THIRTY-NINTH PARLIAMENT

REPORT 90

JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

ENERGY OPERATORS (ELECTRICITY GENERATION AND RETAIL CORPORATION) (CHARGES)
AMENDMENT BY-LAWS 2016

Presented by Mr Peter Abetz MLA (Chair)

and

Hon Robin Chapple MLC (Deputy Chair)

November 2016
JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

Date first appointed:
28 June 2001

Terms of Reference:

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

10. Joint Standing Committee on Delegated Legislation

10.1 A Joint Standing Committee on Delegated Legislation is established.

10.2 The Committee consists of 8 Members, 4 of whom are appointed from each House. The Chair must be a Member of the Committee who supports the Government.

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

10.4 (a) 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.

(b) Where a notice of motion to disallow an instrument has been given in either House pursuant to recommendation of the Committee, the Committee shall present a report to both Houses in relation to that instrument prior to the House’s consideration of that notice of motion. If the Committee is unable to report a majority position in regards to the instrument, the Committee shall report the contrary arguments.

10.5 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.

10.6 In its consideration of an instrument, the Committee is to inquire whether the instrument —
(a) is within power;
(b) has no unintended effect on any person’s existing rights or interests;
(c) provides an effective mechanism for the review of administrative decisions; and
(d) contains only matter that is appropriate for subsidiary legislation.

10.7 It is also a function of the Committee to inquire into and report on —
(a) any proposed or existing template, pro forma or model local law;
(b) any systemic issue identified in 2 or more instruments of subsidiary legislation; and
(c) the statutory and administrative procedures for the making of subsidiary legislation generally, but not so as to inquire into any specific proposed instrument of subsidiary legislation that has yet to be published.

10.8 In this order —
‘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 Abetz MLA (Chairman) Hon Robin Chapple MLC (Deputy Chair)
Hon John Castrilli MLA Ms Simone McGurk MLA
Hon Mark Lewis MLC (to 22 September) Hon Martin Pritchard MLC
Mr Paul Papalia MLA Hon Alyssa Hayden MLC (from 11 October)
Hon Peter Katsambanis MLC

Staff as at the time of this inquiry:
Stephen Brockway (Advisory Officer) Kimberley Ould (Advisory Officer (Legal))
Lauren Mesiti (Committee Clerk) Michael Ryan (Advisory Officer) (from October)

Address:
Parliament House, Perth WA 6000, Telephone (08) 9222 7222
lcco@parliament.wa.gov.au
Website: http://www.parliament.wa.gov.au

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IN RELATION TO THE

ENERGY OPERATORS (ELECTRICITY GENERATION AND RETAIL CORPORATION) (CHARGES)
AMENDMENT BY-LAWS 2016

EXECUTIVE SUMMARY

1 The Committee is of the view that row 4 of by-law 5 of the Energy Operators (Electricity Generation and Retail Corporation) (Charges) Amendment By-laws 2016 (instrument), which amends item 10 of Schedule 4 to the Energy Operators (Electricity Generation and Retail Corporation) (Charges) By-laws 2006, prescribes a fee that is beyond the power to do so under section 124(4)(d)(i) of the Energy Operators (Powers) Act 1979, in that it imposes an impost on customers (for overdue account notices) that amounts to a tax.

2 That part of the instrument offends against Committee Term of Reference 10(6)(a), in that it is not within the power granted by the empowering Act.

RECOMMENDATIONS

3 The Committee therefore makes the following recommendation:

Recommendation: The Committee recommends that row 4 of the table in by-law 5, containing ‘Sch 4 it. 10’, ‘$4.75’ and ‘$5.50’, of the Energy Operators (Electricity Generation and Retail Corporation) (Charges) Amendment By-laws 2016, be disallowed.
REPORT OF THE JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

IN RELATION TO THE

REPORT

1 REFERENCE AND PROCEDURE

1.1 On 28 June 2016, the Energy Operators (Electricity Generation and Retail Corporation) (Charges) Amendment By-laws 2016 (instrument) was published in the Western Australia Government Gazette, having been made by the Electricity Generation and Retail Corporation with the approval of the deputy of the Governor in Executive Council under section 124 of the Energy Operators (Powers) Act 1979 (Act).

1.2 The instrument was laid before each House of Parliament on 17 August 2016 pursuant to section 42(1) of the Interpretation Act 1974, and came before the Joint Standing Committee on Delegated Legislation (Committee) on 7 September 2016. The instrument is at Appendix 1.

1.3 The ‘Electricity Generation and Retail Corporation’ means the body established by section 4(1)(a) of the Electricity Corporations Act 2005, as renamed by section 4(2A). It trades as ‘Synergy’.

