THIRTY-EIGHTH PARLIAMENT

REPORT 42

JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

SHIRE OF CAPEL KEEPING AND WELFARE OF CATS AMENDMENT LOCAL LAW 2009

AND

SHIRE OF KOORDA STANDING ORDERS LOCAL LAW 2009

Presented by Mr Joe Francis MLA (Chairman)

and

Hon Robin Chapple MLC (Deputy Chairman)

September 2010

JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

Date first appointed:

28 June 2001

Terms of Reference:

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

3. Joint Standing Committee on Delegated Legislation

3.1 A *Joint Standing Committee on Delegated Legislation* is established.

3.2 The Committee consists of 8 Members, 4 of whom are appointed from each House. The Chairman must be a Member of the Committee who supports the Government.

3.3 A quorum is 4 Members of whom at least one is a Member of the Council and one a Member of the Assembly.

3.4 A report of the Committee is to be presented to each House by a Member of each House appointed for the purpose by the Committee.

3.5 Upon its publication, whether under section 41(1)(a) of the *Interpretation Act 1984* or another written law, an instrument stands referred to the Committee for consideration.

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

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

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

(c) ousts or modifies the rules of fairness;

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

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

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

3.7 In this clause -

"**adverse effect**" includes abrogation, deprivation, extinguishment, diminution, and a compulsory acquisition, transfer, or assignment;

"**instrument**" means -

(a) subsidiary legislation in the form in which, and with the content it has, when it is published;

(b) an instrument, not being subsidiary legislation, that is made subject to disallowance by either House under a written law;

"**subsidiary legislation**" has the meaning given to it by section 5 of the *Interpretation Act 1984*.

Members as at the time of this inquiry:

Mr Joe Francis MLA (Chairman)
Hon Robin Chapple MLC (Deputy Chairman)
Hon Alyssa Hayden MLC
Ms Janine Freeman MLA
Hon Jim Chown MLC
Mr Paul Miles MLA
Hon Helen Bullock MLC
Mr Andrew Waddell MLA

Staff as at the time of this inquiry:

Christine Kain, Advisory Officer (Legal)
Irina Lobeto-Ortega, Advisory Officer (Legal)
David Driscoll, Committee Clerk

Address:

Parliament House, Perth WA 6000, Telephone (08) 9222 7222

lcco@parliament.wa.gov.au

Website: http://www.parliament.wa.gov.au

ISBN: 978-1-921634-49-9

CONTENTS

REPORT **1**

1 INTRODUCTION 1
2 *SHIRE OF CAPEL KEEPING AND WELFARE OF CATS AMENDMENT LOCAL LAW 2009* 1
3 *SHIRE OF KOORDA STANDING ORDERS LOCAL LAW 2009* 3
4 DISALLOWANCE OF AN INVALID LOCAL LAW 3
Can the Committee recommend disallowance for a local law which fails to follow the process set out in section 3.12 of the LGA? 4
Factors which support the Committee's revised view 5
5 THE COMMITTEE'S CONCLUSIONS 7
Term of Reference 3.6(a) 7
Consequences of disallowance 7
6 RECOMMENDATIONS 8

APPENDIX 1 SHIRE OF CAPEL'S LETTER DATED 31 AUGUST 2010 ..... **9**

APPENDIX 2 SHIRE OF KOORDA LETTER DATED 1 SEPTEMBER 2010 ..... **13**

APPENDIX 3 SECTION 3.12 OF THE *LOCAL GOVERNMENT ACT 1995* **17**

APPENDIX 4 CROWN SOLICITOR'S ADVICE DATED 31 JANUARY 2002 ..... **23**

REPORT OF THE JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

IN RELATION TO THE

***SHIRE OF CAPEL KEEPING AND WELFARE OF CATS AMENDMENT LOCAL LAW 2009* AND**

SHIRE OF KOORDA STANDING ORDERS LOCAL LAW 2009

---

1 INTRODUCTION

1.1 This report concerns two instruments referred to the Joint Standing Committee on Delegated Legislation (**the Committee**), the:

- *Shire of Capel Keeping and Welfare of Cats Amendment Local Law 2009;* and
- *Shire of Koorda Standing Orders Local Law 2009*.

