



THIRTY-SEVENTH PARLIAMENT

REPORT 17

**JOINT STANDING COMMITTEE ON DELEGATED
LEGISLATION**

**CITY OF SUBIACO EATING-HOUSE LOCAL LAW
2005**

Presented by Mr Paul Andrews MLA (Chairman)

and

Hon Ray Halligan MLC (Deputy Chairman)

June 2006

JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

Date first appointed:

June 28 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 Delegated Legislation Committee* 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 section 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)	Dr Graham Jacobs MLA
Hon Ray Halligan MLC (Deputy Chairman)	Ms Jaye Radisich MLA
Hon Shelley Archer MLC	Hon Barbara Scott MLC
Hon Vincent Catania MLC	Mr Tony Simpson MLA

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Kerry-Jayne Braat, Committee Clerk	Felicity Mackie, Advisory Officer (Legal)
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CONTENTS

1	BACKGROUND INFORMATION.....	1
	Power to make the Local Law.....	1
	Conclusion.....	3
	Retrospective subclauses in Local Law	3
2	COMMITTEE SCRUTINY.....	4
3	THE LAW	5
	The general position.....	5
	Whether retrospectivity authorised or contemplated by the Act.....	6
	Conclusion	8
	Disallowance motion.....	8

REPORT OF THE JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

IN RELATION TO THE

CITY OF SUBIACO EATING-HOUSE LOCAL LAW 2005

1 BACKGROUND INFORMATION

1.1 The *City of Subiaco Eating-House Law 2005* (“**the Local Law**”) was published in the *Government Gazette* on 24 January 2006.

1.2 The Local Law provides for the regulation and control of eating-houses within the district of the City of Subiaco.

Power to make the Local Law

1.3 The Explanatory Memorandum (“**the EM**”) to the Local Law advised that it was made pursuant to sections 172 and 342 of the *Health Act 1911* (“**the Act**”).¹

1.4 Section 342 of the Act provides:

(1) Every local government-

*(a) may, if the Executive Director, Public Health consents;
and*

*(b) shall, if the Commissioner or the Executive Director,
Public Health so directs,*

*make local laws in accordance with subdivision 2 of Division 2 of
Part 3 of the Local Government Act 1995 for the purposes
specified in this Act or generally for carrying into effect the
provisions of this Act².*

*(2) A local government shall repeal, amend or suspend the operation
of a local law if directed to do so by the Commissioner or the
Executive Director, Public Health.*

(3)....

¹ Explanatory Memorandum, undated, p1.

² Subdivision 2 of Division 2 of the *Local Government Act 1995* provides the procedure for making local laws empowered under another Act, where no alternate procedure is provided under that other Act.

(5) *A local law made under this section is inoperative to the extent that it is inconsistent with this Act or a regulation ... made under this Act.*

1.5 The Explanatory Memoranda Directions - Checklist advised of the approval of the Executive Director, Public Health (or delegate) for making of the Local Law.³

1.6 Section 172 of the Act is located in Division 3 of Part V of the Act.

1.7 Section 161, provides:

The provisions contained [in Division 3 of Part V of the Act] shall operate and have effect-

(a) in the district of Perth; and

(b) in the district of Fremantle; and

(c) in any other district in which the Governor may from time to time declare by Order in Council that the said provisions shall operate and have effect, and such Order in Council remains unrevoked.

1.8 The Explanatory Memoranda Directions - Checklist advised that an Order in Council declaring Division 3 of Part V of the Act applicable to the district of Subiaco was published in the *Government Gazette* on 3 August 1951.⁴ It did not advise of any revocation.

1.9 Section 172 of the Act provides, inter alia:

Local laws may be made in accordance with Part XIV for all or any of the following purposes:

(1) Regulating the registration of eating-houses under any of the following classifications:

...

(2) Regulating the issue of licences to proprietors and prescribing the terms and conditions upon which such licences shall be issued and held;

³ Explanatory Memoranda Directions- Checklist , undated, p2.

⁴ Explanatory Memoranda Directions- Checklist, undated, p2.

(3) *Prescribing fees for registration of eating-houses, and for licences issued to proprietors*

....

(15) *generally carrying into effect the purposes of the provisions of this division.*

Conclusion

1.10 The making of a local law by the City of Subiaco regulating eating-houses in the district of Subiaco was authorised by sections 172 and 342 of the Act.

