

**40TH PARLIAMENT**



## **Report 15**

# **JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION**

*Annual Report 2018*

---

Presented by

Ms Emily Hamilton MLA (Chair)

and

Hon Robin Chapple MLC (Deputy Chair)

April 2019

## Joint Standing Committee on Delegated Legislation

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

Ms Emily Hamilton MLA (Chair)

Mrs Robyn Clarke MLA

Ms Elizabeth Mettam MLA (to 16 May)

Dr David Honey MLA (from 16 May)

Mr Ian Blayney MLA (to 1 November)

Mr Kyran O'Donnell MLA (from 1 November)

Hon Robin Chapple MLC (Deputy Chairman)

Hon Martin Pritchard MLC

Hon Charles Smith MLC

Hon Kyle McGinn (MLC)

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

Mr Sam Hastings (Advisory Officer (Legal))

Ms Anne Turner (Advisory Officer (Legal))

Mr Stephen Brockway (Advisory Officer)

Ms Denise Wong (Advisory Officer (Legal))

Ms Kimberley Ould (Advisory Officer)

Ms Clair Siva (Committee Clerk)

### Address:

Parliament House

4 Harvest Terrace, West Perth WA 6005

Telephone: 08 9222 7300

Email: [lcco@parliament.wa.gov.au](mailto:lcco@parliament.wa.gov.au)

Website: [www.parliament.wa.gov.au](http://www.parliament.wa.gov.au)

**ISBN 978-1-925578-64-5**



# CONTENTS

---

<b>Executive summary .....</b>	<b>i</b>
Introduction.....	i
Committee activities .....	i
Issues relating to regulations .....	i
Issues relating to local laws.....	i
<b>1 Introduction.....</b>	<b>1</b>
Overview.....	1
Terms of Reference.....	1
Committee Members.....	1
Committee process.....	2
Acknowledgments .....	3
<b>2 Committee activities in 2018.....</b>	<b>4</b>
Volume and nature of work.....	4
Committee reports .....	8
Undertakings.....	9
Circulars relating to explanatory memoranda.....	9
<b>3 Issues in regulations .....</b>	<b>9</b>
Fees—quality of explanatory material .....	9
Fees—ensuring certainty in prescription .....	11
Abrogation of fundamental common law principle.....	12
Unreasonable amendments with unintended effects.....	13
<b>4 Issues in local laws .....</b>	<b>14</b>
Committee consideration of section 3.12(2A) of the <i>Local Government Act 1995</i> .....	14
Increase of modified penalties in the absence of a general penalties clause.....	15
Convoluted methods of making and amending a local law .....	16
Unauthorised powers of entry in extractive industries local laws.....	17
<b>5 Conclusion.....</b>	<b>20</b>
<b>Appendix 1 City of Karratha Bush Fire Brigades Amendment Local Law 2018 .....</b>	<b>21</b>
<b>Appendix 2 Shire of Roebourne Bush Fire Brigades Local Law.....</b>	<b>23</b>
<b>Appendix 3 LGA Schedules 3.1 and 3.2 .....</b>	<b>24</b>
<b>Glossary.....</b>	<b>28</b>

---

**Figures**

Figure 1. *Committee Members in 2018* ..... 2

Figure 2. *Nature and number of issues arising from instruments which were either disallowed or for which undertakings were given* ..... 5

Figure 3. *Nature and number of issues arising from instruments which were disallowed* ..... 5

Figure 4. *Nature and number of issues arising from instruments for which undertakings were given* ..... 6

Figure 5. *Nature and frequency of TOR issues arising from instruments which were either disallowed or for which undertakings were given* ..... 7

Figure 6. *Nature and frequency of TOR issues arising from instruments which were disallowed* ..... 7

Figure 7. *Nature and frequency of TOR issues arising from instruments for which undertakings were given* ..... 8

**Tables**

Table 1. *The Committee’s work statistics for 2018* ..... 4

Table 2. *Example of existing table of fees* ..... 9

Table 3. *Example of new table of fees* ..... 9



# EXECUTIVE SUMMARY

---

## Introduction

- 1 This report discusses some of the key activities of the Joint Standing Committee on Delegated Legislation (Committee) between 1 January and 31 December 2018.
- 2 The Committee's role is to scrutinise, on behalf of the Parliament, instruments made under statutory delegation by:
  - the Governor in Executive Council
  - Ministers
  - statutory bodies
  - local governments.
- 3 The Committee determines whether the instruments are beyond the scope of the delegated power or are otherwise in breach of the Committee's Terms of Reference.

## Committee activities

- 4 The Committee continues to scrutinise a large volume of delegated legislation. In the reporting period, the Committee was referred 377 instruments, including 161 regulations and 121 local laws.
- 5 The Committee tabled eight reports in the Parliament. In seven of those reports, the Parliament was asked to consider whether eight instruments should be disallowed—all eight instruments were disallowed by the Legislative Council.
- 6 This disallowance figure does not reflect the complexity and extent of work undertaken by the Committee behind the scenes to:
  - reach agreement with the legislators on issues identified by the Committee
  - obtain undertakings from the legislators to repeal, re-make or amend delegated legislation.
- 7 Motions for the disallowance of delegated legislation usually do not proceed in the Parliament if satisfactory undertakings are given to the Committee. The Committee only recommends the disallowance of an instrument as a last resort. During 2018, the Committee received nine departmental (Ministerial) and 30 local government undertakings.

## Issues relating to regulations

- 8 As always, the Committee received explanatory material of differing quality. There is some discussion in this report of examples of explanatory material in the context of fee amendments.
- 9 One set of amendment regulations abrogated a fundamental common law principle. Another set of amendment regulations were unreasonable and had unintended consequences. In both cases, the Committee took no further action after receiving satisfactory undertakings.

## Issues relating to local laws

- 10 Section 3.12(2A) of the *Local Government Act 1995* excuses minor procedural errors in local law-making. It has now been operating for over two years and this report discusses examples

of when the Committee did and did not apply it. Five local laws breached their empowering Acts due to procedural defects which could not be excused under section 3.12(2A).

11 The Committee also encountered:

- a local government's prescription of modified penalties in the absence of a general penalties clause
- the complications which can arise when a local law simply adopts the text of another local law by reference
- a systemic issue in extractive industries local laws which give local governments the power to enter onto private land.

These issues did not result in disallowances because the affected local governments provided the Committee with acceptable undertakings.

12 Members of the Committee trust that the matters noted in this report will assist persons and bodies making delegated legislation to understand the Committee's processes and the issues identified in previous instruments.

# 1 Introduction

## Overview

- 1.1 This report:
- outlines the activities of the Joint Standing Committee on Delegated Legislation (Committee)<sup>1</sup> between 1 January and 31 December 2018
  - discusses some of the more notable instruments considered by the Committee
  - comments on significant issues arising from the Committee's scrutiny of delegated legislation.
- 1.2 The Committee holds a standing referral from the Legislative Assembly and Legislative Council to consider instruments of delegated legislation that have been published.<sup>2</sup> Like its predecessors, the Committee in this 40<sup>th</sup> Parliament considers only:
- instruments that are subject to parliamentary disallowance<sup>3</sup>
  - instruments noted by an individual Member.
- 1.3 The majority of the instruments considered are regulations made by the Executive Government via the Governor in Executive Council. Other instruments include local laws made by 137 local governments,<sup>4</sup> court rules, by-laws, planning schemes, orders, notices, plans and other variously-named instruments made by a range of persons or bodies.

## Terms of Reference

- 1.4 The Committee's Terms of Reference (TOR) are listed on the back inside cover of this report. They were adopted by the Parliament on 15 June 2017, when the Committee was established. The Committee operates under the *Standing Orders of the Legislative Council*.<sup>5</sup>
- 1.5 The Committee considers whether an instrument complies with or offends any of the requirements set out in item 10.6 of its TOR, including whether the instrument is 'within power' or 'contains only matter that is appropriate for subsidiary legislation'.

## Committee Members

- 1.6 In 2018, the Committee was constituted by the Members noted on the front inside cover of this report.

---

<sup>1</sup> Being a joint committee of both Houses of Parliament, the Committee in the 39<sup>th</sup> Parliament ceased to exist upon the dissolution of the Legislative Assembly (and, as it happened, the prorogation of the 39<sup>th</sup> Parliament) on 30 January 2017. The Committee of the 40<sup>th</sup> Parliament was established by both Houses on 15 June 2017: Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 15 June 2017, p 951 and Legislative Assembly, *Parliamentary Debates (Hansard)*, 15 June 2017, p 1048.

<sup>2</sup> Either under section 41(1)(a) of the *Interpretation Act 1984* or another written law: Committee TOR 10.5: *Standing Orders of the Legislative Council* Schedule 1, cl 10.5.

<sup>3</sup> Pursuant to section 42 of the *Interpretation Act 1984* or another written law.

<sup>4</sup> Department of Local Government, Sport and Cultural Industries, 26 July 2018, Government of Western Australia, Perth, viewed 16 January 2019, <<https://www.dlgsc.wa.gov.au/localgovernment>>.

<sup>5</sup> *Standing Orders of the Legislative Council* Standing Order 156.





