



THIRTY-NINTH PARLIAMENT

**JOINT STANDING COMMITTEE ON DELEGATED
LEGISLATION**

REPORT 67

INFORMATION REPORT IN RELATION TO

***CITY OF FREMANTLE PLASTIC BAG REDUCTION
LOCAL LAW 2012***

Presented by Mr Peter Abetz MLA (Chair)

and

Hon Robin Chapple MLC (Deputy Chair)

October 2013

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:

“6. Joint Standing Committee on Delegated Legislation

- 6.1 A *Joint Standing Committee on Delegated Legislation* is established.
- 6.2 The Committee consists of 8 Members, 4 of whom are appointed from each House. The Chairman must be a Member of the Committee who supports the Government.
- 6.3 A quorum is 4 Members of whom at least one is a Member of the Council and one a Member of the Assembly.
- 6.4 (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.
- 6.5 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.
- 6.6 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.
- 6.7 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.
- 6.8 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 (Chair) | Hon Ljiljanna Ravlich MLC (Deputy Chair) until 16 October 2013 |
| Hon John Castrilli MLA | Hon Robin Chapple MLC (Deputy Chair) from 16 October 2013 |
| Hon Peter Katsambanis MLC | Hon Mark Lewis MLC |
| Ms Simone McGurk MLA | Mr Peter Watson MLA |

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EXECUTIVE SUMMARY AND RECOMMENDATION FOR THE
REPORT OF THE JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION
IN RELATION TO THE INFORMATION REPORT ON
CITY OF FREMANTLE PLASTIC BAG REDUCTION LOCAL LAW 2012

EXECUTIVE SUMMARY

- 1 The Joint Standing Committee on Delegated Legislation (**Committee**) is of the view that the *City of Fremantle Plastic Bag Reduction Local Law 2012* (**Local Law**) is, with exception of clause 6, within power of the *Local Government Act 1995*, under the Committee's Terms of Reference 6.6(a).
- 2 The Committee recognises there are a range of views whether:
 - clause 6 of the Local Law is within power of the *Local Government Act 1995*;
 - under the Committee's Terms of Reference 6.6(b) and (d), the Local Law:
 - a) has no unintended effect on any person's existing rights or interests;
 - b) contains only matter that is appropriate for subsidiary legislation.
- 3 This report details the Committee's position on the Local Law being within power as well as the range of views referred to above, consistent with its Term of Reference 6.4(b), for the information of the Legislative Council.

RECOMMENDATION

- 4 The recommendation is as it appears in the text at the page number indicated:

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Recommendation 1: The Committee recommends that the Legislative Council and the Legislative Assembly take note of the range of views expressed in this report on whether the *City of Fremantle Plastic Bag Reduction Local Law 2012* satisfies the Committee's Terms of Reference.

REPORT OF THE JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

IN RELATION TO THE INFORMATION REPORT ON

CITY OF FREMANTLE PLASTIC BAG REDUCTION LOCAL LAW 2012

1 INTRODUCTION

Reference and Procedure

- 1.1 The *City of Fremantle Plastic Bag Reduction Local Law 2012 (Local Law)*, published in the *Government Gazette* on 22 February 2013, falls within the definition of ‘Instrument’ in the Terms of Reference of the Joint Standing Committee on Delegated Legislation (**Committee**).
- 1.2 The Local Law was tabled in the Legislative Council on 14 May 2013 and stood referred to the Committee upon its publication in the *Government Gazette*. It is attached as **Appendix 1**. Once a local law is tabled in the Parliament, it is an instrument which is subject to disallowance.
- 1.3 In order to facilitate Committee scrutiny, a *Notice of Motion* to disallow the Local Law was tabled in the Legislative Council on 8 August 2013.

Background

- 1.4 The Committee notes there are a number of state and territory laws either in place or in the process of being introduced in Australia regulating the use of plastic bags.¹
- 1.5 A useful summary of the status of plastic bag regulation in Australia appears in a report prepared by the New South Wales Parliamentary Research Service in April 2013.²
- 1.6 The Local Law is the first of its kind introduced by a local government in Western Australia, and possibly Australia, regarding the regulation of the use of plastic bags.³

¹ Outright bans on plastic bags of less than 35 microns in thickness have been introduced in the ACT (Plastic Shopping Bags Ban Act 2010), South Australia (Plastic Shopping Bags (Waste Avoidance) Act 2008), the Northern Territory (Environmental Protection (Beverage Containers and Plastic Bags) Act 2012) and Tasmania (Plastic Shopping Bags Ban Bill 2013). The Local Law introduces a ban on plastic bags of not less than 60 microns in thickness.

