

**JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION**

*Sixty-fifth Report — “Explanatory Report in Relation to Legal Profession Conduct Amendment Rules 2013” —  
Tabling*

**MR P. ABETZ (Southern River)** [10.00 am]: I present for tabling the sixty-fifth report of the Joint Standing Committee on Delegated Legislation entitled “Explanatory Report in Relation to Legal Profession Conduct Amendment Rules 2013”.

[See paper 1091.]

**Mr P. ABETZ:** Part of the role of Parliament and its committees is to scrutinise the operations of the executive and any other bodies to which it delegates the role of making subsidiary legislation. Explanatory memorandums are important in assisting Parliament in performing this role, by providing information on the purpose and operation of the proposed legislation. If explanatory memorandums are deficient, this role of the Parliament as well as the effectiveness of the system of checks and balances that forms part of the basis of the separation of powers in Australia’s Westminster system of government is significantly undermined.

Also, committees are required to seek additional information from bodies that make subsidiary legislation. This results in a delay in the scrutiny process, which could be avoided if a sufficient explanatory memorandum is provided. This is not ideal given the tight time frames under which the committee operates to report to the Parliament on subsidiary legislation.

The Parliament has delegated to the Legal Practice Board of WA the role of making subsidiary legislation, pursuant to part 17, division 2 of the Legal Profession Act 2008. As the delegator, Parliament is owed full disclosure and due diligence in the preparation of any explanatory memorandum by a delegate body. The committee was initially unable to properly perform its function of scrutinising the amendment rules because the explanatory memorandum provided by the Legal Practice Board was, in the view of the committee, deficient. The main deficiency of the explanatory memorandum was that it failed to adequately explain the rationale behind making some of the amendment rules. This is essential to enable the committee to perform its scrutineer role.

The committee had a number of concerns with some of the exemptions introduced by the amendment rules, which have been raised with the Legal Practice Board. The responses provided to the committee did not initially allay the committee’s concerns. Although these concerns have now been allayed, considerable time was spent by the committee obtaining the information that, in the view of the committee, ought to have been in the explanatory memorandum. Although on 23 October the committee moved in the other place that the notice of motion to disallow the amendment rules be discharged from the notice paper, the committee still wishes to draw the inadequacy of the explanatory memorandum to the attention of the house by this explanatory report.

*Sixty-sixth Report — “Supreme Court Amendment Rules 2013” — Tabling*

**MR P. ABETZ (Southern River)** [10.03 am]: I present for tabling the sixty-sixth report of the Joint Standing Committee on Delegated Legislation entitled “Supreme Court Amendment Rules 2013”.

[See paper 1092.]

**Mr P. ABETZ:** The committee took issue with the requirement in the amendment rules for adequate reasons to be given for a challenge to an administrative decision when a person makes an application for a judicial review of that decision. The committee noted that in 1986, the High Court of Australia decided in *Public Service Board of New South Wales v Osmond* that there is no general rule of the common law or principle of natural justice that requires reasons, adequate or otherwise, to be given for administrative decisions. The committee formed the view that the amendment rules would, if allowed, change the common law by subsidiary means. However, any change to the common law begins with a policy decision of executive government and is ultimately debated in a bill before the Parliament. It is not within the remit of the judiciary to change the common law by subsidiary means.

The committee was not persuaded by the argument of the Honourable Chief Justice of Western Australia that the amendment rules constitute mere matters of practice or procedure. The committee formed the view that in this instance the boundaries of permissible rule-making had been exceeded and there has been an intrusion into rule-making in respect of substantive rights of parties—in this case, the existing common law right of an administrative decision-maker not to give reasons for a decision. The committee, therefore, recommends that the amendment rules be disallowed. The disallowance motion will be debated in another place.

*Sixty-seventh Report — “Information Report in Relation to City of Fremantle  
Plastic Bag Reduction Local Law 2012” — Tabling*

**MR P. ABETZ (Southern River)** [10.05 am]: I present for tabling the sixty-seventh report of the Joint Standing Committee on Delegated Legislation entitled “Information Report in Relation to City of Fremantle Plastic Bag Reduction Local Law 2012”.

[See paper 1093.]

**Mr P. ABETZ:** This local law is the first of its kind introduced by a local government in Western Australia, and possibly Australia, regarding the regulation of the use of plastic bags. The local law seeks to reduce the use of plastic shopping bags within the city by, firstly, prohibiting retailers from providing what is termed “single-use plastic bags” and, secondly, requiring retailers to charge a minimum fee of 10c for each alternative shopping bag, as defined, provided to customers. That is provided for in clause 6. The city seeks to justify the local law on the basis of waste reduction as well as to modify consumer behaviour.

