PARLIAMENT

REPORT 44
JOINT STANDING COMMITTEE ON DELEGATED
LEGISLATION
ANNUAL REPORT 2010

Presented by Mr Joe Francis MLA (Chairman)

and

Hon Robin Chapple MLC (Deputy Chairman)

February 2011

JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

Date first appointed:

28 June 2001

Terms of Reference:

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

3. Joint Standing Committee on Delegated Legislation

- 3.1 A *Joint Standing Committee on Delegated Legislation* is established.
- 3.2 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.
- 3.3 A quorum is 4 Members of whom at least one is a Member of the Council and one a Member of the Assembly.
- 3.4 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.
- 3.5 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.
- 3.6 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;
 - (d) deprives a person aggrieved by a decision of the ability to obtain review of the merits of that decision or seek judicial review;
 - (e) imposes terms and conditions regulating any review that would be likely to cause the review to be illusory or impracticable; or
 - (f) contains provisions that, for any reason, would be more appropriately contained in an Act.
- 3.7 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 inquiry:

Mr Joe Francis MLA (Chairman)
Hon Robin Chapple MLC (Deputy Chairman)
Hon Alyssa Hayden MLC
Ms Janine Freeman MLA

Hon Jim Chown MLC
Mr Paul Miles MLA
Hon Helen Bullock MLC
Mr Andrew Waddell MLA

Staff as at the time of this inquiry:

Felicity Mackie, Advisory Officer (Legal)
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ISBN: 978-1-921634-59-8

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REPORT OF THE JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

ANNUAL REPORT 2010

1 INTRODUCTION

The Committee

- 1.1 Each year, hundreds of instruments of subsidiary legislation are made which affect the lives of many Western Australians. They have the same force in law as primary legislation and create legal rights, obligations and duties and some can impose significant penalties for breach. The Executive Government makes most regulations via the Governor in Executive Council. However a significant proportion of subsidiary legislation is made by the councils of the 139 local governments of Western Australia. In addition there are many other instruments generated by statutory bodies and boards.
- 1.2 The parliamentary function of scrutiny of delegated legislation has been delegated by the Parliament to the Joint Standing Committee on Delegated Legislation (**Committee**). The membership of the Committee changed at the commencement of the 38th Parliament in 2009.
- 1.3 The Committee is an eight-member committee, comprising equal membership from the Legislative Assembly and Legislative Council. 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.
- 1.4 The Committee holds a standing referral from the Legislative Council to consider all instruments of subsidiary legislation that are published,¹ whether under section 41(1)(a) of the *Interpretation Act 1984* or another written law. As a result, the Committee is able to scrutinise and report to the Parliament on a huge volume of instruments. However, due to statutorily imposed deadlines and limited resources, the Committee resolved shortly after its establishment to consider only those instruments that are subject to disallowance pursuant to section 42 of the *Interpretation Act 1984* or another written law, together with any other instruments that were noted by individual members.
- 1.5 The Committee's work comprises of scrutiny of local laws made by local governments and instruments made by government agencies, departments, boards and

¹ As defined in section 5, *Interpretation Act 1984*.

other entities authorised to make subsidiary legislation. Upon publication, the instruments stand referred to the Committee for scrutiny.

- 1.6 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;
 - (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; or
 - (f) contains provisions that, for any reason, would be more appropriately contained in an Act.

Annual reporting

- 1.7 At the commencement of each sitting year, the Committee tables an annual report in both Houses outlining its activities during the previous sitting year. In previous years, the Committee has also tabled a report identifying and discussing issues of concern in respect of local laws. The Committee has resolved to now table one composite annual report.
- 1.8 This report covers the period of activity between 2 December 2009 and 2 December 2010 (the last day of sitting for 2010).
- 1.9 This report includes a summary of issues considered by the Committee, including a description of the more significant issues arising from the Committee's deliberations. It also contains a brief description of responses by ministers to Committee recommendations.²

Members

- 1.10 The Committee was served by the following members:

² Standing Order 337 of the Standing Orders of the Legislative Council requires the responsible Minister to respond to a Committee report recommending action by, or seeking a response from, the Government. The response is to be provided within four months from the date of tabling the report.

- Mr Joe Francis MLA (Chairman);
- Hon Robin Chapple MLC (Deputy Chairman);
- Hon Helen Bullock MLC (appointed 22 April 2010);
- Hon Jim Chown MLC;
- Hon Jock Ferguson MLC (until 13 February 2010);
- Ms Janine Freeman MLA;
- Hon Alyssa Hayden MLC;
- Mr Paul Miles MLA; and
- Mr Andrew Waddell MLA.

1.11 The Committee was saddened on the passing of Hon Jock Ferguson MLC and acknowledges his contribution to the Committee.

1.12 The Committee is assisted by legal advisory officers who examine and report to the Committee on every disallowable instrument, attend meetings and draft correspondence. In the event that the Committee decides to report to the Parliament, the advisers prepare a draft report for the Committee's consideration. The Committee's advisers during 2010 were:

- Ms Christine Kain, Advisory Officer (Legal);
- Ms Irina Lobeto-Ortega, Advisory Officer (Legal);
- Ms Felicity Mackie, Advisory Officer (Legal); and
- Ms Denise Wong, Advisory Officer (Legal) (as required).

1.13 Mr David Driscoll, Committee Clerk, provided administrative and clerical support. Mrs Lorraine Murray, Ms Kerry-Jayne Braat and Ms Selena Flynn all provided internet and reception services.

