



THIRTY-EIGHTH PARLIAMENT

REPORT 46

**JOINT STANDING COMMITTEE ON DELEGATED
LEGISLATION**

***CITY OF GOSNELLS WASTE LOCAL LAW 2011
AND
SHIRE OF DERBY/WEST KIMBERLEY WASTE
SERVICES LOCAL LAW 2011***

Presented by Mr Joe Francis MLA (Chairman)
and
Hon Sally Talbot MLC (Deputy Chair)

November 2011

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:

3. Joint Standing Committee on Delegated Legislation

- 3.1 A *Joint Standing Committee on Delegated Legislation* is established.
- 3.2 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.
- 3.3 A quorum is 4 Members of whom at least one is a Member of the Council and one a Member of the Assembly.
- 3.4 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.
- 3.5 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.
- 3.6 In its consideration of an instrument, the Committee is to inquire whether the instrument -
- (a) is authorized or contemplated by the empowering enactment;
 - (b) has an adverse effect on existing rights, interests, or legitimate expectations beyond giving effect to a purpose authorized or contemplated by the empowering enactment;
 - (c) ousts or modifies the rules of fairness;
 - (d) deprives a person aggrieved by a decision of the ability to obtain review of the merits of that decision or seek judicial review;
 - (e) imposes terms and conditions regulating any review that would be likely to cause the review to be illusory or impracticable; or
 - (f) contains provisions that, for any reason, would be more appropriately contained in an Act.
- 3.7 In this clause -
- “**adverse effect**” includes abrogation, deprivation, extinguishment, diminution, and a compulsory acquisition, transfer, or assignment;
- “**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 Joe Francis MLA (Chairman)	Mr Andrew Waddell MLA
Hon Sally Talbot MLC (Deputy Chair)	Mr Paul Miles MLA
Hon Alyssa Hayden MLC	Hon Jim Chown MLC
Ms Janine Freeman MLA	Hon Helen Bullock MLC

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Government Response

This Report is subject to Standing Order 337:

After tabling, the Clerk shall send a copy of a report recommending action by, or seeking a response from, the Government to the responsible Minister. The Leader of the Government or the Minister (if a Member of the Council) shall report the Government's response within 4 months.

The four-month period commences on the date of tabling.

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REPORT OF THE JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

IN RELATION TO THE REPORT INTO

CITY OF GOSNELLS WASTE LOCAL LAW 2011

AND

SHIRE OF DERBY/WEST KIMBERLEY WASTE SERVICES LOCAL LAW 2011

1 INTRODUCTION

- 1.1 The *City of Gosnells Waste Local Law 2011* (**Gosnells Local Law**) is attached at Appendix 1.
- 1.2 The *Shire of Derby/West Kimberley Waste Services Local Law 2011* (**Derby/West Kimberley Local Law**) is attached at Appendix 2.
- 1.3 The Joint Standing Committee on Delegated Legislation (**Committee**) first scrutinised the Gosnells Local Law on 26 September 2011. The Committee raised a number of concerns with the City of Gosnells (**City**) and sought undertakings to amend the Gosnells Local Law in relation to the Committee's concerns.¹ A Notice of Motion of disallowance was tabled in the Legislative Council to preserve the Committee's position while considering the Gosnells Local Law.
- 1.4 On 25 October 2011 the Council of the City of Gosnells (**City Council**) resolved to approve one requested undertaking to amend the Gosnells Local Law and sought an extension of time to consider the remaining requested undertakings.
- 1.5 On 31 October 2011 the Committee conducted a hearing with representatives from the City, Department of Local Government and Western Australian Local Government Association (**WALGA**).²
- 1.6 On 31 October 2011 the Committee resolved to recommend that the Gosnells Local Law be disallowed on the basis that offence provisions (clauses) in the Gosnells Local Law offend the Committee's terms of reference 3.6(a) and 3.6(b).
- 1.7 The Gosnells Local Law and Derby/West Kimberley Local Law (**the Local Laws**) contain many of the same or similar offence provisions. On 31 October 2011 the Committee also resolved to recommend that the Derby/West Kimberley Local Law, which the Committee scrutinised that day, be disallowed for the same reasons.

¹ The Committee's letter to the City of Gosnells dated 27 September 2011 and responses dated 29 September 2011 and 5 October 2011 can be viewed on the Committee's website at www.parliament.wa.gov.au/del, then choose Reports, Report 46.

² The transcript of the hearing on 31 October 2011 can be viewed on the Committee's website (see above).

1.8 Comments made in this report in relation to offence provisions in the Gosnells Local Law are relevant to the Derby/West Kimberley Local Law where the same or a similar provision exists in that law.

1.9 The Committee's consideration of the Gosnells Local Law raises issues relevant to all waste local laws, the WALGA Waste Model Law and the proposed revised WALGA Waste Model Law.

2 TERMS OF REFERENCE

2.1 The Committee's terms of reference 3.6(a) and 3.6(b) state:

In its consideration of an instrument, the Committee is to inquire whether the instrument—

(a) is authorized or contemplated by the empowering enactment;

(b) has an adverse effect on existing rights, interests or legitimate expectations beyond giving effect to a purpose authorized or contemplated by the empowering enactment

2.2 Terms of reference 3.6(a) and 3.6(b) touch on the legal doctrine of *ultra vires*, which literally means 'beyond the power'.

2.3 It is important to note that terms of reference 3.6(a) and 3.6(b) distinguish between what is 'authorized' (*ultra vires*) and what is 'contemplated' by the empowering enactment or Act. These are different considerations. The terms of reference authorise the Committee to express an opinion on what Parliament contemplated when passing legislation.

2.4 On the distinction between *ultra vires* and the Committee's function, Hon Kim Chance MLC commented when the then new terms of reference were adopted:

The new provision allows the committee to express an opinion about whether the regulation is one that Parliament would accept as a proper exercise of the power, but it does not have to go to the next step and declare whether the regulation is intra vires or ultra vires.³

2.5 Hon Peter Foss MLC added on the distinction between 'authorized' and 'contemplated':

[The House] is not bound by the law; it is bound by the views of the House of what is appropriate. A matter may be intra vires, but the

³ Hon Kim Chance MLC, Leader of the House in the Legislative Council, *Parliamentary Debates (Hansard)*, 27 June 2001, p1444.

*committee may be of the view that it is not contemplated by the empowering enactment; it might be authorised by it due to the wide wording of the empowering legislation. It is possible for Parliament to enact legislation that has an enormous amount of coverage, which could make something intra vires. However, if the House decided that was not what the legislation intended, it would disallow the regulation.*⁴

3 PRELIMINARY ISSUES WITH THE CITY OF GOSNELLS WASTE LOCAL LAW 2011

- 3.1 Prior to dealing with the main issues regarding the Gosnells Local Law, the Committee takes this opportunity to comment on other issues that did not impact on the Committee's decision to recommend that the Gosnells Local Law be disallowed.

'City waste'

- 3.2 The Committee raised an issue regarding the term '*City waste*' in clause 2.1 of the Gosnells Local Law, which provides:

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

- 3.3 The Committee sought an undertaking to remove the word '*City*' before '*waste*' in clause 2.1. The City Council agreed to this request and therefore this issue did not impact on Committee's decision to recommend that the Gosnells Local Law be disallowed.

'Collection service for recyclable material', 'collection for bulk material'

- 3.4 The Committee expressed a preference, not requirement, that the phrases '*collection service for recyclable material*' and '*collection for bulk material*' in clause 2.12 of the Gosnells Local Law be defined. For example, a definition could state that a collection service for recyclable material (or waste) is a collection undertaken by the local government or its contractor for which notice has been given to occupiers of premises.
- 3.5 The City considers that the two phrases are probably better defined by replacing '*material*' with '*waste*' to be consistent with the terms in the *Waste Avoidance and Resource Recovery Act 2007 (WARR Act)*.⁵ The Committee would not object to such an amendment.

⁴ Hon Peter Foss MLC, Legislative Council, *Parliamentary Debates (Hansard)*, 27 June 2001, p1447.

⁵ Ms Bernadine Tucker, Manager, Governance, City of Gosnells, *Transcript of Evidence*, 31 October 2011, p5.

