SECOND SESSION OF THE THIRTY-SIXTH PARLIAMENT

REPORT OF THE

JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

IN RELATION TO THE

POWERS OF ENTRY AND POWERS TO MAKE LOCAL LAWS THAT AFFECT PRIVATE LAND UNDER THE *LOCAL GOVERNMENT ACT 1995*

Presented by Ms Margaret Quirk MLA (Chairman)

and

Hon Ray Halligan MLC (Deputy Chairman)

Report 7
May 2003

JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

Date first appointed:
June 28 2001

Terms of Reference:
The following is an extract from Schedule 1 of the Legislative Council Standing orders:

"**6. Delegated Legislation Committee**

6.1 A *Delegated Legislation Committee* is established.

6.2 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.

6.3 A quorum is 4 members of whom at least 1 is a member of the Council and 1 a member of the Assembly.

6.4 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.

6.5 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.

6.6 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; or

(d) deprives a person aggrieved by a decision of the ability to obtain review of the merits of that decision or seek judicial review; or

(e) imposes terms and conditions regulating any review that would be likely to cause the review to be illusory or impracticable;

(f) contains provisions that, for any reason, would be more appropriately contained in an Act.

6.7 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 Report:

Ms Margaret Quirk MLA (Chairman)
Hon Ray Halligan MLC (Deputy Chairman)
Hon Alan Cadby MLC
Hon Robin Chapple MLC
Hon Ljiljanna Ravlich MLC
Mr Rod Sweetman MLA
Mr Terry Waldron MLA
Mr Peter Watson MLA

Staff as at the time of this Report:

Nigel Pratt, Clerk Assistant
Jan Paniperis, Senior Committee Clerk
Denise Wong, Advisory Officer (Legal))
Anne Turner, Advisory Officer (Legal)

Address:
Parliament House, Perth WA 6000, Telephone (08) 9222 7222
Website: http://www.parliament.wa.gov.au
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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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EXECUTIVE SUMMARY AND RECOMMENDATIONS

EXECUTIVE SUMMARY

1 For several years, the Joint Standing Committee on Delegated Legislation ("Committee") has had concerns about local laws that were made under section 3.5(1) of the *Local Government Act 1995* ("Act"), which sought to:

1.1 regulate the activities of owners or occupiers of private land conducted on that land; and

1.2 authorise local government employees to enter onto that land,

in certain circumstances that went beyond the matters listed in Schedules 3.1 and 3.2 of the Act.

2 The preliminary view of the Committee was that where a local government relies on section 3.5(1) of the Act for making a local law authorising a local government employee to enter private land, the local government:

2.1 is restricted to the matters specified in Schedules 3.1 and 3.2; and

2.2 must comply with the procedures for entering private land set out in Part 3, Division 3, Subdivision 3 of the Act.

3 Following further inquiry, the Committee became aware that the Western Australian Local Government Association ("WALGA") had advised its members that the local law-making power in section 3.5(1) of the Act is not restricted by the matters specified in Schedules 3.1 and 3.2. Some local governments had seized upon this advice to make local laws in respect to private land and authorising entry onto private land in circumstances that the Committee considered were not contemplated by the Schedules or otherwise authorised by the Act.

4 On July 6 2001, the Committee formally resolved to report to Parliament on the power of local government employees to enter private land pursuant to the Act.

5 The Committee therefore resolved to conduct an inquiry into the scope of the local law-making powers in the Act and the power of local government employees to enter onto private land pursuant to a local law made under the Act. To assist it in this regard, the Committee obtained an opinion from Mr Malcolm McCusker QC, a Barrister at the Independent Bar.

FINDINGS

6 The Committee has concluded that:

- the local law-making power provided by section 3.5(1) of the Act is constrained by sections 3.25 and 3.27; and accordingly
- where a local government relies on section 3.5(1) for making a local law in relation to entry onto private land, the local government:
  a) is restricted to the matters specified in Schedules 3.1 and 3.2; and
  b) must comply with the procedures for entering private land set out in Part 3, Division 3, Subdivision 3 of the Act.
- any local law made under the Act inconsistent with the above is not authorised or contemplated by the Act.

RECOMMENDATIONS

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Recommendation 1: The Committee recommends that powers of entry conferred on local governments be expressly stated in the *Local Government Act.*

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Recommendation 2: The Committee recommends that these express powers be the extent of the powers of entry available to local governments to enter private land.

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Recommendation 3: The Committee recommends that any broadening of the capacity by local governments to enter private land continue to be by regulation.

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Recommendation 4: The Committee recommends that the Act be amended:

a) to expressly state that the local law-making power provided under section 3.5(1) is constrained by sections 3.25, 3.27; and Schedules 3.1 and 3.2;

b) so as to include in the list of matters contained in Schedule 3.1:

i) "the repair of all boundary fences";

ii) "the removal of bees"; and

iii) "the limiting or stopping of nuisance lights".

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Recommendation 5: The Committee recommends that pending any amendments to the Act that are brought about by its review, the Minister direct the Department to issue a circular to WALGA, the Western Australian division of Local Government Managers Australia, and all local governments, advising that:

a) section 3.5(1) of the Act is constrained by sections 3.25, 3.27; and Schedules 3.1 and 3.2 in relation to making local laws affecting private land;

b) the power to enter private land pursuant to a local law made under section 3.5(1) of the Act can only be used in relation to those matters authorised by sections 3.25, 3.27; Schedules 3.1 and 3.2; and the procedure in Part 3, Division 3, Subdivision 3 of the Act must be followed when exercising the power to enter;

c) any deviation from this position by a local government will result in the Committee recommending to the Parliament that the local law be disallowed under section 42(2) of the *Interpretation Act 1984*; and

d) local governments wanting to insert additional matters to Schedules 3.1 and 3.2 should advise the Department of this now, while the Act is undergoing a review.

Recommendation 6: The Committee recommends that pending any amendments to Schedules 3.1 or 3.2, WALGA consider amending its *pro forma* Fencing, Beekeeping and Urban Environment and Nuisance laws in the following way, so as to comply with the requirements of the Act:

- **a) clause 16 of the fencing *pro forma* law should be amended so that:**
  - **i) it only applies to fences that abut a public place; and**
  - **ii) notices of breach can only be issued to owners of private land.**
- **b) clause 12 of the beekeeping *pro forma* law should be amended so that it is clear that local government employees cannot enter private land pursuant to that clause.**
- **c) The Urban Environment and Nuisance *pro forma* law should be amended:**
  - **i) by deleting clause 2.3; and**
  - **ii) so that it is clear that local government employees cannot enter private land pursuant to clause 5.2.**

CHAPTER 1
INTRODUCTION

REFERENCE AND PROCEDURE

1.1 The Parliament of Western Australia has delegated its function of scrutiny of subsidiary legislation to the Joint Standing Committee on Delegated Legislation ("Committee"). Part of its function is to consider whether any subsidiary legislation[1] or disallowable instrument[2] is, amongst other things, "authorised or contemplated" by its empowering enactment.

1.2 This report sets out the Committee's position on the extent to which a local government may make local laws under the powers contained in the *Local Government Act 1995* ("Act") that:

- regulate the activities of owners or occupiers of private land conducted on that land; and
- authorise local government employees to enter onto private land.

1.3 The report is concerned with the powers contained in the Act. It is not intended to deal with the powers of local governments to make local laws under other Acts such as the *Health Act 1911*[3], *Town Planning and Development Act 1928*[4], *Bush Fires Act 1954*[5] or any other laws which affect private land and authorise entry onto private land. The Committee acknowledges that local governments already have considerable powers in respect of private land under these and other statutes.

1.4 One of the purposes of this report is to inform local governments of the Committee's position in respect of the above matters so that when making local laws they are aware

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1 Subsidiary legislation means any proclamation, regulation, rule, local law, by-law, order, notice, rule of court, town planning scheme, resolution, or other instrument, made under any written law and having legislative effect: section 5 of the *Interpretation Act 1984.*

2 Under its terms of reference, "instruments" are defined as "subsidiary legislation in the form in which, and with the content it has, when it is published; and an instrument, not being subsidiary legislation, that is made subject to disallowance by either House under a written law. Refer to the discussion in paragraph 1.8 for an explanation of what constitutes a disallowable instrument.

3 Section 342 of the *Health Act 1911* permits local governments to make local laws under that Act in accordance with the procedure contained in the Act but only with the consent of the Executive Director, Public Health or his or her delegate.

4 Section 31 and the Second Schedule to the *Town Planning and Development Act 1928* permits the Governor to make local laws in relation to specified town planning matters.

5 Section 62 of the *Bushfires Act 1954* permits local governments to make local laws in accordance with the procedure contained in the Act.

of what powers the Committee considers are authorised or contemplated by the Act. The Committee's task in this regard has been made more difficult due to the absence of any judicial pronouncements on the proper scope of the local law-making power under the Act.[6] The Committee was assisted in determining its position by an opinion from Mr Malcolm McCusker QC dated November 11 2002.

1.5 The ultimate purpose of this report is to determine the extent of the powers of local governments to make local laws pursuant to the Act. It is expected that an adoption of the recommendations made in this report will result in greater certainty for local governments and fewer local laws coming before the Committee that breach its terms of reference.

BACKGROUND

1.6 The Committee acknowledges that in a modern society, there will be an inevitable tension between the rights of private property owners to the quiet enjoyment of their land and the need to restrict or prohibit certain activities on that land in the public interest. For example, town planning schemes, building, health and environmental regulations and many other laws place a variety of restrictions and prohibitions on property owners that are designed to maintain the health, safety and wellbeing of citizens as well as the amenity of the area in which the law has effect. A power to enter private land often accompanies such laws to enable effective enforcement.

1.7 In a parliamentary democracy, the striking of an appropriate balance between the private rights of individuals and the public interest is a matter that is determined by elected representatives who are entrusted by the voters to make these laws. However, in the case of subsidiary legislation such as local laws made by local governments, the Parliament does not directly make the law but delegates this function.[7]

1.8 The principal purpose of the Committee is to maintain parliamentary scrutiny of this delegated power to ensure that laws are not made that go beyond the mandate permitted by the Parliament. The Committee achieves this through its power to recommend to each House of Parliament that an instrument that contravenes one or more of its terms of reference be disallowed. The Parliament itself, through each of its Houses, exercises ultimate control over this delegated authority through the power of each House to disallow "regulations", a term which includes local laws, rules, by-laws and other instruments that are made disallowable under a written law.[8]

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6 The Act came into operation on July 1 1996.

7 The most common form of delegation contained in numerous Acts of Parliament is to the Governor via the Governor's regulation-making power. This is effectively a grant of regulation-making power to the government of the day because the Governor must act on the advice and consent of the Executive Council. See section 60 of the *Interpretation Act 1984.*

8 Section 42 of the *Interpretation Act 1984*.

1.9 Like the Parliament, local government councils are also comprised of elected representatives. However, unlike the Parliament, which has a plenary power to make laws for the peace, good order and government of the State, local governments have only a delegated power to make local laws. Local laws must be made under the authority and within the mandate set by the Parliament in the Act. These local laws include laws that affect private land and authorise entry onto private land where this has been expressly provided for by the Parliament or which can be implied by necessity.

1.10 Unlike regulations made by the Governor, there is no requirement to have the Executive Government approve local laws before they are made. However, the government of the day does have power to control local government local law-making through two devices contained in the Act. Firstly, the Governor may repeal or amend any local law once made.[9] Secondly, the Governor can make regulations prohibiting local laws being made in respect of certain matters or purposes or certain kinds of local laws.[10] There is also some monitoring of the local law-making process within the Department of Local Government and Regional Development ("Department") to ensure that local laws are made in accordance with the procedure contained in the Act[11] and are not contrary to government policy. However, ultimately it is the Committee that has the primary responsibility for scrutiny of local laws to determine whether they are authorised or contemplated by the Act.

