



**THIRTY-SEVENTH PARLIAMENT**

**REPORT 3**

**STANDING COMMITTEE ON ESTIMATES AND  
FINANCIAL OPERATIONS**

**ENERGY SAFETY BILL 2005 AND ENERGY  
SAFETY LEVY BILL 2005**

Presented by Hon Giz Watson MLC (Chair)

May 2006

## **STANDING COMMITTEE ON ESTIMATES AND FINANCIAL OPERATIONS**

### **Date first appointed:**

30 June 2005

### **Terms of Reference:**

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

#### **“2. Standing Committee on Estimates and Financial Operations**

2.1 *An Estimates and Financial Operations Committee* is established.

2.2 The Committee consists of 5 Members, 3 of whom shall be non-government Members.

2.3 The functions of the Committee are to consider and report on -

- (a) the estimates of expenditure laid before the Council each year;
- (b) any matter relating to the financial administration of the State;
- (c) any bill or other matter relating to the foregoing functions referred by the House;
- (d) to consult regularly with the Auditor General and any person holding an office of a like character.”

### **Members as at the time of this inquiry:**

Hon Giz Watson MLC (Chair)

Hon Ken Travers MLC (Deputy Chair)

Hon Shelley Archer MLC

Hon Nigel Hallett MLC

Hon Anthony Fels MLC

### **Staff as at the time of this inquiry:**

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## CONTENTS

RECOMMENDATIONS .....	I
1 REFERENCE AND PROCEDURE .....	1
2 INQUIRY PROCESS.....	1
3 SCOPE OF THE REPORT .....	3
4 BACKGROUND TO THE BILLS.....	3
5 FUNCTIONS OF ENERGY SAFETY .....	4
6 THE BILLS - IMPOSITION OF THE LEVY .....	7
The Levy Bill .....	7
The Safety Bill .....	7
7 WHETHER THE LEVY IS A TAX?.....	10
Preliminary observations.....	10
<b>The Law</b> .....	11
<b>Manner in which legislation labelled and treated</b> .....	11
<b>Compulsory imposition by public authority</b> .....	11
<b>Imposed for a public purpose</b> .....	12
<b>Whether fee for services</b> .....	12
<b>Additional preliminary matter</b> .....	13
Whether levy is a fee for services .....	13
Whether services are rendered by Energy Safety .....	13
Whether fees relate to identified services.....	14
Whether person paying the levy receives, or directs, the identified services ....	15
Conclusion.....	17
Relevance of regulatory role of Energy Safety .....	17
Conclusion .....	18
8 WHETHER INDUSTRY/CONSUMER FUNDING OF ENERGY SAFETY IS APPROPRIATE .	18
9 THE BILLS - ACCOUNTABILITY AND DELEGATION MECHANISMS - THE SAFETY BILL	
.....	20
First levy not disallowable .....	20
Disallowance in subsequent years.....	21
Quantum of total levy .....	21
Which energy industry participants will pay the levy.....	23
Conclusion.....	24
Recommendation .....	25
Energy Safety Account .....	28
10 PENALTY INTEREST .....	28
Recommendation .....	29
11 INSPECTORS' INVESTIGATIVE POWERS -THE SAFETY BILL .....	29
Investigator's powers .....	29
Recommendation .....	30
Conclusion.....	31
Recommendation .....	34

Recommendation .....	35
Confidentiality .....	35
Recommendation .....	36
12 OTHER MATTERS ARISING .....	36
Recommendation .....	37
<b>APPENDIX 1 LETTER FROM MINISTER DATED 28 APRIL 2006 .....</b>	<b>39</b>
<b>APPENDIX 2 ACTING MINISTER’S LETTER DATED 2 MAY 2006 .....</b>	<b>41</b>
<b>APPENDIX 3 INFORMATION ON OTHER JURISDICTIONS PROVIDED BY THE DIRECTOR OF ENERGY SAFETY .....</b>	<b>45</b>
<b>APPENDIX 4 THE COMMITTEE’S RECOMMENDED AMENDMENTS IN THE ORDER OF CLAUSES IN THE ENERGY SAFETY BILL 2005 .....</b>	<b>47</b>

**RECOMMENDATIONS FOR THE**  
**REPORT OF THE STANDING COMMITTEE ON ESTIMATES AND FINANCIAL OPERATIONS**  
**IN RELATION TO THE**  
**ENERGY SAFETY BILL 2005 AND THE ENERGY SAFETY LEVY BILL 2005**

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**RECOMMENDATIONS**

- 1 Recommendations are grouped as they appear in the text at the page number indicated [Appendix 4 sets out the recommendations in the order of the clauses of the Energy Safety Bill 2005]:

Page 25

**Recommendation 1: The Committee recommends that a new Part 4 be inserted into the Energy Safety Bill 2005 to provide an objection and review procedure. This can be effected in the following manner:**

Page 12, after line 19- To insert -

**“Part 4 - Objections and Review**

**20. Grounds of Objection**

- (1) An energy industry participant may, in accordance with this section, object to a notice of assessment issued to that energy industry participant under section 16 on either or both of the grounds that there is an error in the chief executive officer’s determination:
- (a) that it is an energy industry participant liable to pay a levy; or
  - (b) assessment of the amount to be paid by it by way of levy.
- (2) An objection under subsection (1) is to:
- (a) be made to the chief executive officer in writing within 42 days of the service of a notice of assessment under section 16; and

- (b) identify the relevant energy industry participant and assessment notice; and
  - (c) set out fully and in detail the grounds of objection.
- (3) An objection under subsection (1) may be made by the energy industry participant named in notice of assessment or by the legal representative of that person.
- (4) The chief executive officer may, on written application by a person proposing to make an objection, extend in writing the time for making the objection for such period as the chief executive officer thinks fit.
- (5) The chief executive officer is to promptly consider any objection and may either disallow it or allow it, wholly or in part.
- (6) After making a decision on the objection the chief executive officer is to promptly serve upon the person by whom the objection was made written notice of the chief executive officer's decision on the objection and a statement of the reason for that decision.

**21. Review of decision of chief executive officer on objection**

Any person who is dissatisfied with the decision of the chief executive officer on an objection by that person under section 20 may, within 42 days (or such further period as the State Administrative Tribunal, for reasonable cause shown by the person, allows) after service of notice of the decision, apply to the State Administrative Tribunal for a review of the decision.

**22. Review of decision to refusal to extend time for objection**

A person who is dissatisfied with a decision of the chief executive officer to refuse to extend the time for making an objection against the notice of assessment may apply to the State Administrative Tribunal for a review of the decision.

**23. New matters raised on review**

- (1) Upon a review by the State Administrative Tribunal under section 21 or 22, the State Administrative Tribunal may consider:
  - (a) grounds in addition to those stated in the notice of objection; and
  - (b) reasons in addition to any reasons previously given for the chief executive officer's decision that is under review.

- (2) The State Administrative Tribunal is to ensure, by adjournment or otherwise, that each party and any other person entitled to be heard has a reasonable opportunity of properly considering and responding to any new ground or reason that the State Administrative Tribunal proposes to consider in accordance with subsection (1).

**24. Objection not to affect liability to pay rates or service charges**

The making of an objection or application for review under this Part does not affect the liability to pay any rate or service charge imposed under this Act pending determination of the objection or application for review.

**25. Repayment of levy**

Any moneys paid by a person pursuant to a notice of assessment that is later disallowed in whole or in part on objection or review that are in excess of the amount that is required to be paid by that person in accordance with the decision of the objection or review are to be repaid to that person.

Page 27

**Recommendation 2: The Committee recommends that proposed Parts 4-6 and in clauses 20-32 of the Energy Safety Bill 2005 be renumbered Parts 5-7 and clauses 26-38 respectively to reflect the insertion of the new Part 4 into the Energy Safety Bill 2005. This can be effected in the following manner:**

**Page 13, line 1 - To delete “4” and insert instead “5”**

**Page 13, line 2 - To delete “20” and insert instead “26”**

**Page 13, line 21 - To delete “21” and insert instead “27”**

**Page 15, line 1 - To delete “5” and insert instead “6”**

**Page 15, line 2 - To delete “22” and insert instead “28”**

**Page 16, line 6 - To delete “23” and insert instead “29”**

**Page 16, line 23 - To delete “24” and insert instead “30”**

**Page 18, line 10 - To delete “25” and insert instead “31”**

**Page 18, line 18 - To delete “22(6), 24(4) or 26” and insert instead “28(6), 30(4) or 32”**

**Page 18, line 19 - To delete “26” and insert instead “32”**

**Page 18, line 24 - To delete “27” and insert instead “33”**

**Page 19, line 1 - To delete “28” and insert instead “34”**

**Page 20, line 1 - To delete “6” and insert instead “7”**

**Page 20, line 2 - To delete “29” and insert instead “35”**

**Page 20, line 16 - To delete “30” and insert instead “36”**

**Page 21, line 1 - To delete “31” and insert instead “37”**

**Page 21, line 16 - To delete “32” and insert instead “38”.**

Page 29

**Recommendation 3: The majority of the Committee (Hon Anthony Fels MLC, and Hon Nigel Hallett MLC, dissenting) recommends that clause 18 of the Energy Safety Bill 2005 be amended to provide that the penalty interest rate be prescribed in the regulations. This can be effected in the following manner:**

**Page 12, line 10 - To delete “of 20% per annum” and insert instead after “rate” -**

**“prescribed by the regulations”.**

Page 30

**Recommendation 4: The Committee recommends that, for consistency, the defined term “Director of Energy Safety” be used in clauses 23, 26 and 32. This can be effected in the following manner:**

**Page 16, line 7 - To insert after “Director” -**

**“of Energy Safety”**

**Page 16, line 9 - To insert after “Director” -**

**“of Energy Safety”**

**Page 16, line 18 - To insert after “Director” -**

**“of Energy Safety”**

**Page 18, line 20 - To insert after “Director” -**

**“of Energy Safety”**

**Page 21, line 23 - To insert after “Director” -**

**“of Energy Safety”**

Page 34

**Recommendation 5: The Committee recommends that clause 24 of the Energy Safety Bill 2005 be amended to provide an obligation to provide a person from whom a document or anything else is taken with either a copy of, or access to, the object taken and an obligation to return the taken document or other object within a specified time. This can be effected in the following manner:**

**Page 18, line 7 - To delete “may retain a document or thing removed from the premises for so long as is necessary to examine it or copy it, or both.” and instead insert -**

**“must ensure that a person from whom a document or anything else is taken under this section and who would otherwise be entitled to possession of it is given a copy of it, or reasonable access to it, as appropriate.**

- (7) If an investigator takes a photograph or makes a film under section 24(3)(d), a copy of that photograph or film must be provided to relevant persons.**
- (8) If an investigator takes possession of anything under this section, the Director of Energy Safety must ensure that it is returned to the person entitled to possession of it as follows:**
  - (a) if it was taken in connection with the prosecution or possible prosecution of a suspected contravention of this Act - as soon as practicable after the relevant prosecution is completed or discontinued or, if no prosecution is commenced, as soon as practicable after the decision is made not to prosecute the suspected contravention;**
  - (b) in any other case - within 28 days after it was taken.”**