1.4 The intent of the instrument was to adjust regulated electricity tariffs for the 2016-17 financial year, and to make further adjustments to fees and charges prescribed under the Energy Operators (Electricity Generation and Retail Corporation) (Charges) By-laws 2006 (principal by-laws), adjustments that are effective from 1 July 2016.

2 THE COMMITTEE’S ROLE

2.1 The Committee’s Terms of Reference are as set out in the inside cover of this Report. By Term of Reference 10.6, in its consideration of an instrument, the Committee is to inquire whether the instrument —

(a) is within power.

2.2 The Committee carefully scrutinises fees imposed by subsidiary legislation to ensure that the fees imposed are authorised by enacting legislation. One issue it considers is whether a cost recovery model used by a government department or agency provides a reasonable assurance that fees for services do not over-recover the cost of providing the services for which they are imposed. It is important to emphasise, as has been made clear previously in the House, that in exercising its function of scrutinising
Delegated Legislation Committee

delegated legislation the Committee may have regard to, but is not bound by, the law. This has been emphasised by, for example, Hon Peter Foss, when he stated:

[The House] is not bound by the law; it is bound by the views of the House of what is appropriate. A matter may be intra vires, but the committee may be of the view that it is not contemplated by the empowering enactment; it might be authorised by it due to the wide wording of the empowering legislation. It is possible for Parliament to enact legislation that has an enormous amount of coverage, which could make something intra vires. However, if the House decided that was not what the legislation intended, it would disallow the regulation.¹

3 STATUTORY PROVISIONS

3.1 Section 124 of the Act states, insofar as is relevant to this Report:

**By-laws**

(1) Subject to this Act, an electricity corporation may with the approval of the Governor make by-laws for the more effectual performance of the functions of the corporation, and as to the other matters provided for by this Act. ...

(4) Without limiting or restricting the generality of subsection (1) by-laws made under this Act by an electricity corporation may provide for all or any of the following matters or purposes, that is to say —

(d) prescribing —

(i) the fees and charges that are from time to time to apply in relation to energy supplied or services provided by the corporation.

3.2 By-law 7 of the principal by-laws states:

**Fees**

The fees specified in Schedule 4 are payable in respect of the matters specified in that Schedule.

3.3 Until 30 June 2016, item 10 of that Schedule 4 read:

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¹ Hon Peter Foss MLC, Legislative Council, Parliamentary Debates (Hansard), 27 June 2001, p 1447.
3.4 However, by-law 5 of the instrument under consideration by the Committee stated:

**Schedule 4 amended**

*Amend the provisions listed in the Table as set out in the Table.*

<table>
<thead>
<tr>
<th>Provision</th>
<th>Delete</th>
<th>Insert</th>
</tr>
</thead>
<tbody>
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<td>$233.30</td>
</tr>
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<td>$336.15</td>
</tr>
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<td>Sch 4 it. 8</td>
<td>$19.60</td>
<td>$14.89</td>
</tr>
<tr>
<td>Sch 4 it. 10</td>
<td>$4.75</td>
<td>$5.50</td>
</tr>
</tbody>
</table>

4 The fee over-recovers the cost of providing the fee service

4.1 Premier’s Circular 2014/01, entitled ‘Subsidiary Legislation — Explanatory Memoranda’, sets out the Committee’s requirements as to documentation that must accompany items of delegated legislation that come before it for scrutiny. Attachment 1 to that circular sets out a list of matters that must be dealt with in explanatory memoranda. This includes, in relation to any amendments to prescribed fees and charges, a table illustrating the old and new fee or charge, the increase or decrease as described in figures and percentages, a percentage figure for the achievement of cost-recovery by the amended fee or charge and confirmation of whether there is any cross-subsidisation between fees and charges and, if so, the justification for it.

4.2 In compliance with those requirements, the Department of Finance supplied an explanatory memorandum to the Committee in respect of the instrument, signed by the Minister for Energy and the Director General of the Department.

4.3 In respect of the adjustments to fees and charges made by by-law 5 above, the table contained within the explanatory memorandum stated:
The adjustments in 2016-17 to the Electricity Generation and Retail Corporation's fees and charges are outlined in the table below.

