



THIRTY-EIGHTH PARLIAMENT

REPORT 58

**JOINT STANDING COMMITTEE ON DELEGATED
LEGISLATION**

***CITY OF VINCENT DOGS AMENDMENT LOCAL LAW
No. 2 2012***

Presented by Mr Paul Miles MLA (Chairman)

and

Hon Sally Talbot MLC (Deputy Chair)

October 2012

JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

Date first appointed

28 June 2001

Terms of Reference

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

3. Joint Standing Committee on Delegated Legislation

- 3.1 A *Joint Standing Committee on Delegated Legislation* is established.
- 3.2 The Committee consists of 8 Members, 4 of whom are appointed from each House. The Chairman must be a Member of the Committee who supports the Government.
- 3.3 A quorum is 4 Members of whom at least one is a Member of the Council and one a Member of the Assembly.
- 3.4 A report of the Committee is to be presented to each House by a Member of each House appointed for the purpose by the Committee.
- 3.5 Upon its publication, whether under section 41(1)(a) of the *Interpretation Act 1984* or another written law, an instrument stands referred to the Committee for consideration.
- 3.6 In its consideration of an instrument, the Committee is to inquire whether the instrument -
- (a) is authorized or contemplated by the empowering enactment;
 - (b) has an adverse effect on existing rights, interests, or legitimate expectations beyond giving effect to a purpose authorized or contemplated by the empowering enactment;
 - (c) ousts or modifies the rules of fairness;
 - (d) deprives a person aggrieved by a decision of the ability to obtain review of the merits of that decision or seek judicial review;
 - (e) imposes terms and conditions regulating any review that would be likely to cause the review to be illusory or impracticable; or
 - (f) contains provisions that, for any reason, would be more appropriately contained in an Act.
- 3.7 In this clause -
- “**adverse effect**” includes abrogation, deprivation, extinguishment, diminution, and a compulsory acquisition, transfer, or assignment;
- “**instrument**” means -
- (a) subsidiary legislation in the form in which, and with the content it has, when it is published;
 - (b) an instrument, not being subsidiary legislation, that is made subject to disallowance by either House under a written law;
- “**subsidiary legislation**” has the meaning given to it by section 5 of the *Interpretation Act 1984*.

Members as at the time of this inquiry

Mr Paul Miles MLA (Chairman)

Hon Sally Talbot MLC (Deputy Chair)

Hon Alyssa Hayden MLC

Ms Janine Freeman MLA

Mr Andrew Waddell MLA

Mr Vincent Catania MLA

Hon Jim Chown MLC

Hon Helen Bullock MLC

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EXECUTIVE SUMMARY AND RECOMMENDATION FOR THE

REPORT OF THE JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

IN RELATION TO THE *CITY OF VINCENT DOGS AMENDMENT LOCAL LAW NO.2 2012*

EXECUTIVE SUMMARY

1 Section 3.12(1) of the *Local Government Act 1995* (**Act**) states that in making a local law, a local government is to follow the procedure in section 3.12, in the sequence in which it is described.

2 The Joint Standing Committee on Delegated Legislation (**Committee**) has identified that the City of Vincent did not follow the correct procedure described in the Act when it made its *City of Vincent Dogs Amendment Local Law No.2 2012* (**Amendment Local Law**).

3 The City of Vincent failed to follow the sequential steps outlined in section 3.12(3)(b) of the Act, which has resulted in the Amendment Local Law being invalid. The Amendment Local Law is not authorised by the Act and therefore offends the Committee's *Term of Reference* 3.6(a).

4 On 16 July 2012, the Minister for Local Government stated that he agreed with the Committee's position that local laws should be disallowed where local governments have failed to comply with the local law making process.¹

5 The Committee recommends the House disallow the City of Vincent's Amendment Local Law.

6 The Committee noted that on 22 June 2012, the Director General of the Department of Local Government advised all local governments by *Circular* of the Committee's strict approach to compliance with section 3.12 of the Act.² The Director General further advised local governments that following disallowance of the:

- *Shire of Kellerberrin Parking and Parking Facilities Local Laws 2011*,³ and
- *Town of Kwinana Extractive Industries Local Law 2011*,⁴

¹ Letter from Hon John Castrilli MLA, Minister for Local Government, 16 July 2012, p1.