1.2 The instruments of subsidiary legislation which are the subject of this report fall within the definition of 'instrument' in the Committee's Terms of Reference. The local laws were published in the *Western Australian Government Gazette* (**the Gazette**) on the 4 May 2010 and 6 August 2010, respectively, and stood referred to the Committee upon gazettal. The full text of the local laws is publicly available from the State Law Publisher's website at http://www.slp.wa.gov.au/gazette/gazette.nsf.

1.3 These two local laws raised the same issue for the Committee in that both instruments were gazetted in error. In each case, the instrument gazetted was not the one adopted by the Shire Council or subject to the procedure set out under section 3.12 of *the Local Government Act 1995* (**LGA**).

1.4 The Committee has formed the view that the *Shire of Capel Keeping and Welfare of Cats Amendment Local Law 2009* and the *Shire of Koorda Standing Orders Local Law 2009* offend its Term of Reference 3.6(a), which states:

> *In its consideration of an instrument, the Committee is to enquire whether the instrument … is authorised or contemplated by the empowering enactment.*

2 *SHIRE OF CAPEL KEEPING AND WELFARE OF CATS AMENDMENT LOCAL LAW 2009*

2.1 The Committee first scrutinised the *Shire of Capel Keeping and Welfare of Cats Amendment Local Law 2009* (**Cat Local Law)** at its meeting on 21 June 2010.

2.2 The Committee had concerns with the Shire's power in its new clause 8.2(a) to designate a cat prohibited area by giving local public notice only. A decision to designate an area of land as a cat prohibited area within the Shire of Capel is a decision which has legislative effect and is therefore considered to be subsidiary legislation for the purposes of the *Interpretation Act 1984*.[1]

2.3 The process set out in the new clause, by which the Shire of Capel proposed to only give local public notice before including an area in the list of cat prohibited areas, did not comply with the mandatory requirements for subsidiary legislation listed in section 3.12 of the LGA.

2.4 The Committee sought undertakings from the Shire of Capel in relation to the new clauses of the Cat Local Law.

2.5 The Shire of Capel did not provide the undertakings and instead responded on 25 June 2010 advising that the Council had resolved to rescind the motion by which it adopted the Cat Local Law at its meeting on 11 November 2009. A copy of the minutes of the Council meeting of 23 June 2010 at which this decision was made was provided with the Shire's response.

2.6 The Committee downloaded the public minutes and agenda items from the Shire's internet site to view the 2009 motion by which the Cat Local Law had been adopted. At that point it became evident to the Committee that the Cat Local Law that was gazetted was in fact different to amendments which had been put before, and adopted by, the Council.

2.7 The Committee wrote to the Shire on 18 August 2010 noting that the Cat Local Law gazetted on 4 May 2010 was significantly different to the local law adopted by the Shire Council and on that basis the Committee was proceeding with a recommendation to the House that the Cat Local Law be disallowed. The Committee also sought an explanation as to the circumstances that resulted in a significantly different Cat Local Law being tabled.

2.8 The Shire of Capel responded on 31 August 2010 acknowledging that the Cat Local Law published in the Gazette varied from that adopted by the Council at the 11 November 2009 meeting and confirmed that the discrepancy was due to administrative error (**Appendix 1**):

> *The wrong document was sent to the State Law Publisher and a proof was not obtained as our officer co-ordinating this process went on annual leave that day.*

[1] Note that the *Interpretation Act 1984* defines subsidiary legislation as *"any proclamation, regulation, rule, local law, by-law, order, notice, rule of court, local or region planning scheme, resolution, or other instrument."* Section 42(8)(b) of the *Interpretation Act 1984* further makes it clear that, for the purposes of disallowance, 'regulations' includes local laws.

3 *SHIRE OF KOORDA STANDING ORDERS LOCAL LAW 2009*

3.1 The Committee received correspondence on 1 September 2010 from the Shire of Koorda advising that the *Shire of Koorda Standing Orders Local Law 2009* (**Standing Orders Local Law***)* was submitted in error.

3.2 Further correspondence revealed that an incorrect version of the Standing Orders Local Law had been provided to the State Law Publisher. The version provided had not been considered by the Shire Council and had not been made subject to the mandatory requirements of section 3.12 of the LGA (see **Appendix 2**).

