

40TH PARLIAMENT



Report 4

JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

*Report in relation to the City of Gosnells Waste Local Law 2016
and the Shire of Chittering Waste Local Law 2017*

Presented by
Ms Emily Hamilton MLA (Chair)

and

Hon Robin Chapple MLC (Deputy Chair)

November 2017

Joint Standing Committee on Delegated Legislation

Members as at the time of this inquiry:

Ms Emily Hamilton MLA (Chair)

Mr Ian Blayney MLA

Ms Elizabeth Mettam MLA

Mrs Robyn Clarke MLA

Hon Robin Chapple MLC (Deputy Chair)

Hon Kyle McGinn MLC

Hon Martin Pritchard MLC

Hon Charles Smith MLC

Staff as at the time of this inquiry:

Mr Sam Hastings (Advisory Officer (Legal))

Ms Clair Siva (Committee Clerk)

Address:

Parliament House

4 Harvest Terrace, West Perth WA 6005

Telephone: 08 9222 7300

Email: delleg@parliament.wa.gov.au

Website: www.parliament.wa.gov.au

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Government Response

This Report is subject to Standing Order 191(1):

Where a report recommends action by, or seeks a response from, the Government, the responsible Minister or the Leader of the House shall provide its response to the Council within not more than 2 months or at the earliest opportunity after that time if the Council is adjourned or in recess.

The two-month period commences on the date of tabling.

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**EXECUTIVE SUMMARY AND RECOMMENDATIONS FOR THE
REPORT OF THE JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION
IN RELATION TO THE CITY OF GOSNELLS WASTE LOCAL LAW 2016 AND THE SHIRE OF
CHITTERING WASTE LOCAL LAW 2017**

REPORT

EXECUTIVE SUMMARY

- 1 The Joint Standing Committee on Delegated Legislation (Committee) is of the view that the City of Gosnells and the Shire of Chittering did not follow section 61 of the *Waste Avoidance and Resource Recovery Act 2007* (WARR Act) when they respectively made the City of Gosnells Waste Local Law 2016 (Gosnells Local Law) and the Shire of Chittering Waste Local Law 2017 (Chittering Local Law).
- 2 The procedure in section 61 of the WARR Act provides that a local government can only make a local law with the consent of the CEO of the department administering the WARR Act. The City of Gosnells and the Shire of Chittering failed to obtain the consent of the CEO prior to making the Gosnells Local Law and Chittering Local Law.
- 3 The laws are invalid as they do not comply with section 61 of the WARR Act and offend Committee Term of Reference 10.6(a) in that they are not '*within power*'.

RECOMMENDATIONS

- 4 Recommendations are grouped as they appear in the text at the page number indicated:

Page 6

Recommendation 1: The Committee recommends that the City of Gosnells Waste Local Law 2016 be disallowed.

Recommendation 2: The Committee recommends that Shire of Chittering Waste Local Law 2017 be disallowed.

REPORT OF THE JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION
IN RELATION TO THE CITY OF GOSNELLS WASTE LOCAL LAW 2016 AND THE SHIRE OF
CHITTERING WASTE LOCAL LAW 2017

REPORT

1 REFERENCE AND PROCEDURE

- 1.1 On 1 December 2016 the City of Gosnells Waste Local Law 2016 (Gosnells Local Law) was gazetted.
- 1.2 On 23 March 2017 the Shire of Chittering Waste Local Law 2017 (Chittering Local Law) was gazetted.
- 1.3 Upon gazettal, the Gosnells Local Law and Chittering Local Law stood referred to the Joint Standing Committee on Delegated Legislation (Committee). Once the Local Laws were tabled in Parliament, they became instruments that may be subject to disallowance.

2 STATUTORY PROCEDURE FOR MAKING A WASTE LOCAL LAW

- 2.1 The power to make a waste local law is derived from the *Local Government Act 1995* and the *Waste Avoidance and Resource Recovery Act 2007* (WARR Act).
- 2.2 The WARR Act imposes a consent requirement for local governments that wish to make local laws concerning waste. Section 61 of the Act relevantly provides:

61. Local laws in respect of waste management

(1) *A local government —*

(a) may, if the CEO consents; and

(b) must, if the CEO so directs,

make local laws in accordance with the Local Government Act 1995 Part 3 Division 2 Subdivision 2 for the purposes specified in section 64 or generally for carrying into effect the provisions of this Part.

