THIRTY-SEVENTH PARLIAMENT

REPORT 16

JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

ISSUES OF CONCERN RAISED BY THE COMMITTEE BETWEEN 1 MAY 2005 AND 30 APRIL 2006 WITH RESPECT TO LOCAL LAWS

Presented by Mr Paul Andrews MLA (Chairman)

and

Hon Ray Halligan MLC (Deputy Chairman)

May 2006

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:

"**3. Joint Standing Committee on Delegated Legislation**

3.1 A *Joint Standing Committee on Delegated Legislation* is established.

3.2 The Committee consists of 8 Members, 4 of whom are appointed from each House. The Chairman must be a Member of the Committee who supports the Government.

3.3 A quorum is 4 Members of whom at least 1 is a Member of the Council and 1 a Member of the Assembly.

3.4 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.

3.5 Upon its publication, whether under s 41(1)(a) of the *Interpretation Act 1984* or another written law, an instrument stands referred to the Committee for consideration.

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

(a) is authorized or contemplated by the empowering enactment;

(b) has an adverse effect on existing rights, interests, or legitimate expectations beyond giving effect to a purpose authorized or contemplated by the empowering enactment;

(c) ousts or modifies the rules of fairness;

(d) deprives a person aggrieved by a decision of the ability to obtain review of the merits of that decision or seek judicial review;

(e) imposes terms and conditions regulating any review that would be likely to cause the review to be illusory or impracticable; or

(f) contains provisions that, for any reason, would be more appropriately contained in an Act.

3.7 In this clause -

"**adverse effect**" includes abrogation, deprivation, extinguishment, diminution, and a compulsory acquisition, transfer, or assignment;

"**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 Paul Andrews MLA (Chairman) (since April 2006)

Hon Ray Halligan MLC (Deputy Chairman)

Hon Barbara Scott MLC

Dr Graham Jacobs MLA

Mr Tony Simpson MLA

Hon Robin Chapple MLC (up to May 2005)

Ms Judy Hughes MLA (up to March 2006)

Hon Shelley Archer MLC (since May 2005)

Hon Vincent Catania MLC (since May 2005)

Mr Peter Watson (Chairman up to November 2005)

Ms Jaye Radisich MLA (since March 2006)

Staff as at the time of this inquiry:

Kerry-Jayne Braat, Committee Clerk

Paul Grant, Advisory Officer (Legal)

Irina Lobeto-Ortega, Articled Clerk

Felicity Mackie, Advisory Officer (Legal)

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IN RELATION TO THE

ISSUES OF CONCERN RAISED BY THE COMMITTEE BETWEEN 1 MAY 2005 AND 30 APRIL 2006 WITH RESPECT TO LOCAL LAWS

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1 INTRODUCTION

1.1 One of the major initiatives that the Joint Standing Committee on Delegated Legislation (**Committee**) was involved in during the Thirty-Sixth Parliament was the establishment of the working group of local law stakeholders (**Working Group**), which are the:

- representatives from the Department of Local Government and Regional Development;
- representatives from the Local Government Managers Australia (WA Division);
- representatives from the Western Australian Local Government Association; and
- staff members of the Committee.

1.2 The Working Group last met on 11 July 2005.

1.3 The list of participants also included one member of the Committee (Hon Ray Halligan MLC) and a representative from the Department of Health, which monitors and vets proposed health local laws.

1.4 So as to improve the dissemination of the previously informal information reports that were prepared by the Committee for the Working Group to identify and discuss issues of concern, the Committee has, since 2003, tabled these information reports in both the Legislative Council and the Legislative Assembly. Whereas those information reports were confidential to the Working Group participants, the tabled information reports are now publicly available on the Internet at www.parliament.wa.gov.au. The

Committee's Eighth and Ninth Reports are examples of the tabled information reports.[1]

1.5 This is the third report of the Committee in a series of reports aimed at informing:

- the Parliament;
- local governments; and
- all other stakeholders in the local law making process,

of the Committee's position in relation to certain issues it has encountered with respect to local laws.

1.6 The Committee's last such report, Report 9, dealt with local laws considered between 20 December 2003 and 30 June 2004.

1.7 This report covers issues arising from local laws scrutinised by the Committee between 1 May 2005 and 30 April 2006. This reporting period (rather than one also incorporating the latter part of 2004) was selected due to the significant change to the membership of the Committee following the State election in February 2005.

1.8 Selected for inclusion in this report are those local laws that the Committee has identified upon scrutiny as being problematic or as raising issues that the Committee wishes to highlight for the guidance of all local governments in the drafting of future local laws.

2 NON-COMPLIANCE WITH LOCAL LAW MAKING PROCEDURE

Shire of Dardanup Amendments to the Bush Fire Brigades Local Law 2003; Shire of Dardanup Amendment to Property Local Law 2003

2.1 Section 3.12 of the *Local Government Act 1995* governs the procedure for the making of all local laws (including local laws which amend or repeal other local laws)[2], regardless of the empowering Act. For example, local laws made under the *Bush Fires Act 1954*, such as the *Shire of Dardanup Amendments to the Bush Fire Brigades Local Law*, must be made "*… in accordance with subdivision 2 of Division 2 of Part 3 of the Local Government Act 1995 …*".[3]

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1 Western Australia, Legislative Assembly and Legislative Council, Joint Standing Committee on Delegated Legislation, Report 8, *Issues of concern raised by the Committee between June 9 2003 and December 19 2003 with respect to Local Laws*, April 19 2004; Western Australia, Legislative Assembly and Legislative Council, Joint Standing Committee on Delegated Legislation, Report 9, *Issues of concern raised by the Committee between December 20 2003 and June 30 2004 with respect to Local Laws*, August 31 2004.

2 Refer to s 43(4), *Interpretation Act 1984*.

3 Section 62(1), *Bush Fires Act 1954*.

2.2 The explanatory material provided to the Committee by the Shire of Dardanup in relation to these two amendment local laws indicated that the s 3.12 procedure was not properly followed in the making of those amendment local laws. As such, the two amendment local laws were considered by the Committee not to have been validly made as they were inconsistent with their respective empowering Acts, and were inoperative pursuant to s 3.7 of the *Local Government Act 1995* and void under s 43(1) of the *Interpretation Act 1984*.

2.3 On 23 May 2005 the Shire of Dardanup provided the Committee with an undertaking that it would not attempt to enforce these two amendment local laws.

Shire of Serpentine-Jarrahdale Local Law Relating to the Keeping of Dogs; Shire of Serpentine- Jarrahdale Parking Facilities Local Law

2.4 These local laws were not made in accordance with the procedure outlined in s 3.12 of the *Local Government Act 1995.* No explanatory memoranda or local law making checklists relating to these local laws were provided to the Committee.

2.5 Given that the s 3.12 procedure was not properly followed in the making of these amending local laws, they were inconsistent with the *Local Government Act 1995* and inoperative under s 3.7 of that Act and void under s 43(1) of the *Interpretation Act 1984.*

2.6 The Committee obtained an undertaking from the Shire of Serpentine-Jarrahdale that it would recommence the full s 3.12 local law making procedure with regard to these local laws.

3 DRAFTING STYLE OF LOCAL LAWS

3.1 The Committee had concerns regarding a number of local laws which, although technically made in compliance with the *Local Government Act 1995*, were drafted in an informal style which raised issues of clarity.

3.2 The Committee has a preference, for reasons of clarity, for local laws to be drafted in a similar style to Acts and regulations, with the appropriate use of headings and citation clauses.

3.3 The Committee noted with interest the local law making seminars conducted throughout Western Australia in late 2005 by the Department of Local Government and Regional Development. It is anticipated that through such seminars a degree of uniformity in drafting style across local governments may become evident.