Figure 1. *Committee Members in 2018*

*Back (left to right): Hon Martin Pritchard MLC, Mrs Robyn Clarke MLA, Hon Kyle McGinn MLC, Hon Charles Smith MLC*

*Front (left to right): Ms Emily Hamilton MLA (Chair), Hon Robin Chapple MLC (Deputy Chair)*

*Missing from photograph: Ms Libby Mettam MLA (replaced by Dr David Honey MLA), Mr Ian Blayney MLA (replaced by Mr Kyran O'Donnell MLA)*

## Committee process

- 1.7 When the Committee has questions about an instrument, it usually writes to or contacts the relevant Minister or local government President or Mayor and requests further information to assist in its examination of the instrument. In many instances, the responses received address the Committee's questions and no further action is taken.
- 1.8 When the Committee identifies an issue of concern and forms the view that a clause or clauses in the instrument offend the Committee's TOR, it usually seeks an undertaking from the responsible Minister or local government to amend the instrument.
- 1.9 At the Committee's request, the responsible Minister or local government usually undertakes to amend or repeal the delegated legislation within six months of the date of the undertaking. The Committee monitors whether delegated legislation has been amended within the agreed timeframe.
- 1.10 While the Committee awaits the response to investigations or its request for undertakings on a particular instrument, it is often necessary to authorise a Committee Member to give notice of motion to disallow the instrument in the Legislative Council.<sup>6</sup> Notice must be given within 14 sitting days after the instrument is tabled in the Parliament.<sup>7</sup> The vast majority of these

<sup>6</sup> The Legislative Council has procedures in place for dealing with motions for disallowance, including those motions which are instigated by the Committee: refer to *Standing Orders of the Legislative Council* Standing Order 67.

<sup>7</sup> *Interpretation Act 1984* s 42. Note that other Acts may provide for a different period during which Notices of Motion to disallow their delegated legislation may be given.



notices of motion<sup>8</sup> are later discharged from the Legislative Council Notice Paper following receipt of satisfactory responses from Ministers and local governments.

- 1.11 When requested undertakings are provided, the usual course is for the Committee to accept the undertakings and recommend the discharge of the motion to disallow.<sup>9</sup> However, when required, the Committee reports to the Parliament recommending the disallowance of all or part of the instrument.
- 1.12 The Committee only recommends the disallowance of an instrument as a last resort, that is:
- where agreement cannot be reached on acceptable arrangements
  - where the identified defect in the instrument cannot be cured without re-making the instrument—for example, because statutory procedures for the making of the instrument were not followed.

### Undertakings lists

- 1.13 The Committee posts two lists of undertakings on its webpage ([www.parliament.wa.gov.au/del](http://www.parliament.wa.gov.au/del)), namely:
- departmental undertakings (undertakings provided by Ministers, government departments, agencies and statutory authorities)
  - local government undertakings.
- 1.14 These lists inform stakeholders of issues the Committee has raised and assist departmental and local government officers in drafting delegated legislation. In particular, the local government undertakings list allows local governments and their advisers to identify systemic problems in local laws.

### Acknowledgments

- 1.15 The Committee relies on the assistance provided by relevant Ministers, departments, statutory bodies and local governments in undertaking its function of scrutinising a large volume of delegated legislation within defined time constraints. The Committee extends its appreciation to those Ministers and contact persons who provided that assistance throughout the year.
- 1.16 In particular, the Committee thanks:
- the Department of Local Government, Sport and Cultural Industries (DLGSC), which acts as a valuable filter in dealing with problematic proposed local laws, thus resolving many issues before the local laws are formally made, gazetted and then referred to the Committee
  - the Western Australian Local Government Association (WALGA), another valued source of local laws information and expertise for local governments.

---

<sup>8</sup> Which usually become motions to disallow on the third sitting day after they have been given: *Standing Orders of the Legislative Council* Standing Order 67(3).

<sup>9</sup> The statistics relating to this practice are contained in Table 1 on page 4.

## 2 Committee activities in 2018

### Volume and nature of work

2.1 The Committee held 18 meetings in the reporting period, and the following table provides a breakdown of the Committee's activities in respect of instruments gazetted during that period. The figures in the table do not demonstrate that many of the instruments considered by the Committee are lengthy documents. Irrespective of their size, the instruments often involve complex issues that span a diverse range of subject matters.

Table 1. *The Committee's work statistics for 2018*

Disallowable instruments gazetted:	377
• Regulations	161
• By-laws (made by the Executive)	5
• Local laws (made by local government)	121
• Rules	18
• Other instruments referred (including planning schemes, orders, notices and plans)	72
Notices of motion for disallowance given	51
Motions to disallow discharged	43
Hearings held by the Committee	3
Instruments for which undertakings were provided to the Committee to amend the instrument	39
Reports tabled <sup>10</sup>	8
Disallowance reports tabled <sup>11</sup>	7
Instruments disallowed on recommendation of the Committee <sup>12</sup>	8

2.2 The following three graphs (Figures 2–4) provide an indication of the nature, number and frequency of issues encountered by the Committee in 2018. Note that some instruments had multiple issues.

<sup>10</sup> Refer to paragraph 2.7 for a list of these reports.

<sup>11</sup> See Reports 7–9 and 11–14 in paragraph 2.7.

<sup>12</sup> *ibid.*

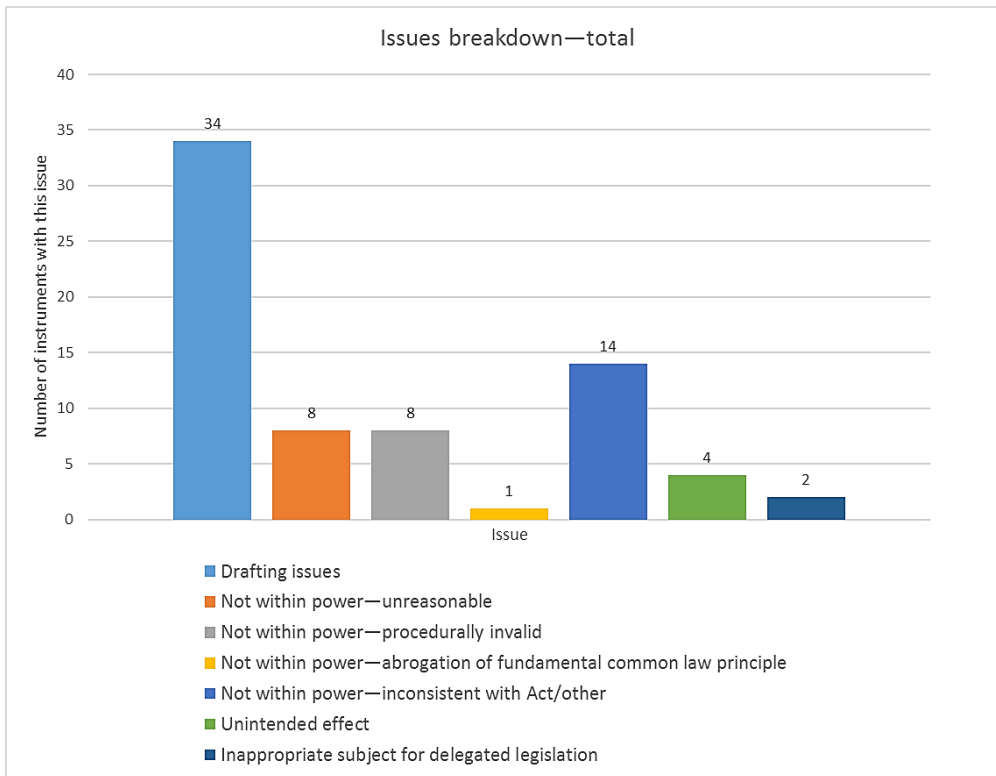


Figure 2. Nature and number of issues arising from instruments which were either disallowed or for which undertakings were given<sup>13</sup>

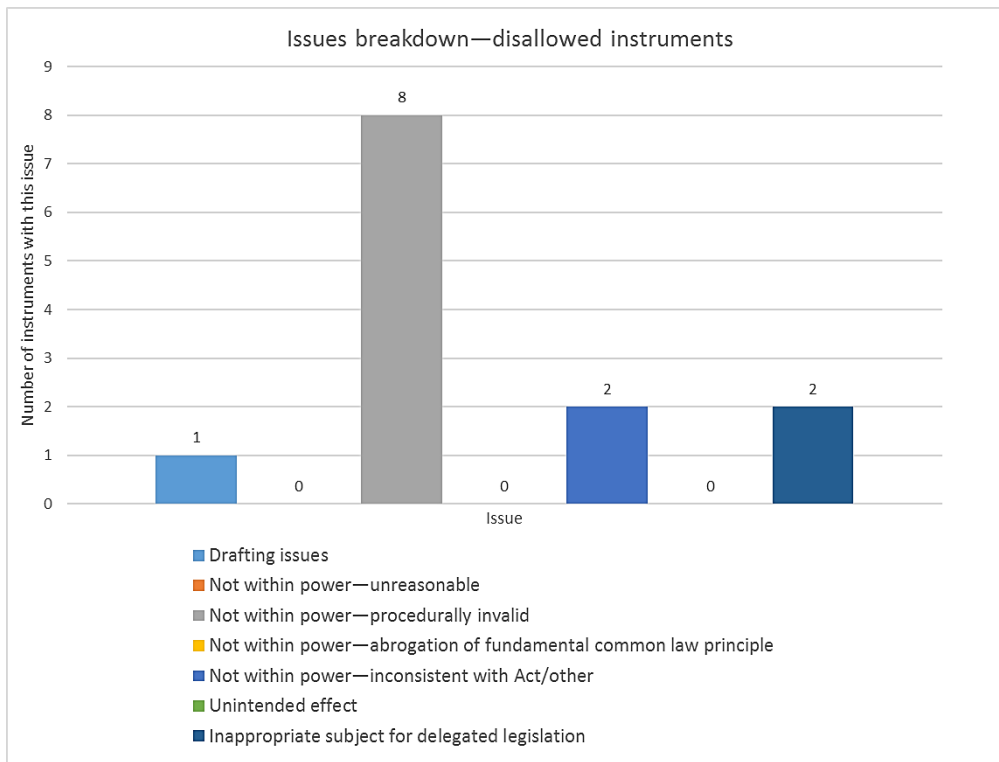


Figure 3. Nature and number of issues arising from instruments which were disallowed

<sup>13</sup> Note that one instrument with the issue described as 'not within power—procedurally invalid' resulted in both a disallowance and an undertaking and has only been counted once for this figure.