2 COMMITTEE ACTIVITIES

Meetings and hearings

2.1 During the reporting period the Committee held 23 meetings. It also held six public hearings and one private briefing.

Reports presented to the Parliament

2.2 In 2010 the Committee presented the following reports to both the Legislative Council and the Legislative Assembly, in accordance with its terms of reference:

- Report Number 38 - *Issues of Concern Raised by the Committee between 1 May 2009 and 31 December 2009 with respect to Local Laws*, tabled on 22 April 2010;
- Report Number 39 - *Annual Report 2009*, tabled on 6 May 2010;
- Report Number 40 - *Betting Control Amendment Regulations (No. 4) 2009, Casino Control Amendment Regulations 2009, Casino Control (Burswood Island) (Licensing of Employees) Amendment Regulations (No. 2) 2009, Gaming and Wagering Commission Amendment Regulations 2009, Racing and Wagering Western Australia Amendment Regulations 2009 and Liquor Control Amendment Regulations (No. 7) 2009*, tabled on 18 May 2010;
- Report Number 41 - *Shire of Dardanup Standing Orders Local Law 2009*, tabled on 12 August 2010;
- Report Number 42 - *Shire of Capel Keeping and Welfare of Cats Amendment Local Law 2009 and Shire of Koorda Standing Orders Local Law 2009*, tabled on 16 September 2010; and
- Report Number 43 - *Shire of Koorda Cemeteries Amendment Local Law 2010*, tabled on 25 November 2010.

Government Responses

2.3 During the reporting period the Committee received Government responses to:

- Report Number 35 - *Fish Resources Management Amendment Regulations (No. 3) 2009*, tabled on 19 November 2009;
- Report Number 36 - *Tabling of Subsidiary Legislation in the Legislative Council*, tabled on 19 November 2009; and
- Report Number 37 - *Unauthorised Disclosure of Confidential Committee Correspondence by the City of Joondalup*, tabled on 26 November 2009.

2.4 Copies of the Government responses can be viewed at <http://www.parliament.wa.gov.au/index.htm>. Follow the links to *Committees*, then *Current Committees*, then *Delegated Legislation Committee*, then *Reports*. Open the report and then click on *Government response*.

Response to Report Number 35

- 2.5 In December 2009, the Minister for Fisheries wrote to the Committee noting that:
- the Committee's Report Number 35 will provide a useful guide for the future setting of fees under the *Fish Resources Management Act 1994* and *Fish Resources Management Regulations 1995*;
 - he had given a high priority to acting on the report. The report would be referred to the Funding Working Group so that the Committee's findings and recommendations may be taken into account when developing a new fee-setting model for fisheries in Western Australia;
 - the new fee-setting model will be in place before 30 June 2010 for fees prescribed in the *Fish Resources Management Regulations 1995* and management plans; and
 - he would not be approving any further fee regulations that have a Development and Better Interest Fund (**DBIF**) component.³
- 2.6 However, in the same letter, the Minister advised that he had recently approved amendments to two management plans that included access licence fees that contained a DBIF component.⁴ The Minister advised that it had not been practicable for the Department of Fisheries to determine an alternative fee in the absence of a revised fee-setting model developed with full regard to the Committee's recommendations. After obtaining further information from the Department in relation to the two management plan amendments, the Committee resolved during meetings in March and April 2010 to take no further action on the basis that all future managed fishery access licence fees would soon be set according to the new fee-setting model and would not contain a DBIF component.
- 2.7 The formal Government response to the Committee's Report Number 35 was tabled in the Legislative Council on 25 March 2010. The Minister for Fisheries, on behalf of the Government, advised that he expected a new fee-setting model to be in place before 30 June 2010 and that, in the meantime, he would not be approving any further fees that had a DBIF component. The Minister noted that new fees for the fisheries which were the subject of the report⁵ would normally have been gazetted in January or February 2010. However, given the findings and recommendations of the

³ Letter from Hon Norman Moore MLC, Minister for Fisheries, 7 December 2009.

⁴ The amendment regulations did not alter the amount of the access licence fees; the application of these fees was due to expire in 2009 and the amendment regulations extended their application.

⁵ These were the Abalone Managed Fishery, the Abrolhos Islands and Mid West Trawl Managed Fishery, the Exmouth Gulf Prawn Managed Fishery, the Shark Bay Prawn Managed Fishery; the Shark Bay Scallop Managed Fishery; the West Coast Demersal Gillnet and Demersal Longline Interim Managed Fishery and the West Coast Purse Seine Managed Fishery.

Committee's report, the new fees for these fisheries would be deferred until early 2011, when a new fee structure is in place.

Response to Report Number 36

2.8 The Committee is pleased to note the Government's willingness to support the Committee's recommendation to amend Standing Order 153(c)(i) by extending the number of sitting days before a disallowance motion comes on for debate in the House from 10 to 16 days. As at 14 February 2011 the Committee had received no final report back from the Legislative Council Procedure and Privileges Committee in relation to the outcome of its review of the Legislative Council Standing Orders.

Response to Report Number 37

2.9 The Government's response to the Committee's Report Number 37 - *Unauthorised Disclosure of Confidential Committee Correspondence by the City of Joondalup* suggested that the Committee may wish to consider reviewing its practice in relation to confidentiality of Committee correspondence. The Committee acknowledges the Governments' comments and is giving consideration to its confidentiality requirements. The Committee has also amended its standard correspondence in order to clarify its requirements.