1.11 For several years, the Committee has had concerns about local laws that have come before it for scrutiny purporting to be made under the local law-making power contained in section 3.5(1) of the Act, which sought to:

- regulate the activities of owners or occupiers of private land conducted on that land; and
- authorise local government employees to enter onto private land.[12]

1.12 Of most concern to the Committee have been:

- a local law that authorised local government employees, upon non-compliance with a notice, to enter onto private land and remove the hives of a beekeeper if

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9 See section 3.17 of the Act. This power has not been used in the period since the Act came into effect on July 1 1996.

10 See section 3.5(4) of the Act. This power has been used on one occasion (September 11 1998) to prevent the Town of Cottesloe making a local law to charge parking fees on land it controls in any part of the district of Cottesloe west of Broome Street or enabling such a requirement to be imposed: see regulation 2A of the *Local Government (Functions and General) Regulations 1996.*

11 The procedure is contained in Part 3, Division 2, Subdivision 2 of the Act.

12 In this report the expression "private land" means all land that is not owned by, or under the care and control of a local government.

the local government determined that the bees had become a nuisance. The local law also permitted the local government to recover the cost of seizing this property from the owner or occupier of the land;

- a local law that authorised local government employees, upon non-compliance with a notice, to enter onto private land to repair or replace a dividing fence (as opposed to a fence abutting a public place) when the local government determined that the fence was dilapidated or unsightly and to recover the cost of doing so from the owner or occupier;[13]

- a local law that authorised local government employees, upon non-compliance with a notice, to enter onto private land to adjust, disable or remove outdoor lighting, for example from tennis courts, to prevent light shining into a neighbouring property;

- a local law authorising local government employees, upon non-compliance with a notice, to enter onto private land to remove "refuse, rubbish or disused material" from an enclosed back yard on the ground that it was adversely affecting the value of adjoining properties;

- a local law which appeared to grant an implied power of entry onto private land to abate a nuisance caused by an amusement that is being conducted at a fair, carnival or show; and

- a local law authorising local government employees, upon non-compliance with a notice, to enter onto private land to remove signs, billboards and hoardings that did not comply with the technical requirements of the local law.

1.13 The sole function of the Committee is to determine whether these local laws are authorised or contemplated by the Act. Broader issues relating to whether local governments should have these powers are matters of policy and beyond the scope of this Report.

ROLE OF STAKEHOLDERS IN LOCAL GOVERNMENT LAW-MAKING

1.14 Since concerns were first raised, there have been numerous discussions with the Western Australian Local Government Association ("WALGA") and the Department.

1.15 WALGA was established on December 6 2001, being an amalgamation of the four previous local government representative bodies.[14] One of the functions of WALGA

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13 Disputes between adjoining private property owners in relation to dividing fences are usually dealt with under the procedures contained in the *Dividing Fences Act 1961*.

14 WA Municipal Association, the Country Shire Council's Association, the Country Urban Council's

is to provide local governments with guidance on how to make local laws. This guidance is provided principally through the publication of a Local Laws Manual to which members may subscribe.

1.16 The Local Laws Manual includes *pro forma*[15] local laws. These *pro formas* are used as templates by local governments to create new local laws. The original set of *pro forma* local laws was developed and published in 1997, after the Act came into effect, with the object of assisting local governments with the basic requirements of local law-making and to reduce the time and expense associated with each local government developing their own local laws. Some of the local laws mentioned in paragraph 1.12 above are based on *pro forma* local laws contained in the Local Laws Manual.

1.17 Whether or not a local law is based on a WALGA *pro forma* or drafted independently, all local laws can be replicated by other local governments through the process of "adoption by reference". Under the Act, the text of any local law made by a local government can be adopted by another local government with or without modifications or as amended from time to time.[16] The object of this power was to save local governments time and expense in having to publish the full text of a local law in the *Government Gazette*.[17] However, one disadvantage of the adoption by reference power is the increased potential for errors to be transmitted from a local law of one local government to another local government.

1.18 Each of the 144 local governments in Western Australia is independent and the local law-making process is not centrally coordinated, as is the case with Government Department regulations and most other statutory instruments.[18] The Committee has noted a wide variation in the standard of local law-making because local laws may be drafted by a variety of persons, from lawyers and consultants to local government employees.

1.19 Due to the tendency for local governments to adopt the text of other local government local laws, or to use *pro forma* local laws as templates the Committee has noted that the successful resolution of a matter with one local government will not necessarily resolve the issue for all local governments. A defect in a local law that has been identified by the Committee can be repeated many times over by other local governments adopting the text of the problematic local law. Local governments may

Association and the Local Government Association (metropolitan councils).

15 A Latin term meaning "as a matter of form" that is often used to refer to a standard document which can be adapted to suit particular circumstances: *Osborn's Concise Law Dictionary*; *The Macquarie Dictionary*.

16 See section 3.8 of the Act.

17 Section 3.12(5) of the Act provides the requirement to publish local laws in the *Government Gazette*.

18 Most regulations are drafted by the Office of Parliamentary Counsel, which is comprised of specialist drafters.

be unaware that the local law that it has adopted by reference has been amended at the request of the Committee or even disallowed by the Legislative Council.

1.20 The Committee's concern with the local laws noted in paragraph 1.12 above was that, depending upon the proper scope of the local law-making power, local governments could be making local laws affecting private land and authorising entry onto private land in circumstances not authorised or contemplated by the Act. The Committee determined that a resolution of this issue required a broader, more coordinated response than confining itself to dealing with individual local governments when they submitted local laws to the Committee for scrutiny. This was particularly the case because several *pro forma* local laws contain provisions that affect private land, including authorising entry onto private land in circumstances that the Committee considered might not be authorised or contemplated by the Act.

The Inquiry Process

1.21 The Committee obtained independent legal advice from Mr Malcolm McCusker QC, a barrister at the Independent Bar ("McCusker opinion"), as to the correct interpretation of the scope of the local law-making powers of local governments under the Act. The Committee then invited the representative bodies of local government in Western Australia, - WALGA and the Western Australian division of Local Government Managers Australia, as well as officers of the Department to give written submissions on the McCusker opinion. WALGA's written response may be viewed in "Appendix 1" and the Hon Tom Stephens MLC's, Minister for Housing and Works; Local Government and Regional Development ("Minister") written response is in "Appendix 2". No response was received from the Western Australian division of Local Government Managers Australia.

1.22 The Committee thanks WALGA and the Minister for their contributions.

CHAPTER 2

LOCAL LAW-MAKING POWER UNDER THE *LOCAL GOVERNMENT ACT 1995*

SOURCES OF POWER TO MAKE LOCAL LAWS GENERALLY

2.1 The general function of local government is contained in section 3.1, as follows:

> ***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.*

2.2 This general function of local government includes its legislative and executive functions.[19] The "constraints" referred to in section 3.1(2) may be express, as in the case of the power to make a local law to raise revenue[20], or implied by direct or indirect inconsistency with the Act or other written laws.[21]

2.3 One of the express constraints in the Act is contained in section 3.7. This results in local laws being "inoperative" to the extent that they are inconsistent with the Act or other written law.

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19 Section 3.4 of the Act.

20 Section 6.15 of the Act.

21 "Written law" under section 5 of the *Interpretation Act 1984* means *"…all Acts for the time being in force and all subsidiary legislation for the time being in force."* Thus, local laws that are inconsistent with other subsidiary legislation will be inoperative. The intent of the Legislature is to make local laws, made under the Act, subordinate to both primary and other subsidiary legislation to the extent of any inconsistency.

2.4 Another constraint is contained in section 43(1) of the *Interpretation Act 1984*, which renders subsidiary legislation "void" to the extent of any inconsistency with the written law under which it is made or any other Act.

Legislative Functions of Local Government

2.5 The local laws listed under paragraph 1.12 were all made under the power contained in section 3.5(1) of the Act, which provides as follows:

> ***3.5 Legislative power of local governments***
>
> *(1) A local government may make local laws under this Act prescribing all matters that are required or permitted to be prescribed by a local law, or are necessary or convenient to be so prescribed, for it to perform any of its functions under this Act.*

2.6 This section is contained in Part 3, Division 2 of the Act. Division 2 is entitled "Legislative functions of local governments". Other than this "necessary and convenient" power, there are no express provisions in Division 2 dealing with local law-making powers affecting private land or authorising entry onto private land. What then is its proper scope? This is canvassed in Chapter 4 of this report.

SOURCES OF POWER TO MAKE LOCAL LAWS REGARDING PRIVATE PROPERTY

Executive Functions of Local Government

2.7 Part 3, Division 3 of the Act is entitled "Executive functions of local governments". One of the executive functions of local government is to "*…administer its local laws…*".[22] Subdivision 2 is entitled "Certain provisions about land" and Subdivision 3 is entitled "Powers of Entry". An extract of these two Subdivisions is attached to this report as "Appendix 3".

2.8 Subdivision 2 contains section 3.25(1), which provides that a local government can issue a notice to an owner or occupier of private land requiring that person to do anything specified in the notice that:

- is prescribed in Schedule 3.1, Division 1;[23] or
- is for the purpose of remedying or mitigating the effects of any offence against a provision prescribed in Schedule 3.1, Division 2.[24]

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22 Section 3.18(1) of the Act.

23 Section 3.25(1)(a) of the Act.

24 Section 3.25(1)(b) of the Act.

2.9 Division 1 of Schedule 3.1 lists a variety of matters that a notice may require an owner (or occupier, if this is permitted) of land to do. Division 2 of the Schedule refers to regulations made under the Act, a breach of which empowers the local government to issue a notice to an owner (or an occupier if this is permitted) to remedy or mitigate.

2.10 Section 3.26 then sets out the "additional powers" of local governments in the event that an owner or occupier does not comply with the section 3.25 notice. This includes a power to *"…do anything that it considers necessary to achieve, so far as is practicable, the purpose for which the notice was given."*[25] Although there is no express reference in section 3.26 to enter private land, this is implied, as without the power to enter private land, the purpose of the notice could not be carried out.[26]

2.11 The other express powers of local governments in respect of private land are contained in section 3.27 of Subdivision 2, when read with Schedule 3.2. This Schedule lists a variety of matters that the local government is authorised by section 3.27 to undertake on private land without requiring consent of the owner or occupier. Again, although there is no express reference in section 3.27 to entry onto private land, this is implied, as without the power to enter private land, the local government could not carry out the matters listed in Schedule 3.2.

2.12 The Committee notes that sections 3.25 and 3.27 provide that Schedules 3.1 and 3.2 can be amended by regulations.[27] This gives the Executive Government significant flexibility in that it can add to the matters listed in the Schedules thereby providing local governments with additional powers over private land, including the power to enter to undertake works for the requirements of a notice.

2.13 The notices referred to in section 3.25 can be issued by a local government whether or not a local law has been made that deals with one of the items contained in Schedule 3.1. However it is common practice for local governments to enact local laws that include a power to issue notices to owners or occupiers requiring them to carry out matters or remedy or mitigate an offence that is specified in Schedule 3.1. These local laws usually include a power of entry clause in cases of non-compliance with a notice. Similarly, a local government can perform the functions listed in Schedule 3.2 without a local law being made.

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25 Section 3.26(2) of the Act.

26 According to Francis Bennion in *Statutory Interpretation: A Code*, at pages 454 and 986, the finding of proper implications within the express words of a law is a legitimate, necessary function of anyone who interprets legislation. In the High Court of Australia case of *Victoria v. The Commonwealth* 122 CLR 353, Dixon J said: *"Implications …must always be read as parts of a whole and with due regard to the subject with which the statute deals"*.