² New South Wales Parliamentary Research Service, e-brief, Plastic Bags: an update, April 2013, available at: [http://www.parliament.nsw.gov.au/prod/parlment/publications.nsf/key/Plasticbags:anupdate/\\$File/Plasticbags+-+an+update.pdf](http://www.parliament.nsw.gov.au/prod/parlment/publications.nsf/key/Plasticbags:anupdate/$File/Plasticbags+-+an+update.pdf)

³ The background to the Local Law can be found on the City’s website at: http://www.fremantle.wa.gov.au/home/List_of_News_and_Media/2013/February/Fremantle_plastic_bag_reduction_law_sets_new_benchmark_in_WA

The Local Law

- 1.7 The Local Law was adopted by the Council of the City of Fremantle (**City**) on 30 January 2013 and came into effect on 21 August 2013 but was not implemented, as is advised on the City's website.⁴
- 1.8 The Local Law seeks to reduce the use of plastic shopping bags within the City by:
- 1.8.1 prohibiting retailers from providing "*single use plastic bags*"; and
 - 1.8.2 requiring retailers to charge a minimum fee of 10 cents for each "*alternative shopping bag*" provided to customers.
- 1.9 The City seeks to justify the Local Law on the basis of waste reduction as well as to modify consumer behaviour for this purpose.⁵

2 COMMITTEE SCRUTINY

Clause 6 of the Local Law

- 2.1 Clause 6 states:

6. Charge to be imposed for provision of alternative shopping bag

A retailer shall not provide an alternative shopping bag to a customer as a means of carrying goods purchased, or to be purchased, from the retailer unless the retailer requires the customer to pay a fee of not less than 10 cents for the provision of the alternative shopping bag.

- 2.2 Clause 6 appears to be unprecedented in Western Australia. The Committee is not aware of any other current or past local law in Western Australia which gives a local government a power to compel a 3rd party (in this case, a retailer) to charge a fee to another party (the customer) which the retailer will retain and not the local government.
- 2.3 The Committee also notes there appears to be no similar clause in any state or territory laws in Australia.⁶

⁴ See http://www.fremantle.wa.gov.au/investment/News_and_events/2013/City_of_Fremantle_Plastic_Bag_Reduction_Local_Law_2012_-_important_information_for_retailers.

⁵ Op.cit, n3.

⁶ The laws either do not regulate whether a retailer charges for a plastic bag or they contain a provision worded as follows: "*This section does not prevent a retailer from requiring a customer to pay a fee for the provision of an alternative shopping bag.*" There are also numerous overseas examples (such as in the United States) of businesses being required by local governments to charge for the provision of a plastic bag.

Clause 7 of the Local Law

2.4 Clause 7 states:

7. Person must not represent that supplied single use plastic shopping bag is not a single use plastic shopping bag

A person shall not sell, supply or provide a bag to another knowing that it is a single use plastic shopping bag if prior to, or in the course of, selling, supplying or providing the bag, the person represents to the other that the bag is not a single use plastic shopping bag.

2.5 In a letter of 20 June 2013 to the City, the Committee requested a rationale for including clause 7 in the Local Law. A copy of this letter is attached as **Appendix 2**.⁷

2.6 The Committee's principal concern with clause 7 was its potential for a very wide application, which could cover selling, supplying or the provision of plastic bags by any person to any other person in any situation. The Committee put the following scenario to the City.

*As the clause makes it an offence for a person to provide to another person a single use plastic bag, if prior to providing this bag to that person they represent it is not a single use plastic bag, there could be a scenario in a private household where this occurs and a technical breach of the Local Law would have been committed.*⁸

2.7 The City's legal advisors provided the following clarification about the intent of clause 7 in a letter of 27 June 2013.

In relation to clause 7 of the Local Law, I am instructed that the clause refers to a "person" rather than a "retailer" as it was envisaged that it would apply to third parties that supply plastic bags to retailers.

*It intends to address the situation where a third party knowingly supplies single use plastic shopping bags to a retailer and deter suppliers from intentionally misrepresenting retailers about their composition, thickness and bio-degradability.*⁹

To address the Committee's concerns, the clause could be amended by substituting the words 'a retailer' in place of the word 'another' in the

⁷ Letter from Mr Peter Abetz MLA to Dr Brad Pettit, Mayor, City of Fremantle, 20 June 2013.

⁸ Ibid, pp1-2.

⁹ Letter from Mr David Nicholson, Partner, McLeods, to Mr Peter Abetz MLA, 27 June 2013, p1.

*first line of the clause and substituting the word ‘retailer’ in place of the word ‘other’ in the last line of the clause. Its application would then be limited to a commercial, retailing context and it would also not apply in a scenario where a shop assistant mistakenly supplies a single use plastic bag to a customer, representing it as something other than a single use plastic bag.*¹⁰

2.8 A copy of this letter is attached as **Appendix 3**.

2.9 This feedback went some way to allaying the Committee’s concerns about clause 7. A further amendment inserting a specific definition of “*person*” in the clause as “*someone in the business of supplying plastic bags*” would ensure a member of the public or a shop assistant is fully excluded from the operation of the clause.