² Ms Jennifer Mathews, Director General, Department of Local Government, *Circular to All Local Governments*, Circular Number 16-2012.

³ Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, *Report 47, Shire of Kellerberrin Parking and Parking Facilities Local Laws 2011*, 3 May 2012.

the *Statutory Procedures Checklist* has been updated to “remove any ambiguity as to the order in which the law making process must occur”.⁵ The Committee welcomes this assistance to local governments.

- 7 In his response to the Committee’s Report 51,⁶ the Minister for Local Government stated that:

The Department of Local Government has also made procedural changes regarding this issue. When a compliance issue is identified regarding a proposed local law, the relevant local government will be advised to restart the law-making process from the beginning.

These changes will ensure that local governments comply with the law-making process and that potentially invalid local laws are not gazetted. In the meantime, I will continue to monitor this ongoing issue.

- 8 The Committee anticipates that these procedural changes will result in significantly fewer invalid local laws being referred to it.

RECOMMENDATION

- 9 The Recommendation is as it appears in the text at the page number indicated:

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Recommendation 1: The Committee recommends that the *City of Vincent Dogs Amendment Local Law No.2 2012* be disallowed.

⁴ Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, *Report 48, Town of Kwinana Extractive Industries Local Law 2011*, 3 May 2012.

⁵ Ms Jennifer Mathews, Director General, Department of Local Government, *Circular to All Local Governments*, Circular Number 16-2012.

⁶ Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, *Report 51, Town of Bassendean Repeal Local Law 2010 and Town of Bassendean Dust and Sand Local Law 2011*, 16 August 2012.

REPORT OF THE JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

IN RELATION TO THE *CITY OF VINCENT DOGS AMENDMENT LOCAL LAW NO.2 2012*

1 REFERRAL TO THE COMMITTEE

- 1.1 The *City of Vincent Dogs Amendment Local Law No.2 2012* (**Amendment Local Law**) falls within the definition of ‘Instrument’ in the *Terms of Reference* of the Joint Standing Committee on Delegated Legislation (**Committee**).
- 1.2 The Amendment Local Law was referred to the Committee upon publication in the *Western Australian Government Gazette*. Its full text is publicly available from the State Law Publisher’s website at <http://www.slp.wa.gov.au/gazette/gazette.nsf>.⁷

2 BACKGROUND

- 2.1 The City of Vincent (**City**) resolved to commence the process of making a Dogs Amendment Local Law No.2 2012 at its meeting on 26 June 2012.
- 2.2 The procedure for making a local law is outlined in section 3.12 of the *Local Government Act 1995* and is replicated at **Appendix 1**.

3 SCRUTINY OF THE PROCEDURE FOR MAKING THE AMENDMENT LOCAL LAW

- 3.1 The Committee first scrutinised the Amendment Local Law on 24 September 2012. The City provided a *Statutory Procedures Checklist* for the Instrument which indicated non-compliance with section 3.12(3)(b) of the Act. That sub-section requires that:

The local government is to –

... as soon as the [Statewide public] notice is given, give a copy of the proposed local law and a copy of the notice to the Minister and, if another Minister administers the Act under which the local law is proposed to be made, to that other Minister.

- 3.2 According to sections 1.7 and 1.8 of the Act, ‘Statewide public notice’ requires a notice to be published in a newspaper circulating generally throughout the State, exhibition of the notice to the public on a notice board at the local government’s offices and to the public at every local government library in the district. All three elements of Statewide public notice must be completed in order for the notice to be effective.

⁷ The Local Law was published in *Gazette No. 163* on 14 September 2012.

- 3.3 The *Statutory Procedures Checklist* for the City's Amendment Local Law indicated that Statewide public notice was published in *The West Australian* on 6 July 2012, with the Minister sent a copy of the proposed Instrument and a copy of the Statewide public notice on 2 July 2012.
- 3.4 The Committee sought confirmation of the accuracy of the information in the *Statutory Procedures Checklist*. On 26 September 2012, the Chief Executive Officer of the City of Vincent confirmed that the checklist was correct; that is, the City posted notification to the Minister of the Council's intention to create the Amendment Local Law four days before the Statewide public notice was published. However, the Act requires that the City should have proceeded in the reverse manner; that is, Statewide public notice should have been given first (pursuant to 3.12(3)(a)) and then the Minister given a copy of the Statewide public notice and the proposed local law, pursuant to 3.12(3)(b).
- 3.5 As a result of this error, the procedure in section 3.12(3) of the Act for the Amendment Local Law has not been sequentially followed. This procedural defect has resulted in the Committee forming a view that the Amendment Local Law is unauthorised by the Act, because the wording of section 3.12(3)(b) expressly uses the words "*as soon as the [Statewide public] notice is given*", which requires notification be given to the Minister only after the Statewide public notices have been given.
- 3.6 A copy of the City's response to the Committee's letter regarding the Amendment Local Law is replicated at **Appendix 2**.

