



Guidelines for Local Laws Resource Book

APPROVED



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Guidelines for Local Laws – Resource Book

Table of contents

About these guidelines resources

3

Purpose

3

Format

3

Preparing for Local Laws

5

2.8 Identifying existing legislative provisions that may be overlapped by a Local Law

5

2.10 A risk management approach to Local Laws

7

2.13 Possible restriction of competition by Local Laws

8

3.1 Application of the Local Law

9

3.3 Notices/Cautions/Warnings

10

3.7 Purposes and conditions of permits, licences, etc.

13

Creating Local Laws

15

4.2 *Interpretation of Legislation Act 1984*

15

4.8 Incorporating material by reference

17

4.10 Expressed plainly

19

4.11 Not exceed powers

21

4.14 Not shift onus of proof

21

4.19 Reviewing the draft - *Charter of Human Rights & Responsibilities Act 1984*

22

5.1 Starting communication

25

Implementing and enforcing Local Laws

27

8.2 Availability of materials incorporated by reference into the Local Law

27

8.6 Website protocols

27

9.3 Powers of authorised officers

29

9.8 Infringement notices - *Infringements Act 2006* requirements

30

9.9 *Infringements Act 2006* reviews

34

About these guidelines resources



About these guidelines resources

Purpose

The suite of Guidelines resources, of which this book is one component, is intended to assist Councils in Victoria to achieve better practice when considering, making, implementing, enforcing and reviewing their Local Laws.

Better practice will ensure that Local Laws are accessible and clear to the community, reduce the regulatory burden on business and assist Councils in achieving policy outcomes.

Format

The primary document in the suite is the Guidelines for Local Laws Manual, which guides users step-by-step through the operational aspects of Local Laws.

This Resource Book supplements the Manual with case studies, discussion points and current examples of Local Laws or related materials to assist Council officers to understand and consider relevant issues. It is best read in conjunction with the Manual, which provides the proper context and background.

The Manual is presented in a linear or sequential format, which is replicated in this workbook. At various sections in the Manual, the Resource Book icon appears to alert users to the additional information contained in this book. The numbering of sections in this Resource Book relate directly to the corresponding section in the Manual.

Preparing for Local Laws



2.8 Identifying existing legislative provisions that may be overlapped by a Local Law



Council needs to take steps to ensure a Local Law does not duplicate, overlap, conflict with, or is inconsistent with existing legislation.

2.8.1 Local Government Act 1989

The Act has provisions with which Local Laws must not be inconsistent.

A current Local Law makes it an offence if anyone:

assaults, obstructs, or attempts to obstruct, threatens, abuses, insults, intimidates, any authorised officer in the exercise of his or her powers or functions or duties under this Local Law

The penalty provided by the Local Law is 20 penalty units.

The Local Law, specifically the penalty amount, is inconsistent with section 238 of the Act, which already provides:

"Any person who obstructs a Council or a member of Council staff in the performance of anything the Council or the member is empowered to do by any Act, regulation or Local Law is guilty of an offence.

Penalty: 10 penalty units."

2.8.4 Specific Legislation

Road Management Act 2004

The Road Management Act 2004, its regulations and Codes constitute a complex piece of legislation. Particular care needs to be exercised to ensure that Local Laws

in relation to permits required to carry out works on roads are not inconsistent with this Act. The Road Management Act 2004 has provisions related to:

- when a permit is required;
- by whom; and
- by which authority it is issued.

It also has limitations on conditions that can be imposed in permits.

Building Act 1993

The Building Act 1993 contains a clear prohibition on Local Laws regarding certain matters.

Section 13 of the Building Act provides:

13 Effect on Local Laws

- (1) *A Local Law made under Part 5 of the Local Government Act 1989 has no force or effect to the extent that it provides for any matter set out in Part 1 of Schedule 1.*
- (2) *Subsection (1) does not apply to a Local Law made under the powers conferred by the building regulations.¹*

This is a blanket prohibition on Local Laws related to the matters set out. A Local Law cannot validly cover these matters, even if it is intended to fill perceived gaps in existing legislation.

¹ Subsection 2 is referring to section 8 of the Building Act. This creates the ability by regulation to empower Councils to make Local Laws which are then deemed to be building regulations. It has been seldom used.