City of Melville Local Law Relating to Firebreaks

3.4 This local law as published relevantly stated:

"**LOCAL GOVERNMENT ACT 1995**
BUSH FIRES ACT 1954
City of Melville
Local Law Relating to Firebreaks

Under the powers conferred by the Local Government Act 1995 and the Bush Fires Act 1954 and by all other powers enabling it, the council of the City of Melville resolved on 15 March 2005 to make the following local law amendment as set out below.

Delete Clause 3 and Insert—

"3 All firebreaks must be cleared by the owner or occupier of land on or before 15 November in any year, and there after be maintained by the owner or occupier clear of inflammable matter up to and including 30 April in the following year." "

3.5 The Committee was of the view that this was not the preferred way for an amendment local law to be published. For the sake of clarity the Committee would prefer amendment local laws to be set out in a similar format as an amending Act of Parliament.

3.6 For instance, the title of the local law as published does not clearly indicate its status as an amendment local law. It also fails to have a citation clause which identifies the notice as an amendment local law; for example the *City of Melville Local Law Amendment Relating to Firebreaks*. It also fails to have a clause which clearly identifies the principal local law which is being amended.

3.7 The Committee acknowledged that it could be argued that the amendment local law is still valid as its nature and purpose can be discerned through a thorough scrutiny of the document. Nevertheless, the Committee formed the view that the local law was unclear on its face.

3.8 The Committee wrote to the City of Melville pointing out the possible invalidity of this amendment local law due to the format in which it was published in the *Government Gazette*. The Committee also requested an undertaking from the City of Melville to republish the amendment local law in a clearer format. The local law was republished as follows in the *Government Gazette* on 24 June 2005:

"***BUSH FIRES ACT 1954***

City of Melville

LOCAL LAW AMENDMENT RELATING TO FIREBREAKS

Under the powers conferred by the Local Government Act 1995 and the Bush Fires Act 1954 and by all other powers enabling it, the council of the City of Melville resolved on 15 March 2005 to make the following local law amendment.

The purpose of this amendment is to amend the City of Melville Local Law Relating to Firebreaks to reflect the increase to the bushfire period that the council of the City of Melville declares.

The amendment is as below.

Delete clause 3 and insert—

"3 All firebreaks must be cleared by the Owner or Occupier of Land on or before 15 November in any year, and thereafter be maintained by the Owner or Occupier clear of inflammable matter up to and including 30 April in the following year."

Town of Vincent Local Law Relating to Dogs

3.9 The Committee took a similar approach when scrutinising this local law. The local law as published relevantly stated:

"***DOG ACT 1976***

Town of Vincent

Local Law Relating to Dogs

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 Vincent HEREBY RECORDS having resolved on 22 March 2005 to amend the principal Town of Vincent Local Law Relating to Dogs, published in the Government Gazette on 23 May 2000 and its amendment published in the Government Gazette on 5 December 2000 as follows—

1. the Seventh Schedule being amended as follows—

(a) by inserting in column 1, the word "7"; and

(b) by inserting in column 2, the words "The south portion of Les Lilleyman Reserve bounded by Gill Street, to the south and the prolongation of the northern kerb-line of Woodstock Street, eastwards across Les Lilleyman Reserve".

2. the Eighth Schedule being amended at item 3 by inserting in column 2, after the words "North Perth" the words "Except that portion of the reserve roughly bounded by Gill Street, to the south and the prolongation of the northern kerb-line of Woodstock Street, eastwards across Les Lilleyman Reserve". "

3.10 The Committee sought and obtained an undertaking from the Town of Vincent that the local law would be republished in a clearer format. The local law was subsequently republished in the *Government Gazette* on 12 August 2005 in the following format:

"***DOG ACT 1976***

Town of Vincent

Local Law Relating to Dogs Amendment Local Law 2005

Under the powers conferred by the Dog Act 1976 as amended from time to time and under all other powers enabling it, the Council of the Town of Vincent resolved on the 22nd day of March 2005 to make the "Town of Vincent Local Law Relating to Dogs Amendment Local Law 2005".

In this local law, the Town of Vincent Local Law Relating to Dogs as published in the Government Gazette on 23 May 2000 and amended as published in the Government Gazette on 30 May 2000 and 5 December 2000, is referred to as the principal local law and is amended as follows—

1 Seventh Schedule Amended

The Seventh Schedule is amended as follows—

After the words "6. Banks Reserve: Joel Terrace, East Perth." insert in column 1 the number "7.", and insert in column 2 the words "The south portion of Les Lilleyman Reserve bounded by Gill Street, to the south and the prolongation of the northern kerb-line of Woodstock Street, eastwards across Les Lilleyman Reserve."

2 Eighth Schedule Amended

The Eighth Schedule is amended as follows—

In column 2 at Item No. 3 after the words "Les Lilleyman Reserve-North Perth" insert the words "except that portion of the reserve

> *roughly bounded by Gill Street, to the south and the prolongation of the northern kerb-line of Woodstock Street, eastwards across Les Lilleyman Reserve".”*

3.11 The Committee resolved to maintain a watching brief on the general issue of drafting styles for local laws and to liaise with the Department of Local Government and Regional Development and the Working Group as required.

4 ACTIVITIES ON THOROUGHFARES AND TRADING IN THOROUGHFARES AND PUBLIC PLACES LOCAL LAW

Town of Victoria Park Activities on Thoroughfares and Trading in Thoroughfares and Public Places Local Law

Vegetation on Verges

4.1 The Committee noted that the amendments to cl 2.1(a) of the principal local law would remove a six metre buffer zone for vegetation on verges near intersections and permit plants up to 0.75 of a metre in height to be grown on verges near intersections. The Committee was concerned at the safety implications of this amendment, particularly where small children may be crossing the road.

4.2 The Town of Victoria Park undertook to amend the local law to permit only grasses or similar vegetation to be planted within six metres of an intersection.

City of Cockburn (Local Government Act) Local Laws 2000

4.3 This local law inserts the following cl 9.11(6A) into the principal local law:

> *“In the absence of any proof to the contrary, a shopping trolley is to be taken to belong to the retailer whose name is marked on the trolley.”*

4.4 The Committee identified this clause as an attempt, on the part of the City of Cockburn, to make it easier to obtain convictions for a breach of the local law by reversing the onus of proof in relation to the ownership of shopping trolleys. Such a clause is not generally authorised or contemplated by the *Local Government Act 1995.*

4.5 Under common law, it is ordinarily the duty of the prosecution in a criminal matter, or the plaintiff in a civil matter, to prove all of the elements of the offence (criminal)[4] or the cause of action (civil)[5] in order to make out the case against the other party. This is known as the burden or onus of proof.

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4 *Woolmington v DPP* [1935] AC 462 at 481; *R v Falconer* (1990) 171 CLR 30.

5 For example, *Munce v Vinidex Tubemakes Pty Ltd* [1974] 2 NSWLR 235.

4.6 The *Local Government Act 1995* permits the reversal of the onus of proof in only one circumstance. Section 9.13 of the *Local Government Act 1995* is a provision that reverses the burden of proof, but only where vehicles are involved in an offence under the Act or subsidiary legislation made under the Act.

4.7 The Committee noted, however, that identical provisions to that contained in this local law currently exist in a number of local laws (such as the *Town of Victoria Park Activities on Thoroughfares and Trading in Thoroughfares and Public Places Local Law 2000*) that have been accepted by the former Joint Standing Committee on Delegated Legislation. This clause is also contained within the Western Australian Local Government Association (**WALGA**) Activities in Thoroughfares and Public Places and Trading Model Local Law.

4.8 The Committee formed the view that, even though the clause does reverse the onus of proof and may not sustain a legal challenge in the event of a prosecution, the burden in this instance is not particularly onerous for shopping trolley owners.

5 CATS LOCAL LAW

Town of Bassendean Responsible Cat Ownership Local Law

5.1 This local law provided that a *"keeper"* shall not allow a cat to be or create a *"nuisance"*. Furthermore, a person may not keep more than two cats over the age of two months on their premises without the prior written approval of the Council. A penalty of up to $1,000 applied to a contravention of the local law, with a modified penalty by way of infringement notice of $100.