<table>
<thead>
<tr>
<th>Type of fee charged</th>
<th>Date last amended (Increase/Decrease)</th>
<th>Old fee ($)</th>
<th>New fee ($)</th>
<th>Increase/Decrease (%)</th>
<th>Increase/Decrease ($)</th>
<th>% of Cost-recovery Achieved</th>
<th>Cross-subsidisation (Yes/No)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Three phase residential installation—new installation or replacement of single phase meter</td>
<td>1.7.2011 (Increase)</td>
<td>276.00</td>
<td>233.30</td>
<td>-15.47</td>
<td>-42.70</td>
<td>100</td>
<td>No</td>
</tr>
<tr>
<td>Standard meter testing fee</td>
<td>1.7.2011 (Increase)</td>
<td>156.55</td>
<td>336.15</td>
<td>114.72</td>
<td>179.60</td>
<td>100</td>
<td>No</td>
</tr>
<tr>
<td>Meter reading where reading requested by consumer</td>
<td>1.7.2010 (Increase)</td>
<td>19.60</td>
<td>14.89</td>
<td>-24.03</td>
<td>-4.71</td>
<td>100</td>
<td>No</td>
</tr>
<tr>
<td>Overdue account notices</td>
<td>1.7.2012 (Increase)</td>
<td>4.75</td>
<td>5.50</td>
<td>15.79</td>
<td>0.75</td>
<td>157</td>
<td>No</td>
</tr>
</tbody>
</table>

4.4 The item that the Committee believes offends against its Term of Reference 10(6)(a), in that it is not within the power granted by the empowering Act, is the increase to the ‘Overdue account notices’ — the table supplied illustrates that the fee has increased by some $0.75, or 15.79 per cent. It shows a cost-recovery percentage of 157 per cent.

5 STATUTORILY AUTHORISED FEES

5.1 The power of the Executive to impose fees derives from fee provisions in statutes. Empowering fee provisions, often in the ‘Regulation’ or ‘By-laws’ section of acts, only authorise the imposition of a fee, not a tax. Only Parliament may legislate for the imposition of a tax.

5.2 This Committee, and other equivalent committees in previous parliaments, have long been of the view that any fees or charges prescribed in delegated legislation must not over-recover the cost of providing the fee service. That view has been expounded in a number of previous reports to Parliament. As mentioned in paragraph 2.2, the Committee has regard to, but is not bound by the law. Nor is it an arbiter of the law. It is however satisfied in its view that fee collection in excess of the cost of the service provided renders that excess a tax. This is a view that has been supported by government agencies.

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For example, Parliament of Western Australia, Joint Standing Committee on Delegated Legislation, Report 32, Supreme Court (Fees) Amendment Regulations (No.2) 2008, Children’s Court (Fees) Amendment Regulations (No.2) 2008, District Court (Fees) Amendment Regulations 2008, Magistrates Court (Fees) Amendment Regulations (No.2) 2008, Fines, Penalties and Infringement Notices Enforcement Amendment Regulations (No.2) 2007 and Other Court Fee Instruments, May 2009, and Parliament of Western Australia, Joint Standing Committee on Delegated Legislation, Report 50, Hospital Parking Fees, August 2012.
5.3 In his *Second Public Sector Performance Report 2010*, the Western Australian Auditor General wrote, in the ‘Overview’:

> When government charges for goods and services, its general approach is that fees should be set to recover costs unless there is a policy imperative to under recover such as to increase equity. Treasury guidelines state that “If a fee is set at a level beyond what would reasonably be expected to recover costs, in practice it may have become a tax. If the enabling legislation only provides for a fee, making it a tax would invalidate it.”

To achieve cost recovery, agencies need to first establish the scope of the services provided by the fee and then cost their services to a reasonable level of accuracy. This is not always a simple exercise and agencies endeavour to balance the administrative effort involved against the revenue raised by each fee. However, such an approach needs to be reconciled with government and the public’s expectation that fee calculations are materially accurate.³

5.4 The Treasury Guidelines quoted by the Auditor General above were published in 2007. However, new guidelines were published in 2015.⁴ Those Guidelines cross-refer to the Premier’s Circular 2014/10, mentioned at paragraph 4.1, and go on to state:

> Subject to any other relevant legislation, fees and charges in subsidiary legislation must be set at a level that is authorised by statute under which the subsidiary legislation is made.

> If there is any doubt as to whether the level of a particular fee or charge is authorised, legal advice should be sought from the State Solicitor’s Office. In particular, legal advice should be sought if it is proposed that a fee or charge be set at a level that is likely to exceed ‘cost recovery’.⁵

5.5 The Guidelines refer to Treasurer’s Instruction 810⁶, and in particular the duty upon agencies to review their fees and charges at least annually. This review process, it states, ‘is designed to give reasonable assurance that the level at which a fee or

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⁴ *Costing and Pricing Government Services, Guidelines for use by agencies in Western Australian Public Sector*, Government of Western Australia, Department of Treasury, June 2015.

⁵ Ibid, p 3.