The matters listed in Schedule 1 about which Local Laws have no force or effect include:

1. Design and siting of buildings including—
 - (e) matters relating to the preservation of trees, and of architectural or heritage features;
 - (g) matters relating to the use of impermeable surface materials on an allotment and their effect on drainage and runoff;
 - (h) matters relating to the amenity of nearby buildings and allotments; and
 - (j) matters relating to associated fences and boundary walls.
3. Preparation of land for building work.
4. The construction of buildings.
21. The structural adequacy of advertising signs and hoardings.
22. Fixtures projecting from buildings and dangers arising out of projections from construction work.
23. The protection of adjoining property.
24. Use of public space for construction work.
25. Access to and egress from buildings and places of public entertainment.
26. Suitability of buildings and places of public entertainment for occupation.
27. The number of people who can be accommodated in buildings and places of public entertainment.
28. Use and maintenance of buildings and places of public entertainment including use and maintenance and replacement of services, installations and equipment referred to in this Schedule.
30. The manner of alteration and demolition of and additions to buildings, including the connecting or dividing of buildings.
34. The safety of buildings and places of public entertainment.

Schedule 1 raises a number of questions about interpretation. For example, a number of Councils have Local Laws providing for the protection or preservation of trees on private land. These are probably quite valid in the main. A question arises, however, as to whether these Local Laws have “no force or effect” if:

- the stated purpose of the Local Law is to prevent the removal of trees from building sites, or
- there is no stated purpose relating to building sites but the actual effect of the Local Law in a particular case would be to prevent the siting of a proposed building to the owner’s or developer’s preference.

Food Act 1984

Section 63B The *Food Act 1984* provides:

63B. Limitation on power to make Local Laws

- (1) A Council must not make a Local Law under the Local Government Act 1989 for or with respect to any matter or thing for or with respect to which—
 - (a) regulations made under this Act are in force; or
 - (b) regulations could be made under this Act; or
 - (c) a prescribed food standard has effect.
- (2) A Local Law (whether made before or after the commencement of the Food (Amendment) Act 1995) is of no effect to

the extent that it makes provision for or with respect to any matter or thing referred to in subsection (1).

Councils need to be conscious of section 63B(1)(b) when making Local Laws since an array of regulations could be made under this Act.

2.10 A risk management approach to Local Laws

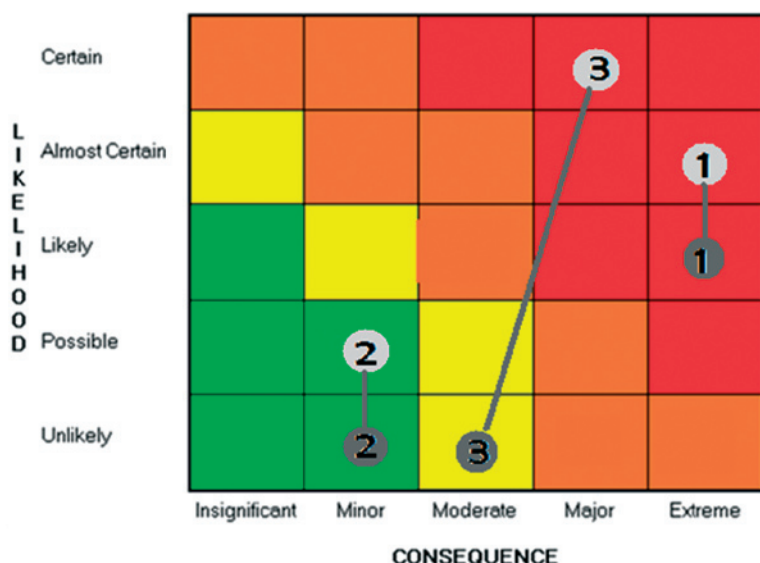


A proposal to introduce a Local Law is an ideal opportunity to use a risk management approach to prioritise the risks sought to be addressed

Most Councils in Victoria now have well established risk management strategies and procedures that accord with the Standard AS/NZS 4360:2004 or ISO 31000:2009. A Council's own risk register might record incidences of the occurrence of a problem or existence of a hazard. This would provide objective evidence of the existence of a problem.

Once a risk is identified, standard risk management techniques provide a good vehicle to assess whether its severity (in terms of likelihood and consequence) justifies intervention.

The figure on the next page shows three problems/risks for which Local Laws solutions are being proposed. The lighter colour circle shows the assessment of the risk pre-Local Law treatment and the darker colour shows the assessment after the Local Law has been applied.



