

Plastic Bag Reduction through Local Laws

By David Nicholson

Momentum has been slowly building regarding a ban on plastic bags. It's been legislated already in the Northern Territory, ACT, South Australia and Tasmania. Channel 10's show 'The Project' recently gave the issue a mainstream platform, calling for the remaining states to follow suit and in our own neck of the woods the City of Fremantle has been attempting to enact a local law banning single use plastic bags since 2012. With the recent change in the State Government the political landscape has changed, which has encouraged some local governments to recommence attempts to introduce a ban on plastic bags by local law. Whilst those attempts may be rendered unnecessary by the recent announcement of a proposed Statewide ban on plastic bags, the legislative proposal is not yet law and could still potentially be voted down in the Legislative Council. This article considers the legal issues raised by a ban on plastic bags enacted via local law, including whether it is within the legislative power of a local government to enact subsidiary legislation of this nature.

Legislative Power

Local governments in Western Australia have a local law-making power pursuant to clause 3.5(1) of the Local Government Act 1995 (LG Act) which provides that local governments may make local laws in relation to matters that are 'required or permitted to be prescribed by a local law' or 'are necessary or convenient to be so prescribed, for it to perform any of its functions under this Act.'

The general function of local government is stated as 'providing for the good government of persons in its district'¹. The LG Act also states that 'a liberal approach is to be taken to the construction of the scope of the general function of a local government.'²

Initial Disallowance of Plastic Bag Reduction Local Law

The City of Fremantle's first attempt at enacting the Plastic Bag Reduction Local Law 2012 was considered by the Joint Standing Committee on Delegated Legislation (Joint Standing Committee) as being within the legislative power of local governments, with the exception of clause 6 of the local law. Clause 6 required retailers to charge a minimum fee to a

customer for an alternative shopping bag.

The Joint Standing Committee is tasked to consider whether the subsidiary legislation:

- (a) is within power;
- (b) has no unintended effect on any person's existing rights or interests;
- (c) provides an effective mechanism for the review of administrative decisions; and
- (d) contains only matter that is appropriate for subsidiary legislation.

The Joint Standing Committee had a range of views in relation to clause 6 and whether it offended paragraphs (b) and (d) above. Some committee members felt that the requirement for retailers to charge a fee for an alternative bag interfered with trade and commerce and therefore had unintended effects on a retailers rights to charge as they wished to for their products and services. In doing so, it was considered the local law attempted to go beyond the accepted notions of local government, which were held by the High Court to define the scope of the legislative power of local government in *Lynch v Brisbane City Council*.

Ultimately the Legislative Council, following lengthy debate, voted in favour of the disallowance motion.

Second Disallowance of Plastic Bag Reduction Local Law

The City of Fremantle revised the local law and in 2015 enacted the Plastic Bag Reduction Local Law 2015. The provision requiring a retailer to charge a customer for an alternative bag was removed and the Joint Standing Committee had no issue with the subsidiary legislation and did not prepare a report to Parliament. However, the Hon Member for North Metropolitan, Peter Katsambanis, moved a disallowance motion⁵ and debate ensued.

The Legislative Council's debate concerned largely whether the subsidiary legislation was a matter for local government or whether it was best dealt with through state legislation. The LG Act does not limit a local government's function to only those areas not dealt with by the state government. Section 3.2 of the LG Act states that the scope of the general function of a local government is not limited by reason only that the Government of the State performs or may perform functions of a like nature.

Part of Hon Peter Katsambanis' criticism of the local law was that it was 'absolutely silly for ad hoc rules to be made by every local council authority particularly when there is no agreement with the state government and not even any agreement within local government authorities through the Western Australian Local Government Association that this is the right way to go.' The State Government at the time provided comment through the Minister for Environment that it did not regulate

the use of plastic bags and had no intention of doing so. Ultimately, the votes were again in favour of the disallowance of the local law.

Further legislative and political developments

Since that debate a certain level of cohesion has been reached in the local government sector. The Western Australian Local Government Association (WALGA) issued a Discussion Paper in August 2016, conducted a survey of local governments to determine the support for the ban on single use plastic bags and on 5 July 2017 its State Council passed a resolution in support of a State-wide ban on plastic bags and agreed to advocate to the State Government for the ban's introduction.