27 Sections 3.25(2) and 3.27(2) of the Act.

2.14 The issue for the Committee was whether local governments' powers to make a local law in respect of private land and to enter onto private land for enforcement purposes are constrained by the express provisions of sections 3.25 and 3.27 and the matters referred to in Schedules 3.1 and 3.2. A related question is whether there is any power to make a local law that deviates from the general procedure for entering private land provided for in the Act.

2.15 If these constraints apply then any local law that was inconsistent with these provisions would be inoperative under section 3.7 of the Act. It would also be void for inconsistency under section 43(1) of the *Interpretation Act 1984*. In either case such a local law would not be authorised or contemplated by the Act and as such the Committee would recommend to the House that it be disallowed.

CHAPTER 3

EXPRESS POWERS OF ENTRY UNDER THE *LOCAL GOVERNMENT ACT 1995*

INTRODUCTION

3.1 While paragraphs 2.10 and 2.11 of this report deal with local government implied powers of entry, this chapter discusses the express powers of entry that are provided by Part 3, Division 3, Subdivision 3 ("Subdivision 3") of the Act, namely sections 3.33 and 3.34.

3.2 Subdivision 3 also contains the general procedure to be followed by local government employees when exercising a power of entry onto private land. This procedure is found in section 3.31 of the Act.

EXPRESS POWERS OF ENTRY

3.3 Section 3.33 in Subdivision 3 provides for entry under the authorisation of a warrant issued by a justice. A warrant may be granted under this section if a justice of the peace is satisfied that the entry is reasonably required by the local government to perform its functions, but:

- entry has been refused, opposed or prevented;
- entry cannot be obtained; or
- a section 3.32 notice cannot be given without unreasonable difficulty or delay.

3.4 Section 3.34 in Subdivision 3 provides for entry in an emergency. For example, an "emergency" will exist if there is the imminent risk of injury or illness to any person.[28] In such circumstances, a local government employee is expressly authorised by the Act to enter private land to prevent or minimise the risk without first having to obtain consent, issue a notice of intended entry or obtain a warrant.

PROCEDURE FOR EXERCISING A POWER OF ENTRY

3.5 Section 3.31 provides that, other than in an emergency or where entry is authorised by a warrant, entry onto "any land, premises or thing" by a local government employee is only lawful if:

[28] Section 3.34(2)(a) of the Act.

- the consent of the owner or occupier is obtained; or
- a notice of intended entry in accordance with section 3.32 has been given to the owner or occupier.[29]

3.6 Section 3.28 deals with the application of the powers of entry contained in Subdivision 3. It states that:

> *The powers of entry conferred by this Subdivision may be used for performing any function that a local government has under this Act if entry is required for the performance of the function or in any other case in which entry is authorized by this Act other than by a local law.*

3.7 The effect of section 3.28 is that the powers of entry that are conferred by Subdivision 3, which includes the general entry requirements of section 3.31, may be used in two circumstances.

3.8 The first circumstance is when a local government performs any executive or legislative function it has under the Act if entry is required for the performance of that function. This includes any executive or legislative function it has under subsidiary legislation made under the Act.[30] The second circumstance is *"…in any other case"* in which entry is authorized by other provisions in the Act itself.[31] That is, in both these circumstances, entry is subject to the "consent and notice" procedures set out in section 3.31.

3.9 Local laws that are validly made under the Act fall within the first circumstance that is contemplated by section 3.28, since:

- such local laws are subsidiary legislation made under the Act; and
- section 3.5(1) of the Act empowers a local government to make local laws prescribing all matters that will allow it to perform its executive and legislative functions under the Act.

3.10 If a local law that was validly made under the Act authorised entry onto private land, that entry must also comply with the procedures set out in section 3.31.

3.11 Where a local government employee enters private land pursuant to either section 3.26 or 3.27 of the Act, the entry is also captured under the first circumstance that is contemplated by section 3.28. Entry onto private land is necessary for the local

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29 If the owner or occupier still objects to the entry, or prevents, refuses or opposes entry after the section 3.32 notice has been issued, then a warrant must be obtained: section 3.31(2) of the Act.

30 See section 44(2) of the *Interpretation Act 1984*.

31 The Committee understands that there are presently no other provisions.

government to perform its executive function in those situations, and when such entry is exercised, the relevant local government employee must comply with the procedures set out in section 3.31.

3.12 Section 3.29 of the Act provides that the powers in Subdivision 3 are in addition to and do not lessen the powers of entry conferred on local governments by any other law. This would include local laws made under other Acts such as the *Health Act 1911, Bush Fires Act 1954, Town Planning and Development Act 1928* and various other Acts that empower local governments to make local laws that authorise entry onto private land.

CHAPTER 4

WHAT IS THE PROPER SCOPE OF THE LOCAL LAW-MAKING POWER?

THE VIEW HELD BY THE WESTERN AUSTRALIAN LOCAL GOVERNMENT ASSOCIATION

4.1 WALGA obtained an opinion from its legal advisers[32] which suggested that the local law-making power under section 3.5(1) is not constrained by sections 3.25 and 3.27 and the matters specified in the Schedules. This broad or expansive interpretation of the local law-making power contends that a local government may make a local law authorising entry onto private land in relation to matters not set out in Schedules 3.1 and 3.2.

4.2 Under this view, a power to enter private land could be triggered by an owner or an occupier not complying with a notice issued under the local law itself. The notice would not need to be one issued under section 3.25 in relation to the matters set out in Schedule 3.1. Under this expansive interpretation, a local law could be made that dealt with the same matters in Schedule 3.1 and 3.2 or even supplement them by including matters not contemplated by either Schedule.

4.3 A copy of the legal opinion was subsequently included in an edition of the Local Laws Manual. A copy of this opinion and the explanatory extract that appears in the Local Laws Manual is attached to this report as "Appendix 4" and "Appendix 5", respectively.

4.4 It became evident to the Committee that some local governments have followed the advice contained in the Local Laws Manual to justify making local laws in respect to private land and that authorise entry in circumstances not contemplated by the Schedules. This can be seen from the examples listed in paragraph 1.12.

4.5 After providing WALGA with a copy of the McCusker opinion, the Committee received correspondence from WALGA dated March 31 2003, which indicated that, at the very least, WALGA agrees that the Act is unclear, and it is willing to work with the Committee and the Department to secure amendments to the Act that are necessary to clarify local law-making powers. The letter is attached to this report as "Appendix 1" .

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[32] Opinion from Minter Ellison Lawyers to Mr Ted Chown, then Convenor of Local Laws WA, dated April 17 1998.

MATTERS SUPPORTING AN EXPANSIVE INTERPRETATION OF THE LOCAL LAW-MAKING POWER

4.6 The expansive or broad interpretation of the scope of the local law-making power is that the matters specified in Schedule 3.1 and 3.2 are not intended to limit the power of local governments to make local laws with respect to private land. This argument is supported by:

- the liberal approach to be taken to the construction to the scope of the general function (which includes the legislative function) of local governments;[33]
- sections 3.25 and 3.27 being contained in Part 3, Division 3 headed "Executive functions of local governments" and the argument that the restrictions on powers in respect of private land are to be confined to the executive function and not to impliedly limit the legislative function of local governments, which is the subject of Part 3, Division 2 of the Act;
- the alleged lack of specificity in the Act of limits on the local law-making function which support a broad reading of the necessary and convenient power to make local laws: and
- the fact that local government law-making may be expressly constrained by:

  a) regulations that may set out:

     i) matters about which, or purposes for which, local laws are not to be made; or

     ii) kinds of local laws that are not to be made;[34] and

  b) the Governor's capacity to repeal or amend a local law.[35]

4.7 This interpretation means that a local government may, pursuant to the necessary and convenient power in s. 3.5(1), make a local law that authorises entry onto private land in circumstances not contemplated by the Schedules. There is therefore no necessary nexus between a notice issued under Part 3, Division 3, Subdivision 2 of the Act (section 3.25) and notices issued under a local law-making power requiring owners or occupiers to do certain things on their private land.

4.8 According to this interpretation of the Act, local laws can supplement the matters enumerated in Schedules 3.1 and 3.2. If a local government required additional

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33 Section 3.1(3) of the Act.

34 Section 3.5(4) of the Act.

35 Section 3.17 of the Act.

powers over and above those granted in the Schedules, it could simply make a local law that expanded those powers.

4.9 For example, a local law could be made in respect to sand drifts that affected the health and welfare of residents of the district, rather than in respect to sand drifts affecting "other" land as required by Schedule 3.1, Division 2, item 6. A local government could then issue a notice not to clear vegetation and enter private land upon non-compliance with that notice. The power to do so would not derive from the implied power of entry in section 3.25 but a power contained in the local law itself.

MATTERS SUPPORTING A NARROW INTERPRETATION OF THE LOCAL LAW-MAKING POWER

4.10 WALGA's broad interpretation of the necessary and convenient power in section 3.5(1) being sufficient to support local law-making in respect of private land and entry to private land beyond those matters specified in Schedules 3.1 and 3.2 faces the following hurdles:

- a failure by the legislature to provide in express and unambiguous terms a plenary power to make subsidiary legislation that would permit an erosion of a fundamental common law right (that is, the right to quiet enjoyment of private land);

- the Act is capable of an interpretation that limits the circumstances in which local laws can be made in respect of private land and the power to enter onto it by reference to clearly delimited circumstances (Schedules 3.1 and 3.2 and Subdivision 3) and permits these circumstances to be readily expanded by the executive making Henry VIII[36] regulations (ss. 3.25(2) and 3.27(2)); and

- a broad interpretation would make redundant Schedules 3.1 and 3.2 because local laws could simply be made in relation to the same subject matters.

THE VIEW HELD BY THE DEPARTMENT OF LOCAL GOVERNMENT AND REGIONAL DEVELOPMENT

4.11 The Committee raised its concerns with the Minister by letter dated October 17 2001. The Committee received a reply from the Minister dated February 13 2002 indicating that Schedules 3.1 and 3.2 would be amended some time in the future to include several new matters that would authorise entry onto private land.

4.12 On February 14 2002, the Committee received from the Minister an opinion provided to it by the Crown Solicitor's Office dated January 2 2002. This opinion concurred

[36] A "Henry VIII clause" is a provision in an Act that authorises the amendment of the enabling legislation or another Act by means of subsidiary legislation or executive act.

with the views expressed by WALGA's legal advisers. It relied primarily upon the second reading debates on the *Local Government Bill 1995*, which introduced the relevant sections of the Act but did not refer to any case law to support its conclusion. A copy of this opinion is attached to this report as "Appendix 6".

4.13 The advice from the Crown Solicitor's Office was attached to a letter from the Minister dated February 13 2002. Despite that advice, the Minister's letter confirmed that the Department endorsed the Committee's approach and indicated that the Schedules would be amended to include the removal of bees, the repair of boundary fences, the removal of nuisance lighting, and the carrying out of works on private thoroughfares. The letter also advised that the whole issue of local government powers of entry would be re-examined as a part of a review of the Act, which was expected to result in amending legislation being introduced into Parliament in early 2003. This letter is attached to this report as "Appendix 7".

4.14 The Committee was not satisfied with the opinion of the Crown Solicitor's Office and instructed Mr Malcolm McCusker, a Barrister at the Independent Bar and a Queen's Counsel, to provide it with an opinion on the scope of the local law-making power contained in section 3.5(1) of the Act. The Committee also instructed Mr McCusker to advise on the validity of local laws that authorise entry onto private land in circumstances that fall outside of the matters listed in Schedules 3.1 and 3.2. Mr McCusker's opinion was received on November 11 2002.