5.2 The local law defines a *"keeper"* as:

> *"(a) the owner of the cat;*
>
> *(b) a person by whom the cat is ordinarily kept;*
>
> *(c) a person who has or appears to have immediate custody or control of the cat;*
>
> *(d) a person who keeps the cat, or has the cat in her or his possession for the time being; or*
>
> *(e) a person who occupies any premises in which a cat is ordinarily kept or ordinarily permitted to live;"*

5.3 The local law defines a *"nuisance"* as:

> "[I]*f a cat—*

> *(a) is injurious or dangerous to the health of any person or domestic or Australian indigenous animal or is in the opinion of an authorised officer likely to be injurious or dangerous to the health of any person or domestic or Australia* [sic] *indigenous animal;*
>
> *(b) creates a noise which persistently occurs or continues to a degree or extent which in the opinion of an authorised person, and has or could have a disturbing effect on the state of reasonable physical, mental, or social well-being of a person; or*
>
> *(c) behaves in a manner that is contrary to a reasonable standard of behaviour expected of an animal in the locality of the premises where the cat is normally resident;"*

5.4 In the past the Committee has been concerned that such a local law may make otherwise innocent persons guilty of offences in circumstances where they neither own the cat nor have the care or control of the cat for which a permit is required. This arises from the broad definition of *"keeper"* and the absence in the local law of specific defences to the offence provisions.

5.5 The definition of keeper includes in paragraph (e) "… *a person who occupies any premises in which the cat is ordinarily kept or ordinarily permitted to live."*

5.6 The wording of the definition of keeper has similarities to the wording in s 3 of the *Dog Act 1976* of a "… *person liable for the control of the dog …"* which includes "… *the occupier of any premises where the dog is ordinarily kept or ordinarily permitted to live."*

5.7 The mischief attempted to be remedied by such a broad definition is acknowledged. Without a broad definition, the problem of identifying and prosecuting the owner of a cat could prove extremely difficult when several persons occupy the one premises where a cat for which a permit is required (but is not obtained) is ordinarily kept or ordinarily permitted to live.

5.8 However, under the *Dog Act 1976* the person deemed to be liable for the control of the dog has the benefit of an express defence under s 33B to a charge of a breach of certain provisions. Essentially, the occupier who is otherwise deemed liable for control of the dog has a defence if at the material time the occupier can show that the dog was in fact owned by some other person (whom the occupier shall identify) over the age of 18 years.

5.9 No similar defence was provided for in the local law and it therefore appeared to make occupiers strictly liable to a penalty when they are not the owner of the cat or have the

cat under their care and control. Such a result may be viewed as contrary to the right to due process at law.

5.10 The Committee sought and obtained an undertaking from the Town of Bassendean to amend the local law to provide for a defence for those persons deemed to be the keeper of a cat in the definition of *"keeper"*.

6 DOGS LOCAL LAW

Shire of Manjimup Dogs Local Law 2004

6.1 Section 51 (ba) of the *Dog Act 1976* provides for local laws to extend the operation of s 31 of the *Dog Act 1976*, to specified public places or classes of public places.

6.2 The *Shire of Manjimup Dogs Local Law 2004* purported to extend the operation of s 31 of the *Dog Act 1976*, and listed the properties to which this extension applied. However, it was unclear whether the properties listed in the local law were public or private properties.

6.3 The Shire of Manjimup confirmed that some private property was erroneously included within the described land and undertook to amend the local law. This undertaking was fulfilled by an amendment gazetted on 17 February 2006.

7 EXTRACTIVE INDUSTRIES LOCAL LAW

Shire of Northam Extractive Industries Local Law 2004

7.1 The purpose of this local law is to regulate extractive industries. Clause 2.1(3) of the local law stated:

> *"(3) This local law applies to all land other than Crown land, in the district; and apply, except wherein these local laws expressly excluded, to every excavation, whether existing or made before or after the coming into operation of these local laws."*

7.2 The Committee compared this clause with cl 1.2(1) of the WALGA Model Extractive Industries Local Law, which relevantly states:

> *"The provisions of this local law –*
>
> *(a) subject to paragraphs (b), (c), (d) and (e);*
>
> *(i) apply and have force and effect throughout the whole of the district; and*

(ii) apply to every excavation whether commenced prior to or following the coming into operation of this local law;

(b) do not apply to the extraction of minerals under the Mining Act 1978;

(c) do not apply to the carrying on of an extractive industry on Crown land;

(d) do not apply to the carrying on of an extractive industry on land by the owner or occupier of that land for use on that land … ."

7.3 The Committee formed the view that the Shire of Northam's local law purported to regulate not only existing and future excavations, but also past excavations.

7.4 At common law there is a presumption against the retrospective operation of legislation. Retrospective operation of legislation offends the general common law principle that legislation intended to regulate human conduct ought to deal with future actions and ought not to change the character of past transactions carried out upon the faith of the then existing law.

7.5 A further presumption is that when interpreting laws, in the absence of an unambiguous contrary intention, such laws should be interpreted so as not to disturb principles of the common law and equity.[6]

7.6 These legal presumptions apply to both primary and subsidiary legislation. If retrospectivity is beyond the power conferred by the enabling Act, any retrospective element of a subsidiary instrument made under that Act is invalid. A general local law making power like that in s 3.5(1) of the *Local Government Act 1995* would not permit the making of retrospective local laws as being in the public interest. This has been upheld by the High Court of Australia in *Broadcasting Co of Australia Pty Ltd v The Commonwealth* (1935) 52 CLR 52 and in *Maxwell v Murphy* (1957) 96 CLR 261.

7.7 The *Local Government Act 1995* does not authorise retrospective local laws and for this reason, cl 2.1(3) of this local law raised the legal presumption against retrospective legislation.

7.8 The Committee sought and obtained from the Shire of Northam an undertaking that the Shire would clarify the wording of cl 2.1(3) on the ground that retrospective operation of local laws is not authorised or contemplated by the *Local Government Act 1995*.

8 FENCING LOCAL LAW

City of Perth Fencing Local Law 2005

8.1 The purpose of this local law is to provide for the regulation, management and control of the installation of fences within the City of Perth's district.

Inconsistency with the Local Government (Miscellaneous Provisions) Act 1960 and the Building Regulations 1989 - building licence

8.2 The Department of Local Government and Regional Development provided a submission to the City of Perth regarding the draft version of this local law. The Department expressed concerns about cl 8, which provides that a building licence is not required for building or erecting a *"… dividing fence or boundary fence that is a sufficient fence as detailed under clause 15."*

8.3 The Department indicated that the need to obtain a building licence is prescribed in Part XV of the *Local Government (Miscellaneous Provisions) Act 1960* and the local law should not be defining what does and does not require a building licence. The City of Perth contended that this is a common practice amongst local governments and cited the *Town of Bassendean Local Law Relating to Fencing 2005* (gazetted on 26 April 2005) as a recent example. It argued that since there is no formal definition of what constitutes a 'building':

> "[I]*t seems to be accepted that local authorities can decide which structures are issued with a building licence as well as having the discretion to interpret which structures are covered by the Local Government (Miscellaneous Provisions) Act 1960."*

8.4 However, s 364(10) of the *Local Government (Miscellaneous Provisions) Act 1960* provides that, for the purposes of that section, the term 'building' does not include a fence. In the Committee's view, this implies that the term 'building', as it is used in the rest of that Act, includes fences. Accordingly, s 374 of the *Local Government (Miscellaneous Provisions) Act 1960* (and reg 10 of the *Building Regulations 1989*) requires a building licence to be obtained by a person wishing to build or alter a building, including a fence, before commencing the work.

