



JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

Your Ref: Bernadine Tucker
Our Ref: 3872/2

Cr Olwen Searle JP
Mayor
City of Gosnells
PO Box 662
GOSNELLS WA 6990

By facsimile: 9397 3333

27 September 2011

Dear Mayor

City of Gosnells Waste Local Law 2011

I refer to the above Local Law and to the supporting information provided to the Joint Standing Committee on Delegated Legislation in July 2011.

The Committee scrutinised this Local Law at its meeting 26 September 2011 and resolved to write to your local government about its preliminary concerns regarding a number of clauses.

Clause 2.1 — City waste

This clause provides:

The City shall undertake or contract for the removal of City waste from premises within the district.

This clause differs from the WALGA Waste Model Law (Model Law) and previous local laws the Local Law is said to be based on, which simply refer to 'waste', not 'City waste'.

'City waste' is not defined in the Local Law. Although 'City' (the City of Gosnells) and 'waste' are defined these definitions do not assist the Committee in interpreting what 'City waste' means—waste produced, collected and/or owned by the City located on premises or waste within the City?

Terms in an instrument may be so vague as to be of no legal effect. Local laws ought to clearly set out requirements and obligations.

The Local Law is made under sections 61 and 64 of the *Waste Avoidance and Resource Recovery Act 2007* (WARR Act) and in accordance with Part 3, Division 2, Subdivision 2 of the *Local Government*

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Act 1995 (LG Act). It is implied that Parliament, in enacting the empowering provisions, does not authorise laws containing vague terms.

In the Committee's preliminary view, the words 'City waste' are so uncertain and vague as to be of no legal effect. It is the Committee's preliminary view the phrase 'City waste' in clause 2.1 is not authorised or contemplated by, and inconsistent with, the WARR Act and LG Act and offends the Committee's term of reference 3.6(a). The phrase is therefore inoperative under section 3.7 of the LG Act and section 61(8) of the WARR Act to the extent of the inconsistency and is void under section 43(1) of the *Interpretation Act 1984* to the extent of the inconsistency.

The Committee seeks an undertaking from your local government to delete the word 'City' before 'waste' in clause 2.1 of the Local Law.

City

'City' is defined in clause 1.3 of the Local Law to mean 'the City of Gosnells' and the instrument repeatedly refers to 'the City', not 'the local government'. Neither 'Council' nor 'Local Government' are defined in the Local Law. (The term 'local government' is not used in the Local Law. The term 'Council' is used only once in the enacting formula and when affixing the seal to the Local Law).

The instrument deviates from the Model Law which defines 'local government' to mean 'the [City of ... etc]' and refers to 'the local government' throughout the Model Law. The *Shire of Broomehill-Tambellup Waste Services Local Law 2009*, on which the Local Law is said to be based, also correctly uses the term 'local government'.

The Committee has raised the issue of the use of the word 'City' in previous instruments including the *City of Perth Parking Local Law 2010* and *City of Mandurah Waste Management Local Law 2010*.

After seeking undertakings from the City of Perth and City of Mandurah to amend their local laws, the Committee wrote to Hon John Castrilli MLA, Minister for Local Government expressing its concerns regarding the use of the word 'City' in local laws. I attach a copy of the letter to the Minister for Local Government dated 21 June 2011. The Minister for Local Government accepted the Committee's view in his response dated 1 August 2011, which is attached for your information.

The Committee seeks an undertaking from your local government to amend the Local Law to make the terms in the instrument consistent with the *Waste Avoidance and Resource Recovery Act 2007* and the *Local Government Act 1995* by replacing references to the 'City' with 'local government';

Clause 2.12(3) — collection service of recyclable material and a collection for bulk material

This clause provides:

An occupiers of premises shall comply with and observe the directions given by an authorised person, the City or its contractor in relation to—

- (a) *a collection service for recyclable material; or*
- (b) *a collection for bulk material; ..*

The Committee is of the view that it would be preferable to define the phrases 'collection service of recyclable material' and 'a collection for bulk material' in the Local Law.

The Committee suggests that your local government amends the Local Law to define the terms 'collection service of recyclable material' and 'a collection for bulk material' in clause 1.2.

Offences and Penalties

Clause 3.1 of the Local Law provides that a person who fails to do anything required or directed to be done under the Local Law or who does anything which under the Local Law they are prohibited from doing commits an offence. The Local Law imposes the maximum penalties under sections 63(3) and (4) of the WARR Act for all offences — a penalty not exceeding \$5 000, and if the offence is of a continuing nature, a further penalty not exceeding \$500 for every day. Section 9.16 of the LG Act provides that offences may be prescribed in certain circumstances.

Clause 3.2 and Schedule 1 of the Local Law implements prescribed offences (infringement notice offences) and modified penalties. Schedule 1 includes a list of offences and 'Any other offence [established by clause 3.1(1)] not specified' in the Schedule. This has the effect of listing all offences as prescribed offences, without specifically listing all prescribed offences.