Previous Government responses

2.10 The Committee notes that, in relation to Government responses previously provided, as at 14 February 2011:

- the Government response to its Report Number 29 - *City of Armadale Signs Local Law 2007* has been completed with the publication, in the *Government Gazette* on 30 April 2010, of the *City of Armadale Signs Repeal Local Law 2010*. This was made by the Lieutenant-Governor and Administrator in Executive Council under section 3.17(1) of the *Local Government Act 1995*; and
- the Government response to its Report Number 34 *City of Joondalup Cats Local Law 2008* advised that the Government was giving consideration to the introduction of a Cat Bill into the Parliament. The Committee notes that in June 2010 the Department of Local Government conducted public consultation in relation to proposals for cat control legislation.

Statistics

2.11 The table below provides an indication of the volume of the Committee's workload in 2010. As can be seen, during the reporting period, 468 instruments of disallowable subsidiary legislation were published in the Western Australian *Government Gazette*.

Each was considered by the Committee. In relation to a significant proportion of those, the Committee wrote to the relevant authority to request further information to assist examination of the subsidiary legislation.

2.12 The figures in the table below do not demonstrate that many of the instruments considered by the Committee are often lengthy documents. Irrespective of their size, the instruments often involve complex issues that span a diverse range of subject matters.

Calender Year	2010	2009
Total number of disallowable instruments referred	468	493
Total number of regulations referred	300	323
Total number of local laws referred	93	89
Total number of rules referred	29	19
Total number of other instruments referred (Including, orders, notices, plans and Metropolitan Regional Schemes)	46	62
Total number of notices of motion for disallowance given	46	50
Total number of notices of motion for disallowance withdrawn	36	48
Total number of hearings held by the Committee	6	2
Total number of undertakings provided to the Committee to amend/repeal an instrument	25	37
Total number of reports tabled (information and disallowance)	6	10
Total number of instruments disallowed on recommendation of the Committee	3	2

Undertakings

2.13 The figure in the last row of the above table indicates that three instruments were disallowed on the recommendation of the Committee in 2010. Prior to recommending disallowance the Committee will seek to obtain a written undertaking from the responsible Minister, Department or local government to amend or repeal the instrument in question. When such undertakings are given, the Committee does not usually proceed with a motion to disallow the instrument. As indicated above, 25 such undertakings were provided to the Committee.

Disallowance

2.14 Unless satisfied by a Government undertaking, the Committee may resolve to report to the Parliament, recommending the disallowance of an instrument in the Legislative Council.⁶

2.15 The Committee recommended disallowance of the *Betting Control Amendment Regulations (No. 4) 2009*, *Casino Control Amendment Regulations 2009*, *Casino*

⁶ Either House of Parliament may pass a motion disallowing a regulation, provided that notice of that motion has been given within 14 sitting days after tabling of the regulation. (Section 42 of the *Interpretation Act 1984*).

Control (Burswood Island) (Licensing of Employees) Amendment Regulations (No. 2) 2009, Gaming and Wagering Commission Amendment Regulations 2009, Racing and Wagering Western Australia Amendment Regulations 2009 and Liquor Control Amendment Regulations (No. 7) 2009. This is reported in the Committee's Report Number 40. The instruments were not disallowed.⁷

2.16 The Committee also recommended disallowance of the *Shire of Dardanup Standing Orders Local Law 2009* and that instrument was subsequently disallowed by the Legislative Council on 19 August 2010.⁸ This is reported in the Committee's Report Number 41.

2.17 In its Report Number 42, the Committee recommended that the *Shire of Capel Keeping and Welfare of Cats Amendment Local Law 2009* and *Shire of Koorda Standing Orders Local Law 2009* be disallowed. These Local Laws were disallowed by the Legislative Council on 23 September 2010.⁹

2.18 In its final report for the year, Report Number 43, the Committee recommended disallowance of the *Shire of Koorda Cemeteries Amendment Local Law 2010*. The debate on the motion to recommend disallowance of the Local Law is due for debate in the Legislative Council on 15 February 2011.

3 ISSUES RELATING TO LOCAL LAWS

Local Laws Working Group

3.1 As has been previously reported, the Local Laws Working Group (**Working Group**) is a group of local law stakeholders comprising:

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

3.2 Working Group meetings provide an opportunity for Committee members and staff to discuss issues of concern noted by the Committee as part of its scrutiny of local laws and for other participants to advise the Committee of issues attracting their attention.

⁷ Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 20 May 2010, p3066.

⁸ Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 19 August 2010, p5833.

⁹ Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 23 September 2010, p7218.

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- 3.3 The Working Group met in May 2010. Mr Joe Francis MLA, Hon Alyssa Hayden MLC and Mr Paul Miles MLA represented Committee members. Four members of the Committee's staff also attended the meeting.

Circular Number 28-2005: Minister's Directions - Local Laws Explanatory Memoranda to the Joint Standing Committee on Delegated Legislation

- 3.4 The Working Group meeting discussed the need for a review of Circular Number 28-2005: Minister's Directions - Local Laws Explanatory Memoranda to the Joint Standing Committee on Delegated Legislation. Participants agreed that more clarity was required in the Circular to reflect current requirements and to assist local government officers' understanding of, and compliance with, the Committee's requirements.

Online undertakings

- 3.5 The Committee advised the participants of its practice of grouping all local government undertakings together on the *Parliament of Western Australia* internet site. This becomes a point of reference for all local governments and their advisers to ascertain systemic problems with a particular local law and what amendments the Committee has required a local government to make in order for the local law to be valid.¹⁰
- 3.6 The Committee was pleased to receive extremely positive feedback from the Working Group participants regarding the online undertakings. However it was noted that not all local governments were aware of its existence. At the suggestion of Committee staff, it was agreed that the Department of Local Government provide a link from their website to the Committee's website for easy access for local governments and better use of the information.

