

CITY OF FREMANTLE ALFRESCO DINING LOCAL LAW 2014 — DISALLOWANCE

Motion

Pursuant to standing order 67(3), the following motion by Hon Robin Chapple was moved pro forma on 21 October 2014 —

That pursuant to recommendation of the Joint Standing Committee on Delegated Legislation, the City of Fremantle Alfresco Dining Local Law 2014 published in the *Government Gazette* on 18 July 2014 and tabled in the Legislative Council on 13 August 2014 under the Local Government Act 1995, be and is hereby disallowed.

HON ROBIN CHAPPLE (Mining and Pastoral) [2.14 pm]: I rise on behalf of the Joint Standing Committee on Delegated Legislation to explain the rationale behind this decision. It is really quite an unfortunate set of circumstances, one that the City of Fremantle became aware of and set in train processes to attempt to fix the problem. Unfortunately, the city had a problem because of time components. I will try to work through this for the benefit of the chamber.

In making a local law, the local government must follow procedures set out in section 3.1(2) of the Local Government Act 1995 in a sequence that is prescribed. This includes a requirement under section 3.12(6) to give local public notice of a local law. Report 79, which we tabled in February 2015, identifies the fact that the City of Fremantle did not comply with these provisions. I will go on to explain some of the nuances around why and how we had to seek to disallow this local law. The local law is made pursuant to the general local government law-making power in section 3.5 of the Local Government Act. In making a local law, the local government is to follow procedures described in section 3.1(2). We have attached in appendix 1 the local law that did not follow the sequence and therefore was invalidated, as far as the delegated legislation committee was concerned. Towards the conclusion of the procedures, the requirements set out in section 3.12(6), which provides that after a local law has been published in the *Government Gazette*, the local government is to give local public notice stating the title of the local law and summarise the purpose and effect of the local law specifying the day on which it comes into operation and advise that copies of the local law may be inspected or obtained in the local government office.

There is more to be read in the report but I now want to move to what happened. The City of Fremantle then realised that it had not complied with the requirements of the Local Government Act and gave notice. The newly-created local law was published in the *Government Gazette* on 18 July 2014. Subsequently, the city received correspondence from the Department of Local Government and Communities identifying a number of shortfalls in the publicised local law, including incorrect formatting, incorrect enactment date, absence of definition of “nuisance”, use of ambiguous terms and reference to the city rather than the local government. These shortfalls should have ideally been communicated to the city prior to the gazettal. However, these matters were not brought to the city’s attention until after the gazettal date so the gazettal actually occurred. The city agreed to repeal the City of Fremantle’s alfresco dining local law 2014, but because it had already been gazetted, it is a matter that falls before our committee.

By letter on 29 January 2014, attached as appendix 2 to our report, the mayor confirmed the above information in the minutes. The letter also revealed that the proposed time line for making a replacement instrument will not be gazetted in time or until the earliest, 3 April 2014. This is well beyond the indicative debating date that we would have in respect of a disallowance, so we actually had to treat the two as separate, and it was too late for the replacement interest to effect a repeal of the original local law. Although the committee seeks to disallow this local law, it is mindful that a series of events occurred that caused the local government and, indeed, the deliberations of the committee some shuddering, because we really did not want to disallow it; it was just wrong in terms of the way that procedure had been done. We came to the conclusion —

Committee Term of Reference 10.6(a) is offended. It states

*In its consideration of an instrument, the Committee is to inquire whether the instrument—
(a) is within power,*

The act is clear; the failure to complete the procedures in section 3.12(6) results in noncompliance with section 3.12. The local law is not within power and therefore invalid.

There are a number of benefits to recommending the disallowance of the invalid instrument, including ensuring that it is quickly removed from the public record and reducing the risk of public misinformation. Should the Legislative Council disallow the local law, the City of Fremantle local laws relating to ongoing eating areas gazetted in 1998 will be revived and alfresco dining will be permitted, but not under the new determination. One would imagine that very shortly the committee will be dealing with the amended alfresco dining local laws

No 2. The committee's recommendation is that the City of Fremantle Alfresco Dining Local Law 2014 be disallowed.

