

40TH PARLIAMENT



Report 6

JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

Town of East Fremantle Plastic Bag Reduction Local Law 2017

Presented by

Ms Emily Hamilton MLA (Chair)

and

Hon Robin Chapple MLC (Deputy Chair)

November 2017

Joint Standing Committee on Delegated Legislation

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EXECUTIVE SUMMARY AND RECOMMENDATIONS FOR THE
REPORT OF THE JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION
IN RELATION TO THE
TOWN OF EAST FREMANTLE PLASTIC BAG REDUCTION LOCAL LAW 2017

EXECUTIVE SUMMARY

- 1 The Joint Standing Committee on Delegated Legislation (Committee) is of the view that the Town of East Fremantle (Town) did not follow the mandatory procedures prescribed in sections 3.12 and 3.13 of the *Local Government Act 1995* when it made the *Town of East Fremantle Plastic Bag Reduction Local Law 2017* (Instrument).
- 2 In making the Instrument, the Town breached section 3.12(4) by adopting a local law which was ‘*significantly different from what was proposed.*’ Further, in that scenario, section 3.13 of the *Local Government Act 1995* required the Town to recommence the local law-making procedure prescribed by section 3.12. However, the Town failed to do so.
- 3 The Instrument is invalid as it does not comply with sections 3.12 and 3.13 of the *Local Government Act 1995* and offends the Committee’s Term of Reference 10.6(a) in that it is not ‘*within power*’.

RECOMMENDATION

- 4 The Committee’s recommendation appears in the text at the page number indicated:

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Recommendation 1: The Committee recommends that the *Town of East Fremantle Plastic Bag Reduction Local Law 2017* be disallowed.

REPORT OF THE JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

IN RELATION TO THE

TOWN OF EAST FREMANTLE PLASTIC BAG REDUCTION LOCAL LAW 2017

1 REFERENCE AND PROCEDURE

- 1.1 The *Town of East Fremantle Plastic Bag Reduction Local Law 2017* (Instrument) was published in the *Government Gazette* on 2 June 2017. Upon that gazettal, the Instrument stood referred to the Joint Standing Committee on Delegated Legislation (Committee).¹ On 13 June 2017, the Instrument was tabled in the Parliament and became subject to disallowance.

2 STATUTORY PROCEDURE FOR MAKING A LOCAL LAW

- 2.1 The power to make the Instrument was derived from section 3.5(1) of the *Local Government Act 1995* (LGA), which provides that:

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^[2] under this Act.

- 2.2 Part 3, Division 2, Subdivision 2 of the LGA provides the procedure that a local government is to follow when making a local law. In the case of the Instrument, sections 3.12(4) and 3.13 are most relevant:

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.*

¹ Committee Term of Reference 10.5: *Standing Orders of the Legislative Council* Schedule 1, clause 10.5.

² The general function of a local government is 'to provide for the good government of persons in its district': LGA s 3.1.

- (2) *At a council meeting the person presiding is to give notice to the meeting of the purpose and effect of the proposed local law in the prescribed manner.*
- (3) *The local government is to —*
- (a) *give Statewide public notice stating that —*
- (i) *the local government proposes to make a local law the purpose and effect of which is summarized in the notice; and*
- (ii) *a copy of the proposed local law may be inspected or obtained at any place specified in the notice; and*
- (iii) *submissions about the proposed local law may be made to the local government before a day to be specified in the notice, being a day that is not less than 6 weeks after the notice is given; and*
- (b) *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; and*
- (c) *provide a copy of the proposed local law, in accordance with the notice, to any person requesting it.*
- (3a) *A notice under subsection (3) is also to be published and exhibited as if it were a local public notice.*
- (4) *After the last day for submissions, the local government is to consider any submissions made and may make the local law* as proposed or make a local law* that is not significantly different from what was proposed.*
- * Absolute majority required.*
- (5) *After making the local law, the local government is to publish it in the Gazette and give a copy of it to the Minister and, if another Minister administers the Act under which the local law is proposed to be made, to that other Minister.*
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- (6) *After the local law has been published in the Gazette 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.*
- (7) *The Minister may give directions to local governments requiring them to provide to the Parliament copies of local laws they have made and any explanatory or other material relating to them.*
- (8) *In this section —*
- making** in relation to a local law, includes making a local law to amend the text of, or repeal, a local law.*