Page 35

**Recommendation 6: A majority of the Committee (Hon Ken Travers MLC, and Hon Shelley Archer MLC, dissenting) recommends that clause 25 of the Energy Safety Bill 2005 be deleted. This can be effected in the following manner:**

**Page 18, lines 10 to 18 - To delete the clause.**

Page 36

**Recommendation 7: The Committee recommends that clause 28 of the Energy Safety Bill 2005 be amended to impose obligations of confidentiality upon the persons noted in paragraph 11.20. This can be effected in the following manner:**

**Page 19, line 2 - To insert after “officer” -**

**“, or former chief executive officer”**

**Page 19, line 2 - To insert after “Safety” -**

**“, or former Director of Energy Safety”**

**Page 19, line 3 - To insert after “functions” -**

**“, or formerly performing functions”**

**Page 19, line 3 - To insert after “Act” -**

**“or any other person to whom information or material is disclosed under this Act or who properly or improperly gains access to the information or material in some other way”**

**Page 19, line 5 - To delete “in the course of duty” and insert instead -**

**“for the purposes of this Act”.**

Page 37

**Recommendation 8: The Committee recommends that clause 3 of the Energy Safety Bill 2005 be amended to reflect the amendments proposed by Hon Paul Llewellyn MLC. This can be effected in the following manner:**

**Page 3, line 24 - to insert after “regulation” -**

**“including energy efficiency regulation”**

**Page 3, line 25 - To insert after “safety” -**

**“and energy efficiency”.**

**Recommendation 9: The Committee recommends that the Energy Safety Bill 2005 and the Energy Safety Levy Bill 2005 be passed subject to recommendations 1-8.**

## REPORT OF THE STANDING COMMITTEE ON ESTIMATES AND FINANCIAL OPERATIONS

### IN RELATION TO THE

### ENERGY SAFETY BILL 2005 AND THE ENERGY SAFETY LEVY BILL 2005

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#### 1 REFERENCE AND PROCEDURE

- 1.1 On 6 April 2006, on motion by Hon Anthony Fels MLC, the Energy Safety Bill 2005 (**Safety Bill**) and the Energy Safety Levy Bill 2005 (**Levy Bill**) (collectively **Bills**) were referred to the Standing Committee on Estimates and Financial Operations (**Committee**) for inquiry and report with a reporting deadline of 10 May 2006.
- 1.2 The Bills were referred after the second reading was agreed, which restricted the Committee's capacity to examine the policy of the Bills.

#### 2 INQUIRY PROCESS

- 2.1 On 10 April 2006, the Committee appointed a Subcommittee, comprising Hon Ken Travers MLC as the Convenor and Hon Anthony Fels MLC, to assist the Committee with the inquiry (**Subcommittee**).
- 2.2 The Subcommittee held a public hearing on 12 April 2006, at which Mr Albert Koenig, Director of Energy Safety and Executive Director, EnergySafety WA, Department of Consumer & Employment Protection (**Director**), accompanied by Mr Geoffrey Wood, Director, Gas and Energy Management, gave evidence.
- 2.3 The Subcommittee wrote to the Minister Assisting the Minister for Employment Protection; Hon John Bowler MLA, (**Minister**) on 13 April 2006 seeking advice as to:
- the reasons for the choice of 'user pays' funding for the activities of the Office of Energy Safety, rather than funding those activities through the Consolidated Revenue Fund; and
  - whether consultation with industry had occurred prior to the introduction of these Bills in the Legislative Assembly and, if so, the extent of that consultation and the feedback received. If not, why consultation did not occur prior to the introduction of the Bills.
- 2.4 The Subcommittee wrote two further letters to the Minister on 26 April 2006 seeking advice as to:
- why cl 15(4) of the Safety Bill did not allow the first levy published under cl 14 to be disallowable by Parliament;

- whether the formula or method for assessing the amount to be paid by way of levy by each energy industry participant had been established for the first year;
- whether the Government had determined what would be in the first levy notice;
- if so, was that notice in accordance with the amount and method proposed in the EnergySafety Draft Business Plan for 2006/07 dated April 2006;
- whether energy industry participants had indicated their views on the proposed business plan;
- why the Bills did not provide a process for review or objection to the levy imposed on energy industry participants (the Committee noted that Part 4 of the *Taxation Administration Act 2003* (“**State Tax Act**”) provides such a process);
- why cl 28 of the Safety Bill did not impose obligations of confidentiality similar to those imposed by s 114 of the State Tax Act upon:
  - 1. former Directors of Energy Safety, CEOs of the relevant department and their staff;
  - 2. former investigators;
  - 3. any person to whom information is lawfully disclosed;
  - 4. any person who had gained access, whether properly or improperly, to information gathered; and
- why cl 24 of the Energy Safety Bill allowed indefinite removal of documents whereas section 99 of the State Tax Act provides that:
  - the Commissioner must ensure that a person from whom a document or anything else has been taken is given a copy of, or reasonable access to, it; and
  - that a document or anything else taken is returned within 28 days unless a prosecution is contemplated or duty is payable, in which cases it is to be returned as soon as practicable after the prosecution (or decision not to prosecute) occurs or the duty is paid.

2.5 The Subcommittee received a written submission from Hon Paul Llewellyn MLC.

2.6 It also received written responses from:

- the Director on 18 April 2006 to questions on notice from the hearing of 12 April 2006; and
  - the Minister on 24 April 2006 to the Subcommittee's letter of 13 April 2006; and
  - the Minister on 28 April 2006 to the Subcommittee's first letter of 26 April 2006. That response is set out in Appendix 1.
- 2.7 The Subcommittee did not receive a response to its second letter of 26 April 2006 from the Minister before its final meeting on 1 May 2006.
- 2.8 The Committee received a response to its second letter of 26 April 2006 on 2 May 2006 from Hon John Kobelke MLA, Acting Minister for Employment Protection, (**Acting Minister**). That response is set out in Appendix 2.
- 2.9 Given the short time available, the Committee thanks the individuals and organisations that promptly provided evidence and information for the inquiry.

### 3 SCOPE OF THE REPORT

- 3.1 Due to the time constraints placed on the Committee, it has focused its inquiry into the Bills to consideration of the issues raised in the referral debate.<sup>1</sup>

### 4 BACKGROUND TO THE BILLS

- 4.1 The Explanatory Memorandums (both **EM**) advise that the Bills seek to establish adequate long-term funding for the technical and safety regulation of the electrical and gas industries and other related activities carried out by the Director and his staff by imposing a levy on "*energy industry participants*".<sup>2</sup>
- 4.2 The Committee was advised that EnergySafety is currently partially funded per annum by licence fees (approx \$2.5m), Indian Ocean Territories service fees (approx \$0.045m) and allocation from consolidated revenue.<sup>3</sup> Current funding results in a shortfall of approx \$1.5m per annum in revenue required to properly perform its functions.<sup>4</sup>

<sup>1</sup> Hon Kim Chance MLC, Leader of the House, Hon Anthony Fels MLC, and Hon Paul Llewellyn MLC, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 6 April 2006, pp1270-1276.

<sup>2</sup> Both EMs to the Safety Bill p1. [The Committee had before it two EMs to the Safety Bill, one presented to the House with the Bill, the other forwarded to the Committee on 11 April 2006.] "*Energy industry participants*" is defined in cl 3 of the Safety Bill.

<sup>3</sup> Draft EnergySafety Division, *Business Plan 2006/7*, April 2006 (Draft Business Plan), p34.

<sup>4</sup> Albert Koenig, Director of Energy Safety and Executive Director, EnergySafety WA, Department of Consumer and Employment Protection, *Transcript of Evidence*, 12 April 2006, p14.

- 4.3 The Bills reflect the recommendation of the Functional Review Task Force<sup>5</sup> that a scheme be developed for EnergySafety to render it fully industry funded.<sup>6</sup>

## 5 FUNCTIONS OF ENERGYSAFETY

- 5.1 The Office of Director of Energy Safety was established on 1 January 1995 by section 5 of the *Energy Coordination Act 1994*, in the context of the break up of the State Energy Commission of WA (**SECWA**) into Western Power and AlintaGas. It took over the regulatory functions previously performed and funded by SECWA.

- 5.2 The Director has statutory powers, subject only to the direction of the Minister for Energy, and is responsible for administering the technical and safety regime set up under:

- the *Energy Coordination Act 1994*;
- the *Gas Standards Act 1972*;
- the *Electricity Act 1945*; and
- various regulations made under those Acts.

- 5.3 Until 1 July 2002, the Director and the Director's staff formed the Technical and Safety Division of the Office of Energy. As part of the restructuring of the public sector of Western Australia under the Machinery of Government Changes initiative, the Director and staff were transferred from the Office of Energy to the Department of Consumer and Employment Protection (**DOCEP**).<sup>7</sup>

- 5.4 The Director currently reports to the Minister for Energy on his statutory functions and to the Minister for Consumer and Employment Protection in respect of administrative matters. However, the Committee was advised that it is anticipated that legislation will shortly be amended to allocate the Director's statutory functions to the portfolio of the Minister for Consumer and Employment Protection.<sup>8</sup>

- 5.5 The Technical and Safety Division of DOCEP has been renamed EnergySafety, and restructured into three directorates:

- Electricity;

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<sup>5</sup> See paragraph 8.6 for this review, which occurred in 2002/03. As a Cabinet document, it was not available to the Committee.

<sup>6</sup> Hon Kim Chance MLC, Leader of the House, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 22 March 2006, p685.

<sup>7</sup> Albert Koenig, Director of Energy Safety and Executive Director, EnergySafety WA, Department of Consumer and Employment Protection, *Transcript of Evidence*, 12 April 2006, pp1-2.

<sup>8</sup> Ibid, p5.

- Gas & Emergency Management; and
- Business Services (which includes its Licensing Office).

5.6 The original EM to the Safety Bill and “Industry Funding for EnergySafety” document of November 2005 describe EnergySafety’s functions as:

- administering electricity and gas technical and safety legislation;
- providing technical and policy advice to government;
- enforcing safety standards for electricity and gas networks;
- monitoring reliability and quality of energy supplies;
- investigating consumer complaints (in liaison with the Ombudsman);
- enforcing safety standards for consumers’ electrical and gas installations;
- enforcing safety and energy efficiency standards for consumers’ electrical and gas appliances;
- licensing electrical contractors, workers and gas fitters;
- carrying out incident and accident investigation;
- promoting electrical and gas safety in the industry and the community;
- managing liquid fuel and gas supply emergencies; and
- promoting energy infrastructure security and resilience.

The purpose of these functions is, *inter alia*, to ensure the safety of the public (and energy workers) regarding infrastructure and private and business installations, reliable energy supplies for residential and business consumers and safe appliances with satisfactory labelling.

5.7 The second EM to the Safety Bill, summarises those function as covering the technical and safety regulation of:

- electricity production;
- electricity transmission and distribution;
- electricity utilisation (consumers’ installations and appliances);

- gas distribution (and gas production plants connected to gas distribution systems); and
- gas utilisation (consumers' installation and appliances).