HON HELEN MORTON (East Metropolitan — Minister for Mental Health) [2.21 pm]: I would like to indicate that the government supports the recommendation in the committee's seventy-ninth report to disallow the City of Fremantle Alfresco Dining Local Law 2014 for all of the reasons that Hon Robin Chapple outlined, including that the Local Government Act 1995 sets out a clear step-by-step process in a statutory procedures checklist. I understand that all the steps in that process must be completed and when the checklist is completed a copy has to be provided to the Joint Standing Committee on Delegated Legislation. When the City of Fremantle made its local law, it is clear that one part of that checklist had not been completed, and that makes the local government law potentially invalid. Consequently, the government supports the recommendation for disallowance.

HON SUE ELLERY (South Metropolitan — Leader of the Opposition) [2.22 pm]: I rise to indicate that the opposition also supports the committee's recommendation as set out in the report and outlined by Hon Robin Chapple. This is a technical breach of the required sequence of procedures that the council needed to go through. It is set out in the committee's report in a fairly straightforward fashion and the opposition also supports the disallowance.

HON SIMON O'BRIEN (South Metropolitan) [2.23 pm]: As a member for South Metropolitan Region, my attention was drawn to this report when it was tabled. The good shire of Fremantle, sorry, the good local government of Fremantle is an interesting one on a number of levels. I have had a bit to do with it on a number of other projects just in the last few days. I listened with interest to what was described by Hon Robin Chapple in his capacity as deputy chair of the standing committee, and through him I thank the committee for its report. I listened to the brief response from the minister, basically that the government concurs with the committee's recommendation. Also, in viewing the report, I thought there was something quite unsatisfactory here. There are some elements of this I just do not get. We are told one of the requirements under section 3.12 of the Local Government Act 1995 is that having followed a number of steps, in sequence, as laid out in the provision we get to subsection (6), which states —

After the local law has been published in the *Gazette* —

Which of course is one of the early requirements —

the local government is to give local public notice

- (a) stating the title of the local law; and
- (b) summarizing the purpose and effect of the local law (specifying the day on which it comes into operation); and
- (c) advising that copies of the local law may be inspected or obtained from the local government's office.

In other words, as one would expect, the local government promulgates information to say: "Look, we've made this local law and here is where to find a copy of it." If that was not a lawful requirement of the act, one would expect that local governments would do it anyway.

In this case, at an earlier stage of the process, under section 3.12(3), the local government has to do a number of things, including giving statewide public notice about its proposal, providing copies of it, calling for submissions and so on. At that point, as soon as the notice is given, it must give a copy of the proposed local law and a copy of the notice to the minister. Presumably it was compliance with the provision in section 3.12(3)(b) that drew the attention of the local government department to the proposed local law. In due course the department came back to the City of Fremantle—belatedly, I believe—and said that the newly created local law offended in a number of ways. It had incorrect formatting with the use of italics and capitalisation—that is a hanging offence in anyone's terms! Jokes aside, observing correct form is important to preserve the dignity of statute law no matter how or when it is made. I think it is great that we live in a society that can actually pay attention to that sort of detail in the interest of getting it right. I am glad that we have the luxury that our other needs are sufficiently taken care of that we can bother about that. But there were some other fatal flaws. I refer to page 3 of the committee's report that states that the local law had the incorrect enactment date—one would think that that is a serious flaw. There was an absence of a definition of nuisance in the local law. When I read that it gave me a wry smile, in the context of the speech I am now making. I am not trying to substitute myself in any way, but it strikes me that there have been some nuisance procedures going through this chamber. The report comments that some ambiguous terms were used, such as references to the "city" rather than the "local government". This is all recorded in the City of Fremantle's ordinary council meeting of 22 October 2014 minutes, which state —

These shortfalls should have ideally have been communicated to the City prior to gazettal of the local law;