3.13. Procedure where significant change in proposal

If during the procedure for making a proposed local law the local government decides to make a local law that would be significantly different from what it first proposed, the local government is to recommence the procedure. (underlining added)

- 2.3 The phrase ‘significantly different’ is not defined in the LGA.
- 2.4 In order to assist local governments to pass valid local laws, the Department of Local Government, Sport and Cultural Industries (Department) has, for many years, published a *Statutory Procedures Checklist* which outlines the mandatory procedural steps prescribed by section 3.12 of the LGA, and other sections, to pass a valid local law. Part C of the checklist clearly indicates the requirements of section 3.12(4) of the LGA.

3 SCRUTINY OF THE INSTRUMENT

- 3.1 The Committee first scrutinised the Instrument at its meeting on 21 August 2017. The Instrument was proposed by the Town of East Fremantle (Town) at an Ordinary Council Meeting on 21 March 2017. The proposed Instrument was then advertised for public

comment pursuant to sections 3.12(3) and (3a) of the LGA³ and the Instrument was ultimately adopted by the Council on 25 May 2017.

- 3.2 The Instrument purports to ban the retail and (in some instances) wholesale supply of single use plastic shopping bags within the Town's district. A 'single use plastic shopping bag' (SUP Bag) is defined in clause 4 as follows:

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 35 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.

- 3.3 The Instrument commenced operation on 29 November 2017.⁴ The stated purpose of the Instrument is to reduce the use of SUP Bags within the district and the Instrument is justified as a means to reduce litter in the terrestrial and marine environments.⁵

- 3.4 The Committee noted that the thickness threshold of 35 microns (or micrometres)⁶ is the same threshold used in other jurisdictions which have banned plastic bags. In order to be a SUP Bag, the bag must have '*handles*',⁷ meaning that so-called 'fruit and vegetable bags', which have no handles, and perhaps bags with only one handle would not be banned. The Explanatory Memorandum advised that the Town intends to commence banning this narrower range of plastic bags as a starting point.

- 3.5 However, when the Instrument was first proposed by the Council:

- a SUP Bag was defined to mean a plastic bag with a thickness of less than 60 microns

³ Effectively from the start of April 2017, the proposed Instrument was advertised in *The West Australian*, two local newspapers (the *Fremantle Herald* and *Fremantle Gazette*) and on notice boards at the Town's offices and library (the Fremantle City Library, which it shares with the City of Fremantle).

⁴ Instrument clause 2.

⁵ Explanatory Memorandum, p 1.

⁶ Paragraph (a)(i) of the definition of SUP Bag: Instrument clause 4.

⁷ Paragraph (a)(ii) of the definition of SUP Bag: *ibid*, clause 4.

- ‘reusable plastic bag’ was defined to mean a plastic bag with a thickness of 60 microns or more.⁸

3.6 As part of the public consultation process for the Instrument, the Town received four submissions: two from members of the public supporting the proposed Instrument, one from the Department and one from the Western Australian Local Government Association (WALGA). In its submission, the WALGA recommended to the Town that the thickness threshold be lowered from 60 microns to 35 microns. According to the Explanatory Memorandum, this was to:

support a consistent approach with other States and Territories, and to assist with the Local Law[']s acceptance in Parliament⁹

3.7 On the adoption of the Instrument, the Council followed the WALGA’s recommendation and amended the thickness threshold from 60 microns to 35 microns. The Council’s advisers were aware of the potential breach of section 3.12(4) of the LGA but argued that:

The proposed amendment is not considered to be significantly different from what was first proposed. The intent of the local law is still the same, only the definitions of a “reusable plastic bag” and “single use plastic shopping bag” have changed from 60 microns to 35 microns.¹⁰

4 INSTRUMENT IS SIGNIFICANTLY DIFFERENT FROM WHAT WAS PROPOSED

4.1 There is limited legislative guidance on the meaning of the phrase ‘significantly different’ and only a few factual examples of when the Committee has found a proposed local law to be ‘significantly different’ from the local law that was made. There is a view, often repeated by the Department, that an alteration that changes an obligation or right is likely to be a significant difference. However, each case turns on its own facts.