5.8 The Director stated that EnergySafety:

- supported the work of the Economic Regulation Authority and the Ombudsman's office in relation to reliability and quality of supply but did not regulate or enforce these issues;<sup>9</sup>
- did not inspect consumer installations (other than occasionally in remote areas) but approved utility inspection plans that set out how the utilities would meet their statutory obligation to inspect consumer installations. It also controlled the standards of the inspectors employed by the utilities;<sup>10</sup>
- received reports from utilities about sub-standard work and carried out prosecutions;<sup>11</sup>
- monitored safety incidents, building up a picture of problem areas and then liaising with organisations to address them. It also conducted compliance audits of certain aspects of utility business systems.<sup>12</sup> However, as regards actual inspections of new pipelines, new transmission towers etcetera ... EnergySafety keeps "*a very broad eye on those things.*"<sup>13</sup> [The Director made the point that additional funding will enable it to increase these activities];
- did not have regulation enforcement powers to force organisations to address safety concerns;<sup>14</sup>
- licensed electrical and gas tradesmen but relied on a complaint system for enforcing standards. This activity is funded through a licence fee and will not rely on the levy beyond 2008;<sup>15</sup> and
- in all, investigation-type activities consumed approximately half of EnergySafety's budget.<sup>16</sup>

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<sup>9</sup> Ibid, p16.

<sup>10</sup> Ibid, p16.

<sup>11</sup> Ibid, p16.

<sup>12</sup> Ibid, p15.

<sup>13</sup> Ibid, p16.

<sup>14</sup> Ibid, pp15-6.

<sup>15</sup> Ibid, p8.

<sup>16</sup> Ibid, p8.

- 5.9 The Committee notes the Director's view that additional legislation allowing for order making powers is required to be passed to enhance the energy safety regime in Western Australia.<sup>17</sup>

## 6 THE BILLS - IMPOSITION OF THE LEVY

### The Levy Bill

- 6.1 The Levy Bill contains only 3 clauses. The substantive clause is cl 3, which provides:

*If a levy is determined under the Energy Safety Act 2005 sections 14(1) and 15 in respect of an energy industry participant, that levy is imposed in respect of the energy industry participant.*

- 6.2 The EM to Levy Bill advises that:

*Its purpose is to impose the levy which is the cornerstone of the funding arrangements proposed under the Energy Safety Bill. **The separate Bill is required under section 46(7) of the Constitutions Acts Amendments Act 1899.** (Committee's emphasis.)*

- 6.3 Section 46(7) of the *Constitution Acts Amendment Act 1899* provides:

*Bills **imposing taxation** shall deal only with the imposition of taxation.* (Committee's emphasis.)

### The Safety Bill

- 6.4 The Safety Bill contains six parts, the most relevant to the Committee's enquiry being:

- Part 2 - Business plans;
- Part 3 - Energy Safety Levy;
- Part 4 - Energy Safety Account.

- 6.5 Clause 14 of the Safety Bill provides that the Minister may by notice published in the *Government Gazette* on or before May each year specify:

- the total amount of the levy for the financial year;
- the method by which it is determined which energy industry participants are liable to pay the levy;

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<sup>17</sup> Ibid, p5.

- the formula or method for assessing the quantum of the levy to be paid by each energy industry participant; and
- the day on which the levy is payable.

The notice must be “... *made by reference to the business plan that covers the relevant financial year*”. (Clause 14(3) of the Safety Bill.)

6.6 “*Business plan*” means a business plan referred to in cl 11(1) of the Safety Bill (cl 3(1) of that Bill).

6.7 Clause 11(1) of the Safety Bill provides that when the Minister approves a draft business plan, it becomes (with any modifications later agreed or directed by the Minister) the business plan for the relevant financial year.

6.8 By cl 4 of the Safety Bill, the Chief Executive Officer of the department assisting the Minister in administering the Safety Bill and the Director must submit a draft business plan to the Minister no later than six months before the start of the next financial year. (There is an exception for the first draft plan, which must be submitted by 9 May 2006).

6.9 Pursuant to cl 6 of the Safety Bill, that draft plan must include:

- a) a statement of intent that complies with cl 7 in setting out in relation to energy safety activities the:
  - objectives of the Director’s office;
  - nature and scope of activities to be undertaken by the Director’s office;
  - performance targets and other measures by which the performance of the Director’s office may be judged and related to the stated objects; and
  - “*type of information and advice to be given to the Minister by the Director of Energy Safety*”.
- b) a financial plan in accordance with cl 8, which provides that such a plan must set out in relation to energy safety activities:
  - an outline of any agreement reached by the Director with the department, or other public sector body, for services or facilities to be provided in the relevant financial year;

- 
- an outline of departmental services and facilities provided to be provided to the Director in the relevant financial year;
  - a forecast of estimated expenditure for remuneration and labour costs of the Director's office;
  - a forecast of other estimated expenditure for fixed and variable operating costs and expenses of the Director's office;
  - the total estimated capital expenditure in relation to the Director's office;
  - the total estimated retained revenue of the Director's office, including any amounts paid into the Energy Safety Account under cl 20(3)(b)-(e). [This includes penalties for unpaid levies, licence fees, revenue raised from safety activities and other moneys paid into the account **but does not include** accrued levies].
- c) a statement setting out the total amount proposed to be raised by way of levy in the relevant financial year;
- d) a statement as to what proportion of the total levy is to be payable by participants in the electrical industry and what proportion by participants in the gas industry;
- e) a description of the proposed formula or method for assessment in relation to the levy; and
- f) any other information that the Minister requires.
- 6.10 The draft business plan is to be agreed between the Minister, the chief executive officer of the Department assisting the Minister and the Director by four months before the start of the next financial year. Where agreement is not reached, the Minister may direct the chief executive officer to make specified modifications to the draft plan. (Clause 9 of the Safety Bill.)
- 6.11 Other than the first levy notice, a levy notice published in the *Government Gazette* under cl 14 of the Safety Bill must be laid before each House of Parliament within six sitting days of that publication. Each House may issue a notice of disallowance within 10 sitting days of having the levy notice laid before it. Notice of Disallowance must be published in the *Government Gazette* within 21 days of the passing of the resolution. (Clause 15 of the Safety Bill.)
- 6.12 In the event that a levy notice is disallowed, it will have no effect. Instead, the levy notice last passed will be taken to be the levy notice for the relevant year and the levy

amount payable by an industry participant is to be determined by the amount last payable by that participant adjusted by the percentage that the March Consumer Price Index (**CPI**) of the relevant year varies from that of the previous year.

6.13 Any amount overpaid by an energy industry participant as a consequence of receipt of a levy assessment based on a disallowed levy notice must be repaid to that participant. (Clause 15 of the Safety Bill.)

6.14 By cl 16 of the Safety Bill, the chief executive officer must:

- determine the industry participants liable to pay a levy;
- assess the amount of levy to be paid by each participant; and
- give a notice of assessment to each of those participants.

This is to be done in accordance with the levy notice and any regulations and as soon as practical after the levy notice has been published.

6.15 Clause 17 of the Safety Bill imposes an obligation to pay the assessed levy and cl 18 imposes a penalty of 20% interest on any overdue unpaid levy.

6.16 By Part 4 of the Safety Bill, the levy is to be paid into an Energy Safety Account, which can be with an operating account, or part of an operating account, of the department (cl 20) and is to be used for payment of (cl 21):

- the costs and expenses related to the energy safety activities of the Director's office, including operating costs and capital expenditure;
- the costs of administering the Energy Safety Account (including collecting the levies and penalties);
- any moneys required to be repaid as a consequence of disallowance of a levy notice; and
- any other purpose related to energy safety activities authorised by the Minister.

## **7 WHETHER THE LEVY IS A TAX?**

### **Preliminary observations**

7.1 The Committee noted that:

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### *The Law*

- Conventionally, a tax is a compulsory acquisition of monies by a public authority for a public purpose, enforceable by law. It is not a fee for services rendered.<sup>18</sup> However, none of these features, other than that it not be a fee for service rendered, is in itself determinative.<sup>19</sup> It is necessary to review the legislation imposing the financial obligation and its effect as a whole to characterise that legislation.
- The manner in which the legislation has been labelled and treated is one of the factors to be considered in determining its nature but is not in itself conclusive.
- It is not necessary that the monies raised by a levy be paid into the Consolidated Revenue Fund for it to be a tax.<sup>20</sup>
- The presence or absence of an objective of raising revenue for the Government will often be significant in deciding whether the imposition of a liability bears the character of taxation. This is relevant to the question of public purpose.<sup>21</sup>
- Revenue raised by a Government may be earmarked, formally or informally, for a specific purpose, and still be a tax.<sup>22</sup>

### *Manner in which legislation labelled and treated*

- The EM for the Levy Bill suggests that that Bill imposes a tax (see paragraphs 6.2 and 6.3 above):
- “Levy” is another name for “tax”, generally used when the tax relates to a specific industry or class of persons.<sup>23</sup>

### *Compulsory imposition by public authority*

- The levy is a compulsory imposition by public authorities, namely DOCEP and the office of the Director of Energy Safety.

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<sup>18</sup> *Matthews v Chicory Marketing Board (Vic)* (1938) 60 CLR 263 at 276.

<sup>19</sup> *Luton v Lessels* [2002] HCA 13 (**Luton case**).

<sup>20</sup> *Australian Tape Manufacturers Association Ltd & Ors v The Commonwealth of Australia* (1993) 176 CLR 480

<sup>21</sup> *Airservices Australia v Canadian Airlines International Ltd* (1999) 167 ALR 392 (**Airservices Australia case**).

<sup>22</sup> *Luton case*.

<sup>23</sup> Australian Government Solicitor’s Legal Advice on Cost Recovery, 2 March 2001, Productivity Commission website <http://www.pdc.gov.au>

***Imposed for a public purpose***

- As described by the EM and the Director,<sup>24</sup> EnergySafety's activities bear the character of fulfilling a public purpose;
- In the second reading speech for the Safety Bill, Hon K Chance MLC, Leader of the House, stated: "*This new approach [to funding] will give the community confidence that safety standards will be maintained.*"<sup>25</sup>
- Section 46(6) of the *Constitution Acts Amendments Act 1899* provides that a bill which appropriates monies for "*the ordinary annual services of Government*" shall only deal with such appropriation. The Safety Bill complies with this provision.

***Whether fee for services***

- The Director stated that the levy was not intended to be a fee for service and that EnergySafety does not provides services "*as such.*"<sup>26</sup> In answer to the question whether he saw any of EnergySafety's activities as a service to industry participants, he further stated: "*In a sense, yes. It is not strictly a service; nonetheless, many of the things that we do have an advisory nature as well.*"<sup>27</sup> He later identified safety promotion and advice as services provided generally to the public and industry.
- Hon Kim Chance MLC, Leader of the House was of the opinion that the levy was a fee for service.<sup>28</sup> He went on to refer to the previous 'user pays' source of funding for energy safety and stated that the Safety Bill sought to revert to the system of user funding.<sup>29</sup>

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<sup>24</sup> Albert Koenig, Director of Energy Safety and Executive Director, EnergySafety WA, Department of Consumer and Employment Protection, *Transcript of Evidence*, 12 April 2006, whole transcript, in particular the passages referred to in paragraph 5.8 above.

<sup>25</sup> Hon K Chance MLC, Leader of the House, Western Australia, Council, *Parliamentary Debates (Hansard)*, 22 March 2006, p686.

