



PARLIAMENT OF WESTERN AUSTRALIA

**JOINT STANDING COMMITTEE
ON
DELEGATED LEGISLATION**

THIRTY-SEVENTH REPORT:

*Town of Claremont
Tree Preservation Local Law*

Presented by the Hon R L Wiese MLA (Chairman)
and
the Hon N D Griffiths MLC (Deputy Chairman)

Joint Standing Committee on Delegated Legislation

Members

Hon Bob Wiese MLA (Chairman)
Hon Nick Griffiths MLC (Deputy Chairman)
Hon Simon O'Brien MLC
Hon Ray Halligan MLC
Hon Jim Scott MLC
Mr Ted Cunningham MLA
Mr Iain MacLean MLA
Mr Norm Marlborough MLA

Advisory/Research Officer

Michael Smyth

Committee Clerk

Jan Paniperis

Terms of Reference

It is the function of the Committee to consider and report on any regulation that:

- (a) appears not to be within power or not to be in accord with the objects of the Act pursuant to which it purports to be made;*
- (b) unduly trespasses on established rights, freedoms or liberties;*
- (c) contains matter which ought properly to be dealt with by an Act of Parliament; or*
- (d) unduly makes rights dependent upon administrative, and not judicial, decisions.*

If the Committee is of the opinion that any other matter relating to any regulation should be brought to the notice of the House, it may report that opinion and matter to the House.

ISBN No: 0 7309 8913 5

Report of the Joint Standing Committee on Delegated Legislation

in relation to

Town of Claremont Tree Preservation Local Law

1 Introduction

- 1.1 In the exercise of its scrutiny function, the Committee reviewed the *Town of Claremont's Tree Preservation Local Law* ('Local Law') made under the *Local Government Act 1995* ('Act'). A copy of the Local Law is attached and marked 'Annexure A'. Under the Committee's Joint Rules, if the Committee is of the opinion that a matter relating to any regulation or local law should be brought to the notice of the House, it may report that opinion and matter to the House. It is also the function of the Committee to consider and report on any regulation or local law that appears not to be within power.
- 1.2 The Local Law came about as a result of community concern at the number of trees in the Town's district that were being cut down¹. A draft policy for the purpose of protecting trees was drafted but after an extensive period of public consultation, it became clear that the residents wanted a law which contained legally enforceable sanctions². On this basis the policy was redrafted as a local law.
- 1.3 The broad purpose of the Local Law is to:
- 'preserve trees within the Town of Claremont and to prescribe the manner in which the ratepayers of the Town of Claremont will make application[s] to remove a tree from their private property'³.
- 1.4 To assist in its consideration of the Local Law, the Committee invited one officer from the Town, Mr Saba Kirupanather, Executive Officer Technical Services, and one councillor, Mr Alexander Karas, the instigator of the Local Law, to appear before it on 17 September 1998. Mr Edward Chown, Coordinator, Local Laws WA at the Western Australian Municipal Association, was also invited to attend the inquiry.

¹ Transcript of Evidence, 17 September 1998, page 1, Councillor Karas.

² Transcript of Evidence, 17 September 1998, page 2, Councillor Karas.

³ Town of Claremont, Explanatory Memorandum, forwarded by letter dated 21 July 1998 ('Explanatory Memorandum').

- 1.5 The Local Law was published in the *Government Gazette* on 17 July 1998 and tabled in the Parliament on 12 August 1998. The Deputy Chairman moved a disallowance motion on Thursday 15 October 1998. Under standing order 153(c)⁴, Thursday 19 November 1998 is the last day for debate of the disallowance motion. If not debated then, the question shall be put and determined without further adjournment on the next sitting day, Tuesday 24 November 1998.

2 The Legislative Background

- 2.1 The Local Law was created pursuant to sections 3.5 and 3.10 of the Act which provide:

‘3.5. (1) 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.

(2) A local law made under this Act does not apply outside the local government's district unless it is made to apply outside the district under section 3.6.

(3) The power conferred on a local government by subsection (1) is in addition to any power to make local laws conferred on it by any other Act.

(4) Regulations may set out --

(a) matters about which, or purposes for which, local laws are not to be made; or

(b) kinds of local laws that are not to be made, and a local government cannot make a local law about such a matter, or for such a purpose or of such a kind.

3.10. (1) A local law made under this Act may provide that contravention of a provision of the local law is an offence, and may provide for the offence to be punishable on conviction by a penalty not exceeding a fine of \$5 000.

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

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

⁴ *The Standing Orders of the Legislative Council*

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

(a) the circumstances or extent of the offence;

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

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

2.2 The Committee is satisfied that section 3.5 gives the Town broad powers to create a Local Law for the purpose of preserving trees and that section 3.10 clearly permits penalties to be imposed. The Committee’s concerns stem from the way in which the Local Law has been drafted.