- 2.3 “CEO” is defined in section 3 of the WARR Act:

CEO *means chief executive officer of the department of the Public Service principally assisting in the administration of this Act.*

- 2.4 At the time that the Gosnells Local Law and Chittering Local Law were made, the department of the Public Service principally assisting in the administration of the WARR Act was the Department of Environmental Regulation.
- 2.5 Part 3 Division 2 Subdivision 2 of the *Local Government Act 1995* provides the procedure that a local government is to follow in making a local law.
- 2.6 In order to assist local governments to pass valid local laws, the Department of Local Government, Sport and Cultural Industries has for many years published a *Statutory*

Procedures Checklist (checklist), which outlines the procedural steps to pass a valid local law. The requirement for the CEO's consent to the final version of a waste local law is clearly specified in Part C of the checklist.

- 2.7 The Committee is of the view that the obtaining of the CEO's consent is a condition precedent to the formal making of a waste management local law.

3 PROCEDURAL SCRUTINY OF THE GOSNELLS LOCAL LAW

- 3.1 The Committee first scrutinised the Gosnells Local Law at its meeting on 7 August 2017. The Committee resolved to conduct a procedural scrutiny of the local law.

- 3.2 The Explanatory Memorandum for the Gosnells Local Law was accompanied by the checklist. The checklist indicates that on 21 September 2016 a copy of the proposed local law was sent to the CEO for comment.

- 3.3 The local law was published in the Government Gazette on 1 December 2016.

- 3.4 On 15 February 2017 the Committee received a letter from the Director General of the Department of Environmental Regulation (the CEO). This letter is attached as Appendix 1. The letter identifies that prior to the City making the local law, the CEO provided suggested amendments. These amendments were adopted by the Council prior to making the local law at their Council meeting on 22 November 2016.

- 3.5 However, at that meeting, further substantive amendments were made to the Gosnells Local Law, including the insertion of a new definition of "nuisance". The CEO was not provided a final copy of the law (including the new definition of "nuisance") to give his consent, prior to the making of the law on 22 November 2016.

- 3.6 The letter identifies that the City of Gosnells may have believed that it had implied consent to make the local law based on its correspondence with Mr Banks. Notwithstanding this position, a substantive amendment was made to the law prior to its making. Therefore, actual consent to the making of the final local law (including the objectionable substantive addition) was not provided as required by the WARR Act.

- 3.7 In conducting a procedural analysis of the law, the Committee had regard to the checklist submitted by the City in support of the laws. The Committee notes that the checklist does not indicate that the City completed the procedural step of obtaining the consent of the CEO to the final version of the law.

- 3.8 On the face of the materials before the Committee, no valid consent was provided by the CEO prior to the making of the local law.

4 PROCEDURAL SCRUTINY OF THE CHITTERING LOCAL LAW

- 4.1 The Committee first scrutinised the Chittering Local Law at its meeting on 7 August 2017. The Committee resolved to conduct a procedural scrutiny of the local law.

- 4.2 The Explanatory Memoranda for the Local Law was accompanied by the checklist. The checklist indicates that a copy of the proposed local law and a copy of a state-wide

public notice were provided to the Minister of the Department of Environment and Conservation for consideration.

- 4.3 In considering this law, the Committee, through its staff, made contact with the Shire of Chittering. The Shire's representative provided two items of correspondence from the CEO to the Shire.
- 4.4 In the first letter (extracted at Appendix 2), dated 20 December 2016, the CEO provides comment on the substance of the local law and requests that a final version of the law be provided for his consent prior to its adoption by the Shire.
- 4.5 In the second letter (extracted at Appendix 3), dated 26 April 2017, the Acting CEO wrote to the Shire, highlighting that he had not given his consent to the making of the Chittering Local Law and had not been consulted, as requested, on the final version of the law. By this stage the local law had been made on 16 February 2017 and gazetted on 23 March 2017.
- 4.6 In conducting a procedural analysis of the law, the Committee had regard to the checklist submitted by the Shire in support of the laws. The Committee notes that the checklist does not indicate that the Shire completed the procedural step of obtaining the consent of the CEO to the final version of the law.
- 4.7 On the face of the materials before the Committee, no valid consent was provided by the CEO prior to the making of the local law.