8.5 The Committee noted that cl 8 may have an unusual practical effect. The wording of cl 8 suggests that a building licence will need to be obtained for a dividing or boundary fence that does not meet the exact requirements of a sufficient fence, even though cl 15 only prescribes the minimum requirements of a sufficient fence. Clause 14(2) confirms this interpretation of cl 8, by obliging a person to obtain a building

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[6] *Minister for Lands and Forests v McPherson* (1991) 22 NSWLR 687. See also Chapter 5, D.C. Pearce and R.S. Geddes, *Statutory Interpretation in Australia*, Fifth Edition, Butterworths, 2001.

licence even if he or she wishes to erect a dividing fence that exceeds the requirements of a sufficient fence. The Committee noted that this practical result is unlikely to arise from the wording used in the *Town of Bassendean Local Law Relating to Fencing 2005.*

8.6 The Committee accordingly formed the view that cl 8 was inconsistent with s 374 of the *Local Government (Miscellaneous Provisions) Act 1960* and consequently, inoperative and void pursuant to s 3.7 of the *Local Government Act 1995* and s 43(1) of the *Interpretation Act 1984*, respectively.

Inconsistency with the Local Government (Miscellaneous Provisions) Act 1960 and the Building Regulations 1989 - building licence application

8.7 Regulation 11 of the *Building Regulations 1989*, when read with s 374 of the *Local Government (Miscellaneous Provisions) Act 1960*, prescribes the requirements for making an application for a building licence generally (**General Requirements**).

8.8 Clause 10 of the *City of Perth Fencing Local Law 2005* prescribes the requirements for making an application for a building licence with respect to fencing (**Fencing Requirements**). The Department of Local Government and Regional Development had also suggested to the City of Perth that since the application requirements are controlled by other written laws, this local law should not also seek to prescribe such requirements.

8.9 The City of Perth contended that the General Requirements are only relevant to buildings that are more complex than fences, for example, the General Requirements include providing:

> *"Building details*
>
> *(a) 2 complete sets of drawings (to scale not less that 1:100)*
>
> *showing —*
>
> *(i) a plan of every storey;*
>
> *(ii) at least 2 elevations of external fronts;*
>
> *(iii) one or more sections, transverse or longitudinal;*
>
> *(iv) the heights of each storey;*
>
> *(v) depth of foundations;…*
>
> *Block details*

(b) a block and drainage plan (to a scale not less than 1:500)

showing —

(i) street names, lot number, and title reference to the site with the north point clearly marked;

(ii) the size and shape of the site;

(iii) the dimensioned position of proposed new building and of any existing buildings on the site;

(iv) the relative levels of the site with respect to the street or way adjoining;

(v) the position and size of any existing sewers and existing stormwater drains;

(vi) the position of street trees, if any, between the site and the roadway;"

8.10 Clause 10 of the local law requires a building licence application to be submitted with:

"(a) where required, a copy of planning approval issued by the City under the city planning scheme;

(b) two copies of plans drawn to scale of not less than 1:50 showing the size, position, design, and the method of construction of the proposed fence;

(c) the relevant building licence fee; and

(d) such other information as may be required by the City to assist in determining the application."

8.11 The Committee considered that the Fencing Requirements are more relevant to building licence applications with respect to fences. The Fencing Requirements are not inconsistent with, and do not operate to exclude, the General Requirements, but rather, they appear to supplement the General Requirements.

Unauthorised Subdelegation of Legislative Power

8.12 Clause 17(1) provides that the City will determine how a 'front fence' or a 'boundary fence' that is adjacent to a vehicle access point or a thoroughfare will be truncated or reduced in height in order to preserve sight lines. The problems associated with the

unauthorised subdelegation of local law making power is discussed in the Committee's Fourth Report[7] and Eighth Report.[8]

8.13 Section 433(23) of the *Local Government (Miscellaneous Provisions) Act 1960* authorises the making of local laws under the *Local Government Act 1995* for:

> *"… prescribing the height to which a building may be erected, which height may vary according to the position of the building, the width of any road upon which it abuts, or any other matter;"*

8.14 Clause 17(1) amounts to a subdelegation of legislative power because it provides for the City to determine (by simple majority) how a relevant front fence or boundary fence will be truncated or reduced in height rather than prescribing the dimensions of such fences in the local law itself (that would require an absolute majority decision and all of the other requirements imposed by s 3.12 of the *Local Government Act 1995*).

8.15 In the Committee's view cl 17(1) was not authorised nor contemplated by the *Local Government Act 1995* or the *Dividing Fences Act 1961*. It is also inconsistent with s 433(23) of the *Local Government (Miscellaneous Provisions) Act 1960* and is consequently, inoperative and void pursuant to s 3.7 of the *Local Government Act 1995* and s 43(1) of the *Interpretation Act 1984*, respectively. The Committee advised the City of Perth that cl 17(1) should be amended so that it prescribes the required dimensions of front fences and boundary fences when they are adjacent to a vehicle access point or a thoroughfare.

Not Authorised and Unreasonable Clause

8.16 Clause 31(2) provides that when a court convicts a person of failing to pay for a building licence under the local law before erecting a fence, the court may order the person to pay the building licence fee to the City of Perth in addition to any other orders the court may make.

8.17 Under cll 28 and 10(c) of this local law, it is an offence to erect a fence without first paying the fee for the application of a building licence (if it is necessary to obtain one under the local law). Clause 28(3) provides that if convicted, a person who commits such an offence is liable to a fine of up to $5,000. The effect of cl 31(2) is that the person could be ordered by the Magistrates Court to pay a fine of up to $5,000 as well as to pay the relevant application fee to the City of Perth.

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7 Western Australia, Legislative Assembly and Legislative Council, Joint Standing Committee on Delegated Legislation, Report 4, *City of Perth Code of Conduct Local Law*, September 2002, pp43-45.

8 Western Australia, Legislative Assembly and Legislative Council, Joint Standing Committee on Delegated Legislation, Report 8, *Issues of concern raised by the Committee between June 9 2003 and December 19 2003 with respect to Local Laws*, April 2004, pp12-14.

8.18 The failure to pay the application fee is an offence;[9] that is, it is of a criminal nature. However, the City's recovery of the unpaid application fee is in the nature of a civil claim, which should ordinarily be pursued separately to any criminal proceedings.

8.19 Clause 31(2) also provides the potential for a person convicted of failing to pay the application fee to be penalised twice for the same offence. This 'penalty upon a penalty' is not permitted under s 434 of the *Local Government (Miscellaneous Provisions) Act 1960* or s 3.10 of the *Local Government Act 1995*.

8.20 The empowering sections do authorise the City of Perth to create, via this local law, an offence for the non-payment of the application fee and to punish the offender with a fine of up to $5,000. However, the relevant Acts do not authorise the City of Perth to empower the Magistrates Court to order the payment of the application fee to the City of Perth upon the offender's conviction. The Committee notes that there is authority that supports the view that subsidiary legislation is invalid if it seeks to add to the method of penalty that is authorised under the empowering Act(s).[10]

8.21 The Committee sought and obtained from the City of Perth a written undertaking that the following amendments would be made to the local law:

- cl 8 to be deleted;
- cl 17(1) to be amended so that it prescribes the required dimensions of front fences and boundary fences when they are adjacent to a vehicle access point or a thoroughfare; and
- cl 31(2) to be deleted.

8.22 The City of Perth undertook to amend the local law. The City of Perth also provided the Committee with a comprehensive response setting out various administrative difficulties that the City anticipated that it would encounter in complying with the Committee's interpretation of the relevant legislation.

8.23 The Committee acknowledged these administrative difficulties and encouraged the City of Perth to approach both the Department of Local Government and Regional Development and the Department of Housing and Works with a view to initiating possible legislative reform.

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9 Clause 28(1) of this local law. See also s 72, *Interpretation Act 1984*.

10 D.C. Pearce & R.S. Argument, *Delegated Legislation in Australia*, Second Edition, Butterworths, Perth, 1999, pp182-183.