Retrospective subclauses in Local Law

1.11 The Local Law contains the following subclauses in clause 4:

(3) *To the extent that clause 2(4) of The City of Subiaco Health Laws 1999 (published in the Government Gazette on 1 June 1999) repealed Part 8 of The City of Subiaco Health By-Laws 1994 (published in the Government Gazette on 11 November 1994) that repeal is repealed and Part 8 is revived with effect from 1 June 1999 until the day prior to the commencement of this Local Law, and on the date of commencement of this Local Law is repealed.*

(4) *The reference in clause 4(3) to Part 8 of The City of Subiaco Health Laws 1994 includes any schedules of The City of Subiaco Health By-Laws referred to in that Part, but does not include any reference to Part 8 or those schedules to meat premises or itinerant vendors.*

1.12 The EM provided no explanation for the subclauses 4(3) and (4) of the Local Law.

1.13 Committee staff obtained copies of *The City of Subiaco Health Laws 1999* (“**the 1999 Laws**”) and *The City of Subiaco Health By-Laws 1994* (“**the 1994 By-Laws**”).

1.14 Subclause 2(4) of the 1999 Laws provided:

The City of Subiaco Health Local Laws 1994, adopted by the City of Subiaco on 23 August 1994 and published in the Government Gazette on the 11 November 1994, are repealed.

1.15 Part 8 of the 1994 By-Laws provided for the registration and licensing of eating houses, meat premises and itinerant vendors.

1.16 The 1999 Laws made no provision for regulation of eating-houses.

2 COMMITTEE SCRUTINY

2.1 The Committee scrutinised the Local Law at its meeting on Wednesday, 5 April 2006, when it noted that subclauses 4(3) and (4) appeared to offend the presumption against retrospectivity.⁵

2.2 The Committee considered these clauses to be unusual provisions, particularly in the length of retrospectivity - being some 7 years - and in the fact that the revival of the 1994 By-laws was to have no prospective effect.

2.3 The Committee noted that the *Local Laws – Explanatory Memoranda Directions 2005* require a local government to provide a description of the purpose and effect of, and justification for, any local law (or any amendments to, or repeals of, it) in the EM and that any unusual provisions should be identified in the EM.⁶

2.4 The Committee resolved to write to the City of Subiaco seeking an explanation of the purpose and effect of, and justification for, subclauses 4(3) and (4) of the Local Law and advising of its resolution to place a protective Notice of Motion of Disallowance on the Local Law pending the City's response.

2.5 The Committee's letter was sent by facsimile transmission on 6 April 2006.

2.6 The Committee received a response from the City of Subiaco on 20 April 2006, stating:

Please be advised that clauses 4(3) and 4(4) are an attempt to retrospectively cure a prior 'defect', which is described below:

- In 1985 the City gazetted By Law No 5 relating to Eating Houses;

*- In 1994 the City gazetted a Health by-Law that contained provisions (namely, Part 8) dealing with Food Premises. Our recent legal advice is that **arguably** this enactment had the effect of **impliedly** repealing the 1985 By Law, **something the City was not previously aware of**; and*

- In 1999 a further Health Local Law was enacted that expressly repealed the 1994 By-Law, but which did not, at the same time, make any new provision for Eating Houses-

⁵ See paragraphs 3.1 - 3.6 below for a discussion of the presumption against retrospectivity.

⁶ Circular no 28-2005, issued by the Minister for Local Government on 9 November 2005.

simply because the City thought that the 1985 By Law was still valid.

As you can see, it is arguable that from 1999 until the gazettal of this recent Local Law, the City may have been in the position where its Eating House powers were without foundation.

For the sake of good order and governance, the City therefore wishes as far as is possible to ensure, retrospectively, that this deficiency is cured. For those reasons clauses 4(3) and 4(4) were inserted.

(Committee's emphasis).

2.7 The Committee considered the City's letter at its meeting on Wednesday, 3 May 2006.

2.8 The Committee noted that Clause 2 of the 1994 By-Laws provided that:

The Model By-Laws Series A as adopted by the City of Subiaco and published in the Government Gazette of 15th October 1964 and amended from time to time are repealed.

2.9 It also noted that the preamble to the 1994 By-Laws stated:

Pursuant to the provisions of the Health Act 1911, the City of Subiaco, having adopted the Model By-Laws Series "A" in the Government Gazette of 15th October 1964, and the City of Subiaco By-Law No 5 Relating to Eating Houses in the Government Gazette 20 September 1985, made under the Health Act 1911, and as amended from time to time, has resolved and determined that the adopted By-Laws shall be repealed and substituted with the City of Subiaco Health Laws 1994 as set out herein.

2.10 The Committee further noted that the City had not in the Local Law sought to confirm the application of the 1985 By-Law but had instead sought to retrospectively apply a different local law, the 1994 By-Laws.

3 THE LAW

The general position

3.1 The Committee considered it doubtful that section 41(1) of the *Interpretation Act 1984*, which provides:

Where a written law confers power to make subsidiary legislation, all subsidiary legislation made under that power shall-

(a) *be published in the Gazette;*

(b) *subject to section 42, come into operation on the day of publication, or where another day is specified or provided for in the subsidiary legislation, on that day.*

permits retrospective operation of subsidiary legislation.