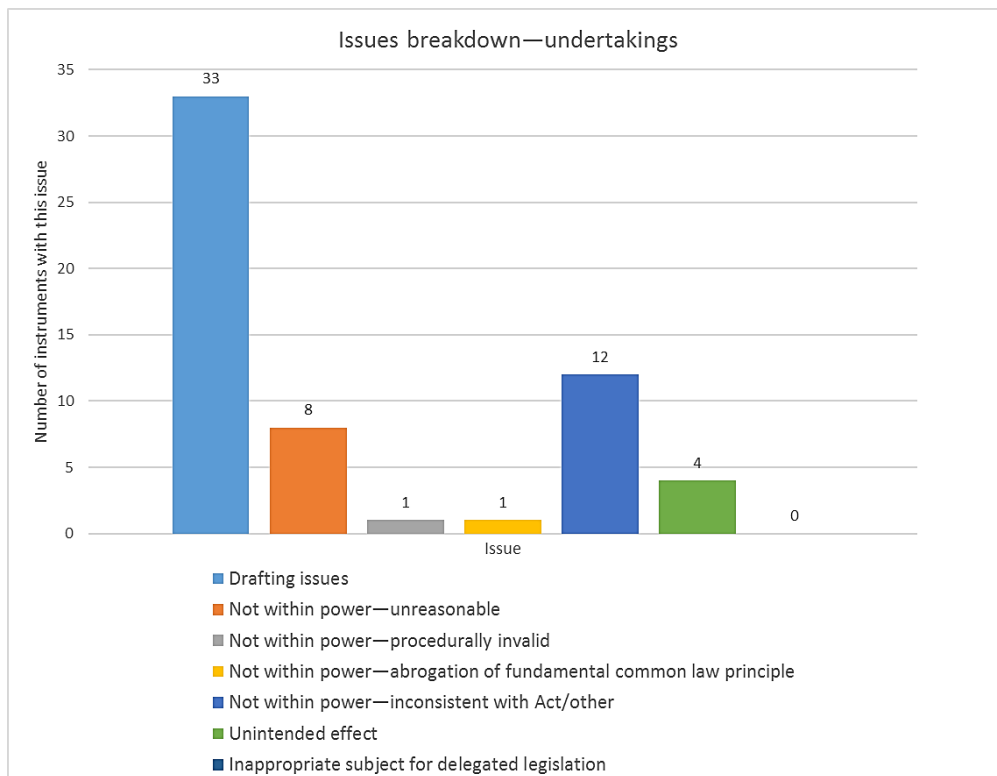


Figure 4. *Nature and number of issues arising from instruments for which undertakings were given*

- 2.3 The above three graphs (Figures 2–4) illustrate that the Committee recommends the disallowance of instruments as a last resort.<sup>14</sup>
- 2.4 ‘Drafting issues’ feature prominently in the Committee’s work. The vast majority of drafting issues occur in local laws. They range from minor typographical and grammatical errors, which are commonly encountered by the Committee, to referencing errors which may affect the substance and effectiveness of an instrument.
- 2.5 The following three graphs (Figures 5–7) provide an indication of the nature and frequency of issues encountered by the Committee and broken down into the Committee’s TOR. The TOR most commonly offended by the instruments considered by the Committee is TOR 10.6(a).
- 2.6 TOR 10.6(a) provides that the Committee is to inquire into whether an instrument ‘is within power’ of (or authorised by) the empowering Act.<sup>15</sup> The Committee may consider that an instrument is ‘not within power’ because of various reasons, including that it:
- is an unreasonable exercise of the delegated legislative power
  - is procedurally invalid
  - abrogates a fundamental common law principle without express or necessarily implied authority from the empowering Act
  - is inconsistent with its empowering Act or other legislation.<sup>16</sup>

<sup>14</sup> See also, paragraphs 1.11–1.12.

<sup>15</sup> See Committee TOR 10.6(a): *Standing Orders of the Legislative Council* Schedule 1, cl 10.6(a).

<sup>16</sup> Figures 2–4 on pages 5–6 provide a breakdown of these ‘not within power’ issues.

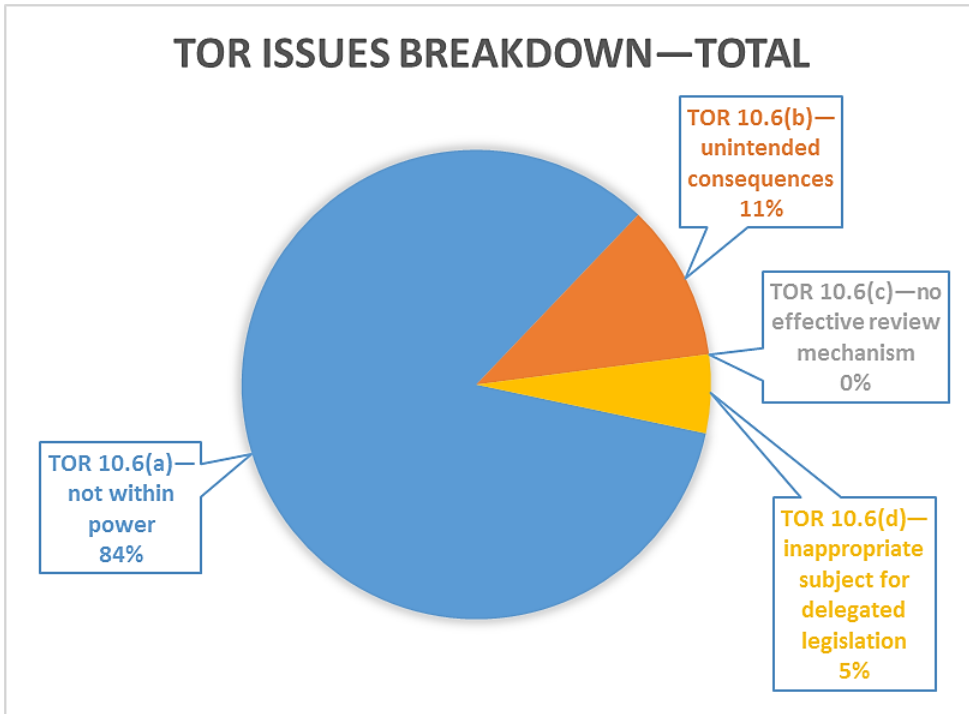


Figure 5. Nature and frequency of TOR issues arising from instruments which were either disallowed or for which undertakings were given<sup>17</sup>

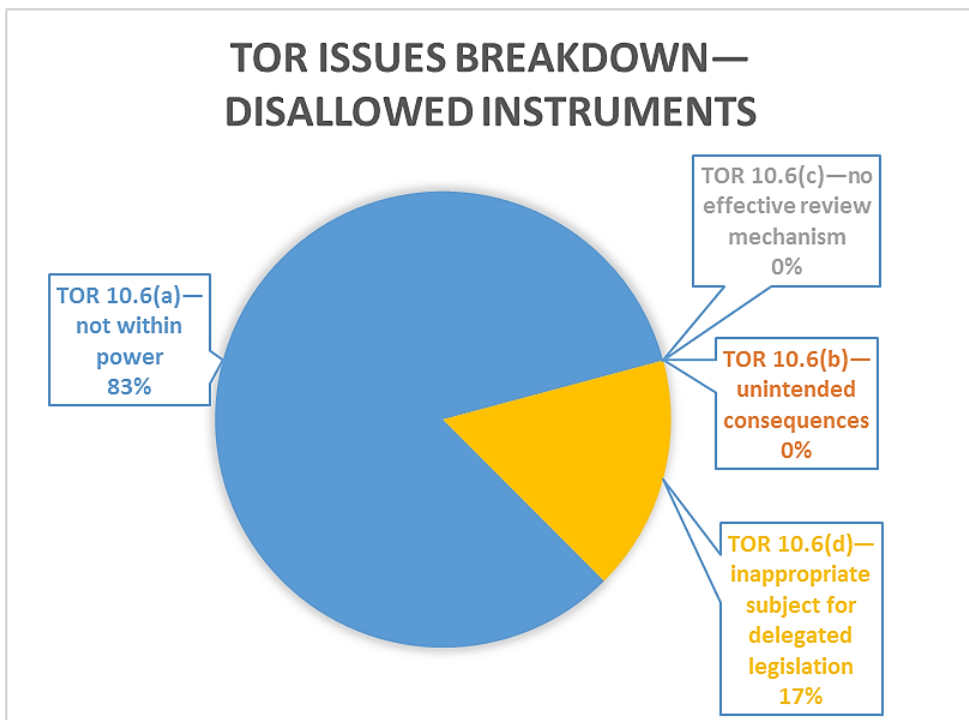


Figure 6. Nature and frequency of TOR issues arising from instruments which were disallowed

<sup>17</sup> Note that one instrument which breached TOR 10.6(a) resulted in both a disallowance and an undertaking and has only been counted once for this figure.