9 HEALTH LOCAL LAW

Shire of Dandaragan Health Local Laws 2005

9.1 This local law appears to have been based on an old local law - one which contained a number of provisions that have previously been of concern to the Committee and on which the Committee has previously reported.[11]

Unreasonable Wording

9.2 Section 6.3.3 of the local law provided as follows:

> *"A person shall not place or cause to be placed in or on any premises, and an owner or occupier of premises shall not permit to remain in or on the premises -*
>
> *(a) any food, refuse or other waste matter which might attract rodents to the premises or which might afford harbourage for rodents; or*
>
> *(b) any food intended for birds or other animals,*
>
> *unless it is contained in a rodent proof receptacle or a compartment, which is kept effectively, protected against access by rodents."*

9.3 The Committee has, in the past, considered that the effect of these clauses is to potentially prohibit both of the following situations:

- serving food for human consumption on plates or bowls, which are then placed on tables or bench tops or some other surface; and
- the usual method of feeding pets by means of placing pet food into a bowl or some other open container that can be accessed by the pet.

9.4 The Committee has previously held this prohibition to be unreasonable and has requested that the wording be changed so as to regulate only the storage of food, refuse or other waste matter. The Committee also notes that in November 2003 the Minister for Health provided an undertaking to the Committee that the Executive Director, Public Health, would not consent to any proposed local laws that contained this clause.

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[11] Western Australia, Legislative Assembly and Legislative Council, Joint Standing Committee on Delegated Legislation, Report 8, *Issues of concern raised by the Committee between June 9 2003 and December 19 2003 with respect to Local Laws,* April 2004, pp4-5.

Ouster Clauses

9.5 Sections 6.1.5(3), 6.2.3(3), 7.1.2(4) and 7.1.9(3) of the local law provide that if an owner or occupier fails to execute any work directed in a notice from the Shire to be done in order to:

- eradicate/control/prevent the breeding of flies or mosquitoes;
- clean/disinfect/disinfest/sanitise premises or things,

the Shire can execute that work at the cost of the owner or occupier, and:

> *"The Council shall not be liable to pay compensation or damages of any kind to the …* [person served with the notice] *… in relation to any action taken by the Council under this Section."*

9.6 Such provisions have in the past been considered by the Committee to be 'ouster clauses'. These clauses by their character seek to oust the jurisdiction of courts to hear claims or review decisions of inferior courts or tribunals. The clauses purport to prevent an owner or occupier of private land from bringing an action in tort for damages or making a claim for compensation against the Shire for any loss, damage or injury that they may sustain as the result of the Shire's work to clean, disinfect, disinfest or sanitise the premises or things on the premises. That is, they seek to oust the liability of the Shire.

9.7 Section 9.56 of the *Local Government Act 1995* protects councillors, council employees and agents from personal liability in tort who perform actions or omissions in good faith. However, this protection does not extend to the entity known as 'the local government'.[12] The above mentioned clauses are therefore void for inconsistency with s 9.56(4) of the *Local Government Act 1995*.[13]

9.8 The liability of public authorities in tort is well established and governed by the same principles that apply to private individuals.[14] A public authority such as a local government can be liable, as if it were a private individual, for the torts of negligence, nuisance, trespass and breach of a statutory duty. However, the fundamental common law right to bring an action in tort or otherwise against a local authority may be abrogated or modified by statute. Subsidiary legislation may only permit abrogation in circumstances where the empowering Act permits it, either expressly or by necessary implication.[15]

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12 Section 9.56(4), *Local Government Act 1995.*

13 Pursuant to s 43(1), *Interpretation Act 1984.*

14 *Sutherland Shire Council v Heyman* (1985) 157 CLR 42.

15 *Coco v The Queen* (1994) 179 CLR 427 at 437 to 438.

9.9 The common law has always frowned on deprivation without compensation.[16] Where a public authority carries out work that may result in the destruction or loss of private property or the injury of a person, the owner of that property or the injured person has a common law right to pursue the public authority for compensation for that destruction, loss or injury. That common law right can only be removed by statute where there are express words,[17] or where that removal is necessarily implied.[18] Where that common law right is removed by subsidiary legislation, that removal will be invalid unless there is clear authority for it in the empowering Act.

9.10 Section 344(1)(b) of the *Health Act 1911* provides that, *"…in addition to any penalty, any expense incurred by … the local government …in the execution of work directed to be executed by any person and not executed by him, shall be paid by the person … failing to execute the work"*. However, there is no section of the Act that either expressly or necessarily implies that a local government will not have to provide compensation to the owner of property destroyed or to the owner or occupier injured during the local government's execution of the works to:

- eradicate/control/prevent the breeding of flies and mosquitoes; and
- clean/disinfect/disinfest/sanitise premises or things.

9.11 The above mentioned clauses may also be void for inconsistency with s 259 of the *Health Act 1911*.[19] That section provides that the owner of any building, animal, or thing that is destroyed by direction of the Executive Director, Public Health or the local government under Part IX (Infectious Diseases) is entitled to compensation to the extent and subject to the conditions provided for in that section.

9.12 Accordingly, ss 6.1.5(3), 6.2.3(3), 7.1.2(4) and 7.1.9(3) of the local law were not authorized or contemplated by, and were inconsistent with, the *Health Act 1911*. As explained above, the clauses were also inconsistent with the *Local Government Act 1995*.

9.13 The Committee sought and obtained from the Shire of Dandaragan an undertaking that, *inter alia*, the following amendments would be made to the local law:

a) s 6.3.3 to be amended so that it refers only to waste or stored food; and

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16 See F.A.R. Bennion, *Statutory Interpretation - A Code*, Fourth Edition, Butterworths, 2002, p707.

17 *Deeble v Robinson* [1954] 1 QB 77.

18 *Coco v the Queen* (1994) 179 CLR 427; *Daniels Corporation International Pty Ltd and Anor v Australian Competition and Consumer Commission* (2002) 77 ALJR 40.

19 Section 43(1), *Interpretation Act 1984.*

b) the following ouster clauses to be amended so that they do not invalidly purport to exclude common law negligence or breach of duty actions against the Shire of Dandaragan:

- s 6.1.5(3);
- s 6.2.3(3);
- s 7.1.2(4); and
- s 7.1.9(3).

10 SPECIAL EVENTS LOCAL LAW

City of South Perth Special Events Local Law 2005

10.1 This local law was designed to regulate special events such as the annual Australia Day fireworks display. The Committee noted two main concerns regarding this local law:

- Clause 7 prohibited a person from possessing or using a 'large object' (defined as meaning various objects, including lounge chairs, couches, beds, fridges, wading pools and another object with any dimension greater than 1.5 metres) in a public place within a special event location (**SEL**) on a special event day (**SED**), unless the person: (a) is transporting the large object to private property or a licensed area; or (b) has the prior written permission of the City of South Perth. The Committee was concerned that such a broad definition of 'large object' was unreasonable as it would unintentionally capture beach umbrellas or 'beach tents', which may be used to protect users from the sun's rays, especially when one considers that special event spectators could otherwise be exposed to the sun for extended periods of time.

- Clause 15 purported to allow the City to resolve, by absolute majority, to establish alcohol free locations (**AFL**s), SELs and SEDs. This clause essentially used a determination device in a way that appeared to breach the Committee's stated position on such devices.

10.2 The Committee requested a written undertaking from the City of South Perth that it would, *inter alia*:

a) as soon as possible, provide an exemption for beach umbrellas and 'beach tents' and other similar shade providing objects against the offence created in cl 7; and

b) either repeal cl 15 as soon as possible or prescribe the AFLs, SELs and SEDs in a local law as soon as possible.

10.3 The City undertook to amend the local law as requested in July 2005, and the amendments were gazetted in December 2005.

