



JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

Your Ref: LE/102
Our Ref: 3871/12

Cr James Best
Mayor
City of South Perth
Civic Centre
Cnr Sandgate St and South Tce
SOUTH PERTH WA 6151

By fax: 9474 2425

27 September 2011

Dear Mayor

City of South Perth Dog Local Law 2011

I refer to the *City of South Perth Dog Local Law 2011 (the Local Law)* and to the explanatory memoranda which were provided to the Committee in July 2011. The Committee considered the Local Law at its meeting on 26 September 2011 and resolved to write to you regarding the following issues.

Subclause 4.1(1) not authorised by the empowering enactment

The Committee has considered the wording of clause 4.1 and has formed the preliminary view that subclause 4.1(1)(c) is not authorised or contemplated by section 3.7 of the *Local Government Act 1995*, which provides that a local law made under that Act is inoperative to the extent that it is inconsistent with the Act or any other written law. The Committee has formed the preliminary view that a portion of clause 4.1 of the Local Law offends the Committee's Term of Reference 3.6(a):

In its consideration of an instrument, the Committee is to enquire whether the instrument is authorised or contemplated by the empowering enactment.

The Committee notes the statutory framework which deals with animals (excluding assistance animals) being permitted in al fresco food premises.

The operation of the Food Act 2008 and status of Departmental policy guidelines

Section 22 of the *Food Act 2008* requires food businesses (as defined in section 10 of that Act) to comply with any provision imposed by the *Australia New Zealand Food Standards Code* (Chapter 3 of which has been incorporated into the Act). Standard 3.2.2, clause 24(1)(b) of the Code provides that a food business must "permit an assistance animal only in dining and drinking areas and other areas

used by customers". The ordinary meaning of the words 'dining and drinking areas' covers al fresco areas, in the absence of any further definition of the words.

This statutory requirement to ban all animals (except assistance animals) from food premises is mitigated by the Minister for Health's policy decision to limit the enforcement of the ban to certain situations only (as outlined in the Department of Health's 'Regulatory Guideline No. 2' and 'Fact Sheet No. 5'). According to those documents, enforcement agencies (that is, local governments) are to only enforce the ban on animals where the food business in question is not adequately managing its 'food safety risk' and that local governments must take a 'risk-based approach' to enforcement and only actively enforce the ban "*where there is evidence of a present risk of unsafe or unsuitable food being sold*".

Section 120 of the *Food Act 2008* gives the Chief Executive Officer of the Department of Health the authority to require enforcement agencies to adopt a guideline when performing their functions under the Act. Therefore, while compliance with the guideline is mandatory, it does not give local governments the authority to legislate contrary to the actual provisions in the *Food Act 2008*.

By specifying in clause 4.1(1)(c) that dogs are permitted in al fresco areas, the City of South Perth has gone outside what is authorised by the *Food Act 2008* and attempted to enshrine in legislation a policy guideline from the Department of Health, which may change from time to time.

The portion of the clause which is outside the boundaries of what is authorised by the *Food Act 2008* is therefore only the phrase in brackets: "*(other than an al fresco area)*". This phrase can be deleted from the Local Law without affecting the validity or operation of the rest of clause 4.1.

Undertakings

The Committee therefore seeks the following undertakings from the Council of the City of South Perth in relation to subclause 4.1(1)(c) of the Local Law:

- that the phrase "*(other than an al fresco area)*" will be deleted from clause 4.1(1)(c) of the Local Law;

and that

- all consequential undertakings arising from the undertaking will be made;
- clause 4.1(1) will not be enforced in a manner contrary to the undertaking that the Council gives;
- the undertaking will be completed within six months of the date of the City's letter giving the undertakings;
- the City of South Perth will provide a copy of the minutes of the meeting at which the South Perth Council resolves to provide the undertaking above; and
- where the Local Law is made publicly available, whether in hard copy or electronic form, it be accompanied by a copy of these undertakings.

Disallowance

At its meeting on 26 September 2011, the Committee resolved to move a notice of motion for the Legislative Council to disallow the *City of South Perth Dog Local Law 2011* should the Committee recommend disallowance to Parliament. The giving of notice in Parliament, however, should not be taken to indicate that the Committee has resolved to recommend disallowance and allows the City of South Perth time to provide the undertakings requested above.

Should the Committee recommend disallowance, the Local Law will cease to have effect from the date of disallowance and cannot be relied upon by the City.

Given the strict timeframes under which the Committee operates for disallowance in Parliament, the Committee requests that you provide all of the undertakings above and the supporting documents from the City of South Perth Council by **5pm, Tuesday 11 October 2011**.

If you have any queries in relation to this letter, please contact the Committee's Advisory Officer (Legal), Ms Irina Lobeto-Ortega on ph: 9222 7302, by fax: 9222 7805 or via email at delleg@parliament.wa.gov.au.

Yours sincerely



Mr Joe Francis MLA
Chairman