4.15 The Committee received information from the Department confirming that:

- Part 3 of the Act would be amended so as to make it clear that local governments are prevented from creating local laws that would otherwise allow local governments to have control over private land and things on private land that are not listed in Schedule 3.1 or 3.2;

- Schedule 3.1 would be amended to include new powers for local government to issue a notice for:

  a) the removal of bees from private property;

  b) the repair of a boundary fence; and

  c) limiting or stopping nuisance lighting on private property, and

- Schedule 3.2 would be amended to include a new power to allow local governments to carry out public works on private thoroughfares.

4.16 After providing the Minister with a copy of the McCusker opinion, the Committee received further correspondence from the Minister dated April 3 2003, which re-

confirmed the Department's existing views. The letter is attached to this report as "Appendix 2".

THE VIEW HELD BY THE COMMITTEE

4.17 The Committee's view, when performing its scrutiny function, is that the power to make a local law under section 3.5(1) of the Act affecting private property is restricted by sections 3.25 and 3.27, and matters listed in Schedules 3.1 and 3.2. That is, a local law made under section 3.5(1) of the Act that attempts to deal with matters concerning private land beyond those provided for in Schedules 3.1 or 3.2 will not be authorised or contemplated by the Act because it is inconsistent with the Act. Such a local law will be void and inoperative to the extent of that inconsistency due to the operation of:

- section 3.7 of the Act; and
- section 43(1) of the *Interpretation Act 1984*.

4.18 The Committee's view with regard to local government powers over private land is that Schedules 3.1 and 3.2 provide an exhaustive list of the circumstances in which a local government may interfere with the quiet enjoyment of that land by the owner or occupier under the Act. As such, local government entry onto private land is only authorised under the Act in the following situations:

- pursuant to section 3.26 in relation to a matter listed in Schedule 3.1;
- pursuant to section 3.27 in relation to a matter listed in Schedule 3.2;
- in an emergency, according to section 3.34;[37] and
- where a warrant issued under section 3.33 authorises entry.

4.19 Entry onto private land by a local government employee is governed by the general procedure for entry in Subdivision 3, unless the Subdivision 3 procedures are expressly stated not to apply or there is a different procedure specified under another written law. That is, before a local government employee exercises one of the first three powers of entry listed above, the employee must first:

- obtain the consent of the owner or occupier to enter onto that land;[38] or
- issue a section 3.32 notice of entry to the owner or occupier.[39]

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37 The Committee notes that even in an emergency, the Act states that the local government should issue a notice of intended entry if it is practicable to do so: section 3.34(5).

38 Section 3.31(1)(a) contained in Subdivision 3 of the Act.

SOME PRACTICAL EXAMPLES RESULTING FROM THE COMMITTEE'S VIEW

Matter Contemplated by the Schedules

4.20 Where a matter is contemplated by the Schedules, the Committee considers that two scenarios are possible. A local government can either rely on the implied powers of entry conferred by section 3.26 or 3.27, or make a local law authorising entry onto private land relating to a matter listed in either Schedule 3.1 or 3.2.

4.21 For example, Schedule 3.1 of the Act prescribes that a local government is empowered by section 3.25 to issue a notice to prohibit the dripping or running of water from private land onto any other land.[40] It is also possible for the local government to make a local law that authorises the issue of such a notice,[41] as the subject matter is listed in Schedule 3.1. If the local government was relying on section 3.25 to issue the notice, its employees could rely on section 3.26 to enter private land to abate the dripping or running of water upon non-compliance by the owner or occupier. If the local government's local law authorised entry after non-compliance with the notice, its employees would also be authorised to enter onto private land to stop this dripping or running of water.

4.22 In both scenarios, the local government employees must also comply with the additional requirements of Subdivision 3 of the Act. Before the entry onto private land is exercised, the local government must either obtain the consent of the owner or occupier or issue a notice of intended entry pursuant to section 3.32. If, after receiving the section 3.32 notice, the owner or occupier objects to the entry, the local government is obliged to obtain a warrant.[42]

Matter Not Contemplated by the Schedules

4.23 In contrast, a local government could not rely on section 3.5(1) of the Act to make a local law that, for example, authorised the entry upon private land to remove garden gnomes because this matter is not contemplated by Schedules 3.1 or 3.2 of the Act.[43] There is also no power to enter private land for this purpose under section 3.26 or 3.27 of the Act.

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39 Section 3.31(1)(b) contained in Subdivision 3 of the Act. If the owner or occupier still refuses, objects to, or prevents entry, a warrant must be obtained: section 3.31(2) of the Act.

40 Schedule 3.1, Division 1, Item 1 of the Act.

41 Section 3.5(1) of the Act.

42 Section 3.31(2) of the Act.

43 This would not prevent a local law being made under another Act, for example the *Health Act 1911*, in the event that the accumulation of materials became a health risk.

4.24 All of the examples of local laws listed in paragraph 1.12 deal with matters that do not fall within Schedules 3.1 and 3.2 of the Act, and were not considered by the Committee to be authorised or contemplated by the Act because they are:

- inoperative under section 3.7 of the Act to the extent of any inconsistency with the Act; and
- void to the extent of any inconsistency with the Act under section 43(1) of the *Interpretation Act 1984*.

4.25 In addition, all of these local laws had either an express or implied power to enter private land to remedy default in the event that an owner or occupier failed to comply with a notice issued under the local law. In the Committee's view such an entry in the absence of following the procedures for entry in Subdivision 3 would not be lawful. This would expose the local governments to possible legal actions for trespass and the prospect of having to pay compensation to the affected owners or occupiers.

4.26 "Appendix 8" is a flow chart that sets out the practical steps that, in the Committee's view, a local government would have to undertake when entering onto private land pursuant to the Act.

CHAPTER 5

LEGAL AUTHORITIES SUPPORTING THE COMMITTEE'S INTERPRETATION

ERODES OR ABROGATES A FUNDAMENTAL COMMON LAW RIGHT

5.1 In cases which have considered the scope of delegated powers, the courts have been reluctant to *"…assume that subsidiary legislation overrides the general principles of common law."*[44] This is because of what Pearce and Argument call the *"…width and vagueness of the necessary or convenient power to make subsidiary legislation."*[45] Where subsidiary legislation attempts to depart from common law principles, it will be invalid unless there is clear authority in an empowering Act to the contrary.

5.2 A number of High Court of Australia cases have considered laws that attempted to erode common law principles in primary legislation.[46] Then, in *Coco v the Queen*,[47] Mason CJ, Brennan, Gaudron and McHugh JJ in a joint judgment, stated the proper approach to interpreting laws that purport to erode or abrogate fundamental common law rights, immunities or privileges. They said:

> *The courts should not impute to the legislature an intention to interfere with fundamental rights. Such an intention must be clearly manifested by unmistakable and unambiguous language. General words will rarely be sufficient for that purpose if they do not specifically deal with the question because, in the context in which they appear, they will often be ambiguous on the aspect of interference with fundamental rights.*[48]

5.3 In *Coco v The Queen*, the High Court acknowledged that the presumption against interfering with fundamental rights might be displaced by necessary implication but this would only occur if it were necessary to prevent a statutory provision from

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44 Pearce D & Argument S, *Delegated Legislation in Australia*, 2nd ed, Butterworths, Sydney, 1999, p. 137 citing, for example, *CJ Burland Pty Ltd v Metropolitan Meat Industry Board* (1968) 120 CLR 400; *Willoughby Municipal Council v Homer* (1926) 8 LGR 3; *Ex parte Aston Investments Pty Ltd Re Hall* [1960] SR (NSW) 620; and *Willcocks v Anderson* (1970) 124 CLR 293.

45 Pearce D & Argument S, *Delegated Legislation in Australia*, 2nd ed, Butterworths, Sydney, 1999, p. 137.

46 *Re Bolton; Ex parte Beane* ((9) (1987) 162 CLR 514 at 523.); In *Bropho v. Western Australia* ((10) (1990) 171 CLR 1 at 18.), *Potter v. Minahan* (1908) 7 CLR 277 at 304; *Baker v. Campbell* (1983) 153 CLR 52 at 96, 116 and 123; *Hamilton v. Oades* (1989) 166 CLR 486 at 495, 500; *Bropho v. Western Australia* (1990) 171 CLR 1 at 17.).

47 (1994) 179 CLR 427.

48 、 (1994) 179 CLR 427 at 437.

becoming inoperative or meaningless. In the court's view such a case would be rare, where general words are used.[49]

5.4 This threshold approach to interpreting statutes was more recently reaffirmed by the High Court in *Daniels Corporation International Pty Ltd and Anor v Australian Competition and Consumer Commission*[50].

5.5 It is against this background that the fundamental common law right of an owner or occupier to the quiet enjoyment of private land is now considered. The Committee's view is that the Act respects and preserves this common law right by confining the power of local governments to enter private land in specific circumstances listed in Schedule 3.1, Schedule 3.2 and Subdivision 3, and in accordance with the procedures outlined in Subdivision 3.

5.6 At common law, every entry onto private property will be a trespass unless it is authorised by law.[51] In *Plenty v Dillon*[52] the High Court held that in the absence of express words, the statutory power to serve a summons did not imply a right to enter onto private property so as to effect service. The decision reflects the policy of the law to protect the possession of property as well as the privacy and security of its occupier.[53]

5.7 The settled common law presumption is that, in the absence of express provisions to the contrary or by necessary implication, the legislature did not intend to authorise what would otherwise be tortious conduct.[54] This notion is reflected in the judgment in *Entick v Carrington*[55]:

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49 (1994) 179 CLR 427 at 437.

50 [2002] 77 ALJR 40 per Gleeson CJ, Gaudron, Gummow and Hayne JJ at para [11], [43] and [132]. There, the Court, in finding that legal professional privilege was not abrogated by a statute, re-stated its view that statutory provisions are not to be construed as abrogating important common law rights, privileges and immunities in the absence of clear words or a necessary implication to that effect.

51 Australian Parliament Senate Standing Committee for the Scrutiny of Bills, *Entry and Search Provisions in Commonwealth Legislation*, April 6 2000, www.aph.gov.au/senate/committee/scrutiny/bills00/b04.pdf (February 17 2002) at paragraph 1.15.

52 (1991) 171 CLR 635.

53 *Entick v Carrington* (1765) 2 Wils KB 275 at 291 [95 ER 807 at 817]; *Southam v Smout* (1964) 1 QB 308 at 320; *Morris v Beardmore* (1981) AC 446 at 464; *Semayne's Case* (1604) 5 Co Rep 91a at 91b [77 ER 194 at 195]; *Eccles v Bourque* [1975] 2 SCR 739 at 742-743; (1974) 50 DLR (3d) 753 at 755; *Plenty v Dillon* (1991) 171 CLR 635 at 647 per Gaudron and McHugh JJ; McCusker Opinion at pages 9 to 10.

54 *Morris v Beardmore*, (1981) AC 446 at 455 per Lord Diplock. "Trespass" is classed as a tort, which is "a civil wrong for which the remedy is a common law action for unliquidated damages, and which is not exclusively the breach of a contract, or the breach of a trust or other merely equitable obligation": *Osborn's Concise Law Dictionary*.

55 (1765) 2 Wils KB 275 at 291 [95 ER 807 at 817].

> *…our law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave; if he does he is a trespasser, though he does no damage at all; if he will tread upon his neighbour's ground, he must justify it by law.*

5.8 Following these principles, the only instances where the Act provides for the erosion of an owner or occupier's common law right to quiet enjoyment of private land are in:

- section 3.26 in relation to a matter contained in Schedule 3.1;
- section 3.27 in relation to a matter contained in Schedule 3.2;
- section 3.34 in an emergency; or
- section 3.33 where a warrant has been issued.

5.9 While the power of entry in sections 3.33 and 3.34 are expressly stated, the powers of entry in sections 3.26 and 3.27 are necessarily implied to prevent them from becoming inoperative or meaningless.