11 PARKING AND PARKING FACILITIES LOCAL LAW

City of South Perth Parking and Amendments Local Laws 2004

11.1 Clause 5 of this amendment local law inserted a new cl 7.4 into the principal local law. Clause 7.4 purported to allow the City of South Perth to 'establish' a temporary 'general no parking zone' (**Zone**), rather than prescribe a Zone in the local law itself.

11.2 In effect, this clause allowed the City to make resolutions about a Zone's area and the dates and times during which a Zone operates, without the need to make a local law. That is, resolutions to establish or change the Zone will have legislative effect, despite the fact that they are not local laws. However, local governments are only authorized by the Parliament to make legislation in the form of local laws. The cl 7.4 device is effectively the same as a 'determination' device, which is usually used in local government property local laws.

11.3 The use of determination devices avoids scrutiny by both the Department of Local Government and Regional Development and the Parliament in a manner similar to the use of a policy made by a simple majority of council in the *City of Perth Code of Conduct Local Law*.[20] This is because the mandatory procedure for making a local law under s 3.12 of the *Local Government Act 1995* is not required to be followed in order to make, repeal or amend a determination/resolution. The determination device also bypasses the requirements of s 42 of the *Interpretation Act 1984* in relation to publication of the determination in the *Gazette*, tabling in both Houses of Parliament and the possibility of disallowance.

11.4 It could not have been the intention of Parliament for the procedures contained in s 3.12 of the *Local Government Act 1995* and s 42 of the *Interpretation Act 1984* to be avoided. Any local law that attempts to evade scrutiny by the Department of Local Government and Regional Development or the Parliament (via the Committee) is not authorized by the *Local Government Act 1995*, is inconsistent with the *Interpretation Act 1984* and is void.

11.5 There is also an argument that determinations amount to a subdelegation of legislative power, since determinations are made by a simple majority of council members, whereas local laws must be made by an absolute majority of council members under s 3.12(4) of the *Local Government Act 1995*.

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[20] Western Australia, Legislative Assembly and Legislative Council, Joint Standing Committee on Delegated Legislation, Report 4, *Report in relation to the City of Perth Code of Conduct Local Law*, September 2002.

11.6 By inserting the new cl 7.4 into the principal local law, cl 5 of this amendment local law appeared to breach the Committee's position on determination devices.

11.7 The Committee requested a written undertaking from the City of South Perth that it would, *inter alia*:

- either repeal cl 5 of the amendment local law as soon as possible or prescribe in the local law the area and dates and times of operation of any Zone as soon as possible; and

- refrain from enforcing any Zones in the meantime.

11.8 The City of South Perth undertook to amend the local law as requested in July 2005, and the amendments were gazetted in December 2005.

Shire of Nannup Local Law Parking and Parking Facilities

11.9 In this local law the Shire of Nannup had erroneously adopted the out-dated text of another local government's local law. This instrument was disallowed by the Legislative Council on 23 August 2005 on the recommendation of the Committee after the Shire of Nannup was unable to provide the Committee with a formal undertaking to amend the local law. For details see the Committee's Eleventh Report.[21]

Shire of Bruce Rock Parking and Parking Facilities Local Law

11.10 This local law regulates the parking of vehicles in the district of the Shire of Bruce Rock. The Committee noted the following matters of concern.

Averment Clause

11.11 Clause 5.2 of the local law states:

> *"**5.2 Averment on complaint as to clause 1.4 (2) agreement***
>
> *An averment on a complaint that this Local Law applies to a parking facility or a parking station under an agreement referred to in clause 1.4 (2), shall be sufficient proof that this Local Law applies to that facility or station, unless there is proof to the contrary that such an agreement does not exist."*

[21] Western Australia, Legislative Assembly and Legislative Council, Joint Standing Committee on Delegated Legislation, Report 11, *Shire of Nannup Local Law Parking and Parking Facilities*, August 2005.

11.12 This clause is based on cl 10.2 of WALGA's former Model Parking and Parking Facilities Local Law, which was discussed in the Committee's Ninth Report as follows:

> "*Clause 10.2 of the pro forma provides that:*
>
> > *An averment on a complaint that this Local Law applies to a parking facility or a parking station under an agreement referred to in clause 1.5(2) [a private parking agreement], shall be sufficient proof that this Local Law applies to that facility or station, unless there is proof to the contrary that such an agreement does not exist.*
>
> *The clause deems that a mere averment or assertion that the parking local law applies to the private land under a private parking agreement is sufficient proof of that application, unless there is proof that the agreement does not exist. ...*
>
> *The equivalent clauses in the gazetted local laws reverse the burden of proving that a valid private parking agreement exists. In prosecuting a parking offence under one of the gazetted local laws, the local government merely has to assert that, under a private parking agreement, the parking local law applies to the relevant private land before the accused is required to disprove the existence of the agreement to establish his or her innocence.*
>
> *Section 9.13 of the Act does not authorize the making of a clause that is equivalent to clause 10.2 of the pro forma. Section 9.13 only reverses the burden of proving the identity of the person who committed the offence; it does not reverse the burden of proving the existence of a valid private parking agreement. In the Committee's view, the clauses in the gazetted local laws that are equivalent to clause 10.2 of the pro forma would not be authorized nor contemplated by the Act.*
>
> *The Committee has notified the WALGA of these issues. In relation to the gazetted local laws that adopted the problematic clauses in the pro forma:*
>
> – *The local governments have provided the Committee with a written undertaking to refrain from relying upon the clauses*

that are equivalent to clause 10.2 of the pro forma while the issues are still being resolved with the WALGA."[22]

11.13 It is noted that WALGA's current Model Parking and Parking Facilities Local Law (updated in April 2005) does not contain an averment clause.

Conflict with Road Traffic Code 2000

11.14 Clause 3.7(2)(e) and (l) of the local law replicates cl 4.5(2)(e) and (k) of the WALGA Model Local Law. The Committee's Ninth Report noted the following possible conflict between this clause and the provisions of the *Road Traffic Code 2000*:

> *"Clauses 4.5(2)(e) and (k) of the pro forma provide, respectively, as follows:*
>
> *(2) A person shall not park a vehicle so that any portion of the vehicle is:*
>
> …
>
> *(e) on or within 10 metres of any portion of a carriageway bounded by a traffic island;*
>
> …
>
> *(k) within 10 metres of the nearer property line of any thoroughfare intersecting the thoroughfare on the side on which the vehicle is parked, unless a sign or markings on the carriageway indicate otherwise.*
>
> *The Committee considered that the equivalent clauses in the gazetted local laws are inconsistent with regulation 143(2) of the Road Traffic Code 2000 (**the Code**), which provides that there must be at least 20 metres between a parked vehicle and a traffic light situated on the same carriageway:*
>
> *A person shall not stop a vehicle on a carriageway within 20 m from the nearest point of an intersecting carriageway at an intersection with traffic-control signals, unless the driver stops at a place on a length of carriageway, or in an area, to*

[22] Western Australia, Legislative Assembly and Legislative Council, Joint Standing Committee on Delegated Legislation, Report 9, *Issues of concern raised by the Committee between December 20 2003 and June 30 2004 with respect to Local Laws*, August 2004, pp12-13.

which a parking control sign applies and the driver is permitted to stop at that place under these regulations.

Clauses 4.5(2)(e) and (k) of the pro forma do not differentiate between intersections that do and do not contain traffic lights. In the Committee's view, they incorrectly imply that it is lawful to park a vehicle within say, 12 metres from the nearest traffic light intersection. It was the Committee's view that the equivalent clauses in the gazetted local laws would be inoperative and void to the extent of their inconsistency with regulation 143(2) of the Code pursuant to section 3.7 of the Act and section 43(1) of the Interpretation Act 1984.