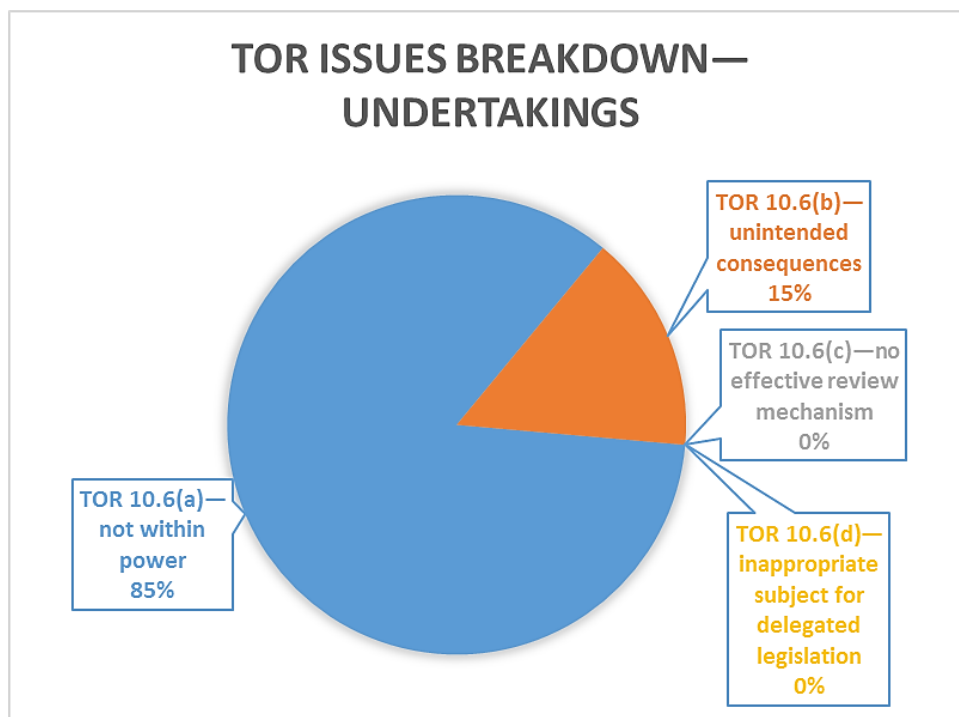


Figure 7. Nature and frequency of TOR issues arising from instruments for which undertakings were given

## Committee reports

2.7 In 2018, the Committee presented the following eight reports to the Legislative Assembly and the Legislative Council:

- Report 7—*Biosecurity and Agriculture Management Act 2007 Notice Under Section 130(1)*, tabled on 22 March 2018.
- Report 8—*Shire of Northampton Local Government Property Local Law 2017*, tabled on 22 March 2018.
- Report 9—*Shire of Chittering Repeal Local Law 2017*, tabled on 22 March 2018.
- Report 10—*Annual report 2017*, tabled on 17 May 2018.
- Report 11—*Shire of Broome Parking and Parking Facilities Amendment Local Law (2) 2017*, tabled on 17 May 2018.
- Report 12—*Shire of Northam Cemeteries Amendment Local Law 2017*, tabled on 23 August 2018.
- Report 13—*Shire of Toodyay Health Local Law 2017*, tabled on 23 August 2018.
- Report 14—*City of Kalgoorlie-Boulder Activities on Thoroughfares and Trading in Thoroughfares and Public Places Amendment Local Law 2018 and City of Kalgoorlie-Boulder Local Government Property Amendment Local Law 2018*, tabled on 18 October 2018.

2.8 These reports can be viewed at <[www.parliament.wa.gov.au/del](http://www.parliament.wa.gov.au/del)> by choosing 'REPORTS'.

## Undertakings

2.9 During the reporting period, the Committee received nine departmental and 30 local government undertakings. The lists of undertakings can be viewed at [www.parliament.wa.gov.au/del](http://www.parliament.wa.gov.au/del) by scrolling down to 'Undertakings provided to the Committee'.

## Circulars relating to explanatory memoranda

2.10 In its *Annual report 2017*, the Committee reported that it had provided suggestions for the review of the following two government circulars:

- Premier's Circular Number 2014/01, *Subsidiary legislation—explanatory memoranda*, directed at State government departments and agencies
- Ministerial Circular Number 04-2010, *Local Laws Explanatory Memoranda Directions 2010*, directed at local governments.

2.11 These two circulars direct delegated legislation makers to provide the Committee with the explanatory material that it requires to perform its role. To the Committee's knowledge, these circulars are yet to be updated and re-issued.

## 3 Issues in regulations

### Fees—quality of explanatory material

#### Fees which are re-imposed without amendment

3.1 This year, the Committee saw fees in regulations amended in three ways:

- Individual fees were deleted and new individual fees were inserted in their place.
- A whole provision (be it a regulation, schedule or table appearing within a provision) would be deleted and a replacement provision would be inserted.
- A combination of the first and second methods.

3.2 When the amending instrument features the second method, some fees captured in the replaced provision may be re-imposed without amending the amount of those fees. For example, the amending instrument may delete Table 2 and replace it with Table 3:

Table 2. *Example of existing table of fees*

Fee type	Fee amount (\$)
Fee A	58
Fee B	60
Fee C	75

Table 3. *Example of new table of fees*

Fee type	Fee amount (\$)
Fee A	58
Fee B	61
Fee C	76



- 3.3 Fees B and C have increased by \$1 but Fee A has been re-imposed without any change to the amount of the fee. In this scenario, the Committee is obliged to scrutinise all three fees, even though the amount of Fee A has not been amended. In the event that the second method of amendment is used, as is the case in the above example, the Explanatory Memorandum must provide the Committee with fee information<sup>18</sup> for all fees included in the new table.<sup>19</sup>
- 3.4 The failure of a department to provide information for all fees in a new table results in the Committee needing to request this information from the department. This leads to delay in the scrutiny of instruments and creates additional work for the Committee.

### **Omnibus fee instruments—update**

- 3.5 An 'omnibus instrument' is one which amends a number of principal regulations, usually under various statutory empowering provisions. This method is commonly applied to the annual increases in fees by government departments. The Committee first encountered omnibus instruments in 2016, at the end of the 39<sup>th</sup> Parliament.<sup>20</sup>
- 3.6 The Committee requires explanatory memoranda in relation to omnibus instruments to include the same information as is required in relation to instruments which amend only one set of regulations, including:
- the relevant empowering provision(s). This should include specific powers (including the power to impose a particular type of fee) in addition to the general regulation-making power. Separate empowering provisions should be identified for each set of principal regulations amended
  - a description of the purpose and effect of, and justification for, the subsidiary legislation (or any amendments to or repeals of it)
  - the identification of any unusual or controversial provisions, with particular regard to the Committee's TOR
  - details of consultations undertaken including stakeholders consulted, a summary of their comments and any action taken in response.

The information should be provided in relation to each of the principal instruments amended by the omnibus instrument.

- 3.7 The Committee has been impressed with the quality of explanatory material provided by some departments in support of omnibus instruments. The Committee particularly thanks the Departments of Transport, Justice and Health, and the Western Australia Police Force, for the thoroughness of their explanatory memoranda for omnibus fee instruments.
- 3.8 In some other instances the level of detail required for omnibus instruments has not been met. The most notable example of this was the *Commerce and Industrial Relations Regulations Amendment (Fees and Charges) Regulations 2018*, which amended 19 principal regulations administered by the Department of Mines, Industry Regulation and Safety

---

<sup>18</sup> See Premier's Circular Number 2014/01, *Subsidiary legislation—explanatory memoranda*, 15 February 2014, p 3. See: <<https://www.dpc.wa.gov.au/GuidelinesAndPolicies/PremiersCirculars/Lists/Circular/Attachments/257/2014-01%20Subsidiary%20Legislation%20-%20Explanatory%20Memoranda.pdf>>. Viewed 11 February 2019.

<sup>19</sup> This is because the amending instrument inserts a whole new table of fees and this new table, being a part of the amending instrument, is subject to the Committee's consideration.

<sup>20</sup> 39<sup>th</sup> Parliament of Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, Report 89, *Annual report 2016*, 17 November 2016, pp i and 3.

(DMIRS) to give effect to the annual review of Commerce and Industrial Relations fees and charges.<sup>21</sup>

- 3.9 The one-page Explanatory Memorandum contained no reference to the relevant empowering provisions of the various Acts and was therefore non-compliant with Premier's Circular Number 2014/01<sup>22</sup> and of limited assistance to the Committee. The Committee obtained a supplementary Explanatory Memorandum from DMIRS, which provided some limited further detail.