NOT AUTHORISED OR CONTEMPLATED BY THE ACT

5.10 The test for the validity of a subsidiary law-making power, including a necessary or convenient power such as is provided in section 3.5(1), has been held to be the test of "proportionality".[56] As to a "necessary and convenient" statutory power to make subsidiary legislation (which by definition includes local laws)[57]:

> *…such a power does not enable the authority by regulations to extend the scope or general operation of the enactment, but is strictly ancillary. It will authorise the provision of subsidiary means of carrying into effect what is enacted in the statute itself and will cover what is incidental to the execution of its specific provisions. But such a power will not support attempts to widen the purposes of the Act, to add new and different means of carrying them out or to depart from or vary the plan which the legislature has adopted to attain its ends.*[58]

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56 *South Australia v Tanner* (1989) 166 CLR 161 at 165 per Wilson, Dawson, Toohey and Gaudron JJ; *Coulter v The Queen* (1988) 164 CLR 350 at 357 per Mason CJ, Wilson and Brennan JJ; McCusker opinion at page 7.

57 Section 5 of the *Interpretation Act 1984.*

58 *Shanahan v Scott* (1957) 96 CLR 245 at 250 per Dixon CJ, Williams, Webb and Fullagar JJ; followed by *Minister for Resources v Dover Fisheries Pty Ltd* (1993) 116 ALR 54 at 66 per Gummow J; McCusker opinion at pages 7 to 8.

5.11 The test for whether any subsidiary legislation is valid is whether it *"…goes outside the field of operation which the* [empowering] *Act marks out for itself…"*[59], or *"…varies the general plan or purpose of the Act…"*[60]. An instrument of subsidiary legislation will go beyond the power of its empowering Act if it does not come *"…within the scope of what the Parliament intended when enacting the* …[primary Act]*…"* and if it reveals *"…a different means for carrying the purposes of the Act into effect…".*[61]

5.12 The Committee considers that local laws:

- seeking to regulate an owner or occupier's conduct on private land, and authorising entry onto private land in situations that fall outside Schedules 3.1 and 3.2; and
- including entry provisions that are inconsistent with the entry procedures specified in Subdivision 3 of the Act,

are not authorised or contemplated by the Act.

5.13 The following reasons support the Committee's view:

- The Act authorises local government entry onto private land only in clearly defined circumstances and usually only after notifying the owner or occupier of its intention to do so. It would seem inconsistent with those detailed provisions, imposing restraints upon local governments from entering private land, if local governments could make valid local laws authorising entry for purposes other than those detailed in Schedules 3.1 and 3.2.[62]
- Schedules 3.1 and 3.2 would become redundant if local governments were empowered to make local laws in relation to matters affecting private land that went beyond the matters specified in those Schedules.
- The Act provides for a Henry VIII mechanism by which Schedules 3.1 and 3.2 may be amended by regulations approved by the Executive Government.[63] The scheme of the Act contemplates that it might be necessary for a local government to issue notices or require an owner or an occupier of private land

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59 *Re Munnings*, unreported, Full Federal Court, August 25 1987.

60 *Johns v Australian Securities Commission* (1993) 178 CLR 408 at 469 per McHugh J; McCusker opinion at page 8.

61 *Shine Fisheries Pty Ltd v The Minister for Fisheries* [2002] WASCA 11 at paragraph 56; McCusker opinion at page 8.

62 McCusker opinion at pages 4 and 7.

63 Sections 3.25(2) and 3.27(2) of the Act.

to do or refrain from doing acts that are not dealt with by the list of matters prescribed by the Schedules. The Act addresses this possibility by providing that the Schedules can be amended by regulations. It is an entirely different means for carrying the purposes of the Act into effect for these Schedules to be (in effect) extended or amended by local laws.[64]

- It would be contrary to the legislative scheme of the Act to grant a power to local governments to make local laws authorising entry onto private land for purposes beyond those stated in the Schedules when the Parliament has provided a mechanism to easily amend Schedules 3.1 and 3.2 of the Act by regulations.[65]

- While it is true that the local law-making power provided for in section 3.5(1) is contained in Division 2 entitled "Legislative functions of local governments" and that sections 3.25 and 3.27 are contained in Division 3 entitled "Executive functions of local governments", the two regimes do not operate independently of one another.[66] Indeed, the general scope of local government must be construed "in the context of its other functions" under the Act.[67] A local government exercises its legislative function when making local laws but in implementing its local laws, the local government is exercising another aspect of its executive function.[68]

- Accordingly, even if local laws validly enabled local government employees to enter onto private property in circumstances going beyond the matters prescribed in Schedules 3.1 and 3.2,[69] the local government employees who enter private land in those circumstances would still be acting inconsistently with sections 3.25 and 3.27 of the Act. It is the Committee's view that the Parliament would not have intended to provide for a power to make local laws in circumstances where the local government was not also given the power to implement those local laws.

64 McCusker opinion at page 9.

65 Such amendments are usually effected by an Act of Parliament.

66 McCusker opinion at page 11.

67 Section 3.1(2) of the Act.

68 Section 3.18(1) of the Act; McCusker opinion at page 11.

69 This is a possibility that the Committee does not endorse.

CHAPTER 6
PRO FORMA WALGA LAWS REQUIRING AMENDMENT

EXAMPLES OF PRO FORMA LAWS THAT ARE NOT AUTHORISED OR CONTEMPLATED BY THE ACT

6.1 WALGA's Local Laws Manual contains the following *pro forma* laws that are not authorised or contemplated by the Act based on the Committee's interpretation of the proper scope of the local law-making power.

Fencing Pro Forma Law

6.2 This *pro forma* law is made under the power provided by section 3.5(1) of the Act. Clause 16 allows the local government to issue a notice to repair a fence on private property that breaches the requirements of the local law, for example where it is dilapidated or unsightly. When the owner or occupier fails to comply with the notice, the local government (through its employees, agents or contractors) is then able to enter onto the private property to remedy the breach, and recover the costs of doing so from the owner or occupier.

6.3 Item 4 of Schedule 3.1, Division 1 allows a local government to issue a notice to an owner[70] of private land that is adjoined to a public place to:

- ensure that the private land is suitably enclosed to separate it from the public place; and
- where applicable, ensure that the private land is enclosed with a fence, to the satisfaction of the local government, that is suitable to prevent sand or other matter on the private land from going onto the public place.

6.4 However, there is no indication that "a fence" in the *pro forma* law is restricted only to a fence that abuts a public place as is specified in Item 4 of Schedule 3.1, Division 1. The definition of "fence" that is provided in clause 4 of the *pro forma* law encompasses a dividing fence separating private property. The *pro forma* law definition provides that a fence is:

> *any structure, including a retaining wall, used or functioning as a barrier, irrespective of where it is located and includes any gate.*

6.5 Clause 4 of the *pro forma* law adopts the definition of a "dividing fence" contained in the *Dividing Fences Act 1961* as follows:

> *…a fence that separates the lands of different owners*[71] *whether the fence is on the common boundary of adjoining lands or on a line other than the common boundary*[72]

6.6 The *pro forma* law definition of "a fence" appears to go beyond the limits provided for in Schedule 3.1, and the Committee considers that Clause 16 of this *pro forma* law is not authorised or contemplated by the Act and is therefore, void.

6.7 The Department has advised the Committee that the repair of boundary fences will be added to the Schedule.[73] While the term "boundary fence" has no statutory definition, the Committee understands this term to refer to fences that abut a public place. However, the Committee considers that sections 3.25, 3.26 and Schedule 3.1 already provide local governments with the necessary power to enter onto private land after non-compliance with a notice, for the purpose of ensuring that a fence abutting a public place is suitably enclosed. There is no need to make such an addition to Schedule 3.1.

6.8 The Committee considers that it would be appropriate for the *pro forma* law to be amended so that the power to enter onto private land for the purpose of remedying a breach is limited only to fences that abut a public place.

6.9 Another alternative would be to add the repair of dividing fences to Schedule 3.1 This would permit:

- local laws to be made to allow a local government to issue a notice to an owner to repair a dividing fence on his or her property;
- entry onto that property in accordance with the entry procedures in Subdivision 3 in the event of non-compliance with the notice; and
- the local government to recover the costs of the repair from the owner.[74]

6.10 However, the mechanism for resolving disputes between neighbours involving dividing fences is already provided for in the *Dividing Fences Act 1961*. That Act details the:

- steps that should be taken to repair or install a dividing fence;

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70 Schedule 3.1, Division 2, Item 4(2) of the Act.

71 "Owners" does not include owners of public land: see section 5 of the *Dividing Fences Act 1961* and regulation 3 of the *Dividing Fences Regulations 1971*.

72 Section 5 of the *Dividing Fences Act 1961*.

73 Refer to the discussion in paragraph 4.15.

74 This right of recovery is provided in section 3.26(3) of the Act and in Clause 16(3) of the *pro forma* law.

- rights and obligations of each private property owner; and
- the appropriate method of sharing the costs of the repair or installation.

6.11 There is also provision for a Court resolution where the dispute cannot be resolved privately.

6.12 The Committee considers that amending Schedule 3.1 to include the repair of dividing fences would result in a conflict between the Act and the *Dividing Fences Act 1961*. Under the latter Act, the costs of repair or installation are usually shared between the affected neighbours, whereas under the Act, the local government would be limited to recovering its costs from the owner of the land that it entered. It may be inequitable for a local government to recover its costs from only one of the affected neighbours. Any local laws made pursuant to the Act allowing local government employees to enter onto private land to repair or install a dividing fence and recover the costs from the owner would be inconsistent with the *Dividing Fences Act 1961*, and void.

6.13 Furthermore, clause 16(1) of the *pro forma* law permits a notice to be issued to an occupier in addition to an owner. The Committee notes that Item 4(2) of Schedule 3.1, Division 1 states that the notice cannot be given to an occupier who is not also the owner and as such the *pro forma* law appears to be inconsistent with the Schedule.

6.14 Unless an amendment to Item 4 of Schedule 3.1, Division 1 permitted the notice to issue to an occupier who is not also the owner, the *pro forma* law must be amended so it is not inconsistent with the Schedule requirements.

Bee Keeping Pro Forma Law

6.15 This *pro forma* law is also made under the power provided by section 3.5(1) of the Act. Clause 12 impliedly authorises a local government employee to enter onto private land to remove nuisance bees and/or beehives if the owner or occupier fails to comply with a notice requesting that certain breaches of the local law be remedied.

6.16 The removal of bees does not currently appear in Schedule 3.1 as a matter for which a local government can issue a notice to require a particular thing to be done by an owner or an occupier. The Department has advised the Committee that the removal of nuisance bees and beehives will be included in Schedule 3.1 to rectify this matter.[75]

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[75] Refer to the discussion at paragraph 4.15. As to other "exotic pests", section 199(20) of the *Health Act 1911* provides that local laws can be made for the purpose of the destruction of mosquitoes, Argentine Ants and other prescribed insect pests. Currently, the only insect pest that has been prescribed in the *Health (Prescribed Insect Pests) Regulations 1991* is the European Wasp. Section 199(2) also provides that local laws can be made to prohibit the keeping of animals on any premises so as to be a nuisance or injurious to health.

Urban Environment and Nuisance Pro Forma Law

6.17 This *pro forma* law is also made under the power provided by section 3.5(1) of the Act. The Committee is concerned with clauses 2.2, 2.3, 2.4, 2.5, and 2.6.

6.18 Clause 2.2 prohibits the conduct of any amusement at a fair, carnival or show (including fairs, carnivals or shows that were being operated on private land) so as to create a nuisance[76] to neighbours, and clause 2.3 implies a power of entry to abate such a nuisance. The Committee considers these clauses to be inconsistent with the Act and void because nuisance amusements have not been specified in either Schedule 3.1 or 3.2. Clause 2.3 of the *pro forma* law must be deleted in order to remove the inconsistency.