3.3 The Council undertook not to enforce any clauses in the Standing Orders Local Law.

4 DISALLOWANCE OF AN INVALID LOCAL LAW

4.1 The Committee takes the position that the requirements of section 3.12 of the LGA are mandatory (attached here at **Appendix 3**). A failure to comply with the requirements of section 3.12 of the LGA will therefore result in a local law being invalidly made.[2]

4.2 Historically the Committee acted on the advice of a former Clerk and proceeded on the basis that a local law which does not comply with section 3.12 of the LGA is void from its inception[3] and has no legal effect. As a result, there was no valid instrument before the Committee to recommend disallowance. Such instruments were often returned to the local government in question and advice given to re-publish the local law in the Gazette, in compliance with the section 3.12 requirements.

4.3 The Committee notes, however, that section 41 of the *Interpretation Act 1984* provides that subsidiary legislation comes into operation on the day of publication unless otherwise specified.[4]

---

2 The Committee takes its opinion from advice from the State Solicitor's Office (formerly the Crown Solicitor's Office) dated 31 January 2002 which confirms that non-compliance with section 3.12 of the LGA will result in a local law being invalidly made. This advice is attached to this report as **Appendix 4**.

3 The legal term is void *ab initio*, meaning "void from the beginning", from the *Encyclopaedic Australian Legal Dictionary*, on-line, LexisNexis.

4 *Where a written law confers power to make subsidiary legislation, all subsidiary legislation made under that power shall —*

(a) be published in the Gazette;

(b) subject to section 42, come into operation on the day of publication, or where another day is specified or provided for in the subsidiary legislation, on that day.

4.4 Further, there is, however, a presumption that subsidiary legislation is validly made in section 43(3) of the *Interpretation Act 1984* which provides:

> *It shall be presumed, in the absence of evidence to the contrary, that all conditions and preliminary steps precedent to the making of subsidiary legislation have been complied with and performed.*

4.5 The Committee notes also the common law presumption of validity in relation to subordinate legislation.[5]

4.6 If there is a procedural flaw in the making of a local law, a court may declare the local law to be void *ab initio*, that is, retrospectively of no effect. If this occurs, that law is taken not to have been made. This cannot occur, however, in the absence of a court declaration. A court can only make a declaration on the validity of a law when a party who has legal standing commences an action in the court in relation to that law. [6]

4.7 This results in the situation where, until a court declares a local law to be invalid, it will remain in effect. Practically speaking, this means that the local law remains available on the State Law Publisher's website as a valid law, unless successfully challenged in the courts. In most cases, members of the public are unaware that there is any question about the validity of the local law.

4.8 From time to time, the Committee receives evidence which rebuts the presumption of validity, as is the case with the two local laws which are the subject of this report.

Can the Committee recommend disallowance for a local law which fails to follow the process set out in section 3.12 of the LGA?

4.9 As a result of the former Clerk's advice (see paragraph 4.2, above), the Committee has not previously used Term of Reference 3.6(a) to recommend

---

5 In *Hoffman - La-Roche v Secretary of State for Trade and Industry* [1975] AC 295, Lord Diplock said at p 366:

> *All that can usefully be said is that the presumption that subordinate legislation is intra vires prevails in the absence of rebuttal, and that it cannot be rebutted except by a party to legal proceedings in a court of competent jurisdiction*

6 The position is usefully summarised in the Western Australian Supreme Court decision *Donna Selby & Ors v Peter Adrian Joseph Pennings & Ors* [1998] WASCA 24, where Ipp J (with whom the other judges agreed on this point) said:

> *[T]he true effect of the presumption is that the legislation or act which is impugned is presumed to be good until pronounced to be unlawful, but is then recognised as never having had any legal effect at all … There is no rule that lends validity to invalid acts. In a practical world, however, a court will usually assume that subordinate legislation, and administrative acts, are valid unless it is persuaded otherwise.*

disallowance in circumstances where the mandatory requirements of section 3.12 of the LGA have not been complied with.

4.10 The Committee has, however, reviewed its practice in relation to instruments which fail to follow the mandatory process set out in section 3.12.

4.11 It did not sit comfortably with the Committee to leave an instrument in place where the Committee has received evidence that leads it to the conclusion that mandatory statutory requirements have not been met. It appears to the Committee that recommending disallowance is available to it under the existing Standing Orders, whether the instrument appears valid or not.

