



PARLIAMENT OF WESTERN AUSTRALIA

**JOINT STANDING COMMITTEE
ON
DELEGATED LEGISLATION**

TWENTY-NINTH REPORT:

Weights and Measures (Exemptions) Regulations 1997

Presented by the Hon Robert Laurence Wiese MLA (Chairman)

**29
November 1997**

Joint Standing Committee on Delegated Legislation

Members

Hon Bob Wiese MLA (Chairman)
Hon Nick Griffiths MLC (Deputy Chairman)
Hon Simon O'Brien MLC
Hon Barbara Scott MLC
Hon Jim Scott MLC
Mr Ted Cunningham MLA
Mr Norm Marlborough MLA
Mr Iain MacLean MLA

Advisory/Research Officer

Andrew Mason

Committee Clerk

Jan Paniperis

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;*
- (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.

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Report of the Joint Standing Committee on Delegated Legislation

in relation to

Weights and Measures (Exemptions) Regulations 1997

1 Introduction

- 1.1 By its Rules the Committee is constrained in the performance of its scrutiny function to the examination of legislative instruments to determine whether they comply with certain legal principles and broader issues relating to rights, liberties and freedoms. In particular, pursuant to Rule 5(a) of the Committee's Rules it is the function of the Committee to consider and report on any regulation that appears not to be within power. This is usually the starting point for the Committee in the performance of its work for, if the regulation is beyond the power delegated to the Executive and capable of being struck down as such by a court, there is little point in examining the regulations in relation to any other matter.
- 1.2 Where the Committee is of the view that a regulation is beyond power or that there are other matters of concern it is the practice of the Committee to consult the relevant Minister or Department to determine whether the matter can be resolved other than by disallowance of the offending regulation. In some cases this consultative process will in fact lead the Committee to the conclusion that the regulation is in fact within power.
- 1.3 It is also the practice of the Committee, where an inquiry into a matter has not been finalised within the time allowed, to move for disallowance of the regulations in order to protect the initial position taken by the Committee. Taking this course of action allows sufficient time for the Committee to address the issues raised in any inquiry. Of course as stated the initial position taken by the Committee can be moved as a result of the consultative process undertaken. The result may well be that the Committee ultimately recommends that the disallowance motion be withdrawn.

2 The Committee's Concern

- 2.1 The *Weights and Measures Act 1915* ("the Act") establishes standards and units of weight and measure and the system and procedure for the verification and stamping of weights, measures and weighing and measuring instruments. In particular section 30 of the Act states that:

*“No person shall use, or have in his possession for use for trade, any weight, measure, or weighing or measuring instrument which is not **stamped as required by this Act**, or which is incorrect or unjust.”*

- 2.2 An instrument is **required by the Act to be stamped** in three circumstances:
- 2.2.1 s.28 If it is used for trade and is not exempted by the regulations then it must be stamped initially;
- 2.2.2 s.29 If it is used for trade then it must be stamped every two years unless the regulations provide an exemption; and
- 2.2.3 s.31 If it becomes defective or has been mended or repaired or been removed for installation at another site then it must be restamped.
- 2.3 Thus pursuant to these provisions the Trade Measurement Unit of the Ministry of Fair Trading (“the Ministry”) has established a system whereby the majority of instruments must be stamped by a Government Inspector. The Ministry have advised the Committee that due to the large number of instruments in the State (approximately 40,000) it has not proved possible for all instruments to be inspected, tested and stamped by an Inspector when required. In fact there are only approximately 8 metropolitan Inspectors available (availability in the field varies with these Inspectors as some are in management positions) and 1 country Inspector based in Bunbury. This has meant that for some traders it has not been possible to carry on normal business operations in the interim period. As a result the *Weights and Measures (Exemptions) Regulations 1997* (“the Regulations”) were promulgated to provide exemptions to the requirement for stamping in specified circumstances. Attached and marked “Annexure A” is a copy of the Regulations. In particular an “Approved Person” will be able to test and mark an instrument and the owner is then able to use it until an Inspector can be made available to stamp the instrument. An “Approved Person” is someone who has met appropriate standards of competence.
- 2.4 The Committee became concerned that regulation 5 of the Regulations may be *ultra vires* the enabling legislation. Regulation 5 provides an exemption from section 31 of the Act, which section requires an instrument to be restamped where it has become defective or has been mended or repaired or has been removed for installation at another site. The concern is that the Act does not provide any authority to regulate to provide an exemption from section 31. If this is correct, then an individual who complies with regulation 5 may nevertheless still be in breach of section 30 of the Act.
- 2.5 The Act authorises regulations to make an exemption from the requirement to be stamped when the instrument is originally stamped and when the instrument is stamped every two years. However there is no specific provision in the Act for regulations to exempt an instrument from the requirement to be restamped where the instrument becomes defective or has been mended or repaired or removed for installation at another site. As stated regulation 5 does in fact provide an exemption from the requirement to

be stamped in this third circumstance. Without any further information this regulation would appear to be *ultra vires* as there is no apparent specific power within the Act to provide an exemption from this requirement unlike exemptions in the other circumstances referred to.