The Committee recognizes that regulation 8 of the Code contemplates that local laws can be made to regulate subject matters that overlap with the scope of the Code. However, the Committee considers that it could not have been the intention of the Parliament, when enacting section 3.5 of the Act, for that section to be used by different local governments to make local laws that imposed different stopping distances to those imposed in other local government districts."[23]

11.15 The Committee's Ninth Report noted that the Committee notified WALGA of this issue.

11.16 The Committee sought and obtained from the Shire of Bruce Rock an undertaking that the averment clause in the local law would be repealed.

City of Gosnells Parking and Parking Facilities Local Law 2005

11.17 Clause 8.2 of this local law also contained the invalid averment clause referred to above.

11.18 The local law was based both on a superseded WALGA Model Local Law and the *City of Bayswater Parking and Parking Facilities Local Law 2004*. The City of Bayswater local law's cl 9.2 (an averment clause) was modelled on cl 10.2 of WALGA's 2003 Model Parking and Parking Facilities Local Law.

11.19 The Committee wrote to the City of Gosnells and advised that cl 8.2 of the local law was inconsistent with the latest version of the relevant WALGA Model Local Law and should be deleted. The City of Gosnells provided an undertaking to delete the averment clause.

[23] Ibid, pp11-12.

12 PROPERTY LOCAL LAW

Town of Victoria Park Local Government Property Local Law Amendment

12.1 This amendment local law inserted a new definition of what constitutes a *"camera device"* in the principal local law. The definition stated that a *"camera device"* means *"an apparatus for taking photographs or moving pictures, and includes a mobile phone when equipped for this purpose"*. An offence was also created if a person operates a camera device in any portion of a toilet block or change room on local government property: cl 5.3(3). This new definition was inserted as a measure to reduce the opportunities for inappropriate photographic images to be obtained of young children.

12.2 With the advent of new technology, especially in the past 12 to 18 months, the choice of the word 'equipped' in the definition of *"camera device"* was, in the Committee's view, problematic as many new mobile phones are now equipped with photographic abilities. A likely scenario is of a person using a mobile phone to make a telephone call (or to receive a telephone call) whilst in a toilet block or change room, who under this definition is unintentionally committing an offence subject to a $100 modified penalty. However, another person using a mobile phone that is not equipped with a camera for the same purpose would not be committing an offence. Although it could be assumed that a local government enforcement officer would be able to differentiate between a mobile phone being used as a communication device and the phone being used as a photographic device, the Committee considered that this would not be clear cut.

12.3 It was the view of the Committee that a more suitable phrase to use in the definition of *"camera device"* in the local law would be *"a mobile phone when used for this purpose"* as it would avoid the above scenario.

12.4 The Committee therefore sought and obtained an undertaking from the Town of Victoria Park that the local law would be amended so that the definition of *"camera device"* is changed by substituting the word *"used"* for the word *"equipped"*.

Shire of Jerramungup Local Government Property Local Law

12.5 By this local law the Shire of Jerramungup adopted the *Shire of Exmouth Local Government Property Local Law* as published in the *Government Gazette* of 10 July 2000 and as amended in the *Government Gazette* on 13 December 2002, as a local law of the Shire of Jerramungup, subject to a number of modifications.

12.6 The purpose of the local law is to regulate the care, control and management of all property of the local government, except thoroughfares. Some activities are permitted only under a permit or under determination and some activities are restricted or prohibited.

Reversal of the Burden of Proof

12.7 Clause 8.4 of the local law demonstrated the problems that can arise when a local government adopts the text of an older, out-dated, local law. The relevant WALGA Model Local Law had been amended to address previous concerns raised by the Committee, but those recent amendments to the WALGA Model were not incorporated in this local law. In fact, the Committee's Ninth Report dealt with the exact problem as identified in this case when the Shire of Boyup Brook adopted the *Shire of Exmouth Local Government Property Local Law*.[24]

12.8 Clause 8.4 of the local law provided that:

> *"**Liability for damage to local government property***
>
> *8.4(1) Where a person unlawfully damages local government property, the local government may by notice in writing to that person require that person within the time required in the notice to, at the option of the local government, pay the costs of –*
>
> *(a) reinstating the property to the state it was in prior to the occurrence of the damage; or*
>
> *(b) replacing that property.*
>
> *(2) Unless there is proof to the contrary, a person is to be taken to have damaged local government property within subclause (1) where –*
>
> *(a) a vehicle or a boat caused the damage, the person was the person responsible, at the time the damage occurred, for the control of the vehicle or the boat; or*
>
> *(b) the damage occurred under a permit, the person is the permit holder in relation to that permit.*
>
> *(3) On a failure to comply with a notice issued under subclause (1), the local government may recover the costs referred to in the notice as a debt due to it."*

12.9 However, cl 10.4 of the relevant WALGA Model Local Law currently states:

[24] Ibid, pp9-11.

*"**Liability for damage to local government property***

10.4(1) Where a person unlawfully damages local government property, the local government may by notice in writing to that person require that person within the time required in the notice to, at the option of the local government, pay the costs of –

(a) reinstating the property to the state it was in prior to the occurrence of the damage; or

(b) replacing that property.

(2) On a failure to comply with a notice issued under subclause (1), the local government may recover the costs referred to in the notice as a debt due to it."

12.10 Clause 8.4(1) allows the Shire of Jerramungup to issue a notice to a person who has unlawfully damaged the Shire's property to pay the costs of either reinstating or replacing the property. Clause 8.4(3) provides that if the person fails to comply with the notice, the Shire can recover the costs referred to in the notice as a debt due to it.

12.11 Clause 8.4(2) deems a certain person to be responsible for the damage to Shire property unless there is proof to the contrary. Where the damage was caused by a vehicle or boat, the relevant person is the person who was responsible for the control of the vehicle or boat at the time the damage occurred. Where the damage occurred under a permit, the relevant person is the permit holder.

12.12 Under this local law, it is not an express offence to unlawfully damage Shire property. Clause 8.4 appears to deal with civil liability rather than criminal liability. That is, when, for example, a car that is owned by the Shire is damaged, cl 8.4 will allow the Shire to issue a notice to a person to pay for the reinstatement or replacement of that car, and if that payment is not made, the Shire can then sue for that cost as a debt.

12.13 Section 9.13 of the *Local Government Act 1995* does reverse the burden of proof, but only where vehicles are involved in an offence under the Act or subsidiary legislation made under the Act. Further, s 9.13 only deems the owner of the vehicle to have committed the offence. The Committee took the view that cl 8.4 of the local law is not authorised by s 9.13 of the *Local Government Act 1995* because:

- it relates to damage that occurred under a permit in addition to damage caused by a vehicle or boat;
- even where it relates to damage caused by a vehicle or boat, cl 8.4 deals mainly with civil liability, not criminal offences; and

- the person deemed by this local law to be liable for the damage is the person who had control of the vehicle at the time, not the owner of the vehicle as is contemplated by s 9.13.

Airport access

12.14 The local law modifies the *Shire of Exmouth Local Government Property Local Law* by including provisions relating to the Jerramungup Airport, which is operated by the Shire.

12.15 The provisions basically prohibit access to the airport by persons and animals other than for the purposes of work, travel or (in the case of persons) to farewell or greet passengers without the prior approval of the local government. Only those provisions relating to animals on airport property are covered in the relevant WALGA Model Local Law, and the Model provisions have been copied.

