THIRTY-SEVENTH PARLIAMENT

REPORT 14

JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

SECTION 3 OF THE *INTERPRETATION ACT 1984*

Presented by Mr Peter Watson MLA (Chairman)

and

Hon Ray Halligan MLC (Deputy Chairman)

November 2005

JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

Date first appointed:

June 28 2001

Terms of Reference:

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

"**3. Joint Standing Committee on Delegated Legislation**

3.1 A *Joint Delegated Legislation Committee* is established.

3.2 The Committee consists of 8 Members, 4 of whom are appointed from each House. The Chairman must be a member of the Committee who supports the Government.

3.3 A quorum is 4 Members of whom at least 1 is a Member of the Council and 1 a Member of the Assembly.

3.4 A report of the Committee is to be presented to each House by a Member of each House appointed for the purpose by the Committee.

3.5 Upon its publication, whether under section 41(1)(a) of the *Interpretation Act 1984* or another written law, an instrument stands referred to the Committee for consideration.

3.6 In its consideration of an instrument, the Committee is to inquire whether the instrument –

(a) is authorized or contemplated by the empowering enactment;

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

(c) ousts or modifies the rules of fairness;

(d) deprives a person aggrieved by a decision of the ability to obtain review of the merits of that decision or seek judicial review;

(e) imposes terms and conditions regulating any review that would be likely to cause the review to be illusory or impracticable; or

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

3.7 In this clause –

"adverse effect" includes abrogation, deprivation, extinguishment, diminution, and a compulsory acquisition, transfer, or assignment;

"instrument" means –

(a) subsidiary legislation in the form in which, and with the content it has, when it is published;

(b) an instrument, not being subsidiary legislation, that is made subject to disallowance by either House under a written law;

"subsidiary legislation" has the meaning given to it by section 5 of the *Interpretation Act 1984*."

Members as at the time of this inquiry:

Mr Peter Watson MLA (Chairman)
Hon Ray Halligan MLC (Deputy Chairman)
Hon Barbara Scott MLC
Dr Graham Jacobs MLA
Mr Tony Simpson MLA
Ms Judy Hughes MLA
Hon Shelley Archer MLC
Hon Vincent Catania MLC

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Government Response

This Report is subject to Standing Order 337:

> *After tabling, the Clerk shall send a copy of a report recommending action by, or seeking a response from, the Government to the responsible Minister. The Leader of the Government or the Minister (if a Member of the Council) shall report the Government's response within 4 months.*

The four-month period commences on the date of tabling.

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REPORT OF THE JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

IN RELATION TO

SECTION 3 OF THE *INTERPRETATION ACT 1984*

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1 BACKGROUND

1.1 Over the past few years the Committee has become increasingly concerned about the potential operation of s 3(1) of the *Interpretation Act 1984*, which states:

> *"**3. Application***
>
> *(1) The provisions of this Act apply to every written law, whether the law was enacted, passed, made, or issued before or after the commencement of this Act, unless in relation to a particular written law —*
>
> *(a) express provision is made to the contrary;*
>
> *(b) in the case of an Act, the intent and object of the Act or something in the subject or context of the Act is inconsistent with such application; or*
>
> *(c) in the case of subsidiary legislation, the intent and object of the Act under which that subsidiary legislation is made is inconsistent with such application."*

1.2 Under s 5 of the *Interpretation Act 1984* a *"written law"* includes subsidiary legislation.

1.3 Most recently, the Committee has raised issues with the relevant agencies in relation to the following two instruments of subsidiary legislation:

- *Barrow Island Marine Reserves Order 2004*;[1] and
- *Electricity Networks Access Code 2004*.[2]

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1 *Western Australian Government Gazette*, No.214, December 10 2004, pp5989-5993.

2 *Western Australian Government Gazette*, No.205, November 30 2004.

1.4 The particular provisions of these two instruments which were problematical for the Committee were very similar in effect, in that they both sought to exclude s 31(2) of the *Interpretation Act 1984*, which states:[3]

> *"An appendix or schedule to or a table in a written law, together with any notes thereto, forms part of the written law."*

2 THE COMMITTEE'S CONCERNS

2.1 The possible result of a strict literal application of s 3 of the *Interpretation Act 1984* is of significant concern to the Committee.