Factors which support the Committee's revised view

4.12 Section 42(2) of the *Interpretation Act 1984* provides that:

> *Notwithstanding any provision in any Act to the contrary, if either House of Parliament passes a resolution disallowing any regulations of which resolution notice has been given within 14 sitting days of such House after such regulations have been laid before it or if any regulations are not laid before both Houses of Parliament in accordance with subsection (1), such regulations shall thereupon cease to have effect,* ***but without affecting the validity or curing the invalidity of anything done or of the omission of anything*** *in the meantime.* [Committee emphasis]

4.13 The highlighted words in section 42(2), together with the operation of section 41 (see footnote 4 above) suggest that the commencement of subsidiary legislation and subsequent disallowance are separate from the question of whether the legislation is valid. The power of the House to disallow is exercisable on the laying of instruments before the Parliament, not on the instruments (in this case, the local laws) having been validly made.

4.14 Pearce and Argument note that many Acts which empower the making of delegated legislation also provide for the disallowance of that delegated legislation by some other authority, usually either the Parliament or the Governor-in-Council.[7]

4.15 Both the courts[8] and the Parliament have emphasised the difference in function between judicial review as to validity and the Parliamentary decision to disallow.

---

7 Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia*, 3rd edition, LexisNexis Butterworths, Sydney, 2005, p 362.

8 Colman v Miller [1906] VLR 622 at 626 per Hodges J.

4.16 In explanation of a motion to amend the Standing Orders of the Legislative Council[9], Hon Kim Chance MLC said the following on the distinction between the legal doctrine of *ultra vires*[10] and the Committee's function under current Term of Reference 3.6(a):

> *The danger in the committee pronouncing whether a regulation* [which includes local laws] *is made within the delegated power is a collateral attack; that is, the same issue is litigated with the attendant danger that the Supreme Court will take an opposite view to the committee's because the court must make a decision between contending parties, whether it wants to disagree with the committee or not. The new provision allows the committee to express an opinion about whether the regulation is one that Parliament would accept as a proper exercise of the power, but it does not have to go to the next step and declare whether the regulation is intra vires or ultra vires. That is a question of law, and we have courts to deal with those matters.*[11]

4.17 Hon Peter Foss MLC said in support of the amendment:

> *It is not the committee's role to act like a court and find whether a piece of subsidiary legislation falls inside or outside a parameter. It is to inquire of the existence of various matters to determine what, if any, action the House should take. For instance, if the committee were to find that the subsidiary legislation was not authorised or contemplated by the empowering enactment, we could allow it to pass through to the keeper, that is, to the Supreme Court, to allow it to disallow it as being ultra vires.*[12]

4.18 The distinction is that a court is required to pronounce on validity, whereas the Committee has the option of recommending action to the Parliament on the basis that a provision is not one that the Parliament would view as a proper exercise of power.

---

9 To create the permanent status of the Joint Standing Committee on Delegation.

10 "***Ultra vires*** *is a Latin term for beyond the power. An ultra vires act is beyond the legal power or authority of a person, institution, or legislation, and therefore invalid"* from the *Encyclopaedic Australian Legal Dictionary*, on-line, LexisNexis.

11 Western Australia, Legislative Council, *Parliamentary Debates* (Hansard), 27 June 2001, p1444. The discussion took place in relation to what is now the Committee's Term of Reference 3.6(a).

12 *Ibid.*, p1447.

4.19 An instrument stands referred to the Committee at the time of gazettal.[13] On tabling of the local law, there is an instrument which may be subject to disallowance.

4.20 The Parliament has the power to disallow a local law tabled before it.[14] In the Committee's view, tabled instruments that have not been made by the prescribed method are not excluded from that power to disallow.

5 THE COMMITTEE'S CONCLUSIONS

Term of Reference 3.6(a)

5.1 The Committee has concluded that, in relation to both the Cat Local Law and the Standing Orders Local Law, the instruments offend its Term of Reference 3.6(a) on the basis that the mandatory requirements of section 3.12 of the LGA have not been complied with.

5.2 The Committee has resolved to recommend that the House disallow the two instruments as it is of the view that they are not authorised by the LGA.

Consequences of disallowance

5.3 The Committee notes that there are a number of benefits identified with recommending disallowance of invalid instruments, which include ensuring invalid laws are quickly removed from the public record and reducing the risk of public misinformation.