## Fees—ensuring certainty in prescription

- 3.10 The *Water Services (Water Corporations Charges) Amendment Regulations 2017* repealed the existing credit card charge cap (formerly 0.481 per cent) from the principal regulations<sup>23</sup> and replaced it with a charge 'in accordance with the instructions in the invoice'.<sup>24</sup> The charge would be determined by the relevant water corporation, not 'provided for' in the principal regulations as is authorised and contemplated by the empowering Act.<sup>25</sup> Future changes to the charge would therefore not be reviewable by this Committee.
- 3.11 This instrument created a circumstance where a tax could be levied though the over-recovery of a credit card charge by a water corporation, despite the fact that the empowering Act does not contain a taxing power. This danger was exacerbated by the removal of this Committee's (and therefore the Parliament's) ability to review changes to the relevant charge to ensure that it does not impose a tax. In the Committee's view, this could be seen to be repugnant to the intention of the Parliament when it passed the empowering Act.
- 3.12 To provide more certainty regarding the credit card charge, while still maintaining some flexibility for water corporations, the Committee sought and received an undertaking from the Minister that the principal regulations would, within three months, be amended in line with the approach taken in the *Energy Operators (Electricity Generation and Retail Corporation)(Charges) Amendment By-laws 2018* for imposing credit card surcharges. That instrument linked the 'permitted surcharge' to the Reserve Bank of Australia's Standard No. 3 of 2016, which provides for:

scheme rules that require participants to give merchants the freedom to make a charge for accepting payment of a particular kind that reflects the cost to the merchant of accepting that payment type.<sup>26</sup>

---

<sup>21</sup> In contrast, the Explanatory Memorandum provided by DMIRS for the *Mines and Petroleum Regulations Amendment (Fees and Charges) Regulations 2018*, which implemented the annual review of Mines and Petroleum levies, fees and charges, was more comprehensive and complied with the Premier's Circular.

<sup>22</sup> See Premier's Circular Number 2014/01, *Subsidiary legislation—explanatory memoranda*, 15 February 2014, p 3. See: <<https://www.dpc.wa.gov.au/GuidelinesAndPolicies/PremiersCirculars/Lists/Circular/Attachments/257/2014-01%20Subsidiary%20Legislation%20-%20Explanatory%20Memoranda.pdf>>. Viewed 6 February 2019.

<sup>23</sup> *Water Services (Water Corporations Charges) Regulations 2014*.

<sup>24</sup> In *Water Services (Water Corporations Charges) Regulations 2014* regs 15A and 20.

<sup>25</sup> Regulations may be made to 'provide for additional charges to be payable—(i) according to the method or manner of payment of statutory water service charges': *Water Services Act 2012* s 124(2)(i).

<sup>26</sup> Reserve Bank of Australia Standard No. 3 of 2016, *Scheme rules relating to merchant pricing for credit, debit and prepaid card transactions*, p 2. See: <<https://www.rba.gov.au/payments-and-infrastructure/review-of-card-payments-regulation/pdf/standard-no-3-of-2016-scheme-rules-relating-to-merchant-pricing-2016-05-26.pdf>>. Viewed 11 February 2019.

## Abrogation of fundamental common law principle

- 3.13 The *Rights in Water and Irrigation Amendment Regulations 2018* introduced a requirement for all holders of a water entitlement licence<sup>27</sup> to install a meter to measure the volume of water that is being drawn under the licence. The Regulations also allowed for the Minister to issue exemptions for this new requirement. As these exemptions could be issued, they could also be revoked by the Minister.
- 3.14 The Committee was concerned that new regulation 41F(2)<sup>28</sup> empowers the Minister to take into account irrelevant considerations when determining whether to revoke an exemption. As such, new regulation 41F(2) erodes the fundamental common law principle that an administrator, when exercising a discretion, must not take irrelevant considerations into account.<sup>29</sup>
- 3.15 An instrument must not erode fundamental common law principles unless that erosion is explicitly authorised or necessarily implied by the empowering Act(s).<sup>30</sup> No such authority existed in either of the empowering Acts.<sup>31</sup> New regulation 41F(2) breaches the Committee's TOR 10.6(a), which provides that:

In its consideration of an instrument, the Committee is to inquire whether the instrument— ... is within power.

- 3.16 New regulation 41F provides as follows:

**41F. Exemption from requirement to measure quantity of water taken under licence**

- (1) The Minister may, in any particular case, grant an exemption from the requirement to measure the quantity of water taken under a licence if satisfied on reasonable grounds that —
- (a) it is impracticable to install a meter under regulation 41C to measure the quantity of water taken under the licence; and
  - (b) it is inappropriate to use an alternative measurement method for measuring the quantity of water taken under the licence.
- (2) The Minister may revoke an exemption granted under subregulation (1) if the licensee fails to comply with any terms, conditions or restrictions included in the licence.

- 3.17 The provision prescribes that the Minister may grant an exemption from the requirement to measure the amount of water taken if it is impracticable to install a meter and also inappropriate to use an alternative measurement method. However, subregulation (2) allows

---

<sup>27</sup> '**water entitlement** means the quantity of water that a person is entitled to take under this Act or under a licence': *Rights in Water and Irrigation Act 1914* Schedule 1, cl 17(4).

<sup>28</sup> Inserted into the principal regulations (*Rights in Water and Irrigation Regulations 2000*) by regulation 4 of the Regulations.

<sup>29</sup> For example, *Water Conservation and Irrigation Commission (New South Wales) v Browning* (1947) 74 CLR 492, per Latham CJ at p 496, per Rich J at p 498, per Starke J at p 500 and per Dixon J at p 504. The taking into account of irrelevant considerations is a jurisdictional error, which is a ground for judicial review: Australian Law Reform Commission, Report 129, *Traditional rights and freedoms—encroachments by commonwealth laws*, Australian Government, Sydney, December 2015, pp 418–19.

<sup>30</sup> Dan Meagher and Matthew Groves, 'The common law principle of legality and secondary legislation', *UNSW Law Journal*, 2016, vol. 39, issue no. 2, p 450 at pp 451 and 486.

<sup>31</sup> *The Rights in Water and Irrigation Act 1914* and the *Water Agencies (Powers) Act 1984*.

the Minister to revoke the exemption if the licensee fails to comply with any terms, conditions or restrictions under the licence. These terms, conditions or restrictions may have nothing to do with the measurement of the amount of water being taken by the licensee.

- 3.18 In the Committee's view, new regulation 41F(1) is prescriptive in the matters which the Minister must take into account when determining whether to grant an exemption. These matters, concerning the practicalities of measuring water quantity, are appropriate because they are directly related to the question at hand. Conversely, under new regulation 41F(2), the Minister may then revoke an exemption for any breach of the licence, even if the breach has no connection to the matter of measuring the amount of water taken under the licence.
- 3.19 The Minister was not convinced that new regulation 41F(2) is unauthorised. However, the Minister undertook to amend the provision by limiting the power to revoke an exemption to circumstances where the terms, conditions and restrictions that relate to the taking or measurement of water have not been complied with.

### Unreasonable amendments with unintended effects

- 3.20 The *Public Transport Authority Amendment Regulations 2018* introduced a prohibition on the tendering of high denomination notes to bus drivers or ferry masters in payment of the fare. New regulation 41(3) states:

**41. Refusal of passage**

...

- (3) A driver, master or authorised person may advise a person that the person must not travel or remain on a conveyance if the person tenders a \$50 note or \$100 note in payment of the fare.

- 3.21 Justification for the new regulation was anecdotal evidence of some passengers deliberately and repeatedly presenting high value notes to bus drivers in the knowledge the driver would not have sufficient change to allow a ticket to be issued and thus, travel free.
- 3.22 The Committee took the view that there was dissonance between the mischief sought to be rectified as stated in the explanatory memorandum and the content of new regulation 41(3). A driver, master or authorised person enjoyed a discretionary power but there was no reference in the new regulation to:
- passengers regularly and repeatedly tendering large denomination notes
  - passengers tendering high denomination notes knowing the driver lacked sufficient change
  - drivers or ferry masters holding a reasonable belief that a passenger is a regular and repeat fare evader
  - drivers or ferry masters only refusing to travel passengers who regularly and repeatedly present large denomination notes to avoid payment of fares.
- 3.23 The Committee took the view that the new regulation would have the unintended effect of punishing a passenger who genuinely does not know the driver cannot break a high denomination note.
- 3.24 Committee TOR 10.6(b) states:

In its consideration of an instrument, the Committee is to inquire whether the instrument— ... has no unintended effect on any person's existing rights or interests';

- 3.25 The existing right is to travel on a bus or ferry after tendering the 'fare' (which is not defined in the *Public Transport Authority Act 2003* or regulations). The Committee noted its ordinary meaning is 'the price of conveyance or passage'<sup>32</sup> and is absent any reference to coins or notes of any denomination.
- 3.26 The Committee had concerns about the potentially unintended and punitive impact of new regulation 41(3) on passengers who fitted (amongst others) the following descriptions and scenarios:
- Tourists in possession of high denomination notes exchanged at airports or post offices.
  - Non-English speaking persons who cannot read a sign on a bus or ferry (if displayed) regarding the non-acceptance of high denomination notes.
  - Children and young people when not travelling as primary or secondary school students.
- 3.27 The Committee concluded that new regulation 41(3) was unreasonable and thus not 'within power' of either:
- section 69(1) of the *Public Transport Authority Act 2003*, the Governor's 'necessary or convenient' regulation-making power
- or
- section 69(2)(c), the Governor's ability to make regulations 'about the setting of fares for the use of a public transport service provided by the Authority'.
- Neither power was sufficiently wide enough to authorise its making. New regulation 41(3) was therefore a disproportionate exercise of the powers.
- 3.28 Although not agreeing with the Committee's views, the Minister agreed to repeal the new regulation.

## 4 Issues in local laws

### Committee consideration of section 3.12(2A) of the *Local Government Act 1995*

- 4.1 Section 3.12 of the *Local Government Act 1995* (LGA) governs the procedure for making local laws. The first two subsections provide as follows:
- 3.12. Procedure for making local laws**
- (1) In making a local law a local government is to follow the procedure described in this section, in the sequence in which it is described.
- (2A) Despite subsection (1), a failure to follow the procedure described in this section does not invalidate a local law if there has been substantial compliance with the procedure.
- 4.2 In its *Annual report 2017*, the Committee provided a brief outline of the relatively new subsection (2A) and the Committee's approach to applying it. The next page provides some more examples of when the Committee has and has not relied upon subsection (2A) to excuse procedural defects in the making of local laws.