2.2 The purported exclusion of an appendix, schedule or notes from subsidiary legislation may appear to be a relatively minor issue. However, the Committee's concerns primarily lay in the next logical step in such an approach to the drafting of subsidiary legislation. The question arises that if subsidiary legislation may exclude any provisions of the *Interpretation Act 1984*, then the Parliament's power of disallowance of subsidiary legislation under s 42 of that Act may also be excluded by subsidiary legislation. Such an exclusion would avoid scrutiny of those very instruments by the Parliament. The implications for adequate and proper parliamentary scrutiny and control of the legislative process is obvious.

2.3 The Committee's initial response to the above two instruments was based on the Committee's long-standing approach to the issue of purported exclusions of the provisions of the *Interpretation Act 1984* by subsidiary legislation. That is, that the Committee would examine the provisions of the subsidiary legislation's enabling Act to see if there was express or implied authorisation for the subsidiary legislation to exclude the provisions of the *Interpretation Act 1984*.

2.4 Whilst noting that in the past agencies have been prepared to compromise with respect to the wording of subsidiary legislation in order to accommodate the Committee's concerns on a case by case basis, the frequency with which s 3 of the *Interpretation Act 1984* is being invoked by agencies has prompted the Committee to seek a more satisfactory resolution of the issue.

3 LEGAL ADVICE TO THE COMMITTEE

3.1 In forming its view that the operation of s 3 of the *Interpretation Act 1984* was likely to continue to be a significant issue confronting the Committee, the Committee resolved on June 22 2005 to obtain a barrister's opinion on this matter for guidance. The opinion of Mr Andrew Beech SC is at **Appendix 1** of this report.

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[3] Section 2(4) of the *Barrow Island Marine Reserves Order 2004* and section 1.5(e) of the *Electricity Networks Access Code 2004*.

3.2 The legal advice provided to the Committee indicates that certain provisions of the *Interpretation Act 1984* stand *"in a different category"*,[4] and therefore may be held by a court to be not capable of being excluded by subsidiary legislation. Part VI of the Act, and in particular the disallowance procedure for subsidiary legislation set out in s 42, would appear to be in this category.

3.3 In the Committee's view, however, the issue is not beyond doubt. In the absence of a clear express statutory statement, significant discretion remains with the courts to determine which provisions of the *Interpretation Act 1984* are to be immune from the operation of s 3.

3.4 The Committee is of the view that it would be more appropriate for the issue to be clarified by the Parliament, rather than be left to judicial pronouncement.

4 A MODEL FOR REFORM

4.1 The New South Wales Parliament appears to have expressly sought to address in its jurisdiction the type of concerns held by the Committee. Section 5 of the *Interpretation Act 1987* (NSW) relevantly states:

> *"**5. Application of Act***
>
> *(1) This Act applies to all Acts and instruments (including this Act) whether enacted or made before or after the commencement of this Act.*
>
> *(2) This Act applies to an Act or instrument except in so far as the contrary intention appears in this Act or in the Act or instrument concerned.*
>
> …
>
> *(5) This section does not authorise a statutory rule to exclude or modify the operation of Part 6 (statutory rules and certain other instruments).*
>
> …."

4.2 Part 6 of the *Interpretation Act 1987* (NSW) includes s 41, which deals with the disallowance of statutory rules by the Parliament.

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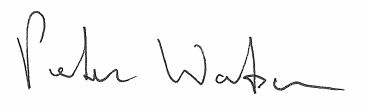
[4] Mr Andrew Beech SC, *Opinion on Section 3 of the Interpretation Act 1984*, (see **Appendix 1**), October 31 2005, p5.

4.3 As noted by Mr Andrew Beech SC, it may be prudent to amend s 3(1) of the *Interpretation Act 1984* so as to avoid any doubt. Section 5 of the *Interpretation Act 1987* (NSW) may provide an appropriate model for Western Australia.

Recommendation 1: The Committee recommends that section 3 of the *Interpretation Act 1984* be amended so that the operation of Part VI of the *Interpretation Act 1984* is not able to be excluded or modified by subsidiary legislation.



Mr Peter Watson MLA
Chairman
November 24 2005

APPENDIX 1

LEGAL OPINION OF MR ANDREW BEECH SC

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Opinion

Section 3 of the Interpretation Act

1. I am asked to provide advice as to the operation of s3(1) of the Interpretation Act 1984 on the following questions:

   (a) can subsidiary legislation exclude the application of the Interpretation Act?

   (b) if the answer to (a) is yes, is this power limited in any way?