‘City’ not ‘local government’ in local laws

- 3.6 The Committee also raised the issue of the use of the term ‘City’, not ‘local government’, in the Gosnells Local Law.
- 3.7 Clause 1.3 of the Gosnells Local Law defines ‘City’ to mean ‘the City of Gosnells’ and the Gosnells Local Law repeatedly refers to ‘the City’, not ‘the local government’. For example, in clause 2.1 (see paragraph 3.2) and clause 2.8(1), which provides that ‘The City may authorise waste to be deposited in a private container ...’. In contrast, the enacting formula in the Gosnells Local Law states that the ‘Council of the City of Gosnells’ resolved to make the law and the law states that the common seal of the City of Gosnells was affixed ‘by authority of a resolution of the Council’.
- 3.8 The Committee has previously advised Hon John Castrilli MLA, Minister for Local Government, of its view that the term ‘local government’ rather than ‘City’ should be used in local laws. The Minister for Local Government and Department of Local Government have accepted the Committee’s view and the Department of Local Government advises local governments to use the term ‘local government’ in local laws.⁶
- 3.9 In the Committee’s view, terminology is particularly important in the enacting formula and when affixing the common seal to an instrument. The practice of specifically referring to the Council in the enacting formula and when affixing the common seal to an instrument is appropriate.
- 3.10 Terminology is very important when local law clauses refer to a law making function of the ‘local government’, rather than administrative tasks undertaken by the ‘City’. For example, in the *City of Perth Parking Local Law 2010* where clause 2.1 provided that ‘the City may prohibit or regulate by signs or otherwise the stopping and parking of any vehicles ...’, the Committee took issue with the use of the word ‘City’ and requested an undertaking that the term be replaced with ‘Council’, the law making body. The term ‘City’ is often understood to refer to the administrative arm of the local government and is not appropriate in clauses referring to law making functions. The issue of using ‘City’ ‘Shire’ and ‘Town’ in local law rather than ‘local government’ is less important when a clause relates solely to an administrative function.
- 3.11 As stated in the Committee’s letter to the Minister for Local Government, the Committee is concerned about the shift of power from elected members to the

⁶ The Committee’s letter to Hon John Castrilli MLA, Minister for Local Government, dated 21 June 2011 and the response from the Minister for Local Government dated 1 August 2011, attached to the Committee’s letter to the City of Gosnells dated 27 September 2011, can be viewed on the Committee’s website at www.parliament.wa.gov.au/del, then choose Reports, Report 46.

administrative arm of the local government implied by the use of ‘City’ ‘Shire’ and ‘Town’ in local laws.

- 3.12 ‘City of Gosnells’ is the corporate name of the local government in the Gosnells district pursuant to the *Local Government Act 1995 (LG Act)*.⁷ Witnesses at the hearing noted that either ‘City’ or ‘local government’ can be used in local law.⁸ The City, while acknowledging that there is no *legal* difference between the two terms, considers the term ‘City’ in local laws ‘preferable’ to using the ‘generic “local government”’ as this reflects the corporate name under the LG Act.⁹
- 3.13 Many local laws including the *Shire of Broomehill-Tambellup Waste Services Local Law 2009*, on which the Gosnells Local Law is said to be based, and the Derby/West Kimberley Local Law use the term ‘local government’ throughout the law and define ‘local government’ in the local law to mean ‘the [City/Shire/Town of ...]’.¹⁰
- 3.14 It is preferable that local laws reflect terms in enacting legislation. The WARR Act refers to a ‘local government’ providing waste and making local laws¹¹ and uses the term ‘local government’ throughout. The LG Act also uses the term ‘local government’ but in turn provides that a local government is a body corporate.
- 3.15 The Committee takes this opportunity to point out that particular care needs to be taken where there are specific provisions in local laws that relate to law making functions rather than general administration. The Committee’s preference remains that the term ‘local government’ be used throughout local laws instead of ‘City’ ‘Shire’ or ‘Town’.

⁷ Section 2.5(2) of the *Local Government Act 1995* provides that ‘[t]he local government is a body corporate with perpetual succession and a common seal’. Section 2.5(4) provides that ‘[t]he corporate name of the local government is the combination of the district’s designation and name’.

⁸ Ms Bernadine Tucker, Manager, Governance, City of Gosnells, stated at hearing that their legal advice said that ‘the terms ‘local government’ and ‘city’ are correct’ but ‘City of Gosnells’ is preferable: *Transcript of Evidence*, 31 October 2011, p3. Ms Mary Adam, Manager, Legislation, Department of Local Government, added that the Department of Local Government does not have a particular position on this issue but will accept the Committee’s view: *Transcript of Evidence*, 31 October 2011, p17. Mr James McGovern, Manager, Governance, WALGA, stated that ‘we have no problem with the terms city, town or shire being used because the interpretation clause of the local law makes it clear who that entity is’: *Transcript of Evidence*, 31 October 2011, p17.

⁹ Ms Bernadine Tucker, Manager, Governance, City of Gosnells, *Transcript of Evidence*, 31 October 2011, pp 2, 3 and 4.

¹⁰ For example, a clear majority of local laws the Committee considered in October 2011, that were not amendment local laws, used ‘local government’ rather than ‘City’, ‘Shire’ or ‘Town’ in clauses of the local law including the *Shire of Chittering Dogs Local Law 2011*, *Shire of Harvey Pest Plants Local Law 2011*, *Shire of Quairading Extractive Industries Local Law 2011*, *Town of Kwinana Activities on Thoroughfares and Public Places and Trading Local Law 2011* and *Shire of Kalamunda Keeping and Control of Animals and Nuisance Local Law 2011*.

¹¹ Sections 50 and 61 of the *Waste Avoidance and Resource Recovery Act 2007*.

4 OFFENCE PROVISIONS IN THE LOCAL LAWS

- 4.1 The Committee's decision to recommend disallowance of the Local Laws is made on the basis that offence provisions in the Local Laws offend the Committee's terms of reference 3.6(a) and 3.6(b).
- 4.2 Clause 3.1 of the Gosnells Local Law¹² makes it an offence for a person to do anything required or directed to be done in the local law or do anything in the local law that a person is prohibited from doing.

Clauses of concern

- 4.3 The Committee takes issue with the following offence provisions in the Gosnells Local Law. (The same or similar clauses in the Derby/West Kimberley Local Law, where applicable, are footnoted).

- Clause 2.3¹³

An owner or occupier of premises shall—

...

- (b) *at all times keep the lid of each receptacle [bin] closed except when depositing waste or cleaning each receptacle;*
- (c) *except for a reasonable period before and after collection time, keep each receptacle on the premises and located—*
 - (i) *behind the street alignment so as not to be visible from a street or public place; or*
 - (ii) *in such other position as is approved by an authorised person;*
- (d) *within a reasonable period before collection time, and no later than 6.00 a.m. on the designated collection day, place each receptacle on the verge (or other area as stipulated by an authorised person) adjoining the premises as close as practicable to the street alignment of the premises so that it does not obstruct any footpath, cycleway, right-of-way or carriageway and positioned facing square to the carriageway with the handle facing away from the kerb line.*

¹² Clause 4.1 of the *Shire of Derby/West Kimberley Waste Services Local Law 2011*.

¹³ Clauses 2.3(b) to (d) of the *Shire of Derby/West Kimberley Waste Services Local Law 2011* are effectively the same as these clauses, with minor terminology differences.

- Clause 2.5¹⁴

An owner or occupier of premises shall—

(a) *not deposit or permit to be deposited in a receptacle—*

[See pages 23-24 and 33 of this report for the prescriptive list of items that shall not be deposited which includes building rubble, earth, liquid.]

...

(b) *at all times keep the receptacle in a clean condition;*

- Clause 2.7¹⁵

Where a receptacle is supplied ... a person shall not, unless approved by an authorised person—

(a) *damage, destroy or interfere with a receptacle;*

(b) *mark or disfigure the receptacle in any manner other than by placement of a street number or other property identifying mark; or*

(c) *remove a receptacle from any premises unless permitted by this local law.*

- Clause 2.8(2)¹⁶

Where the City has authorised waste from a premises to be deposited in a private container [which may be authorised when premises consist of more than 3 dwellings, are used for commercial or industrial purposes or are used for a food business] the owner or occupier of the premises, or any other person authorised by the owner or occupier of the premises to manage the private container, shall—

¹⁴ Clause 2.5(a) of the *Shire of Derby/West Kimberley Waste Services Local Law 2011* and *City of Gosnells Waste Local Law 2011* is similar (subclauses (i) and (ii) differ). Clause 2.5(b) of the *Shire of Derby/West Kimberley Waste Services Local Law 2011* is in the same terms as clause 2.5(b) of the *City of Gosnells Waste Local Law 2011*.

¹⁵ Clauses 2.7(a) and (b) of the *Shire of Derby/West Kimberley Waste Services Local Law 2011* are effectively the same (with minor terminology differences) as clauses 2.7(a) and (c) of the *City of Gosnells Waste Local Law 2011*. The *Shire of Derby/West Kimberley Waste Services Local Law 2011* does not contain a provision similar to clause 2.7(b) of the *City of Gosnells Waste Local Law 2011*.

¹⁶ Clauses 2.8(2)(e), 2.8(3)(c) and (e) of the *Shire of Derby/West Kimberley Waste Services Local Law 2011* are effectively the same (with minor terminology differences) as clauses 2.8(2)(e), (i) and (k) of the *City of Gosnells Waste Local Law 2011*.

...

