

LOCAL GOVERNMENT AMENDMENT BILL 2009

EXPLANATORY MEMORANDUM

OVERVIEW OF BILL

The Bill consists of over 40 amendments to improve the operation of the *Local Government Act 1995*.

Key amendments relate to:

- (a) providing local governments with new powers to enter land to remove graffiti;
- (b) widening the circumstances that local governments can take gravel and other building materials from land for building purposes (roads);
- (c) improving various accountability provisions relating to declaring financial interests, annual returns, elections donations and restricting the types of gifts that council members may receive; and
- (d) stronger powers for the Minister and the Department of Local Government and Regional Development to obtain information from local governments when carrying out investigations.

The Bill also includes a range of technical and minor improvements to the legislation.

CLAUSE NOTES

Outlined below is a brief description of each clause of the Local Government Amendment Bill 2009.

Clause 1 – Short title

Clause 1 cites the short title of the Act.

Clause 2 – Commencement

Clause 2 provides for the commencement of the Act on such days as may be fixed by proclamation.

Clause 3 – The Act amended

The amendments in this Act are to the *Local Government Act 1995*.

Clause 4 – Section 2.7 amended

Section 2.7 provides for the role of a council in relation to a local government.

Clause 4 of the Bill amends section 2.7(1)(a) to clarify that the council 'governs' rather than 'directs and controls' the local government. This amendment is in keeping with the principle that the council should take a high level governance role and the day-to-day direction and controlling is a matter for the Chief Executive Officer and the administration.

Clause 5 – Section 2.25 amended

Section 2.25 provides for the disqualification of a council member for the failure to attend meetings.

Clause 5(1) of the Bill amends section 2.25(2) to provide that the current power of the Minister to approve the granting of leave over a period of more than six consecutive ordinary meetings of a council is not needed if all of those meetings are held within a period of three months. It is presently the case that many local governments have moved to fortnightly rather than monthly meetings. This means that six consecutive ordinary meetings may only cover a period of three months. An absence for up to three months is not considered to be an unreasonable period.

Clause 5(2) of the Bill inserts a new section 2.25(3A) to clarify that leave cannot be granted retrospectively, or retrospectively for part of a meeting, where leave is granted during a meeting.

Clause 5(3) of the Bill covers two issues. Paragraph (a) amends section 2.25(4) to delete the word 'first' to make it clear that leave may be granted during the course of a meeting rather than only prior to a meeting. The second issue is in paragraph (b), which amends section 2.25(4) to include a provision ensuring that if all meetings are held within a two month period, then the existing disqualification requirement for not attending three consecutive meetings without leave would not apply.

Clause 5(4) of the Bill inserts a new subsection (5A) to clarify that should a council member be absent without leave during a two month period within which three or more ordinary meetings are held, then the member is disqualified at the end of the next ordinary meeting following the two month period.

Clause 5(5) of the Bill amends section 2.25(5)(b) to provide that a member who is suspended from attending meetings by the State Administrative Tribunal (SAT) under section 5.117 of the Act is not disqualified under this section.

Clause 5(6) of the Bill has been included to insert a new section 2.25(6) to provide that where council members have had leave granted during the third consecutive meeting for which they are absent, they may continue to hold office despite legal uncertainty as to the validity of this practice.

This has recently become an issue where the SAT has given advice in a particular case that the industry practice of providing leave during the third meeting may not have been valid. The amendments set out in this clause will ensure that the practice of granting leave as late as during the third meeting will continue to apply.

Clause 6 – Section 2.27 amended

Section 2.27 provides for the procedure to determine qualification to retain membership of council.

Clause 6(1) of the Bill amends section 2.27(4)(a) to shorten the period from 28 to 14 days within which a council member is to advise the Chief Executive Officer of his or her entitlement to be a council member when the Chief Executive Officer has issued a notice that the person is to be disqualified.