- 2.6 This view is reinforced when it is noted that the Act was promulgated in 1915 when the number of instruments would have been far less than is current. The possibility of exemption to the requirements of section 28 and 29 by way of regulation may have been some acknowledgement of the integrity of a newly stamped weighing or measuring device and of the fact that a machine which is operating *in situ* and undisturbed would under normal circumstances continue to weigh accurately and hence the need for stamping could be waived every 2 years. However an instrument that had been repaired or removed may well not have weighed accurately and therefore the possibility of waiving the stamping requirements under section 31 was not contemplated in 1915. The Committee envisages that this view may have stemmed from the fact that resourcing would have been less of a problem with very few machines requiring inspection.
- 2.7 If the above legal view in sub-paragraphs 2.4 and 2.5 is correct then the matter becomes of particular concern as it places operators in an invidious position in terms of their contractual obligations with third parties. If they comply with the new regulation 5 and continue to use the instrument although it has not been restamped they will be in breach of section 30 of the Act and may be liable to customers as a result. It is not simply a question of whether the Ministry will use its discretion in respect of enforcement under section 30. Potential third party liability may arise even though the operator complies with the new regulations.

3 The Committee's Inquiry

- 3.1 The Committee first addressed this matter in meeting on 9 October 1997 and subsequently wrote to the Ministry outlining the above concern on 10 October 1997. A response was received from the Ministry on 16 October 1997 but was not before the Committee when it met at 8.30 am on 16 October 1997. The Regulations were gazetted on 20 June 1997 and tabled in the Parliament on 19 August 1997. Under the provisions of section 42 of the *Interpretation Act 1984* there are 14 sitting days from the date of tabling in which there is power for the Parliament to move for the disallowance of such subordinate legislation. Therefore this period ended on 16 October 1997. In the circumstances the Committee resolved for the Deputy Chairman to table a Notice of Motion of Disallowance over the Regulations in the Legislative Council in order to protect the initial position of the Committee and to enable sufficient time for the Committee to handle the inquiry. Accordingly a Notice of Motion was tabled in the Legislative Council on 16 October 1997 and moved *pro forma* on 22 October 1997 by virtue of Legislative Council Standing Orders. It is necessary for this motion to be disposed of by 27 November 1997, again pursuant to Legislative Council Standing Orders.

- 3.2 The response from the Ministry on 16 October 1997 enclosed a copy of correspondence from Parliamentary Counsel dated 2 December 1996 which addressed the issue raised by the Committee. Parliamentary Counsel identified that section 31 of the Act contemplates that unless and until an Inspector has restamped the instrument, then it must not be allowed to be used for trade, even though it has only just been repaired or relocated. Parliamentary Counsel then stated:

“The scenario contemplated in my view by s.31, has for some time proved completely impracticable. There are far more businesses and weighing or measuring instruments now than there were in 1915. An inspector may not always be immediately available to reverify an instrument when it is repaired or relocated. It would appear inappropriate to forbid a trader to use that instrument which may have only recently been repaired or relocated until such time as an inspector would be available, which may not occur for some days or even weeks, depending on circumstances. This in turn, would lead to legitimate concerns on the part of traders that until an inspector has reverified and restamped the relevant instrument, they may be vulnerable to prosecution in the meantime for using for trade a weighing or measuring instrument which is not stamped as required by s.30”

- 3.3 The Committee is in agreement about the practicalities of section 31. However it is clearly evident that section 31 (unlike sections 28 and 29) does not specifically contemplate regulations being made providing for an exemption from its requirements. Are there any other provisions of the Act which provide the necessary authority?

- 3.4 Parliamentary Counsel referred to sub-section 52(t) of the Act. Section 52 is the general regulation making power within the Act and sub-section (t) relevantly provides that:

“The Governor may make regulations for any of the subjects following: —

(t) Providing for exemptions in pursuance of this Act.”

The question then becomes whether an exemption of the type contemplated by regulation 5, from the stamping requirements of section 31, is “in pursuance of the Act”?