Risk 1 remains a serious risk even after the proposed Local Law is implemented. This would indicate that an alternative means of solving the problem should be identified, particularly if the cost/burden of the Local Law is high.

Risk 2 suggests marginal improvement but its likelihood and consequences probably suggest it was not significant enough to warrant a Local Law response. In any reasonably competent risk management system, this level of risk would likely fall within the Council's agreed "risk appetite".

As a result of the introduction of the Local Law, Risk 3 is projected to move from serious to a more acceptable risk. Depending on the "burden" (i.e. cost of risk treatment) involved this would be seen as a worthwhile use of the Local Law regulatory mechanism.

2.13 Possible restriction of competition by Local Laws



Council's Local Laws must not restrict competition unless Council can demonstrate:

- the benefits outweigh the costs; and
- there is no other way of achieving the objective.

This also applies to policies and guidelines supporting Local Laws.

The following is an outline of the process originally laid out in the National Competition Policy (NCP) statement and re-jigged to the Local Laws context.

It should be noted that Schedule 8 of the Act does not require Councils to report to the Minister in this matter. However, the Local Law Community Impact Statement should demonstrate that a review has taken place.

- Step 1:** Clarify the objective of the Local Law and demonstrate how the Local Law achieves this objective
- Step 2:** Identify whether the Local Law restricts competition
- Step 3:** If competition is restricted, determine which review model for the Local Law is appropriate. (Local Law clauses found not to restrict competition are not reviewed further)
- Step 4:** Demonstrate that the restriction is necessary to achieve the objective
- Step 5:** Identify the costs to the community of the restriction
- Step 6:** Identify the benefits to the community of the restriction
- Step 7:** Assess whether the benefits outweigh the costs
- Step 8:** Make recommendations and set dates for repeal or amendments if necessary
- Step 9:** Report on review to Minister/community

3.1 Application of the Local Law



- Under section 116 of the Act, Council can decide the times, extent, cases, etc., to which a Local Law applies.
- If Council wants to decide these matters, it needs to explicitly do so.
- If Council wishes to reserve the right to determine matters provided for by section 116, the Local Law should:
 - specifically reserve that right;
 - specify the circumstances under which determination may be triggered;
 - specify conditions which will apply; and
 - specify that Council will make the decision.

3.1.2 Issues

As stated in the Manual:

The following example provision, extracted from a Local Law currently in force, does not achieve the objective of section 116:

The Council may prescribe specified premises to be exempt from a provision of this Local Law for a specified time and on specified conditions.

Obvious questions arise for Council to consider:

- How is Council going to go about prescribing this?
- How will it be made public?
- Will the prescribing be through the same process that found the Local Law was necessary in the first place?
- What sort of premises did Council have in mind?
- Why were these exemptions not made as part of the Local Law as required by the Act?

The following provision of the Local Law compounds the problem by giving authority to an authorised officer to exempt individuals from a Local Law. No guidelines are given.

The Council or an authorised officer may, in writing, from time to time exempt any person; any class of persons; any authority; or all persons during any specified time from the application of clause 21.1 or clause 21.3...

In the following provision, the question again arises as to how Council is going to determine who is entitled to have a Local Law requirement waived.

Council may from time to time exempt any person or class of persons or any authority or all persons during any specified time from the need to obtain a permit under clause

3.3 Notices/Cautions/Warnings



- Council needs to be clear about and clearly articulate what it is trying to achieve when it uses mechanisms such as notices to comply, cautions and warnings.
- Council needs to be clear about the intended consequences of these mechanisms – particularly whether failure to comply creates another offence.
- Council needs to be extremely clear about whether it is creating its own procedures or using procedures, such as official warnings under the *Infringements Act 2006*.

3.3.2 Notice to comply

If a notice to comply has further repercussions, such as possible cancellation of permit, then those repercussions also need to be clearly spelled out.

A Council Local Law provides (in relevant parts):

14. Correction of a permit

Council may correct, cancel or amend any permit issued.

15. Notice to comply

- 15.1 Council may, by serving a notice to comply in the form or to the effect of Schedule 1, direct any owner, occupier or other person apparently in breach of this Local Law to remedy any thing which constitutes an offence under this Local Law.