On 26 April 2017 the City of Fremantle resolved to advertise its third attempt at this local law⁶. On 25 May the Town of East Fremantle resolved to make a similarly worded local law, which was gazette on 2 June 2017.⁷ The issue has also been raised at Council meetings throughout the metropolitan area including the City of Joondalup, City of Kalamunda, City of Vincent and the Shire of Mundaring amongst others.

Many local governments are optimistic that Mark McGowan's recent comments that he was open to the idea of a ban on plastic bags and supported local governments being able to make their own decisions,⁸ mean that any local law banning plastic bags is less likely to be disallowed by parliament.

Legal issues

While the State Government seems supportive of local governments enacting a plastic bag ban by local law – and one of its most vocal opponents, Hon Peter Katsambanis is now in a Liberal minority in the Legislative Assembly⁹ – there may still be hurdles to overcome for local governments.

Firstly, Labor does not have a majority in the Legislative Council and so while the State Government may support local governments enacting local laws on this topic, the Labor party does not have a majority to vote against any disallowance motion in the Upper House. This could potentially see any such local law disallowed for a third time.

Secondly, any local law enacted will still be open to judicial challenge and therefore there may be further consideration of a local government's legislative power and whether such a local law falls within the general function of a local government to provide for the good government of the people in a district.

Thirdly, it could potentially be contended that such a local law is actually for environmental protection rather than good government and is therefore more properly in the scope of the Environmental Protection Act 1986 rather than the LG Act.

However, local governments already deal with environmental issues with respect to waste management, litter and refuse on building sites, the keeping of animals, amongst other things, and on that basis a legislative ban on plastic bags is arguably not outside what is understood to be the 'accepted notions of local government'.

Lastly, local governments that enact a local law to ban plastic bags may potentially encounter problems enforcing the provisions of the local law due to the limitations on local government's access to private property. The LG Act permits a local government to enter property in an emergency¹⁰ or with a warrant¹¹ but otherwise for the entry on the private property to be lawful the local government must either get the consent of the owner or occupier or it must issue a notice at least 24 hours in advance that it intends to enter the property and specify the purpose for the entry.¹² Local governments could not include further powers of entry in the local law as that would amount to an extension of the scope of the LG Act in relation to private property¹³ and therefore would most probably be considered to be beyond power as subsidiary legislation.

The change in State Government has increased local governments' confidence in the possibility of successfully enacting a local law to ban plastic bags. However, there may still be further hurdles to overcome before local laws of this nature are successfully implemented to reduce waste and landfill in local areas. The increased level of discussion and legislative action at a local government level may also serve to increase pressure on the State Government to itself legislate to ban plastic bags. If that occurred then any local laws on the subject would be rendered ineffectual in the event of any inconsistency (s. 3.7 LG Act). The education of the public will also be crucial; many will not like to part with their single-use plastic bags or as Hon Peter Katsambanis puts it 'the humble plastic bag', which he considers 'to be a very, very good friend.'

Statewide ban on plastic bags announced

On 12 September 2017 Hon Stephen Dawson MLC, Minister for the Environment announced that lightweight single-use shopping bags will be banned in Western Australia from 1 July 2018. This announcement will not prevent the passage of the local laws to the Joint Standing Committee and eventually to the Legislative Council. The City of Fremantle and the Town of East Fremantle local laws may well be in effect prior to any state legislation being enacted. If state legislation is passed it will then render any local laws on the subject ineffectual, at least to the extent that the local laws are inconsistent with the State legislation, as mentioned in the article above. The final enactment of the proposed state legislation is also not entirely certain as it requires approval of the Legislative Council where Labor do not hold a majority. Nonetheless, given the widespread public support for the ban it would be unlikely that the legislation fails to pass and certainly clarity on this environmental issue will be welcome.

If you would like to discuss any of the matters raised in this article further, please do not hesitate to contact David Nicholson at dnicholson@mcleods.com.au. The information contained in this article should not be relied upon without obtaining further detailed legal advice in the circumstances of each case.