- 3.5 The Committee wrote to the Ministry on 21 October 1997 suggesting that the Ministry obtain legal advice as to whether an argument can be made that regulation 5 has been made “in pursuance of the Act” and is therefore within *vires*. On 18 November 1997 the Ministry provided the Committee with a facsimile copy of legal advice from the Crown Solicitor’s Office dated 17 November 1997. A copy of this advice is attached and marked “Annexure B”.

- 3.6 The Crown Solicitor notes that regulation 4 of the Regulations provides exemptions from the stamping requirements of sections 28 and 29 of the Act while regulation 5 provides an exemption from the restamping requirements of section 31 of the Act. The

Crown Solicitor then argues that although sections 28 and 29 make express provision for exemption and section 31 does not, there is no cogent reason for distinguishing between the original stamping of an instrument and its restamping as a result of the same instrument becoming damaged or requiring movement. If an exemption is allowed for an instrument when originally stamped pursuant to sections 28 and 29 there is no logical reason why an exemption should not be allowed for when the same instrument is to be restamped pursuant to section 31. The Crown Solicitor then argues that when viewed in this manner the exemption provided in regulation 5 can be seen to be in pursuance of the Act and in furtherance of the exemptions already provided. The Crown Solicitor refers to several legal authorities as to what is contemplated by an empowering provision which authorises regulations to be made in “pursuance of the Act”. These authorities suggest that words of this kind authorise the provision of subsidiary means of carrying into effect what is enacted in the statute itself and will cover what is **incidental** to the execution of its specific provisions. The Crown Solicitor then argues that regulation 5 can be seen as incidental to the exemptions provided to sections 28 and 29 as otherwise there is no logic in exempting instruments only when they are stamped initially. The Committee has taken note of this argument but has also looked beyond this to the overall purpose and objects of the Act.

3.7 The preamble to the Act states that the Act is to:

“.....provide Standards and Units, and to amend and declare the Law of Weights and Measures; for the Verification and Stamping of Weights, Measures, and Weighing and Measuring Instruments; to regulate the Sale of Coal and Firewood; and for the purposes consequent thereon or incidental thereto.”

3.8 It is to be remembered that the exemption provided by regulation 5 is only temporary and does not remove the requirement to have the instrument stamped by an Inspector. Arguably regulation 5 facilitates the stamping process given the resources available. It allows instruments to be appropriately checked and then used pending the ultimate stamping by an Inspector. In these circumstances the Committee has come to the view that regulation 5 is in “pursuance of the Act” and in particular is directed towards facilitating the “Verification and Stamping of Weights, Measures, and Weighing and Measuring Instruments” as stated in the Preamble to the Act.

3.9 In these circumstances the Committee is of the view that a legal argument can be mounted that sub-section 52(t) of the Act provides the necessary authority for regulation 5. This is despite section 31 specifically omitting reference to regulations providing an exemption to its requirements like sections 28 and 29. Although a legal argument can be mounted the Committee is of the view that there is a degree of uncertainty in respect of the Act and what it authorises may be done by way of regulation. In addition the Act would not appear to address the realities of today where there are over 40,000 instruments in the State and insufficient resources for an Inspector to be available to stamp each and every one as required. The Act should be overhauled to adjust the role of an Inspector to one of random testing and supervision and oversight of the standards and operations of “approved repairers”.

- 3.10 In the circumstances the Committee has resolved to take no further action other than to express its opinion that the Act should be updated and the legal uncertainties and various practical deficiencies should be addressed in light of the realities of today. The Committee also has resolved to table this report and recommend to the House as follows:

That the motion for disallowance of the Weights and Measures (Exemptions) Regulations 1997 be withdrawn.

"ANNEXURE A"

2806

GOVERNMENT GAZETTE, WA

[20 June 1997]

FAIR TRADING

FT301

WEIGHTS AND MEASURES ACT 1915

WEIGHTS AND MEASURES (EXEMPTIONS) REGULATIONS 1997

Made by the Governor in Executive Council.

Citation

1. These regulations may be cited as the *Weights and Measures (Exemptions) Regulations 1997*.

Exemption from section 21 (1) (a) in respect of certain articles of food sold by retail

2. (1) A person who sells by retail sale from a retail shop articles of food —

- (a) which are selected, and placed in standard bags, by customers before those articles of food are weighed or measured; and
- (b) which are not pre-packed articles,

is exempted from section 21 (1) (a) of the Act in respect of that sale.