<sup>26</sup> Albert Koenig, Director of Energy Safety and Executive Director, EnergySafety WA, Department of Consumer and Employment Protection, *Transcript of Evidence*, 12 April 2006 pp3 and 4.

<sup>27</sup> Ibid, p8.

<sup>28</sup> Hon Kim Chance MLC, Leader of the House, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 6 April 2006, p28.

<sup>29</sup> Ibid, p29.

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*Additional preliminary matter*

- The Director stated that the Department had received legal advice that the levy was not a tax because it was not an excise.<sup>30</sup>
- The Committee notes that excises do not exhaust the categories of taxation.

**Whether levy is a fee for services**

7.2 To demonstrate a fee for services, it is necessary to establish that:

- services were rendered;
- the fee related to those services; and
- the services for which the fee was charged were rendered to, or at the request or direction of, the persons paying the levy.

*Whether services are rendered by EnergySafety*

7.3 EnergySafety's activities have been set out in paragraphs 5.6-5.8 above.

7.4 It was the Director's evidence that approximately half of EnergySafety's budget is devoted to investigative activities,<sup>31</sup> although it had limited enforcement powers.<sup>32</sup> Its role in respect of consumer safety concerning installations is largely to monitor inspections performed by industry.<sup>33</sup>

7.5 EnergySafety's regulation of electrical and gas contractors was currently 80-90% funded by contractor licence fees and would soon become fully-funded by those fees.<sup>34</sup>

7.6 It is clear to the Committee from the Director's evidence and the Draft EnergySafety Division Business Plan 2006/07, dated April 2006, (**Draft Business Plan**) that EnergySafety has an important, high-level policy and technical advice role in the regulatory framework.<sup>35</sup>

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<sup>30</sup> Albert Koenig, Director of Energy Safety and Executive Director, EnergySafety WA, Department of Consumer and Employment Protection, *Transcript of Evidence*, 12 April 2006, pp2-3.

<sup>31</sup> Ibid p8.

<sup>32</sup> Ibid p 8. This is confirmed by the Draft Business Plan, which notes that its investigative role in respect of networks is to assist the Economic Regulator Authority and the Ombudsman pp3 and 7.

<sup>33</sup> Ibid, pp15-6. Also Draft Business Plan, p19.

<sup>34</sup> Albert Koenig, Director of Energy Safety and Executive Director, EnergySafety WA, Department of Consumer and Employment Protection, *Transcript of Evidence*, 12 April 2006, p8.

<sup>35</sup> See, for example, Draft Business Plan pp6-10, 12 and 28-9.

- 7.7 The argument that these activities were “services” was best expressed by the Director as the levy being a:

*... benefit for those persons who either use electricity and gas directly as consumers or who purchase products or services that have been provided or made available through some assistance or use of electricity and gas ... there is some benefit derived in the production of those services and commodities from the regulatory framework that we administer.”<sup>36</sup>*

- 7.8 The Committee considers that the evidence of service provision by EnergySafety to energy industry participants, or ultimate consumers of energy (as distinct from direct services provided to government and other government agencies and indirect benefit to the general public), was of both direct and indirect services contributing to a safer environment for the provision of energy and energy related services by others.

*Whether fees relate to identified services*

- 7.9 The Draft Business Plan, confirmed by the Director’s evidence, shows that the levy will generate income for all of EnergySafety’s activities not funded through licence or direct service fees. Services provided to government, and other government agencies, are included in this levy.
- 7.10 In response to the question as to whether there was a relationship between the provision of the activities that EnergySafety will carry out and the cost of providing those activities, the Director stated that:

*There is a loose relationship, yes. Perhaps I can explain it this way: I should be careful to say that the levy is not intended to be a fee for service; rather, it is meant to be a realistic mechanism for imposing on a particular sector of industry a cost recovery mechanism that ultimately flows through, in terms of where the costs are met, to those people who are the ultimate end beneficiaries of the regulatory framework that we administer. In that context, one can, realistically I think, see benefit for those persons who either use electricity and gas directly as consumers or who purchase products or services that have been provided or made available through some assistance or use of electricity and gas and these could be commodities sold overseas or wherever. Whatever incremental costs are included in terms of electricity and gas, there is some benefit derived in the production of those services and commodities from the regulatory framework that*

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<sup>36</sup> Albert Koenig, Director of Energy Safety and Executive Director, EnergySafety WA, Department of Consumer and Employment Protection, *Transcript of Evidence*, 12 April 2006, p3. (Full context paragraph 7.10 below.)

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*we administer. Therefore, very broad spreading of these costs across the industry sector is not an unrealistic way of getting a user-pays arrangement in place, albeit it is not specifically intended to be a fee for service because it is not aimed at any one specific organisation.*<sup>37</sup>

- 7.11 Fees can be fixed by reference to the cost of delivering services to all of the users of the service rather than by the cost of delivering to a particular user.<sup>38</sup>
- 7.12 However, the connection between the quantum of the levy and any services provided to energy industry participants was described by the Director as a “*loose relationship*”.<sup>39</sup> The remoteness of any connection is underlined by the EM to the Safety Bill which, as has been noted, identified the levy as giving the public generally confidence that safety standards are being met - that is, there is a ‘service’ to the community generally.

*Whether person paying the levy receives, or directs, the identified services*

- 7.13 The argument that this levy represented a ‘*user pays*’ fee for service provision was complicated by the difficulty in determining who will, in fact, ultimately pay the levy.
- 7.14 The Bills impose the levy on defined energy industry participants. In effect, energy distributors. However, the identified beneficiaries are the energy industry generally and consumers, not simply the defined energy industry participants.<sup>40</sup>
- 7.15 The Director’s evidence was that the levy was:

*... a realistic mechanism for imposing on a particular sector of industry a cost recovery mechanism that ultimately flows through, in terms of where the costs are met, to those people who are the ultimate end beneficiaries of the regulatory framework ...*<sup>41</sup>

And, in response to the question: *To what extent can energy providers such as Alinta...and the new structure of Western Power ... pass on this levy?*

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<sup>37</sup> Ibid, p3.

<sup>38</sup> *Airservices Australia* case.

<sup>39</sup> Albert Koenig, Director of Energy Safety and Executive Director, EnergySafety WA, Department of Consumer and Employment Protection, *Transcript of Evidence*, 12 April 2006, p3.

<sup>40</sup> As has been noted, services are also provided to government.

<sup>41</sup> Albert Koenig, Director of Energy Safety and Executive Director, EnergySafety WA, Department of Consumer and Employment Protection, *Transcript of Evidence*, 12 April 2006, p3.

*We expect the costs to be passed on, albeit that process might vary over time.*<sup>42</sup>

7.16 In the Legislative Council, Hon Kim Chance MLC, Leader of the House, stated that the levy was imposed on distributors and that the funds were not derived from householders directly.<sup>43</sup> He argued that the householder would be protected from paying the levy by reason of the guarantee that energy prices will be capped for the term of the Government.

7.17 The Committee notes that there is no guarantee beyond this for electricity prices. The Committee further notes the clear expectation of Mr Koenig that the cost of the levy will be passed on to consumers.

7.18 Western Power has been identified as being likely to carry the heaviest burden.<sup>44</sup>

7.19 The Director said:

*... a big percentage of the electricity distributed by Western Power is for industry and commerce. Small-use customers, who currently have a tariff-cap for a period, consume a modest quantity of the electricity that is distributed or sold. It is the network that creates a transport charge for that electricity. It is possible for Western Power either to come to an arrangement with the government on what dividends it will pay to the government to make some allowance for what might not be possible to recover from those customers who have a tariff-cap, or to spread those costs across the other industrial and commercial consumers ...*<sup>45</sup>

7.20 The Committee accepts that for electricity consumers the levy is imposed on energy industry participants in the short term.

7.21 It appears that in the short term taxpayers will fund that part of the levy that Government owned energy industry participants are not able to recover from consumers through reduced dividend payments to the Consolidated Revenue Fund.

7.22 Although it is possible that the cost of the levy will be passed on to consumers, in the longer term, the question of who bears the cost will be a decision for the Government

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<sup>42</sup> Ibid, p13.

<sup>43</sup> Hon Kim Chance MLC, Leader of the House, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 6 April 2006, p28.

<sup>44</sup> Albert Koenig, Director of Energy Safety and Executive Director, EnergySafety WA, Department of Consumer and Employment Protection, *Transcript of Evidence*, 12 April 2006, p6.

<sup>45</sup> Ibid, p13.

of the day, and/or the energy industry participants, as to whether costs are passed on to consumers.

### *Conclusion*

- 7.23 Given the circumstances outlined, and noting comments in the *Airservices Australia* case as to the relationship between fees and cost of delivery not needing to be exact, the Committee is of the view that it cannot conclusively determine that the levy is a fee for service.
- 7.24 The Committee notes that the levy is a mechanism for recovering costs from the beneficiaries of the regulatory framework for energy safety rather than from the Consolidated Revenue Fund.

### **Relevance of regulatory role of EnergySafety**

- 7.25 According to Gaudron J in the *Airservices Australia* case (para 142), where services are provided as part of a regulatory scheme without intent of commercial profit, the fact that the cost of carrying out the imposition of the fees was included in the charges “*could be*” fatal to the argument that the charge was not a tax (Gaudron J relied on the earlier judgement of Dixon CJ in *Swift Australian Co (Pty) Ltd v Boyd Parkinson* (1962) 108 CLR 189).
- 7.26 The Draft Business Plan reveals that the levy has been quantified on the basis that the cost of carrying out the imposition of the levy be recovered through the levy.<sup>46</sup>
- 7.27 The Director made several references to EnergySafety’s regulatory role, including:
- the statutory office of Director of Energy Safety was established with a technical and safety regulation function and the technical safety division of the Office of Energy was established to support the work of the statutory office;<sup>47</sup>
  - two of its divisions deal with regulation, the third with emergency management;<sup>48</sup>
  - the levy is a cost recovery mechanism designed to flow through to the end beneficiaries of the regulatory framework that EnergySafety administers.<sup>49</sup>
- 7.28 However, not all of the functions of EnergySafety are clearly regulatory. Policy advice to government and safety promotion and public awareness-raising may not fit squarely into the regulatory role.

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<sup>46</sup> Draft Business Plan, pp 27 and 40.

<sup>47</sup> Albert Koenig, Director of Energy Safety and Executive Director, EnergySafety WA, Department of Consumer and Employment Protection, *Transcript of Evidence*, 12 April 2006, p1.

<sup>48</sup> Ibid, p2.

7.29 This is recognised by both EMs to the Safety Bill,<sup>50</sup> which state:

*The Bill seeks to establish adequate long-term funding by the energy industry for technical and safety regulation of the electricity and gas industries **and other related activities**. (Committee's emphasis.)*

7.30 In his second reading speech, Hon K Chance MLC, Leader of the House said that the Safety Bill introduces:

*... a structural change to a user-pays system for regulatory cost...*<sup>51</sup>

7.31 The Committee notes that it is the Government's view that the Bills represent a user pays system for services/benefit provided.<sup>52</sup> This is a different model than cost recovery for a regulatory system.