2. my answers to those questions are as follows:

   (a) yes;

   (b) the "power" for subsidiary legislation to exclude the application of the Interpretation Act is probably limited in that it does not extend to exclusion of certain provision of part VI of the Interpretation Act, but the matter might be clarified by an amendment to the Interpretation Act.

3. Section 3(1) of the Interpretation Act provides as follows:

   "3 Application

   (1) The provisions of this Act apply to every written law, whether the law was enacted, passes, made, or issued before or after the commencement of this Act, unless in relation to a particular written law –

   (a) express provision is made to the contrary;

   (b) in the case of an Act, the intent and object of the Act or something in the subject or context of the Act is inconsistent with such application; or

   (c) in the case of subsidiary legislation, the intent and object of the act under which that subsidiary legislation is made is inconsistent with such application."

4. Construction of a statute is not a mechanical task of ascertaining the dictionary meaning of each individual word used. Rather, a statute is to be construed by

taking into account its language and structure, and having regard to context, where appropriate any purpose which may be evident and any inconvenience or improbability of result which may result from a particular construction.

5. I set out below some well known passages on the proper approach to construction of statutes.

6. The following were recently cited with approval by the High Court in Network Ten v Channel Nine [2004] HCA 14 at [11].

In *Newcastle City Council v GIO General Ltd*, McHugh J observed:

> "[A] court is permitted to have regard to the words used by the legislature in their legal and historical context and, in appropriate cases, to give them a meaning that will give effect to any purpose of the legislation that can be deduced from that context."

In the joint judgment in *CIC Insurance Ltd v Bankstown Football Club Ltd*, Brennan CJ, Dawson, Toohey and Gummow JJ said:

> "It is well settled that at common law, apart from any reliance upon s 15AB of the *Acts Interpretation Act 1901* (Cth), the court may have regard to reports of law reform bodies to ascertain the mischief which a statute is intended to cure. Moreover, the modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses 'context' in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern the statute was intended to remedy. Instances of general words in a statute being so constrained by their context are numerous. In particular, as McHugh JA pointed out in *Isherwood v Butler Pollnow Pty Ltd*, if the apparently plain words of a provision are read in the light of the mischief which the statute was designed to overcome and of the objects of the legislation, they may wear a very different appearance. Further, inconvenience or improbability of result may assist the court in preferring to the literal meaning an alternative construction which, by the steps identified above, is reasonably open and more closely conforms to the legislative intent."

7. An important starting point to considering the meaning of s3(1) of the Interpretation Act is a consideration of the rest of the Act. That is so for two reasons. First, the primary object of statutory construction is to construe the

relevant provision so that it is consistent with the language and purpose of all the provisions of the statute: Project Blue Sky v ABA (1998) 194 CLR 355 at [69]. Secondly, s3(1) is about the scope of application of the provisions of the Act. For that reason, it is especially important to consider the meaning and effect of the provision of the Act as a whole.

8. I do not propose to deal with the provisions of the Act individually. They may be broadly summarised as follows.

9. Part II contains a number of general interpretation provisions.

10. Part III relates provides for the commencement and citation of written laws and other related matters such as proclamation and assent.

11. Part IV contains provisions as to the enactment and operation of written laws.

12. Part V relates to the repeal of written laws.

13. Part VI relates specifically to subsidiary legislation. I will return to part VI below.

14. Part VII sets out general provision regarding statutory powers and duties.

15. Part VIII includes provisions regarding time and distance.

16. Part IX relates to procedures and penalties; part X contains miscellaneous provisions.

17. From that summary it may be seen that a great many provisions of the Interpretation Act are intended to be of general application and to assist in the ascertainment of the meaning to be given to a written law. In relation to such provisions, it is far from surprising that it should be open to the draftsman of any written law (whether an Act or subsidiary legislation), to exclude the operation of such provision. Indeed, that would seem a sensible position. There is no reason why the author (or more correctly, the entity creating the legislative instrument) should not stipulate as to matters such as what ought be taken into account in

determining the meaning of a provision, or as to a matter such as whether Sundays are to be taken in computing time for the purpose of the particular written law (cf s62(2) Interpretation Act).

18. Further, it should be noted that in several of the Australian jurisdictions (eg Victoria, Queensland) express and unambiguous provision is made in the Interpretation Act that if subsidiary legislation says that the Act does not apply, then it does not. Thus it can hardly be said to be an absurd or manifestly inconvenient result.