3 **The Committee’s Concerns**

3.1 The Committee’s primary concerns in relation to the drafting of the Local Law are that:

(1) there is no allowance for any exemptions;

(2) the definitions are not extensive or precise enough;

(3) the lack of guidelines as to how the Town would make its decisions on applications to remove trees; and

(4) the deemed refusal clause in paragraph 5.

This report will deal with each of these issues in turn.

3.2 Paragraph 1 of the Local Law provides:

‘(a) No person shall remove, damage or destroy any tree in the Town of Claremont without prior written approval of the Council’s authorised officer.

(b) No person shall authorise, cause or permit the removal, damage or destruction of any tree in the Town of Claremont without prior written approval of the Council’s authorised officer.’

3.3 The difficulty that the Committee has with this paragraph is that it prohibits a wide range of activities involving trees, but fails to provide any exemptions, for example for pruning. This was a source of discussion during the inquiry on 17 September 1998. The

following passage of the Transcript of Evidence is indicative of the Committee's concerns:

'The CHAIRMAN: Can either of you indicate how you differentiate between what you have in part 1(1)(a), that no person shall "remove, damage or destroy", and appropriate pruning of trees? Do you require a permit to prune any of the trees above four metres, which we all have in our yards?

Mr KARAS: We did not preclude pruning. When I wrote this, I looked at other council laws. For example, some define a tree. Some of them had three pages of definitions of "a tree" and a lot on "pruning". One from New South Wales defines lopping.

The CHAIRMAN: How do you differentiate? Do you require a ratepayer to apply to prune a tree? Heaps of trees in my backyard are only a couple of hundred yards from your boundary which are well over four metres; we prune them on a regular basis. It is not lopping or destroying them. We are pruning them to keep them under control.

Mr KARAS: Under our policy and law, that is permitted.

The CHAIRMAN: Can you explain how that is permitted under the wording?

Mr KIRUPANANTHER: The only one that follows on for any wilful damage or removal or destruction.

The CHAIRMAN: It does not say "wilful damage"; it says "damages or destroys".

Mr KIRUPANANTHER: They could do the pruning for the growth of the tree. Questions arose in the last six weeks of people following the advertisement. People contacted us. They do not need permission for pruning, but only to the extent that they damage the tree.

The CHAIRMAN: I understand what you are saying. Interpreting the law strictly, it says that you should not remove, damage or destroy.

Mr KARAS: We do not consider pruning as removing, damaging or destroying - that is maintaining.

Mr MacLEAN: A vexatious person could complain that the person has pruned a tree and injured it. Injuring is part of the prescribed requirement. One could prune a tree to make it look nice and kill it at the same time. This small group of developers, it is within their bounds, to have the trees pruned in such a way. The trees start dying and become a danger and must be taken out. True? If you

pruned a tree and cut the main trunk flat during wet weather, that tree will be injured. It will start to die as water will get into the main trunk. That tree will become a danger because the upper limbs will start to die off. It must be removed. Otherwise, it is a danger and the council will be responsible. The resident has said, "My tree is dying I need to remove it, and the council has said no."

Mr KARAS: I understand that. That and similar questions often arose in public discussions. We all agreed that some element in any community will get around the law or defy it. It is like poisoning and ringbarking. We can tell when a tree is poisoned, but we cannot prosecute somebody because we cannot prove the person has done it.⁵

Beyond not allowing for pruning, there is no differentiation between various species of trees in the Local Law. This is an aspect which should probably be spelled out in the Local Law. The fact that a tree is large does not make it worthy of preservation (this issue of tree height as defined under this Local Law will be dealt with below). It may be that certain rare native trees in the Claremont area are small and would therefore not be protected. Further, the Local Law does not make any allowances for trees that may need to be removed as a matter of urgency if, for example, it poses a threat to life or property.

- 3.4 The Committee is of the view that the Local Law as currently drafted is simply too broad in its application and leaves too much to the discretion of its officers. If pruning was not intended to be covered by the Local Law it should have been specifically excluded.
- 3.5 The second area of concern to the Committee is related to the first. The brevity of the Local Law has meant that the definitions are imprecise. It was pointed out during the inquiry that the definition of 'tree' in the Local Law could be interpreted to include all trees, not just trees over 4 metres.⁶ Mr Karas admitted that this 'was a slip-up in the definition'.⁷ Later, Mr Karas went on to say:

'It comes back to the same argument about what is the definition of a tree. I did not want to put in that definition at all; however, I have seen the local laws in some councils where it is three pages. In practice, it is not worth making a long, complicated lawyer's explanation covering every foreseeable circumstance. We want people to understand the reasons for what we are doing and why we are doing it, rather than to create a legal document that covers every foreseeable, and

⁵ Transcript of Evidence, 17 September 1998, pages 5-6.