6.19 Clauses 2.4 and 2.5 prohibit the emission or reflection of lights from private property onto neighbouring properties so as to cause a nuisance, while clause 2.6 authorises the local government to issue notices to the offending owners or occupiers to remedy the nuisance in a certain way. Clause 5.2 operates in conjunction with clause 2.6 to impliedly authorise local government employees to enter onto the offending property, upon non-compliance with a clause 2.6 notice, to perform the things specified in the notice. The Committee considers clauses 2.4, 2.5 and 2.6 to be inconsistent with the Act and void. However, the Minister's advice that Schedule 3.1 will be amended to include the limiting or stopping of nuisance lighting should cure the inconsistency.[77]

THE NEED FOR AMENDMENT OF THE WALGA PRO FORMA LAWS

6.20 As part of its supervisory function, the Committee is not empowered by its terms of reference to comment or become involved in the screening or approval of new *pro forma* laws. However, local governments have relied upon *pro forma* laws that the Committee considers are defective because they go beyond the matters authorised or contemplated by the Act.

6.21 In these circumstances, where the defect is contained in a *pro forma* law upon which local governments rely to make their local laws, the Committee will advise WALGA of this defect only after it scrutinises a published local law which is based on the *pro forma* law.

---

76 "Nuisance" is defined in clause 1.3 of the *pro forma* local law as including:

(a) an activity or condition which is harmful or annoying and which gives rise to legal liability in the tort of public or private nuisance at law;

(b) an unreasonable interference with the use and enjoyment of a person in her or his ownership or occupation of land; and

(c) interference which causes material damage to land or other property on the land affected by the interference.

77 Refer to the discussion in paragraph 4.15.

6.22 Defective local laws will continue to be published if the defective *pro forma* laws discussed above continue to operate in their current state in the absence of amendments to Schedules 3.1 and 3.2. These amendments can be implemented relatively quickly by drafting and publishing appropriate regulations.

CHAPTER 7
CONCLUSION

FINDINGS

7.1 The Committee has concluded that:

- the local law-making power provided by section 3.5(1) of the Act is constrained by sections 3.25 and 3.27; and accordingly
- where a local government relies on section 3.5(1) for making a local law in relation to entry onto private land, the local government:
  a) is restricted to the matters specified in Schedules 3.1 and 3.2; and
  b) must comply with the procedures for entering private land set out in Part 3, Division 3, Subdivision 3 of the Act.
- any local law made under the Act inconsistent with the above is not authorised or contemplated by the Act.

RECOMMENDATIONS

Recommendation 1: The Committee recommends that powers of entry conferred on local governments be expressly stated in the *Local Government Act.*

Recommendation 2: The Committee recommends that these express powers be the extent of the powers of entry available to local governments to enter private land.

Recommendation 3: The Committee recommends that any broadening of the capacity by local governments to enter private land continue to be by regulation.

Recommendation 4: The Committee recommends that the Act be amended:

a) to expressly state that the local law-making power provided under section 3.5(1) is constrained by sections 3.25, 3.27; and Schedules 3.1 and 3.2;

b) so as to include in the list of matters contained in Schedule 3.1:

i) "the repair of all boundary fences[78]";

ii) "the removal of bees"; and

iii) "the limiting or stopping of nuisance lights".

Recommendation 5: The Committee recommends that pending any amendments to the Act that are brought about by its review, the Minister direct the Department to issue a circular to WALGA, the Western Australian division of Local Government Managers Australia, and all local governments, advising that:

a) section 3.5(1) of the Act is constrained by sections 3.25, 3.27; and Schedules 3.1 and 3.2 in relation to making local laws affecting private land;

b) the power to enter private land pursuant to a local law made under section 3.5(1) of the Act can only be used in relation to those matters authorised by sections 3.25, 3.27; Schedules 3.1 and 3.2; and the procedure in Part 3, Division 3, Subdivision 3 of the Act must be followed when exercising the power to enter;

c) any deviation from this position by a local government will result in the Committee recommending to the Parliament that the local law be disallowed under section 42(2) of the *Interpretation Act 1984*; and

d) local governments wanting to insert additional matters to Schedules 3.1 and 3.2 should advise the Department of this now, while the Act is undergoing a review.

Recommendation 6: The Committee recommends that pending any amendments to Schedules 3.1 or 3.2, WALGA consider amending its *pro forma* Fencing, Beekeeping and Urban Environment and Nuisance laws in the following way, so as to comply with the requirements of the Act:

a) clause 16 of the fencing *pro forma* law should be amended so that:

i) it only applies to fences that abut a public place; and

ii) notices of breach can only be issued to owners of private land.

b) clause 12 of the beekeeping *pro forma* law should be amended so that it is clear that local government employees cannot enter private land pursuant to that clause.

c) The Urban Environment and Nuisance *pro forma* law should be amended:

i) by deleting clause 2.3; and

ii) so that it is clear that local government employees cannot enter private land pursuant to clause 5.2.

[78] The Committee understands this term to refer to fences that abut a public place.

……..

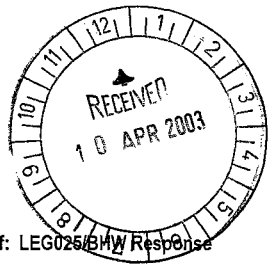
Margaret Quirk MLA

Chairman

May 14 2003

APPENDIX 1

LETTER FROM WESTERN AUSTRALIAN LOCAL GOVERNMENT ASSOCIATION DATED MARCH 31 2003



WESTERN AUSTRALIAN
LOCAL GOVERNMENT ASSOCIATION

31 March 2003 **Our Ref: LEG025/BHW Response**

Ms Margaret Quirk MLA
Chairman
Joint Standing Committee on Delegated Legislation
Parliament House
PERTH 6000

Dear Ms Quirk

Local Government Powers of Entry under the *Local Government Act 1995*

Thank for your providing the Association with a copy of the opinion prepared by Mr Malcolm McCusker QC, on which you are now seeking our response.

The McCusker opinion clearly articulates the point of view that justifies the Committees current position, however for comparison purposes, it would also have been useful to have a copy of the Crown Solicitors opinion, which contains the contrary view.

At this stage we have not referred the McCusker opinion to our legal advisors. It was felt that the view of the Joint Standing Committee appeared to be a foregone conclusion, that being that local government is constrained by Sections 3.25 and 3.27 of the *Local Government Act 1995.*

This view has been formed as a result of feedback from the Committee to Councils, seeking to remove the clause or have the whole local law disallowed, as well as the address to the Eighth Australasian and Pacific Conference on Delegated Legislation Conference in Hobart by you.

As the concern of the Committee appears to be that the law making power of local government is constrained by sections 3.25 and 3.27 of the Act it would seem that the only way to resolve the issue is to amend the regulations and/or Act.

An appropriate amendment will enable the matter to be clarified as even Mr McCusker commented "whilst acknowledging that there is a degree of uncertainty due to lack of clarity in the Act on this issue, in my opinion a provision in such local laws...would probably be held to be invalid " (page 5 item 14).

I believe it would be in our collective interests to work together to secure the required amendments to the *Local Government Act* and/or Regulations so that local government can have the flexibility that is required to manage community issues.

I look forward to meeting with staff from the Committee and the Department of Local Government and Regional Development so that effective local law-making powers can be achieved.

Yours sincerely

Ricky Burges
Chief Executive Officer

Local Government House
15 Altona Street
West Perth WA 6005
PO Box 1544
West Perth WA 6872
Telephone: (08) 9321 5055
Facsimile: (08) 9322 2611
Email: info@walga.asn.au
Website: www.walga.asn.au

The Voice of Local Government

APPENDIX 2

LETTER FROM THE MINISTER FOR LOCAL GOVERNMENT AND REGIONAL DEVELOPMENT DATED APRIL 3 2003

04 APR 2003 14:19 FROM HOUSING AND WORKS TO 92227805 P.02/02

MINISTER FOR HOUSING AND WORKS;
LOCAL GOVERNMENT AND REGIONAL DEVELOPMENT;
THE KIMBERLEY, PILBARA & GASCOYNE

Hon Tom Stephens MLC
Member for the Mining and Pastoral Region;
Deputy Leader of the Government
in the Legislative Council

Our Ref: 1-7628

- 3 APR 2003

Ms Margaret Quirk MLA
Chairman
Joint Standing Committee on Delegated Legislation
Parliament House
PERTH WA 6000

Dear Ms Quirk

Thank you for your letter of 14 November 2002 in relation to powers of entry under the *Local Government Act 1995* ("the Act") enclosing a legal opinion by Mr Malcolm McCusker QC. I apologize for the delay in responding.

The Department of Local Government and Regional Development has had the opportunity to consider Mr McCusker QC's opinion and is of the view that it accords with its understanding of the aims of the Act.

The Department is currently developing proposed amendments to the Act to improve its operation. A new section is proposed for Part 3 of the Act to clarify that local governments are not authorised to create local laws that would allow local governments to have entry powers beyond the matters covered in Sections 3.25 and 3.27 of the Act.

I further advise that it is proposed that Schedules 3.1 and 3.2 of the Act be amended to empower local governments to issue a notice on private property for the removal of bees, to repair a boundary fence, to limit or stop nuisance lighting and to allow a local government to carry out works on private thoroughfares. These are matters that have been requested by local governments and appear to be appropriate for the purposes of Part 3.

Should you require any further information about these matters, please contact Tim Fowler, Principal Legislation Officer on 9222 0575.

Yours sincerely

Tom Stephens MLC
MINISTER FOR HOUSING AND WORKS;
LOCAL GOVERNMENT AND REGIONAL DEVELOPMENT;
THE KIMBERLEY, PILBARA AND GASCOYNE

11th Floor, Dumas House, 2 Havelock Street, WEST PERTH WA 6005
Telephone: (08) 9213 6500 • Facsimile: (08) 9213 6501
Email: tom-stephens@dpc.wa.gov.au • Freecall: 1800 255 299

** TOTAL PAGE.02 **

APPENDIX 3

EXTRACTS OF SUBDIVISIONS 2 AND 3 FROM PART 3, DIVISION 3 OF THE *LOCAL GOVERNMENT ACT 1995*

Local Government Act 1995

Part 3, Division 3

Subdivision 2 — Certain provisions about land

3.24. Authorizing persons under this Subdivision

The powers given to a local government by this Subdivision can only be exercised on behalf of the local government by a person expressly authorized by it to exercise those powers.

3.25. Notices requiring certain things to be done by owner or occupier of land

(1) A local government may give a person who is the owner or, unless Schedule 3.1 indicates otherwise, the occupier of land a notice in writing relating to the land requiring the person to do anything specified in the notice that —

(a) is prescribed in Schedule 3.1, Division 1; or

(b) is for the purpose of remedying or mitigating the effects of any offence against a provision prescribed in Schedule 3.1, Division 2.

(2) Schedule 3.1 may be amended by regulations.

(3) If the notice is given to an occupier who is not the owner of the land, the owner is to be informed in writing that the notice was given.

(4) A person who is given a notice under subsection (1) is not prevented from complying with it because of the terms on which the land is held.

(5) A person who is given a notice under subsection (1) may appeal against it.

(6) A person who fails to comply with a notice under subsection (1) commits an offence.

3.26. Additional powers when notices given

(1) This section applies when a notice is given under section 3.25(1).

(2) If the person who is given the notice (**"notice recipient"**) fails to comply with it, the local government may do anything that it considers necessary to achieve, so far as is practicable, the purpose for which the notice was given.

(3) The local government may recover the cost of anything it does under subsection (2) as a debt due from the person who failed to comply with the notice.