---

<sup>32</sup> *The Macquarie Dictionary*, Sixth edition, Macmillan Publishers, Australia, 2013, p 533.

### **Examples of occasions when section 3.12(2A) did apply**

#### *Town of Cambridge—Private Property Amendment Local Law 2017 and Waste Amendment Local Law 2017*

- 4.3 The explanatory material provided for these two local laws indicated that the Town notified the Minister for Local Government about the proposed versions of the local laws<sup>33</sup> shortly before the Statewide public notices of the proposed local laws were published. However, the LGA required the Minister to be notified ‘as soon as’ the Statewide public notices were published—that is, just after the notices are published.<sup>34</sup> The Town complied with all of the other procedures.
- 4.4 Consistent with previous examples, the Committee considered that, effectively, the Town completed both steps<sup>35</sup> at the same time. Therefore, the Town ‘substantially complied’ with the procedure required by section 3.12.

#### *Shire of Gingin Waste Amendment Local Law 2018*

- 4.5 The procedural defect in this case involved the Shire notifying the Ministers for Local Government and Environment<sup>36</sup> of the proposed version of the local law approximately five weeks after the Statewide public notice was published, instead of ‘as soon as the notice is given’.<sup>37</sup>
- 4.6 In response to the Shire notifying the relevant Ministers, albeit later than required, the DLGSC and the Department of Water and Environmental Regulation commented on the proposed local law. Each department suggested minor amendments, most of which were adopted in the final version of the local law.
- 4.7 In the circumstances, the Committee considered that there had been ‘substantial compliance’ with the section 3.12 procedure for the purposes of subsection (2A).

### **Examples of occasions when section 3.12(2A) did not apply**

- 4.8 There were five local laws with procedural defects which, in the Committee’s opinion, could not be saved by the application of section 3.12(2A). Each of these local laws was the subject of Committee reports recommending disallowance of all or part of the law.<sup>38</sup> The Legislative Council followed the Committee’s recommendation on every occasion.

### **Increase of modified penalties in the absence of a general penalties clause**

- 4.9 Section 9.17(3) of the LGA requires that the ‘modified penalty’ applicable to an offence under a local law be no greater than 10 per cent of the ‘maximum penalty’ which a court could impose in relation to the offence.

---

<sup>33</sup> This involves giving the Minister a copy of the proposed version of a local law and a copy of the Statewide public notice of the proposed local law: LGA s 3.12(3)(b).

<sup>34</sup> *ibid.*

<sup>35</sup> That is, notifying the Minister of the proposed versions of the local laws and publishing the Statewide public notices of the proposed local laws.

<sup>36</sup> The local law was proposed to be made under both the LGA and the *Waste Avoidance and Resource Recovery Act 2007*. The Shire was required to also notify the Minister for Environment because this Minister administers the *Waste Avoidance and Resource Recovery Act 2007*: see LGA s 3.12(3)(b).

<sup>37</sup> As required by LGA s 3.12(3)(b).

<sup>38</sup> See Reports 8, 9 and 11–13 in paragraph 2.7.

- 4.10 The *Shire of Collie Parking and Parking Facilities Amendment Local Law 2017* (Amendment Local Law) increased the modified penalties prescribed by the *Shire of Collie Parking and Parking Facilities Local Law 2012*. In its consideration of the Amendment Local Law, the Committee noted that the *Shire of Collie Parking and Parking Facilities Local Law 2012* did not prescribe any maximum penalties for offences under that local law.
- 4.11 The Committee therefore concluded that the Amendment Local Law was inconsistent with section 9.17(3) of the LGA.
- 4.12 The Committee notified the Shire that all of the modified penalties prescribed under the principal local law appeared to be invalid, and obtained undertakings from the Shire:
- to amend the principal local law to include the relevant maximum penalties
  - not to enforce the principal local law inconsistently with the above undertaking.

### Convoluting methods of making and amending a local law

- 4.13 The *City of Karratha Bush Fire Brigades Amendment Local Law 2018* (Amending Local Law) amended the *Shire of Roebourne Bush Fire Brigades Local Law* (Principal Local Law).<sup>39</sup> A copy of each of the local laws appears in Appendix 1 and Appendix 2, respectively.

#### Method used to make the Principal Local Law

- 4.14 The Principal Local Law was made in 2003 by simply ‘adopting’ another Shire’s bush fire brigades local law by reference to the title of that local law and making ‘modifications’ to it. The title of the adopted local law was the *Shire of Bridgetown-Greenbushes Bush Fire Brigades Local Law*.<sup>40</sup>
- 4.15 The Committee’s view was that the Principal Local Law was comprised of the text of the Bridgetown-Greenbushes local law as modified.<sup>41</sup> This is the text that should have been the subject of the Amending Local Law. However, the City made amendments to the modification clauses, rather than the full text, of the Principal Local Law.
- 4.16 While the amendment approach adopted by the City was less than ideal, a purposive reading of the Amending Local Law revealed an effective, if convoluted, amendment of the Principal Local Law. However, the Committee warned the City that any future amendments to the *City of Karratha Bush Fire Brigades Local Law* (the new title of the Principal Local Law) should amend the adopted and modified text directly.
- 4.17 In the Committee’s view, it would have been preferable for the Principal Local Law to set out the full text of the local law being adopted (with the necessary modifications built in) because:
- it would avoid any confusion between references to the adopting local law and references to the text which was adopted and modified
  - it is much easier for a reader to read and understand one document as opposed to referring to two documents, one of which adopts and modifies the other.

<sup>39</sup> The Shire of Roebourne became the City of Karratha on 1 July 2014: City of Karratha. See: <<http://karratha.wa.gov.au/city-history>>. Viewed 22 January 2019.

<sup>40</sup> This was gazetted on 20 October 2000.

<sup>41</sup> This is because the content of the 2003 adopting local law (the Principal Local Law, which appears in Appendix 2) is notionally incorporated into the text of the adopted local law. A similar approach (the co-interpretation principle) is taken when an amendment Act amends a principal Act: see DC Pearce & RS Geddes, *Statutory interpretation in Australia*, 8<sup>th</sup> Edition, LexisNexis Butterworths, Australia, 2014, pp 338 and 340.



4.18 In the interim, the Committee notes that the City has since made a new bush fire brigades local law which sets out the full text.

### Unauthorised powers of entry in extractive industries local laws

4.19 The Committee first noted this issue in the *Shire of Victoria Plains Extractive Industries Local Law 2018*.

#### Powers of entry in local laws—generally

4.20 The Committee is of the view<sup>42</sup> that local governments may make local laws which grant themselves a power to enter private property only in the specific circumstances which are prescribed in the LGA:

- the local law-making power provided by section 3.5(1) of the Act is constrained by sections 3.25<sup>[43]</sup> and 3.27; and accordingly
- where a local government relies on section 3.5(1) for making a local law in relation to entry onto private land, the local government:
  - a) is restricted to the matters specified in Schedules 3.1 and 3.2 [see Appendix 3]; and
  - b) must comply with the procedures for entering private land set out in Part 3, Division 3, Subdivision 3 of the Act.
- any local law made under the Act inconsistent with the above is not authorised or contemplated by the Act.<sup>44</sup>

4.21 Further:

the power to enter private land pursuant to a local law made under section 3.5(1) of the Act can only be used in relation to those matters authorised by sections 3.25, 3.27; Schedules 3.1 and 3.2; and the procedure in Part 3, Division 3, Subdivision 3 of the Act must be followed when exercising the power to enter;<sup>45</sup>

#### Power of entry—clause 7.4(1)

4.22 Clause 7.4(1) of the *Shire of Victoria Plains Extractive Industries Local Law 2018* potentially authorises the Shire to enter onto an excavation site for matters other than those prescribed in Schedules 3.1 and 3.2 of the LGA. It is therefore potentially inconsistent with, and not ‘within power’ of, that Act.

4.23 The Committee noted that similar ‘power of entry’ issues arise in clause 5.2(1) of the WALGA template extractive industries local law. For this reason, the Committee copied its letter to the Shire to both WALGA and the DLGSC for their information.

4.24 Clause 7.4(1) of the *Shire of Victoria Plains Extractive Industries Local Law 2018* provides as follows:

---

<sup>42</sup> In keeping with the view of the Committee in the 36<sup>th</sup> Parliament.

<sup>43</sup> Read with section 3.26 of the LGA.

<sup>44</sup> See 36<sup>th</sup> Parliament of Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, Report No. 7, *Powers of entry and powers to make local laws that affect private land under the Local Government Act 1995*, 14 May 2003, p 35, paragraph 7.1.

<sup>45</sup> *ibid.*, p 36, Recommendation 5.

If a licensee fails to pay any fees and charges or carry out or complete the restoration and reinstatement works required by the licence conditions either—

- (a) within the time specified in those conditions; or
- (b) where no such time has been specified, within 60 days of the completion of the excavation or portion of the excavation specified in the licence conditions, then, subject to the local government giving the licensee 14 days notice of its intention to do so—
  - (i) the local government may carry out or cause to be carried out the required work or so much of that work as remains undone; and
  - (ii) the licensee shall pay to the local government on demand all costs incurred by the local government or which the local government may be required to pay under this clause.  
(underlining added)

4.25 The 'restoration and reinstatement works' referred to in clause 7.4(1) could include activities such as removing structures, planting trees and making faces safe. Most, if not all, of these activities would require the Shire to enter onto the excavation site.