19. Offences

A person who:

- 19.1 contravenes or fails to comply with any provision of this Local Law; or
- 19.2 contravenes or fails to comply with any condition contained in a permit under this Local Law; or
- 19.3 contravenes or fails to comply with a notice to comply within the time specified in the notice to comply

is guilty of an offence and is liable to:

- 19.4 a maximum penalty of 20 penalty units, unless stated otherwise in this Local Law.

As a minor issue, the words “or fails to comply” are not necessary as “contravenes” includes a failure to comply as per section 38 of the *Interpretation of Legislation Act 1984*.

Schedule 1 of the Local Law contains the notice to comply referred to:

**X CITY COUNCIL
COMMUNITY LOCAL LAW NO 1 2006**

NOTICE TO COMPLY

To: Name:
 Address:

You have, in the opinion of X City Council or an authorised officer of the Council, committed a breach of clause of the City of X Community Local Law No 1 2006 by

.....

at:

To remedy the breach within days from the date of this notice you must –

.....

.....

.....

If you require further information you may contact
at the Municipal Offices, on 0000 0000 between the hours of
and
If you fail to comply with this Notice you will be guilty of an offence under clause of this Local Law and may be subject to penalties of up to \$2,000. In addition, Council may undertake such works as specified in the Notice, for the full cost of which you will be liable.

This notice remains in force for a period of 1 year from the date of the notice.

Date:

Name of authorised officer:

Signature of authorised officer:

Note: If this Notice relates to a contravention of a permit and you do not comply with the Notice, the permit may be cancelled. If you do not wish to have the permit cancelled you should comply with the directions in this Notice or show cause to the Council in writing why the permit should not be cancelled.

Issues

The clauses of the Local Law and the form of the notice are ambiguous or inconsistent with one another. The intention and validity of the Local Law and the manner of implementation are not clear.

Issue 1: Lack of clarity about authority.

The Local Law refers to “Council”. It is quite specific in differentiating between actions the Council may carry out and actions that might be carried out by an authorised officer. The Local Law does not in fact utilise the power to

delegate functions to that “class of persons” i.e. authorised officers.

In practice, authorised officers can only carry out those functions that a Local Law states authorised officers can carry out. In this example it is questionable as to whether the notice is validly issued if issued by an authorised officer.

Issue 2: Lack of clarity about which offence(s) will attract penalty.

There are three possible offences all contained within clause 19:

1. breach of the Local Law;
2. failure to comply with the notice; and
3. failure to comply with the permit condition.

The notice is not clear about which offence will attract the penalties up to \$2000.

Issue 3: Cancellation of permit.

Clause 14 of the Local Law gives Council the power to cancel a permit but it does not set out the grounds on which this may be done. Provision of a fine of the maximum amount allowed under the Act, together with cancellation of the permit might be regarded as a double or excessive penalty.

Issue 4: Notice in force for a period of one year.

It is not clear what this reference is intended to achieve. It could mean that the notice remains in force if not complied with. Or, if the notice is complied with, it might be intended to capture a further breach by relying on the original notice. If so, it is most unlikely a court would support such a proposition.

Lack of clarity about purpose and consequences

A Council has a Local Law which provides:

60. Powers of authorised officer

An authorised officer may issue a warning, a notice to comply or an infringement notice on a person who is breaching the Local Law.

The clause above would be better worded as “if a person is in breach of the Local Law, an authorised officer may ...”

In terms of function, there is a range of problems. For example, it does not set out the circumstances in which the officer would issue a warning as distinct from commencing legal proceedings. The function of a warning is not described. It is unclear how a warning is different to a notice to comply. The consequences of ignoring a warning are not outlined.

The following example provided is an improvement in that it attempts to set out the circumstances under which a permit may be cancelled. It also puts a realistic timeframe (seven days) on a notice to comply.

51. Cancellation of permit

- (1) The Council may cancel a permit if it considers that:
 - (a) there has been a serious or ongoing breach of the conditions of the permit; or
 - (b) a notice to comply has been issued, but not complied with within seven days after the time specified in the notice for compliance; or
 - (c) there was a significant error or misrepresentation in the application for the permit; or
 - (d) in the circumstances, the permit should be cancelled.
- (2) Before it cancels a permit, the Council must provide to the permit holder an opportunity to make comment on the proposed cancellation.

Subclause (d) is a catchall that detracts from the fairness of the preceding subclauses. The clause would be enhanced by requiring Council to consider a submission from the permit holder rather than just allowing them to make comment.