- (e) *ensure the private container is not visible from the street but is readily accessible for the purposes of collection;*

...

- (i) *keep or cause to be kept each private container thoroughly clean and in good condition and repair;*

...

- (k) *keep the cover on each private container closed except when it is necessary to place something in, or remove something from the private container;*

- Clause 2.9(2)¹⁷

An owner or occupier of premises required to provide a suitable enclosure [for the storage and cleaning of receptacles or private containers] under this clause shall keep the enclosure thoroughly clean and disinfected.

4.4 Other local laws and the WALGA Waste Model Law contain provisions the same or similar to the above provisions in the Local Laws. As the Committee has reported previously, the Committee is not and should not be prevented from raising issues in local laws because previous local laws have contained the same or similar clauses.

Penalties

4.5 The Gosnells Local Law provides a maximum penalty for an offence prosecuted in Court and also provides the City with the option to issue an infringement notice with modified penalties, as permitted under section 9.16 of the LG Act, for each offence in the Gosnells Local Law.¹⁸

4.6 All offences in the Gosnells Local Law carry an infringement notice modified penalty of a \$150 fine except the offence of failing to keep the lid on a bin closed which imposes a \$75 fine.¹⁹ If the City issues an infringement notice and the person pays the modified penalty, that person can not be prosecuted in Court for the offending conduct.

¹⁷ Clause 2.9(2) of the *Shire of Derby/West Kimberley Waste Services Local Law 2011* is in the same terms.

¹⁸ Clause 3.2 and Schedule 1 of the *City of Gosnells Waste Local Law 2011*. See also section 9.16 of the *Local Government Act 1995*.

¹⁹ Schedule 1 of the *City of Gosnells Waste Local Law 2011*.

4.7 The Committee is concerned that clause 3.1(2) of the Gosnells Local Law²⁰ imposes the maximum penalty for an offence (not dealt with by infringement notice) permitted under sections 64(3) and (4) of the WARR Act — that a person who commits an offence is liable on conviction to a penalty not exceeding \$5 000, and if the offence is of a continuing nature, to a further penalty not exceeding \$500 for each day or part of a day.

4.8 Section 64 of the WARR Act provides for different and minimum penalties for offences when it provides:

(5) *The local law may provide for the imposition of a minimum penalty for the offence.*

(6) *The level of the penalty may be related to—*

(a) *the circumstances or extent of the offence; or*

(b) *whether the offender has committed previous offences and, if so, the number of previous offences that the offender has committed.*

4.9 While acknowledging that the provisions in the Act do not mandate that local laws create minimum penalties and different levels of penalties in a local law, the Committee considers that good government principles require that reasonable and appropriate maximum penalties be imposed for particular breaches of a local law.

4.10 The Committee is concerned that local governments may exercise their discretion to impose the maximum penalty on the basis that courts ‘*never impose a maximum penalty anyway*’²¹ or to ‘*future proof*’²² the penalty.

Not prescribing infringement notice offences

4.11 The Shire of Derby/West Kimberley Local Law also imposes the maximum penalty authorised for an offence but, unlike the majority of waste local laws, does not prescribe infringement notice offences with modified penalties. Therefore, the only penalty for each offence under this law is a penalty not exceeding a \$5 000 fine.

4.12 The Committee has a preference for waste local laws prescribing infringement notice offences and modified penalties.

²⁰ Clause 4.1(2) of the *Shire of Derby/West Kimberley Waste Services Local Law 2011*.

²¹ Ms Bernadine Tucker, Manager, Governance, City of Gosnells, *Transcript of Evidence*, 31 October 2011, p12.

²² Ms Mary Adam, Manager, Legislation, Department of Local Government, *Transcript of Evidence*, 31 October 2011, p14.

5 LEGISLATION

5.1 Local governments provide waste services pursuant to section 50(1) of the WARR Act, which provides that subject to that Act and the *Environmental Protection Act 1986* a local government may provide or enter into a contract for the provision on its behalf of waste services.

5.2 The Local Laws are made under sections 61 and 64 of the WARR Act.²³

5.3 Section 61 of the WARR Act provides:

61. Local laws in respect of waste management

(1) A local government —

(a) may, if the CEO^[24] consents; and

(b) must, if the CEO so directs,

make local laws in accordance with the Local Government Act 1995 Part 3 Division 2 Subdivision 2 [which sets out procedures for making the law] for the purposes specified in section 64 or generally for carrying into effect the provisions of this Part.

5.4 Section 64 of the WARR Act prescribes a lengthy list of purposes of waste local laws:

64. Subject matter of local laws

...

(2) Local laws may be made for all or any of the following purposes —

(a) the provision and administration of waste services and related matters;

(b) the establishment, provision, use and control of receptacles for the deposit and collection of waste, whether temporary or otherwise;

²³ Sections 66 and 67 of the *Waste Avoidance and Resource Recovery Act 2007* also provide powers to impose a waste collection rate and receptacle charge.

²⁴ The ‘CEO’ is the Director General of the Department of Environment and Conservation.

-
- (c) *if a local government itself undertakes or contracts for removal of waste from premises, imposing on the owner or occupier of the premises requirements in connection with the removal so as to facilitate the removal, and prescribing the manner in which the requirement is to be complied with;*
 - (d) *if a local government or the holder of a waste collection permit does not itself undertake or contract for removal of waste from premises, imposing on the owner or occupier of the premises a requirement to remove waste from the premises, and prescribing the manner in which the requirement is to be complied with;*
 - (e) *if a local government itself undertakes or contracts for the removal of waste, requiring the waste to be placed in waste receptacles provided by the local government;*
 - (f) *prescribing intervals at which the contents of the receptacles will be removed by a local government;*
 - (g) *requiring the temporary placing of waste receptacles in streets or lanes by owners or occupiers of property for collection of waste, and requiring the replacement of the receptacles on the property;*
 - (h) *providing for the maintenance by owners and occupiers of waste receptacles provided by a local government;*
 - (i) *providing for the issue of approvals to collect local government waste and remove it from premises;*
 - (j) *fixing fees and charges in relation to waste services provided by a local government and the issue of approvals under paragraph (i), and prescribing the persons liable and the method of recovery of amounts not duly paid.*

5.5 The WARR provisions are to be read with section 3.1 of the LG Act which provides for the good government of persons in a district. Section 3.1 provides:

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.*

6 LEGAL PRINCIPLES

- 6.1 The Committee has regard to legal principles in considering whether a local law is authorised.
- 6.2 Enacting legislation does not authorise local laws that extend the scope of the Act or widen the purposes of the Act.²⁵
- 6.3 The scope of the empowering provisions, particularly section 64 of the WARR Act, is broad. The issue with the Local Laws is not whether each local law is unauthorised because it widens the subject matters or purposes authorised by the enacting provisions, but whether each local law extends beyond the scope of the enacting provisions in the unreasonable manner that it legislates prescribed purposes.
- 6.4 The ‘good government’ criterion is also of a very broad ambit. In the High Court case of *Lynch v Brisbane City Council* (1961) 104 CLR 353 Dixon CJ stated in relation to a power to make ordinances for ‘*the general good government of its [the local government’s] inhabitants*’ that:

They give a power to lay down matters in respect of municipal concern, matters that have been reasonably understood to be within the province of municipal government because they affect the welfare and good government of the city and its inhabitants. The words are not to be applied without caution nor read as if they were designed to confide to the city more than matters of local government. They express no exact limit of power but, directed as they are to the welfare

²⁵ *Shanahan v Scott* (1957) 96 CLR 245 per Dixon CJ, Williams, Webb and Fullagar JJ at 250. This case relates to a local law ‘*necessary or convenient*’ empowering provision similar to section 3.5 of the *Local Government Act 1995*.

*and good government of a city and its inhabitants, they are not to be read as going beyond the accepted notions of local government.*²⁶

- 6.5 What goes ‘*beyond the accepted notions of local government*’ is difficult to define and can change over time.
- 6.6 Despite the terms of the empowering provisions in the WARR Act, there are limits on the power to make waste local laws.
- 6.7 A local law is not authorised if it has an effect which is so unreasonable that it cannot be regarded as falling within the contemplation of the Parliament in enabling the making of delegated legislation reasonably proportionate to the empowering provisions of the Act.
- 6.8 The touchstone of reasonableness is implied in empowering provisions. As McKechnie J of the Supreme Court of Western Australia commented in *Epic Energy (WA) Nominees Pty Ltd & Anor v Dr Kenneth Comminos Michael Western Australia Independent Gas Pipeline Regulator* [2003] WASC 156, when considering a ‘*necessary or convenient*’ empowering provision:

*The words “necessary or convenient” have long been construed to import an objective standard of reasonableness ... I regard the importation of a concept of reasonableness into a power to do all things necessary or convenient as long settled ...*²⁷

- 6.9 In determining whether a local law has the necessary nexus with the good government of persons in the district and is authorised or contemplated by the empowering provisions consideration is given to whether those local laws are unreasonable or disproportionate to the purpose sought to be achieved. The express good government provision in section 3.1 of the LG Act reinforces the principle that unreasonable clauses in the Local Laws are unauthorised.
- 6.10 The test of proportionality or unreasonableness was commented on in *Minister for Resources v Dover Fisheries* (1993) 116 ALR as follows:

The test of proportionality reflects an underlying assumption that the legislature did not intend that the power to enact delegated legislation would be exercised beyond what was reasonably proportional to achieve the relevant statutory object or purpose; the test of reasonableness assumes that the legislature did not intend to confer a power to enact delegated legislation which enactment no reasonable

²⁶ *Lynch v Brisbane City Council* (1961) 104 CLR 353 at 364.

