

**41ST PARLIAMENT**



## **Report 7**

# **JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION**

*Shire of Westonia Shipping and/or Sea Container Local Law 2024*

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Presented by

Mr Geoff Baker MLA (Chair)

and

Hon Lorna Harper MLC (Deputy Chair)

November 2024

## **Joint Standing Committee on Delegated Legislation**

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

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Mr Stuart Aubrey MLA

Hon Martin Pritchard MLC

Mr Paul Lilburne MLA

Hon Lorna Harper MLC (Deputy Chair)

Hon Steven Martin MLC

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## EXECUTIVE SUMMARY

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- 1 The *Shire of Westonia Shipping and/or Sea Container Local Law 2024* was made by the Shire of Westonia on 20 September 2024, and was published in the Government Gazette on 4 October 2024. It came into operation 14 days after gazettal.
- 2 Item 9 of Part 3 of that instrument purports to make its conditions retrospective.
- 3 The Joint Standing Committee on Delegated Legislation is of the view that item 9 of Part 3 is inconsistent with the legislative powers granted to local governments by Part 3, Division 2 of the *Local Government Act 1995*.
- 4 As a result of that inconsistency, item 9 of Part 3 is not within power of the enabling Act and as such offends the Committee's Term of Reference 10.6(a).

### Findings and recommendations

**Findings and recommendations are grouped as they appear in the text at the page number indicated:**

#### FINDING 1

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The Committee finds that item 9 of Part 3 of the *Shire of Westonia Shipping and/or Sea Container Local Law 2024* is inconsistent with the provisions of the *Local Government Act 1995* and consequently it offends the Committee's Term of Reference 10.6(a).

#### RECOMMENDATION 1

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The Committee recommends to the Parliament that item 9 of Part 3 of the *Shire of Westonia Shipping and/or Sea Container Local Law 2024* be disallowed.



# 1 Reference and procedure

- 1.1 The *Shire of Westonia Shipping and/or Sea Container Local Law 2024* (2024 local law) was made by the Shire of Westonia (Shire) on 20 September 2024, and was published in the Government Gazette on 4 October 2024. It came into operation 14 days after gazettal.
- 1.2 Upon its gazettal, the 2024 local law stood referred to the Joint Standing Committee on Delegated Legislation (Committee). Once the local law was tabled in the Legislative Council, it became an instrument that may be subject to disallowance.
- 1.3 The 2024 local law is at Appendix 1.

# 2 Background

- 2.1 The *Shire of Westonia Shipping and/or Sea Container Local Law 2023* (2023 local law) was adopted by the Shire on 18 May 2023, and was gazetted on 23 May 2023.
- 2.2 The preamble to that instrument incorrectly stated that it was adopted on 21 February 2023. That was one of many mistakes that were identified by the Committee when it considered the 2023 local law on 9 August 2023.
- 2.3 The purpose of the 2023 local law was to prescribe an approval process for the placement of shipping and/or sea containers on residential, commercial and industrial land within the Westonia townsite. Anyone wanting to place a shipping container within the township of Westonia must make a Planning/Development application to the Shire. If that application is granted, a Building Licence must be applied for so that a Building Surveyor has oversight of the container's placement.
- 2.4 A penalty of between \$250 and \$5,000 applies for any breach.
- 2.5 Conditions as to placement apply to the grant of any application, and those conditions are set out at Part 3 of the instrument. At item 9, it is stated:

This Local Law applies retrospectively.
- 2.6 The Committee found that the 2023 local law was invalid for failure to comply with the statutory law-making procedure set out at section 3.12 of the *Local Government Act 1985* (Act). In particular, section 3.12(3)(b) states:

The local government is to —

as soon as the notice is given, give a copy of the proposed local law and a copy of the notice to the Minister and, if another Minister administers the Act under which the local law is proposed to be made, to that other Minister.
- 2.7 The Committee is entitled to consider section 3.12(2A), which states:

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.
- 2.8 In this instance, the view was taken that the failure to timeously supply the Minister for Local Government with a copy of the proposed local law deprived that Minister of the opportunity to make comment on it. This is a vital step in the law-making process.
- 2.9 As is the Committee's custom and practice, instead of moving a motion to disallow the 2023 local law, the Chair wrote to the Shire of Westonia (Shire) on 9 August 2023 seeking the following undertakings:
  1. Within 6 months, repeal the local law.