Clause 6(2) amends section 2.27(6) to provide that if, within 28 days of the notice, the member has not applied to the SAT for a determination of the matter and provided a copy of the application to the Chief Executive Officer, then the person is taken to be disqualified at the end of the 28 day period.

Clause 6(3) provides for the insertion of a new subsection (7A) stating that where such a disqualification occurs, the Chief Executive Officer is to give the member a written notice to that effect.

Clause 6(4) amends section 2.27(7) to ensure that any person, including a Chief Executive Officer, may seek a declaration from the SAT as to whether a council member is disqualified.

Clause 6(5) inserts a new subsection (10) to provide for a transitional arrangement whereby any notices lodged under the existing section 2.27(3) will operate under section 2.27 as if this section had not been amended. This allows matters commenced under the old rules to be completed under those previous provisions.

Clause 7 – Section 2.39 amended

Section 2.39 provides for the appointment of commissioners.

Clause 7 of the Bill amends section 2.39 to clarify that the appointments of commissioners are also made under Schedule 2.4 clause 4. This is only a technical drafting improvement.

Clause 8 – Section 3.27 amended

Section 3.27 provides local governments with the power to enter land to carry out particular activities set out in Schedule 3.2.

Clause 8(1) of the Bill inserts a new subsection (2A) to clarify that these powers also apply to pastoral leases held under the *Land Administration Act 1997*.

Clause 8(2) inserts a new subsection (4A) to remove the restriction on local governments from taking gravel and other building materials where the land is under a form of 'cultivation' that involves the planting of pasture for the purpose of grazing. The intention of this part of the Act has always been to enable access by local governments to land used for grazing purposes despite whether or not any cultivation may or may not have occurred for that purpose.

Clause 9 – Section 3.47 amended

Section 3.47 provides for the disposal of confiscated or uncollected goods.

Clause 9 of the Bill inserts new section 3.47(2b)(ca) to enable regulations to be made to specify particular non-perishable goods that only need to be kept for one month by the local government prior to disposal. It is intended that regulations will be made to specify shopping trolleys as such goods.

It should be noted that for other types of non-perishable goods, the Act requires local governments to keep such goods for a minimum period of two months.

Clause 10 – Section 3.58 amended

Section 3.58 provides for the disposal of local government property. Section 3.58(3) and (4) enable a local government to dispose of property to a particular person as long as prior public notice is given and a valuation of the market value of the property has been obtained.

Clause 10(2) of the Bill amends section 3.58(4)(c) to provide that valuations need not be obtained in circumstances where the council resolves that values have not changed and that the valuation which was carried out more than six months before the proposed disposition still provides a true indication of the property's value.

Clause 10(3) includes a new paragraph (a) in section 3.58(5) to replace the outdated reference to the *Public Works Act 1902* with a new reference to the *Land Administration Act 1997*.

Clause 11 – Section 3.64 amended

Section 3.64 sets out the matters that are to be included in an establishment agreement for a regional local government.

Clause 11 of the Bill amends section 3.64(d) to clarify that there is power for an establishment agreement to provide for deputy members for the regional local government from the member local governments.

Clause 12 – Section 4.17 amended

Section 4.17 provides for cases in which the vacant office of council member can remain unfilled. Section 4.17(3) allows offices to be vacant where at least 80% of the number of offices of member are filled in a local government that does not have wards. The approval of the Western Australian Electoral Commissioner is required in such circumstances.

Clause 12 of the Bill amends section 4.17(3) and adds a new section 4.17(4A) allowing this 80% rule to also apply to a local government that has wards where there are five or more offices of councillor.

This amendment will enable local governments to continue to function without holding unnecessary extraordinary elections where the electors are well represented.

Clause 13 – Section 4.30 amended

Section 4.30 provides for the eligibility of non-resident owners and occupiers to be enrolled.

Clause 13 of the Bill amends section 4.30(1)(c) and adds subsection (3) to clarify that where an enrolment claim is submitted by the close of enrolments, it may be accepted by the Chief Executive Officer after the close of enrolments has occurred. This will give Chief Executive Officers further time to resolve any eligibility issues after the close of enrolments. This will assist in more people being registered to be included on the roll for elections.