4.2 The Committee in the 38th Parliament recommended the disallowance of the *City of Nedlands Parking and Parking Facilities Local Law 2012* on the basis that the final local law was significantly different from the proposed local law (Report 62).¹¹ In that case, the Committee took issue with the following clause being *inserted* into the local law, having considered the purpose and effect of the clause and the intent of sections 3.12 and 3.13 of the LGA:

⁸ Proposed Instrument clause 4.

⁹ p 3.

¹⁰ Town of East Fremantle, *Minutes of Special Council Meeting*, 25 May 2017, p 6.

¹¹ Parliament of Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, Report 62, *City of Nedlands Parking and Parking Facilities Local Law 2012*, 29 November 2012.

5.14(4) *The owner or occupier of premises adjacent to a verge shall not charge a fee to authorise a person to stop on a verge in accordance with subclause (2) of this clause.*¹²

- 4.3 Conversely, the Committee did not take issue with the *deletion* of an entire Part of the proposed local law (Part 6) when making the final local law on the basis that the Part had been the subject of community consultation.¹³ The following discussion in Report 62 is relevant:

The New Shorter Oxford English Dictionary defines ‘significant’ to mean ‘important, notable; consequential’. In determining if a law made is significantly different from a proposed law, each case turns on its own facts.

In Report 9: Issues of concern raised by the Committee between December 20 2003 and June 30 2004 with respect to Local Laws, the former Committee found that a local law which prescribed prickly lettuce as a pest plant was significantly different from the proposed local law which did not prescribe prickly lettuce as a pest plant. In that case, the Committee acknowledged that although the difference was minor in form, the law was significantly different because the main purpose of the local law was to prescribe pest plants for the district and the insertion prescribed a new pest plant in the local law which, the Committee noted, had not been advertised.

*The Committee has also previously found that there was a significant difference between the local law made and what was proposed when a gazetted local law prescribed increased penalties (fines) not contained in the advertised proposed law.*¹⁴

- 4.4 In *Clark v Cook Shire Council* [2008] 1 Qd R 327, the Queensland Court of Appeal considered the meaning of ‘significantly different’. This case involved an amendment to the zoning of land in a planning scheme. The relevant legislation in this case is analogous to sections 3.12(4) and 3.13 of the LGA. The Queensland Act¹⁵ provided that, if a local government decides to proceed with a proposed planning scheme with modifications, and is satisfied that the modifications will make the proposed planning scheme ‘*significantly different*’ from the proposed planning scheme as notified, it must recommence the notification process. The Court unanimously approved of a ‘macro’ view of the legal test for ‘significantly different’, finding that the modifications must

¹² See *ibid*, pp 5-8.

¹³ *ibid*, p 4.

¹⁴ *ibid*, p 6.

¹⁵ *Integrated Planning Act 1967* (Qld) Schedule 1, section 16.

have the consequence that the modified scheme *as a whole* is significantly different from the notified scheme. The difference is not significant merely because it has, or may have, an adverse effect on a person.