Technical Sub-Group meeting

- 3.7 It was agreed that it would be of benefit for a Working Group sub-group to meet once every six months to discuss technical issues encountered during the period. Members would comprise representatives from the Committee's staff, Department of Local Government, WALGA and LGMA.
- 3.8 The Local Laws Sub-Group met in August 2010. Matters discussed included an update on the Model Standing Orders Local Laws, the Regulatory Impact Assessment Process and its impact on local laws, draft guidelines for local governments in relation to confidential Committee correspondence and local law guidance and support resources for local governments.

Cemeteries Local Laws

- 3.9 The Committee has recently tabled Report 43, the *Shire of Koorda Cemeteries Amendment Local Law 2010*. Through this report, the Committee has identified a problem that local governments are currently facing when amending their local laws relating to cemeteries. The Committee considered several amendments to cemeteries local laws in 2010, all of which contained the same problematic clause as the Shire of Koorda in Report 43.
- 3.10 The clause in question relates to reviews by a monumental mason under the *Cemeteries Act 1986* which were previously referred to a Local Court and which, following the commencement of operation of the State Administrative Tribunal, were intended to be referred to that forum instead. The Committee identified that the clause in the *Cemeteries Act 1986* purporting to give this right of review only referred to funeral directors and therefore did not permit monumental masons to apply to the State Administrative Tribunal. The Committee has raised this anomaly in the *Cemeteries Act 1986* with the Minister for Local Government as well as addressing the issue in its Report 43.
- 3.11 The Committee has requested that the Governor exercise his power under section 3.17 of the *Local Government Act 1995* to effect a global amendment to all cemeteries local laws in Western Australia, which will remove the problematic clause, if it exists in any local government laws.

Parking and Parking Facilities Local Laws - Special Events

- 3.12 The Committee considered a number of parking local laws during the reporting period which included a clause dealing with parking for special events. Such clauses were worded as follows:¹¹

(1) The local government may indicate by signs that all or any part of a parking facility is set aside during the period indicated on the signs for the parking of vehicles by persons attending a special event.

(2) A person shall not park or stop a vehicle or permit a vehicle to remain parked in any area which is set aside under sub-clause (1) unless a ticket obtained from the local government relating to the special event is displayed inside the vehicle so that it can be read by an authorised person from outside the vehicle.

¹⁰ The internet site can be viewed at <http://www.parliament.wa.gov.au>. Follow the links to *Committees*, then *Current Committees*, the *Delegated Legislation Committee*, then at *Committee Details*, scroll down to *Local Government Undertakings*.

¹¹ Clause 7.4, *Town of Claremont Parking and Parking Facilities Local Law 2009*.

(3) *A fee payable for special event parking may be determined and imposed by the local government.*

(4) *For the purpose of this clause a “special event” means any event or occurrence considered by the local government to be special and likely to attract a substantial number of persons driving vehicles.*

- 3.13 On inquiring what special events this clause was intended to capture, Committee staff were advised that events at the Claremont Showgrounds such as the Royal Agricultural Show and annual music events such as the Big Day Out were the reason for the introduction of the clause. Staff were advised that there are approximately five such music events throughout the year and the dates of the events change from year to year.
- 3.14 Clause 7.4(3) is a determination device, which is a means by which the council of a local government purports in a local law to sub-delegate the exercise of its powers under the *Local Government Act 1995* to a mere resolution of a simple majority of the council, subject to certain procedural and administrative procedures being followed to publicise any such resolution.
- 3.15 The Committee’s historical position on determination devices is that they are problematic as they avoid scrutiny by the Parliament as the mandatory procedure for making a local law under section 3.12 of the *Local Government Act 1995* is not required to be followed, in order to make, repeal or amend a determination. The determination device also by-passes the requirements of section 42 of the *Interpretation Act 1984* in relation to publication of the determination in the *Gazette*, tabling in both Houses of Parliament and disallowance.
- 3.16 There is also an argument that determinations amount to a sub-delegation of legislative power, since determinations are made by a simple majority of Council members, whereas local laws must be made by an absolute majority of Council members under section 3.12(4) of the *Local Government Act 1995*.
- 3.17 In the absence of legislative authority to the contrary, there is a common law rule against sub-delegation of legislative power. This rule is based on the principle that a body that has been delegated the power to make legislation cannot itself delegate this power.¹² Local governments have been delegated the power to make local laws by the Parliament enacting section 3.5(1) of the *Local Government Act 1995*. That is, a local government is not permitted to delegate this power to make local laws to another body unless authorised to do so by the *Local Government Act 1995* or another Act.

¹² For example, see *Hawke’s Bay Raw Milk Producers Co-op Co Ltd v New Zealand Milk Board* [1961] NZLR 218; *Turner v Owen* (1990) 96 ALR 119.