5.4 Disallowance of the *Shire of Capel Amendment Local Law Relating to the Keeping and Welfare of Cats 2009* results in the local law reverting to a previous version, without the current amendments.

5.5 Disallowance of the *Shire of Koorda Standing Orders Local Law 2009* will result in the Shire reverting to its previous complete local law: the *Shire of Koorda Standing Orders Local Law Relating to Standing Orders*, published in the Gazette on 25 September 1998.

---

13 See paragraph 1.2 in relation to the instruments and Term of Reference 3.5.

14 Section 42 of the *Interpretation Act 1984*.

6 RECOMMENDATIONS

Recommendation 1: The Committee recommends that the *Shire of Capel Amendment Local Law Relating to the Keeping and Welfare of Cats 2009* be disallowed.

Recommendation 2: The Committee recommends that the *Shire of Koorda Standing Orders Local Law 2009* be disallowed.

Mr Joe Francis MLA
Chairman

16 September 2010

APPENDIX 1

SHIRE OF CAPEL'S LETTER DATED 31 AUGUST 2010

APPENDIX 1

SHIRE OF CAPEL'S LETTER DATED 31 AUGUST 2010

SHIRE of CAPEL

SHIRE OF CAPEL

Our Ref: 80508

Mr J Francis MLA
Chairman
Joint Standing Committee on Delegated Legislation
Parliament House
PERTH WA 6000

Dear Mr Francis

Shire of Capel Keeping and Welfare of Cats Local Law 2009

I refer to your facsimile dated 18 August 2010 and apologise for the delay in replying.

The Shire acknowledges that the Local Law Relating to the Keeping and Welfare of Cats published in the Gazette by the Shire varied from that adopted by Council on 11 November 2009.

This incorrect gazettal occurred due to administrative error in that the wrong document was sent to the State Law Publisher and a proof was not obtained as our officer co-ordinating this process went on annual leave that day.

We apologise for the inconvenience this has caused and fully accept and understand the reasons for the Committee's recommendation to Parliament that the Local Law be disallowed.

If you have any queries please do not hesitate to contact me on 9727 0222 or email me at info@capel.wa.gov.au.

Yours faithfully

Paul F Sheedy
CHIEF EXECUTIVE OFFICER

31 August 2010

C:\Documents and Settings\mblandford\Local Settings\Temporary Internet Files\OLK4\310810 JSCoDL
re Cat Law - Correct Gazettal.doc

Forrest Box 369 Capel Phone (08) 9727 0222. Fax (08) 9727 0223. info@capel.wa.gov.au www.capel.wa.gov.au

APPENDIX 2

SHIRE OF KOORDA LETTER DATED 1 SEPTEMBER 2010

APPENDIX 2

SHIRE OF KOORDA LETTER DATED 1 SEPTEMBER 2010

SHIRE OF KOORDA
ABN 76 109 337 541

All Communications to be addressed to the Chief Executive Officer

PO BOX 20
KOORDA WA 6475

PHONE: (08) 9684 1219
FAX: (08) 9684 1379
EMAIL: shire@koorda.wa.gov.au

1 September 2010

Our Ref: KOLL 34S

Mr Joe Francis MLA
Chairman
Joint Standing Committee on Delegated Legislation
Parliament House
PERTH WA 6000

Dear Mr Francis

Shire Of Koorda Standing Orders Local Laws 2009

The following briefly outlines stages and errors.

- Commenced review of existing Standing Orders in late 2008
- 15th April 2009 - resolved to make the Shire Of Koorda Standing Orders Local Law 2009.
  -This Local Law was sent to the State Law Publisher for advertising in the Government Gazette. At this time an experienced staff member was dealing with the review of all Local Laws. (Who left our employ on 12 June 2009).
  The State Law Publisher sent a proof of the Local Law to the Shire for checking in August 2009. This checking was not done immediately (due to staff changes).
  Eventually the consultant (John Gilfellon) engaged to review other Local Laws; identified changes were required to the Shire of Koorda Standing Orders Local Law 2009.

- It was then realised that the incorrect version of the proposed new Local Law had been forwarded for advertising in the Government Gazette back in August 2009, (New staff member clerical error), not the Local Law that council had proposed to make.

- The State Law Publisher was contacted and asked to hold onto the "proof" as changes would need to be made. The request was agreed to.