Term of Reference 6.6(a)

Generally

2.10 Sections 3.1 and 3.5(1) of the *Local Government Act 1995 (Act)* are relevant to the scope of the local law making power of the City. They provide as follows:

3.1. General function

- (1) *The general function of a local government is to provide for the good government of persons in its district.*
- (2) *The scope of the general function of a local government is to be construed in the context of its other functions under this Act or any other written law and any constraints imposed by this Act or any other written law on the performance of its functions.*
- (3) *A liberal approach is to be taken to the construction of the scope of the general function of a local government.*

3.5. Legislative power of local governments

- (1) *A local government may make local laws under this Act prescribing all matters that are required or permitted to be prescribed by a local law, or are necessary or convenient to be so prescribed, for it to perform any of its functions under this Act.*

2.11 Section 1.3(2) of the Act provides:

¹⁰ Op cit, n9, pp1-2.

1.3. Content and intent

(3) *In carrying out its functions a local government is to use its best endeavours to meet the needs of current and future generations through an integration of environmental protection, social advancement and economic prosperity.*

- 2.12 The legal principles to take into account when deciding whether a local law provides for the ‘good government’ of persons in a local government district are discussed in the Committee’s 46th Report and have been taken into account by the Committee in its consideration of the Local Law.¹¹
- 2.13 The critical question is whether the subject matter of the Local Law, by aiming to reduce the use of plastic bags within the City of Fremantle, falls within the accepted notions of local government?
- 2.14 The City’s legal advisors provided the Committee with the following information in support of the Local Law being within power of the Act.

The prohibition on the sale and supply of single use plastic shopping bags by retailers in the district of the City comprises one waste avoidance and waste reduction initiative undertaken by the City that would facilitate environmental protection by reducing the waste stream to landfill sites, thereby meeting the needs of both current and future generations in a manner consistent with section 1.3 of the LG Act.

It is also the experience of the City that single use plastic bags contribute significantly to litter within Fremantle town site and elsewhere in the district of the City. Restricting the sale of [sic] supply of single use plastic bags in a retailing context is likely to reduce this particular source of litter, thereby improving the standards of amenity experienced by persons within the City.

*The management of litter and waste, together with other environmental issues relevant to general amenity, additionally fall within accepted notions of local government.*¹²

- 2.15 The City’s legal advisors also stated that:

¹¹ Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, Report 46, *City of Gosnells Waste Local Law 2011 and Shire of Derby/West Kimberley Waste Services Local Law 2011*, 24 November 2011, pp12-15.

¹² Op.cit., n9, p3.

- the regulation of the sale and supply of single use plastic shopping bags by retailers is comparable to well established forms of local government regulation of activities, which may comprise environmental protection or general amenity; and
 - a prohibition on the sale and supply of single use plastic bags by retailers would contribute to the good government of persons in the City's district by:
 - a) integrating considerations of environmental protection, through a reduction in the quantity of waste going to landfill; and
 - b) protecting the standard of general amenity, by eliminating a significant source of litter.
- 2.16 The Committee is of the view that, with the exception of clause 6 (a range of views as to whether it is within power are set out below), the Local Law is within power of the Act for the following reasons.
- The Act describes the functions and powers of a local government in sections 3.1 and 3.5(1) in an extremely broad manner and in the widest possible terms.
 - It is the clear intention of Parliament that a liberal approach should be taken to the construction of the scope of these functions by virtue of section 3.1(3) of the Act.
 - The subject matter, purpose and scope of the Local Law comes within the ambit of the powers conferred on local governments under the Act. The reference to “*environmental protection*” in section 1.3(3) of the Act is an important factor in this regard.

Clause 6 of the Local Law

- 2.17 One view considered by the Committee is that the ambit of the law making power in the Act does not extend to enabling a local government to make a local law that contains the power set out in clause 6 for the following reasons.
- It amounts to an interference with trade and commerce in that it directly interferes with a retailer’s ability to determine the price of any product or service it is selling or providing.
 - To require a retailer to charge a fee and retain it for a product effectively amounts to price fixing (which could, if it was being initiated by a group of corporations, contravene fair trading legislation).
- 2.18 Further views on clause 6 are set out below under Terms of Reference 6.6(b) and (d).

Terms of Reference 6.6(b) and (d)

- 2.19 There are a broad range of views that have emerged in the process of the Committee's scrutiny of the Local Law under these Terms of Reference, which are set out below for the information of the Parliament in accordance with Term of Reference 6.4(b).

Term of Reference 6.6(b)

- 2.20 This Term of Reference has been applied by the Committee where delegated legislation attempts to erode rights or interests which were not intended by the empowering enactment.

