



**THIRTY-NINTH PARLIAMENT**

**REPORT 79**  
**JOINT STANDING COMMITTEE ON DELEGATED**  
**LEGISLATION**

***CITY OF FREMANTLE ALFRESCO DINING***  
***LOCAL LAW 2014***

Presented by Mr Peter Abetz MLA (Chairman)

and

Hon Robin Chapple MLC (Deputy Chair)

February 2015

## 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:

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

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

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

Mr Peter Abetz MLA (Chairman)  
Hon John Castrilli MLA  
Hon Mark Lewis MLC  
Mr Paul Papalia MLA

Hon Robin Chapple MLC (Deputy Chair)  
Hon Peter Katsambanis MLC  
Ms Simone McGurk MLA  
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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 FREMANTLE ALFRESCO DINING LOCAL LAW 2014***

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**EXECUTIVE SUMMARY**

- 1 The Joint Standing Committee on Delegated Legislation (**Committee**) is of the view that the City of Fremantle (**City**) did not follow the mandatory, sequential procedure described in section 3.12 of the *Local Government Act 1995* when it made the *City of Fremantle Alfresco Dining Local Law 2014* (**Local Law**).
- 2 The procedure includes a requirement under section 3.12(6) to give local public notice after the Local Law had been published in the *Government Gazette*. That sub-section concerns communicating to users of the Local Law, important details about when it becomes operational, its purpose and significantly in terms of public access, inspection details. The Local Law is invalid because the City did not complete section 3.12(6).
- 3 Being invalidly made, the Local Law offends Committee *Term of Reference 10.6(a)* in that it is not within power of the empowering enactment.

**RECOMMENDATIONS**

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**Recommendation 1: The Committee recommends that the *City of Fremantle Alfresco Dining Local Law 2014* be disallowed.**



**REPORT OF THE JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION**  
**IN RELATION TO THE**  
***CITY OF FREMANTLE ALFRESCO DINING LOCAL LAW 2014***

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**1 REFERENCE**

1.1 The *City of Fremantle Alfresco Dining Local Law 2014* (**Local Law**) published in the *Government Gazette* on 18 July 2014 was referred to the Joint Standing Committee on Delegated Legislation (**Committee**) upon its publication in the *Government Gazette*. Once a local law is tabled in the Parliament, it is an instrument that may be subject to disallowance.

**2 STATUTORY PROCEDURE FOR MAKING A LOCAL LAW AND NON-COMPLIANCE WITH THE *LOCAL GOVERNMENT ACT 1995***

2.1 The Local Law is made pursuant to the general, local government law making power in section 3.5(1) of the *Local Government Act 1995* (**Act**).<sup>1</sup> In making a local law, a local government is to follow the procedure described in section 3.12 of the Act. The procedure is both mandatory and sequential. A local law which does not follow the sequence is invalid. Section 3.12 is attached at **Appendix 1**.

2.2 Towards the conclusion of the procedure, there is a requirement set out in section 3.12(6), which provides that:

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

*(a) stating the title of the local law; and*

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

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

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<sup>1</sup> Section 3.5 is titled: *Legislative power of local governments*. Section 3.5(1) states: “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.”

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### **3 THE IMPORTANCE OF SECTION 3.12(6)**

3.1 The requirement in section 3.12(6) to give ‘local public notice’ (defined in section 1.7)<sup>2</sup> is important. It communicates to the users of a local law details of when it becomes operational, its purpose and significantly in terms of public access, inspection details.

### **4 OUTCOME**

4.1 The Local Law is invalid because the City failed to complete the final procedural step in section 3.12(6) and actively resolved not to complete it.

4.2 The Committee’s position on the status of invalidly made local laws arising from non-compliance with the law making procedure in section 3.12 of the Act is well established and documented in previous reports.<sup>3</sup>

### **5 SCRUTINY OF THE LOCAL LAW**

#### **Non-compliance with section 3.12(3)(b) of the Act**

5.1 The Committee considered the Local Law at its meeting on 18 February 2015 noting that the *Statutory Procedures Checklist* accompanying the Explanatory Memorandum states:

*Local Public Notice not given – local law is being repealed*

5.2 The City’s Ordinary Council Minutes of 22 October 2014 also evince this intention and the reason for the repeal. The Minutes state:

*The newly created local law was published in the government gazette on 18 July 2014 and subsequently the City received correspondence from the Department of Local Government and Communities (“the Department”) identifying a number of shortfalls in the published local law including –*

*1. Incorrect formatting (use of italics, capitalisation etc)*

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<sup>2</sup> It states: “(1) Where under this Act local public notice of a matter is required to be given, a notice of the matter is to be — (a) published in a newspaper circulating generally throughout the district; and (b) exhibited to the public on a notice board at the local government’s offices; and (c) exhibited to the public on a notice board at every local government library in the district. (2) Unless expressly stated otherwise it is sufficient if the notice is — (a) published under subsection (1)(a) on at least one occasion; and (b) exhibited under subsection (1)(b) and (c) for a reasonable time, being not less than — (i) the time prescribed for the purposes of this paragraph; or (ii) if no time is prescribed, 7 days.”