4.26 As the restoration and reinstatement works for each licence would differ, the Committee turned to clause 3.5 of the local law to obtain some indication of what activities could amount to such works. Clause 3.5 prescribes the types of matters which must be included in an excavation site's rehabilitation and decommissioning program. This program would influence the restoration and reinstatement conditions imposed by the Shire in the licence. A program must indicate:

- (a) the objectives of the program, having due regard to the nature of the surrounding area and the proposed end-use of the excavation site;
- (b) whether restoration and reinstatement of the excavation site is to be undertaken progressively or upon completion of excavation operations;
- (c) how any face is to be made safe and batters sloped;
- (d) the method by which topsoil is to be replaced and revegetated;
- (e) the numbers and types of trees and shrubs to be planted and other landscaping features to be developed;
- (f) how rehabilitated areas are to be maintained; and
- (g) the program for the removal of buildings, plant, waste and final site clean up.<sup>46</sup>

4.27 The activities prescribed in Schedules 3.1 and 3.2 of the LGA are specific (see Appendix 3). In the Committee's view, the prescribed activities which are most obviously relevant to an excavation site are Schedule 3.1, Division 1, clauses 4 and 6 and Schedule 3.1, Division 2, clause 2. These prescribed activities are likely to be much narrower than the range of activities required by the restoration and reinstatement conditions in any excavation licence.

4.28 It could be argued that there is no direct inconsistency between clause 7.4(1) of the local law and the LGA because the activity for which the Shire is authorised to enter would depend on the conditions of each licence and whether that particular activity was prescribed in either

---

<sup>46</sup> *Shire of Victoria Plains Extractive Industries Local Law 2018* cl 3.5.

Schedule 3.1 or Schedule 3.2 of the LGA. When interpreting clause 7.4(1), the Shire's power of entry should be read as being constrained by the limits set in the Schedules.

- 4.29 For example, if a licence issued under the local law required the licensee to build a retaining wall to prevent or minimise the movement of sand and rocks on or from the land, the Shire's entry would be authorised by section 3.25 and Schedule 1, Division 1, clause 6 of the LGA. If the licence required trees to be planted to re-vegetate the site, the Shire's entry would not be authorised under the LGA and therefore could not be authorised under the local law.
- 4.30 Although there is no direct inconsistency between clause 7.4(1) and the LGA, the Committee was of the view that it would be prudent to amend clause 7.4 to clearly state that the power of entry is subject to sections 3.25 and 3.27, and Schedules 3.1 and 3.2 of the LGA.

### **Power of entry—clause 8.3(1)**

- 4.31 Clause 8.3 provides the Shire with an even wider power of entry than clause 7.4(1):
- (1) If a person fails to comply with a notice referred to in clause 8.1 [notice to remedy non-compliance], the local government may—
    - (a) do the thing specified in the notice;
    - (b) take whatever remedial action it considers appropriate and which would have been if the breach or failure had not occurred; and
    - (c) recover all costs from the licensee, as a debt.
  - (2) The provisions of this clause are subject to section 3.25 and item 12 of Division 1 of Schedule 3.1 of the *Local Government Act 1995* and any power of entry exercised by the local government under this local law is subject to Part 3, Division 3 of the *Local Government Act 1995*.
- 4.32 It was encouraging to see an attempt by the Shire, in clause 8.3(2), to constrain the power of entry provided in clause 8.3(1). However, clause 8.3 should be expressed to be subject to sections 3.25 and 3.27, and Schedules 3.1 and 3.2, not just section 3.25 and Schedule 3.1, Division 1, item 12 (item 12 relates only to the fixing of fences on private land abutting public land).<sup>47</sup>
- 4.33 For the reasons set out in relation to clause 7.4(1), clause 8.3 is also potentially inconsistent with, and not within power of, the LGA. There is no equivalent clause in the WALGA template extractive industries local law.
- 4.34 It was also encouraging to see an attempt by the Shire, in clause 8.3(2), to ensure that any power of entry is exercised in a way that is consistent with Part 3, Division 3 of the LGA. However, the reference should be more specific; it should include Subdivision 3.
- 4.35 It could be argued that the following phrase in clause 8.3(2) saves the powers of entry in both clauses 7.4(1) and 8.3(1):
- any power of entry exercised by the local government under this local law is subject to Part 3, Division 3 [, Subdivision 3] of the *Local Government Act 1995*.
- 4.36 This is because sections 3.25 and 3.27 are contained in Part 3, Division 3 of the LGA. However, in the interests of clarity, the Committee considered it would be best not to rely on this phrase in its current context. To put the matter beyond doubt, the Committee

---

<sup>47</sup> Clause 8.3(2) may have been based on a similar subclause in the WALGA template fencing local law: cl 5.1(4).

considered it would be prudent for the phrase, as corrected, to be deleted from clause 8.3 and placed in a stand-alone clause.

4.37 The Shire provided the undertakings requested by the Committee.

## **5 Conclusion**

5.1 The Committee performs the important role of overseeing delegated legislation on behalf of the Parliament, and giving guidance where necessary to persons and bodies making delegated legislation. The Committee looks forward to another productive and fulfilling year in 2019.



Ms Emily Hamilton MLA  
**Chair**

# APPENDIX 1

## CITY OF KARRATHA BUSH FIRE BRIGADES AMENDMENT LOCAL LAW 2018

3 April 2018

GOVERNMENT GAZETTE, WA

1179

### LOCAL GOVERNMENT ACT 1995 BUSH FIRES ACT 1954

CITY OF KARRATHA

### BUSH FIRE BRIGADES AMENDMENT LOCAL LAW 2018

Under the powers conferred by the *Local Government Act 1995*, *Bush Fires Act 1954* and under all other powers enabling it, the Council of the City of Karratha resolved on 22 January 2018 to make the following local law.

#### PART 1—PRELIMINARY

##### 1. Citation

This local law may be cited as the *City of Karratha Bush Fire Brigades Amendment Local Law 2018*.

##### 2. Commencement

This local law comes into operation 14 days after the date of its publication in the *Government Gazette*.

##### 3. Principal local law

This local law amends the *Shire of Roebourne Bush Fire Brigades Local Law*, published in the *Government Gazette* on 16 June 2003.

##### 4. Title amended

The title of the local law is amended by deleting "Shire of Roebourne" and inserting "City of Karratha".

##### 5. Clause 1.1 amended

In clause 1.1 delete "Shire of Roebourne" and insert "City of Karratha".

##### 6. Clause 1.4 inserted

Insert the following clause after clause 1.3—

###### 1.4 Clause 1.2

(1) In clause 1.2(1)—

(a) Insert the following definitions in alphabetical order—

(i) "active member" is defined in clause 4.2;

(ii) "Bush Fire Control Officer" means a bush fire control officer appointed under the Act;

(iii) "Department" means the department of the Public Service principally assisting in the administration of the *Fire and Emergency Services Act 1998*;

(iv) "district" means the district of the local government;

(v) "normal brigade activities" is defined by section 35A of the Act;

(b) In the definition for "brigade member" delete "a fire fighting member" and insert "an active member";

(c) In the definition of "Bush Fire Operating Procedures" delete "Bush Fire" and insert "Department Standard", and delete "adopted by the local government";

(d) In the definition of "Rules" delete "Rules Governing the Operation of Bush Fire Brigades" and insert "Bush Fire Brigade Operational and Management Guide";

(e) Delete the definition for "Authority";

(f) Delete the definition for "fire fighting member".

##### 7. Clause 3 amended

Insert the following after clause 3.3—

###### 3.4 First Schedule amended

The First Schedule is amended as follows—

(a) in the Schedule title, delete "RULES GOVERNING THE OPERATION OF BUSH FIRE BRIGADES" and insert "BUSH FIRE BRIGADE OPERATIONAL AND MANAGEMENT GUIDE";

- (b) delete "the Authority" and insert "the Department" in every instance;
- (c) delete "FESA" and insert "Department" in every instance;
- (d) delete "May" and insert "January" in every instance;
- (e) in clause 3.1 of the First Schedule, delete "Bush Fire Operating Procedures" and insert "Fire and Emergency Services Commissioner Standard Operating Procedures"; and
- (f) in clause 3.1 of the First Schedule, delete "fire fighting" and insert "normal brigade".

In clause 5.4 of the First Schedule, delete "offices (whether vacant or not) of member" and insert "members"

#### **8. Additional clauses inserted**

Insert the following clauses after clause 3—

##### **"4. Part 2 amended**

##### **4.1 Clause 2.3 amended**

In clause 2.3—

- (a) delete all instances of "Bush Fire Operating Procedures" and insert "Fire and Emergency Services Commissioner Standard Operating Procedures";
- (b) delete all instances of "other persons" and insert "all persons".

##### **4.2 Clause 2.7 amended**

In clause 2.7 delete "Bush Fire Operating Procedures" and insert "Fire and Emergency Services Commissioner Standard Operating Procedures".

##### **5. Part 3 amended**

##### **5.1 Clause 3.2 amended**

In clause 3.2 delete "Bush Fire Operating Procedures" and insert "Fire and Emergency Services Commissioner Standard Operating Procedures".

##### **5.2 Clause 3.7 amended**

In clause 3.7 after the word "next" insert "annual".

##### **6. Part 4 amended**

##### **6.1 Clause 4.1 amended**

In clause 4.1 delete "Fire fighting members" and insert "Active members".