- 3.18 The Committee has, since 2004, allowed the use of clauses in parking local laws that establish areas that may be designated as “parking stations” or “no parking” areas, with the details of specific parking bays and days and times to which parking restrictions apply to be determined by the local government and adequately signposted at those parking bays. The Committee has taken the view that the designation of individual parking bays is a purely administrative matter and that, so long as any restriction is adequately sign-posted, it will not object to determination devices being used sparingly in parking local laws.
- 3.19 Similarly, special events local laws (such as the annual Skyshow and Red Bull Air Race) have been allowed to use determination devices to establish “no parking” zones over entire suburbs, but only where a procedure is followed where the areas are publicised before the event and adequately sign-posted during the event. The use of determination devices in special events local laws has been accepted by the Committee as necessary due to the very small timeframe in which local governments have to implement the “no parking” zones - usually only knowing a few weeks before the event exactly when and where it will be held and the restrictions that are to apply. This has been accepted by the Committee as too short a time period in which to effectively enact a local law amendment. The Committee’s insistence on sufficient public notice for the closure of a large number of parking spaces is consistent with the requirements of public notice that local governments must follow when closing individual thoroughfares to vehicles under section 3.50 of the *Local Government Act 1995*.
- 3.20 Clause 7.4(1) of this local law provided the Town of Claremont with a general, unlimited power to set aside all or any part of a parking facility for the parking of vehicles by persons attending a special event.
- 3.21 The definition of “special event” in clause 7.4(4) is too vague and does not address the Committee’s concerns, as previously stated, about appropriate public notice. To address its concerns and to maintain consistency in its approach, the Committee sought an undertaking from the Town that clause 7.4(4) be amended to include some reasonable, defined limit to the possible dates that may be used for the special event.
- 3.22 Further, it sought an undertaking that clause 7.4 be amended to include a provision whereby sufficient local public notice of the special event is to be given.
- 3.23 The Town provided the undertakings sought to amend the problematic clause.
- 3.24 Similar undertakings were provided by other local government councils in relation to special events clauses in parking local laws during the reporting period. Some councils resolved to remove the problematic special events clause entirely.

4 ISSUES RELATING TO REGULATIONS

- 4.1 The Committee considered a large number of regulations during the reporting period. Issues such as retail trading hours, child car seat laws and government fees and charges all received a significant degree of public interest.
- 4.2 Some of the more contentious regulations and issues considered by the Committee are discussed below.

Road Traffic Code Amendment Regulations (No.2) 2010

- 4.3 These amendment regulations were published in the *Government Gazette* on 4 June 2010 and came into operation on 1 October 2010.
- 4.4 Among other things, the amendments altered the age at which children are permitted to occupy certain seats, the types of restraints they are permitted to use and the places in motor vehicles that children under 16 years are permitted to occupy. They also changed driver responsibilities.
- 4.5 The amendments inserted new terms into the *Road Traffic Code 2000 (Code)* such as “booster seat”, “child safety harness” and “suitable child safety harness”. They contain more detail than the previous regulations, which simply referred to a “child restraint” and a “suitable child restraint”.
- 4.6 An exemption provision was required for the eldest of three children under four years old seated in the rear seat of a motor vehicle that has two rows of seats. If the child cannot be seated to comply with regulations that require being restrained in a device appropriate to their age (because there is not sufficient space to fit the device), then the child may occupy a seated position in the rear in a child harness attached to a lap-sash seatbelt, if there is sufficient space for the child to sit in that position.
- 4.7 The Committee was advised by the Department of Transport that to prepare the community for the new laws, a three month public education campaign would be undertaken, prior to the regulations coming into effect.
- 4.8 The Department of Transport noted that the revised rules for child car restraint and seatbelt wearing will still have considerable implications for the driving public. It noted that some groups, such as child and day care centres, may need to reassess the suitability of their vehicles to determine whether the numbers and ages of the children being carried can be legally accommodated under the new laws.
- 4.9 The Department of Transport also noted that access to suitable vehicles and restraints has always been a problem in Indigenous communities (and for people from low socio-economic backgrounds) and it was possible that the new laws would exacerbate the problem. It advised that the Office of Road Safety had undertaken preliminary

investigations into how access to child restraints and suitable vehicles could be enhanced for these groups.

- 4.10 The Committee was advised that Victoria, New South Wales and Queensland have already adopted these rules, with other states to follow.

Hearing

- 4.11 The Committee had concerns with some of the amendments and resolved to conduct a hearing with officers from the Department of Transport and the Office of Road Safety in order to assist with its deliberations. The transcript of that hearing can be viewed at <http://www.parliament.wa.gov.au>. Follow the links to *Committees*, then *Current Committees*, *Delegated Legislation Committee*, *Past Inquiries*, then click on *Road Traffic Code Amendment Regulations (No.2) 2010*. The transcripts of the evidence given on 6 September 2010 and 13 September 2010 are at the bottom of the page.

- 4.12 The Committee remained concerned about several aspects of the amendments.

- 4.13 One of the issues the Committee considered was situations where a child aged four to seven years may not be able to travel in the rear of a vehicle where, for example, they suffer from motion/car sickness or where they have a leg in plaster. The Committee was of the view that, in relation to this requirement, an exemption be included in the Code for cases where a child is unable to travel in the rear of a vehicle due to medical reasons.

- 4.14 After several letters between the Committee and the Department of Transport, the Committee secured undertakings from the Minister for Transport to:

- conduct an administrative review of the operations of the *Road Traffic Code Amendment Regulations (No 2) 2010* one year after they have been implemented. This will include extensive consultation with WA Police; and
- amend regulation 235(7) of the *Road Traffic Code 2000* within six months to include a specific reference to a child in the front row of seats in a motor vehicle in order to provide a defence based on a medical exemption in those circumstances.

Hospitals Fees and Charges

- 4.15 The *Hospitals (Licensing and Conduct of Private Psychiatric Hostels) Amendment Regulations 2009* and the *Hospitals (Licensing and Conduct of Private Hospitals) Amendment Regulations 2009 (the Amendment Regulations)* were published in the *Government Gazette* by the Government on 30 October 2009 and were referred to the Committee upon gazettal. The agency responsible for the administration of these fees is the Department of Health.