- However it was realised by the Shire that the required changes to the incorrect Local Law forwarded for printing would be significant and it was decided to adopt a completely "New Standing Orders Local Law" (The original intended proposal with minor amendments now considered desirable). This process was commenced on 17 March 2010. (Shire Of Koorda Standing Orders Local Law 2010). In August 2010 the state Law Publisher contacted the Shire regarding the proof held from August 2009 and what action should be taken.
  A staff member authorised the printing without realising it was in fact the incorrect Local Law and had not been subject to compliance with section 3.12 of the Local Government Act.

S:\SHARED\ADMINISTRATION GENERAL\Local Laws\Standing Orders\Letter to Christine Kain 1-9-2010.docx

- Once it was printed in the gazette it was realised the incorrect 'Proposed Shire Of Koorda Standing Orders Local Law' had been authorised for printing, a copy never adopted and that should have been deleted from the system.

- The matter was raised with an officer of the Department of Local Government, who indicated that when the correct Local Law was published a clause retracting the incorrect Local Law should be published , that is retract the Local Law published in the Government Gazette 6 August 2010.

Yours sincerely

Cr Janet Brooks
SHIRE PRESIDENT

S:\SHARED\ADMINISTRATION GENERAL\Local Laws\Standing Orders\Letter to Christine Kain 1-9.2010.docx

APPENDIX 3

SECTION 3.12 OF THE *LOCAL GOVERNMENT ACT 1995*

APPENDIX 3

SECTION 3.12 OF THE *LOCAL GOVERNMENT ACT 1995*

(2) If the offence is of a continuing nature, the local law may make the person liable to a further penalty not exceeding a fine of $500 in respect of each day or part of a day during which the offence has continued.

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

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

(a) the circumstances or extent of the offence;

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

[(5) deleted]

(6) A local law made under this Act may specify the method and the means by which any fines imposed are to be paid and collected, or recovered.

[Section 3.10 amended by No. 1 of 1998 s. 7.]

Subdivision 2 — Local laws made under any Act

3.11. Subdivision applies to local laws made under any Act

This Subdivision applies to local laws made under this Act and the procedure for making them and, unless a contrary intention appears in that other Act, to local laws made under any other Act, and the procedure for making them.

3.12. Procedure for making local laws

(1) In making a local law a local government is to follow the procedure described in this section, in the sequence in which it is described.

(2) At a council meeting the person presiding is to give notice to the meeting of the purpose and effect of the proposed local law in the prescribed manner.

(3) The local government is to —

(a) give Statewide public notice stating that —

(i) the local government proposes to make a local law the purpose and effect of which is summarized in the notice;

(ii) a copy of the proposed local law may be inspected or obtained at any place specified in the notice; and

(iii) submissions about the proposed local law may be made to the local government before a day to be specified in the notice, being a day that is not less than 6 weeks after the notice is given;

(b) as soon as the notice is given, give a copy of the proposed local law and a copy of the notice to the Minister and, if another Minister administers the Act under which the local law is proposed to be made, to that other Minister; and

(c) provide a copy of the proposed local law, in accordance with the notice, to any person requesting it.

(3a) A notice under subsection (3) is also to be published and exhibited as if it were a local public notice.

(4) After the last day for submissions, the local government is to consider any submissions made and may make the local law* as proposed or make a local law* that is not significantly different from what was proposed.

* *Absolute majority required.*

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

(6) After the local law has been published in the *Gazette* the local government is to give local public notice —

(a) stating the title of the local law;

(b) summarizing the purpose and effect of the local law (specifying the day on which it comes into operation); and

(c) advising that copies of the local law may be inspected or obtained from the local government's office.

(7) The Minister may give directions to local governments requiring them to provide to the Parliament copies of local laws they have made and any explanatory or other material relating to them.

(8) In this section —

making in relation to a local law, includes making a local law to amend the text of, or repeal, a local law.

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

3.13. Procedure where significant change in proposal

If during the procedure for making a proposed local law the local government decides to make a local law that would be significantly different from what it first proposed, the local government is to recommence the procedure.

3.14. Commencement of local laws

(1) Unless it is made under section 3.17, a local law comes into operation on the 14th day after the day on which it is published in the *Gazette* or on such later day as may be specified in the local law.