##### **6.2 Clause 4.2 amended**

Clause 4.2 is amended as follows—

- (a) In the clause title, delete "Fire fighting" and insert "Active".
- (b) (2) Delete "Fire fighting" and insert "Active".
- (c) Delete "bush fire".

##### **6.3 Clause 4.3 amended**

Clause 4.3 is amended as follows—

- (a) After "render other" insert "voluntary".
- (b) Delete "fire fighting members" and insert "active members".

##### **6.4 Clause 4.4 amended**

Clause 4.4 is amended as follows—

- (a) In subclause (a) delete "15" and insert "16".
- (b) In subclause (d) delete "a fire fighting member" and insert "an active member".
- (c) In subclause (f) after "ranks under" delete "the Authority's" and insert "the brigade's".

##### **7. Part 6 amended**

##### **7.1 Clause 6.2 amended**

In clause 6.2 delete "May" and insert "January". "

Dated this 20th day of March 2018.

The Common Seal of the City of Karratha was affixed by authority of a resolution of the Council in the presence of—

P. LONG, Mayor.  
C. ADAMS, Chief Executive Officer.

## APPENDIX 2

---

### SHIRE OF ROEBOURNE BUSH FIRE BRIGADES LOCAL LAW

16 June 2003

GOVERNMENT GAZETTE, WA

2195

LOCAL GOVERNMENT ACT 1995

SHIRE OF ROEBOURNE

### BUSH FIRE BRIGADES LOCAL LAW

Under the powers conferred by the *Bush Fires Act 1954* and under all other powers enabling it, the Council of the *Shire of Roebourne* resolved on 14 April 2003 to make the following local law.

The Bush Fire Brigades Local Law of the Shire of Bridgetown-Greenbushes published in the *Government Gazette* of 20 October 2000, is adopted as a local law of the Shire of Roebourne with the modifications which follow—

#### 1. Preliminary

1.1 Wherever the “Shire of Bridgetown-Greenbushes” is mentioned in the local law substitute “Shire of Roebourne”.

1.2 In clause 1.2 delete the definition of “Bush Fire Management Committee”.

1.3 Wherever “Bush Fire Management Committee” or “Management Committee” are mentioned in the local law substitute “Bush Fire Advisory Committee” and “Advisory Committee” respectively.

#### 2. Clause 1.3—Repeal

Delete clause 1.3 and substitute—

“All previous Local Laws of the Shire of Roebourne Relating to the Organisation, Establishment, Maintenance and Equipment of Bush Fire Brigades, are repealed.”

#### 3. First Schedule—Rules Governing the Operation of Bush Fire Brigades

##### 3.1 Clause 2.4—Applications for membership

Delete “of that in Appendix 1” and substitute “determined by the local government from time to time.”.

##### 3.2 Clause 2.9—Existing liabilities to continue

In subclause (1) delete “2.6” and substitute “2.7”.

##### 3.3 Delete Appendixes I and II.

Dated this 14th day of April 2003.

The Common Seal of the Shire of Roebourne was affixed in the presence of—

K. J. RICHARDS, President.  
T. S. RULAND, Chief Executive Officer.



## APPENDIX 3

---

### LGA SCHEDULES 3.1 AND 3.2

#### Schedule 3.1 — Powers under notices to owners or occupiers of land

[Section 3.25(1)]

##### Division 1 — Things a notice may require to be done

1. Prevent water from dripping or running from a building on the land onto any other land.
2. Place in a prominent position on the land a number to indicate the address.
3. Modify or repair, in the interests of the convenience or safety of the public, anything constructed as mentioned in Schedule 9.1, clause 8, or repair any damage caused to the public thoroughfare or other public place mentioned in that clause.
4. (1) Ensure that land that adjoins a public thoroughfare or other public place that is specified for the purposes of this item by a local law —
  - (a) is suitably enclosed to separate it from the public place; and
  - (b) where applicable, is enclosed with a close fence, to the satisfaction of the local government, suitable to prevent sand or other matter coming from the land onto the public place.
- (2) The notice cannot be given to an occupier who is not an owner.
5. (1) Ensure that unsightly land is enclosed, to the satisfaction of the local government, with a fence or other means suitable to prevent the land, so far as is practicable, from being unsightly.
- (2) In this item —

*unsightly*, in relation to land, means having an appearance that, because of the way in which the land is used, does not conform with the general appearance of other land in the locality.
- (3) The notice cannot be given to an occupier who is not an owner.
- 5A. (1) Ensure that overgrown vegetation, rubbish, or disused material, as specified, is removed from land that the local government considers to be untidy.
- (2) In this item —

*disused material* includes disused motor vehicles, old motor vehicle bodies and old machinery.

[5B. Deleted by No. 16 of 2016 s. 41.]

6. Take specified measures for preventing or minimising the movement of sand, silt, clay or rocks on or from the land if, in the opinion of the local government, that movement would be likely to adversely affect other land.
7. Ensure that land that adjoins a public thoroughfare or other public place that is specified for the purposes of this item by a local law is not overgrown.
8. Remove all or part of a tree that is obstructing or otherwise prejudicially affecting a thoroughfare that is under the local government's control or management and adjoins the land where the tree is situated.
9. Ensure that a tree on the land that endangers any person or thing on adjoining land is made safe.
10. Take specified measures for preventing or minimizing —
  - (a) danger to the public; or
  - (b) damage to property,which might result from cyclonic activity.
11. Remove bees that are likely to endanger the safety of any person or create a serious public nuisance.
12. Ensure that an unsightly, dilapidated or dangerous fence or gate that separates the land from land that is local government property is modified or repaired.
13. Take specific measures to prevent —
  - (a) artificial light being emitted from the land; or
  - (b) natural or artificial light being reflected from something on the land,creating a nuisance.
14. (1) Remove or make safe anything that is obstructing or otherwise prejudicially affecting a private thoroughfare so that danger to anyone using the thoroughfare is prevented or minimised.  
  
(2) In this item —  
*private thoroughfare* has the same meaning as in Schedule 9.1 clause 7(1).

[Division 1 amended in Gazette 29 Apr 1997 p. 2144; amended by No. 49 of 2004 s. 72; No. 17 of 2009 s. 46; No. 16 of 2016 s. 41.]

**Division 2 — Provisions contraventions of which may lead to a notice requiring things to be done**

1. Regulations under Schedule 9.1, clause 3 (Obstructing or encroaching on public thoroughfare).
- 1A. Regulations under Schedule 9.1, clause 5(1) (Gates and other devices across public thoroughfares) requiring a person to remove a gate or other device from across a public thoroughfare when requested by a local government to do so.
2. Regulations under Schedule 9.1, clause 6 (Dangerous excavation in or near public thoroughfare).
- 2A. Regulations under Schedule 9.1, clause 7(2) (Crossings from public thoroughfares to private land or to private thoroughfares) that —
  - (a) prohibit a person from constructing a crossing; or
  - (b) by means of a notice in writing given to a person by the Commissioner of Main Roads, require the person to bring a crossing into accordance with an approval by the Commissioner of Main Roads or to remove a crossing and restore the place where it was to its former condition.
3. Regulations under Schedule 9.1, clause 8(1) (Constructing private works on, over, or under public places).
4. Regulations under Schedule 9.1, clause 9 (Protection of watercourses, drains, tunnels and bridges).
5. Regulations under Schedule 9.1, clause 10 (Protection of thoroughfares from water damage).
6. Regulations under Schedule 9.1, clause 12 (Wind erosion and sand drifts).

*[Division 2 amended in Gazette 24 Jun 1996 p. 2862.]*

## **Schedule 3.2 — Particular things local governments can do on land even though it is not local government property**

[Section 3.27(1)]

1. Carry out works for the drainage of land.
2. Do earthworks or other works on land for preventing or reducing flooding.
3. Take from land any native growing or dead timber, earth, stone, sand, or gravel that, in its opinion, the local government requires for making or repairing a thoroughfare, bridge, culvert, fence, or gate.

Section 3.36 applies.

Section 3.27(3) applies.

4. Deposit and leave on land adjoining a thoroughfare any timber, earth, stone, sand, gravel, and other material that persons engaged in making or repairing a thoroughfare, bridge, culvert, fence, or gate do not, in the local government's opinion, require.

Section 3.36 applies.

Section 3.27(3) applies.

5. Make a temporary thoroughfare through land for use by the public as a detour while work is being done on a public thoroughfare.

Section 3.36 applies.

Section 3.27(3) applies.

6. Place on land signs to indicate the names of public thoroughfares.
7. Make safe a tree that presents serious and immediate danger, without having given the owner the notice otherwise required by regulations.

[8. Deleted by No. 16 of 2016 s. 42.]

[Schedule 3.2 amended by No. 17 of 2009 s. 47; No. 16 of 2016 s. 42.]

## GLOSSARY

---

Term	Definition
<b>Committee</b>	Joint Standing Committee on Delegated Legislation
<b>DLGSC</b>	Department of Local Government, Sport and Cultural Industries
<b>DMIRS</b>	Department of Mines, Industry Regulation and Safety
<b>LGA</b>	<i>Local Government Act 1995</i>
<b>TOR</b>	Term(s) of Reference
<b>WALGA</b>	Western Australian Local Government Association

# Joint Standing Committee on Delegated Legislation

## Date first appointed:

15 June 2017

## 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*.





---

Parliament House,  
4 Harvest Terrace, West Perth WA 6005  
Telephone: +61 8 9222 7222  
Email: [lcco@parliament.wa.gov.au](mailto:lcco@parliament.wa.gov.au)  
Website: <http://www.parliament.wa.gov.au>