- 4.5 In *Clark v Cook Shire Council*, Williams JA essentially stated that ‘significantly different’ applies to the ‘macrocosm’ of the instrument, not just to any modification because any modification ‘*would almost certainly in some way adversely affect some particular landowner*’.¹⁶ His Honour adopted another Court’s reasoning that an instrument must be ‘*quite different*’ in ‘*some material respect*’ to satisfy this test:

*The words of s 16(2) make it clear that what has to be compared in order to determine whether or not there is a significant difference is the “planning scheme with modifications” and the “proposed planning scheme as notified”. As the learned judge at first instance in this case said, the phrase “significantly different” is more apt “to apply to the macrocosm of the planning scheme as a whole, rather than the microcosm of possible submissions or objections from particular landowners on grounds involving an assertion that personal interests have been adversely affected.” As Keane JA has pointed out the drafting of the relevant provisions of the Act appears to be a legislative adoption of the approach to a somewhat similar problem adopted by the New South Wales Court of Appeal in Leichhardt Council v Minister for Planning [No 2] (1995) 87 LGERA 78, where Priestley JA (with whom Sheller JA agreed) said at 84 that the test was whether the plan was “so different from the publicly exhibited draft that in some important respect it could be said to be a quite different plan ...”.*¹⁷

- 4.6 In the same case, Keane JA found that the alterations would only amount to a significant difference if the modified scheme ‘*as a whole*’ was ‘*materially different*’ from the notified scheme. His Honour was of the opinion that the Act was concerned with the framework of the instrument:

Section 16(2) of Sch 1 is explicitly focussed upon the difference between the modified scheme and the notified scheme, not between particular provisions in respect of particular parts of the local government area affected by particular elements of the planning scheme. In my respectful opinion, “significance” in this context is concerned with whether the modifications are such as to have the consequence that the modified scheme as a whole is materially different from the notified scheme.

¹⁶ [2008] 1 Qd R 327 at p 330, paragraph 4.

¹⁷ *ibid*, p 331, paragraph 5.

*... s 12 and s 16 of Sch 1 are not concerned with the potential impact of the modified scheme on individual interests as such, but with the overall framework for land use and development within the local government area.*¹⁸

4.7 Therefore, the Committee considered the following factors when assessing whether there is a significant difference between the proposed Instrument and the Instrument which was adopted and then gazetted:

- Whether the modification includes an insertion or deletion of a clause.
- The effect of the modification—whether the modified law as a whole is materially different, or quite different in some material respect, from the proposed law. Is the overall framework of the law modified?

4.8 With respect to the first factor, the changes to the definitions of ‘reusable plastic bag’ and SUP Bag are in the nature of insertions; that is, changes about which the public has not been consulted prior to the making of the Instrument.

4.9 In relation to the second factor, the Committee is of the view that a material aspect of the Instrument was changed—it now bans the supply of thinner plastic bags, changing an integral part of the ban. Further, the ban may now not affect as many plastic bags, potentially narrowing the scope of the Instrument. Although the general intent of the Instrument was not changed by the late modification, in the words of Keane JA in *Cook*, the overall framework of the Instrument was modified. This conclusion would result in the finding that the Instrument was made invalidly and is void and of no effect.

4.10 The timing of the modification to the thickness threshold (at the end of the local law-making process) meant that the public, including the Department, was not consulted about the reduction in thickness threshold from 60 microns to 35 microns. The Committee is concerned that members of the public would have assessed the proposed Instrument and based their submissions on a 60-micron threshold, and did not have the opportunity to consider the reduced threshold prior to the Instrument’s adoption. In the Committee’s view, this is contrary to one of the intents of sections 3.12 and 3.13 of the LGA, which is to:

*ensure that local governments engage in community consultation prior to making a local law. This consultation process is particularly important when new laws are being proposed or inserted into a local law.*¹⁹

¹⁸ *ibid*, p 337, paragraphs 29-30.

¹⁹ Parliament of Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, Report 62, *City of Nedlands Parking and Parking Facilities Local Law 2012*, 29 November 2012, p 6.