## Conclusion

7.32 What constitutes sufficient public purpose for a law to be characterised as a tax is a matter of debate. The Committee concludes that the Bills impose taxation for the purposes of s 46(7) of the *Constitution Acts Amendment Act 1899*. Further, that the Bills have been formulated in accordance with the requirements of this Act.

## 8 WHETHER INDUSTRY/CONSUMER FUNDING OF ENERGY SAFETY IS APPROPRIATE

8.1 In debate following the second reading, Hon Kim Chance MLC, Leader of the House, acknowledged that there were arguments for the taxpayers generally paying for a service, rather than the consumer of that service. He observed that it had been "... *only a relatively brief period that the consolidated fund has been the provider of the funds for energy safety*" and stated that "[a]s proposed in the bills, the distributors will be the people who pay, in the same way as the State Energy Commission of Western Australia paid when it was the distributor".<sup>53</sup>

8.2 In his submission to the Committee, Hon Paul Llewellyn MLC stated:

*I submit that in this particular case it is appropriate for funding to come from the proposed levy (together with the revenue received from licensing electrical and gas operatives under existing arrangements) rather than from consolidated revenue.*

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<sup>49</sup> Ibid, p3.

<sup>50</sup> Both EMs to the Safety Bill, p1.

<sup>51</sup> Hon K Chance MLC, Leader of the House, Western Australia, Council, *Parliamentary Debates (Hansard)*, 22 March 2006, p686.

<sup>52</sup> See paragraphs 7.1 and 7.13-22 above.

<sup>53</sup> Hon Kim Chance MLC, Leader of the House, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 6 April 2006. p28.

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*That is because:*

1. *The proposed levy will provide a secure source of revenue for the important functions of the Director of Energy Safety.*
2. *It is appropriate for the costs of the Director's activities to be borne by the energy industry, given that the energy industry generates the need for those activities. This sends a price signal to the industry to operate more safely - e.g. if there are less pole top fires there will be less expenditure on investigations and a smaller levy.*
3. *To the extent that the levy is reflected in prices it sends a more accurate signal to energy users of the true cost of energy generation. (Although I note that given the amount of the levy - an estimated \$4.4 million according to a briefing I have received - the impact on energy prices is likely to be negligible).*
4. *The provisions in the Energy Safety Bill 2005 enabling Parliamentary scrutiny of the business plan and levy should avoid "cost padding" by the Director of Energy Safety.*

8.3 The Director stated that the reason that a levy system had been chosen, rather than using the Consolidated Revenue Fund for revenue was:

- EnergySafety had had difficulty obtaining adequate funding for its activities from the Consolidated Revenue Fund;<sup>54</sup>
- there were precedents elsewhere for taking that approach (New Zealand, Queensland, Victoria and "to a degree" South Australia were named by the Director)<sup>55</sup>; and
- "... the government did a policy review on this through the functional review that took place some three years ago and concluded, after looking around Australia, that this was an appropriate way to fund this office".<sup>56</sup>

8.4 The Committee refers to the Director's statement set out in paragraph 7.10 above.

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<sup>54</sup> Albert Koenig, Director of Energy Safety and Executive Director, EnergySafety WA, Department of Consumer and Employment Protection, *Transcript of Evidence*, 12 April 2006, pp3 and 14-5.

<sup>55</sup> Ibid, p4.

<sup>56</sup> Ibid, p15.

8.5 Following the hearing, on 26 April 2006, the Director provided the Committee with information regarding other jurisdictions and these are appended as Appendix 3.

8.6 In correspondence received from the Minister on 24 April 2006, he explained the reasons for the choice of ‘user pays’ funding for the activities of the Office of Energy Safety, rather than funding those activities through the Consolidated Revenue Fund:

*The original funding of energy technical and safety regulation, when it was located at SECWA prior to 1995 and for the 18 months following the commencement of Western Power and AlintaGas, was on a “user pays” basis, since it was provided from these utilities’ electricity and gas revenues and not the Consolidated Revenue Fund. The Government’s Functional Review of 2002/03 identified that a number of other jurisdictions were using levy (or similar) mechanisms on the energy industry to fund energy technical and safety regulation. Given that this had been the original position in WA and the recommendation from the Functional Review, the Government decided to adopt this approach.*

8.7 Due to the restriction on the Committee’s ability to examine the policy of the Bills (see paragraph 1.2 above), the Committee did not pursue this issue further and reached no conclusions.

## **9 THE BILLS - ACCOUNTABILITY AND DELEGATION MECHANISMS - THE SAFETY BILL**

9.1 The scheme has been set out in Part 6.

9.2 The main accountability mechanism is the power of either House of Parliament to disallow a levy notice, which is found in cl 15 of the Safety Bill. This power applies to all levy notices except the first notice (cl 15(4) of the Safety Bill).

### **First levy not disallowable**

9.3 The Committee wrote to the Minister on 26 April 2006 inquiring why the levy notice was not disallowable in the first year and what would be the implications of removing cl 15(4) from the Safety Bill.

9.4 The Committee notes that:

- the quantum of the levy is \$4.48 million, as outlined in the Draft Business Plan;<sup>57</sup>

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<sup>57</sup> Draft Business Plan, p34.

- The Minister's letter of 28 April 2006 advised that the industry has seen the changes to the method of formulating the levy as positive;<sup>58</sup> and
- the Minister has given a commitment in his letter of 28 April 2006 to implement the levy in accordance with the Draft Business Plan.<sup>59</sup>

9.5 In light of the Minister's response, and his commitment, the Committee accepts cl 15(4) of the Safety Bill as proposed.

#### **Disallowance in subsequent years**

9.6 The information that will be available to either House of Parliament in determining whether or not to disallow the subsequent levy notices is that information which is in the levy notice itself, that is:

- the total amount that is to be raised by way of levy;
- the method by which it will be determined which energy industry participants are liable to pay a levy;
- the formula or method for assessing the amount of levy each energy participant who is to pay a levy will pay; and
- the day on which the levy is payable

in respect of the relevant financial year (cl 14(1) of the Safety Bill); and:

- the approved business plan (cl 11(2) of the Safety Bill, which provides that the approved business plan is to be laid before each House of Parliament within 14 days of approval).

9.7 The chief executive officer of DOCEP and the Director of Energy Safety may modify the approved business plan with the consent of the Minister. The Minister may also amend the approved business plan (cl 12 of the Safety Bill). There is no obligation for this modified business plan to be laid before Parliament.

#### **Quantum of total levy**

9.8 The Director stated that the scrutiny for efficiency and control of the levy started with the "*business plan process*", when the Minister would "*inevitably*" seek advice from the Department of Treasury and Finance. He expressed the view that "... *the last thing*

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<sup>58</sup> Appendix 1 - Letter from Hon John Bowler, Minister Assisting the Minister for Employment Protection, 28 April 2006, p2.

<sup>59</sup> Ibid, p2.

*that the Minister would want is to have a disallowance motion put forward because the quantum of the levy is seen to be running out of control in some way ... ”.*<sup>60</sup>

- 9.9 When asked how EnergySafety’s accountability under the Bills differed from its accountability when funded as one of the budget items for DOCEP, the Director responded that:

*The budget proposals for EnergySafety will probably be more explicitly available to everyone to see, particularly in Parliament, through the business plan process that these bills set up than would be the normal budgetary process, whereby whatever we have for EnergySafety is contained within what would be the departmental submission under the portfolio at budget time ... the level of detail about what EnergySafety does that would be available for scrutiny through this business plan is much greater than would be available to Parliament through the normal budget process. I say that because the business plan has to be tabled in Parliament as part of the Minister’s determination ...*<sup>61</sup>

- 9.10 The Committee notes this should provide a more transparent accountability process than the current budget and estimates process.
- 9.11 EnergySafety has prepared its current business plan as part of a five year budget to determine the levy on a “five-year rolling average basis” with a view to achieving minimal variation from year to year in the budget, notwithstanding the potential for anomalies in its year to year requirements due to significant one off costs, for example, a computer system upgrade.<sup>62</sup>
- 9.12 During the hearing on 12 April 2006 the Committee canvassed the way in which the costs of services provided by DOCEP are calculated and the degree of separation between EnergySafety and DOCEP (see the Director’s transcript of evidence, in particular pages 5, 6 -7 and 18).
- 9.13 In the event a levy notice is disallowed, as has been noted in paragraph 6.12, the levy notice last passed will be taken to be the levy notice for the relevant year and the levy amount payable by an industry participant is to be determined by the amount last payable by that participant adjusted by the percentage that the March CPI of the relevant year varies from that of the previous year.

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<sup>60</sup> Albert Koenig, Director of Energy Safety and Executive Director, EnergySafety WA, Department of Consumer and Employment Protection, *Transcript of Evidence*, 12 April 2006, p9.

<sup>61</sup> Ibid, p17.

<sup>62</sup> Ibid, pp7-8.

- 9.14 The Committee notes that it is not clear from cl 15(5) of the Safety Bill whether the total levy will also increase by the CPI.

### **Which energy industry participants will pay the levy**

- 9.15 Clause 6 (d) and (e), together with cl 14, of the Safety Bill, provide that the allocation of the levy between the gas and electricity industries and the formula or method for assessment in relation to the levy are to be set out in the business plan and that the method by which it will be determined which energy industry participant will pay the levy, and the formula or method for determining an energy industry participant's levy, is to be in the levy notice.

- 9.16 The method for determining:

- how the levy will be apportioned between the gas and electricity industry;
- which industry participants will pay a levy; and
- the amount of the levy to be paid by individual energy industry participants

may vary from year to year.<sup>63</sup>

- 9.17 However, the Committee notes from the Minister's response at the paragraph numbered 5 of his letter of 28 April 2006 (attached as Appendix 1) that he has agreed to "... *amend the legislation to "fix" the split between electricity (62%) and gas (38%) sectors.*"

- 9.18 Clause 3(1) of the Safety Bill defines "*energy industry participant*" by setting out a number of different:

- industry licence holders;
- persons exempted from holding a licence;
- supply authorities as defined in the *Electricity Act 1945*, s 5;
- distributors of liquefied petroleum gas; and
- "... *person[s] or clas[es]s of person[s] prescribed by the regulations as an energy industry participant for the purposes of this definition*".

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<sup>63</sup> Ibid, for example p6 - the current apportionment between gas and electricity is proposed for the first five years, but will be proposed to the Minister each year, and p12 - the extensive investigative powers are needed because the model itself is not fixed by legislation, the Government may in the future think a different model is appropriate.

- 9.19 Clause 3(i) of the Safety Bill allows the class of persons liable to pay the levy to be extended by regulation.
- 9.20 By cl 16 of the Safety Bill, the chief executive officer of the department assisting the Minister, currently DOCEP, must:
- determine the industry participants liable to pay a levy;
  - assess the amount of levy to be paid by each participant; and
  - give a notice of assessment to each of those participants.
- 9.21 This is to be done in accordance with the levy notice and any regulations and as soon as practical after the levy notice has been published.
- 9.22 The Subcommittee wrote to the Minister on 26 April 2006 enquiring why the Bills did not provide a process for review or objection to the levy imposed on energy industry participants. (The Committee noted that Part 4 of the State Tax Act provides such a process);
- 9.23 The Subcommittee had not received a response from the Minister by the date of its final meeting, that is 1 May 2006.
- 9.24 The Committee considered the Acting Minister's response of 2 May 2006.
- 9.25 The Committee notes the Minister's intention is that any error in the assessment of the liability of an energy industry participant to pay a levy be corrected through administrative process. The Committee is concerned that this may not be possible under the Safety Bill as drafted.