- 4.16 The purpose of the Amendment Regulations was to increase the fees for the grant of a licence, renewal of a licence and approval of premises as a private psychiatric hostel/private hospital and introduce a fee for a replacement licence. Ten of the fees in the Amendment Regulations were increased by amounts in excess of 1,000 per cent, with two fees being increased by 8,233.33 per cent. The Committee wrote to the Department of Health as part of its ongoing inquiry into cost recovery to seek further information behind the fee increases and whether any fees were being cross-subsidised by others.
- 4.17 The Department initially responded with cost information which revealed that many of the fees were over-recovering the Department's costs, in some cases by up to 700 per cent. The Department advised the Committee that these new fees were "*consistent with other jurisdictions and increased revenue*"¹³.
- 4.18 The Committee sought undertakings from the Department that those fees which were currently over-recovering would be reduced to reflect the cost of the service only.
- 4.19 The Department subsequently advised that the initial costing which had been provided to the Committee had under-estimated the costs of delivering those services. A revised breakdown of costs was provided, which contained additional expenses not included in the original document. The revised costing still resulted in the majority of the fees over-recovering the costs, with two fees over-recovering by almost 300 per cent.¹⁴
- 4.20 The Department gave undertakings to reduce these two fees to the amount being charged prior to the Amendment Regulations being gazetted: \$1,100.00. The Minister for Health approved the undertakings in March 2010.
- 4.21 The Department of Health also advised the Committee that it had put into place mechanisms to review the fees on a yearly basis.

Retail Trading Amendments in 2010

- 4.22 The Committee considered several amendments to the *Retail Trading Hours (Tourism Precincts and Holiday Resorts) Regulations 2007* in 2010, prior to the principal regulations being repealed in July. The amendments which came before the Committee in 2010 were intended to expand the Perth and Fremantle tourism precincts (as they were then known) through the operation of the *Retail Trading Hours (Tourism Precincts and Holiday Resorts) Amendment Regulations (No. 2) 2009*

¹³ Letter from the Director General of the Department of Health, 22 December 2009, p1.

¹⁴ For the grant of licences under clause 4(1) of the *Hospitals (Licensing and Conduct of Private Hospitals) Regulations 1987* and clause 5(1) of the *Hospitals (Licensing and Conduct of Private Psychiatric Hostels) Regulations 1997*, where the number of persons licensed to be accommodated was more than 201 persons. The figure given for 'Actual Cost' was \$1,512.40 and the fee charged for the issue of the licence was \$6,000.00.

and the *Retail Trading Hours (Tourism Precincts and Holiday Resorts) Amendment Regulations 2010*, respectively.

- 4.23 Section 12A of the *Retail Trading Hours Act 1987* (**the Act**) previously authorised the prescription of the tourism precinct boundaries under the Act. Section 12A(4) is somewhat circular in its wording in that ‘tourism precinct’ means “*the area or areas prescribed for the purposes of this definition*”.
- 4.24 The terminology used in section 12A has been the subject of several amendments following the Committee’s consideration of the instruments, most notably the replacement of the phrase ‘tourism precinct’ with ‘special trading precinct’¹⁵.
- 4.25 When the Committee initially considered these two instruments in April 2010, it expressed concern that the amendments may not have been authorised by section 12A of the Act. Following a series of correspondence with the Department of Commerce, the Committee held a public hearing in May 2010 into the *Retail Trading Hours (Tourism Precincts and Holiday Resorts) Amendment Regulations (No. 2) 2009* to enquire into the legislative basis for the expansion of the Perth tourism precinct and invited the Department to attend.
- 4.26 At the hearing, the Department of Commerce advised that it had received advice from the State Solicitor’s Office that the relevant test to be applied to a proposed amendment to a ‘tourism precinct’ in the *Retail Trading Hours Act 1987* was threefold:
- that the proposed area form a ‘precinct’;
 - that the area be of significance to tourists; and
 - that the proposed area be proximate to the Perth CBD, the suburb of Perth or the City of Perth (local government).¹⁶
- 4.27 The Committee questioned the Department on the areas of significance to tourists within the expanded Perth tourism precinct using the criteria above. The Committee also had concerns with the expanded area of the Fremantle tourism precinct and how the suburbs within the City of Fremantle satisfied the ‘significance to tourists’ test.

¹⁵ The Retail Trading Hours Amendment (Joondalup Special Trading Precinct) Bill 2009 amended section 12A of the *Retail Trading Hours Act 1987* to delete the word “*tourism*” and replace it with “*special trading*”, in relation to trading precincts. The Bill also created the special trading precinct of Joondalup. The ‘special trading precincts’ of Midland and Armadale were created in subsequent months.

¹⁶ Ms Anne Driscoll, Executive Director, Consumer Protection, Department of Commerce, *Transcript of Evidence*, 24 May 2010, p7. The full transcript of the hearing is publicly available on the Committee’s website at <http://www.parliament.wa.gov.au>, by following the links to the Committee.

- 4.28 The Committee was evenly divided on the question of disallowance of the *Retail Trading Hours (Tourism Precincts and Holiday Resorts) Amendment Regulations (No. 2) 2009* and as a result, resolved not to recommend disallowance and not to remove the notice of motion to disallow. The Committee also resolved not to prepare a disallowance report and that the disallowance motion be debated in the Legislative Council.
- 4.29 The Committee took no further action with regard to the *Retail Trading Hours (Tourism Precincts and Holiday Resorts) Amendment Regulations 2010* following the hearing.
- 4.30 The Act has now been amended to remove the concept of a ‘tourism precinct’ entirely and therefore has removed the need for regulations to satisfy the criteria outlined above.
- 4.31 The Committee notes that its previous concerns regarding the legality of the term ‘tourism precinct’ have now been made redundant following the amendments to the *Retail Trading Hours Act 1987* and the subsequent changes to the subsidiary legislation.