Subsection (4) has been added to provide that a person's entitlement to be enrolled will be determined in accordance with the new provisions in section 4.30 if an election is called within the period of 50 days after the commencement of the *Local Government Amendment Act 2009*.

Clause 14 – Section 4.32 amended

Section 4.32 provides for how a person makes an eligibility claim to enrol as a non-resident owner or occupier for a local government election.

Clause 14 of the Bill inserts a new section 4.32(5A) to clarify that where an enrolment claim has been made before the close of enrolments but not processed prior to the close of nominations, the Chief Executive Officer is required to accept or reject the claim before the close of nominations. This will maximise opportunities for people to be enrolled for the purpose of voting and to have the right to nominate as a candidate.

Clause 15 – Section 4.33 amended

Section 4.33 provides for the expiry of claims of eligibility to enrol as an occupier of rateable property under section 4.30. This enables occupiers to be enrolled for two ordinary elections and up to six months after the second ordinary election.

An anomaly arises where a particular local government may not be having ordinary elections because it has been suspended and a commissioner has been appointed to manage the local government. This has the unintended effect of extending the period that an occupier would be enrolled in a way that is different to other local governments having ordinary elections every two years.

Clause 15 of the Bill amends section 4.33 by removing subsections (1a) and (2) and inserting new subsections (2A), (2B) and (2). This will have the effect of bringing local governments under suspension and operating with a commissioner into line with the same expiry timeframe arrangements for occupiers of rateable property in other districts.

The amendments in this clause are also consequential on the amendments in clauses 13 and 14.

Clause 16 – Section 4.43 amended

Section 4.43 provides for the arrangements for corrections that may need to be made to the rolls for local government elections.

Clause 16 of the Bill amends section 4.43(3b) to refer to a new section 4.44A provided for in Clause 17 of the Bill. This is a consequential drafting amendment.

Clause 17 – Section 4.44A inserted

Clause 17 of the Bill inserts a new section 4.44A to provide for new powers for the returning officer to alter the electoral rolls in the lead up to an election where late eligibility decisions have been made by the Chief Executive Officer after the close of enrolments.

Clause 18 – Section 4.48 amended

Section 4.48 provides for eligibility to be a candidate for local government elections.

Clause 18 of the Bill amends section 4.48(2) to clarify that a person who is nominating for the position of elector mayor or president must nominate based on the qualification that the person had at the time of the close of enrolments and at the time of nomination.

Clause 19 – Section 4.59 amended

Section 4.59 provides for regulations about candidates for local government elections.

Clause 19 of the Bill inserts a new section 4.59(c) to clarify that regulations may be made to require the disclosure of elections donations given to candidates from donors.

At present, the current regulations made under this head of power only deal with the requirement for candidates to disclose such donations. It is intended that, once this head of power has been amended, then regulations will be developed to expand the disclosure requirements to include donors.

Clause 20 – Section 5.11A inserted

Clause 20 of the Bill inserts a new section 5.11A to clarify that there is power for local governments to appoint persons to be deputy members of local government committees. This has been included as doubt has been raised as to the extent that the *Interpretation Act 1984* covers this situation.

Section 5.11A(1) provides the power to make appointments by absolute majority.

Section 5.11A(2) specifies the types of persons to be appointed as deputies to local government committees.

Section 5.11A(3) states that a deputy may perform the functions of a member where the member is unable to do so by reason of illness, absence or other cause.

Section 5.11A(4) states that a deputy has all the functions and protection given to a member of a committee.

Clause 21 – Section 5.36 amended

Section 5.36 provides for the appointment of Chief Executive Officers of local governments. Under this section, it is a requirement for all vacant positions of Chief Executive Officer to be advertised regardless of the situation.