### *Conclusion*

- 9.26 The Committee considers that a limited objection and review procedure should be inserted into the Safety Bill.
- 9.27 The Committee notes that Division 7 of Part 6 of the *Local Government Act 1995* provides an objection and review procedure for ratepayers. The Committee considered that this procedure could be adapted for the use of energy industry participants dissatisfied with the quantum of their levy notice. The Committee recognised that the quantum of the total levy was subject to disallowance by Parliament and that the only objection available should be that the chief executive officer had not:
- determined the energy industry participant liable to pay a levy; and/or
  - assessed the amount of levy to be paid by the energy industry participant

in accordance with the levy notice and any regulations.

## Recommendations

**Recommendation 1: The Committee recommends that a new Part 4 be inserted into the Energy Safety Bill 2005 to provide an objection and review procedure. This can be effected in the following manner:**

Page 12, after line 19- To insert -

### **“Part 4 - Objections and Review**

#### **20. Grounds of Objection**

- (1) An energy industry participant may, in accordance with this section, object to a notice of assessment issued to that energy industry participant under section 16 on either or both of the grounds that there is an error in the chief executive officer’s determination:
  - (a) that it is an energy industry participant liable to pay a levy; or
  - (b) assessment of the amount to be paid by it by way of levy.
- (2) An objection under subsection (1) is to:
  - (a) be made to the chief executive officer in writing within 42 days of the service of a notice of assessment under section 16; and
  - (b) identify the relevant energy industry participant and assessment notice; and
  - (c) set out fully and in detail the grounds of objection.
- (3) An objection under subsection (1) may be made by the energy industry participant named in notice of assessment or by the legal representative of that person.
- (4) The chief executive officer may, on written application by a person proposing to make an objection, extend in writing the time for making the objection for such period as the chief executive officer thinks fit.
- (5) The chief executive officer is to promptly consider any objection and may either disallow it or allow it, wholly or in part.

- (6) After making a decision on the objection the chief executive officer is to promptly serve upon the person by whom the objection was made written notice of the chief executive officer's decision on the objection and a statement of the reason for that decision.

**21. Review of decision of chief executive officer on objection**

Any person who is dissatisfied with the decision of the chief executive officer on an objection by that person under section 20 may, within 42 days (or such further period as the State Administrative Tribunal, for reasonable cause shown by the person, allows) after service of notice of the decision, apply to the State Administrative Tribunal for a review of the decision.

**22. Review of decision to refusal to extend time for objection**

A person who is dissatisfied with a decision of the chief executive officer to refuse to extend the time for making an objection against the notice of assessment may apply to the State Administrative Tribunal for a review of the decision.

**23. New matters raised on review**

- (1) Upon a review by the State Administrative Tribunal under section 21 or 22, the State Administrative Tribunal may consider:
- (a) grounds in addition to those stated in the notice of objection; and
  - (b) reasons in addition to any reasons previously given for the chief executive officer's decision that is under review.
- (2) The State Administrative Tribunal is to ensure, by adjournment or otherwise, that each party and any other person entitled to be heard has a reasonable opportunity of properly considering and responding to any new ground or reason that the State Administrative Tribunal proposes to consider in accordance with subsection (1).

**24. Objection not to affect liability to pay rates or service charges**

The making of an objection or application for review under this Part does not affect the liability to pay any rate or service charge imposed under this Act pending determination of the objection or application for review.

**25. Repayment of levy**

Any moneys paid by a person pursuant to a notice of assessment that is later disallowed in whole or in part on objection or review that are in excess of the amount that is required to be paid by that person in accordance with the decision of the objection or review are to be repaid to that person.

**Recommendation 2: The Committee recommends that proposed Parts 4-6 and in clauses 20-32 of the Energy Safety Bill 2005 be renumbered Parts 5-7 and clauses 26-38 respectively to reflect the insertion of the new Part 4 into the Energy Safety Bill 2005. This can be effected in the following manner:**

**Page 13, line 1 - To delete “4” and insert instead “5”**

**Page 13, line 2 - To delete “20” and insert instead “26”**

**Page 13, line 21 - To delete “21” and insert instead “27”**

**Page 15, line 1 - To delete “5” and insert instead “6”**

**Page 15, line 2 - To delete “22” and insert instead “28”**

**Page 16, line 6 - To delete “23” and insert instead “29”**

**Page 16, line 23 - To delete “24” and insert instead “30”**

**Page 18, line 10 - To delete “25” and insert instead “31”**

**Page 18, line 18 - To delete “22(6), 24(4) or 26” and insert instead “28(6), 30(4) or 32”**

**Page 18, line 19 - To delete “26” and insert instead “32”**

**Page 18, line 24 - To delete “27” and insert instead “33”**

**Page 19, line 1 - To delete “28” and insert instead “34”**

**Page 20, line 1 - To delete “6” and insert instead “7”**

**Page 20, line 2 - To delete “29” and insert instead “35”**

**Page 20, line 16 - To delete “30” and insert instead “36”**

**Page 21, line 1 - To delete “31” and insert instead “37”**

**Page 21, line 16 - To delete “32” and insert instead “38”.**

### **Energy Safety Account**

9.28 Clause 20 of the Safety Bill provides that a separate operating account called the Energy Safety Account is to be established or, alternatively, such an account is to be established as part of an existing operating account. That account is to be credited with monies received by way of the levy.

9.29 By cl 21 of the Safety Bill, monies received into the Energy Safety Account can be paid out for the following purposes:

- the costs and expenses related to the energy safety activities of the Director’s office, including operating costs and capital expenditure;
- the costs of administering the Energy Safety Account (including collecting the levies and penalties);
- any moneys required to be repaid as a consequence of disallowance of a levy notice; and
- any other purpose related to energy safety activities authorised by the Minister.

### **10 PENALTY INTEREST**

10.1 Clause 17 of the Safety Bill imposes an obligation to pay the assessed levy and cl 18 imposes a penalty of 20% interest on any overdue unpaid levy.

- 10.2 The Committee is concerned that this does not provide sufficient flexibility for changing economic circumstances.
- 10.3 The Committee was of the view that penalty interest should reflect current market rate plus a penalty component.
- 10.4 The Committee is of the view that the House has a number of options to address this, including amending cl 18 in either of the following ways:
- to set the interest rate in the Safety Bill at the Reserve Bank official cash rate plus a margin prescribed by the regulations; or
  - to provide that the penalty interest rate be prescribed by regulation.
- 10.5 The Committee was divided as to which of these two options was the most appropriate.

### Recommendation

**Recommendation 3: The majority of the Committee (Hon Anthony Fels MLC, and Hon Nigel Hallett MLC, dissenting) recommends that clause 18 of the Energy Safety Bill 2005 be amended to provide that the penalty interest rate be prescribed in the regulations. This can be effected in the following manner:**

**Page 12, line 10 - To delete “of 20% per annum” and insert instead after “rate” - “prescribed by the regulations”.**

## 11 INSPECTORS’ INVESTIGATIVE POWERS -THE SAFETY BILL

### Investigator’s powers

- 11.1 Clause 23 of the Safety Bill provides that “*the Director*” may designate persons to be investigators for the purposes of the Bill. This clause requires the Director to issue identity cards to investigators.
- 11.2 The Committee notes that the term “*the Director*”, used in clauses 23, 26 and 32, is not defined in the Safety Bill.

## Recommendation

**Recommendation 4: The Committee recommends that, for consistency, the defined term “Director of Energy Safety” be used in clauses 23, 26 and 32. This can be effected in the following manner:**

**Page 16, line 7 - To insert after “Director” -**

**“of Energy Safety”**

**Page 16, line 9 - To insert after “Director” -**

**“of Energy Safety”**

**Page 16, line 18 - To insert after “Director” -**

**“of Energy Safety”**

**Page 18, line 20 - To insert after “Director” -**

**“of Energy Safety”**

**Page 21, line 23 - To insert after “Director” -**

**“of Energy Safety”**

11.3 An investigator’s powers are set out in cl 24 of the Safety Bill. They include the power to enter land or non-residential premises at any time and:

- cl 24(3), enter land or private premises without warning;
- cl 24(3)(a), search and examine anything on the premises;
- cl 24(3)(e)(iv), operate equipment or facilities at the premises;
- cl 24(3)(b), remove relevant documents or take copies etcetera of any documents found in the course of the investigation regardless of relevance;
- cl 24(3)(d), photograph or film anything on the premises;
- cl 24(3)(e)(v), require the provision of passwords etcetera to computers;

- cl 24(3)(e), demand information from any person; and
- cl 24(3)(b) and (5), keep anything removed for as long as necessary.

### Conclusion

- 11.4 A number of the Committee members had concerns regarding the power to film anything on the premises. The Committee considered that relevant persons should be provided with a copy of any photograph taken, or film made, under the power conferred by cl 24(3)(d) of the Safety Bill.
- 11.5 The Committee's recommendation on this issue is incorporated in recommendation 5.
- 11.6 Failure to comply with an investigator's demand is an offence with a penalty of up to \$20,000. Hindering or obstructing is an offence with the same penalty.
- 11.7 The Director acknowledged that the investigators' powers were "substantial". He went on to state:

*They are there principally there as reserve powers in case somebody does not want to give us the information that we would need to be able to fairly allocate the levy across the various industry participants ... It is fair to say that some of those organisations are very reluctant to part with some of that information because it is marketing and commercial information that is quite sensitive about how many customers they have in effect ... If somebody wants to play hardball we need to have some ability to follow up.*<sup>64</sup>

- 11.8 When questioned about safety issues that might arise from investigators having unfettered access to premises, the Director said:

*Our normal process is to comply with whatever safety and induction mechanisms are required ... unless there was some exceptional reason- it is hard for me to visualise one - I could not imagine us wanting to counter those procedures. We would look to work with a company from which we seek information in the best way that we can. If the company chose for some reason - which is possible, but admittedly rare - to be completely uncooperative, that is when some of these sorts of powers might have to be applied. However, we would normally expect our people when doing audits on the information supplied to fit in with all the normal company procedures and to examine all company documents and other things in the company of*

<sup>64</sup> Albert Koenig, Director of Energy Safety and Executive Director, EnergySafety WA, Department of Consumer and Employment Protection, *Transcript of Evidence*, 12 April 2006, p10.