5 CAN SECTION 3.12(2A) SAVE THE LOCAL LAWS FROM INVALIDITY?

- 5.1 Section 3.12(2A) of the *Local Government Act* provides:

(2A) Despite subsection (1), a failure to follow the procedure described in this section does not invalidate a local law if there has been substantial compliance with the procedure. (emphasis added)

- 5.2 The Committee is of the view that section 3.12(2A) cannot be relied upon to save either the Gosnells Local Law or the Chittering Local Law from invalidity. Section 3.12(2A) only pertains to deficiencies in the local law-making procedure under section 3.12 of the *Local Government Act 1995*, not deficiencies in the procedure under any other Act. The requirement to obtain the consent of the CEO is contained in the WARR Act and could not be taken to be included as part of 'the procedure' under section 3.12 of the *Local Government Act*.

6 THE IMPORTANCE OF COMPLIANCE WITH SECTION 61 OF THE WASTE AVOIDANCE AND RESOURCE RECOVERY ACT 2007

- 6.1 The requirement in section 61 of the WARR Act to give the CEO copies of the proposed local law and receive consent to make the law is a critical step in the waste law making process. The WARR Act provides the CEO with broad powers to oversee the local law making process, including the power to direct a local government to make or amend a

local law.¹ Such broad powers, as provided by the Parliament, are a clear indication of the critical role that the CEO plays in the administration and oversight of the local law making process.

7 CONCLUSION

7.1 Term of Reference 10.6(a) states:

In its consideration of an instrument, the Committee is to inquire whether the instrument –

(a) is within power.

7.2 The Gosnells Local Law and the Chittering Local Law are invalid by reason on non-compliance with section 61 of the *Waste Avoidance and Resource Recovery Act 1995*. They offend term of reference 10.6(a) (above). The Committee therefore recommends to the Legislative Council that the local laws be disallowed.

7.3 There are a number of benefits in recommending disallowance of invalid local laws, including ensuring they are quickly removed from the public record, thereby reducing the risk of public misinformation.

8 RECOMMENDATION

8.1 The Committee makes the following recommendations.

Recommendation 3: The Committee recommends that the City of Gosnells Waste Local Law 2016 be disallowed.

Recommendation 4: The Committee recommends that Shire of Chittering Waste Local Law 2017 be disallowed.



Ms Emily Hamilton MLA

Chair

2 November 2017

¹ *Waste Avoidance and Resource Recovery Act 2007* s 61(2)

APPENDIX 1



Government of Western Australia
Department of Environment Regulation

Your ref: 4604863
Our ref: CEO258/17
Enquiries: Leanne Reid
Phone: 6467 5522
Email: Leanne.Reid@der.wa.gov.au

Mr Ian Cowie
Chief Executive Officer
City of Gosnells
PO Box 662
GOSNELLS WA 6990



Dear Mr Cowie

CITY OF GOSNELLS WASTE LOCAL LAW 2016

I refer to your letter dated 9 January 2017 to the Minister for Environment, Hon Albert Jacob MLA, regarding the City of Gosnells Waste Local Law 2016. The Minister has referred your letter to me for a response.

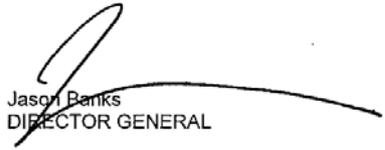
Under the *Waste Avoidance and Resource Recovery Act 2007* (WARR Act), a local government may, if the Chief Executive Officer (CEO) Department of Environment Regulation (DER) grants consent, or must if the CEO DER directs, make local laws in accordance with the *Local Government Act 1995* for waste management services.

I acknowledge that the City of Gosnells did make the changes to the Waste Local Law suggested in my letter of 31 October 2016, however, an addition was also made to the Waste Local Law in the form of a definition of nuisance in clause 1.4(1)(c). If this final version had been provided to me for my consent, I would have requested the removal of the definition of nuisance and the subsequent resubmission of the final version for my written consent.

I understand that this Waste Local Law has been adopted by the City of Gosnells Council and was published in the *Government Gazette* on 1 December 2016, and that it is the City's view that my consent was implied as it made the changes I requested to the earlier version.

I have provided a copy of this correspondence to the Joint Standing Committee on Delegated Legislation for consideration.