19. In my brief, the Joint Standing Committee on Delegated Legislation ("the Committee") is said to have had a longstanding approach to the question as follows. It is said that "the Committee is of the view that the issue comes down to the question of whether the Interpretation Act 1984 grants a plenary power to alter the usual interpretation specified in that Act by way of an instrument of subsidiary legislation merely by virtue of s3(1)(a) of the Interpretation Act 1974, without the need for an express provision to this effect in the enabling Act. Such a view would seem to go against the basic rule on interpreting subsidiary legislation; that is, it must be authorised by the Act under which it is made."

20. For that reason, it is suggested by the Committee that s3(1)(a) should be interpreted to read as if the underlined words were inserted as set out below:

    (a) <u>in the case of an Act</u> express provision is made to the contrary.

21. I do not agree with that view of s3(1).

22. First, the question does not seem to me to be whether the Interpretation Act "grants a plenary power to alter the usual interpretation specified in the Interpretation Act". Rather by, s3, the Interpretation Act defines and confines its own scope of operation. It does so by the language chosen in s3(1).

23. Further, the "basic rule of interpreting subsidiary legislation" that it must be authorised by the Act under which it is made is not to the point, for the reason just

given. There is, in my opinion, no occasion for searching the enabling Act for authority for subsidiary legislation to "reverse or alter the usual meaning as contained in the Interpretation Act". The Interpretation Act will simply not apply – because it is said by s3(1)(a) not to apply – if subsidiary legislation so provides.

24. To my mind, the language and structure of s3(1) militates strongly in favour of construing para (a) as being intended to apply to both Acts and subsidiary legislation (rather than being limited to Acts). That flows, in my opinion, from a consideration of paragraphs (b) and (c). Paragraph (b) limits it application to "the case of an Act". Similarly, para (c) limits it application to "the case of subsidiary legislation". Para (c) then goes on to require, in order that the paragraph be engaged, that the intent and object of the Act (rather than the subsidiary legislation) is inconsistent with such application.

25. Given what is spelt out in the opening words of paragraphs (b) and (c), it seems to me that the absence of anything similar in para (a) is telling. In other words, the generality of para (a) stands in marked contrast to paras (b) and (c). Para (a) applies to all written laws, whether an Act or subsidiary legislation.

26. There is one part of the Interpretation Act which stands in a different category: Part VI. That relates specifically to subsidiary legislation. Section 42 and 43 are of a distinctive character. Section 42 provides for regulations to be laid before each House of Parliament; if either House resolves to disallow a regulation it shall thereupon cease to have effect. Section 43 makes general provision about the limits on validity of subsidiary legislation (see subsection (1)) and about how powers to make subsidiary legislation are to be taken as having been exercised and the like.

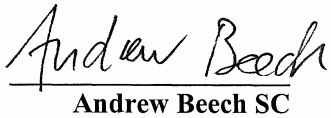
27. I agree with the Committee's view that the interpretation Act should not be read as permitting, by s3(1)(a), that subsidiary legislation could exclude the operation of s42 by expressly so providing. However, that view does not lead me to the conclusion that s3(1)(a) applies only to express provision in an Act. Rather, it leads me to the view that the generality of "the provisions of this Act" in the

opening words of s3(1) should be read down to exclude s42 and s43(1) – so that those sections alone cannot be excluded by express provision in subsidiary legislation. In this regard, I refer to the following passages from the High Court decision in Project Blue Sky v ABA (1998) 194 CLR 355 at [70] – [71].

> 70. A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals. Where conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions. Reconciling conflicting provisions will often require the court "to determine which is the leading provision and which the subordinate provision, and which must give way to the other". Only by determining the hierarchy of the provisions will it be possible in many cases to give each provision the meaning which best gives effect to its purpose and language while maintaining the unity of the statutory scheme.
>
> 71. Furthermore, a court construing a statutory provision must strive to give meaning to every word of the provision. In *The Commonwealth v Baume* Griffith CJ cited *R v Berchet* to support the proposition that it was "a known rule in the interpretation of Statutes that such a sense is to be made upon the whole as that no clause, sentence, or word shall prove superfluous, void, or insignificant, if by any other construction they may all be made useful and pertinent".

28. In my view, the best harmonisation of the Interpretation Act as a whole, doing the least violence to its language and most consistent with its evident purpose is the reading I have suggested.

29. Nonetheless it may well be prudent to amend s3(1) so as to avoid any doubt. The New South Wales legislation provides a possible model.



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31 October 2005