Clause 21 of the Bill inserts a new section 5.36(5A) to provide a new power to exempt by regulations the requirement to advertise. It is proposed that the regulations will deal with particular practical situations where acting Chief Executive Officer arrangements are necessary or where a Chief Executive Officer may be shared by more than one local government.

Clause 22 – Section 5.37 amended

Section 5.37 provides for the appointment of senior employees of local governments.

Clause 22 of the Bill inserts a new section 5.37(4A) to provide a new power to exempt by regulations the requirement to advertise. It is proposed that the regulations will deal with particular practical situations where acting arrangements are necessary.

Clause 23 – Section 5.43 amended

Section 5.43 provides for limits on delegations to Chief Executive Officers.

Clause 23 of the Bill inserts a new section 5.43(ha) to specify that the power of council to authorise a person to sign documents can not be delegated to the Chief Executive Officer. This relates to new powers included in clause 42 of the Bill providing for the execution of local government documents.

Clause 24 – Section 5.47 replaced

New section 5.47 provides for regulations relating to local government superannuation for employees.

Clause 24 of the Bill repeals the current section 5.47 and replaces it with new section 5.47 which gives a wider head of power to allow regulations to be made about superannuation matters. At present, the regulations relating to this matter provide for the current industry scheme to be the default scheme, should a new employee not nominate a particular superannuation fund. These regulations have been made under a transitional head of power under Schedule 9.3 clause 16.

For drafting continuity, it is proposed to move these regulations under the power set out in the new section 5.47.

Clause 25 – Section 5.48 amended

Section 5.48 provides for long service benefits for employees and employees of local government associations.

Clause 25 of the Bill amends section 5.48(1) to update the reference to the Western Australian Local Government Association as the relevant association subject to this provision. This is a minor drafting update.

Clause 26 – Section 5.62 amended

Section 5.62 provides for the definition of a 'closely associated person' in relation to the financial interest provisions of the Act. These relationships require council members to declare financial interests at meetings.

Clause 26 of the Bill amends section 5.62(1) to include two additional categories of 'closely associated person' being a person who gives a gift or a travel benefit to an elected member which needs to be disclosed in the annual financial return of a member. Accordingly, where a member receives such a gift or travel benefit since being last elected, the member will have a financial interest with that person.

Clause 27 – Section 5.63 amended

Section 5.63 provides for financial interests which do not need to be disclosed by a council member.

Clause 27 of the Bill amends section 5.63(1)(b) by clarifying that the exemption referred to in section 5.63(1) does not extend to issues before council relating to the overdue rates of an individual council member. Paragraph (b) is amended by deleting the words 'arising from' and inserting instead the word 'in'.

The current exemption provision refers to 'an interest arising from' the imposition of any rate. This has been interpreted as extending the exemption where the council member's payment difficulties are considered at a council meeting. This is not appropriate. Accordingly, this amendment will provide for the exemption to only apply at the point where the rates are set in the budget by the council as these rates will affect all ratepayers. The inclusion of the word 'in' has that limiting effect.

Clause 28 – Section 5.78 amended

Section 5.78 provides for the requirements in disclosure of information in a primary or an annual return.

Section 5.78(2)(b) currently provides for non-disclosure in the actual value, amount or extent of any asset, income, interest, gift, contribution, debt or disposition of real property.

Clause 28 of the Bill amends section 5.78(2)(b) by leaving out gifts and travel contributions from the non-disclosure provision.

Clause 29 – Section 5.82 amended

Section 5.82 provides for a council member to disclose in the annual return the details of gifts received.

Clause 29 of the Bill amends section 5.82(1) to include a new requirement for the disclosure of the value of such a gift.

Clause 30 – Section 5.83 amended

Section 5.83 provides for a council member to disclose in the annual return the details of travel contributions received.

Clause 30 of the Bill amends section 5.83(1) to include a new requirement for the disclosure of the value of such travel contributions.

Clause 31 – Section 5.96 amended

Section 5.96 enables people to be provided with copies of certain local government information at a price that does not exceed the cost of producing the copies.