⁶ Transcript of Evidence, 17 September 1998, page 6.

⁷ Transcript of Evidence, 17 September 1998, page 6.

unforeseeable, circumstance.’⁸

Committee members also pointed out the difficulties associated with attempting to measure the height of a tree, particularly if it has been knocked down and chopped up.⁹

- 3.6 The Committee also notes that although the ‘Application to Remove Trees’ in Schedule 1 of the Local Law requires an applicant to nominate the species of the tree to be removed, there is nothing within the Local Law which differentiates between species of trees. The difference between a native tree and one that is introduced should be a relevant consideration in a tree preservation local law, but the Town’s Local Law makes no attempt to identify and define different species. Further, although the word ‘destroy’ is defined, the words ‘remove’ and ‘damage’ are not. This is just a sample of the definitions that have not been included. In the Committee’s view, this deficiency undermines the effectiveness of the Local Law.
- 3.7 The third area of concern stems again from the way the Local Law has been drafted. As a result of the brief nature of the Local Law, there are no clear indications as to how the Town will evaluate an application to remove a tree. It is not clear on what basis the removal of a tree will be allowed. Does the tree have to be sick or dangerous? What about home owners who simply want to change the look of their garden?
- 3.8 As it stands, the Local Law amounts to an infringement of a person’s rights over their private property. In the Committee’s view, the lack of any exemptions coupled with deficiencies in the definitions means that there is no clear indication as to how the Town will evaluate an application to remove a tree. This adds a further unacceptable element of uncertainty for those residents who are bound by the Local Law.
- 3.9 The final point of concern to the Committee is paragraph 5 of the Local Law which provides:

‘Any application not approved by the Council within 60 days of lodgement shall be deemed to have been refused.’

Members of the Committee raised their concerns in regard to this paragraph during the inquiry as follows:

‘The CHAIRMAN: One matter must be raised; that is, No 5 of the local law, that any application not approved by council within 60 days of lodgment shall be deemed to have been refused. To my way of thinking, that is totally

⁸ Transcript of Evidence, 17 September 1998, page 12.

⁹ Transcript of Evidence, 17 September 1998, page 11.

inappropriate. Was that done deliberately? It seems to me that if the council fails to act, the person applying is automatically refused. There should be an obligation on council to act positively -or negatively -and if it does not, the person should be allowed to go ahead with the removal of the tree.

Mr KARAS: It fits in with the way the town planning schemes in most councils operate. Although I am not very experienced in this area, I believe the intention is to stop council sitting on the application deliberately, or administratively being incompetent.

The CHAIRMAN: That is my point. At this stage in the way it is written, if the council sits on the application and does nothing, for whatever reason, it is automatically refused. Do you accept that is appropriate?

Hon SIMON O'BRIEN: The wording would be changed so that it reads that "it not be approved". Perhaps it is a typographical error.

The CHAIRMAN: It is not a typographical error, because it is in the law.

Hon SIMON O'BRIEN: The way it is now, it allows the council to sit on the application for 60 days and it need not be refused.

Mr KARAS: There is a right of appeal.

Mr MacLEAN: We should be encouraging the council to work more efficiently. It should be within 60 days of approval.

The CHAIRMAN: I raise this matter because the committee will be looking at commenting on it and I wondered whether you had any views about it.

Mr KARAS: In all town planning schemes, every council does it in this way.

The CHAIRMAN: This is not a town planning scheme; it is a local law. Do you have any comment?

Mr KIRUPANANTHER: Not really. Our interest is to see a good tree remain. If we put in the words being suggested, if there is a lapse, the tree could be removed.

The CHAIRMAN: Not if the council is looking after the trees and doing its job properly within 60 days.¹⁰

¹⁰ Transcript of Evidence, 17 September 1998, page 13.

The Committee recognises that deemed refusal clauses are common place in town planning schemes, but believes it will have unfair consequences in the context of this Local Law. It is the Committees view that this paragraph of the Local Law should be changed so that if the application is not approved or refused within 60 days, the application ‘shall be deemed to have been **approved**’.

3.10 For the reasons outlined above, the Committee is of the view that the Local Law as drafted:

- (1) unduly trespasses on established rights, freedoms or liberties and unduly makes rights dependant upon administrative, and not judicial, decisions;
- (2) fails to allow for any exemptions;
- (3) does not include definitions for things that should be defined and does not adequately define those things that are defined;
- (4) gives no indication as to how the Town would make its decisions on applications to remove trees; and
- (5) contains a deemed refusal clause which is unfair in its operation.