The committee is of the view that the City of Fremantle Plastic Bag Reduction Local Law—the local law—is, with the exception of clause 6, within the power of the Local Government Act 1995 under the committee’s term of reference, clause 6.6(a). The committee also recognises a range of views about whether clause 6 of the local law is, firstly, within power of the Local Government Act 1995, and, secondly, under the committee’s terms of reference at clauses 6.6(b) and 6.6(d), the local law has no unintended effect on any person’s existing right or interests and contains only matter that is appropriate for subsidiary legislation. The committee sets out these views consistent with its term of reference at clause 6.4(b) for the information of Parliament.

The committee recommends that Parliament take note of the range of views expressed in this report on whether the City of Fremantle Plastic Bag Reduction Local Law 2012 satisfies the committee’s terms of reference. The consideration of the notice of motion tabled by the committee to disallow the local law will be dealt with in the other place.

Having concluded the committee statement, I would like to make some personal remarks on this report as chairman of the committee. The issue of plastic bags is something that keeps coming up regularly. The City of Fremantle has taken upon itself to come up with this local law to try to address the situation of what is termed “single-use plastic bags” under the terms of its law. The difficulty with defining “single-use plastic bags” is that most plastic bags are not for single use. In fact, when my wife and I do shopping, we generally take other reusable bags, but quite often we leave them behind deliberately because we want bin liners for our bins. The fact that we can get free shopping bags saves buying bin liners. In some jurisdictions that have banned so-called single-use plastic bags, it has resulted in sales of bin liners more than doubling. It is an interesting shift in the marketplace.

According to the Clean Up Australia website, 3.92 billion plastic bags are used in Australia each year. I am not sure who counted them or how they came to that figure, but it is certainly a possibility. Most plastic bags used in supermarkets are the high-density polyethylene ones, whereas the plastic bags used for luxury goods in more upmarket stores are the low-density polyethylene bags, which are thicker. Because they are thicker, a lot more material is used in their manufacture. In terms of tonnage going into landfill when they are eventually disposed of, it is greater, and, of course, more energy is consumed in their production.

Biodegradable bags, which are classified as an alternative bag under the City of Fremantle’s by-law, cost smaller retailers somewhere between 4.5c and 5.6c each. Companies such as Woolworths and Coles probably buy them cheaper still. Alternative bags, which under the by-law are allowed to be provided by a retailer, the retailer must charge the customer a minimum of 10c. In other words, a very unfortunate situation develops for a retailer. Imagine for a moment a tourist shopping in Fremantle. He even has his cloth shopping bags to take his shopping away in. He buys \$300 worth of goods, but they do not quite all fit into his cloth bags. He does not have any cash with him so he pays using his credit card. It is all done, and the retailer pops it all in the bag but it does not quite fit. If the retailer says, “Don’t worry; I’ve got a bag over here that I can give you”, and if a by-law officer sees that in Fremantle, that retailer will be fined \$150. In other words, the right is taken away from the retailer to give a gift, if he so chooses, of a perfectly legal item to his customer. Technically, the retailer would have to ask for the credit card again and debit the customer 10c; otherwise, he is breaking the law. There are some issues around retailers having to charge 10c for an alternative bag. That is of great concern to me and I believe would be of considerable concern to retailers. In the by-law’s definition of what is a single-use plastic bag, the measurement of 60 microns thick is used. If it is less than 60 microns, it is a single-use bag; if it is over 60 microns, it is not classified as a single-use plastic bag and could be classified as an alternative-use bag.

There is a real issue in a local government forcing a retailer to charge a minimum amount for a particular item. It really sets a precedent. Suppose the City of Fremantle decides that for the benefit of public health no-one should be allowed to sell hamburgers for less than \$10 each. It may say it is for the common good. All of a sudden, no-one is allowed to sell a hamburger for under \$10. To me, this plastic bag by-law goes well beyond what a local government should engage in. I do not have a great issue with a local government wanting to ban thin plastic bags if that is what it chooses to do, but to actually require the retailer to charge a minimum amount for an

alternative bag goes too far. The alternative bag is not an illegal item, but it is really not the role of local government to determine the minimum price a retailer can sell anything for. I assume that when this disallowance motion is debated in the other place, members such as Hon Peter Katsambanis will speak with more knowledge of the law than I have. The biodegradable bags, which are classified as an alternative bag retailers can provide to customers but must charge 10c for, cost a medium-size shop or small retailer about 4.5c each. The local government is saying, “You must put a minimum 100 per cent mark-up on this item to provide it to a customer.” It seems totally inappropriate for a local government to expect that of a retailer. It is going well beyond its power.

Another issue emerges when we have local government boundaries on one side of the street: on this side of the street the retailer is not allowed to provide plastic bags, and on the other side he is. If I go shopping but have forgotten to take my cloth shopping bags with me, which shop will I go to? I will go to the one at which I can get my free plastic bag. It disadvantages the shops on the other side of the road. Again, some unintended consequences emerge from this by-law that the City of Fremantle is seeking to put in place. If we do not want thin plastic bags used, I believe it would be more appropriate for that to be state legislation rather than local government by-laws. One of the delegated legislation committee’s terms of reference is: does the legislation contain only matter that is appropriate for subsidiary legislation? For the sake of consistency, it would make a lot more sense for state Parliament to make rules on that and for this place to determine whether that is the way WA wants to go. There are certainly some advantages in not having thin plastic bags floating around the environment, there is no question about that, but I do not believe that this by-law from the City of Fremantle is particularly helpful. It creates some significant issues in undermining a retailer’s existing rights or interest to provide a service to their customers in providing a bag for them to take their purchase away in.