*officials from that organisation and so on. That is our normal way of doing things.*<sup>65</sup>

- 11.9 The Director later said that EnergySafety would rely on information provided by energy industry participants but would conduct occasional audits. If information was received that something was wrong, an audit may be rapidly conducted or some other follow-up undertaken.<sup>66</sup>

- 11.10 When asked whether consideration had been given to giving notice of intention to attend premises, the Director replied:

*The normal practice would be to give notice of intent to enter the premises and a convenient time to do so ... If that [previous] allocation methodology were still to be used, for example, some of the investigative powers become more relevant because the type of information to be gathered would be more complex ... it is not inconceivable under different models of allocation for the levy to require what might be an unannounced visit.*<sup>67</sup>

- 11.11 The Director acknowledged that under the current proposed model such a need would be hard to envisage but said:

*... because the model itself is not fixed by legislation, ... it is best to leave the broad investigative powers there as a reserve in case they are needed to be able to support the different models that require different information ...*<sup>68</sup>

- 11.12 An investigator's powers under cl 24 of the Safety Bill are said to be "*the same as section 99(1)*" of the State Tax Act. They were also noted to be in the same terms as investigators' power under the *Racing and Wagering Western Australia Act 2003 (Racing Act)*.<sup>69</sup>

- 11.13 There are significant differences in the provisions relating to the removal of documents between the Safety Bill and both Acts referred to in paragraph 11.10 above. Clause 24 of the Safety Bill allows indefinite removal, whereas s 99 of the State Tax Act provides that:

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<sup>65</sup> Ibid, pp10-1.

<sup>66</sup> Ibid, p12.

<sup>67</sup> Ibid, p11.

<sup>68</sup> Ibid, pp11-2.

<sup>69</sup> The Director's Answers to Question on Notice asked at hearing 12 April 2006, dated 26 April 2006, p2.

- the Commissioner must ensure that a person from whom a document or anything else has been taken is given a copy of, or reasonable access to, it; and
  - that it is returned within 28 days unless a prosecution is contemplated or duty is payable, in which cases it is to be returned as soon as practicable after the prosecution (or decision not to prosecute) or the duty is paid.
- 11.14 The Subcommittee wrote to the Minister on 26 April 2006 enquiring why cl 24 of the Energy Safety Bill allowed indefinite removal of documents whereas section 99 of the State Tax Act contained the provisions noted in paragraph 11.11 above.
- 11.15 The Subcommittee had not received a response from the Minister by the date of its final meeting, that is 1 May 2006.
- 11.16 The Committee notes that in his letter of 2 May 2006, the Acting Minister indicated the Minister's preparedness to have cl 24 amended to reflect the Committee's concern.

## Recommendation

**Recommendation 5: The Committee recommends that clause 24 of the Energy Safety Bill 2005 be amended to provide an obligation to provide a person from whom a document or anything else is taken with either a copy of, or access to, the object taken and an obligation to return the taken document or other object within a specified time. This can be effected in the following manner:**

**Page 18, line 7 - To delete “may retain a document or thing removed from the premises for so long as is necessary to examine it or copy it, or both.” and instead insert -**

**“must ensure that a person from whom a document or anything else is taken under this section and who would otherwise be entitled to possession of it is given a copy of it, or reasonable access to it, as appropriate.**

- (7) If an investigator takes a photograph or makes a film under section 24(3)(d), a copy of that photograph or film must be provided to relevant persons.**
- (8) If an investigator takes possession of anything under this section, the Director of Energy Safety must ensure that it is returned to the person entitled to possession of it as follows:**
  - (a) if it was taken in connection with the prosecution or possible prosecution of a suspected contravention of this Act - as soon as practicable after the relevant prosecution is completed or discontinued or, if no prosecution is commenced, as soon as practicable after the decision is made not to prosecute the suspected contravention;**
  - (b) in any other case - within 28 days after it was taken.”**

11.17 A person is not excused from answering an investigator’s question on the grounds that it might incriminate him or her (cl 25). However, the information obtained can only be used in prosecutions for failing to comply with requirements made under cls 22 or 24 or providing false or misleading information to the Director or an investigator.

11.18 The Committee notes that neither the State Tax Act nor the Racing Act requires a person to give an incriminating statement.

## Recommendation

**Recommendation 6: A majority of the Committee (Hon Ken Travers MLC, and Hon Shelley Archer MLC, dissenting) recommends that clause 25 of the Energy Safety Bill 2005 be deleted. This can be effected in the following manner:**

**Page 18, lines 10 to 18 - To delete the clause.**

## Confidentiality

- 11.19 Section 114 of the State Tax Act imposes a higher standard of confidentiality than that imposed by cl 28 of the Safety Bill.
- 11.20 In particular, the obligation is imposed on **former** Commissioners, investigators as well as any person to whom the information is lawfully disclosed and any person who has properly or improperly gained access to the information.
- 11.21 The Director advised the Committee of an intention to limit the number of persons who had access to information and to formulate policies and procedures concerned with the protection of confidentiality within the office.<sup>70</sup> He also expressed his understanding that a person would not be released from the confidentiality requirements simply by ceasing to be employed by EnergySafety.<sup>71</sup>
- 11.22 The Subcommittee wrote to the Minister on 26 April 2006 enquiring why cl 28 of the Safety Bill did not impose obligations of confidentiality similar to those imposed by s 114 of the State Tax Act upon:
- former Directors of Energy Safety, CEOs of the relevant department and their staff;
  - former investigators;
  - any person to whom information is lawfully disclosed;
  - any person who had gained access, whether properly or improperly, to information gathered.
- 11.23 The Subcommittee had not received a response from the Minister by the date of its final meeting, that is 1 May 2006.

<sup>70</sup> Albert Koenig, Director of Energy Safety and Executive Director, EnergySafety WA, Department of Consumer and Employment Protection, *Transcript of Evidence*, 12 April 2006, p11.

<sup>71</sup> *Ibid*, p13.

## Recommendation

**Recommendation 7: The Committee recommends that clause 28 of the Energy Safety Bill 2005 be amended to impose obligations of confidentiality upon the persons noted in paragraph 11.20. This can be effected in the following manner:**

**Page 19, line 2 - To insert after “officer” -**

**“, or former chief executive officer”**

**Page 19, line 2 - To insert after “Safety” -**

**“, or former Director of Energy Safety”**

**Page 19, line 3 - To insert after “functions” -**

**“, or formerly performing functions”**

**Page 19, line 3 - To insert after “Act” -**

**“or any other person to whom information or material is disclosed under this Act or who properly or improperly gains access to the information or material in some other way”**

**Page 19, line 5 - To delete “in the course of duty” and insert instead -**

**“for the purposes of this Act”.**

## 12 OTHER MATTERS ARISING

12.1 In his submission, Hon Paul Llewellyn MLC advised of his intention to move certain amendments to the Safety Bill. In his letter of 24 April 2006, the Minister advised that he will be supporting the amendments proposed by Hon Paul Llewellyn MLC.

12.2 The Committee agrees with that course of action.

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**Recommendations**

**Recommendation 8:** The Committee recommends that clause 3 of the Energy Safety Bill 2005 be amended to reflect the amendments proposed by Hon Paul Llewellyn MLC. This can be effected in the following manner:

Page 3, line 24 - to insert after “regulation” -

“including energy efficiency regulation”

Page 3, line 25 - To insert after “safety” -

“and energy efficiency”.

**Recommendation 9:** The Committee recommends that the Energy Safety Bill 2005 and the Energy Safety Levy Bill 2005 be passed subject to recommendations 1-8.



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**Hon Giz Watson MLC**  
**Chair**

**Date: 10 May 2006**



# APPENDIX 1

## LETTER FROM MINISTER DATED 28 APRIL 2006

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28. APR. 2006 9:00

JOHN BOWLER MLA

NO. 496 P. 2



GOVERNMENT OF WESTERN AUSTRALIA

**MINISTER FOR RESOURCES AND ASSISTING THE MINISTER FOR STATE DEVELOPMENT  
EMPLOYMENT PROTECTION  
GOLDFIELDS-ESPERANCE AND GREAT SOUTHERN**

Our ref: 19-5470

Hon Ken Travers  
Convenor  
Inquiry into Energy Safety Bill 2005 and Energy Safety Levy Bill 2005  
Parliament House  
PERTH WA 6000

Dear Ken

**ENERGY SAFETY BILL 2005 and ENERGY SAFETY LEVY BILL 2005**

Thank you for your letter dated 26 April 2006 in regard to these two Bills.

I am pleased to provide the following responses to the matters raised, in the order of the numbered paragraphs of your letter, in respect of the Energy Safety Bill 2005.

- 1) Clause 15(4) prevents the levy disallowance mechanism from being applied to the levy of the first year. This is a logical part of the disallowance mechanism which is designed not to disallow the entire levy but the increases from year to year, should they be considered excessive.

Should sub-clause 15(4) be deleted from the Bill, then either House could theoretically disallow the levy for the first year. Parliament however already knows what amount of levy is proposed by the Government for the first year, as this is contained in the EnergySafety Division Business Plan 2006/07 (April 2006 draft), which is in the public domain and has been provided to the Committee. A further copy is attached. ↵

- 2) Yes, the apportioning of the levy between the electricity and gas sectors and the formula for allocating the levy among the participants to each has been finalised following comments being received through industry consultation. The details are set out on pages 38 - 40 of the EnergySafety Division Business Plan 2006/07 (April 2006 draft) which is in the public domain.

Level 19, Governor Stirling Tower, 197 St George's Terrace, Perth, Western Australia 6000  
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jbowler@dpc.wa.gov.au • www.ministers.wa.gov.au/bowler

- 2 -

- 3) Yes, I am satisfied that the proposals contained in the published EnergySafety Division Business Plan 2006/07 are reasonable in terms of both the proposed revenue and expenditure budgets for EnergySafety, and in terms of the quantum of the levy and how it should be applied for 2006/07. I intend to approve this Plan and this position will be reflected in the first Notice.
- 4) Yes, as described in (3) above.
- 5) Yes, energy industry participants indicated concern about the levy application methodology initially proposed in the Plan. Subsequently, on receipt of comments, I have agreed to amend the legislation to "fix" the split between electricity (62%) and gas (38%) sectors. I also agreed to change the allocation of the levy between the various participants in each sector so it will be based on the number of customer sites served by each distributor, for both electricity and gas. These changes were seen as a positive by industry. Other comment on the Plan was generally of a supportive nature, indicating that industry saw the work of EnergySafety as valuable to both industry and the community.

I trust this provides the information sought. Please contact my Policy Adviser, Bob Horstman, on 9222 9686 if you have further queries.

Yours sincerely



JOHN BOWLER JP MLA  
MINISTER FOR EMPLOYMENT PROTECTION

Att

28 APR 2006

## APPENDIX 2

### ACTING MINISTER'S LETTER DATED 2 MAY 2006

02/05/06 16:21 LEGISLATIVE COUNCIL → COMMITTEE OFFICE  
2. MAY. 2006 15:30 JOHN BOWLER MLA

NO. 413 P002/005

NO. 541 P. 2



GOVERNMENT OF WESTERN AUSTRALIA

**MINISTER FOR RESOURCES AND ASSISTING THE MINISTER FOR STATE DEVELOPMENT  
EMPLOYMENT PROTECTION  
GOLDFIELDS-ESPERANCE AND GREAT SOUTHERN**

19-5470

Hon Ken Travers MLC  
Convenor  
Inquiry into Energy Safety Bill and Energy Safety Levy Bill 2005  
Parliament House  
Perth 6000

Dear Ken

**ENERGY SAFETY BILL 2005 and ENERGY SAFETY LEVY BILL 2005**

Thank you for your further letter dated 26 April 2006 in regard to these two Bills.

I am pleased to provide the following responses to the matters raised, in the order of the numbered paragraphs of your letter, in respect of the Energy Safety Bill 2005.