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

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

- 4.1 The Committee has previously stated its position on the status of invalid local laws and the prospect of disallowance on nine other occasions. These are set out in the Committee's reports listed at **Appendix 3**.
- 4.2 This Amendment Local Law raises the same issues in relation to the effect of not complying with the procedure in section 3.12 of the Act. The Committee notes that a failure to comply with the requirements of the section will result in a local law being found to be invalid.
- 4.3 As stated previously, an Instrument stands referred to the Committee at the time of gazettal. Upon the tabling of a local law, there is an Instrument which may be subject to disallowance and the Parliament has the power to disallow a local law so tabled.⁸

⁸ Section 42 of the *Interpretation Act 1984*.

- 4.4 In the Committee's view, tabled instruments that have not been correctly made by following the prescribed statutory method are not excluded from that power to disallow.

5 STATUTORY PROCEDURE FOR MAKING A LOCAL LAW

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

3.12 Procedure for making local laws

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

[Committee emphasis]

- 5.2 If the steps set out in section 3.12 are not followed exactly in the order in which they are outlined, then the requirements of the Act have not been met and the local law is consequentially invalid.
- 5.3 Long-standing advice from the then Crown Solicitor's Office (now State Solicitor's Office) in January 2002 was that the procedure in section 3.12 is mandatory. A local law which does not follow the process in the order in which it is described there, will be invalid.⁹
- 5.4 Therefore, as the process outlined in section 3.12(3)(b) of the Act has not been followed correctly, the Committee has formed the view that the Amendment Local Law is invalid and capable of disallowance.
- 5.5 On 16 July 2012, the Minister for Local Government stated that he agreed with the Committee's position that local laws should be disallowed where a local government has failed to comply with the local law making process.¹⁰

6 REVIEW OF SECTION 3.12 OF THE ACT

- 6.1 The Committee notes that this is the tenth occasion since September 2010 that the Committee has scrutinised a local law which has not correctly followed the mandatory sequential procedure prescribed in section 3.12(2) of the Act.
- 6.2 The Committee is concerned that the overly prescriptive nature of section 3.12(2) may be the cause of local laws being invalid. Prior to the publication of Circular Number 16-2012 on 22 June 2012, local governments were clearly unaware of the legal

⁹ That longstanding advice dated 31 January 2002 is replicated in Appendix 4 to Report 42, Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, *Report 42, Shire of Capel Keeping and Welfare of Cats Amendment Local Law 2009 and Shire of Koorda Standing Orders Local Law 2009*, 16 September 2010.

¹⁰ Letter from Hon John Castrilli MLA, Minister for Local Government, 16 July 2012, p1.

consequences of not complying exactly with all of the steps in section 3.12(2) in the order in which they are prescribed.

6.3 Sequential errors result in significant resources and rate payer money being expended by local governments to make laws which are ultimately found to be invalid and of no legal effect. While the Committee is sympathetic to the intention of local governments when they fail to comply with the process in section 3.12(2), the Committee's *Terms of Reference* oblige it to investigate when an Instrument of subsidiary legislation is not made according to the requirements of its empowering statute.

6.4 The Committee sees a solution to this discord between a strict legal interpretation of the words of section 3.12(2) and the practical impact on the many local governments in the State which may not be aware of the effect of non-compliance with section 3.12(2) of the Act.

6.5 On 16 July 2012, the Minister for Local Government advised that following disallowance of the *Shire of Kellerberrin Parking and Parking Facilities Local Laws 2011*¹¹ and the *Town of Kwinana Extractive Industries Local Law 2011*¹² he will review section 3.12 of the Act "in the future and the possibility of further amendment will be considered."¹³

6.6 On 22 June 2012, the Director General of the Department of Local Government advised all local governments by *Circular* of the Committee's strict approach to compliance with section 3.12.¹⁴ The Director General further advised that following disallowance of the:

- *Shire of Kellerberrin Parking and Parking Facilities Local Laws 2011*;¹⁵ and
- *Town of Kwinana Extractive Industries Local Law 2011*,¹⁶

the *Statutory Procedures Checklist* has been updated to "remove any ambiguity as to the order in which the law making process must occur".¹⁷ The Committee welcomes this assistance to local governments.