3.2 The Committee is of the general view that the words “*another day*” in section 41(1) of the *Interpretation Act 1984* do not include a day ‘prior to’ the day of publication. However, in the circumstances, it was not necessary for the Committee to reach a conclusion on that question.

3.3 The Committee noted that the rule at common law is that a statute ought not be given a retrospective operation, where to do so would affect an existing right or obligation, unless the language of the statute expressly or by necessary implication required such construction.⁷

3.4 The same principles apply to a question as to the retrospective operation of delegated legislation as apply to Acts. The legislative intention to permit retrospectivity needs to be gathered by considering both the enabling Act and the instrument made under it.⁸ If retrospectivity is beyond the power conferred by the enabling Act, the instrument is not authorised by the enabling Act.

3.5 A general local law-making power for all things necessary or convenient to give effect to an Act does not permit the making of retrospective local laws as being in the public interest.⁹

Whether retrospectivity authorised or contemplated by the Act

3.6 Section 172 of the Act empowers local laws being made to carry into effect the purposes of Division 3 of Part V of the Act, including the regulation of eating-houses. It is, therefore, a general law-making power.

3.7 Section 162 of the Act provides that

(1) *Subject as hereinafter provided, no person shall establish or carry on the business of an eating-house in any district after the prescribed date unless —*

(a) *the eating-house is registered; and*

⁷ *Rodway v The Queen* (1990) 169 CLR 515.

⁸ Bennion, F, *Statutory Interpretation*, 4th Ed., Butterworths, 2002, p273.

⁹ *Broadcasting Co of Australia Pty Ltd v The Commonwealth* (1935) 52 CLR 52 and *Maxwell v Murphy* (1957) 96 CLR 261.

(b) the proprietor thereof is licensed in accordance with the provisions of this Division;

Provided that —

- (i) any proprietor already carrying on the business of an eating-house on the prescribed date may make application for the requisite registration of the eating-house and for the requisite licence as the proprietor thereof at any time within one month after the prescribed date, and pending the consideration of the said application may continue to carry on the said business; and*
 - (ii) a person already carrying on the business of an eating-house on the prescribed date shall not have or be deemed to have any right to the grant or registration of such eating-house or any right to the issue to the proprietor thereof of a licence in respect of such eating-house under the provisions of this Act.*
- (2) Subject to this Act the registration of an eating-house and the issue of a licence to the proprietor of an eating-house shall be under the control and subject to the local laws of the local government for the district in which such eating-house is situated.*
- (3) Application for registration of an eating-house or application for the issue of a licence to the proprietor thereof shall be made to the local government in accordance with the local laws of the local government and shall be accompanied by the registration fee or licence fee (as the case may be) for the time being prescribed by such local laws.*
- (4) Any person who establishes or carries on an eating-house without the same being registered, or who acts as the proprietor of an eating-house without holding the requisite licence as required by this section commits an offence.*

3.8 Clearly section 162 of the Act anticipates that eating-houses will be registered and proprietors licensed in accordance with local laws made by local governments but there appears no warrant for retrospective legislation. In particular, the Committee notes that both sections 172 and 342 of the Act are permissive, not mandatory, in their terms.

- 3.9 The Committee also observes that section 64(5) of the Act, dealing with agreements for recouping costs and paying maintenance for sewerage and draining schemes, contains a specific provision for retrospective application of that subsection.
- 3.10 The absence of such a provision in Part V of the Act reinforces the Committee's view that retrospectivity is not authorised by the Act in this case.

Conclusion

- 3.11 The Committee is of the view that the proposed retrospective application of the 1994 By-Law is likely to have an adverse effect on existing rights and obligations (Committee Term of Reference 3.6(b), Schedule 1, Legislative Council Standing Orders).¹⁰
- 3.12 Its concern in this respect is heightened by, but not completely based on, the fact that the local law that is sought to be revived is not the local law allegedly believed to apply during the relevant period.
- 3.13 The Committee concludes, in accordance with the Committee's Term of Reference 3.6(a), Schedule 1, Legislative Council Standing Orders, that subclauses 4(3) and 4(4) of the Local Law were not contemplated or authorised by the Act.

Disallowance motion

- 3.14 On 3 May 2006, the Committee resolved to proceed with Notice of Motion of Disallowance in respect of subclauses 4(3) and 4(4) of the Local Law. That notice was introduced to the Legislative Council on 9 May 2006.¹¹
- 3.15 The Committee recommends the disallowance of subclauses 4(3) and 4(4) of the Local Law.

Recommendation 1: The Committee recommends that subclauses 4(3) and 4(4) of The City of Subiaco Eating-House Local Law 2005 be disallowed.



Mr Paul Andrews MLA
Chairman

20 June 2006

¹⁰ See inside cover to this report.

¹¹ Hon Ray Halligan MLC, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 9 May 2006, p2289.