(2) In this regulation —

“article of food” means —

- (a) confectionery;
- (b) fruit;
- (c) vegetable; or
- (d) other food item that is selected, and placed in a bag, by a customer before that food item is weighed or measured;

“pre-packed article” has the same meaning as it has in Part IIIA of the Act;

“retail sale” has the same meaning as it has in the *Retail Trading Hours Act 1987*;

“retail shop” means place at, in, on or from which goods —

- (a) are sold by way of retail sale; or
- (b) are displayed, kept or sold for retail sale;

“sell” has the same meaning as it has in the *Retail Trading Hours Act 1987*;

“standard bag” means bag or other container —

- (a) provided in a retail shop for use by customers of the retail shop; and
- (b) weighing not more than 5 grams.

(3) Subsections (1a) and (3) of section 3 of the *Retail Trading Hours Act 1987* apply to a retail shop referred to in subregulation (1) as if that retail shop were a retail shop within the meaning of that Act.

Approved persons

3. The Chief Inspector may approve a person for the purposes of regulations 4 and 5.

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Exemption from section 28 or 29 of unstamped weights or measures or weighing or measuring instruments

4. (1) A weight or measure, or a weighing or measuring instrument, which has not yet been stamped under section 28 or 29 of the Act is exempted from that section if subregulation (2) is complied with in respect of that weight or measure or weighing or measuring instrument (in that subregulation called "the apparatus").

(2) This subregulation is complied with in respect of the apparatus if —

- (a) an approved person notifies the Chief Inspector that the apparatus is required by section 28 or 29 of the Act to be stamped;
- (b) an inspector is not then available to stamp the apparatus;
- (c) the apparatus is as soon as is practicable inspected and tested by an approved person; and
- (d) the approved person referred to in paragraph (c) —
 - (i) destroys any existing stamp on the apparatus;
 - (ii) applies his or her unique identifying mark to the apparatus; and
 - (iii) notifies the Chief Inspector in writing of the marking of the apparatus within 14 days after that marking.

(3) An exemption under subregulation (1) ceases to have effect when the apparatus is stamped under section 28 or 29, as the case requires, of the Act.

(4) In this regulation —

"approved person" means person approved under regulation 3.

Exemption from section 31 in respect of use for trade of certain used weights or measures or weighing or measuring instruments

5. (1) A person who uses for trade a weight or measure, or a weighing or measuring instrument —

- (a) which has become defective in consequence of wear or accident;
- (b) which has been mended or repaired; or
- (c) which, being a fixed weighing or measuring instrument, has been removed for installation at another site,

but which has not yet been restamped under section 31 of the Act is exempted from that section if subregulation (2) is complied with in respect of that weight or measure or weighing or measuring instrument (in that subregulation called "the apparatus").

(2) This subregulation is complied with in respect of the apparatus if —

- (a) an approved person notifies the Chief Inspector that the apparatus is required by section 31 of the Act to be restamped;
- (b) an inspector is not then available to restamp the apparatus;
- (c) the apparatus is as soon as is practicable —
 - (i) mended or repaired;
 - (ii) inspected and tested; or
 - (iii) installed at the other site,as the case requires, by an approved person; and

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[20 June 1997

- (d) the approved person referred to in paragraph (c) —
 - (i) destroys any existing stamp on the apparatus;
 - (ii) applies his or her unique identifying mark to the apparatus; and
 - (iii) notifies the Chief Inspector in writing of the marking of the apparatus within 14 days after that marking.
- (3) An exemption under subregulation (1) ceases to have effect when the apparatus is restamped under section 31 of the Act.
- (4) In this regulation —

“approved person” means person approved under regulation 3.

By Command of the Governor,

J. PRITCHARD, Clerk of the Executive Council.

FT302

ASSOCIATIONS INCORPORATION ACT 1987

ORDER PURSUANT TO SECTION 34(2)

SWY Theatre Company Incorporated

Pursuant to the provisions of section 34(2) of the Associations Incorporation Act 1987, I order that the undertaking of SWY Theatre Company Incorporated be transferred to Perth Theatre Company ACN 074 225 791 with effect from the date of this Order.

Dated the 17th day of June 1997.

RALPH MINEIF, Assistant Commissioner for
Corporate Affairs.

17.11.'97 12:19

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ANNEXURE

B

**CROWN SOLICITOR'S OFFICE**Westgate Tower
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Our Ref: CEO 97/5713
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Director
Retail & Business Services
Ministry of Fair Trading
PO Box 6355
EAST PERTH WA 6892

Attention: Mr C. Boyce

WEIGHTS AND MEASURES ACT 1915 - REGULATION 5 OF WEIGHTS & MEASURES (EXEMPTIONS) REGULATIONS 1997 - RESTAMPING EXEMPTION

I refer to your letter of 6th November 1997.