Views supporting the Local Law offending 6.6(b)

- 2.21 'Rights or interests' have been recognised as including the freedom of individuals to trade as they wish.¹³
- 2.22 Before the Local Law came into force, retailers in the City had the right, as do others in the State, to provide customers with a plastic bag as a service, free of charge, to assist them in carrying products purchased from the retailer.
- 2.23 This is an important part of the retailer's relationship with its customers and is an expression of its right to carry on its business in its own way.
- 2.24 Clause 6 of the Local Law interferes with this right by:
- preventing a retailer from supplying a certain type of plastic bag to its customers; and
 - requiring the retailer to treat other types of plastic bags as purchasable products, which did not previously have that characteristic.
- 2.25 This removal of the freedom of a retailer to decide how it will assist its customers in carrying products goes to the heart of how a business trades with its customers.
- 2.26 While there are a number of existing local laws that regulate trading by businesses, such as those covering where trading may take place, it has been argued that the interference caused by clause 6 in the retailer's relationship with its customers has an effect on the rights of retailers in the City that goes beyond that which is intended by the Act.
- 2.27 In other words, the Act does not intend for a local government to interfere in how a business provides a service to its customers to the extent provided for in clause 6. It

¹³ *Momcilovic v The Queen* (2011) HCA 34 at paragraph 444 per Heydon J, citing *The Commonwealth and the Postmaster-General v The Progress Advertising and Press Agency Co Pty Ltd* [1910] HCA 28.

should be up to a retailer to decide whether they will charge for a service they are offering to their customer.

2.28 Compelling a retailer to charge a fee to their customers for the provision of an “*alternative plastic bag*” and to retain that fee creates a precedent which could take the form of a local law requiring any person or organisation to charge and retain a fee for whatever the local government deems is appropriate. For example:

- A local government may require a retailer selling health foods amongst a number of fast food outlets to charge a very high price for certain products on the basis that the sale of these products is not consistent with the type of businesses in the area.
- Conversely, fast food outlets may be required to charge a certain price for products when deemed inconsistent with other products being sold in the area.
- In another context, a local government may make a local law that requires a property owner to charge tourists/visitors access fees to their property and retain them for the purposes of funding council services, such as rubbish collection.

2.29 There have also been reports that the existing bans in states and territories on plastic bags have resulted in an increase in the sales of bin liners. It has been reported the increase has been around 80% in South Australia.¹⁴

2.30 While it is unclear whether the Local Law would have a similar effect in the City, the potential remains for bin liners ending up as rubbish at waste sites both within and outside of the district. It has been argued by some that this would be an unintended consequence of the Local Law outside of the district.

Views supporting the Local Law complying with 6.6(b)

2.31 The Local Law clearly has an intended effect on the behaviour of retail customers in the City despite being directed at retailers by prohibiting them from providing certain plastic bags or charging a fee for other types of plastic bags.

2.32 By requiring retailers to charge customers for a plastic bag, the intended effect of the Local Law appears to be that retailers recover a cost that they normally would have absorbed and passed on to the customer through product pricing. Therefore, the Local Law does not create a cost impost for retailers or impinge on their existing rights or interests.

¹⁴ Review of the *Plastic Shopping Bags (Waste Avoidance) Act 2008*, Martin Aspin, November 2012, p3.

- 2.33 All customers have a right to purchase a plastic bag, or to provide their own. Providing bags for goods is not a requirement for retailers, from a legal perspective, and so, while temporary inconvenience may be an initial consequence of the Local Law while the community adjusts to the new requirements, no rights or interests have been impinged upon.
- 2.34 It has also been argued by some that no unintended effect is caused as, for all intents and purposes, the Local Law is designed to create a deliberate disincentive to using/issuing plastic bags and to create incentives for retailers to offer alternatives (i.e. being able to charge for them under the Local Law).
- 2.35 Profits made by retailers from the sale of plastic bags will assist them to effectively advertise the ban of plastic bags and provide re-useable bag options.
- 2.36 Despite evidence that sales of bin liners in South Australia increased, whether this represents an increase or decrease in total plastic bag consumption is unclear.

Term of Reference 6.6(d)

- 2.37 This term of reference is usually applied where the Committee forms the view that the subject matter of the instrument under scrutiny is likely to have such an impact (for example, economically, socially or environmentally) that it should be the subject of full debate in the Parliament.

Views supporting the Local Law offending 6.6(d)

- 2.38 Among the various matters that have been recognised as being appropriate for primary rather than delegated legislation are the following.
- a) Significant questions of policy including significant new policy or fundamental changes to existing policy.
 - b) Provisions imposing obligations on citizens or organisations to undertake certain activities.
 - c) Provisions imposing taxes, levies, or significant fees and charges.¹⁵
- 2.39 It has been argued by some that clause 6 of the Local Law falls within each of these categories and, as such, should be in primary, not subsidiary, legislation.
- 2.40 Regarding category (c) in paragraph 2.38 above, although the fee does not come within the legal definition of a tax¹⁶, as it is not collected by the City but retained by retailers, it

¹⁵ Department of the Prime Minister and Cabinet, *Legislation Handbook* (as at May 2000), pp3-4, quoted in Pearce and Argument, *Delegated Legislation in Australia*, 4th edition, pp119-120.

shares the critical characteristic of being a compulsory exaction which is more appropriate for primary legislation. There is currently no head of power in primary legislation that appears to authorise the imposition by the City of the fee.