The Committee is concerned about a number of offences and prescribed offences in the Local Law. The Committee is of the firm view that many offences and prescribed offences are contrary to the principles of good governance. Section 3.1(1) of the LG Act provides that a general function of a local government is to provide for the good government of persons in its district.

The Committee notes that offences that are too vague and uncertain are not authorised by the empowering provisions.

Many offences involve vague terms that are not defined and leave a broad subjective discretion to the City employee who is authorised to prosecute the offences. For example, what is considered a 'clean' bin may vary considerably from person to person. The Committee questions whether it is reasonable to expect a person to keep their bin 'clean' at all times. It may be difficult to determine what is considered a 'sufficient' number of private containers. Further, some offences including failing to keep a lid closed, failing to keep the receptacle so it is not visible from the street or failing to keep it in a prescribed position may be considered more trivial acts or omissions, not conduct that should attract the fines enacted in the Local Law.

It is notable that the penalty for all offences is the maximum under the WARR Act even though the seriousness of the offending conduct varies considerably. Section 64(6) of the WARR Act provides that the level of a penalty imposed by a local law may relate to the circumstances or extent of the offence, whether the offender has previously committed an offence and, if so, the number of offences previously committed. It appears that the Act contemplates the imposition of penalties relating to the circumstances or extent of the offence. There appears to have been no attempt to reflect the seriousness of the offending conduct in the penalties. It is uncertain whether discretion is permitted.

The Committee is also concerned with the vague prescribing of 'Any other offence not specified' in Schedule 1.

Conclusion

In summary, the Committee requests the following undertakings from your local government:

- to delete the word 'City' before 'waste' in clause 2.1;
- to amend the instrument to make the terms in the instrument consistent with the *Waste Avoidance and Resource Recovery Act 2007* and the *Local Government Act 1995* by replacing references to the 'City' with 'local government';
- to define the phrases 'collection service of recyclable material' and 'collection for bulk material' in clause 1.2;
- to review and revise the offences and Schedule 1 (Prescribed Offences). Please provide details of proposed amendments,

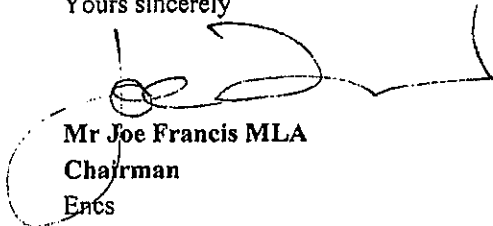
and that

- all consequential undertakings arising from the undertaking will be made;
- clauses will not be enforced in a manner contrary to the undertakings that the Council gives;
- the undertaking will be completed within six months of the date of the City's letter giving the undertakings;
- the City of Gosnells will provide a copy of the minutes of the meeting at which the Council resolves to provide the undertaking above; and
- where the Local Law is made publicly available, whether in hard copy or electronic form, it be accompanied by a copy of these undertakings.

Due to its concerns with this Local Law, the Committee resolved to give notice of motion to disallow the *City of Gosnells Waste Local Law 2011* in the Legislative Council on 27 September 2011. However, the giving of notice should not be taken as indicating that the Committee has resolved to recommend disallowance at this stage.

Given the strict timeframes for disallowance of subsidiary legislation under the Legislative Council's Standing Orders and the *Interpretation Act 1984*, the Committee requests that the information and undertakings be provided by 5pm on Wednesday, 12 October 2011. If you have any questions, please telephone the Committee's Advisory Officer, Ms Suzanne Veletta on 9222 7250 or at delleg@parliament.wa.gov.au.

Yours sincerely



Mr Joe Francis MLA
Chairman
Encls



JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

Our Ref: 3855/15 & 3856/1

Hon John Castrilli MLA
Minister for Local Government
12th Floor, Dumas House
2 Havelock Street
WEST PERTH WA 6005

By facsimile: 9213 6801

21 June 2011

Dear Minister

City of Perth Parking Local Law 2010 and City of Mandurah Waste Management Local Law 2010

The Joint Standing Committee on Delegated Legislation recently scrutinised the two above named local laws noting that each local government had used the term 'City' in their definitions clause rather than the correct terms 'Council' and 'Local Government'.

City of Perth Parking Local Law 2010

In the *City of Perth Parking Local Law 2010 (Perth Local Law)*, the Committee noted that the term 'local government' was not used as the preferred term to refer to either the City of Perth or the Council of the City of Perth.

Given the varying uses of the terms 'City' and 'Council' throughout the Perth Local Law, the Committee sought clarification in relation to the following:

- why the defined term 'Council' had been replaced by 'City' in clauses 2.1 and 2.2; and
- given that 'City' was defined as 'City of Perth', to which entity or persons did the 'City of Perth' specifically refer and queried why this was not specified in the Perth Local Law.

The City of Perth advised that the term 'Council' was amended to read 'City' to enable the City's administration to identify and set aside or remove parking within an appropriate timeframe to facilitate special events. The City also explained that the definitions clause in the local law clearly defined 'City' to mean 'City of Perth' and that this was considered to be a common definition of the term

'City' that often appears in local laws. The City of Perth means the local government of the City of Perth.