2. Not enforce the local law to the contrary before it is repealed in accordance with undertaking 1.
  3. Any new local law:
    - is not to apply retrospectively
    - does not contain the typographical errors in clauses 1.5, 2.1(2), 2.1(3), 2.2, 2.3, Part 3 and formatting errors.
  4. Where the local law is made publicly available by the Shire, whether in hard copy or electronic form, ensure that it is accompanied by a copy of the undertaking.
- 2.10 The undertakings that were given by the Shire, relayed to the Committee by a letter of 30 October 2023 were to:
1. Within 6 months, repeal the local law.
  2. Not enforce the local law to the contrary before it is repealed in accordance with undertaking 1.
  3. The Shire ensures any new local law errors have been corrected.
  4. Where the local law is made publicly available by the Shire, whether in hard copy or electronic form, ensure that it is accompanied by a copy of the undertaking.
- 2.11 Whilst the wording of the given undertakings does not coincide exactly with the requested undertakings, the Committee accepted them in good faith.

### 3 The 2024 local law

- 3.1 This instrument, gazetted on 4 October 2024, was considered by the Committee at its meeting on 13 November 2024.
- 3.2 It was noted that the 2023 local law had been repealed by a separate instrument, the *Shire of Westonia Repeal Local Law 2024*, gazetted on the same day. It was further noted that, contrary to the undertakings given, most of the errors contained in the 2023 local law were repeated in the 2024 local law, and that the Shire had failed to ensure that the copy of the 2023 local law on the Shire's website was accompanied by a copy of the undertakings given.
- 3.3 More importantly, item 9 of Part 3 of the instrument remained.

#### Retrospectivity

- 3.4 As was explained to the Shire in the Chair's letter of 9 August 2023, there is a general presumption against the retrospective operation of legislation. This derives from the common law principle which holds that such laws:
  - offend the general principle that legislation intended to regulate human conduct ought to deal with future actions
  - ought not to change the character of past transactions carried on upon the faith of the then existing law.
- 3.5 A further presumption is that, in the absence of an unambiguous contrary intention, such laws should be interpreted so as not to disturb principles of the common law and equity.
- 3.6 Strong justification is required for legislation that retrospectively has an adverse effect on rights and liberties or imposes obligations.
- 3.7 The general law making power in section 3.5(1) of the *Local Government Act 1995* does not permit the making of retrospective local laws as being in the public interest. This has been



upheld by the High Court of Australia in *Broadcasting Co of Australia Pty Ltd v The Commonwealth* [1935] HCA 3 and in *Maxwell v Murphy* [1957] HCA 7.

- 3.8 The Committee is of the view that item 9 of Part 3 of the 2024 local law is invalid as not being within power of the *Local Government Act 1995*. It offends Committee Term of Reference 10.6(a). There is no strong justification for retrospectivity, and it would offend against the rights of any individual or corporate entity that had placed a shipping and/or sea container within the township of Westonia prior to the 2024 local law coming into force.
- 3.9 The Committee is also of the view that item 9 of Part 3 is severable without affecting the validity of the remainder of the instrument.

## 4 Conclusion

- 4.1 The Committee's Term of Reference 10.6(a) states that:

In its consideration of an instrument [including a local law], the Committee is to inquire whether the instrument ... is within power.

### FINDING 1

The Committee finds that item 9 of Part 3 of the *Shire of Westonia Shipping and/or Sea Container Local Law 2024* is inconsistent with the provisions of the *Local Government Act 1995* and consequently it offends the Committee's Term of Reference 10.6(a).

### RECOMMENDATION 1

The Committee recommends to the Parliament that item 9 of Part 3 of the *Shire of Westonia Shipping and/or Sea Container Local Law 2024* be disallowed.

- 4.2 Disallowing invalid local laws, or parts of them, ensures that they are removed from the public record, thereby reducing the risk of public misinformation.



Mr Geoff Baker MLA  
**Chair**

# APPENDIX 1

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## SHIRE OF WESTONIA SHIPPING AND/OR SEA CONTAINER LOCAL LAW 2024

### LOCAL GOVERNMENT ACT 1995

#### SHIRE OF WESTONIA

#### SHIPPING AND/OR SEA CONTAINER LOCAL LAW 2024

Under the powers conferred by the Local Government Act 1995 and all other powers enabling it, the Shire of Westonia resolved on 20<sup>th</sup> September 2024 to make the following local law.

#### PART 1 – PRELIMINARY

##### 1.1 CITATION

This Local Law is the Shire of Westonia Shipping and/or Sea Container Local Law 2024

##### 1.2 COMMENCEMENT

This Local Law comes into operation 14 days after the date of its publication in the Government Gazette.

##### 1.3 PURPOSE AND EFFECT

1. The purpose of this Local Law is to prescribe the approval process required for the placement of shipping and/or sea containers on residential, commercial and industrial land within the Westonia townsite.
2. The effect of this Local Law is to establish minimum requirements for the placement of shipping and/or sea containers on land within the Westonia townsite.

##### 1.4 APPLICATION

This Local Law applies to all categories of land within the Westonia townsite.