5 THE IMPORTANCE OF COMPLYING WITH SECTIONS 3.12(4) AND 3.13 OF THE LGA

- 5.1 Contrary to section 3.12(4) of the LGA, the Town's Council adopted a local law that was significantly different from the one which was proposed, advertised and on which the public was consulted. The thickness threshold of the plastic bags which are banned goes to the heart of the ban which is established by the Instrument. As stated earlier, a material aspect of the Instrument was changed—and it was changed only after the public had been consulted on a local law which banned thicker plastic bags. Had the Town recommenced the local law-making process when the change was decided, as required by section 3.13 of the LGA, the public would have had the opportunity to be notified and consulted on the lower thickness threshold.
- 5.2 The Town suggested that the potential reduction of the Instrument's impact, resulting from the Council's adoption of a lower threshold thickness (late in the local law-making process), should not be a concern for the Committee. However, that potential reduction in the scope of the Instrument at that late stage is precisely why the Committee is of the view that the Town breached section 3.12(4). Put simply, the Town made a local law which was materially different from the local law which the public was expecting it to make.
- 5.3 One intent of section 3.12 of the LGA is to ensure that the public are adequately notified and have an opportunity to submit their views about proposed local laws. That consultation process is rendered meaningless if the proposed local law is then adopted with significant changes. In this context, 'significant' refers to the effect and substance of a local law, not necessarily its form. The intent of sections 3.12(4) and 3.13 of the LGA is to ensure that local governments do not make significant changes to local laws unless the public is first properly notified and consulted about those changes.

6 CAN SECTION 3.12(2A) OF THE LGA SAVE THE INSTRUMENT FROM INVALIDITY?

- 6.1 Section 3.12(2A) provides that:

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. (underlining added)

- 6.2 The Committee is of the view that the Instrument is invalid by reason of non-compliance with sections 3.12(4) and 3.13 of the LGA. For the reasons expressed below, it is of the further opinion that section 3.12(2A) cannot be relied upon to save the Instrument from invalidity due to that non-compliance.

Breach of section 3.12(4) of the LGA

- 6.3 One aspect of the procedure described in section 3.12 is, of course, the section 3.12(4) adoption of a '*local law as proposed or ... a local law that is not significantly different*

from what was proposed’ In the Committee’s view, it is not possible to comply substantially with the local law-making procedure if the requirements of section 3.12(4) are not satisfied—it is a vital step in the process. Further, the second scenario contemplated by section 3.12(4), of adopting a local law that is ‘*not significantly different from what was proposed*’ is already a legislated concession to the requirement to adopt a local law ‘*as proposed*’ (the first scenario). Anything less than full compliance with section 3.12(4), in either scenario, would render the public consultation process envisaged by section 3.12 meaningless.

Breach of section 3.13 of the LGA

6.4 The Town has also breached section 3.13 of the LGA, by failing to recommence the local law-making process under section 3.12 when it decided to make the Instrument, which, in the Committee’s view, amounted to ‘*a local law that would be significantly different from what it first proposed*’. Section 3.12(2A) cannot be used to rectify a breach of section 3.13 because it only pertains to deficiencies in the local law-making procedures prescribed in section 3.12, not deficiencies in procedures prescribed in other sections of the LGA.

7 CONCLUSION

7.1 The Committee’s Term of Reference 10.6(a) states that:

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

7.2 The Committee is of the view that the Instrument is invalid by reason of non-compliance with sections 3.12(4) and 3.13 of the LGA. It offends Term of Reference 10.6(a). The Committee therefore recommends to the Parliament that the Instrument be disallowed.

7.3 Strictly speaking, an instrument which is made invalidly is void and of no effect, and cannot be disallowed. With this in mind, the disallowance which is recommended by the Committee may be viewed as unnecessary. However, there are a number of benefits in recommending the disallowance of invalid local laws, including ensuring they are quickly removed from the public record, thereby reducing the risk of public misinformation.

8 RECOMMENDATION

8.1 The Committee makes the following recommendation.

Recommendation 1: The Committee recommends that the *Town of East Fremantle Plastic Bag Reduction Local Law 2017* be disallowed.

Emily Hamilton

**Ms Emily Hamilton MLA
Chair**

30 November 2017

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*.



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