Of course they should have been. Talk about slamming the stable door to the echo of long-receding hoof beats because the horse has already bolted. That leaves the question in my mind: why did the department not act within the required date? It is very insistent on form and very insistent through its Local Government Act, through the statutes—in fact, some might even say pedantically—on everything being done in the exact right order, and it is supported in this report by the Joint Standing Committee on Delegated Legislation, as we are reminded on page 2 at footnote 3, for example. If we are to have a system designed to iron out all problems, big and small, it behoves the custodians of the Local Government Act, the Minister for Local Government and his department to make sure they are doing the right thing as well, and that does not appear to have happened in this case. Then there is a missing jigsaw piece in what I am observing and I have not picked up where it might be. At some point the city then decided—it is officially recorded in those minutes of the council meeting—to try again and to go for a City of Fremantle Alfresco Dining Local Law 2014 No 2, which I presume is the corrected version of the same policy, and at the same time repeal attempt one, which is the very law we are considering right now.

Hon Robin Chapple: Yes.

Hon SIMON O'BRIEN: I thank Hon Robin Chapple for the interjection.

What are the mechanics of doing this? We are embarking on one method, but we are also told that the Joint Standing Committee on Delegated Legislation, in exercising its prerogative to recommend and have one of its members move to have this local law disallowed, will get rid of it. It will repeal it and it will pave the way for a new “itallically” and “definitionally” correct version to come to life in due course, and I believe probably by about April this year.

Hon Robin Chapple: Part of the issue is that the local law would still be legal if it was not disallowed, because the new alfresco local law 2 would not be able to be introduced in the time frame. It overrode the local law that we are now attempting to disallow and therein lies one of the fundamental problems.

Hon SIMON O'BRIEN: I thank the honourable member for his expert interjection, which, of course, is based on his inquiries as deputy chairman of the august joint standing committee that has delivered this report, because it clarifies the issue. It seems to me we have arrived at a very peculiar issue. On the one hand there is an assertion that the local law does not comply with section 3.12(6) of the Local Government Act in terms of receiving public notice that this law and its terms are now in force. That is the reason to disallow it and cause it to become null and void, which presumably will happen in a minute. Ironically, this is long, long after—five or six months at least—the council had the deficiencies in the local law brought to its attention and decided to do away with it, indeed as recorded in its meeting of last October. Therefore, of course the council did not go ahead and promulgate the provisions of the local law to its residents because it wanted to scrap it and do it again. It seems like a very pure bureaucratic way of doing things, but does it not take a while to get there? This dates from July 2014 and it is now March 2015, and somewhere around July, August or September last year the council woke up to the fact that this law is, pedantic or not, fatally flawed. I mean, things such as enactment dates cannot be wrong. Here we are now using the device of one of our joint standing committees giving notice of motion that was subsequently moved pro forma, which we are dealing with today, to disallow this instrument, the owner of which local law has decided to do away with it and already has the process underway to replace it. That struck me as curious.

Hon Robin Chapple: We are quite often faced with these sorts of issues, because once you actually have a local law, in this case, or any regulation that is gazetted, it is law until it is disallowed. We have had many occasions on which a local law is not being introduced—nobody is going to follow it up—but it still sits on the statutes and if somebody looks at those statutes and does what they say, even though in theory it has been withdrawn, it is still being done within law as far as the gazettal is concerned. That is why we have to go through this really rather truncated, formal process. It helps the City of Fremantle—it helps all—to get rid of it.

Hon SIMON O'BRIEN: The City of Fremantle is happy. We got a letter from the mayor. The city is happy because the committee and this house are doing all the work. It does not have to do whatever is involved in repealing a local law. It will have a new one next month, apparently, which presumably could have incorporated a repeal of the existing one; I do not know. In any case, our procedures are being used to tidy up the mess that has existed unsatisfactorily for some time, because, as my friend opposite points out, if someone does not do something to formally repeal or, in this case, disallow this law, it will indeed stand. Because of the matters raised in this committee's report, it could be argued in a court of relevant jurisdiction that the law was invalid anyway under the Local Government Act, but that would be an even more convoluted way of dealing with that. This is an interesting study for students of delegated legislation. I spent five years on this joint standing committee back at the turn of the last millennium and from the point of view of intellectual and other debate, some interesting

matters such as this can be found. This is not the most interesting case I have come across, but it is a good example of something that occurs all the time—that is, local governments falling foul of the Local Government Act and the provisions of section 3.12 and it having to be up to our joint standing committee to draw these matters to attention, and if it does not stop them falling through the net, no-one does.