##### 1.5 DEFINITIONS In this Local Law;

**Act** means the *Local Government Act 1995*

**Applicant** means the person making an application for approval under this Local Law.

**Building Surveyor** means a building surveyor of the Local Government.

**CEO** means the Chief Executive Officer of the Local Government

**Commercial lot** means a lot where a commercial use is permitted or will be its predominant use.

**Front setback area** means the area between the building line of a lot and the front boundary of that lot.

**Industrial lot** means a lot where an industrial use is permitted and which is its predominant use.

**Local government** means the Shire of Westonia.

**Residential lot** means a lot where residential use is permitted and which is its predominant use.

**Rural lot** means a lot where rural use is permitted and which is its predominant use.

**Special rural lot** means a lot where special rural use is permitted and which is its predominant use.

Thoroughfare has the meaning given to it by the Act, but does not include a private thoroughfare which is not under the control of the Local Government.

#### 1.6 LICENSE FEES AND CHARGES

All license fees and charges under this Local Law shall be determined by the Local Government from time to time in accordance with section 6.16 of the Act.

### PART 2 – APPROVALS

#### 2.1 APPLICATION FOR APPROVAL

1. Where a person is required to obtain the approval of the Local Government under this Local Law, that person shall apply through the following method;
  - (a) the application must be in the form determined by the Local Government
  - (b) is signed by the applicant and the owner of the lot
  - (c) provides all of the information required by the form
  - (d) be forwarded to the CEO of the Local Government together with the fee imposed by it under and in accordance with sections 6.16 to 6.19 of the Act.
2. The Local Government may require the applicant to provide additional information reasonably related to an application before determining an application for approval.
3. The Local Government may refuse to consider any application which is not in accordance with the requirements of 1. And 2. Above.

#### 2.2 DECISION ON APPLICATION FOR APPROVAL

- (a) The Local Government may approve the application unconditionally, subject to any conditions, or may refuse the application outright.
- (b) The Local Government is to provide the applicant with written advice of any refusal to approve.
- (c) The Local government is to provide the applicant with written advise of its approval. Compliance with approval.

#### 2.3 COMPLIANCE WITH APPROVAL

Where an application has been approved, the applicant and the owner or occupier of the lot to which the approval relates, shall comply with the terms and conditions of that approval. Unless otherwise stated in the form of approval, such approval granted under this Local Law runs with the lot to which it relates, may be relied upon by any subsequent owner of the lot, and may be enforced by the Local Government against the subsequent owners of that lot. Where the Local Government believes that the Local Law has been breached, the Local Government is to provide written notice to the owner specifying details of the breach and providing the owner with a time within which the breach is to be rectified.

### PART 3 – GENERAL CONDITIONS

1. Prior to the placement of a shipping and/or sea container on any lot within the Westonia townsite, a Development/Planning application will be required by the Local Government to adequately assess the application.
2. Once approval has been provided, the applicant is to apply for a Building License to ensure that the Building Surveyor has oversight of its placement on the lot.
3. This Local Law limits the number of shipping and/or sea containers to one only per lot being a maximum of 6.5 meters for a residential lot and up to 12.5 meters for an

industrial or commercial lot.

4. The shipping and/or sea container is to be located wholly within the boundaries of the lot subject to the approval, and shall be maintained in a good and orderly condition to the satisfaction of the Local Government.
5. Following approval, the container shall be suitably screened and/or fenced from the road frontage, be located at the rear of the lot and not within the front setback, while meeting setback requirements of the Building Code of Australia classification.
6. The container cannot be located over septic tanks, leach drains or any utilities services or easements, and cannot, under any circumstances, be used as ancillary accommodation.
7. The Local Government may require additional works or measures other than those already mentioned, to properly address any amenity issues that arise from the location of the container.
8. Temporary use of a container on a building site as an office or storage unit is permissible, subject to application and approval by the Local Government. Such approval shall extend for the period of construction of the building only, and shall be removed within 14 days of completion of the building.
9. This Local Law applies retrospectively.

#### PART 4 – OFFENCES

A person who fails to comply with a notice of breach commits an offence and is liable on conviction to a penalty of not less than \$250 and not exceeding \$5000, and if the offence is a continuing offence, to a maximum daily penalty of \$500.

A person who fails to comply with or who contravenes any provision of this Local Law commits an offence and is liable on conviction, to a penalty of not less than \$250 and not exceeding \$5000 and, if the offence is a continuing offence, to a maximum daily penalty of \$500.

Dated this 2nd day of October 2024.

The Common Seal of the Shire of Westonia has been affixed by authority of a resolution of the Council in the presence of -;



A handwritten signature in black ink, appearing to read 'Rodney Mark Crees'.

RODNEY MARK CREES, Shire President

A handwritten signature in black ink, appearing to read 'Arthur William Price'.

ARTHUR WILLIAM PRICE, Chief Executive Officer.





# Joint Standing Committee on Delegated Legislation

## Date first appointed:

25 May 2021

## 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 The Standing Orders of the Legislative Council relating to Standing Committees will be followed as far as they can be applied.
- 10.9 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*."



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