



**THIRTY-NINTH PARLIAMENT**

**REPORT 85**  
**JOINT STANDING COMMITTEE ON DELEGATED  
LEGISLATION**  
*ALBANY CEMETERY BOARD BY-LAWS  
AMENDMENT*

Presented by Mr Peter Abetz MLA (Chairman)

and

Hon Robin Chapple MLC (Deputy Chair)

August 2016

## JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

### Date first appointed:

28 June 2001

### Terms of Reference:

The following is an extract from Schedule 1 to the Legislative Council Standing Orders:

#### ‘10. Joint Standing Committee on Delegated Legislation

- 10.1 A *Joint Standing Committee on Delegated Legislation* is established.
- 10.2 The Committee consists of 8 Members, 4 of whom are appointed from each House. The Chair must be a Member of the Committee who supports the Government.
- 10.3 A quorum is 4 Members of whom at least one is a Member of the Council and one a Member of the Assembly.
- 10.4 (a) A report of the Committee is to be presented to each House by a Member of each House appointed for the purpose by the Committee.  
(b) Where a notice of motion to disallow an instrument has been given in either House pursuant to recommendation of the Committee, the Committee shall present a report to both Houses in relation to that instrument prior to the House’s consideration of that notice of motion. If the Committee is unable to report a majority position in regards to the instrument, the Committee shall report the contrary arguments.
- 10.5 Upon its publication, whether under section 41(1)(a) of the *Interpretation Act 1984* or another written law, an instrument stands referred to the Committee for consideration.
- 10.6 In its consideration of an instrument, the Committee is to inquire whether the instrument –  
(a) is within power;  
(b) has no unintended effect on any person’s existing rights or interests;  
(c) provides an effective mechanism for the review of administrative decisions; and  
(d) contains only matter that is appropriate for subsidiary legislation.
- 10.7 It is also a function of the Committee to inquire into and report on –  
(a) any proposed or existing template, *pro forma* or model local law;  
(b) any systemic issue identified in 2 or more instruments of subsidiary legislation; and  
(c) the statutory and administrative procedures for the making of subsidiary legislation generally, but not so as to inquire into any specific proposed instrument of subsidiary legislation that has yet to be published.
- 10.8 In this order –  
“instrument” means –  
(a) subsidiary legislation in the form in which, and with the content it has, when it is published;  
(b) an instrument, not being subsidiary legislation, that is made subject to disallowance by either House under a written law;  
“subsidiary legislation” has the meaning given to it by section 5 of the *Interpretation Act 1984*.’

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

Mr Peter Abetz MLA (Chairman)

Hon Robin Chapple MLC (Deputy Chair)

Hon John Castrilli MLA

Hon Peter Katsambanis MLC

Hon Mark Lewis MLC

Ms Simone McGurk MLA

Mr Paul Papalia MLA

Hon Martin Pritchard MLC

### Staff as at the time of this inquiry:

Stephen Brockway (Advisory Officer)

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# CONTENTS

<b>EXECUTIVE SUMMARY AND RECOMMENDATION</b> .....	<b>i</b>
EXECUTIVE SUMMARY .....	i
RECOMMENDATION .....	i
<b>REPORT</b> .....	<b>1</b>
1 REFERENCE AND PROCEDURE .....	1
2 STATUTORY PROVISIONS .....	1
3 INCORRECT CITATION .....	3
4 DEFECT IN PROCEDURE FOR MAKING THE BY-LAW .....	3
5 DISALLOWANCE OF AN INVALID INSTRUMENT .....	4
6 RECOMMENDATION .....	4



**EXECUTIVE SUMMARY AND RECOMMENDATION FOR THE**  
**REPORT OF THE JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION**  
**IN RELATION TO THE**  
***ALBANY CEMETERY BOARD BY-LAWS AMENDMENT***

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**EXECUTIVE SUMMARY**

- 1 The Joint Standing Committee on Delegated Legislation (the Committee) is of the view that the Albany Cemetery Board did not follow the mandatory, sequential procedure set out at section 3.12 of the *Local Government Act 1995*, as required by section 54(2) of the *Cemeteries Act 1986*, when it made the *Albany Cemetery Board By-Laws Amendment* (the instrument).
- 2 Being invalidly made, the instrument offends against Committee Term of Reference 10.6(a) in that it is not within the power granted by the empowering Act.