I have given careful consideration to the matters set out in the letters from the Hon. R.L. Wiese MLA dated 10th and 21st October 1997. With respect, however, I am unable to agree with the views of the Joint Standing Committee on Delegated Legislation set out in those letters.

The pivotal provision of the Weights & Measures Act 1915 in point is Section 28(1) which necessitates every weight, measure and weighing or measuring instrument used for trade, not being a weight, measure or instrument exempted by the Regulations, be verified and stamped. Section 29 provides an added requirement for periodic restamping. Section 30 prohibits use of unstamped weights etc. It is implicit that its provisions do not relate to exempted weights etc. Section 31 is the provision which is primarily in point in the present context. It deals with weights, measures and instruments which have become defective, been repaired or, being fixed, have been moved. Section 52 allows for the making of regulations in respect to certain matters. Section 52(i) allows for regulations to be made providing "for exemptions in pursuance of this Act". Section 52(w) provides that regulations may be made "Generally for other matters for carrying out the provisions of this Act".

Regulations 4 and 5 of the Weights & Measures (Exemptions) Regulations 1997 are designed to allow for interim use of weights, measures and instruments pending stamping or restamping when an inspector is not available to stamp or restamp. Regulation 4 provides exemption from Sections 28 and 29 while Regulation 5 provides for exemption from Section 31. Sections 28 or 29 make express provision for exemption while Section 31 does not. It is this absence of an express power of exemption which is of concern to the Joint Committee.

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It would seem on ultimate analysis that when one considers the content of Regulations 4 and 5, it becomes difficult to take the view that Regulation 5 is ultra vires. If the view of the Committee was accepted, the scenario could be that a particular weight which has been exempted from stamping when newly acquired, following testing by an approved person because of the temporary unavailability of an inspector, which has then been stamped and subsequently damaged, could not subsequently be used following repair by the same or another approved person where an inspector was again not available. There is no logical reason for this to be the case. There is no cogent basis for distinguishing between stamping and restamping.

It would appear to me that Section 52(t) is in point and allows for the making of Regulation 5. That Section allows for the provision of "exemptions in pursuance of this Act". It would appear that when evaluated in the manner suggested in the previous paragraph of this letter, Regulation 5 can be seen to be in furtherance of the exemptions expressly provided for in Sections 28 and 29 and thus in pursuance of the Act. It would also appear that reliance could be placed upon Section 52(w). At page 126 of the textbook "Judicial Review of Delegated Legislation in Australia and New Zealand" (1977) Butterworths by D.C. Pearce, he deals with the expression "Carrying out or giving effect to legislation" and similar expressions in statutes endowing regulation-making power. He observes "As a result of a decision of the High Court in *Clements v. Bull* (1953) 88 CLR 572, it would seem that these words standing on their own, in fact give the same regulation-making power as if the words "necessary or convenient" were included". The observations of Taylor J at pages 586 and 587 of the report of that case are of particular relevance. In the leading case of *Shanahan v. Scott* (1956) 96 CLR 245, when commenting upon provisions allowing regulations to be made for purposes "necessary or expedient for the administration of this Act or for carrying out the objects of this Act", the High Court of Australia at 250 observed :

"The result is to show that such a power does not enable the authority by regulations to extend the scope or general operation of the enactment but is strictly ancillary. It will authorise the provision of subsidiary means of carrying into effect what is enacted in the statute itself and will cover what is incidental to the execution of its specific provisions. But such a power will not support attempts to widen the purposes of the Act, to add new and different means of carrying them out or to depart from or vary the plan which the legislature has adopted to attain its end."

In my opinion, the contents of Regulation 5 can be seen as ancillary or incidental to Sections 28 and 29 and Regulation 4. It is important in the present case to examine and give careful consideration to the actual subject matter of Regulation 5.

I trust the above observations adequately deal with your concerns. It would seem that if one approaches the issue in the way suggested the problems perceived by the Committee fall away. The absence of an express provision for exemption in respect to Section 31 is not crucial. Insofar as the preamble to the Act may be relevant, it would seem that the words "purposes consequent thereon or incidental thereto" could, if need be, be relied upon. On the

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inconsistency point it would seem, on the basis of the above reasoning, that the regulations actually achieve consistency.



DEPUTY CROWN SOLICITOR

17 November, 1997

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