



**THIRTY-EIGHTH PARLIAMENT**

**REPORT 48**  
**JOINT STANDING COMMITTEE ON DELEGATED**  
**LEGISLATION**  
*TOWN OF KWINANA EXTRACTIVE INDUSTRIES*  
*LOCAL LAW 2011*

Presented by Mr Joe Francis MLA (Chairman)

and

Hon Sally Talbot MLC (Deputy Chair)

May 2012

## 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)  
Hon Sally Talbot MLC (Deputy Chair)  
Hon Alyssa Hayden MLC  
Ms Janine Freeman MLA

Hon Jim Chown MLC  
Mr Paul Miles MLA  
Hon Helen Bullock MLC  
Mr Andrew Waddell MLA

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## **Government Response**

This Report is subject to Standing Order 191(1):

*Where a report recommends action by, or seeks a response from, the Government, the responsible Minister or the Leader of the House shall provide its response to the Council within not more than 2 months or at the earliest opportunity after that time if the Council is adjourned or in recess.*



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**REPORT OF THE JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION**  
**IN RELATION TO THE**  
***TOWN OF KWINANA EXTRACTIVE INDUSTRIES LOCAL LAW 2011***

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**1 INTRODUCTION**

- 1.1 The Joint Standing Committee on Delegated Legislation (**Committee**) has identified that the Town of Kwinana did not follow the mandatory procedure prescribed in the *Local Government Act 1995 (Act)* when it adopted its new extractive industries local law.
- 1.2 The Town of Kwinana (**Town**) has failed to correctly follow a sequential step in section 3.12 of the Act, which has resulted in the local law being invalid. The local law is therefore not authorised by the Act and offends the Committee's Term of Reference 3.6(a).
- 1.3 This report recommends that the House disallow the *Town of Kwinana Extractive Industries Local Law 2011*.

**2 REFERRAL TO THE COMMITTEE**

- 2.1 The *Town of Kwinana Extractive Industries Local Law 2011 (Local Law)* falls within the definition of 'instrument' in the Terms of Reference of the Committee. The Town resolved to commence the process of adopting a new local law relating to extractive industries at its meeting on 25 May 2011 and this Local Law was published in the *Western Australian Government Gazette (Gazette)* on 28 September 2011.
- 2.2 The Local Law was referred to the Committee upon gazettal and its full text is publicly available from the State Law Publisher's website at <http://www.slp.wa.gov.au/gazette/gazette.nsf>.
- 2.3 The Town provided the Committee with explanatory material pursuant to the requirement in section 3.12(7) of the Act on 18 October 2011. The Committee first scrutinised the Local Law at its meeting on 7 November 2011 and resolved to proceed to recommend the disallowance of the Local Law to the Parliament.
- 2.4 The Committee wrote to the Town on 8 November 2011 to advise that the Committee was proceeding to recommend disallowance. The Committee also advised the Minister for Local Government of its decision to recommend disallowance.

**3 NON-COMPLIANCE WITH SECTION 3.12 OF THE LOCAL GOVERNMENT ACT 1995**

**Disallowance of an invalid local law - the Committee's position**

- 3.1 The Committee has previously stated its position on the status of invalid local laws and the prospect of disallowance in its 42<sup>nd</sup> report: *Town of Capel Keeping and*

*Welfare of Cats Amendment Local Law 2009 and Town of Koorda Standing Orders Local Law 2009.*<sup>1</sup>

- 3.2 This Local Law raises the same issues in relation to the effect of not complying with the procedure in section 3.12 of the Act and the Committee notes that a failure to comply with the requirements of the section will result in a local law being found to be invalid.<sup>2</sup>
- 3.3 An instrument stands referred to the Committee at the time of gazettal.<sup>3</sup> Upon the tabling of a local law, there is an instrument which may be subject to disallowance and the Parliament has the power to disallow a local law tabled before it.<sup>4</sup>
- 3.4 In the Committee's view, tabled instruments that have not been correctly made by following the prescribed statutory method are not excluded from that power to disallow.

#### **4 SCRUTINY OF THE LOCAL LAW**

- 4.1 The Committee has considered the information contained in the Statutory Procedures Checklist provided by the Town and formed the view that the Local Law is invalid, based on non-compliance with section 3.12(3)(b) of the Act.
- 4.2 The Committee resolved to move a notice of motion in the Legislative Council to recommend disallowance of the Local Law on 7 November 2011, which was moved in the Legislative Council on 1 December 2011.
- 4.3 The Committee wrote to the Town on 8 November 2011 with its view that the Local Law was invalid. The Town responded on 18 November 2011 and acknowledged that that the procedure in section 3.12 of the Act had not been correctly followed. The Town did however refer to the fact that the non-compliance with section 3.12 "*did not and could not have caused any adverse effects*". The Town's letter is attached to this report as **Appendix 1**.