**RECOMMENDATION**

- 3 The Committee makes the following recommendation:

Page 4

**Recommendation: The Committee recommends that that the *Albany Cemetery Board By-Laws Amendment* be disallowed.**



## REPORT OF THE JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

### IN RELATION TO THE

#### *ALBANY CEMETERY BOARD BY-LAWS AMENDMENT*

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#### **1 REFERENCE AND PROCEDURE**

- 1.1 On 1 December 2015, the Albany Cemetery Board (the Board) published the *Albany Cemetery Board By-Laws Amendment* (the instrument) in the Government Gazette. It was then tabled in the Legislative Assembly on 16 February 2016 and in the Legislative Council on 17 February 2016, as required by section 42(1) of the *Interpretation Act 1984*.
- 1.2 The intent of the instrument was to amend sections 46 and 47 of the *Albany Cemetery Board By-Law*, gazetted on 31 July 1997, concerning the permissible specifications for monuments within the Allambie Park Cemetery, the Memorial Park Cemetery, the Allambie Park Crematorium and other cemeteries under the care, control and management of the Board. The Board was appointed by the Governor under section 7 of the *Cemeteries Act 1986* (the Act).

#### **2 STATUTORY PROVISIONS**

- 2.1 The instrument was purported to be made under section 53 of the Act. In fact, that provision deals with the setting of fees and charges by resolution of a Board.
- 2.2 The correct head of power for making by-laws is in fact section 54, which reads:

##### ***54. Procedure for local laws and by-laws***

- (1) *A Board that is a local government may make local laws in accordance with subdivision 2 of Division 2 of Part 3 of the Local Government Act 1995 for the purposes specified in section 55.*
- (2) *A Board that is not a local government may make by-laws for the purposes specified in section 55 and is to make them in accordance with subdivision 2 of Division 2 of Part 3 of the Local Government Act 1995 as if the Board was a local government making local laws.*
- 2.3 By virtue of section 55 of the Act, by-laws may be made by a Board that are necessary or convenient for the purposes of the Act, or for a number of listed purposes including, at section 55(1)(c), ‘*prescribing specifications and materials for memorials*’.

- 2.4 The Albany Cemeteries Board is not a local government, and therefore section 54(2) provides the appropriate head of power. By-laws must be made in accordance with subdivision 2 of Division 2 of Part 3 (sections 3.11 to 3.17) of the *Local Government Act 1995*, as if the Board were a local government making local laws.
- 2.5 Section 3.12 of that Act sets out the necessary procedures to be undertaken in making a local law. It reads:

**3.12. Procedure for making local laws**

- (1) *In making a local law a local government is to follow the procedure described in this section, in the sequence in which it is described.*
- (2) *At a council meeting the person presiding is to give notice to the meeting of the purpose and effect of the proposed local law in the prescribed manner.*
- (3) *The local government is to —*
- (a) *give Statewide public notice stating that —*
- (i) *the local government proposes to make a local law the purpose and effect of which is summarized in the notice; and*
- (ii) *a copy of the proposed local law may be inspected or obtained at any place specified in the notice; and*
- (iii) *submissions about the proposed local law may be made to the local government before a day to be specified in the notice, being a day that is not less than 6 weeks after the notice is given;*
- and*
- (b) *as soon as the notice is given, give a copy of the proposed local law and a copy of the notice to the Minister and, if another Minister administers the Act under which the local law is proposed to be made, to that other Minister; and*
- (c) *provide a copy of the proposed local law, in accordance with the notice, to any person requesting it.*
- (3a) *A notice under subsection (3) is also to be published and exhibited as if it were a local public notice.*
- (4) *After the last day for submissions, the local government is to consider any submissions made and may make the local law\* as proposed or make a local law\* that is not significantly different from what was proposed.*
- \* Absolute majority required.*
- (5) *After making the local law, the local government is to publish it in the Gazette and give a copy of it to the Minister and, if another*