Note the reference to Council, which is a defined term in the Local Law. Council needs to be clear whether it intends the decision to come to it rather than being dealt with by Council staff.

3.3.2.1 Warnings under *Infringements Act 2006* (and withdrawal of warnings)

Regulation 6 of the *Infringements (Reporting and Prescribed Details and Forms) Regulations 2006* sets out the prescribed details which an official warning must contain:

- (a) that it is an official warning;
- (b) the date of the official warning;
- (c) the name and address (if known) of the person served with the official warning;
- (d) the name of the enforcement agency;
- (e) the enforcement agency identifying reference of the official warning;
- (f) either the name of the issuing officer or the enforcement agency identifying reference of the issuing officer;
- (g) the date and approximate time and place of the infringement offence alleged to have been committed;
- (h) the Act or other instrument that creates the infringement offence and a brief description of the infringement offence alleged to have been committed;
 - (i) that further information may be obtained from:
 - (i) a nominated telephone number;
 - (ii) a designated address;
 - (iii) and if available, the enforcement agency's website.

Regulation 7 sets out the prescribed details which a withdrawal of an official warning must contain:

- (a) that it is a withdrawal of an official warning;
- (b) the date of the withdrawal of an official warning;
- (c) the name and address (if known) of the person served with the withdrawal of an official warning;
- (d) the name of the enforcement agency;
- (e) the enforcement agency identifying reference of the withdrawal of an official warning;
- (f) the date and approximate time and place of the infringement offence alleged to have been committed;
- (g) the Act or other instrument that creates the infringement offence and a brief description of the infringement offence alleged to have been committed; and
- (h) a statement of how the enforcement agency intends to proceed in respect of the infringement offence alleged to have been committed.

3.7 Purposes and conditions of permits, licences, etc.



- The legislation presumes that the purposes for which permits, licences etc., will be issued and the conditions on which they will be issued will be set out in the Local Law, not held in reserve.
- The conditions set out:
 - should be reasonable having regard to all the circumstances.
 - should not include matters which cannot be complied with, such as joint named insurance.
 - must not be utilised as an opportunity for Council to avoid liabilities which would otherwise exist.

3.7.5 Specific conditions of permits – Indemnity clauses

A Council's Local Law requires the following document to be signed before it will issue permits for street trading.

NOW THIS INDENTURE WITNESSETH that in consideration of the Council granting such authority the Indemnifier **INDEMNIFIES** and will **KEEP** the Council **INDEMNIFIED** against any and for all damage to or loss of any equipment and property owned by or under the control of the Council in or adjacent to the area wherein such *

.....
is situated and against any claim arising out of all injuries and damage suffered by any person whatsoever including the Indemnifier any employee or agent sub-contractor or any customer of the Indemnifier resulting from the use of the said area in the manner and for the purposes aforesaid.

The form of indemnity actually contained on the back of the permit application has

different wording (i.e. is inconsistent with the Local Law), even though it is of similar effect.

According to the Council's website, a similar indemnity appears to be required for a number of other activities, which is not specifically noted in the Local Law.

As stated in the Manual, this sort of clause has the effect of ousting the jurisdiction of the courts to hear claims. Councils adopting these types of indemnities are effectively using the power of the Council to require a permit as an opportunity to relieve themselves of liabilities they would otherwise bear.

Creating Local Laws



4.2 Interpretation of Legislation Act 1984



- Existing provisions of legislation such as the *Interpretation of Legislation Act 1984*, should be utilised where possible. For example, if a word or phrase is defined in enabling legislation or in the *Interpretation of Legislation Act 1984*, that definition should be accepted in the Local Law. If a different definition is required, it is preferable to use a different word or phrase and define it.
- If the *Interpretation of Legislation Act 1984* states how a provision is to be interpreted, such as singular including plural, there is no need to repeat that in the Local Law. It is already the law and repeating it is simply duplicating existing legislation.

4.2.2 Issues

As indicated in the Manual, the definitions or rules outlined in the *Interpretation of Legislation Act 1984* can make clauses that are often inserted into Local Laws unnecessary or redundant.