Western Australian Meat Industry Authority Amendment Regulations (No. 2) 2010

- 4.32 The *Western Australian Meat Industry Authority Amendment Regulations (No. 2) 2010 (the WAMIA amendments)* were published in the *Government Gazette* on 30 June 2010. The Committee first considered the WAMIA amendments, which consisted of fee increases relating to the abattoir approval scheme and the Muchea Livestock Centre, in September 2010. Several of the fees were increased by as much as 50 per cent and 100 per cent, with no specific information provided in the explanatory material as to the relationship between the fee imposed and the cost of provision of the particular service. The Western Australian Meat Industry Authority (**the Authority**) is responsible for the administration and operations of the Muchea Livestock Centre.
- 4.33 The Committee’s queries therefore related to the level of cost recovery being achieved by the fees and it sought advice from the Authority (initially through the Department of Agriculture and Food) as to the level of cost recovery for the fees, including a breakdown of costs. The Committee also sought confirmation that none of the fees which were being increased were being used to cross-subsidise any other fees at the Muchea Livestock Centre. The Committee seeks this information every time that a government department or statutory body increases its fees by subsidiary legislation.
- 4.34 The Committee experienced considerable difficulty in obtaining the requested information from the Authority and it was, in fact, several months before an adequate response was received from the Minister for Agriculture and Food, on behalf of the Authority.

- 4.35 The Committee notes that the information that it requested from the Authority relates to the way in which fees are calculated by an agency or statutory body. This information is required under the Public Sector Commissioner's Circular 2009-12, *Costing and Pricing Government Services*¹⁷, which is to be considered together with a document issued by the Department of Treasury and Finance called *Costing and Pricing Government Services: Guidelines for Use by Agencies in the Western Australian Public Sector*¹⁸.
- 4.36 The Committee acknowledges, and is grateful for, the significant assistance that it received from the Minister in obtaining the information from the Authority. The Committee remains concerned, however, that the Authority was not able to produce meaningful information revealing the level of cost recovery for the Muchea Livestock Centre, when it had commenced operations so recently (in May 2010). The Committee will continue to closely scrutinise any future amendments to fees administered by the Authority to ensure that adequate information is provided in relation to the costs being recovered under the *Western Australian Meat Industry Authority Act 1976*.

Energy Coordination (Gas Tariffs) Amendment Regulations 2010

- 4.37 On 26 March 2010, the *Energy Coordination (Gas Tariffs) Amendment Regulations 2010* were published in the *Government Gazette* and stood referred to the Committee.
- 4.38 The amendments provided for the adjustment of the gas tariff caps for small use customers as prescribed in the *Energy Coordination (Gas Tariffs) Regulations 2000 (Tariff Regulations)*. The adjustments to the tariff caps took effect from 1 April 2010.
- 4.39 The amendments to the Tariff Regulations replaced the standard Consumer Price Index (CPI) adjustment for 1 July 2010 with the new base tariffs. The Committee was advised that the tariff caps will return to the standard CPI escalation methodology for 1 July 2011, unless alternative tariff arrangements are agreed to as a result of the full Gas Tariffs Review process.
- 4.40 The Committee was advised that the proposed adjustment to the retail tariff caps included the provision for partial recovery of costs associated with the Varanus Island gas disruption in the tariff areas serviced by supply from this processing facility (excluding Albany).

¹⁷ This Circular was previously issued as a Premier's Circular in 2004 and in 2007, and is currently available to the public on the website of the Public Sector Commissioner at <http://www.publicsector.wa.gov.au/Pages/default.aspx>.

¹⁸ This document is also available on the Department of Treasury and Finance's public website, at http://www.dtf.wa.gov.au/cms/uploadedFiles/costing_pricing_government_services_april2007.pdf.

- 4.41 The Office of Energy advised the Committee that as a result of the Varanus Island gas disruption, there was not enough gas in the market. Alinta had to buy gas from other suppliers, otherwise it would not have been able to supply the residential market. The amendments re-set the base tariffs to reflect this premium cost of gas in the market. Put another way, during the Varanus Island incident, gas supplies at a wholesale level decreased, while prices increased. In order to ensure continuity of supply to small use customers, Alinta had to buy gas at a wholesale level at premium prices. The amendments allowed for the recovery of these additional costs that Alinta incurred in supplying gas to its customers during the supply disruption.
- 4.42 The Committee was advised that as gas consumption was less than forecast for 2009/10, there had been less cost recovery than expected for the period, and as a result there had been an under-recovery of \$1.17 million. The Office of Energy advised that it is intended that this balance of costs will continue to be recovered (at 0.04 cents per unit) limited to the 2010/11 period to ensure that over-recovery of this allowance does not occur.
- 4.43 The Committee had concerns with these amendments and made further inquiries with the Office of Energy. The Committee noted that the proposed adjustment to the retail tariff caps included the provision for partial recovery of costs associated with the Varanus Island gas disruption. The Committee was of the view that there was the potential for over-recovery in future years if, following recovery of the Varanus Island costs, annual CPI adjustments were simply applied on top of the new base tariffs.
- 4.44 The response from the Office of Energy did not entirely satisfy the Committee, however it resolved to not recommend disallowance of the amendments.
- 4.45 The Committee did, however, resolve to maintain a watching brief in relation to this instrument.
- 4.46 The Committee also resolved to include a discussion on this instrument in its annual report to Parliament, as a way of alerting Members of Parliament to the Committee's concerns.