2.41 Also, it has been suggested to the Committee there is no evidence to suggest the fee would equate to achieving cost recovery by retailers. All indications are that it imposes a 'penalty' or 'disincentive' to discourage consumers using plastic bags. Fees that are over cost recovery are considered to be a tax.

2.42 Additionally, it is also notable that no state or territory legislation currently in place regulating plastic bags contains any provision similar to clause 6.

2.43 Some potential negative outcomes that may result from the Local Law remaining in force that underline the strong desirability of its subject matter being handled at a state or federal level are as follows.

- An imposition of a direct cost on a consumer that will increase the cost of goods purchased, with a disproportionate impact on low value purchases.
- A direct imposition on a retailer regarding the price that they may provide their goods or services for sale, analogous to a price control measure.
- An added administrative burden on retailers generally and especially on those who have business premises both within the boundaries of the City and outside the boundaries of the municipality.
- A potential shift of clientele to retailers in neighbouring municipalities which will have a negative impact on retailers and job opportunities within the City.
- Confusion and unnecessary angst for infrequent visitors to the City, especially to the tens of thousands of tourists attracted to the area each year.
- Even further confusion, uncertainty and administrative difficulty if neighbouring municipalities chose to implement local laws relating to the same subject matter with minor or major differences to the provisions in the Local Law. Such a proliferation of inconsistent local laws may be in terms of charging for plastic bags as well as the types of plastic bags that are permitted. As a number of retailers operating in the City operate throughout the State, this would cause a significant administrative burden for them as well as confusion for customers.

¹⁶

See *Matthews v Chicory Marketing Board* (1938) 60 CLR at 270 per Latham CJ.

- 2.44 It has been suggested to the Committee that a consistent law throughout the State, or nationally, would alleviate the negative outcomes identified above; create certainty and a level playing field, ensuring all retailers in Western Australia are subject to the same requirements.

Views supporting the Local Law complying with 6.6(d)

- 2.45 The fact that the wording in the Act giving local governments in Western Australia powers to make laws is so broad places a heavy onus on the Committee not to disallow any local law without an explicit reason.

- 2.46 Section 3.2 of the Act states (emphasis in bold added):

*The scope of the general function of a local government in relation to its district is not limited by reason only that the Government of the State performs or **may** perform functions of a like nature.*

- 2.47 That the Local Law may be better dealt with in the state or federal jurisdiction may not, in itself, be a good reason to discount the powers given to local governments under the Act.

- 2.48 Neither the Federal or the State Government has, to date, introduced specific legislation to regulate the sale of plastic bags. On a number of occasions various Members have tabled questions in Parliament relating to when or if the Western Australian Government will introduce such legislation.

- 2.49 There is widespread community support for changes in plastic shopping bag use and industry has already shown leadership on this issue. For example, Bunnings, Ikea, Officeworks and The Body Shop all have store policies in place and are either plastic bag-free, or charge a small amount for a compostable bag. These charges have not stopped people from shopping at these stores.

- 2.50 In the absence of either state or federal legislation regulating plastic bag use in Western Australia, the City has taken the initiative in passing the Local Law and some have argued that the City should be commended for leadership in this policy area.

3 CONCLUSION

- 3.1 While the Committee is of the view that the Local Law, with the exception of clause 6, is within power of the Act, Committee members have a range of views on whether:

- clause 6 of the Local Law is within power of the Act;
- the Local Law offends 6.6(b) and (d) of the Committee's Terms of Reference.

- 3.2 The Committee recognises a range of views on this issue and informs the Parliament accordingly in its consideration of the *Notice of Motion* tabled by the Committee to disallow the Local Law.

Recommendation 1: The Committee recommends that the Legislative Council and the Legislative Assembly take note of the range of views expressed in this report on whether the *City of Fremantle Plastic Bag Reduction Local Law 2012* satisfies the Committee's Terms of Reference.



Mr Peter Abetz MLA

Chair

24 October 2013

APPENDIX 1

CITY OF FREMANTLE PLASTIC BAG REDUCTION LOCAL LAW 2012

22 February 2013

GOVERNMENT GAZETTE, WA

1011

— PART 1 —

LOCAL GOVERNMENT

LG301*

LOCAL GOVERNMENT ACT 1995

City of Fremantle

PLASTIC BAG REDUCTION LOCAL LAW 2012

Under the powers conferred by the *Local Government Act 1995* and under all other powers enabling it, the Council of the City of Fremantle resolved on 30 January 2013 to make the following local law.

1. Citation

This local law may be cited as the *City of Fremantle Plastic Bag Reduction Local Law 2012*.

2. Commencement

This local law comes into operation 180 days after the date of its publication in the *Government Gazette*.

3. Application

This local law shall apply throughout the district.

4. Definitions

In this local law unless the context otherwise requires—

“**Act**” means the *Local Government Act 1995*;

“**alternative shopping bag**” means—

- (a) a biodegradable bag; or
- (b) a reusable plastic bag.