The following example contains a number of unnecessary clauses:

1. Unless the contrary intention appears in this Local Law, a reference to a clause is to a clause of this Local Law, a reference to a schedule is to a schedule of this Local Law, and a reference to a Part is to a Part of this Local Law.
 2. Introductions to Parts, headings and notes of this Local Law are explanatory only and do not form part of this Local Law. They are provided to assist understanding.
 3. Where, in this Local Law, a word or phrase has a particular meaning, other grammatical forms of that word or phrase have a corresponding meaning.
 4. A reference in this Local Law to a singular word includes the plural and vice-versa.
- Section 33 of the *Interpretation of Legislation Act 1984* provides for the same thing as clause 1 of this Council's Local Law.
 - The Local Law does not seem to have any "Introduction to Parts" as referred to in clause 2. In any event, the provision appears to be inconsistent with section 36 of the *Interpretation of Legislation Act 1984*. Since section 36 is not discretionary, it would be better to concentrate on making sure the Local Law complies with it.
 - Sections 37 and 39 of the *Interpretation of Legislation Act 1984* cover the same matters as clauses 4 and 3 (respectively) of the Local Law.

The following table sets out a number of definitions taken from one Council's Local Law. It illustrates a number of general problems with definitions in terms of clarity, relevancy and currency.

| Provision | Problem |
|--|--|
| Definition of land "includes anything on that land". | Unusual definition that could include a motor vehicle on the land. |
| Definition of Council property "means land ...including any ...things ... on that land". | Redundancy – land is already defined to include things on it. |
| Definition of permit includes "conditions as set down by Council under this Local Law". | The Local Law does not set down any conditions. |
| Definition of road states that it has the same meaning as in the <i>Local Government Act 1989</i> then goes on to say it "includes a footpath, nature strip, right of way and lane". | <i>The Local Government Act 1989</i> (LGA) definition already includes footpath, nature strip and right of way – so those additions are redundant. The LGA definition does not include lane, so the definition is not the same as that of the LGA despite the statement that it is. |
| Definition of weed is "as defined by the National Weed Strategy" and "refers to any plant that has economic, social or conservation impact". | <p>The National Weed Strategy no longer exists; it has been replaced by the Australian Weeds Strategy. By virtue of section 112(2) of the LGA, the National Weed Strategy remains the operative document incorporated by reference but it is no longer available / accessible.</p> <p>The additional words from 'refers' onwards are not part of the Strategy definition and are not accurate. Presumably, a crop of wheat, for example, has economic impact (positive) but it would not normally be classified as a weed.</p> |

4.8 Incorporating material by reference



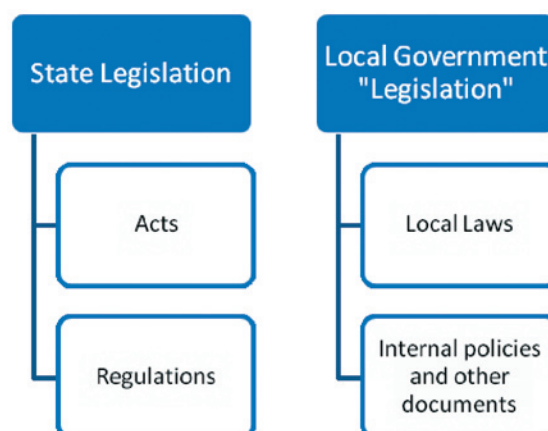
- Many Councils incorporate material (such as policies, codes and guidelines) into their Local Laws by reference.
- Incorporation by reference is a potentially complex area. It needs to be handled carefully if it is to be legally effective in adding material to Local Laws.
- Council needs to have a clear view of issues such as:
 - whether Council means to incorporate a document or just refer to it;
 - which version and which part of the document is incorporated; and
 - the implications of the document being amended.
- Documents that are incorporated effectively form part of the Local Law and need to be as readily available as the Local Law.

The use of incorporation by reference

Local Laws in Victoria use incorporation by reference extensively.

They also seem to be unique in incorporating by reference Councils' own internal documents, such as policies and guidelines.

Part of the reason for this appears to be that local Councils lack the ability to make regulations and so use internal documents as quasi-regulations.



This is not the situation in other Australian states. For example, under section 3.8 of the *Local Government Act 1995* of Western Australia, a Local Law may adopt the text of an external document such as “any code, rules, specifications, or standard issued by the Standards Association of Australia or by such other body as is specified in the Local Law”.