²⁷ *Epic Energy (WA) Nominees Pty Ltd & Anor v Dr Kenneth Comminos Michael Western Australia Independent Gas Pipeline Regulator* [2003] WASC 156 at 14.

*mind could justify as appropriate and adopted for the purpose in issue and the subject matter of the grant. Whether one describes that test as one of “reasonable proportionality” or “unreasonableness”, the object is to find the limit set by the legislature for the proper exercise of the regulation or rule making power and then to measure the substantive operation of the delegated legislation by reference to that limit. In my view there is no substantive difference between the tests as stated.*²⁸

- 6.11 In the High Court of Australia case *South Australia v Tanner* (1989) 166 CLR 161, Brennan J provided the following commentary on how to determine if delegated legislation is invalid:

In deciding whether an impugned regulation is valid, the court has three steps to take: it construes the terms in which the Parliament has conferred the power to make the regulation, it ascertains the scope and legal effect of the impugned regulation and it determines whether the regulation having that scope and legal effect is within the ambit of the power...

*When the validity of a regulation (I use the term to describe any kind of subordinate legislation purportedly made under a statutory power) is attacked as ultra vires the court will not hold the regulation invalid unless, having regard to its operation in the circumstances to which it applies and to the statutory object to which it must be directed, the regulation could not reasonably have been adopted to achieve the object. The badge of invalidity is not attached merely because the impugned regulation applies in some instances which are immaterial to the fulfilment of the statutory object.*²⁹

- 6.12 Ultimately, the question is whether the delegated legislation is within the scope of what the Parliament intended when enacting the legislation which empowers the subordinate authority to make certain laws.³⁰

- 6.13 In *Zheng v Cai* (2009) 239 CLR 446 the High Court of Australia made the following comments on interpreting the intent of legislation:

It has been said that to attribute an intention to the legislature is to apply something of a fiction.^[31] However, what is involved here is not

²⁸ *Minister for Resources v Dover Fisheries* (1993) 116 ALR 54 per Cooper J at 74.

²⁹ *South Australia v Tanner* (1989) 166 CLR 161 at 173, 176.

³⁰ *Minister for Resources v Dover Fisheries* (1993) 116 ALR 54 per Gummow J at 66.

³¹ *Mills v Meeking* (1990) 169 CLR 214 at 234; *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319 at 339-340.

*the attribution of a collective mental state to legislators. That would be a misleading use of metaphor.^[32] Rather, judicial findings as to legislative intention are an expression of the constitutional relationship between the arms of government with respect to the making, interpretation and application of laws. As explained in *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs*,^[33] the preferred construction by the court of the statute in question is reached by the application of rules of interpretation accepted by all arms of government in the system of representative democracy.³⁴*

- 6.14 This is to be read in the context of section 18 of the *Interpretation Act 1984*, which provides that a purposive approach to interpretation shall be preferred:

18. *Purpose or object of written law, use of in interpretation*

In the interpretation of a provision of a written law, a construction that would promote the purpose or object underlying the written law (whether that purpose or object is expressly stated in the written law or not) shall be preferred to a construction that would not promote that purpose or object.

7 DISCUSSION

- 7.1 The Committee is of the view that a number of offence provisions in the Local Laws are too prescriptive.
- 7.2 For example, the Committee considers clause 2.3(b),³⁵ which creates an offence of not keeping a lid on a bin closed at all times (even if the bin is empty or perfectly clean) except when depositing waste or cleaning the bin, too prescriptive.
- 7.3 The Committee takes issue with the requirement in clause 2.3(c) to keep a bin so it is not visible from a street or public place (unless otherwise authorised). Unless

³² *Singh v The Commonwealth* (2004) 222 CLR 322 at 385 .

³³ (2002) 123 FCR 298 at 410-412.

³⁴ *Zheng v Cai* (2009) 239 CLR 446 per French CJ, Gummow, Crennan, Kiefel and Bell JJ at 455-456. See also *Lacey v Attorney General of Queensland* [2011] HCA 10 at 24. Chief Justice French has stated on the meaning of legislative intention that '[i]f the term 'legislative intention' is meant to designate a collective mental state of the body of individuals who make up the parliament, then it is a fiction which has no useful purpose. In my view it is used to proclaim an attributed intention based upon legislative purpose formulated by the usual processes of statutory interpretation. That attribution is made by the court interpreting the statute.'; Chief Justice French, 'Judicial Activism - The Boundaries of the Judicial Role', LawAsia Conference, Ho Chi Minh City, Vietnam, 10 November 2009, pp5-6.

³⁵ Clauses in this section refer to the clauses in the *City of Gosnells Waste Local Law 2011*. The equivalent or similar clauses in the *Shire of Derby/West Kimberley Waste Services Local Law 2011* are noted at pages 6 to 8 and in the local law at Attachment 2 of this report.

- otherwise authorised, it is therefore an offence to keep a bin in a carport or behind a picket fence if the bin is visible.
- 7.4 The Committee also takes issue with the requirement in clause 2.3(d) that a person ‘*shall*’ place their bin at a particular place by 6am for each collection day and clause 2.3(c) requiring the bin to be returned (to a not visible location) within a reasonable time.
- 7.5 Other clauses considered too prescriptive are clauses 2.7(b) and (c), which forbid a person from marking or moving the bin off premises (even temporarily) unless approved by an authorised person or under the local law.
- 7.6 The Committee also considers the terms of clauses 2.5(b) and 2.8(2)(i) which prescribe that a bin shall be kept ‘*clean*’ ‘*at all times*’ and a ‘*private container*’ kept ‘*thoroughly clean*’ too prescriptive. Is it reasonable to expect a person to keep a bin ‘*clean*’ ‘*at all times*’? In the context of a rubbish bin, the term ‘*clean*’ is also subjective and vague.
- 7.7 The Committee is of the view that such prescriptive laws are not reasonable and proportionate to the empowering legislation and are therefore not authorised by the empowering provisions, despite the terms and lengthy list of subject matters outlined in section 64(2) of the WARR Act. The Committee is also of the view that such prescriptive clauses were not contemplated by Parliament when enacting the empowering Act.
- 7.8 In the Committee’s view, offence provisions in the Local Laws are so unreasonable because each local law creates offences that people in many circumstances, not only ‘*some instances*’,³⁶ will unavoidably commit.
- 7.9 For example, bins are often blown over into the street, which potentially offends clause 2.3(c) as the bin is not being kept in the prescribed location.
- 7.10 Committee members have observed that local government truck operators sometimes leave bin lids open after collecting rubbish from the bins. Also, even though placing stickers on a bin offends clause 2.7(1)(b) (unless approved by an authorised person), commercial bin cleaner stickers are placed on bins.³⁷
- 7.11 Further, an owner or occupier whose bin is used to play street cricket offends clause 2.3(c) (as the bin is not in the required position), a person who draws cricket stumps

³⁶ *South Australia v Tanner* (1989) 166 CLR 161 at 176.

³⁷ The City of Gosnell’s website states that the Gosnells RoadWise Advisory Group has distributed Slow Down Consider Our Kids bin stickers within school zones at all schools in the City of Gosnells to remind people to slow down around schools and look out for pedestrians: <http://www.roadwise.asn.au/groups/metrosouth/gosnells> (viewed as at 3 November 2011). If the City did not authorise placing these stickers on bins, this conduct would constitute an offence.

on their bin offends clause 2.7(1)(b) and the person (or persons) who moved the bin from the premises commits an offence against clause 2.7(1)(c). All these offences are punishable by a \$150 infringement notice penalty.