Standards Australia

- 4.47 The Committee scrutinised a number of regulations during the reporting period which adopted the standards of Standards Australia.¹⁹
- 4.48 An example is the *Navigable Waters Amendment Regulations (No.3) 2010* which adopted Australian Standards in relation to personal flotation devices (life jackets).

¹⁹ Standards Australia is the nation's peak non-government Standards organisation. It is charged by the Commonwealth Government to meet Australia's need for contemporary, internationally aligned Standards and related services, <http://www.standards.org.au/OurOrganisation/Aboutus.aspx> (viewed on 6 December 2010).

Those regulations were authorised under section 115(1)(a) of the *Western Australian Marine Act 1982* which provides that regulations made under the Act may “*adopt, either wholly or in part or with modifications and either specifically by reference, any...of the standards, rules, codes or specifications of the bodies known as Standards Australia...*”.

- 4.49 The Committee notes that Standards Australia (which was once a government organisation) is now a private entity. Access to the standards can require the payment of not insignificant amounts of money. The Committee is mindful of this in relation to its Term of Reference 3.6(b); that is, whether an instrument:

has an adverse effect on existing rights, interests, or legitimate expectations beyond giving effect to a purpose authorized or contemplated by the empowering enactment.

- 4.50 The Committee has ascertained that the State Library of Western Australia has a subscription to the Standards Australia website which publishes Australian Standards, through which members of the public can obtain access to the standards free of charge. However the Committee is concerned that members of the public may not be aware of this method of accessing the information.

- 4.51 The Committee is maintaining a watching brief in relation to all regulations that adopt the standards of Standards Australia. It will continue to inquire with government departments and agencies as to how they notify the public about how the information contained in the relevant standards can be accessed.

- 4.52 The Committee is of the view that the Government should require its departments and agencies to include notification on their internet home pages that members of the public can obtain free access to the standards published by Standards Australia at the State Library of Western Australia.

- 4.53 The Committee was pleased to note the advice from the Department of Transport in relation to the life jacket example given above, that the standards in question can be viewed, free of charge, at the Department of Transport’s Marine Safety Business Unit Fremantle office.

5 FEES AND CHARGES

- 5.1 The consideration of fees and charges imposed by regulations continues to occupy a significant amount of the Committee’s time.

Meeting with Department of Treasury and Finance - 22 February 2010

- 5.2 As part of its ongoing inquiry into cost recovery the Committee met with Mr Michael Barnes, Deputy Under Treasurer, Department of Treasury and Finance and Mr Sean

Cameron, Acting Executive Director, Strategic Policy and Evaluation, Department of Treasury and Finance who appeared before the Committee on 22 February 2010. The transcript of that hearing can be viewed at <http://www.parliament.wa.gov.au>. Follow the links to *Committees*, then *Current Committees*, *Delegated Legislation Committee*, then under *Past Inquiries*, click on *Cost Recovery*. The transcript of the evidence given on 22 February 2010 is at the bottom of the page.

- 5.3 The meeting provided an opportunity for the Committee to share its concerns in relation to the calculation of fees and charges with Department officials. Of particular concern to the Committee was the practice, by some government departments and agencies, of simply relying on the CPI as a justification to increase their fees.
- 5.4 Discussion also included the contents of the Government's *Costing and Pricing Government Services: Guidelines for Use by Agencies in the Western Australian Public Sector*²⁰ and whether it was being followed, the resources that are made available to departments and agencies to ensure that the guide is followed, and the policies that exist in the event that this does not occur.
- 5.5 Further discussion in relation to this hearing can be found in the Committee's Report Number 40 - *Betting Control Amendment Regulations (No. 4) 2009, Casino Control Amendment Regulations 2009, Casino Control (Burswood Island) (Licensing of Employees) Amendment Regulations (No. 2) 2009, Gaming and Wagering Commission Amendment Regulations 2009, Racing and Wagering Western Australia Amendment Regulations 2009 and Liquor Control Amendment Regulations (No. 7) 2009*, tabled on 18 May 2010 at pages 9-11.

Auditor General's Report - November 2010

- 5.6 The Committee notes the publication of the *Western Australian Auditor General's Second Public Sector Performance Report 2010: Report 12 - November 2010*. Of particular interest to the Committee were the results of the audit titled "*The price is right? Setting fees and charges for government services.*"
- 5.7 The audit found that all six agencies audited had weaknesses in their approach to setting fees and charges. It also found that the Department of Treasury and Finance's guidelines and oversight of fee setting practice, while generally sound, can be improved in some areas.
- 5.8 The findings in the Auditor General's report demonstrate the importance of the Committee's role in scrutinising government fees and charges to ensure that fee increases are authorised and that no over recovery occurs.

²⁰ See footnote 18 for full reference to this document.

6 ISSUES FOR THE COMMITTEE IN 2011

- 6.1 The Committee has applied for funding to travel to Brisbane in July 2011 for the Australia-New Zealand Scrutiny of Legislation Conference.
- 6.2 It is anticipated that the Working Group will be meeting in 2011. The Committee looks forward to that opportunity.
- 6.3 The Committee's inquiry into cost recovery is ongoing.



**Mr Joe Francis MLA
Chairman**

24 February 2011