“**AS**” means Australian Standard as published by Standards Australia;

“**authorised person**” means a person authorised by the local government under section 9.10 of the Act to administer or enforce the local law;

“**biodegradable bag**” means a carry bag comprised of material of a type that has been assessed and tested in accordance with the relevant standard and can, in accordance with the relevant standard, be designated as compostable;

“**district**” means the district of the local government;

“**local government**” means the City of Fremantle;

“**Regulations**” means the *Local Government (Functions and General) Regulations 1996*;

“**relevant standard**” means AS 4736/2006 Biodegradable plastics—Biodegradable plastics suitable for composting and other microbial treatment as amended from time to time;

“**retailer**” means a person selling retail goods;

“**reusable plastic bag**” means a carry bag—

- (a) the body of which comprises (in whole or in part) polyethylene, polypropylene or polyethylene terephthalate with a thickness of 60 microns or more; and
- (b) that includes handles.

“**single use plastic shopping bag**” means—

- (a) a carry bag—
 - (i) the body of which comprises (in whole or in part) polyethylene, polypropylene or polyethylene terephthalate with a thickness of less than 60 microns; and
 - (ii) that includes handles;

but does not include—

- (b) a biodegradable bag;
- (c) a reusable plastic bag; or
- (d) a plastic bag that constitutes, or forms an integral part of, the packaging in which goods are sealed prior to sale.

5. Retailer not to provide single use plastic shopping bag

(1) A retailer shall not provide a single use plastic shopping bag to a customer as a means of carrying goods purchased, or to be purchased, from the retailer.

(2) It is a defence to a charge under subclause (1) if the retailer proves that he or she believed on reasonable grounds that the bag was not a single use plastic shopping bag.

(3) The prohibition contained in subclause (1) applies whether or not a fee is charged to the customer for provision of a single use plastic shopping bag.

6. Charge to be imposed for provision of alternative shopping bag

A retailer shall not provide an alternative shopping bag to a customer as a means of carrying goods purchased, or to be purchased, from the retailer unless the retailer requires the customer to pay a fee of not less than 10 cents for the provision of the alternative shopping bag.

7. Person must not represent that supplied single use plastic shopping bag is not a single use plastic shopping bag

A person shall not sell, supply or provide a bag to another knowing that it is a single use plastic shopping bag if prior to, or in the course of, selling, supplying or providing the bag, the person represents to the other that the bag is not a single use plastic shopping bag.

8. Offences and general penalty

(1) Any person who fails to do anything required or directed to be done under this local law, or who does anything which under this local law that person is prohibited from doing, commits an offence.

(2) Any person who commits an offence under this local law is liable, upon conviction, to a penalty not exceeding \$2,500, and if the offence is of a continuing nature, to an additional penalty not exceeding \$250 for each day or part of a day during which the offence has continued.

9. Prescribed offences

(1) An offence against a clause specified in Schedule 1 is a prescribed offence for the purposes of section 9.16(1) of the Act.

(2) The amount of the modified penalty for a prescribed offence is that specified adjacent to the clause in Schedule 1.

(3) Prior to giving an infringement notice to a person in respect of the commission of a prescribed offence, an authorised person should be satisfied that—

- (a) commission of the prescribed offence is a relatively minor matter; and
- (b) only straightforward issues of law and fact are involved in determining whether the prescribed offence was committed, and the facts in issue are readily ascertainable.

10. Form of notices

For the purposes of this local law—

- (a) the form of the infringement notice given under section 9.16 of the Act is that of Form 2 in Schedule 1 of the Regulations; and
- (b) the form of the notice referred to in section 9.20 of the Act is that of Form 3 in Schedule 1 of the Regulations.

SCHEDULE 1
PRESCRIBED OFFENCES

| Clause | Description | Modified Penalty \$ |
|--------|---|---------------------|
| 5(1) | Provision of single use plastic shopping bag by retailer | \$150 |
| 6 | Provision of alternative shopping bag without minimum charge | \$150 |
| 7 | Representing that supplied single use plastic shopping bag is not a single use plastic shopping bag | \$150 |

Dated this 7th day of February 2013.

The Common Seal of the City of Fremantle was hereunto affixed by authority of a resolution of the Council in the presence of:

Dr BRAD PETTITT, Mayor.
GRAEME MacKENZIE, Chief Executive Officer.

APPENDIX 2

LETTER FROM THE COMMITTEE TO THE CITY OF FREMANTLE OF 20 JUNE 2013



JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

Your Ref: 035/001
Our Ref: 38111/20

Dr Brad Pettitt
Mayor, City of Fremantle
PO Box 807
Fremantle, WA, 6959

By email: mayor@fremantle.wa.gov.au

20 June 2013

Dear Mayor,

City of Fremantle Plastic Bag Reduction Local Law 2012

I refer to the *City of Fremantle Plastic Bag Reduction Local Law 2012 (the Local Law)* and to the supporting material received by the Committee on 6 March 2013. The Committee considered the Local Law at its meeting on 19 June 2013.

Scrutiny of the Local Law

The Committee is continuing the process of scrutinising the Local Law and will be in contact with you shortly regarding this.