- 7.12 Many offence provisions are unreasonable in that they do not reflect modern realities. People who lead busy lives or work on a fly in fly out basis may necessarily commit offences against the Local Laws. For example, it would be difficult for a shift worker, fly in fly out worker or a person who is temporarily interstate or overseas who lives alone to not commit an offence against clause 2.3(d), which requires that they place their bin in a particular location for a particular (reasonable) period for each collection day. They are also likely to offend clause 2.3(c), as this requires an owner or occupier to return the bin from the prescribed place near the verge within a reasonable period.
- 7.13 The Committee is of the view that in many instances, offences are being committed unintentionally and inadvertently by otherwise law abiding citizens. The Committee is concerned that the Local Laws criminalise behaviour that is not obnoxious or hazardous in any way. The public is entitled to have a legitimate expectation that reasonable behaviour will not be penalised in local laws.
- 7.14 Some offence provisions may be unreasonable in that they create an impost and cost on the community for little or no benefit. For example, is a person expected to purchase or build a structure (perhaps in their carport) so their bin is not visible from a public place, even if they are renting?
- 7.15 The City advised at hearing that the objective or purpose of the offence provisions in issue were the prevention of health and environmental issues, the amenity of the district, addressing community concerns and protecting property (the bins). For example, the objective of the provision requiring a lid on a bin to be closed is directed at keeping the rubbish in the bins and not spreading rubbish, at keeping crows and magpies away from the rubbish, and preventing fly attack.³⁸ Also, clause 2.7(1)(c), not removing a bin from premises, is directed at preventing bins from being removed or stolen.³⁹
- 7.16 The Committee understands that laws are required to address these objectives and a certain level of prescription may be required in some instances, but is of the view that a number of provisions in the Local Laws go far beyond what is required to achieve the objectives of the Local Laws.
- 7.17 The Committee is of the view that offence provisions in waste local laws should be drafted to more directly reflect the objectives of the local law, or be more outcome

³⁸ Mr Trevor Perkins, Director, Governance, City of Gosnells, *Transcript of Evidence*, 31 October 2011, p6.

³⁹ *Ibid*, p8.

based, rather than being prescriptive, activity based provisions that unnecessarily capture an unreasonably broad scope of conduct.

7.18 A few clauses in the Local Laws reflect a more objective focused drafting approach. For example, clauses 2.5(d) of both Local Laws require an owner or occupier to ‘*take all reasonable steps to prevent*’ fly breeding and the emission of offensive and noxious odours from the bin. Also, both clauses 2.5(e) require an owner or occupier to ensure that the bin does not cause a nuisance to the occupiers of adjoining premises.

7.19 In the Committee’s view, prescriptive provisions with high penalties are only justifiable where an owner or occupier has acted unreasonably or repeatedly breached an offence. For many waste local law offences, progressive offence penalties could be imposed, where second and subsequent offences only attract a pecuniary penalty.

8 CONCLUSIONS

Term of reference 3.6(a)

8.1 The Committee is of the view that a number of offence provisions in the Local Laws offend its term of reference 3.6(a) in that they are not authorised *or* contemplated by the empowering enactment. The Committee refers to the clauses and issues identified above in this report.

8.2 The Committee is of the view that a number of offence provisions in the Local Laws widen the scope of the empowering provisions in that they legislate matters that are unreasonable and disproportionate to the empowering provisions.

8.3 The Committee considers that the Local Laws have an effect which is so unreasonable that they cannot be regarded as falling within the contemplation of the Parliament in authorising the making of delegated legislation.

8.4 The Committee has also formed the view that in enacting the lengthy list of purposes in section 64 of the WARR Act, Parliament did not contemplate that they would be used to impose provisions as prescriptive as clauses in the Local Laws.

8.5 The Committee also considers that Parliament would not have contemplated that the WARR Act would authorise local laws that criminalise conduct that causes no harm.

8.6 A number of clauses in the Local Laws could not reasonably be regarded as the concern local government or be a law for the welfare and good government of persons in the district and offend section 3.1 of the LG Act.

Term of reference 3.6(b)

8.7 The Committee is also of the view that a number of offence provisions in the Local Laws offend its term of reference 3.6(b).

8.8 The community has a legitimate expectation that if they act in a reasonable matter and do not create harm to the public or environment they will not be sanctioned or penalised. The unreasonable offences imposed by the Local Laws are noted above in this report.

8.9 The Committee is of the view that any adverse impacts of the Local Laws on existing rights, interests or legitimate expectations go beyond giving effect to the purposes authorised or contemplated by the Act.

9 RECOMMENDATIONS

9.1 The Committee makes the following recommendations:

Recommendation 1: The Committee recommends that the *City of Gosnells Waste Local Law 2011* be disallowed.

Recommendation 2: The Committee recommends that the *Shire of Derby/West Kimberley Waste Services Local Law 2011* be disallowed.

9.2 The Committee commends its report to the House.



Mr Joe Francis MLA

Chairman

24 November 2011

APPENDIX 1

CITY OF GOSNELLS WASTE LOCAL LAW 2011



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WASTE AVOIDANCE AND RESOURCE RECOVERY ACT 2007
LOCAL GOVERNMENT ACT 1995

CITY OF GOSNELLS

WASTE LOCAL LAW 2011

WASTE AVOIDANCE AND RESOURCE RECOVERY ACT 2007
LOCAL GOVERNMENT ACT 1995

CITY OF GOSNELLS

WASTE LOCAL LAW 2011

Under the powers conferred by the *Waste Avoidance and Resource Recovery Act 2007* and the *Local Government Act 1995* and under all other powers enabling it, the Council of the City of Gosnells resolved on 12 July 2011 to make this local law.

PART 1—PRELIMINARY

1.1 Citation

This local law may be cited as the *City of Gosnells Waste Local Law 2011*.

1.2 Repeal

Part 4—Waste Food and Refuse of the *City of Gosnells Health Local Laws 1999* adopted by the City of Gosnells and published in the *Government Gazette* on 24 November 1999 as amended from time to time is repealed.

1.3 Interpretation

In this local law unless the context otherwise requires—

“Act” means the *Waste Avoidance and Resource Recovery Act 2007*;

“authorised person” means a person authorised by the City under section 9.10 of the LG Act to administer this local law;

“City” means the City of Gosnells;

“collection day” means the day of the week on which waste is collected and removed by the City or its contractor;

“collection time” where used in connection with any premises, means the time of the day on which waste is collected and removed from the premises by the City or its contractor;

“district” means the district of the City of Gosnells;

“food business” has the meaning given to it in the *Food Act 2008*;

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

“occupier” where used in relation to land, has the meaning given in section 1.4 of the LG Act;

“owner”, in relation to premises comprised of or on land, has the meaning given in section 1.4 of the LG Act;

“private container” means a container that is not supplied by the City or its contractor, which has been approved by the City for the depositing of waste from a premises;

“public place” includes a street, way or place which the public are allowed to use, whether the street, way or place is or is not on private property;

“receptacle” means a polyethylene or other approved material cart that—

(a) is fitted with wheels, a handle and a lid;

(b) has a capacity of at least 120 litres; and

(c) has been supplied to the premises by the City or its contractor, or has otherwise been approved by the City;

“Regulations” means the *Waste Avoidance and Resource Recovery Regulations 2008*;

“street” includes a highway and a thoroughfare which the public are allowed to use and includes every part of the highway or thoroughfare, and other things including bridges and culverts, appurtenant to it;

“street alignment” means the boundary between the land comprising a street and the land that abuts thereon, but where a new street alignment is prescribed under the *Local Government (Miscellaneous Provisions) Act 1960*, means the new street alignment so prescribed;

“waste” includes matter—

(a) whether liquid, solid, gaseous or radioactive and whether useful or useless, which is discharged into the environment; or

(b) prescribed by the Regulations to be waste;

“waste facility” means premises used for the storage, treatment, processing, sorting, recycling or disposal of waste; and

“waste service” means—

- (a) the collection, transport, storage, treatment, processing, sorting, recycling or disposal of waste; or
- (b) the provision of receptacles for the temporary deposit of waste; or
- (c) the provision and management of waste facilities, machinery for the disposal of waste and processes for dealing with waste.

PART 2—WASTE SERVICES

2.1 Provision of waste service

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

2.2 Obligations of owner or occupier of premises

(1) An owner or occupier of premises shall—

- (a) not remove any waste from a premises other than in accordance with this local law;
- (b) pay to the City the annual waste collection rate imposed under section 66 of the Act;
- (c) pay to the City the annual receptacle charge made in lieu of, or in addition to the annual waste collection rate, under section 67 of the Act.

(2) The City may in writing authorise the occupier of premises within the district to remove or dispose of waste from or on the premises if—

- (a) the waste on the premises is not available for removal at regular periods; and
- (b) is of such a nature or quantity as to be unsuitable for removal by the City or its contractor.

(3) Where any waste is removed from a premises under a written authority of the City, the person removing it shall not dispose of the waste other than at a waste facility in accordance with clause 2.10.