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*Minister administers the Act under which the local law is proposed to be made, to that other Minister.*

- (6) *After the local law has been published in the Gazette the local government is to give local public notice —*
  - (a) *stating the title of the local law; and*
  - (b) *summarizing the purpose and effect of the local law (specifying the day on which it comes into operation); and*
  - (c) *advising that copies of the local law may be inspected or obtained from the local government's office.*
- (7) *The Minister may give directions to local governments requiring them to provide to the Parliament copies of local laws they have made and any explanatory or other material relating to them.*
- (8) *In this section —*  
***making*** *in relation to a local law, includes making a local law to amend the text of, or repeal, a local law.*

### **3 INCORRECT CITATION OF HEAD OF POWER**

- 3.1 The instrument incorrectly cites section 53 of the Act as the head of power for making by-laws when, in fact, section 54(2) contains that provision. In other circumstances, the defect in citing the wrong section of the Act as the head of power for making the by-law amendment would not in itself have been enough to invalidate the instrument. Section 43(2) of the *Interpretation Act 1984* states:

*Where any subsidiary legislation purports to be made in exercise of a particular power or powers, it shall be deemed also to be made in exercise of all powers under which it may be made.*

### **4 DEFECT IN PROCEDURE FOR MAKING THE BY-LAW**

- 4.1 The correct procedures for making a by-law, as set out above in section 3.12 of the *Local Government Act 1995*, were not followed. In particular, a draft of the instrument was not advertised locally or subjected to any form of public consultation, as required by section 3.12(3)(a), nor was a copy sent to the relevant Minister (being the Minister for Local Government and Communities) as required by section 3.12(3)(b). Having agreed on the terms of the instrument, the Board proceeded immediately to publish it in the Government Gazette.
- 4.2 The provisions of section 3.12 are mandatory, and therefore the failure to properly follow the procedures for making the amending by-law renders it invalid.

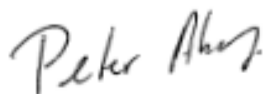
**5 DISALLOWANCE OF AN INVALID INSTRUMENT**

- 5.1 If there is a procedural flaw in the making of an instrument, a court may declare it to be void *ab initio*, that is, retrospectively of no effect. If this occurs, that law is taken not to have been made. This cannot occur, however, in the absence of a court declaration. A court can only make a declaration on the validity of a law when a party who has legal standing commences an action in the court in relation to that law.<sup>1</sup>
- 5.2 This results in the situation where, until a court declares an instrument to be invalid, it will effectively remain in effect. Practically speaking, this means that the by-law remains available on the State Law Publisher's website as an apparently valid instrument, unless successfully challenged in the courts. In most cases, members of the public are unaware that there is any question about the validity of the particular by-law.
- 5.3 In those circumstances, the Committee is of the view that there are a number of benefits identified with the disallowance of invalid instruments, which include ensuring that such laws are quickly removed from the public record and reducing the risk of public misinformation.

**6 RECOMMENDATION**

- 6.1 The Committee makes the following recommendation:

**Recommendation: The Committee recommends that that the *Albany Cemetery Board By-Laws Amendment* be disallowed.**



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**Mr Peter Abetz MLA  
Chairman**

**18 August 2016**

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<sup>1</sup> The position is usefully summarised in the Western Australian Supreme Court decision *Donna Selby & Ors v Peter Adrian Joseph Pennings & Ors* [1998] WASCA 24, where Ipp J (with whom the other judges agreed on this point) said:  
*[T]he true effect of the presumption is that the legislation or act which is impugned is presumed to be good until pronounced to be unlawful, but is then recognised as never having had any legal effect at all ... There is no rule that lends validity to invalid acts. In a practical world, however, a court will usually assume that subordinate legislation, and administrative acts, are valid unless it is persuaded otherwise.*