Clause 31 of the Bill amends section 5.96 to include a head of power for regulations to limit this provision by specifying circumstances where it will not apply. It is proposed that these regulations will limit the supply of the electoral roll and the rates record to ensure that they are not used for private marketing purposes.

Clause 32 – Part 5 Division 8 heading replaced

The current heading for Part 5 Division 8 provides for 'Fees, expenses and allowances'.

Clause 32 of the Bill amends the heading to Part 5 Division 8 to read 'Local government payments and gifts to its members' to reflect the change of content in that Division by the amendments in clause 33.

Clause 33 – Section 5.98 amended

Section 5.98 provides for fees and expenses for council members. Fees may be paid to council members for attending council or committee meetings.

Clause 33 of the Bill inserts section 5.98(2A) to enable regulations to specify other types of meetings where councillors will also be paid fees for attending. Councils will have the discretion to determine whether fees will be paid for attending such meetings.

An example of a type of meeting to be included in the regulations is a meeting of a regional organisation of councils where a councillor is representing the interests of a particular local government.

Clause 34 – Section 5.100A inserted

Clause 34 of the Bill inserts a new section 5.100A to provide a regulation making power to specify the types of gifts that councils will be permitted to give to council members.

Concerns have been raised about councils granting councillors particular types of gifts that are not considered to be in the interests of good local government. This new regulation making power is intended to limit those practices.

Clause 35 – Section 5.101A inserted

Clause 35 of the Bill inserts a new section 5.101A to provide a regulation making power to specify the method that a council member may use in paying expenses.

A number of local governments have recently adopted practices where credit cards are issued to council members for this purpose. The new regulations will specify the particular methods, such as credit cards, that council members will be authorised to use.

Clause 36 – Section 6.14 amended

Section 6.14 provides for powers for local governments to invest their funds.

Clause 36 of the Bill amends section 6.14(2) of the Act to remove obsolete references included in (2)(a) and (b). This is a minor drafting improvement.

Clause 37 – Section 6.25 amended

Section 6.25 provides for terms used in Part 6, Division 6, Subdivision 1 of the Act relating to definitions concerning rating.

Clause 37 of the Bill amends section 6.25 to include a definition of 'owner' to make it clear that a 'lease for life' resident is defined in the same way as set out in the *Retirement Villages Act 1992* whereby leaseholders are not 'owners'.

This amendment is necessary to clarify that 'lease for life' residents are not liable for the payment of rates. This is a technical amendment to clarify this issue based on recent interpretation of the Act.

Clause 38 – Section 6.29 replaced

Section 6.29 provides for valuation and rates on mining and petroleum interests.

Clause 38 of the Bill amends section 6.29 to remove any ambiguity relating to the power of the Minister to determine that portions of mining tenements (such as buildings and plant) may be rated under the Gross Rental Value system. The whole of section 6.29 has been re-drafted to clarify this issue.

In addition, a new section 6.29(5) has been included to validate previous decisions of the Minister prior to the commencement of this Bill.

Clause 39 – Section 6.33 amended

Section 6.33 provides for differential general rates.

Clause 39(1)(a) of the Bill amends section 6.33 to enable local governments to also apply differential rates throughout their districts based on zonings additional to those under the *Planning and Development Act 2005*. This will enable local governments to use other types of land use zonings included in Redevelopment Acts (such as the *Armada Redevelopment Act 2001*).

In addition, a new section 6.33(5) has been included to validate any past practices of local governments in this area.

Also, clause 39(1)(b) of the Bill amends 6.33(1)(b) to widen the powers of a local government to determine differential rates without necessarily being limited by the predominant purpose for which the land is held. The words 'predominant purpose' are deleted to enable local governments to impose differential general rates for ancillary uses of land.

Clause 40 – Section 6.68 amended

Section 6.68 provides for the exercise of power to sell land where rates have been unpaid for three years.