¹¹ Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, *Report 47, Shire of Kellerberrin Parking and Parking Facilities Local Laws 2011*, 3 May 2012.

¹² Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, *Report 48, Town of Kwinana Extractive Industries Local Law 2011*, 3 May 2012.

¹³ Letter from Hon John Castrilli MLA, Minister for Local Government, 16 July 2012, p1.

¹⁴ Ms Jennifer Mathews, Director General, Department of Local Government, *Circular to All Local Governments*, Circular Number 16-2012.

¹⁵ Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, *Report 47, Shire of Kellerberrin Parking and Parking Facilities Local Laws 2011*, 3 May 2012.

¹⁶ Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, *Report 48, Town of Kwinana Extractive Industries Local Law 2011*, 3 May 2012.

- 6.7 The Committee anticipates that the procedural changes made by the Department of Local Government, and referred to by the Minister for Local Government in his response to the Committee's Report 51,¹⁸ will result in significantly fewer invalid local laws being referred to it.¹⁹

7 CONCLUSIONS

Term of Reference 3.6(a)

- 7.1 The Committee has concluded that the Amendment Local Law offends its *Term of Reference 3.6(a)* on the basis of non-compliance with a mandatory requirement in section 3.12(3)(b) of the Act. The Committee has therefore resolved to recommend that the House disallow the Amendment Local Law, as it is of the view that it is invalid and not authorised by the Act.
- 7.2 The Committee has also concluded that there is an avenue for ensuring that this type of non-compliance (or more appropriately termed, 'substantial compliance') should not be a barrier to local laws being authorised under the Act.

Consequences of disallowance

- 7.3 As outlined in previous reports, the Committee notes that a number of benefits exist in recommending the disallowance of invalid instruments, which include ensuring that invalid laws are quickly removed from the public record and reducing the risk of public misinformation.
- 7.4 Disallowance of the Amendment Local Law will revive the *City of Vincent Dogs Local Law 2007*²⁰ as published in the *Government Gazette* on 21 November 2007 and amended as published in the *Government Gazette* on 24 February 2012.

¹⁷ Ms Jennifer Mathews, Director General, Department of Local Government, *Circular to All Local Governments*, Circular Number 16-2012.

¹⁸ Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, *Report 51, Town of Bassendean Repeal Local Law 2010 and Town of Bassendean Dust and Sand Local Law 2011*, 16 August 2012.

¹⁹ Refer to paragraph 7 of the Executive Summary of this report for the text of the Minister's response.

²⁰ The Town of Vincent became the City of Vincent on 1 July 2011.

RECOMMENDATION

Recommendation 1: The Committee recommends that the *City of Vincent Dogs Amendment Local Law No.2 2012* be disallowed.



**Mr Paul Miles MLA
Chairman**

18 October 2012

APPENDIX 1

SECTION 3.12 OF THE *LOCAL GOVERNMENT ACT 1995*

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.

APPENDIX 2

RESPONSE FROM THE CITY OF VINCENT

61 8 92736019

ENQUIRIES TO: John Giorgi, JP (9273 6002)
YOUR REF: Chief Executive Officer
OUR REF: LEG0009 JG:jh



CITY OF VINCENT

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26 September 2012

Mr Paul Miles MLA
Chairman
Legislative Council Committee Office
18-32 Parliament Place
PERTH WA 6000

Attn: Mrs F. Mackie

Dear Mr Miles

DELEGATED LEGISLATION COMMITTEES – CITY OF VINCENT DOGS AMENDMENT LOCAL LAW NO.2 2012

I refer to your letter dated 25 September 2012. Unfortunately due to an administration error, the City acknowledges that the initial letter advising of the amendment to the Local Law had been sent to the Minister four (4) days before the Statewide Public Notice was published.

As requested, the City will give Statewide Public Notice, as prescribed by Section 3.12 of the Local Government Act 1995.

We will write to you again when the process has been completed again.

Yours sincerely

A handwritten signature in black ink, appearing to read "J. Giorgi".