After considering the City of Perth's arguments above, the Committee remained concerned that the information provided regarding the use of 'City' rather than 'Council' in clauses 2.1, 2.2 and 2.21(3) of the Perth Local Law shifted the power to identify and set aside or remove parking within the City of Perth from the elected members of the Perth City Council to the administrative arm of the local government. The Committee sought an undertaking that the word 'City' be changed back to 'Council' in clauses 2.1, 2.2 and 2.21(3) of the Local Law. The City provided undertakings on 8 June 2011 to replace the word 'City' with the word 'Council' in the named clauses.

City of Mandurah Waste Management Local Law 2010

The Committee noted that this Local Law had not used the standard definition from WALGA's *Waste Model* law which states that '*local government means the [City of Mandurah]*'. Instead 'City' was defined as '*the City of Mandurah, the body corporate or legal entity established under section 2.5 of the Local Government Act 1995*'.

The Committee noted that neither "Council" nor "Local Government" were defined in clause 1.5(1) though the term "local government" was mentioned once in the definition of "suitable enclosure" as meaning "*an enclosure—(f) provided with a ramp into the enclosure having a gradient no steeper than 1:8 unless otherwise approved by the local government.*" The term "Council" was used once in the enacting formula:

Under the powers conferred on it by the Waste Avoidance and Resource Recovery Act 2007 and the Local Government Act 1995 and under all other enabling powers, the Council of the City of Mandurah resolved on 25 January 2011 to adopt the following local law.

and

in the definition of "authorised person" as meaning "a person appointed by the Council under section 9.10 of the LG Act to perform any of the functions of an authorised person under this local law."

The Committee had a preliminary view that the *Waste Avoidance and Resource Recovery Act 2007* under which this Local Law was made refers to "local governments" making local laws not a "body corporate or legal entity".

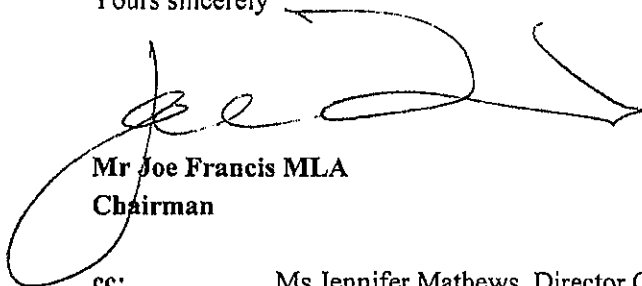
The Committee requested an explanation as to why the terms "Council" and "Local Government" were not defined in clause 1.5(1). The City said it had been advised by the Department to make those changes. The Committee has now asked the City to provide an undertaking to make the terms consistent with the *Waste Avoidance and Resource Recovery Act 2007* and the *Local Government Act 1995*.

The Committee is concerned at the shift of power from elected members to the administrative arm of the local government implied by the use of such terminology in local laws. The Committee will be vigilant in ensuring that the correct terminology is used in all local laws and requests you advise the Department accordingly.

The Committee would appreciate your response to this matter by Thursday, 4 August 2011.

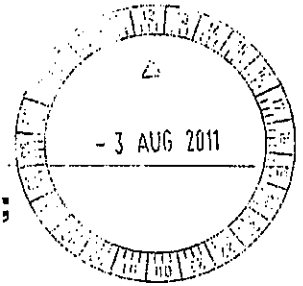
If you have any queries in relation to this letter, please contact the Committee's Advisory Officer (Legal), Ms Irina Lobeto-Ortega on ph: 9222 7302, fax: 9222 7805 or via email at delleg@parliament.wa.gov.au.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Joe Francis', with a large, sweeping flourish extending to the right and a loop on the left side.

Mr Joe Francis MLA
Chairman

cc: Ms Jennifer Mathews, Director General, Department of Local Government
By facsimile: 9217 1555



**Minister for Local Government; Heritage;
Citizenship and Multicultural Interests**

Your Ref: 3855/15 & 3856/1
Our Ref: 38-09808

Mr Joe Francis MLA
Chairman
Joint Standing Committee on Delegated Legislation
GPO Box A11
PERTH WA 6837

Dear Mr Francis

**CITY OF PERTH PARKING LOCAL LAW 2010 AND CITY OF MANDURAH
WASTE MANAGEMENT LOCAL LAW 2010**

Thank you for your letter dated 21 June 2011 regarding the term 'City' in the City of Perth's and City of Mandurah's local laws.

I am advised by the Department of Local Government that your comments have been noted and will be reflected in advice provided to local governments on draft local laws in the future.

Thank you for bringing this matter to my attention.

Yours sincerely

G M (John) Castrilli MLA
**MINISTER FOR LOCAL GOVERNMENT; HERITAGE;
CITIZENSHIP AND MULTICULTURAL INTERESTS**

- 1 AUG 2011