2.3 Receptacles

An owner or occupier of premises shall—

- (a) ensure that there are a sufficient number of receptacles to contain all waste which accumulates or may accumulate on the premises and maintain the receptacles in a serviceable condition;
- (b) at all times keep the lid of each receptacle closed except when depositing waste or cleaning each receptacle;
- (c) except for a reasonable period before and after collection time, keep each receptacle on the premises and located—
 - (i) behind the street alignment so as not to be visible from a street or public place; or
 - (ii) in such other position as is approved by an authorised person;
- (d) within a reasonable period before collection time, and no later than 6:00 a.m. on the designated collection day, place each receptacle on the verge (or other area as stipulated by an authorised person) adjoining the premises as close as practicable to the street alignment of the premises so that it does not obstruct any footpath, cycleway, right-of-way or carriageway and positioned facing square to the carriageway with the handle facing away from the kerb line.

2.4 Exemption

(1) An owner or occupier of premises may apply in writing to the City for an exemption from compliance with the requirements of clause 2.3(c) and (d).

(2) The City or an authorised person may grant, with or without conditions, or refuse an application for exemption from compliance under this clause.

(3) An exemption granted under this clause must state—

- (a) the premises to which the exemption applies;
- (b) the period during which the exemption applies; and
- (c) any conditions imposed by the City or the authorised person.

(4) An exemption granted under this clause ceases to apply if and when the person to whom it is granted fails to comply with a condition of the exemption.

2.5 Use of receptacles

An owner or occupier of premises shall—

- (a) not deposit or permit to be deposited in a receptacle—
 - (i) more than 50kg of waste (or as otherwise authorised by the City or an authorised person);
 - (ii) hot or burning ash;
 - (iii) oil, motor spirit or other flammable liquid, or any cylinders used for the storage of flammable gas;

- (iv) liquid paint, solvent or other liquid;
- (v) bricks, concrete, building rubble, asbestos, earth or other like substances;
- (vi) drugs, dressings, bandages, swabs or blood samples unless placed in a sealed impervious and leak-proof container;
- (vii) hospital, medical, veterinary, laboratory or pathological substances containing blood unless placed in a sealed impervious and leak-proof container;
- (viii) syringes, needles, surgical hardware, broken glass, sharps or other sharp objects unless placed in a durable, impervious and leak-proof container;
- (ix) cytotoxics, radioactive substances and dangerous chemicals;
- (x) sewage, manure, nightsoil, faeces or urine;
- (xi) any object which is greater in length, width or breadth than the corresponding dimension of the receptacle or which will not allow the lid of the receptacle to be tightly closed;
- (xii) waste which is or is likely to become offensive or a nuisance, or give off an offensive or noxious odour, or to attract flies or cause fly breeding unless it is first wrapped in non-absorbent or impervious material or placed in a sealed impervious container;
- (xiii) hazardous products including ammunition and flares;
- (xiv) fluorescent tubes, compact fluorescent lamps, high intensity discharge lamps, or any mercury bearing waste;
- (xv) computers and all peripherals, televisions and home entertainment electronic equipment, mobile and digital telephones, communications equipment and other technology with a high content of printed circuit boards; or
- (xvi) batteries;
- (b) at all times keep the receptacle in a clean condition;
- (c) whenever directed to do so by an authorised person, thoroughly clean, disinfect, deodorise and apply a residual insecticide to the receptacle;
- (d) take all reasonable steps to prevent—
 - (i) fly breeding and keep the receptacle free of flies, maggots, cockroaches, rodents and other vectors of disease; and
 - (ii) the emission of offensive and noxious odours from the receptacle; and
- (e) ensure that the receptacle does not cause a nuisance to the occupiers of adjoining premises.

2.6 Ownership of receptacles

- (1) A receptacle supplied by the City or its contractor to a premises remains the property of the City or its contractor, as the case may be.
- (2) The owner or occupier of a premises supplied with a receptacle remains responsible for any waste placed or deposited in the receptacle until such time as it has been removed by the City or its contractor.

2.7 Damage to receptacles

- (1) Where a receptacle is supplied under clause 2.6 a person shall not, unless approved by an authorised person—
 - (a) damage, destroy or interfere with a receptacle;
 - (b) mark or disfigure the receptacle in any manner other than by placement of a street number or other property identifying mark; or
 - (c) remove a receptacle from any premises unless permitted by this local law.
- (2) If the receptacle of a premises is damaged, destroyed, defective, lost or stolen, the owner or occupier of the premises shall notify the City within 7 days after the event.

2.8 Use of private containers

- (1) The City may authorise waste to be deposited in a private container when—
 - (a) premises consist of more than 3 dwellings;
 - (b) premises are used for commercial or industrial purposes; or
 - (c) premises are used for a food business.
- (2) Where the City has authorised waste from a premises to be deposited in a private container the owner or occupier of the premises, or any other person authorised by the owner or occupier of the premises to manage the private container, shall—
 - (a) unless approved by the City not deposit or permit to be deposited in the private container anything specified in clause 2.5(a)(ii) to (xvi);
 - (b) take all reasonable steps to prevent flies breeding in, or the emission of offensive or noxious odours from, the private container;
 - (c) whenever directed by an authorised person to do so, thoroughly clean, disinfect, deodorise and apply a residual insecticide to the private container;
 - (d) where required by an authorised person cause the private container to be located on the premises in a suitable enclosure as defined in clause 2.9(3);

- (e) ensure the private container is not visible from the street but is readily accessible for the purposes of collection;
- (f) ensure the private container does not cause a nuisance to an occupier of adjoining premises;
- (g) ensure a sufficient number of private containers are provided to contain all waste which accumulates or may accumulate in or from the premises;
- (h) ensure each private container on the premises—
 - (i) has a close fitting lid;
 - (ii) is constructed of non-absorbent and non-corrosive material; and
 - (iii) is clearly marked, for the use of, and is used only for, the temporary deposit of waste;
- (i) keep or cause to be kept each private container thoroughly clean and in good condition and repair;
- (j) place any waste in, and only in, a private container marked for that purpose;
- (k) keep the cover on each private container closed except when it is necessary to place something in, or remove something from the private container; and
- (l) ensure each private container is emptied at least weekly or as directed by an authorised person.

2.9 Suitable enclosure

(1) An owner or occupier of premises—

- (a) consisting of more than 3 dwellings; or
- (b) used for commercial or industrial purposes, or a food premises;

shall if required by the City provide a suitable enclosure for the storage and cleaning of receptacles or private containers on the premises.

(2) An owner or occupier of premises required to provide a suitable enclosure under this clause shall keep the enclosure thoroughly clean and disinfected.

(3) For the purposes of this clause, a “suitable enclosure” means an enclosure—

- (a) of sufficient size to accommodate all receptacles or private containers used on the premises—
 - (i) where the premises comprises 3 or more dwellings, twice the size of the combined floor area of the total number of receptacles provided to each dwelling but in any event having a floor area not less than 3m by 3m;
 - (ii) where the premises is used for commercial or industrial purposes, or a food premises, twice the size of the combined floor area of all receptacles used on the premises but in any event having a floor area not less than 3m by 3m;
 - (iii) where there is in use on the premises a container or containers approved under clause 2.8, twice the size of the combined floor area of all containers approved for use in the premises but in any event having a floor area not less than 3m by 3m;
- (b) constructed of brick, concrete, corrugated compressed fibre cement sheet or colourbond sheeting;
- (c) having walls not less than 1.8m in height and having an access way of not less than 1m in width and fitted with a self-closing gate;
- (d) containing a smooth, non-slip and impervious floor—
 - (i) of not less than 75mm in thickness; and
 - (ii) which is evenly graded to a grated outlet connected to the existing sewer disposal system connection to the property;
- (e) which is easily accessible to allow for the removal of the receptacles or private containers;
- (f) provided with a ramp into the enclosure having a gradient no steeper than 1:8 unless otherwise approved by the City; and
- (g) provided with a tap connected to an adequate supply of water.

2.10 Deposit of waste

(1) The driver of a vehicle, upon entering a waste facility, shall present or display a current pass issued by the City to the attendant or person in charge of the site and shall not deposit any waste until authorised to do so by that attendant or person in charge.

(2) A person shall not deposit waste in or on a waste facility except—

- (a) at such place on the site as may be directed by the person in charge of the waste facility; or
- (b) if the person in charge is not in attendance at the waste facility, as may be directed by a notice erected on the site.

2.11 Removal of waste from waste facility

(1) A person shall not remove any waste from a waste facility without the written approval of the City.

(2) A person who obtains approval from the City shall comply with any conditions imposed by the City as set out in the approval.

2.12 Removal of waste from premises or receptacle

- (1) A person shall not remove any waste from premises unless that person is—
- (a) the owner or occupier of the premises;
 - (b) authorised to do so by the owner or occupier of the premises; or
 - (c) authorised in writing to do so by an authorised person.
- (2) A person shall not, without the approval of the authorised person or the owner of a receptacle, remove any waste from a receptacle or other container provided for the use of the general public in a public place.
- (3) An occupier 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;
- (4) Where additional collection services are provided by the City upon request by an occupier of premises, fees as set by the City from time to time under sections 6.16 and 6.19 of the LG Act, shall be paid by the occupier requesting the service.