⁶ *Treasurer’s Instruction 810, Financial Administration Bookcase*, Government of Western Australia, Department of Treasury, (last updated 26 July 2016).
charge is set is consistent with the cost recovery policy and not likely exceed full cost recovery’. 7

5.6 At page 5, the Treasury Guidelines explain to agencies the role of this Committee in the process of setting fees and charges, and reminds them of the Committee’s view, which is:

"Where a fee or charge outlined in subsidiary legislation results in greater than 100% cost recovery, there will be a rebuttable presumption it is a tax. If there is no taxing provision in the relevant legislation, the agency will need to persuade the Committee the fee or charge is valid."

5.7 That the Committee’s view has been accepted by government agencies may be illustrated by the fact that, of the hundreds of fee adjustments scrutinised in the calendar year to 31 October 2016, the amendment that is the subject of this Report is the only one that results in a cost-recovery of over 100 per cent, according to figures supplied in explanatory memoranda.

5.8 The view of the Committee that any fee that over-charges results in the imposition of a tax, which requires a taxing provision in order to be ‘within power’, caused Parliament to amend the Fish Resources Management Act 1994 to impose a clear taxing provision. 8

5.9 Further, on the few occasions where the Committee has identified a fee that over-recovers the cost of providing the fee service, Ministers have given undertakings to make adjustments to the regulations that prescribed the over-recovery, and have made the necessary amendments to reduce fee levels so that they no longer achieve more than 100 per cent cost-recovery. For example, in respect of the Transport Co-ordination Amendment Regulations (No.2) 2014, the then Minister for Transport accepted that one of the fees prescribed resulted in an over-recovery, and that there were no powers of taxation in the empowering statute. 9 He thus caused the offensive regulation to be amended, so that the prescribed fee achieved cost-recovery of below 100 per cent, and refunded the 128 licensees of affected vehicles that had already been invoiced.

5.10 In the case of the fee amended by the instrument which is the subject of this Report, it is clear from the statutory provisions at paragraphs 3.1 to 3.4 that Parliament has authorised Synergy, with the approval of the Governor, to prescribe ‘fees ... for services provided by the corporation’. They do not authorise the corporation, with the

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7 Ibid, p 4.
8 Section 58(4), Fish Resources Management Act 1994, inserted by section 4 of the Fish Resources Management Amendment (Fees) Act (No.2) 2011.
approval of the Governor, to impose a fee that results in the generation of a profit to it on the activity concerned. There is no taxing provision along the lines of that in the *Fish Resources Management Act 1994*. This would clearly be in the gift of Parliament were that found to be its intention.

5.11 The empowering provisions authorise a fee for service, and that fee must therefore be set on a cost-recovery basis in order for it to be properly considered to be authorised by Parliament. It is clear to the Committee that this is what Parliament intended when passing the empowering provisions.

6 CORRESPONDENCE

6.1 As noted above, there have been occasions where agencies have provided figures to the Committee that illustrate over-recovery of costs. In those cases, Ministers have agreed to Committee requests to reduce fee levels so that they no longer achieve more than 100 per cent cost-recovery. The practice of over-recovery has reduced more recently, due perhaps in part to the publications of the Auditor General and the Department of Treasury (mentioned above), to the publication of Premier’s Circular 20014/01 and its requirement for information in tabular form and to the continued scrutiny of this Committee.

6.2 In correspondence, which may be found at Appendix 2, the Minister for Energy has chosen to dispute the Committee’s finding, as set out in its letter of 8 September 2016. The Minister’s initial response, dated 10 October 2016, stated:

*I do not consider it unreasonable that Synergy’s overdue account notices fee is set at a level above cost-recovery, and I do not agree with your concern [that] this charge may be considered a tax.*

6.3 The Committee responded in turn on 13 October 2016, seeking further and better particulars of the Minister’s belief that this charge could not be considered a tax, and the Minister replied to that letter on 4 November 2016 setting out his arguments in more detail.

6.4 As mentioned, the Committee is clearly not an arbiter of the law. That is the function of the courts. It is for Parliament to determine whether to disallow the fee imposed by the instrument. However, the Committee takes this opportunity to address each of the Minister’s submissions, contained in that letter of 4 November 2016, in turn:

- The Minister points out that, as a matter of law, the general characteristics of a tax are that it is a compulsory exaction of money by a public authority for public purposes, enforceable by law which is not a payment for services rendered and which is compulsory. He believes that it is not clear that the fee is ‘enforceable by law’, being contractual, and it is not raised by a public authority for public purposes. Rather, the excess is paid into Synergy’s
accounts in order to offset the costs of provision and used to fund Synergy’s ongoing operations.