(4) If a notice recipient —

(a) incurs expense in complying with any requirement of the notice; or

(b) fails to comply with such a requirement and, as a consequence, is fined or has to pay to a local government the cost it incurs in doing anything under subsection (2),

the notice recipient may apply to a court for an order under subsection (6).

(5) In subsection (4) —

"court" means a court that would have jurisdiction to hear an action to recover a debt of the amount of the expense, fine or cost sought to be recovered by the notice recipient.

(6) On an application under subsection (4) the court may order —

(a) if the notice recipient is the owner, the occupier; or

(b) if the notice recipient is the occupier, the owner,

to pay to the notice recipient so much of that expense, fine or cost as the court considers fair and reasonable in the circumstances.

(7) In determining what is fair and reasonable the court is to have regard to —

(a) the type of land involved;

(b) the terms on which the occupier is occupying the land; and

(c) any other matter the court considers to be relevant.

[Section 3.26 amended by No. 1 of 1998 s.10.]

3.27. Particular things local governments can do on land that is not local government property

(1) A local government may, in performing its general function, do any of the things prescribed in Schedule 3.2 even though the land on which it is done is not local government property and the local government does not have consent to do it.

(2) Schedule 3.2 may be amended by regulations.

(3) If Schedule 3.2 expressly states that this subsection applies, subsection (1) does not authorize anything to be done on land that is being used as the site or curtilage of a building or has been developed in any other way, or is cultivated.

(4) Nothing in subsection (3) prevents regulations amending Schedule 3.2 from stating that subsection (3) applies, or excluding its application, in relation to a particular matter.

Subdivision 3 — Powers of entry

3.28. When this Subdivision applies

The powers of entry conferred by this Subdivision may be used for performing any function that a local government has under this Act if entry is required for the performance of the function or in any other case in which entry is authorized by this Act other than by a local law.

3.29. Powers of entry are additional

The powers of entry upon land conferred by this Subdivision are in addition to and not in derogation of any power of entry conferred by any other law.

3.30. Assistants and equipment

Entry under this Subdivision may be made with such assistants and equipment as are considered necessary for the purpose for which entry is required.

3.31. General procedure for entering property

(1) Except in an emergency or if the entry is authorized by the warrant of a justice, entry by or on behalf of a local government on to any land, premises or thing is not lawful unless —

(a) the consent of the owner or occupier has been obtained; or

(b) notice has been given under section 3.32.

(2) If notice has been given under section 3.32, a person authorized by the local government to do so may lawfully enter the land, premises or thing without the consent of the owner or occupier unless the owner or occupier or a person authorized by the owner or occupier objects to the entry.

(3) The powers conferred on a local government under this section may be exercised instead of the powers conferred under the *Public Works Act 1902* and are not subject to any qualification or restriction by any provision of that Act.

3.32. Notice of entry

(1) A notice of an intended entry is to be given to the owner or occupier of the land, premises or thing that is to be entered.

(2) The notice is to specify the purpose for which the entry is required and continues to have effect for so long as that requirement continues.

(3) The notice is to be given not less than 24 hours before the power of entry is exercised.

(4) Successive entries for the purpose specified in the notice are to be regarded as entries to which that notice relates.

3.33. Entry under warrant

(1) In the circumstances described in subsection (2), a justice may by warrant authorize a local government by its employees, together with such other persons as are named or described in the warrant, or a police officer, to enter any land, premises or thing using such force as is necessary.

(2) A warrant may be granted under subsection (1) where a justice is satisfied that the entry is reasonably required by a local government for the purpose of performing any of its functions, but —

(a) entry has been refused or is opposed or prevented;

(b) entry cannot be obtained; or

(c) notice cannot be given under section 3.32 without unreasonable difficulty or without unreasonably delaying entry.

(3) A warrant granted under subsection (1) —

(a) is to be in the prescribed form;

(b) is to specify the purpose for which the land, premises or thing may be entered; and

(c) continues to have effect until the purpose for which it was granted has been satisfied.

3.34. Entry in an emergency

(1) In an emergency a local government may lawfully enter any land, premises or thing immediately and without notice and perform any of its functions as it considers appropriate to deal with the emergency.

(2) For the purposes of this section, an emergency exists where the local government or its CEO is of the opinion that the circumstances are such that compliance with the requirements for obtaining entry other than under this section would be impractical or unreasonable because of, or because of the imminent risk of —

(a) injury or illness to any person;

(b) a natural or other disaster or emergency; or

(c) such other occurrence as is prescribed for the purposes of this section.

(3) A local government may use reasonable force to exercise the power of entry given by subsection (1).

(4) A local government may exercise the power of entry given by subsection (1) at any time while the emergency exists and for so long subsequently as is reasonably required.

(5) Although notice of an intended entry under this section is not generally required, a local government is to give notice of an intended entry of land under this section to the owner or occupier of the land where it is practicable to do so.

3.35. Purpose of entry to be given on request

A person who enters or who has entered any land, premises or thing on behalf of a local government is to give particulars of the power by virtue of which the local government claims a right of entry on being requested to do so.

3.36. Opening fences

(1) This section applies only if it is expressly stated in Schedule 3.2.

(2) Subsection (1) does not prevent regulations amending Schedule 3.2 from stating that this section applies, or excluding the application of this section, in relation to a particular matter.

(3) If this section applies and it is not practicable to enter land that is fenced through the existing and usual openings in the fence, the local government may, on giving 3 days' notice in writing to the owner or occupier of the land that it intends to do so, open the fence.

(4) If it opens the fence the local government is to provide at the opening an effective gate or, if the owner of the land agrees, a device across the gap in the fence that enables motor traffic to pass through the gap and prevents the straying of livestock through the gap.

(5) If a gate is provided a person who, without the occupier's consent, leaves the gate open when it is not in use commits an offence.

(6) If a gate is provided, when the local government no longer requires the opening, it is to immediately remove the gate and make good the fence unless the owner agrees to its retention.

(7) The owner and occupier may, in a particular case, relieve the local government of any obligation that it has under this section.

APPENDIX 4

OPINION FROM MINTER ELLISON LAWYERS TO THE WESTERN AUSTRALIAN LOCAL GOVERNMENT ASSOCIATION DATED APRIL 17 1998

MINTER ELLISON
LAWYERS

PARTNERS
GRAHAME YOUNG
LAURIE SHERVINGTON, Notary Public
STEPHEN EDWARDS
BRUCE GOETZE
GREG STEINEPREIS
MICHAEL FERGUSON
DAVID WALLACE
PETER DOHERTY
TONY FOWKE, Notary Public
SEAN MULLINS
MICHAEL HENDERSON
JOHN POULSEN
NEIL DOUGLAS
MATTHEW HANDCOCK
ANGELA KENNEDY
GLEN McLEOD

MANAGING PARTNER
STEPHEN MACLIVER

CONSULTANTS
NIGEL McBRIDE
CELIA SEARLE
STEPHEN KEMP

SENIOR ASSOCIATES
SUSAN MORRIS
ROSEMARY MARTIN
FIONA VERNON
SUSAN FIELDING
LISA TELLER
GRAHAM NAGLE
GRAHAM CASTLEDINE
GRAHAM BROOK
DARREN JACKSON
DEBORAH TEMPLEMAN

LEVEL 51 CENTRAL PARK
152-158 ST GEORGE'S TERRACE
PERTH WESTERN AUSTRALIA

CORRESPONDENCE
GPO BOX A39
PERTH WA 6837

DX 124 PERTH

TELEPHONE (08) 9429 7444
INTERNATIONAL +61 8 9429 7444
FACSIMILE (08) 9429 7666

OUR REFERENCE BKC:AGC:546986

YOUR REFERENCE

WRITER'S DIRECT LINE

17 April 1998

Mr Ted Chown
Co-ordinator
Local Laws WA
2 Dericote Way
GREENWOOD WA 6024

Dear Mr Chown

Power of a local government to make local laws in relation to private land

We refer to your facsimiles of 21 and 29 January 1998 and to our discussions of 16 and 21 January 1998.

We are instructed that the Department of Local Government considers that a local government cannot make local laws in respect of private land which are beyond the scope of section 3.25 and Schedule 3.1 of the *Local Government Act 1995* (the 'Act'). Although the position of the Department is reasonably arguable, we consider that there is an alternative argument that a local government may make local laws with respect to private land which are concerned with matters beyond section 3.25 and Schedule 3.1. We have reached this view because -

1. section 3.5(1) of the Act confers plenary power upon a local government to make local laws;

2. the Act distinguishes, by way of divisions, between the legislative and executive functions of local government, and section 3.25 and Schedule 3.1 are concerned with executive functions; and

3. section 3.25 and Schedule 3.1 of the Act have a narrow application.

Mr Ted Chown 17 April 1998

1. POWER TO MAKE LOCAL LAWS

1.1 Section 3.5 - Necessary or convenient power

Section 3.5 of the Act provides -

> '(1) A local government may make local laws under this Act prescribing all matters that are required or permitted to be prescribed by a local law, or are necessary or convenient to be so prescribed, for it to perform any of its functions under this Act.
>
> (2) A local law made under this Act does not apply outside the local government's district unless it is made to apply outside the district under section 3.6.
>
> (3) The power conferred on a local government by subsection (1) is in addition to any power to make local laws conferred on it by any other Act.
>
> (4) Regulations may set out -
>
> (a) matters about which, or purposes for which, local laws are not to be made; or
> (b) kinds of local laws that are not to be made,
>
> and a local government cannot make a local law about such a matter, or for such a purpose or of such a kind.'

At this time, no regulations have been made under section 3.5(4) limiting the power of a local government to make local laws.

It is the second limb of section 3.5(1) which is important in determining the scope of the power of a local government to make local laws in respect of private land. The second limb allows local laws to be made prescribing all matters that are 'necessary or convenient' to be prescribed by a local law for it to perform any of its functions under the Act.

'Necessary or convenient' is a phrase which has been commonly used in provisions which empower local governments and other bodies to make subsidiary legislation under their governing enactments. In *Shanahan v Scott* (1956) 96 CLR 245, the High Court examined the cases relating to a power to make regulations necessary or convenient for giving effect to an act and stated that the power -

> 'does not enable the authority by regulations to extend the scope or general operation of the enactment but is strictly ancillary. It will authorise the provision of subsidiary means of carrying into effect what is enacted in the statute itself and will cover what

> is incidental to the execution of its specific provisions. But such a power will not support attempts to widen the purposes of the Act, to add new and different means of carrying out or to depart from or vary the plan which the legislature had adopted to attain its ends.'

The approach of the court is to distinguish between whether subsidiary legislation complements a grant of power or supplements a grant of power. A local government may complement its powers by local laws, but it must not supplement them.

Pearce in *Delegated Legislation* considers (at paragraph 281) that an examination of the enactment which confers the subsidiary legislation making power, will usually indicate whether an attempt is being made to add something additional to the operation of the enactment, or whether an attempt is being made to merely fill out the framework of the enactment in such a way as to enable the legislative intention to operate effectively.

Generally, the scope of a necessary or convenient power to make subsidiary legislation will vary according to the Act in which it is included. Where an act has very few provisions and there is a power to make subsidiary legislation which is necessary or convenient, then, in that case, the scope of that power will be interpreted quite widely. The provision is intended to 'fill out' a skeleton act. Where an Act is quite detailed in spelling out the powers of the authority which it constitutes and empowers, then a necessary or convenient power to make subsidiary legislation will be interpreted more narrowly.

In the case of the Act, there is no detailed spelling out of the power of a local government to make local laws (as there was in the former Act). Instead, the approach of the new Act is to allow local laws to be made unless they are inconsistent with any other written law, or prohibited by regulation Accordingly, the necessary or convenient power in section 3.5(1) may be construed widely.