2.13 Waste removal vehicles

A vehicle used by the City or any contractor for the collection and transport of waste from a receptacle or private container shall—

- (a) be fitted with a compartment in which all waste shall be deposited for removal, and of which the interior is constructed from or surfaced with impermeable material; and
- (b) have a cover over the compartment at all times when the vehicle is engaged in the transport of waste.

2.14 Method of removal of waste

A person authorised by the City to remove waste from premises shall—

- (a) convey all waste from the receptacles or private containers of each premises and deposit the waste in the portion of the collection vehicle intended to hold the waste; and
- (b) replace each receptacle or private container as designated by the City and otherwise in a manner consistent with clause 2.3(d).

PART 3—OFFENCES AND PENALTIES

3.1 Offences and penalties

- (1) A person who—
- (a) fails to do anything required or directed to be done under this local law; or
 - (b) does anything which under this local law that person is prohibited from doing,
- commits an offence.
- (2) A person who commits an offence under this local law is liable, upon conviction, to a penalty not exceeding \$5,000 and if the offence is of a continuing nature, to an additional penalty not exceeding \$500 for each day or part of a day during which the offence has continued.

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

3.3 Form of infringement notices

For the purposes of this local law—

- (a) the form of the infringement notice given under section 9.16 of the LG Act is that of Form 2 in Schedule 1 of the *Local Government (Functions and General) Regulations 1996*; and
- (b) the form of the notice given under section 9.20 of the LG Act withdrawing an infringement notice is that of Form 3 in Schedule 1 of the *Local Government (Functions and General) Regulations 1996*.

3048 GOVERNMENT GAZETTE, WA 22 July 2011

Schedule 1
PRESCRIBED OFFENCES

[cl. 4.2]

Clause	Offence	Modified Penalty (\$)
2.2(1)(a)	Removing waste from a premises other than in accordance with this local law	150
2.3(b)	Failure to keep lid of refuse receptacle closed	75
2.3(c)	Failing to keep receptacle on premises so as not to be visible from a street or public place	150
2.3(d)	Failing to place receptacle in prescribed position on collection day	150
2.5(a)	Depositing a prohibited substance in a receptacle.	150
2.5(b)	Failure to keep a receptacle clean.	150
2.7(1)	Damaging, destroying, disfiguring or interfering with a receptacle	150
2.8(2)(g)	Failing to provide a sufficient number of private containers.	150
2.8(2)(l)	Failing to empty a container as directed.	150
2.9(1)	Failing to provide a suitable enclosure for a receptacle	150
2.9(2)	Failure to keep an enclosure clean	150
2.12(3)(b)	Failing to comply or observe the direction of the City in relation to bulk material collection	150
3.1(1)	Any other offence not specified	150

Dated: 12 July 2011.

The Common Seal of the City of Gosnells was affixed by authority of a resolution of the Council in the presence of—

OLWEN SEARLE JP, Mayor.
IAN COWIE, Chief Executive Officer.

Consented to by—

KEIRAN McNAMARA, Chief Executive Officer,
Department of Environment and Conservation.

Dated: 30 May 2011.

APPENDIX 2
SHIRE OF DERBY/WEST KIMBERLEY WASTE SERVICES
LOCAL LAW 2011



LOCAL GOVERNMENT ACT 1995
WASTE AVOIDANCE AND RESOURCE RECOVERY ACT 2007

**SHIRE OF DERBY/WEST
KIMBERLEY**

**WASTE SERVICES LOCAL
LAW 2011**

**LOCAL GOVERNMENT ACT 1995
WASTE AVOIDANCE AND RESOURCE RECOVERY ACT 2007**

SHIRE OF DERBY/WEST KIMBERLEY

WASTE SERVICES LOCAL LAW 2011

ARRANGEMENT

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- 1.2. Commencement
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- 1.4. Definitions

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- 2.3. Receptacles
- 2.4. Exemption
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LOCAL GOVERNMENT ACT 1995
WASTE AVOIDANCE AND RESOURCE RECOVERY ACT 2007

SHIRE OF DERBY/WEST KIMBERLEY

WASTE SERVICES LOCAL LAW 2011

Under the powers conferred by the *Waste Avoidance and Resource Recovery Act 2007* and the *Local Government Act 1995* and under all other powers enabling it, the Council of the Shire of Derby/West Kimberley resolved on 16 December 2010, to make the following local law.

PART 1—PRELIMINARY

1.1. Citation

This local law may be cited as the *Shire of Derby/West Kimberley Waste Services Local Law 2011*.

1.2. Commencement

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

1.3. Application

This local law applies within the townsites of Derby and Fitzroy Crossing.

1.4. Definitions

In this local law unless the context otherwise requires—

Act means the *Waste Avoidance and Resource Recovery Act 2007*;

authorised person means a person appointed by the local government under section 9.10 of the *Local Government Act 1995* to perform any of the functions of an authorised person under this local law;

collection day means the day of the week on which waste is collected and removed by the local government or its contractor;

collection time where used in connection with any premises, means the time of the day on which waste is collected and removed from the premises by the local government or its contractor;

district means the district of the local government;

EHO means the local government's Environmental Health Officer;

local government means the Shire of Derby/West Kimberley;

occupier where used in relation to land, has the meaning given in section 1.4 of the *Local Government Act 1995*;

owner, in relation to premises comprised of or on land, has the meaning given in section 1.4 of the *Local Government Act 1995*;

public place includes a street, way or place which the public is allowed to use, whether the street, way or place is or is not on private property;

receptacle where used in connection with any premises means—

(a) a polyethylene cart fitted with wheels, a handle and a lid and having a capacity of at least 120 litres; or

(b) a container provided by the local government or its contractor for the deposit, collection and recycling of specific materials; and supplied to the premises by the local government or its contractor;

Regulations means the *Waste Avoidance and Resource Recovery Regulations 2008*;

street has the same meaning as in the *Local Government Act 1995*;

street alignment means the boundary between the land comprising a street and the land that abuts thereon, but where a new street alignment is prescribed under the *Local Government (Miscellaneous Provisions) Act 1960*, means the new street alignment so prescribed;

waste includes matter—

- (a) whether liquid, solid, gaseous or radioactive and whether useful or useless, which is discharged into the environment; or
- (b) prescribed by the regulations to be waste;

waste facility means premises used for the storage, treatment, processing, sorting, recycling or disposal of waste; and

waste service means—

- (a) the collection, transport, storage, treatment, processing, sorting, recycling or disposal of waste; or
- (b) the provision of receptacles for the temporary deposit of waste; or
- (c) the provision and management of waste facilities, machinery for the disposal of waste and processes for dealing with waste.

PART 2—WASTE SERVICES

2.1. Provision of waste service

The local government shall undertake or contract for the efficient execution of a waste service in those parts of the district to which this local law applies.

2.2. Obligations of the owner or occupier

(1) Owners or occupiers shall—

- (a) not remove any waste from the premises other than in accordance with this local law;
- (b) pay to the local government the annual waste collection rate imposed under section 66 of the Act;
- (c) pay to the local government the annual receptacle charge made in lieu of, or in addition to the annual waste collection rate, under section 67 of the Act.

(2) The local government may in writing authorise the occupier of a premises within its district to remove waste from or on the premises if—

- (a) the waste on the premises is not available for removal at regular periods and is of such a nature or quantity as to be unsuitable for removal by the local government or its contractor; or
- (b) there is installed on the premises efficient apparatus for the destruction of the waste and the apparatus is used to dispose of the waste on the premises without causing a nuisance or permitting the discharge of smoke into the atmosphere in such quantities or of such a nature as to cause annoyance to persons.

(3) Where any waste is removed from the premises under a written authority of a local government, the person removing it shall—

- (a) dispose of it at the place set apart by the local government for the disposal of waste; and
- (b) pay to the local government the fee for the disposal as determined by the local government from time to time under sections 6.16 to 6.19 of the *Local Government Act 1995*.

2.3. Receptacles

An owner or occupier of premises shall—

- (a) ensure the premises are provided with a receptacle for the depositing of waste and maintain the receptacle in a serviceable condition;
- (b) at all times keep the lid of the receptacle closed except when depositing waste or cleaning the receptacle;
- (c) except for a reasonable period before and after collection time, keep the receptacle on the premises and located—
 - (i) behind the street alignment and so as not to be visible from a street or public place; or
 - (ii) in such other position as is approved by the local government;
- (d) on each collection day at or prior to 6.00 am place the receptacle out in the street in a position, prescribed by the local government, where it is visible from the carriageway of the street or the right of way, but so that it does not obstruct any thoroughfare, land, footpath, cycleway or other carriageway and positioned with the handle facing away from the kerb line, or placed in such other position as is approved by the local government.

2.4. Exemption

(1) An owner or occupier of premises may apply in writing to the local government for an exemption from compliance with the requirements of clause 2.3(c)(i) or where the receptacle is to be placed on collection day by clause 2.3(d).