The Committee does not dispute this definition of a ‘tax’, but takes the view that this fee, prescribed by regulation and enforceable in court as a contractual debt, is an enforceable extraction of money. Anyone requiring electricity in Western Australia must contract with Synergy, and be subject to Synergy’s contractual terms, including these fees for services.

The assertion that Synergy is free to waive the fee adds nothing to the argument, in that any fee or tax may be waived by the charging authority choosing not to enforce the collection of it. Moreover, it is clear from the Minister’s letter that excess fees are applied for a public purpose — Synergy is 100 per cent government-owned, and is the recipient of substantial sums in State subsidy (over $300 million in the financial year 2015-1610).

• The Minister has revised upwards the cost of provision of the service from the $3.50 quoted in the explanatory memorandum to $3.85, due to higher postage rates. However, that explanatory memorandum was signed by the Minister in July 2016, and thus must be assumed to have taken into account increases in postal charges, which actually took effect (for domestic mail) in January 2016. Even on the Minister’s revised figure, however, the cost-recovery rate still amounts to 143 per cent.

• It is submitted that a cost-recovery rate of $1.65 in excess of Synergy’s costs of providing the service is not necessarily inconsistent with there being a ‘reasonable relationship’ between the fee charged and the cost of providing the service. The Committee maintains that a fee above 100 per cent of actual costs amounts to a tax, and more importantly for the purposes of this Report, is not authorised by the empowering statute. Even if the argument were accepted, a fee representing either 157 per cent or 143 per cent of the cost of provision could not be regarded as being relatively reasonable in comparison to that actual cost of provision.

• The Minister’s letter points out that fees need to be set in advance of the financial year to which they relate, and a proportion of the costs are fixed costs. As mentioned previously, all other government agencies, in adjusting fees in 2016, kept increases below a level which achieved full cost-recovery or less. Moreover, most of the elements of the fee listed in the Minister’s letter (issuing collection letters, collection agency costs, outbound calls to customers) are not fixed charges, but are incurred according to the amount of customers affected.

• The Minister asserts that the fee fails to fulfil the characteristics of a tax as described by the High Court of Australia in *Parton v Milk Board (Vic) (1949)* 80 CLR 229 at 258. The Committee reiterates that it is not an arbiter of the law, but finds the authority cited of no relevance to the issue at hand.

• Finally, the Minister points to a recent High Court of Australia ruling on consumer credit card late payment fees charged by the ANZ Banking Group. The Court found that those fees were valid, notwithstanding the fact that they were disproportionate to the actual costs incurred by the bank. This case is of no relevance to Synergy fees, as it relates to fees set by a private bank, not fees imposed by the Executive under an enabling fee provision in an Act. The ANZ Banking Group is not a public entity, and therefore no comparison can be drawn with the present case.

7 Conclusion

7.1 The Committee does not accept that Parliament, in delegating the exercise of these powers to the Executive to impose a fee, contemplated the making of a profit from the imposition of a fee on customers who are late in paying their electricity bills.

7.2 Nor does the Committee accept that the quantum of over-recovery is a relevant consideration. Parliament has delegated the authority to recover the costs of the service provided, and a regulation or by-law that prescribes anything beyond that should be disallowed.

7.3 The instrument imposes a fee that generates monies over and beyond what recovers the costs associated with that activity. The amendment made to item 10 of Schedule 4 to the principal by-laws is, in the view of the Committee, beyond the powers delegated to Synergy, with the approval of the Governor.

Recommendation: The Committee recommends that row 4 of the table in by-law 5, containing ‘Sch 4 it. 10’, ‘$4.75’ and ‘$5.50’, of the *Energy Operators (Electricity Generation and Retail Corporation) (Charges) Amendment By-laws 2016*, be disallowed.

7.4 It should be pointed out that, should the relevant provision of the instrument be disallowed, then the by-law would revert to its former state. The fee in question would remain at $4.75, still significantly higher than the actual costs of the service, being $3.50 according to the explanatory memorandum of July 2016 (the fee would be some 135 per cent higher), or $3.85 according to the Minister’s letter of 4 November 2016 (around 123 per cent higher).
7.5 This does not alter the Committee’s view that the fee imposed by the instrument is unauthorised and should be disallowed. Synergy, and the Minister, should then take the necessary steps to rectify the level of fee charged under the previous, unamended by-law, which still imposes a tax.

7.6 The Committee commends its report to the House.

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Mr Peter Abetz MLA
Chairman
16 November 2016
APPENDIX 1

ENERGY OPERATORS (ELECTRICITY GENERATION AND RETAIL CORPORATION (CHARGES) AMENDMENT BY-LAWS 2016

PART 1

ENERGY

Energy Operators (Powers) Act 1979

Energy Operators (Electricity Generation and Retail Corporation) (Charges) Amendment By-laws 2016

Made by the Electricity Generation and Retail Corporation with the approval of the deputy of the Governor in Executive Council.