Some so-called fabric bags are made out of natural gas or oil and contain probably 100 or 200 times as much raw material to make than the plastic bags. In terms of how many times those bags can be used—they often stretch and rip because they are not woven—questions have been raised about whether those bags are environmentally any better than the so-called single-use polyethylene bags. I believe there are issues that need to be worked through. No doubt it will make for a very interesting debate in the other place.

**MS S.F. MCGURK (Fremantle)** [10.20 am]: I place on the record some comments about this report on the City of Fremantle Plastic Bag Reduction Local Law 2012. I am a member of the Joint Standing Committee on Delegated Legislation. As the member for Southern River, the chair of that committee, has pointed out, there was extensive debate on this initiative by the City of Fremantle, so much so that the committee was unable to reach a decision about whether this by-law should be disallowed. It has left the matter to the Legislative Council to determine its position, and if the outcome of the Legislative Council deliberations is to disallow the local law, I imagine that a disallowance motion would then come to this place to be debated.

The committee was required to consider whether Fremantle council’s initiative to restrict the use of plastic bags was contrary to two particular points. As the member for Southern River, the chair of the committee, has pointed out, it was agreed that the local council’s law was within power on all fronts except two; the debate was whether it contravened two requirements under paragraph 6.6 of the committee’s terms of reference, namely —

- (b) has no unintended effect on any person’s existing rights or interests;
- ...
- (d) contains only matter that is appropriate for subsidiary legislation.

They were the two items debated. We received quite extensive legal advice on this issue, which was that the local law was within power. Notwithstanding that, there was, as I said, quite considerable debate. The full report spells out the arguments for and against whether the local law offends or complies with the committee’s terms of reference.

I should start off by saying that I commend the local council’s efforts to reduce the use of plastic bags and I think that there is a strong sentiment in the community to reduce the use of plastic bags, which, as we know, do not always degrade and often end up in landfill. Some households re-use plastic bags as bin liners, for instance. We all know that sometimes that is not effective because the so-called single-use plastic bags being targeted by the Fremantle council actually often end up with holes in them. Just for the record, it was pointed out to the committee that efforts to reduce plastic bags given away by retailers resulted in increased purchases of commercial bin liners, but we did not have any statistics about whether that resulted in more or fewer plastic bags. Even though the use of commercial bin liners has increased by a certain percentage, it is unclear whether that resulted in reduced use of plastic bags overall. Some of the research we relied on was second-hand. We got that information about increased bin liner use from a report by the New South Wales Parliament research library, which has summarised efforts to legislate for the reduction of plastic bags.

One of issues at the centre of the debate for the committee was whether the law has an unintended effect on a person's existing rights or interests. I argued in the committee that the local law has an intended effect on retailers as well as consumers. The local law bans plastic bags of a certain width and if the retailer then gives away those bags with a purchase, it has to charge a minimum of 10c for each plastic bag. Opponents to this law said that the law applies to the retailer, but it has an unintended effect on the consumer. My argument is that it has an intended effect on the consumer; it sends a message to the consumer that unless they bring an alternative bag, such as a cloth bag, as the member for Southern River referred to, they will be charged 10c. Perhaps then people will think twice about taking these plastic bags at the point of sale. On page 8 of the report is a range of different arguments to support the claim that the local law complies with the committee's terms of reference and, therefore, should be allowed. I will not go over all those points now. I am sure that if the law is disallowed by the upper house, we will have the opportunity to go through those arguments in more detail.

The bottom line is that there is strong community sentiment for policymakers at local, state and federal levels to do something about the amount of waste produced in our community. Reducing the number of plastic bags is a good thing and the City of Fremantle has gone to lengths to have a community debate about this by-law and to put in place an initiative that will reduce plastic bag use. One of the arguments put was that this law is more appropriate for state or federal legislature, which is paragraph 6.6(d) of the committee's terms of reference. Some members of this house will be aware that Labor initiated legislation to limit the use of plastic bags. That legislation was not successful. In the absence of this house or the federal Parliament being prepared to take the initiative on reducing plastic bags, the City of Fremantle's initiative is a good one. There has been extensive local debate. I do not say it has been universally embraced. It has not been applied yet, so we do not know what effect it will have in the community. However, the council has made an effort to discuss the issue extensively in the community. In the absence of other jurisdictions, federal or state, taking up the issue and waging a war to reduce the use of plastic bags, the local council should be commended for its efforts. If a motion is moved to disallow this law to reduce plastic bags in the City of Fremantle, I will argue against it.