(2) A local law made under section 3.17 comes into operation on the day on which it is published in the *Gazette* or on such later day as may be specified in the local law.

[Section 3.14 amended by No. 1 of 1998 s. 9.]

APPENDIX 4

CROWN SOLICITOR'S ADVICE DATED 31 JANUARY 2002

APPENDIX 4

CROWN SOLICITOR'S ADVICE DATED 31 JANUARY 2002

CROWN SOLICITOR'S OFFICE

Dept. of Local Government and Regional Development

Westralia Square
141 St Georges Tce
Perth, Western Australia 6000

GPO Box 883 Perth W.A. 6838
Telephone (08) 9264 1888
Fax (08) 9264 1440, 9264 1442
Facsimile No : 9264 1111

Our Ref : CSO 02/00207
Enquiries : J. Lyon
Telephone : 9264 1898

Doc. No. .....
File No. 427-98
Action Officer J Fowler

Mr Tim Fowler
Department of Local Government and Regional Development
GPO Box R1250
PERTH WA 6001

RECEIVED
01 FEB 2002
DEPT OF LOCAL GOVERNMENT AND REGIONAL DEVELOPMENT

SECTION 3.12 OF LOCAL GOVERNMENT ACT 1995 - PROCEDURE FOR MAKING LOCAL LAW - MANDATORY NATURE

D010578
427-98 VOL 1/F16

I refer to your facsimile of 14 January 2002 concerning the letter to you from the Joint Standing Committee on Delegated Legislation dated 27 July 2001.

In that letter the Committee seeks advice as to whether the Department of Local Government and Regional Development considers the procedures outlined in section 3.12 of the *Local Government Act* as being "mandatory or directory". Incidentally, I should point out that I have not perused the Committee's terms of reference.

Section 3.12 of the *Local Government Act 1995* is concerned with the making of local laws. Its provisions painstakingly set out in detail the procedure to be followed by a local government when making a local law. Amongst the things to be done are the following. A summary of the purpose and effect of the proposed local law is to be read aloud at a council meeting. Statewide public notice and local public notice of the intention to make the law and a summary of its purpose and effect is to be given. In that notice submissions are to be invited. Any received are to be considered. After making the local law, Statewide public notice stating its title and summarising its purpose and effect is to be given.

Traditionally, the courts classified procedural provisions in statutes as being either "mandatory" provisions or "directory" provisions. A breach of a mandatory provision resulted in invalidity. This was not the case in relation to a directory provision.

In my letter dated 23 October 2000 to Mr Schorer (your ref: SJ 5-1, our ref: CSO 00/4607), a copy of which I enclose, I provided advice concerning the effect of a failure to obtain approval under section 6.33(3) of the *Local Government Act*. In that letter I dealt with the distinction between mandatory and directory provisions. In particular, I quoted from the High Court decision in the case of *Project Blue Sky*

Inc v Australian Broadcasting Authority [1998] 194 CLR 355. As I stated in my letter, the majority in the High Court, in respect to the mandatory/directory test, observed (at 390-391):

> "A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid ... in determining the question of purpose, regard must be had to "the language of the relevant provision and the scope and object of the whole statute"."

A consideration of the language of section 3.12 alone leaves one in no doubt that the legislature intended that failure to accord with its provisions would result in invalidity. Similar conclusions arise when one considers the scope and object of the *Local Government Act* as a whole. Its scope and object are concerned with the serious matter of providing a comprehensive system of local government throughout the State. It is of great significance that the provisions of section 3.12 deal with the grave task of making legislation; albeit that it be subsidiary legislation. In the end, in my view, it is abundantly clear that failure to comply with section 3.12 will result in invalidity of any relevant purported local law. Using the now criticised traditional term, the provisions of section 3.12 can be seen to be mandatory.

In your fax you also request advice in relation to sections 3.13 and 3.15 of the Act. Applying the considerations referred to above, the short answer, insofar as section 3.13 is concerned, is that its provisions are mandatory. In practical terms, however, it will not obviously always be easy to differentiate between significant and insignificant differences. In the case of section 3.15, I am of the strong view that a failure to comply with its provisions would not could give rise to the local law in point being invalid. This provision is directory in nature.

DEPUTY CROWN SOLICITOR

31 January 2002

Enc:

(m:\lyonj\opinions\loc01o01.doc)