1. Citation

These by-laws are the Energy Operators (Electricity Generation and Retail Corporation) (Charges) Amendment By-laws 2016.

2. Commencement

These by-laws come into operation as follows —

(a) by-laws 1 and 2 — on the day on which these by-laws are published in the Gazette;

(b) the rest of the by-laws — on 1 July 2016.

3. By-laws amended

These by-laws amend the Energy Operators (Electricity Generation and Retail Corporation) (Charges) By-laws 2006.

4. Schedule 1 amended

(1) In Schedule 1 delete clause 1(2) and insert:

(2) Tariff 1 comprises —

(a) a fixed charge at the rate of 46.1185 cents per day; and

(b) a charge for metered consumption at the rate of —

(i) 30.316 cents per unit for the first 1,650 units per day; and

(ii) 27.351 cents per unit for all units exceeding 1,650 units per day.
(2) In Schedule 1 delete clause 4(1) and insert:

(1) Tariff R1 comprises —

(a) a fixed charge at the rate of $1.8907 per day; and

(b) an energy charge consisting of —

(i) an on peak energy charge at the rate of 35.1873 cents per unit; and

(ii) an off peak energy charge at the rate of 10.2357 cents per unit.

(3) In Schedule 1 delete clause 9(2) and insert:

(2) Tariff A1 comprises —

(a) a fixed charge at the rate of 48.5989 cents per day or, for multiple dwellings supplied through one metered supply point, a fixed charge at the rate of —

(i) 48.5989 cents per day for the first dwelling; and

(ii) 37.7348 cents per day for each additional dwelling;

and

(b) a charge for metered consumption at the rate of 26.4740 cents per unit.

(4) In Schedule 1 delete clause 10(2) and insert:

(2) Tariff B1 comprises —

(a) a fixed charge at the rate of 21.6970 cents per day or, for multiple dwellings supplied through one metered supply point, a fixed charge at the rate of 21.6970 cents per day for each dwelling; and

(b) a charge for metered consumption at the rate of 11.9863 cents per unit.

(5) In Schedule 1 delete clause 11(2) and insert:

(2) Tariff C1 comprises —

(a) a fixed charge at the rate of 35.7763 cents per day; and

(b) a charge for metered consumption at the rate of —

(i) 19.5011 cents per unit for the first 20 units per day; and

(ii) 24.4231 cents per unit for the next 1,630 units per day; and

(iii) 22.0470 cents per unit for all units exceeding 1,650 units per day.
(6) In Schedule 1 delete clause 12(2) and insert:

(2) Tariff D1 comprises —
   (a) a fixed charge at the rate of 40.8681 cents per day; and
   (b) if under subclause (3) there is deemed to be more than one equivalent domestic residence in the premises, a charge of 31.7325 cents per day for each equivalent domestic residence except the first that is deemed to be in the premises; and
   (c) a charge for metered consumption at the rate of 22.2764 cents per unit.

(7) In Schedule 1 delete clause 13(2) and insert:

(2) Tariff K1 comprises —
   (a) a fixed charge at the rate of 48.5989 cents per day; and
   (b) a charge for metered consumption at the rate of —
      (i) 26.4740 cents per unit for the first 20 units per day; and
      (ii) 30.3104 cents per unit for the next 1,630 units per day; and
      (iii) 27.3503 cents per unit for all units exceeding 1,650 units per day.

5. Schedule 4 amended

Amend the provisions listed in the Table as set out in the Table.

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<tr>
<td>Sch 4 ltr. 8</td>
<td>$19.60</td>
<td>$14.89</td>
</tr>
<tr>
<td>Sch 4 ltr. 10</td>
<td>$4.75</td>
<td>$5.50</td>
</tr>
</tbody>
</table>

The Common Seal of the
Electricity Generation and Retail
Corporation was affixed to these
by-laws in the presence of —

L. G. ROWE, Director.
W. J. Bargmann, Executive Officer.
N. Hagley, Clerk of the Executive Council.
APPENDIX 2
CORRESPONDENCE BETWEEN MINISTER NAHAN AND THE COMMITTEE

JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

Our Ref: 3976.18

Dr Mike Nahan
Minister for Energy
13th Floor, Dumas House
2 Havelock Street
West Perth 6005

8 September 2016

Benjamin.Ford@finance.wa.gov.au

Dear Minister

Energy Operators (Electricity Generation and Retail Corporation) (Charges) Amendment By-laws 2016

This instrument was considered by the Committee at its meeting yesterday.