Clause 40 of the Bill amends section 6.68 to include a new subsection (2) with an additional paragraph (b) to enable local governments to follow processes to sell land without initiating prior court action in circumstances where the council considers such action to be impractical.

This amendment applies to cases where the local government has made reasonable efforts to locate the owner but has been unable to do so.

In addition, where a local government makes this decision, it will be required under the new subsection (3A) to give reasons for its decision at a council meeting. These reasons are to be recorded in the minutes of the meeting at which the decision is made.

Clause 41 – Section 8.2 amended

Section 8.2 allows the Minister or Departmental Chief Executive Officer to request information from a local government concerning its operations or affairs.

Clause 41 of the Bill amends section 8.2(1) to clarify that this power applies to a council member, a Chief Executive Officer or a local government employee in addition to the 'local government' itself.

A further section 8.2(2) has been included to provide for an offence where a person does not comply with a notice requesting information.

Clause 42 – Section 9.16 amended

Section 9.16 provides for the issuing of infringement notices for offences policed by local governments.

Clause 42 of the Bill inserts section 9.16(2A) to clarify that there is a further time period of 28 days for local governments to issue parking infringement notices to the person committing the offence where the person is not the vehicle owner. This overcomes a technical difficulty recently identified in this section.

A further section 9.16(3) has been included as a validation provision to cover the situation where councils have exceeded the current 28 day limitation.

Clause 43 – Sections 9.49A and 9.49B inserted

Part 9 Division 3 of the Act includes provisions about local government documents.

Clause 43 of the Bill inserts a new section 9.49A which deals with the execution of documents. This provision clarifies that local governments may use the common seal to execute documents or have them signed on behalf of the local government by authorised persons. This overcomes a common law view that the seal must be used in all circumstances.

Also, a new section 9.49B has been added which sets out the details of contract formalities.

Clause 44 – Various references to 'Executive Director' amended

Clause 44 of the Bill replaces references to 'Executive Director' (of the Department) with 'Departmental CEO'.

This rectifies drafting inconsistencies from the enactment of the *Local Government (Official Conduct) Amendment Act 2007*.

Clause 45 – Schedule 2.5 amended

Schedule 2.5 sets out provisions relating to the membership and operation of the Local Government Advisory Board.

Clause 45 of the Bill amends Schedule 2.5 to give the Board greater discretion in determining its meeting procedures and practices. This will enable meetings to be

conducted by telephone, video conference or other electronic means on such occasions as may be determined by the Board.

Clause 46 – Schedule 3.1 amended

Schedule 3.1 provides for the specific powers available to local governments to issue notices to owners or occupiers of land to rectify nuisances.

Clause 46(a) of the Bill amends Schedule 3.1 to include new powers to enable local governments to take action to request that graffiti be removed from private property.

A new item 5B is inserted into Schedule 3.1 to enable a local government to issue a notice to an owner of property who refuses to allow the local government to remove the offending graffiti. In such cases, the graffiti must be visible from a public place and considered by the local government to be unsightly or offensive. The local government will have the power to obliterate the graffiti if the owner refuses to comply with the notice.

Clause 46(b) of the Bill amends Schedule 3.1 to widen the current power of local governments to prevent the movement of sand from property onto other land. The amendment expands this power to include other materials such as silt, clay or rocks which can cause similar problems.

Clause 47 – Schedule 3.2 amended

Schedule 3.2 provides for the specific powers available to local governments to undertake particular works on private land.

The Bill provides for further powers for local governments to take action to obliterate graffiti in circumstances where it has been applied without the consent of the owner or occupier. In such cases, this will be at the expense of the local government.

Clause 47 of the Bill amends Schedule 3.2 to include a new item 8 to allow entry by local governments to property for the purpose of removing unauthorised graffiti where it can be seen from a public place.

Clause 48 – *Local Government Amendment Act 2004* amended

Clause 48 of the Bill removes sections 19(2), 20 and 38(3) from the *Local Government Amendment Act 2004* as these sections have not been proclaimed due to drafting and operational difficulties.