(2) The local government may grant or refuse, with or without conditions, an application for exemption from compliance under this clause.

(3) An exemption granted under this clause shall state—

- (a) the premises to which the exemption applies;
- (b) the period during which the exemption applies; and
- (c) any conditions imposed by the local government.

(4) The local government may rescind the exemption or from time to time vary conditions imposed by it under this clause by giving written notice of the variation to the person to whom the exemption was given.

2.5. Use of receptacles

An owner or occupier of premises shall—

- (a) not deposit or permit to be deposited in a receptacle—
 - (i) more than 70 kilograms of waste;
 - (ii) hot or burning ash;
 - (iii) oil, motor spirit or other flammable liquid;
 - (iv) liquid paint, solvent or other liquid;
 - (v) bricks, concrete, building rubble, asbestos, earth or other like substances;
 - (vi) drugs, dressings, bandages, swabs or blood samples unless placed in a sealed impervious and leak-proof container;
 - (vii) hospital, medical, veterinary, laboratory or pathological substances containing blood unless placed in a sealed impervious and leak-proof container;
 - (viii) syringes, needles, surgical hardware, broken glass, or other sharp objects unless placed in a durable, impervious and leak-proof container;
 - (ix) cytotoxics, radioactive substances and dangerous chemicals;
 - (x) sewage, manure, nightsoil, faeces or urine;
 - (xi) any object which is greater in length, width or breadth than the corresponding dimension of the receptacle or which will not allow the lid of the receptacle to be tightly closed;
 - (xii) waste which is or is likely to become offensive or a nuisance, or give off an offensive or noxious odour, or to attract flies or cause fly breeding unless it is first wrapped in non-absorbent or impervious material or placed in a sealed impervious container; or
 - (xiii) hazardous products including ammunition and flares;
- (b) at all times keep the receptacle in a clean condition;
- (c) whenever directed to do so by an EHO, thoroughly clean, disinfect, deodorise and apply a residual insecticide to the receptacle;
- (d) take all reasonable steps to prevent—
 - (i) fly breeding and keep the receptacle free of flies, maggots, cockroaches, rodents and other vectors of disease; and
 - (ii) the emission of offensive and noxious odours from the receptacle; and
- (e) ensure that the receptacle does not cause a nuisance to the occupiers of adjoining premises.

2.6. Ownership of receptacles

- (1) A receptacle supplied by the local government or its contractor, remains the property of the local government or its contractor, as the case may be.
- (2) The owner or occupier of a premises supplied with a receptacle remains responsible for any waste placed or deposited in the receptacle until such time as it has been removed by the local government or its contractor.

2.7. Damage to receptacles

- (1) Where a receptacle is supplied under clause 2.6 a person shall not—
 - (a) damage, destroy or interfere with a receptacle; or
 - (b) except as permitted by this local law or as authorised by the local government, remove a receptacle from any premises;
- (2) If the receptacle of a premises is damaged, defective, lost or stolen, the owner or occupier of the premises shall notify the local government within 7 days after the event.

2.8. Use of other containers

- (1) In the case of premises consisting of more than 3 dwellings, any premises used for commercial or industrial purposes or food premises, the local government may authorise waste to be deposited in a container other than a receptacle.
- (2) The owner or occupier of premises who is authorised under this clause to deposit waste in a container shall—
 - (a) unless approved by the local government not deposit or permit to be deposited in the container anything specified in clause 2.5(a)(i) to (xiii);
 - (b) take all reasonable steps to prevent fly breeding in, and the emission of offensive or noxious odours from the container;
 - (c) whenever directed by an EHO to do so, thoroughly clean, disinfect, deodorise and apply a residual insecticide to the container;
 - (d) cause the container to be located on the premises in an enclosure that meets the requirements of a "suitable enclosure" as defined in clause 2.9(3);
 - (e) ensure that the container is not visible from the street but is readily accessible for the purposes of collection; and
 - (f) ensure that the container does not cause a nuisance to an occupier of adjoining premises.

(3) An owner or occupier shall—

- (a) ensure that there are a sufficient number of containers provided to contain all waste which accumulates or may accumulate in or from the premises;
- (b) ensure that each container on the premises—
 - (i) has a close-fitting lid;
 - (ii) is constructed of non-absorbent and non-corrosive material; and
 - (iii) is clearly marked, for the use of, and is used only for, the temporary deposit of waste;
- (c) keep or cause to be kept each container thoroughly clean and in good condition and repair;
- (d) place any waste in, and only in, a container marked for that purpose;
- (e) keep the cover on each container except when it is necessary to place something in, or remove something from it; and
- (f) ensure that each container is emptied at least weekly or as directed by the EHO.

2.9. Suitable enclosure**(1) An owner or occupier of premises—**

- (a) consisting of more than 3 dwellings; or
 - (b) used for commercial or industrial purposes or a food premises shall, if required by the local government, provide a suitable enclosure for the storage and cleaning of receptacles on the premises.
- (2) An owner or occupier of premises required to provide a suitable enclosure under this clause shall keep the enclosure thoroughly clean and disinfected.

(3) For the purposes of this clause, a *suitable enclosure* means an enclosure—

- (a) of sufficient size to accommodate all receptacles or other containers used on the premises but in any event having a floor area not less than—
 - (i) where the premises comprises 3 or more dwellings, twice the size of the combined floor area of a number of receptacles equal to 1 receptacle per dwelling;
 - (ii) where the premises is used for commercial or industrial purposes, or a food premises, twice the size of the combined floor area of all receptacles used on the premises; or
 - (iii) where there is in use on the premises a container or containers approved under clause 2.8, twice the size of the combined floor area of all containers approved for use on the premises.
- (b) having walls not less than 1.8 metres in height and having an access way of not less than 1 metre in width and fitted with a self-closing gate;
- (c) containing a smooth, non-slip and impervious floor—
 - (i) of not less than 75 millimetres in thickness; and
 - (ii) which is evenly finished to a surface having a fall of not less than 1 in 100;
- (d) which is easily accessible to allow for the removal of the receptacles;
- (e) provided with a ramp into the enclosure having a gradient no steeper than 1:8 unless otherwise approved by the local government; and
- (f) provided with a tap connected to an adequate supply of water.

2.10. Recyclable and bulk material collections**(1) Where the local government provides—**

- (a) a collection service for recyclable material, the occupier of premises shall comply with and observe the directions given by the local government in relation to that collection;
- (b) a collection for bulk material, the occupier of premises shall comply with and observe the directions given by the local government in relation to that collection.

(2) Where additional collection services are provided upon request by the occupier of premises, fees as set by the local government from time to time under sections 6.16 to 6.19 of the *Local Government Act 1995* shall be paid.**2.11. Waste removal vehicles**

A vehicle used by the local government or its contractor for the collection and transport of waste shall—

- (a) be provided with a compartment in which all waste shall be deposited for removal, and of which the interior is constructed from or surfaced with impermeable material; and
- (b) have a cover over the compartment at all times when the vehicle is engaged in the transport of waste.

2.12. Method of removal of waste

A person engaged in the removal of waste from premises shall—

- (a) convey all waste from the receptacles of the occupier of the premises and deposit the waste in the portion of the collection vehicle intended to hold the waste; and
- (b) replace the receptacle in the position it was lifted from.

13 September 2011

GOVERNMENT GAZETTE, WA

3739

PART 3—WASTE FACILITY

3.1. Deposit of waste

- (1) The driver of a vehicle upon entering a waste facility shall not deposit any waste until authorised to do so by the attendant or person in charge.
- (2) A person shall not deposit waste in or on a waste facility except—
 - (a) at such place on the site as may be directed by the authorised person in charge of the facility; or
 - (b) if the authorised person in charge is not in attendance at the facility, as may be directed by a notice erected on the site.
- (3) The local government may, under and in accordance with sections 6.16 to 6.19 of the *Local Government Act 1995*, set and amend a scale of fees and charges payable for admission to dispose of or dump waste at a waste facility and such scale may specify classes and differing classes to which differing fees and charges shall apply.

3.2. Removal from waste facility

- (1) A person shall not remove any waste from a waste facility without the written approval of the local government.
- (2) A person who obtains approval from the local government shall comply with any conditions imposed by the local government and set out in the approval.

PART 4—OFFENCES AND PENALTIES

4.1. Offences

- (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 \$5,000, and if the offence is of a continuing nature, to an additional penalty not exceeding \$500 for each day or part of a day during which the offence has continued.

Dated: 25th August, 2011.

The Common Seal of the Shire of Derby/West Kimberley was affixed by authority of a resolution of the Council in the presence of—

E. M. ARCHER, Shire President.
S. BURGE, Chief Executive Officer.

Consented to—

KEIRAN MCNAMARA, Chief Executive Officer.
Department of Environment and Conservation.

Dated: 1st August, 2011.