One matter was of concern to Members. Regulation 5 amends schedule 4 to the Energy Operators (Electricity Generation and Retail Corporation) (Charges) By-laws 2006. The charge for the issue of overdue account notices, set out at item 10 of that schedule, increases from $4.75 to $5.50. The table which is supplied in your Explanatory Memorandum shows a cost-recovery percentage in respect of that charge of 157%.

You will be aware that any impost charged that results in a cost-recovery of over 100% may be regarded as a tax. However, there is no legal authority for the imposition of such a tax in the regulation-making powers set out at section 124 of the Energy Operators (Powers) Act 1979.

By virtue of the fact that your Department is able to calculate this figure with such precision, the Committee assumes that you have a proper costing methodology in place. We would be grateful for an explanation of that methodology in this instance.

Moreover, Members are surprised that there was felt to be a need to impose an increase in this particular charge, given that:

- cost-recovery was clearly being exceeded before the increase took effect; and
the equivalent charge imposed under the Energy Operators (Regional Power Corporation) (Charges) Amendment By-laws 2016, also increased by $0.75, or 15.79%, is said to result in a cost-recovery rate of only 46%.

The Committee would be grateful for an explanation of the cost-recovery methodology employed in this instance, of how you believe the increase in the charge in question may be justified and of what action your Department intends to take to rectify what appears to be a wrongful imposition of a tax.

We would appreciate a response to this letter by 20 September 2016, so that the Committee might consider its contents at its meeting on the following day.

In the meantime, questions about the above issues may be directed to Stephen Brockway, Advisory Officer, on 9222-7872 or at delleg@parliament.wa.gov.au.

Yours sincerely,

Peter Abetz MLA
Chairman
Hon Mike Nahan MLA  
Treasurer; Minister for Energy;  
Citizenship and Multicultural Interests

Your Ref: 3076.18  
Our Ref: 48-18922

Mr Peter Abetz MLA  
Chairman  
Joint Standing Committee on Delegated Legislation  
Parliament House  
PERTH WA 6000

Dear Mr Abetz

ENERGY OPERATORS (ELECTRICITY GENERATION AND RETAIL CORPORATION) (CHARGES) AMENDMENT BY-LAWS 2016

Thank you for your letter dated 8 September 2016 regarding the size and nature of the increase in Synergy’s overdue account notices fee for the 2016-17 financial year.

The overdue account notices fee is designed to recover costs and provide an incentive for customers to pay their electricity bill on time. Further, section 124 of the Energy Operators (Powers) Act 1979 does not limit the level of fees and charges prescribed under the By-laws.

I do not consider it unreasonable that Synergy’s overdue account notices fee is set at a level above cost-recovery, and I do not agree with your concern this charge may be considered a tax.

I note customers have the option of applying to Synergy for a payment extension or repayment arrangement should they be unable to pay their electricity bill on time. Under circumstances where either is granted, a customer would not incur the overdue account notices fee. There is no intention to change Synergy’s overdue account notices fee at this stage.

I hope this information is of assistance to the Committee.

Yours sincerely

Mike Nahan

DR MIKE NAHAN MLA  
TREASURER; MINISTER FOR ENERGY;  
CITIZENSHIP AND MULTICULTURAL INTERESTS  
10 OCT 2016

Level 13, Dumas House, 2 Havelock Street, West Perth, Western Australia 6005  
Telephone: +61 8 6552 5700  Facsimile: +61 8 6552 5791  Email: Minister.Nahan@dpc.wa.gov.au
JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

Your Ref: 48-18922
Our Ref: 3976.18

Dr Mike Nahan MLA
Minister for Energy
Level 13, Dumas House
2 Havelock Street
West Perth
WA 6005

13 October 2016

Dear Minister

Energy Operators (Electricity Generation and Retail Corporation) (Charges) Amendment By-laws 2016

Thank you for your letter of 10 October 2016, which was considered by the Committee at its meeting yesterday.

I am afraid that the Members did not find your response to my letter of 8 September 2016 of assistance in considering this matter further.