3.11 On this basis, the Committee recommends disallowance of the *Town of Claremont Tree Preservation Local Law*. It should be noted that the Committee recognises the underlying objective of the Local Law, that is the preservation of trees, and acknowledges the considerable consultation process that the Town followed in order to reflect the interests of its residents. However, the Committee is of the view that the Local Law as currently drafted is simply too broad in its application and leaves too much to the discretion of its officers

.....
 Hon R L Wiese MLA
 Chairman
 November 12, 1998

ANNEXURE A

3786

GOVERNMENT GAZETTE, WA

[17 July 1998

LOCAL GOVERNMENT

LG101

PRINTERS CORRECTION
SHIRE OF COOLGARDIE

Application for Revestment of Land in Crown

An error occurred in the notice published under the above heading on page 3538 of *Government Gazette* No. 128 dated 30 June 1998 and is corrected as follows—

delete the line "Government in accordance with Section 6.74 of the Local Government in accordance with Section 6.74"

insert " Government in accordance with Section 6.74 "

LG301*

LOCAL GOVERNMENT ACT 1995
TOWN OF CLAREMONT

LOCAL LAW: TREE PRESERVATION

IN PURSUANCE OF THE POWERS conferred upon it by the abovementioned Act and of all other powers enabling it the Council of the Town of Claremont hereby records having resolved on the 27th day of January 1998 to make the following Local Law:

DEFINITION

In this Local Law, unless the context otherwise requires:

"Act" means the Western Australia Local Government Act 1995;

"Authorised Officer" means an officer of the Town of Claremont authorised to administer and enforce the provisions of this Local Law;

"Destroy" includes to poison or ringbark or cut down or remove;

"Council" means the Council of the Town of Claremont;

"Tree" includes any tree having a height of more than 4 metres above ground level.

Any word or expression used in this Local Law shall have the meaning given to it in the Act unless the context requires otherwise.

PART 1

1. (a) No person shall remove, damage or destroy any tree in the Town of Claremont without prior written approval of the Council's authorised officer.
- (b) No person shall authorise, cause or permit the removal, damage or destruction of any tree in the Town of Claremont without prior written approval of the Council's authorised officer.
2. Application to remove trees shall be made in the form of Form 1 in the Schedule.
3. The authorised officer may grant an approval with or without conditions or may refuse approval.
4. Any approval given by the authorised officer shall expire 12 months from the date of the approval.
5. Any application not approved by the Council within 60 days of lodgement shall be deemed to have been refused.
6. A person aggrieved by a decision of the Council may object or appeal in the manner provided for in Part 9 of the Act.
7. Council may, by notice in writing to any person convicted of removing a tree, require that person to plant and maintain a tree or trees of a species and size or height and in the manner and place specified in that notice.
8. Any person who injures or destroys a tree or who does or omits to do any act and in so doing contravenes this Local Law or permits or causes any such act or omission to be made or done commits an offence and upon conviction is liable to a penalty not exceeding \$5 000.

SCHEDULE: FORM 1

TOWN OF CLAREMONT
APPLICATION TO REMOVE TREES

I/We.....of.....
(name) (postal address)

17 July 1998]

GOVERNMENT GAZETTE, WA

3787

.....DO HEREBY APPLY FOR PERMISSION FOR THE REMOVAL OF
(number)

.....
(description of tree and species)

as shown on the sketch below or marked by.....
on the property being House No:..... Lot No:..... DP:.....

Street:..... Locality:.....
Reason for removal:.....

I confirm that I have sent a copy of this application to the owners of all land which abuts the above property. It was sent no later than two weeks prior to the date of this application.
I confirm that I have not received any objection from any of those persons as at the date of this letter. / I attach copies of objections which I have received. (Delete as appropriate)

Signature of Applicant..... Date:.....

OWNER/S AUTHORISATION

I/We have no objection to the above application being made. I/We also authorise any servant of Council to enter upon my/our land at any reasonable time, without notice, to make inspections in relation to this application.

I/We accept ultimate responsibility for complying with the conditions of any approval.
Signature..... Date:.....

SKETCH
(Include street and indicate North)
(Include new planting proposals)
(Include photo if desired)

OFFICE USE ONLY

PERMISSION IS GRANTED/REFUSED FOR THE FOLLOWING WORK:

for a period of (12) months from.....subject to the following conditions:

1. The applicant plant..... trees on the block of a type approved by Council's authorised officer. Should any such trees die within 3 years from the above date, they are to be replaced by identical trees within one month of their dying.
2.
3.

*THIS APPROVAL SHOULD BE RETAINED FOR INSPECTION

CHIEF EXECUTIVE OFFICER Per.....

THE COMMON SEAL of the TOWN OF CLAREMONT was hereunto affixed by authority of a resolution of the Council in the presence of—

PETER OLSON, JP Mayor.
R. J. STEWART, Chief Executive Officer.