#### **5 STATUTORY PROCEDURE FOR MAKING A LOCAL LAW**

- 5.1 It is important to note that section 3.12(1) of the Act is as follows:

***3.12 Procedure for making local laws***

*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.*

[Committee emphasis]

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<sup>1</sup> Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, Report 42, *Shire of Capel Keeping and Welfare of Cats Amendment Local Law 2009 and Shire of Koorda Standing Orders Local Law 2009*, 16 September 2010.

<sup>2</sup> *Ibid.*, p3 and see specifically Appendix 4 to that report, comprising advice from the then Crown Solicitor's Office, p25.

<sup>3</sup> See paragraph 2.2 of this report in relation to the Local Law and Term of Reference 3.5.

<sup>4</sup> Section 42 of the *Interpretation Act 1984*.

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- 5.2 If the steps set out in section 3.12 are not followed exactly in the order in which they are outlined, then the requirements of the Act have not been correctly complied with and the local law is invalid.
- 5.3 The Committee notes that this approach dates from long-standing advice from the then Crown Solicitor's Office (now State Solicitor's Office) that the procedure in section 3.12 is mandatory and a local law which does not follow this process in the order in which it is outlined will be invalid.<sup>5</sup>
- 5.4 The entire text of section 3.12 of the Act is attached to this report as **Appendix 2**.

**Section 3.12(3)(b) of the Act - giving a copy of a proposed local law to the relevant Minister**

- 5.5 Section 3.12(3)(b) requires that:

*The local government is to –*

*... as soon as the [Statewide public] 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.*

- 5.6 According to sections 1.7 and 1.8 of the Act, 'Statewide public notice' requires a notice to be published in a newspaper circulating generally throughout the State, exhibition of the notice to the public on a notice board at the local government's offices and to the public at every local government library in the district. All three elements of Statewide public notice must be completed in order for the notice to be effective.
- 5.7 In this case, the Statutory Procedures Checklist provided by the Town advised that notice of the new Local Law was published in *The West Australian* on 2 June 2011. The notice also appeared in the Town's offices and in every library within the district from 26 May 2011 to 25 July 2011.
- 5.8 The Committee has confirmed with the Town that a letter was sent to the Minister for Local Government on 27 May 2011, which enclosed the adopted ("*proposed*") version of the Local Law. This was six days before Statewide public notice was given.
- 5.9 The express words of section 3.12(3)(b) of the Act are "*as soon as the notice is given*", which the Committee has interpreted as meaning that a local government must give the Minister for Local Government a copy of the proposed local law after Statewide public notice is given, not before, which occurred in this instance.
- 5.10 Although the timeframe in question was a matter of six days (from 27 May 2011 to 2 June 2011), the Committee reiterates that section 3.12 of the Act does not contain any discretion as to the order in which the steps must be completed.

<sup>5</sup> See Appendix 4 to Report 42.

5.11 Therefore, as the process outlined in section 3.12(3)(b) of the Act has not been followed correctly, the Committee has formed the view that the Local Law is invalid and capable of disallowance.

**6 REVIEW OF SECTION 3.12 OF THE ACT**

6.1 The Committee notes that this is the third occasion in the span of a few months that the Committee has scrutinised a local law which has not correctly followed the mandatory sequential procedure prescribed in section 3.12 of the Act.

6.2 The Committee is concerned that the overly prescriptive nature of section 3.12 may be the cause of these invalid local laws. Local governments may not be aware of the legal consequences of not complying exactly with all of the steps in section 3.12 in the order in which they are prescribed.

6.3 This may result in resources and money being expended by local governments to make laws which are ultimately found to be invalid and of no legal effect and in fact, the Town of Kwinana expressly referred to this prohibitive cost in its letter to the Committee regarding this instrument:

*The process of making a Local Law is an expensive one; we estimate that this local law has so far cost between \$9, 000 and \$10, 000 and this is not a cost we wish to incur again if that is at all possible.<sup>6</sup>*

6.4 While the Committee is sympathetic to the intention of local governments when they fail to comply with the process in section 3.12, the Committee's Terms of Reference oblige it to investigate when an instrument of subsidiary legislation is not made according to the requirements of its empowering statute.

6.5 The Committee sees a solution to this discord between a strict legal interpretation of the words of section 3.12 and the practical impact on the many local governments in the State which may not be aware of the effect of non-compliance with section 3.12 of the Act.

6.6 The Committee recommends that the Minister for Local Government review the requirements of section 3.12 with a view to permitting an element of flexibility or discretion in the application of section 3.12 requirements.

**Recommendation 1: The Committee recommends that the Minister for Local Government amend the *Local Government Act 1995* to provide for flexibility in section 3.12 in circumstances where there is no adverse impact on the integrity of the local law.**

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<sup>6</sup> Letter from Town of Kwinana, 18 November 2011, p2.