I would refer you to various reports of this Committee (for example, Reports 32 and 75), where it was found that in cases where:

- empowering legislation authorises the imposition of a “fee” (section 124 of the Energy Operators (Powers) Act 1979 in this case), and

- evidence is received that the amount of an impost does not bear a reasonable relationship to the costs of providing the relevant services in respect of which it is imposed (in this case your own Explanatory Memorandum, showing a cost-recovery rate of 157% with regard to the issuing of overdue account notices),

then the Committee views that impost as being in the nature of a tax, regardless of its label as a “fee” (see item 10 of schedule 4 to the principal by-laws as amended).
My letter of 8 September 2016, on behalf of the Committee, sought information on the costing methodology that you have used in reaching the figures contained in your Explanatory Memorandum. No such information was forthcoming in this regard. Members believe this information to be particularly important in the case of the fee for the issuing of overdue account notices, given that an increase in the fee was imposed despite the fact that it was clearly over-recovering before the increase took effect, and that the equivalent charge imposed under the Energy Operators (Regional Power Corporation) (Charges) Amendment By-laws 2016 achieves (according to your Explanatory Memorandum for that instrument) a cost-recovery of only 46%.

The Committee therefore asks again for an explanation of the cost-recovery methodology adopted in these instances, an explanation of how you believe this uplift to be justified in the circumstances and an indication of what your Department intends to do in order to rectify this apparently wrongful imposition of a tax.

You will be aware that a Notice of Motion to disallow this instrument was moved in the Legislative Council on Tuesday of this week (11 October 2016).

A response to this letter would be appreciated by 4 November 2016, so that it may be considered by the Committee at its meeting on 9 November 2016.

Yours sincerely

Peter Abetz MLA
Chairman

This correspondence (including any attachments) is confidential and privileged. You may only disclose or copy this material to your legal advisers or officers and agencies within your portfolio to the extent that it is reasonably necessary to obtain any information sought by the Committee through this correspondence. Each of the persons to whom you distribute this material for this limited purpose should be made aware of the privileged and confidential status of the material.

ég 3976.16/1013.1st.001.htmlm (AS1723)
Dear Mr Abetz

ENERGY OPERATORS (ELECTRICITY GENERATION AND RETAIL CORPORATION) (CHARGES) AMENDMENT BY-LAWS 2016

Thank you for your letter dated 13 October 2016 requesting information on the costing method and justification for the increase to Synergy's overdue account notice fee for the 2016-17 financial year.

At the time of submitting its 2016-17 Tariff, Fees and Charges submission, Synergy estimated the average cost of an account being overdue was $3.50. The cost estimate was based on the total number of overdue account notice fees charged over an eight-month period, from the start of July 2014 to the end of February 2015, and actual costs associated with the overdue accounts over this period. The cost includes issuing collection letters, collection agency costs, outbound calls to customers and interest foregone by Synergy as a result of receiving customer payments late. The actual cost has since increased due to higher postage rates and is now $3.85.

I reiterate, from my previous correspondence, that I do not consider Synergy’s overdue account notice fee of $5.50 to be the imposition of a tax. I am sure you are aware of the general characteristics of a tax, being a compulsory exaction of money by a public authority for public purposes, enforceable by law which is not a payment for services rendered and which is compulsory.

In my view Synergy's overdue account notice fee is not a tax for the following reasons:

1. It is not clear to me that the fee is "enforceable by law" in circumstances where it is enforceable under a bilateral contract between Synergy and its customers.
2. The fee is not for a public purpose in that it does not raise money for governmental purposes. The money raised by the fee is paid into Synergy's accounts in order to offset the costs associated with providing the service with the remainder margin being held within Synergy's corporate accounts and used to fund Synergy's ongoing operations.

3. A cost recovery rate of $1.65 in excess of Synergy's costs is not necessarily inconsistent with there being a reasonable relationship between the fee charged and the costs of providing the relevant services. This is particularly the case where fees must be set under delegated legislation in advance of the financial year in which it applies. A proportion of the costs associated with the fee are fixed costs and for this reason, an increase or decrease to the number of services applicable to the fee provided in that year will impact upon the ultimate cost to Synergy.

4. Unlike a tax the fee is not compelled by legislation. As a trading corporation, Synergy is free to waive the charge if it chooses to do so provided that any such choice is within the confines of the law. Further, any such waiver could be effected by Synergy on a case by case basis or in accordance with broader business rules. It therefore fails to fulfill the characteristics of a tax as described by the High Court of Australia in Parton v Milk Board (Vic) (1949) 80 CLR 228 at 258.

You may also be aware of a recent High Court of Australia ruling on consumer credit card late payment fees charged by the Australia and New Zealand Banking Group. In that decision, the Court upheld the right to charge late payment fees and ruled that the fact the amounts charged were not proportionate to the actual costs incurred by the Bank did not of itself mean those charges were penalties or invalid.

For completeness, I also point out that certain other fees listed in the by-laws are set at below cost levels.

I hope this information is of assistance to the Committee.

Yours sincerely

[Signature]

DR MIKE NAHAN MLA
TREASURER; MINISTER FOR ENERGY;
CITIZENSHIP AND MULTICULTURAL INTERESTS

04 NOV 2015