- 1) It was not considered necessary to provide a formal appeal process since the method for assessment of the liability of industry participants is determined by the Minister, not the department. If, in the opinion of the affected industry participant, the department has erred in its assessment of the liability of the industry participant, the latter may readily raise the matter with the department, requesting a review. If an administrative error is then found to have taken place, the assessment will be varied accordingly.
- 2) The confidentiality provisions of clause 28 were considered to be adequate, as they should be read in conjunction with those applicable to public servants generally, as outlined in the attached extract from the Public Service Regulations 1988. As advised by Crown (now State) Solicitor's Office, when r.8(b) is read in conjunction with s.81 of the Criminal Code (also attached) it is evident that even past employees of the public service are obliged to maintain confidentiality.

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02/05/06 16:21 LEGISLATIVE COUNCIL → COMMITTEE OFFICE  
61 8 94810223  
2 MAY 2006 15:30 JOHN BOWLER MLA

NO. 413 P003/005

NO. 541 P. 3

3) It is expected that the normal practice of investigators will:-


- provide to the person, from whom a document or thing is taken for perusal, a copy of that document or reasonable access to that document or thing; and
- return that document or thing within a reasonable time unless some action is contemplated,

This reflects the provisions of s.99 of the Taxation Administration Act 2003

Should the Committee consider it important to remove any doubt in this regard, I would be prepared to have Clause 24 of the Bill amended accordingly.

I trust this provides the information sought.

Yours faithfully



JOHN KOBELKE MLA  
A/MINISTER FOR EMPLOYMENT PROTECTION

Att

02 MAY 2006

## **CONFIDENTIALITY PROVISIONS**

### **Extract from the *Public Service Regulations 1988***

#### **8. Public comment**

An officer shall not –

(a) publicly comment, either orally or in writing, on any administrative action, or upon the administration of any Department or organization; or

(b) use for any purpose, other than for the discharge of official duties as an officer, information gained by or conveyed to that officer through employment in the Public Service.

### **Extract from the *Criminal Code***

#### **81. Disclosing official secrets**

(1) In this section –

“**disclosure**” includes –

- (a) any publication or communication; and
- (b) in relation to information in a record, parting with possession of the record;

“**government contractor**” means a person who is not employed in the Public Service but who provides, or is employed in the provision of, goods or services for the purposes of –

- (a) the State of Western Australia;
- (b) the Public Service; or
- (c) the Police Force of Western Australia;

“**information**” includes false information, opinions and reports of conversations;

“**official information**” means information, whether in a record or not, that comes to the knowledge of, or into the possession of, a person because the person is a public servant or government contractor;

“**public servant**” means a person employed in the Public Service;

**“unauthorised disclosure” means –**

(a) the disclosure by a person who is a public servant or government contractor of official information in circumstances where the person is under a duty not to make the disclosure; or

(b) the disclosure by a person who has been a public servant or government contractor of official information in circumstances where, were the person still a public servant or government contractor, the person would be under a duty not to make the disclosure.

(2) A person who, without lawful authority, makes an unauthorised disclosure is guilty of a crime and is liable to imprisonment for 3 years.  
Summary conviction penalty: imprisonment for 12 months and a fine of \$12 000.

*[Section 81 inserted by No. 4 of 2004 s. 59; amended by No. 70 of 2004 s. 35(1).]*

# APPENDIX 3

## INFORMATION ON OTHER JURISDICTIONS PROVIDED BY THE DIRECTOR OF ENERGY SAFETY

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### ESTIMATES AND FINANCIAL OPERATIONS COMMITTEE PARLIAMENT OF WESTERN AUSTRALIA

#### HEARING ON 12 APRIL 2006: ENERGY SAFETY LEVY LEGISLATION

#### PROVISION OF FURTHER INFORMATION AS REQUESTED BY THE COMMITTEE

##### 1. Details of similar funding arrangements in other Jurisdictions

###### **Victoria**

The Energy Safe Victoria office (which has some 90 personnel) is similar in function to the EnergySafety WA office. The Victorian office secures its funding of approximately \$18m p.a. through a combination of:

- licence fees (for electricians, electrical contractors, gas fitters, appliance approvals etc);
- the sale of "certificates" for electrical work; and
- a legislated, Minister determined levy on the electricity and gas supply industries in the State. The levy is approximately \$9m in total and it is applied to both the gas and electricity supply industries as follows for each sector: 10% is applied to the transmission system operator (which is a separate entity in Victoria), and 90% is applied to the various distribution system operators on a pro-rata basis, based on the number of customer installations connected.

###### **New Zealand**

The NZ Government applies levies on both gas and electricity supplied to consumers (industrial, commercial and residential) at a rate of x cents per gigajoule or 100 kilowatt hours, respectively. This revenue, plus the income from industry operative licence fees, funds all regulatory and safety promotion work.

###### **Queensland**

A levy is applied to gas distributors, to fund the operations of the office of the Chief Inspector, Petroleum & Gas (which is similar to the gas part of ESD).

To fund the Electrical Safety Office, a levy of some \$7.5m out of a total budget of \$10.5m (for approximately 70 personnel) is applied to the State's electricity supply industry, through the 2 existing network operators. The remaining funds are obtained through licence fees etc.

###### **South Australia**

The energy industry Technical Regulator in this State collects licence fees from the gas suppliers. These fees are at a level well in excess of the administrative costs for licensing. The funds are used to support technical and safety regulation.

2. Investigation powers

The Committee asked if the powers for investigators (who would be checking for compliance with the legislation) as specified in the Bill were similar to powers specified in other legislation.

This matter was referred to Ms Lee Harvey, Deputy Parliamentary Counsel, for advice which was as follows:

Clause 23(3) (Powers of Investigators) is the same as section 99(1) of the *Taxation Administration Act 2003* which sets out the powers of investigators under that Act. The *Betting Control Act 1954* section 20A(1) and the *Racing and Wagering Western Australia Act 2003* section 113(4) are also in the same terms. Investigators are also permitted to take photographs under the *Rail Safety Act 1998* section 42(4).

I trust this further information meets with the Committee's requirements.



Albert Koenig  
DIRECTOR OF ENERGY SAFETY

18 April 2006

## **APPENDIX 4**

### **THE COMMITTEE’S RECOMMENDED AMENDMENTS IN THE ORDER OF CLAUSES IN THE ENERGY SAFETY BILL 2005**

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Statutory amendments in relation to the Committee’s recommendations can be effected in the following manner:

Page 3, line 24 - to insert after “regulation” -

“including energy efficiency regulation”

Page 3, line 25 - To insert after “safety” -

“and energy efficiency”.

Page 12, line 10 - To delete “of 20% per annum” and insert instead after “rate” -

“prescribed by the regulations”.

Page 12, after line 19 - To insert -

#### **“Part 4 - Objections and Review**

##### **20. Grounds of Objection**

- (1) An energy industry participant may, in accordance with this section, object to a notice of assessment issued to that energy industry participant under section 16 on either or both of the grounds that there is an error in the chief executive officer’s determination:
  - (a) that it is an energy industry participant liable to pay a levy; or
  - (b) assessment of the amount to be paid by it by way of levy.
- (2) An objection under subsection (1) is to:
  - (a) be made to the chief executive officer in writing within 42 days of the service of a notice of assessment under section 16; and
  - (b) identify the relevant energy industry participant and assessment notice; and
  - (c) set out fully and in detail the grounds of objection.
- (3) An objection under subsection (1) may be made by the energy industry participant named in notice of assessment or by the legal representative of that person.

- (4) The chief executive officer may, on written application by a person proposing to make an objection, extend in writing the time for making the objection for such period as the chief executive officer thinks fit.
- (5) The chief executive officer is to promptly consider any objection and may either disallow it or allow it, wholly or in part.
- (6) After making a decision on the objection the chief executive officer is to promptly serve upon the person by whom the objection was made written notice of the chief executive officer's decision on the objection and a statement of the reason for that decision.

**21. Review of decision of chief executive officer on objection**

Any person who is dissatisfied with the decision of the chief executive officer on an objection by that person under section 20 may, within 42 days (or such further period as the State Administrative Tribunal, for reasonable cause shown by the person, allows) after service of notice of the decision, apply to the State Administrative Tribunal for a review of the decision.

**22. Review of decision to refusal to extend time for objection**

A person who is dissatisfied with a decision of the chief executive officer to refuse to extend the time for making an objection against the notice of assessment may apply to the State Administrative Tribunal for a review of the decision.

**23. New matters raised on review**

- (1) Upon a review by the State Administrative Tribunal under section 21 or 22, the State Administrative Tribunal may consider:
  - (a) grounds in addition to those stated in the notice of objection; and
  - (b) reasons in addition to any reasons previously given for the chief executive officer's decision that is under review.
- (2) The State Administrative Tribunal is to ensure, by adjournment or otherwise, that each party and any other person entitled to be heard has a reasonable opportunity of properly considering and responding to any new ground or reason that the State Administrative Tribunal proposes to consider in accordance with subsection (1).

**24. Objection not to affect liability to pay rates or service charges**

The making of an objection or application for review under this Part does not affect the liability to pay any rate or service charge imposed under this Act pending determination of the objection or application for review.

## 25. Repayment of levy

Any moneys paid by a person pursuant to a notice of assessment that is later disallowed in whole or in part on objection or review that are in excess of the amount that is required to be paid by that person in accordance with the decision of the objection or review are to be repaid to that person.

Page 16, line 7 - To insert after “Director” -

“of Energy Safety”

Page 16, line 9 - To insert after “Director” -

“of Energy Safety”

Page 16, line 18 - To insert after “Director” -

“of Energy Safety”

Page 18, line 7 - To delete “may retain a document or thing removed from the premises for so long as is necessary to examine it or copy it, or both.” and instead insert -

“must ensure that a person from whom a document or anything else is taken under this section and who would otherwise be entitled to possession of it is given a copy of it, or reasonable access to it, as appropriate.

(7) If an investigator takes a photograph or makes a film under section 24(3)(d), a copy of that photograph or film must be provided to relevant persons.

(8) If an investigator takes possession of anything under this section, the Director of Energy Safety must ensure that it is returned to the person entitled to possession of it as follows:

(a) if it was taken in connection with the prosecution or possible prosecution of a suspected contravention of this Act - as soon as practicable after the relevant prosecution is completed or discontinued or, if no prosecution is commenced, as soon as practicable after the decision is made not to prosecute the suspected contravention;

(b) in any other case - within 28 days after it was taken.”

Page 18, lines 10 to 18 - To delete the clause.

Page 18, line 20 - To insert after “Director” -

“of Energy Safety”

Page 19, line 2 - To insert after “officer” -

“, or former chief executive officer”

Page 19, line 2 - To insert after “Safety” -

“, or former Director of Energy Safety”

Page 19, line 3 - To insert after “functions” -

“, or formerly performing functions”

Page 19, line 3 - To insert after “Act” -

“or any other person to whom information or material is disclosed under this Act or who properly or improperly gains access to the information or material in some other way”

Page 19, line 5 - To delete “in the course of duty” and insert instead -

“for the purposes of this Act”.

Page 21, line 23 - To insert after “Director” -

“of Energy Safety”.