Copy of legal advice

To assist the Committee in performing its scrutiny function, the Committee requests the City provide it with a copy of the legal advice it has received from its lawyers referred to on page 66 of the minutes of the Council meeting on 30 January 2013.

Clause 7

Clause 7 states:

7. Person must not represent that supplied single use plastic shopping bag is not a single use plastic shopping bag

A person shall not sell, supply or provide a bag to another knowing that it is a single use plastic shopping bag if prior to, or in the course of, selling, supplying or providing the bag, the person represents to the other that the bag is not a single use plastic shopping bag.

It is unclear to the Committee why "A person" is specified and not "A retailer" as in other clauses.

The effect of this clause could be as follows.

- As the clause makes it an offence for a person to provide to another person a single use plastic bag if prior to providing this bag to that person they represent it is not a single use plastic bag,

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there could be a scenario in a private household where this occurs and a technical breach of the Local Law would have been committed.

- The clause does not contain the same defence as appears in clause 5(2). Clause 5 states:

5. Retailer not to provide single use plastic shopping bag

(1) A retailer shall not provide a single use plastic shopping bag to a customer as a means of carrying goods purchased, or to be purchased, from the retailer.

(2) It is a defence to a charge under subclause (1) if the retailer proves that he or she believed on reasonable grounds that the bag was not a single use plastic shopping bag.

(3) The prohibition contained in subclause (1) applies whether or not a fee is charged to the customer for provision of a single use plastic shopping bag.

Accordingly, "a person" could be a shop assistant who mistakenly believes that a plastic bag is not a single use plastic bag where it is, in fact, such a bag and inform the customer accordingly.

It makes it all the more important for this defence to appear in clause 7 if it is targeted at a person rather than just the retailer.

Please provide the City with a rationale for including clause 7 in its current terms.

It is the Committee's preliminary view that clause 7 could not have been contemplated by the *Local Government Act 1994 (Act)* as:

- it would be beyond the accepted notion of local government in the Act to make a law in these terms; and
- it would not have been intention of the Act to authorise a local law containing a clause of this type which has such an adverse effect on a person subject to the local law.

Accordingly, it offends the Committee's Terms of Reference 6.6(a) and (b), which state:

6.6 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;

Notice of Motion to Disallow

At its meeting on 19 June 2013, the Committee resolved to move a Notice of Motion in the Legislative Council to disallow the *City of Fremantle Plastic Bag Reduction Local Law 2012* on 27 June 2013, should the Committee recommend disallowance to the Parliament. The giving of the notice in Parliament, however, should not be taken to indicate that the Committee has resolved to recommend disallowance and allows time for the Committee to complete its scrutiny process and obtain the information from the City requested above.

Committee's requests

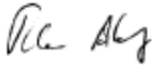
In conclusion, please provide the Committee with the following information:

- a copy of the legal advice it has received from its lawyers referred to on page 66 of the minutes of the Council meeting on 30 January 2013; and
- a rationale for including clause 7 in its current terms.

Please provide your response by **Friday 5 July 2013**.

If you have any queries in relation to this letter, please contact the Committee's Advisory Officer (Legal), Mr Alex Hickman on 9420 7633 or via email at delleg@parliament.wa.gov.au.

Yours sincerely



Mr Peter Abetz MLA
Chairman

CC: Mr Paul Garbett, Manager, Planning, Projects and Policy, email: paulg@fremantle.wa.gov.au

APPENDIX 3

LETTER FROM MCLEODS TO THE COMMITTEE OF 27 JUNE 2013



Our Ref
Your Ref

DFN:FREM-31763

27 June 2013

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

By email: delleg@parliament.wa.gov.au

Dear Mr Abetz

City of Fremantle Plastic Bag Reduction Local Law 2012

I act for the City of Fremantle (City) and am instructed to respond to your letter to the City dated 20 June 2013.

As the legal advice previously provided by this firm to the City was provided on a confidential basis and is subject to legal professional privilege, I am regretfully instructed to not accede to your request to provide a copy of that advice. I have, nonetheless, responded to the specific queries you have raised in relation to the Local Law and provided some further comment by way of explanation in relation to the Local Law.

1. Comments in relation to clause 7 of Local Law

In relation to clause 7 of the Local Law, I am instructed that the clause refers to a "person" rather than a "retailer", as it was envisaged that the clause would apply to third parties that supply plastic bags to retailers. The clause intends to address the situation where a third party knowingly supplies single use plastic shopping bags to a retailer, whilst representing that the supplied plastic bags do not constitute single use plastic shopping bags. Given that the definition of a "single use plastic shopping bag" refers to the composition and thickness (in microns) of the plastic bag, which may not readily be ascertainable on a cursory inspection of a bag, it is possible that the composition or thickness of plastic bags supplied to a retailer could be misrepresented, whether intentionally or inadvertently. This clause is intended to at least deter suppliers of plastic bags from intentionally misrepresenting the composition, thickness or bio-degradability of any plastic bags supplied to retailers in the district of the City.