<sup>3</sup> For example, Parliament of Western Australia, 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 2011, Joint Standing Committee on Delegated Legislation, Report 45, *Shire of Kellerberrin Dogs Local Law*, 3 November 2011 and Joint Standing Committee on Delegated Legislation, Report 72, *Shire of Shark Bay Local Government Property Amendment Local Law 2014*.



2. *Incorrect enactment date;*
3. *Absence of the definition of ‘nuisance’;*
4. *Use of ambiguous terms; and*
5. *Reference to ‘the City’ rather than ‘the local government’;*

*These shortfalls should have ideally have been communicated to the City prior to gazettal of the local law; however these matters were not brought to the City’s attention until after the gazettal date.*

*The City considers that the shortfalls identified by the Department will almost certainly result in disallowance of the local law by the Parliamentary Joint Standing Committee on Delegated Legislation (‘the Committee’). The City has therefore rectified the matters highlighted by the Department.*

5.3 The Minutes reveal that the City’s council agreed to:

- adopt a City of Fremantle Alfresco Dining Local Law 2014 (No. 2) for advertising; and
- repeal the City of Fremantle Alfresco Dining Local Law 2014.

5.4 By letter dated 29 January 2015, attached at **Appendix 2**, the Mayor confirmed the (above) information in the Minutes. The letter also reveals that the proposed timeline for making a replacement instrument will not be gazetted till, at the earliest, 3 April 2015. This is well beyond the Indicative (debating date) of the Local Law in the Legislative Council<sup>4</sup> and too late for a replacement instrument to effect a repeal of the Local Law.

## **6 CONCLUSION**

6.1 Committee Term of Reference 10.6(a) is offended. It states:

*In its consideration of an instrument, the Committee is to inquire whether the instrument — (a) is within power,*

6.2 The Act is clear. Failure to complete the procedure in section 3.12(6) results in non-compliance with section 3.12. The Local Law is not ‘within power’ and therefore invalid.

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<sup>4</sup> As at the tabling of this Report, the Indicative Date is 10 March 2015.

6.3 There are a number of benefits to recommending the disallowance of invalid instruments, including ensuring that they are quickly removed from the public record and reducing the risk of public misinformation.

6.4 Should the Legislative Council disallow the Local Law, the *City of Fremantle Local Laws Relating to Outdoor Eating Areas* gazetted in 1998 will revive.

**7 RECOMMENDATION**

7.1 The Committee recommends to the Legislative Council that the Local Law be disallowed.

**Recommendation 1: The Committee recommends that the *City of Fremantle Alfresco Dining Local Law 2014* be disallowed.**



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**Mr Peter Abetz MLA  
Chairman**

**19 February 2015**

**APPENDIX 1**  
**SECTION 3.12 OF THE *LOCAL GOVERNMENT ACT 1995***



# APPENDIX 1

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

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### 3.12. Procedure for making local laws

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

- (c) advising that copies of the local law may be inspected or obtained from the local government's office.
- (7) The Minister may give directions to local governments requiring them to provide to the Parliament copies of local laws they have made and any explanatory or other material relating to them.
- (8) In this section —  
**making** in relation to a local law, includes making a local law to amend the text of, or repeal, a local law.

**APPENDIX 2**  
**LETTER FROM THE CITY OF FREMANTLE DATED 29**  
**JANUARY 2015**





## APPENDIX 2

### LETTER FROM THE CITY OF FREMANTLE DATED 29 JANUARY 2015

From the office of the Mayor

Our Ref: TTP

Contact: Tanya Toon-Poynton - 9432 9643

29 January 2015

Mr Peter Abetz MLA, Chairman  
Joint Standing Committee on Delegated Legislation  
Legislative Council Committee Office  
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*The opinions expressed in this letter  
are not necessarily those of the City  
of Fremantle.*

Dear Mr Abetz

#### CITY OF FREMANTLE ALFRESCO DINING LOCAL LAW 2014

I refer to the letter received by my office on 17 December 2014, reference AT:3933/10.

The City of Fremantle Council did record a motion, by absolute majority, on 22 October 2014, to repeal the City of Fremantle Alfresco Dining Local Law, and make the replacement City of Fremantle Alfresco Dining Local Law 2014, No.2.

Unfortunately the report that went to the council meeting does not contain a clear purpose and effect of the Local Law as required under section 3.12(2) of the *Local Government Act 1995*.

City Officer's requested advice from an advisory officer at the Joint Standing Committee on Delegated Legislation, who suggested the purpose and effect implied at that meeting was not sufficient. Based on this advice, the purpose and effect of the local law was noted in the agenda of the Council meeting held on 28 January 2015, and recorded in the minutes.

The anticipated timeline, as requested, for final gazettal of the local law is as follows:

Proposed date	Action
30 January – 18 March	Public advertising period (+42 days)
25 March 2015	Adoption of the local law at the Ordinary Meeting of Council
3 April 2015	Proposed gazette date

If you have any queries in relation to this matter, please contact  
Tanya Toon-Poynton, Governance Coordinator on 9432 9643

Yours sincerely



Dr Brad Pettitt  
Mayor