1.2 **Section 3.1 - Good government**

Pearce states (at paragraph 281) that -

> 'It is probably sufficient if the regulations fall within the general purpose of the Act in the sense that the Act could not function to best effect without the aid, as it were, of the regulations. The function of the Act must, however, be able to be spelled out of the specific provisions of the Act ... '.

The general purpose of the Act may be described as constituting a local government to perform the general function described in section 3.1(1) of the Act. Section 3.1(1) provides -

> 'The general function of a local government is to provide for the good government of persons in its district.'

Some indication of the scope of this general function, and how it affects section 3.5(1) may be obtained from considering a subsidiary legislation making power which is commonly conferred on local governments in other States. In Queensland, the Brisbane City Council had a power to make ordinances for promoting and maintaining the peace, comfort, welfare and convenience of the City and its inhabitants and for the good government of the City and the wellbeing of its inhabitants. In respect of this power the High Court stated in *Lynch v the Brisbane City Council (1960)* 104 CLR 353 at 364 that -

> 'They give a power to lay down rules in respect of matters 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 and good government of a city and its inhabitants, they are not to be read as going beyond the accepted notions of local government.'

Section 3.1(1) is important in construing the second limb of section 3.5(1) which refers to the 'functions' of a local government under the Act. It follows from the width of the general function that the second limb under section 3.5(1) should be expansively construed.

2. DISTINCTION BETWEEN EXECUTIVE AND LEGISLATIVE FUNCTIONS

Section 3.4 provides that the general function of a local government includes legislative and executive functions.

Sections 3.5 and 3.25 of the Act are contained within Part 3 which is entitled 'Functions of local governments'. More particularly, section 3.5 is contained within Division 2 which is entitled 'Legislative functions of local governments' and section 3.25 is contained within Division 3 which is entitled 'Executive functions of local governments'.

The distinction between the functions drawn in the Act, indicates that one function should not necessarily be used to read down the scope of the other. On the other hand, section 3.7 makes it clear that a local law is inoperative to the extent that it is inconsistent with the Act, and that will include direct and indirect inconsistency.

3. SECTION 3.25 AND SCHEDULE 3.1 OF THE ACT

Although we appreciate the Department of Local Government's view that a local government may do no more with respect to private land than the acts which are specified in section 3.25 and Schedule 3.1 of the Act, we do not consider that these provisions are necessarily intended to limit the power of a local government to make local laws with respect to private land.

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Section 3.25 allows a notice to be given directing that a particular act be done on private land. The failure to do that act can be enforced under section 3.26. The sections, together constitute a procedure which is limited to the types of acts described in Schedule 3.1. It is not necessarily intended to be an exhaustive code limiting the powers of local government in these matters. The language of the provisions is not drafted in a limiting or negative way. There will of course be other legislation (such as planning and health) which will provide further powers to local governments in this area which supports the view that the Act's provisions do not constitute a code.

It may be argued that section 3.27 limits section 3.5(1) in the way that the Department suggests that section 3.25 does. Similarly to section 3.26 however, this section is limited to the situation where a local government does not have consent to do an act specified in Schedule 3.2 on private land, but may nevertheless do the act under the authority of section 3.27 and Schedule 3.2 of the Act. Accordingly, the same arguments will apply.

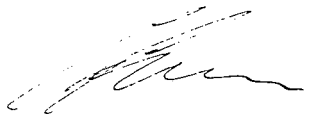
4. CONCLUSION

In conclusion, we consider it is reasonably arguable that sections 3.25 and 3.27 of the Act, and their respective Schedules do not limit the power of a local government to make local laws under section 3.5(1) with respect to private land. Where there is an inconsistency between a local law and these sections then the local law will be invalid to the extent of the inconsistency. A local law will be inconsistent with section 3.25(1) if, for instance, it attempts to prevent an appeal in respect of the section 3.25 notice.

If the Department of Local Government considers that this result is inconsistent with the legislative intention in respect of section 3.5(1), then regulations may be made under section 3.5(4) of the Act limiting the power of a local government to make local laws with respect to private land.

Should you have any queries, please contact Barbara Callanan or Graham Castledine of our office.

Yours faithfully
MINTER ELLISON



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APPENDIX 5

EXTRACT FROM THE WESTERN AUSTRALIAN LOCAL GOVERNMENT ASSOCIATION LOCAL LAWS MANUAL

LEGISLATIVE REVIEW

POWER OF A LOCAL GOVERNMENT TO MAKE LOCAL LAWS IN RELATION TO PRIVATE LAND

There has been some uncertainty which Local Laws WA has tried to dispel over whether or not sections 3.25 and 3.27 of the Act, and their respective Schedules, limit the power of a local government to make local laws under section 3.5(1) with respect to private land.

For example, if the holder of a licence to keep bees breaches a local law, can the local government order that person, under the local law, to remove the bees? No such authority is conveyed in Schedule 3.1.

Also, can the local government give notice to the owner or occupier of any land having a non-conforming fence under a local law, when item 4 of Schedule 3.1 limits the giving of notice to an owner?

This uncertainty was reflected in a statement in section 4, page 1 of this Local Laws Manual on "Advertising Devices/Signs Hoardings and Bill Posting" which read -
"The Local Government Act local laws relating to Signs Hoardings and Bill Posting and Advertising Devices are considered to unnecessarily duplicate provisions of the *Local Government (Miscellaneous Provisions) Act 1960* and town planning schemes, also, in that a head of power does not exist in Schedule 3.1 of the *Local Government Act 1995* enabling a local government to order the removal of unsuitable signs from private land, prevailing legal opinion appears to be that Councils cannot make such an order in local laws."

Following receipt of the attached advice from Minter Ellison Lawyers WAMA has now adopted the more expansive interpretation contained therein.

The advice has been referred to the Department of Local Government and it is understood that the Department is not inclined to dispute this interpretation, which after all is in the best interests of Local Government.

The decision certainly allows much more flexibility to local governments in the making of local laws.

APPENDIX 6

OPINION FROM CROWN SOLICITOR'S OFFICE DATED JANUARY 2 2002

CROWN SOLICITOR'S OFFICE

Your Ref: 427-98
Our Ref: CSO 4923/01
Enquiries: H Cogan
Telephone No: 9264 1891

D0200515

Westralia Square
141 St Georges Tce
Perth, Western Australia 6000

GPO Box B83 Perth W.A. 6838
Telephone (08) 9264 1888
Fax (08) 9264 1440, 9264 1442
DX 175
Facsimile No: 9264 1111

RECEIVED
03 JAN 2002
DEPT. OF LOCAL GOVERNMENT AND REGIONAL DEVELOPMENT

2 January 2002

Acting Director
Strategies and Legislation
Department of Local Government
GPO Box R1250
PERTH WA 6001

Dept. of Local Government and Regional Development
Doc. No. .....
File No. 427-98
Action Officer S. Lowe

ATTENTION: IAN COWIE

D0107142

POWER OF ENTRY UNDER THE LOCAL GOVERNMENT ACT 1995

Thank you for your letter requesting advice on the above mentioned matter.

I have considered the letter dated 18 October 2001 from Ms Ravlich to the Hon Minister for Local Government and the advice dated 17 April 1998 from Minter Ellison, a copy of which you sent me. I have also examined the relevant Hansard debates for the introduction of the *Local Government Act 1995* which shed very little light on the present issue. Additionally, sections 3.25, 3.27 and 3.5 of the *Local Government Act 1995* do not appear to have been considered judicially.

Given the above, I agree with the view expressed in the advice from Minter Ellison, namely that a local government may make local laws with respect to private land which are concerned with matters beyond section 3.25 and Schedule 3.1. This view is supported by certain comments made in Hansard, which although not directly relevant to the present issue, support a broad reading of section 3.5 of the Act. For example, during the Second Reading Speeches in the Council, the Honourable George Cash stated at 10392 that:

> "Some of the fundamental changes underpinning the new legislation are particularly apparent in part 3. Instead of being restricted to prescribed specific functions and procedures, as in the current legislation, local governments will have general powers to perform functions. These will include a general function to provide for the good government of persons in their districts...Through their legislative function councils will have the power to make local laws for any of their functions under the new Act, including their general function."

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The Honourable Bob Thomas stated at 11579 that:

> "Mr Paver's argument is that, in the past, local government was able to undertake only the duties and activities that were prescribed in the legislation. I refer to the three Rs - roads, rates and rubbish. Of course, in reality, local government was able to deal with many other matters according to the legislation, but the Bill changes that and says, "Local government can do anything that it thinks correct in providing good government for its municipality, and the only constraints are when it contravenes either federal or state laws."

In Committee, in the Council, the Honourable A.J.G MacTiernan stated at 12668 in relation to section 3.5 of the Act that:

> "This clause relates to the legislative power of local governments - the power to make local laws. That provision has caused great controversy, certainly within Parliament. It is not possible, of course, to grant broad general powers to local government without giving it powers to make laws…I understand the concern that because of the new focus - the plenary power rather than the specified power that we are supposedly giving local government - we will see local governments making a broader range of decisions. Frankly, that is the purpose of the legislation, and it is certainly worth trying. I put on record that I am not opposed to that in principle."

I trust that these observations are of assistance. Please let me know if you have any comments or queries or if I can be of any further assistance.

SENIOR ASSISTANT CROWN SOLICITOR

APPENDIX 7

LETTER FROM THE MINISTER FOR LOCAL GOVERNMENT AND REGIONAL DEVELOPMENT DATED FEBRUARY 13 2002

MINISTER FOR HOUSING AND WORKS; LOCAL GOVERNMENT AND REGIONAL DEVELOPMENT; THE KIMBERLEY, PILBARA & GASCOYNE

Hon Tom Stephens MLC
Member for the Mining and Pastoral Region; Deputy Leader of the Government in the Legislative Council

Our Ref: 1-2476 1-3565
Your Ref: 3555/7

13 FEB 2002

RECEIVED
14 FEB 2002

Margaret Quirk MLA
Chairman
Joint Standing Committee on Delegated Legislation
Parliament House
PERTH WA 6000

Dear Margaret

Power of Entry under the *Local Government Act 1995*

I refer to previous correspondence on the above matter. As anticipated in my response of 16 November 2001, the Department of Local Government and Regional Development is now in receipt of further advice from the Crown Solicitor's Office (see copy attached).

This advice supports the opinion put forward by Minter Ellison that sections 3.25 and 3.27 of the *Local Government Act 1995*, and their respective Schedules do not limit the power of local government to make local laws under section 3.5(1) with respect to private land. As you are aware, this view is contrary to that which has been held by the Department which considered that local governments could only issue notices and go onto private land where the action related to matters specified in Schedules 3.1 and 3.2. It had also been intended to add a number of additional things to these Schedules including the removal of bees, the repair of boundary fences, the removal of nuisance lighting, and the carrying out of works on private thoroughfares. However, this whole issue will now have to be re-examined. This will occur as part of the review of the Act which is expected to result in amending legislation being put before Parliament early in 2003.

I trust the above has helped clarify the matter for your Committee.

Yours sincerely

Tom Stephens MLC
MINISTER FOR HOUSING AND WORKS;
LOCAL GOVERNMENT AND REGIONAL DEVELOPMENT;
THE KIMBERLEY, PILBARA AND GASCOYNE

Endeavour

11th Floor, Dumas House, 2 Havelock Street, WEST PERTH WA 6005
Telephone: (08) 9213 6500 • Facsimile: (08) 9213 6501
Email: tom-stephens@dpc.wa.gov.au • Freecall: 1800 255 299

APPENDIX 8

PRACTICAL STEPS FOR ENTERING PRIVATE LAND PURSUANT TO THE *LOCAL GOVERNMENT ACT 1995* FLOW CHART

Practical Steps for Entering Private Land Pursuant to the *Local Government Act 1995*