**JOHN GIORGI, JP
CHIEF EXECUTIVE OFFICER**

APPENDIX 3

COMMITTEE REPORTS WHERE THE COMMITTEE HAS RECOMMENDED DISALLOWANCE OF INVALID LOCAL LAWS

Please refer to the following Committee reports for a discussion on the Committee's position on the status of invalid local laws:

- 42nd report: *Town of Capel Keeping and Welfare of Cats Amendment Local Law 2009* and *Town of Koorda Standing Orders Local Law 2009*;²¹
- 45th Report: *Shire of Kellerberrin Dogs Local Law*;²²
- 47th Report: *Shire of Kellerberrin Parking and Parking Facilities Local Laws 2011*;²³
- 48th Report: *Town of Kwinana Extractive Industries Local Law 2011*;²⁴
- 51st Report: *Town of Bassendean Repeal Local Law 2010* and *Town of Bassendean Dust and Sand Local Law 2011*;²⁵

²¹ Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, *Report 42, Shire of Capel Keeping and Welfare of Cats Amendment Local Law 2009 and Shire of Koorda Standing Orders Local Law 2009*, 16 September 2010. 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*.

²² Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, *Report 45, Shire of Kellerberrin Dogs Local Law*, 3 November 2011. The Committee formed the view that the local law had been invalidly made, based on non-compliance with sections 3.12(5) and (6) of the *Local Government Act 1995*. The Committee recommended that the Executive Council advise the Governor to invoke section 3.17 of the *Local Government Act 1995* to repeal the local law. This course of action was chosen because due to an administrative error, a notice of motion to disallow was not moved in the Legislative Council on the last date for disallowance: 27 September 2011.

²³ Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, *Report 47, Shire of Kellerberrin Parking and Parking Facilities Local Laws 2011*, 3 May 2012. This Instrument offended section 3.12(5) of the *Local Government Act 1995*, that is, the sequence is that after making the local law, it has to be published in the *Gazette* and then a copy is to be given to the Minister. The Instrument was gazetted on 14 October 2011 but was sent to the Minister 11 days prior to gazettal.

²⁴ Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, *Report 48, Town of Kwinana Extractive Industries Local Law 2011*, 3 May 2012. This Instrument offended section 3.12(3)(b) of the *Local Government Act 1995*, in that a copy of the proposed local law was given to the Minister six days before Statewide public notice was given.

²⁵ Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, *Report 51, Town of Bassendean Repeal Local Law 2010 and Town of Bassendean Dust and Sand Local Law 2011*, 16 August 2012. This Instrument offended section 3.12(3)(b) of the *Local Government Act 1995*, in that a copy of the proposed local law was given to the Minister one day before Statewide public notice was given.

- 53rd Report: *Mindarie Regional Council Standing Orders Amendment Local Law 2012*,²⁶
- 54th Report: *City of Bayswater Standing Orders Local Law 2012*,²⁷
- 55th Report: *City of Perth Standing Orders Amendment Local Law 2012*,²⁸ and
- 57th Report: *Shire of Broomehill-Tambellup Removal of Refuse, Rubbish and Disused Materials Local Law 2012*.²⁹

²⁶ Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, *Report 53, Mindarie Regional Council Standing Orders Amendment Local Law 2012*, 13 September 2012. This Instrument offended section 3.12(3)(b) of the *Local Government Act 1995* in that the Minister was never given a copy of the Statewide public notice contrary to section 3.12(3)(b) of the Act.

²⁷ Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, *Report 54, City of Bayswater Standing Orders Local Law 2012*, 13 September 2012. This Instrument offended section 3.12(3)(b) of the *Local Government Act 1995* in that a copy of the proposed local law was given to the Minister 8 days before Statewide public notice was given.

²⁸ Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, *Report 55, City of Perth Standing Orders Amendment Local Law 2012*, 13 September 2012. This Instrument offended section 3.12(3)(b) of the *Local Government Act 1995* in that the City sent copies of the Statewide public notice and the proposed local law to the Minister before giving Statewide public notice.

²⁹ Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, *Report 57, Shire of Broomehill-Tambellup Removal of Refuse, Rubbish and Disused Materials Local Law 2012*, 27 September 2012. This Instrument offended section 3.12(3)(b) of the *Local Government Act 1995* in that a copy of the proposed local law was given to the Minister six days before Statewide public notice was given.