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**7 THE COMMITTEE'S CONCLUSIONS****Term of Reference 3.6(a)**

- 7.1 The Committee has concluded that the Local Law offends its Term of Reference 3.6(a) on the basis of non-compliance with a mandatory requirement in section 3.12 of the Act.
- 7.2 The Committee has therefore resolved to recommend that the House disallow the Local Law as it is of the view that it is invalid and not authorised by the Act.
- 7.3 The Committee has also concluded that there is an avenue for ensuring that this type of non-compliance (or more appropriately termed, 'substantial compliance') should not be a barrier to local laws being authorised under the Act.

**Consequences of disallowance**

- 7.4 As outlined in a previous report, the Committee notes that a number of benefits exist in recommending the disallowance of invalid instruments, which include ensuring that invalid laws are quickly removed from the public record and reducing the risk of public misinformation.
- 7.5 This is the Town's first complete local law relating to extractive industries since 2001. Disallowance of the Local Law will therefore revive the Town's previous version: the *Town of Kwinana Extractive Industries Local Law* from 2001.

**8 RECOMMENDATION**

**Recommendation 2: The Committee recommends that the *Town of Kwinana Extractive Industries Local Law 2011* be disallowed.**



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**Mr Joe Francis MLA**

**Chairman**

**3 May 2012**



**APPENDIX 1**  
**LETTER FROM THE TOWN OF KWINANA DATED**  
**18 NOVEMBER 2011**

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**Telephone** (08) 9439 0200  
**Facsimile** (08) 9439 0222  
**TTY** (08) 9419 7513  
admin@kwinana.wa.gov.au  
[www.kwinana.wa.gov.au](http://www.kwinana.wa.gov.au)

17 November 2011



Cnr Gilmore Ave & Sulphur Rd  
Kwinana WA 6167  
PO Box 21, Kwinana WA 6966  
**Hours** Mon-Fri 8am-5pm

Hon J Francis MLA  
Chairman  
Joint Standing Committee on Delegated Legislation  
Legislative Council Committee Office  
Parliament House  
WEST PERTH WA 6000

Dear Mr Francis

**TOWN OF KWINANA EXTRACTIVE INDUSTRIES LOCAL LAW 2011**

I refer to your letter of 8 November, concerning the Committee's resolution to recommend disallowance of the above mentioned Local Law to the Parliament based on the fact that the Local Law has been invalidly made and is therefore of no legal effect.

Firstly may I apologise for our alternate interpretation of section 3.12 of the Local Government Act. This was an unwitting error and occurred as a consequence of the Town attempting to deal with, in a timely manner, the requirements of the local law making process as set out in the Local Government Act.

This process was undertaken in the correct order, as outlined in the Department of Local Government's Local Law Process - Flow Chart. The public notice was 'given' to the newspaper on 27 May to appear as soon as possible, the notice was also displayed on the Town's administration centre notice board and library notice boards on this day and was shortly followed by a letter sent to the Minister of Local Government later that same day.

Unfortunately the notice did not appear in The West Australian until 02 June so it would appear that our letter arrived 4 business days ahead of this publication.

I would be grateful if, given that this oversight did not and could not have caused any adverse effects in regard to public submission periods, legislative meaning or the purpose and intent of this local law, you would reconsider your intention to recommend disallowance of the Local Law.

The process of making a Local Law is an expensive one; we estimate that this local law has so far cost between \$9,000 and \$10,000 and this is not a cost we wish to incur again if that is at all possible.

Both the Council and Officers of the Town are now better informed of the importance of the timing required by this section of the Local Government Act and we have now rectified our workflow practises to ensure this does not happen again.

Yours faithfully

A handwritten signature in black ink, appearing to read 'C. Adams', written in a cursive style.

Carol Adams  
Mayor

## APPENDIX 2

### SECTION 3.12 OF THE *LOCAL GOVERNMENT ACT 1995*

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#### 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;
    - (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;
  - (b) as soon as the notice is given, give a copy of the proposed local law and a copy of the notice to the Minister and, if another Minister administers the Act under which the local law is proposed to be made, to that other Minister; and
  - (c) provide a copy of the proposed local law, in accordance with the notice, to any person requesting it.
- (3a) A notice under subsection (3) is also to be published and exhibited as if it were a local public notice.
- (4) After the last day for submissions, the local government is to consider any submissions made and may make the local law\* as proposed or make a local law\* that is not significantly different from what was proposed.

\* *Absolute majority required.*
- (5) After making the local law, the local government is to publish it in the *Gazette* and give a copy of it to the Minister and, if another Minister administers the Act under which the local law is proposed to be made, to that other Minister.

- (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;
  - (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.

*[Section 3.12 amended by No. 1 of 1998 s. 8; No. 64 of 1998 s. 6; No. 49 of 2004 s. 16(4) and 23.]*