In light of your concerns, the ambit of the clause could potentially be restricted by:

- (a) substituting the words "a retailer" in place of the word "another" in the first line of the clause; and

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Craig Clarke
Peter Wittkuhn
David Nicholson
Peter Gillett
Elisabeth Stevenson (Special Counsel)
Trudi Firth (Associate)
Tim Beckett (Associate)

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- (b) substituting the word “retailer” in place of the word “other” in the third line of the clause.

If the clause is amended in this manner, then its application would be limited to a commercial, retailing context, and it could not conceivably apply in the private household scenario referred to in your letter. Similarly, if amended in this manner, the clause would not apply in a scenario where a shop assistant mistakenly supplies a single use plastic bag to a customer, representing it as something other than a single use plastic bag.

A “reasonable mistake of fact” defence such as that contained in clause 5(2) unfortunately could not apply to clause 7, given that the offence under that clause is to “...sell, supply or provide a bag to another **knowing** that it is a single use plastic shopping bag...” (emphasis added), where the person additionally “...represents to the other that the bag is not a single use plastic shopping bag...”. In other words, if the person in question *knows* that the bag supplied is a single use plastic shopping bag, then that person cannot be operating under a reasonable, but mistaken belief that the bag supplied is not a single use plastic shopping bag. There is therefore no scope of application for a defence in similar terms to clause 5(2).

2. General comments in relation to Local Law

Section 1.3 of the *Local Government Act 1995 (LG Act)* requires that in carrying out its functions a local government “...is to use its best endeavours to meet the needs of current and future generations through an integration of environmental protection, social advancement and economic prosperity.”

The endeavours made by the City to integrate considerations of environmental protection so as to meet the needs of current and future generations in accordance with section 1.3 include its adoption and implementation of an Environmental Action Plan (EAP), which sets out a strategic policy framework for sustainability projects and initiatives. The following extract from the EAP emphasises the key role of local government in mitigating the environmental impact of cities at the local level:

“Cities have a major impact on ecosystems through direct local impacts from the clearing of land for housing and other infrastructure, as well as immediate impacts of lifestyles and the industrial activities that support these. The impacts go well beyond the boundaries of the city – cities import food, energy, water, materials and consumer goods, and export wastes. Urban dwellers in the developed world are often disproportionate consumers of resources due to high consumption lifestyles. Car usage is high, often due to low-density urban forms and uniform zoning.

...

Councils have a key role to play in advancing environmental sustainability through various mechanisms: regulation, incentives, organisational change (asset management and service delivery), education and facilitation, and advocacy. Priorities need to be established and actions chosen wisely to achieve the greatest environmental benefits within financial and resource constraints.”

The City has additionally adopted a Strategic Policy entitled Waste Minimisation (Policy SG2) the objective of which is “to achieve a significant but achievable reduction in the amount of waste going to landfill”. The Policy endorses as a waste management hierarchy, which in order of priority, is as follows:

- waste avoidance
- waste reduction
- waste re-use
- recycling
- waste treatment
- waste disposal
- landfill gas recovery

The prohibition on the sale and supply of single use plastic shopping bags by retailers in the district of the City comprises one waste avoidance and waste reduction initiative undertaken by the City that would facilitate environmental protection by reducing the waste stream to landfill sites, thereby meeting the needs of both current and future generations in a manner consistent with section 1.3 of the LG Act.

It is also the experience of the City that single use plastic bags contribute significantly to litter within Fremantle town site and elsewhere in the district of the City. Restricting the sale or supply of single use plastic bags in a retailing context is likely to reduce this particular source of litter, thereby improving the standards of amenity experienced by persons within the City.

The management of litter and waste, together with other environmental issues relevant to general amenity, additionally fall within accepted notions of local government. For example, issues related to environmental management that are commonly the subject of regulation by local law include the following:

- (a) keeping of animals;
- (b) burning of rubbish & refuse;
- (c) containment of litter and refuse on building sites;
- (d) emissions of sand, light, dust or fumes from private land;
- (e) disposal of storm water and waste water from swimming pools; and
- (f) removal of hazardous plants or trees.

The regulation of the sale and supply of single use plastic shopping bags by retailers is comparable to these well-established forms of local government regulation of activities, which may comprise environmental protection or general amenity.

In the City’s view then, a prohibition on the sale and supply of single use plastic bags by retailers would thus contribute to the good government of persons in the City’s district by:

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City of Fremantle Plastic Bag Reduction Local Law 2012

McLeods
Page 4

-
- (a) integrating considerations of environmental protection, through a reduction in the quantity of waste going to landfill; and
 - (b) protecting the standard of general amenity, by eliminating a significant source of litter.

I trust the above addresses the initial concerns of the Committee and provides some further explanation in support of the Local Law. I am additionally more than happy to respond to any further queries the Committee may have in relation to the Local Law.

Yours sincerely



McLeods
David Nicholson
Partner

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Email: dnicholson@mcleods.com.au