Hon Robin Chapple: As the member has identified, if it had been picked up by the department and it was aware of this issue, we would not be here today on this issue.

Hon SIMON O'BRIEN: It raises a whole lot of questions about what point it is best for local governments—we know at what point they should be because it is laid down in law—to get the local government department to run its eyes over the proposed local law, because it might come back at a suitable time and say it is great apart from several little areas. That would avoid the need for us to have to go through this sort of process time and again. That is some constructive advice that those observing this debate might care to contemplate, and no doubt that has already been communicated in some way, shape or form by the committee to the relevant people.

I cannot tell members how excited I am to contemplate the advent of the City of Fremantle Alfresco Dining Local Law 2014 No 2. We all look forward to that with great anticipation—I am positively hugging myself at the thought. We know it will be a better law than the current law, for all the reasons that have been described in the committee report. With all that in mind, I agree that we ought to support this disallowance. I just think it is sometimes a bit of a pity that these processes take so long. But I guess that is part of a system that is aimed at making sure that we get things right as often as we possibly can and detect and correct problems on the occasions when subsidiary authorities do not get it right. I commend the motion to the house.

HON PETER KATSAMBANIS (North Metropolitan) [2.40 pm]: I rise to make some brief comments on the motion before the house and on the report of the Joint Standing Committee on Delegated Legislation on which this motion is based. I put on the record that I am a member of the committee and obviously will not be reflecting on the deliberations of the committee in any way. However, I would like to place on record why it is important for members of the general public that we go through this sort of exercise. When people read committee reports and the debates that we have in this place, it must sometimes seem as though we are fighting over things as mundane as the use of italics, capitalisation, grammar and correct sentences, and the general public could be excused for thinking that we are being unnecessarily pedantic. This law before us today is a classic example of that. However, the fact is that members of the general public make important decisions based on these laws, and they require certainty that the laws on which they are making those important decisions, and sometimes committing a lot of money towards, do not run the risk of being ruled invalid at a later date. This particular local law relates to alfresco dining in the City of Fremantle.

The City of Fremantle is a good example of alfresco dining done very well. Alfresco dining is attractive to the general public. People like it. A person may make an important investment decision based on an alfresco dining local law and take out a lease on a property, invest in staff, and invest in furniture and a fit-out, only to find a few months or a few years later that someone who wants to do some form of malfeasance or nuisance, or someone who has a commercial advantage, has taken legal action based on the validity of that law. It is true that some of the issues that are identified in the process might seem mundane or even a little silly. However, issues such as enactment dates, as Hon Simon O'Brien had mentioned, and the use of unambiguous terms, are very important, because otherwise they could lead to protracted legal action. The definition of “nuisance” is obviously also important in relation to this local law.

Therefore, when we debate a report of the delegated legislation committee in this place and consider whether a particular local law should stand or should not stand, we looking at it through the eyes of protecting the general public. We want to protect people who have made decisions based on that particular local law from legal action in the future. We want to give people certainty and clarity so that their investment decisions will have a solid foundation and so that they can provide services—in this case, alfresco dining—that are wanted by the general public.

In examining the process, as both Hon Robin Chapple and Hon Simon O'Brien have done in their contributions, we have perhaps identified ways in which local government authorities and the Department of Local Government working together could do things better than they currently do, and hopefully those bodies will get together and work out a process that is better than the current process so that we can avoid the need for these sorts of motions to come to this place. But given what has been identified by the committee, and given the report before us, this house has no option other than to move for the disallowance of this local law. With those few words, I will conclude my contribution.

Question put and passed.