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Dear Gary

Legal Advice and Services – Amendment to Beaches and Beach Reserves Local Law

Instructions

1. Thank you for your instructions for legal advice with respect to the *Town of Cottesloe Beaches and Beach Reserves Local Law 2012 (Principal Local Law)*.
2. We note that our instructions are to –
 - (a) prepare a draft amendment to the Principal Local Law (**Draft Amendment**) for the Town to consider; and
 - (b) provide comment on State Government requirements and risks of disallowance.

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Draft Amendment

Objectives

3. Councillors of the Town are concerned to strengthen the prohibition on fishing for sharks and applicable penalties.
4. The Principal Local Law prescribes a prohibition on fishing for sharks: clause 7.1(a).
5. This offence has a subjective element, which we understand has made it difficult to prove and prosecute. There is a concern that the activity is not being adequately addressed and the offence is not providing the adequate deterrence.
6. We understand the Town wishes to introduce a strict liability offence for an activity that – in practical terms – is exclusive to fishing for sharks.
7. We have been provided with copies of correspondence with the Department of Fisheries (**Department**), which suggests prohibiting fishing with a wire trace to achieve the appropriate “strict liability offence”.
8. That correspondence refers to such a prohibition specific to commercial fishing, which the Minister ordered under the *Fish Resources Management Act 1994*, published in the Government Gazette on 30 December 2008.
9. We have further consulted with the relevant officers from the Department as part of preparing this advice. Their comments reiterated the relevant considerations that they set out in their correspondence directly with the Town. Unfortunately, they did not have any direct experience with enforcement action involving recreational shark fishing offences or strict liability offences involving fishing with a wire trace.
10. The Town may want to further investigate whether there may be unintended consequences of prohibiting fishing with a wire trace. For example, prohibiting certain fishing that is not for sharks.
11. Any community concerns about unintended consequences could be evaluated during the advertising required under the *Local Government Act 1995*, if the Draft Amendment is progressed.

Form of the Draft Amendment

12. We have prepared the Draft Amendment and enclosed it for the Town’s review.

13. We have considered alternative ways of framing the Draft Amendment. However, in view of the consultation with the Department, it appears that a simple “strict liability offence” is the only practical mechanism to add to the existing subjective offences that prohibit shark fishing (ie in both the Principal Local Law and the *Fish Resources Management Regulations 1995*).
14. The Draft Amendment simply proposes a prohibition for anyone fishing with a metal trace. The wording is consistent with the Minister’s order under the *Fish Resources Management Act 1994* referred to above.
15. The prohibition would apply only to fishing in the foreshore areas that are referred to as the “defined area” in the Principal Local Law. This is consistent with the application of the Principal Local Law’s other restrictions.
16. The prohibition creates a strict liability offence. This means that any person fishing with a wire trace commits an offence, regardless of whether that person actually intends to fish for sharks. This will mean any prosecution that the Town pursues will not have to prove the intention of the offender, as is currently necessary with respect to clause 7.1(a) (ie intent to catch a shark).
17. Further, a modified penalty for the offence has been included in the Draft Amendment. It is up to the Town to specify an amount for the modified penalty up to a maximum of \$500.
18. As referred to above, the Draft Amendment may well function to prohibit fishing for species, other than sharks, that is normally done with a wire trace. The Town might consider it appropriate to consult with recreational fishing organisations on this implication, before progressing the Draft Amendment. Alternatively, the Town might consider it appropriate to explore such concerns during the advertising required under the *Local Government Act 1995* for the adoption of a proposed local law.

Disallowance risks

State Government requirements

19. The *Local Government Act 1995* sets out the process for making local laws in Part 3, Division 2, Subdivision 2. This process includes providing copies of the proposed local law to –

(a) the Minister once it is proposed; and

(b) the Minister and the Parliament once it is published in the Government Gazette.

20. The Minister, through the Department of Local Government (**Department**), will usually provide feedback on formatting matters, as well as flagging any subject-matter that may result in the local law being disallowed following the scrutiny of the Parliamentary Joint Standing Committee on Delegated Legislation (**Committee**).

21. The Committee has terms of reference that it expects delegated legislation to conform with. Relevantly, Schedule 1 of the Legislative Council Standing Orders sets out the following in respect of the Committee –

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

(a) is within power;

(b) has no unintended effect on any person's existing rights or interests;

(c) provides an effective mechanism for the review of administrative decisions; and

(d) contains only matter that is appropriate for subsidiary legislation.

10.7 It is also a function of the Committee to inquire into and report on-

(a) any proposed or existing template, pro forma or model local law;

(b) any systemic issue identified in 2 or more instruments of subsidiary legislation; and

(c) the statutory and administrative procedures for the making of subsidiary legislation generally, but not so as to inquire into any specific proposed instrument of subsidiary legislation that has yet to be published.”

22. In practice, local laws are generally only disallowed where they are –

(a) abusive or offend principles of justice (ie retrospective application or reverse onus of proof); or

(b) poorly drafted.

23. However, following a recommendation of the Committee, it is effectively open to the Parliament's Legislative Council to disallow a local law as it sees fit.

24. Local laws have been disallowed for political reasons, and a recent example of this is the disallowance of the City of Fremantle's local law banning plastic bags.

25. We do not consider the Draft Amendment as abusive or offensive to principles of justice. It is our view that the Draft Amendment will satisfy the procedural requirements for a local law.

26. It is a matter for the Town to determine how politically palatable the Draft Amendment would ultimately be to the Legislative Council.

27. We would envisage that the current political emphasis on water safety and shark attack mitigation would mean favourable treatment of the Draft Amendment. We would welcome your instructions to prepare any submission in support of the Draft Amendment should the Town proceed to adopt it following advertising.

Yours sincerely

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