Yours sincerely


Jason Banks
DIRECTOR GENERAL

15 February 2017

cc. Ms Lauren Mesiti, Committee Clerk, JSCDL, GPO Box A11, Perth WA 6837

The Atrium, 168 St Georges Terrace, Perth WA 6000
Postal address: Locked Bag 33, Cloisters Square, Western Australia 6850
Phone: (08) 6467 5000 Fax (08) 6467 5562
www.der.wa.gov.au

APPENDIX 2



Government of Western Australia
Department of Environment Regulation

Your ref: O1677317, 19/04/1
Our ref: CEO5334/16
Enquiries: Leanne Reid
Phone: 6467 5522
Email: leanne.reid@der.wa.gov.au

Mr Alan Sheridan
Chief Executive Officer
Shire of Chittering
PO Box 70
BINDOON WA 6502

Dear Mr Sheridan

SHIRE OF CHITTERING PROPOSED WASTE LOCAL LAW

I refer to your letter of 26 October 2016 to the Minister for Environment, Hon Albert Jacob MLA, requesting comment on the Shire of Chittering proposed Waste Local Law 2016.

The majority of the clauses in the proposed waste local law are identical with the template Waste Local Law to which the former Joint Standing Committee on Delegated Legislation (JSCDL) has indicated its general approval. However, in *Schedule 1 – meaning of 'non-collectable waste'* the term 'non-frangible metal' is included. In its Report 77 of November 2014, *Inquiry into a proposed template waste local law*, the JSCDL advised:

In the Committee's view this term is insufficiently certain without further definition ... and would, if contained in a local law, therefore not be within power and would offend Committee term of reference 10.6(a).

I recommend that the Shire either includes a precise definition of the term 'non-frangible metal' or deletes it from the Waste Local Law.

I have been advised that this has been discussed with the Shire's Principal Environmental Health Officer, Mr Glenn Sargeson.

The Department of Environment Regulation (DER) is not able to provide legal advice to the Shire regarding the validity of the local law generally.

Once the consultation period has closed please forward two copies of the final draft for consideration of my consent.

Yours sincerely


Jason Banks
DIRECTOR GENERAL

20 December 2016

SHIRE OF CHITTERING
RECEIVED

03 JAN 2017

Officer.....CHO
File.....1904/1
Ref.....1677317

The Atrium, 168 St Georges Terrace, Perth WA 6000
Postal address: Locked Bag 33, Cloisters Square, Western Australia 6850
Phone: (08) 6467 5000 Fax (08) 6467 5562
www.der.wa.gov.au

APPENDIX 3



Government of **Western Australia**
Department of **Environment Regulation**

Your ref: 01781915; 19/4/1
Our ref: CEO1175/17
Enquiries: Leanne Reid
Phone: 6467 5522
Email: Leanne.Reid@der.wa.gov.au

Mr Alan Sheridan
Chief Executive Officer
Shire of Chittering

Via email: chatter@chittering.wa.gov.au

Dear Mr Sheridan

SHIRE OF CHITTERING WASTE LOCAL LAW 2017

I refer to your letter dated 6 April 2017 regarding the Shire of Chittering Waste Local Law 2017.

Under the *Waste Avoidance and Resource Recovery Act 2007* (WARR Act), a local government may, if the Chief Executive Officer (CEO) grants consent, or must if the CEO directs, make local laws in accordance with the *Local Government Act 1995* for waste management services.

I understand that Mr Jason Banks wrote to you on 20 December 2016 recommending changes to the local law for the purposes of the Chief Executive Officer's role in considering consent. Your letter confirms that the local law was published in the *Government Gazette* on 23 March 2017. I have not yet provided my written consent to the local law and as a result, it may be invalid.

I will review the Shire's Waste Local Law and provide comment as soon as practicable.

Should your staff require further information in relation to this matter, please contact the Department of Environment Regulation's Policy Officer, Ms Leanne Reid, on 6467 5522 or by email at leanne.reid@der.wa.gov.au.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Dan Volaric'.

Dan Volaric
ACTING DIRECTOR GENERAL

26 April 2017

The Atrium, 168 St Georges Terrace, Perth WA 6000
Postal address: Locked Bag 33, Cloisters Square, Western Australia 6850
Phone: (08) 6467 5000 Fax (08) 6467 5562
www.der.wa.gov.au

Joint Standing Committee on Delegated Legislation

Date first appointed:

15 June 2017

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*.



Legislative Council of Western Australia
Parliament House
4 Harvest Terrace, West Perth WA
Telephone: 08 9222 7222
Website: www.parliament.wa.gov.au