12.16 The airport provisions (cl 5.10) contain the following references to *"designations"* and *"resolutions"* of the local government:

> *"(2) The local government may from time to time* ***designate or set apart*** *any specified part to or parts of the Airport:-*
>
> *(a) to which only persons* ***from time to time designated*** *by the local government shall be admitted;*
>
> *(b) to which persons other than those mentioned in subclause (1) shall not be admitted;*
>
> *(c) to which the general public, or any limited classes of the general public, may be admitted, either at all times or at specified times, or for limited periods and generally upon such terms and conditions* ***as the local government may resolve****;*
>
> *(d) to which no vehicle may be admitted or to which a limited class of vehicles may be admitted or to which vehicles may be admitted only on such terms and conditions* ***as the local government may resolve****;*
>
> *(e) to which no aircraft may be admitted or to which a limited class of aircraft may be admitted or to which aircraft may be admitted only on such terms and conditions* ***as the local government resolves****.*

> *(3) Signs, markings or notices may be placed by the local government at the airport indicating the limits of any part of the airport set apart for any special or limited use under subclause (2).*
>
> *(4) Notwithstanding the provisions of this clause the local government may on special occasions, for instance, an aerial pageant or other event of public interest, make such arrangements for the control of the airport* ***as it may by resolution impose****."*(emphasis added)

12.17 The Committee has expressed concern at such widely-framed 'determination' clauses in the past where, by a simple majority resolution of the Council, the express provisions of a local law may be over-ruled. The Committee has regarded these provisions as a sub-delegation of a local government's local law making power which is not authorised by the *Local Government Act 1995*.

12.18 However, the Committee has in recent years agreed with the Department of Local Government and Regional Development and WALGA that determination devices are permissible to a certain degree within local government property local laws which follow the WALGA Model Local Government Property Local Law and thereby provide a determination-making process where the public is given an opportunity to comment on a determination of a local government before it comes into effect.

12.19 The local law as adopted by the Shire of Jerramungup included the relevant WALGA Model determination-making process. However, the Committee noted that in cl 5.10 of the local law the words *"designate"* and *"resolution"* are used rather than *"determination"*. This indicates the intended use of a process to alter this local law outside of the permissible formal local law making or determination-making processes.

12.20 The Committee sought and obtained an undertaking from the Shire of Jerramungup that:

- cl 8.4 would be deleted and replaced by cl 10.4 of the WALGA Model Local Government Property Local Law; and
- subclauses 5.10(2)-(4) would be deleted.

13 STANDING ORDERS LOCAL LAW

City of Cockburn Local Law Relating to Standing Orders

13.1 This local law repealed the City of Cockburn's *Local Law Relating to Standing Orders*, gazetted 10 August 1999, and created a new Standing Orders Local Law.

13.2 In 2001, the Committee scrutinised amendments to the 1999 local law and had an issue with a 'declaration of due consideration' clause which stated:

> *"Any Councillor who is not familiar with the substance of any report, Minutes or other information provided for consideration at a meeting shall declare that fact at the time declarations of due consideration are called for in the Order of Business of the meeting and in the event any Councillor makes such a declaration the Councillor shall leave the Council Chamber before any discussion or voting on that matter takes place."*

13.3 At that time the Committee was concerned that the local law was inconsistent with s 2.10 of the *Local Government Act 1995* which outlines the role of councillors. Section 2.10 provides:

> "***The role of councillors***
>
> *A councillor –*
>
> *(a) represents the interest of electors, ratepayers and residents of the district;*
>
> *(b) provides leadership and guidance to the community in the district;*
>
> *(c) facilitates communication between the community and the council;*
>
> *(d) participates in the local government's decision-making processes at council and committee meetings, and*
>
> *(e) performs such other functions as are given to a councillor by this Act or any other written law."*

13.4 Further, s 2.7 of the *Local Government Act 1995* provides that the role of the council is to direct and control the local government's affairs as well as being responsible for the local government's functions. Clause 4.14 of the local law appeared to be inconsistent with ss 2.10 and 2.7 of the *Local Government Act 1995*, and therefore under s 3.7 of the *Local Government Act 1995* was inoperative to the extent that it is inconsistent with the *Local Government Act 1995*.

13.5 On a broader level, the attempt by cl 4.14 to prevent a democratically and validly elected councillor to vote appeared to be contrary to the theory of democratic representative government upon which local government is based. The Committee could not see how the clause could be authorised under the general law making power contained in s 3.5 of the *Local Government Act 1995*.

13.6 However, the Committee was not able to initiate a notice of motion for disallowance or recommend disallowance of the local law in 2001 as the last day for giving notice of motion for disallowance had passed before the Committee held its first meeting on 6 July 2001 (after its establishment on 28 June 2001).

13.7 The Committee identified a similarly-worded 'declaration of due consideration' clause when the new local law was gazetted in 2005. The clause states:

> *"Any member who is not familiar with the substance of any report, minutes or other information provided for consideration at a meeting shall declare that fact at the time declarations of due consideration are called for in the order of business of the meeting and in the event any member makes such a declaration the member shall leave the Council chamber before any discussion or voting on that matter takes place."*

13.8 The Committee's 2001 position regarding the problem with this clause still held when the Committee considered the local law in 2005. The Committee was of the view that the clause was beyond the power of the City of Cockburn to make under the *Local Government Act 1995*.

13.9 Section 5.21 of the *Local Government Act 1995* states:

> *"(1) Each council member and each member of a committee who is present at a meeting of the council or committee is entitled to one vote.*
>
> *(2) Subject to section 5.67*[25]*, each council member and each member of a committee to which a local government power or duty has been delegated who is present at a meeting of the council or committee is to vote.*
>
> *(3) If the votes of members present at a council or a committee meeting are equally divided, the person presiding may cast a second vote."*

13.10 Thus the *Local Government Act 1995* contemplates that voting is both an entitlement and a duty.

13.11 The Committee sought and obtained an undertaking from the City of Cockburn to either amend or delete cl 4.9 and not to enforce it in the meantime. In December 2005 the City of Cockburn fulfilled its undertaking and amended the declaration of due consideration clause to read as follows:

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[25] 'Disclosing members not to participate in meetings'.

"Any member who is not familiar with the substance of any report, minutes or other information provided for consideration at a meeting shall declare that fact at the time declarations of due consideration are called for in the order of business of the meeting."

14 JETTIES, BRIDGES AND BOAT PENS LOCAL LAW

City of Albany Jetties, Bridges and Boat Pens Local Laws 2004

14.1 Clause 3.4 of this local law stated that:

> *"… an authorised person may:*
>
> *(a) board any vessel at any time to inspect or adjust any mooring lines;"*

14.2 The *Local Government Act 1995* does not provide an express power of entry for an authorised person to enter private property such as a boat.

14.3 The Committee noted that some people live on boats/house boats at marinas and formed the view that the general principle that entry without authority is a trespass should apply in this circumstance. Every unauthorised entry upon private property is a trespass, the right of a person in possession or entitled to possession to exclude others from those premises being a fundamental common law right.[26]

14.4 The Committee also noted that Part 3, Division 3, Subdivision 2 of the *Local Government Act 1995* titled: 'Certain provisions about land' only applies to private property that is land. The *expressio unius* principle[27] may apply to exclude matters other than land from the entry procedures set out in the *Local Government Act 1995*. However, arguably, given that a boat is private property, it should be treated similar to land, that is, the subject matter should be in Schedules 3.1 and 3.2 and must comply with the procedures for entering private land set out in Part 3, Division 3, Subdivision 2 of the *Local Government Act 1995*.

14.5 The Committee considered that the subject matter of cl 3.4(a) was more appropriately placed in the substantive part of the *Local Government Act 1995*.

14.6 The Committee sought and obtained from the City of Albany an undertaking to delete cl 3.4(a) and not to enforce it in the meantime. The subsequent amendment was gazetted in February 2006.

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[26] *Entick v Carrington* (1765) 2 Wils KB 275 at 291; *Halliday v Neville* (1984) 155 CLR 1 at 10 per Brennan J; *Plenty v Dillon* (1991) 171 CLR 635.

[27] The express inclusion of one subject matter implies all others are excluded.

15 CONCLUSION

15.1 The drafting and procedural errors that are discussed in this report represent only a sample of the types of errors encountered by the Committee during this reporting period. In the Committee's view, errors of this sort continue to appear to stem from a combination of a lack of resources and local law making experience on the part of some of the drafters.

15.2 The Committee's report is provided as a means of assistance and guidance to those local government officers or consultants tasked with drafting local laws.

Mr Paul Andrews MLA
Chairman

30 May 2006