In Western Australia, the Joint Standing Committee on Delegated Legislation scrutinises Local Laws. In its July 2003 report, the Committee stated:

“The Committee is of the view that making laws which adopt internal policies such as for advertising signs or codes of conduct do not fall within the above powers of the Act. Adopting these documents is considered to be a method of avoiding the scrutiny of Parliament by making laws outside of the s.3.12 process.”

Whilst the law in Victoria is different to that in Western Australia, Victorian law needs to be strictly followed by Councils to avoid criticism or invalidity.

4.8.10 Issues – does the incorporated matter have to be in existence?

As stated in the Manual:

Some Councils rely on the reference in section 112(1)(c) to “from time to time” as indicating that documents which do not exist at the time of making the Local Law can be adopted in the future. This is achieved by inserting into the Local Law a provision such as:

“... if such a policy is adopted by Council at any time.”

This would clearly not be valid in respect of State Government subordinate legislation. Section 32(3) of the *Interpretation of Legislation Act 1984* provides that if the subordinate legislation must be “laid before the house” then a copy of the document incorporated must be provided to the Clerk of the Parliaments to be published in the Government Gazette.

It is suggested “from time to time” refers to the possibility of a new *version* of the document being published in the future, not that the document may come into existence in the future.

This is given weight by section 112(2) which requires notice of the new version to be gazetted if it is intended that the new version will apply. Section 112(2) assumes that the document already exists and has been amended. There is no equivalent provision to, for example, publish in the Government Gazette notification that a document that did not exist at the outset has now been brought into existence.

Various devices have been developed to get around the possibility that a Local Law can only apply, adopt or incorporate an existing matter.

One such device is providing that the document has no effect until it is gazetted in accordance with section 112(2) of the Act.

The problem is that section 112(2) has no reference to new documents. It specifically, and only, refers to the situation where a document has already been incorporated by reference and has been amended.

Another device is the voluntary adoption of a process “complying” with section 223 of the Act.

For example, an existing Local Law has a provision:

100 Council policies

1. In addition to the controls provided in this Local Law, Council may prescribe a Council policy in relation to any of the following:
 - (h) any other matter dealt with under this Local Law.
2. A person must comply with a provision of a Council policy prescribed by Council under clause 100(1).

Penalty: 10 Penalty Units

3. Before prescribing a Council policy for the purposes of clause 96(1), Council must undertake the section 223 process.

While this is suggested in the Manual as a solution, from a strict legal viewpoint the voluntary adoption of a process (section 223) does not overcome the problem that there is no legal basis for belatedly incorporating new provisions into the Local Law in this way.

By far the preferred course is that documents be in existence at the time the Local Law is created.

4.8.15 Issues

As stated in the Manual:

One problem with incorporating internal Council documents in Local Laws is that every time a change is made to the incorporated document, the change is not effective until the change is published in the Government Gazette.

A Council's Local Law provides that

A reference in this Local Law to a *Council policy*, or a *government Act, regulation or policy*, or a part, section or provision of *Council policy, government Act, regulation or policy*, includes a modification, re-enactment or replacement of it and a part, section or provision of it, and a substitution or an amendment of it, and a substitution or an amendment of a part, section or provision of it.

This seemingly straightforward clause is troubling. If the "reference" in the Local Law to a "Government Act" or "regulation" is simply a reference, then the provision is not required because section 31 of the *Interpretation of Legislation Act 1994* achieves the same thing.

If the "reference" is by way of incorporating or adopting the wording of a provision of an Act or regulation², then section 112(2) of the Act would apply to defeat this clause of the Local Law.

There are two alternatives applicable for Council policies:

- Either the policy is "applied, adopted or incorporated" by the Local Law, in which case this clause is in direct conflict with section 112(2) of the Act and is invalid. Section 112(2) requires that for the amended Council policy to apply, Council must publish notice in the Government Gazette.
- Alternatively, the policy is referred to but not incorporated by reference. In this case, it does not matter if Council changes the policy. This is because it does not form part of the Local Law anyway and Council cannot rely on it for that purpose.

² For example, some Councils have incorporated the wording of EPA regulations related to noise into their Local Laws with the intention that the wording will form part of the Local Law, but not the regulations.

A Council has a Community Local Law policy. The policy says:

This policy is a fluid document and as such should be reviewed on a regular basis to ensure relevance and consistency with both Council and community expectations.

This is not a problem because Council's policy is not adopted into or incorporated by reference into its Local Law.

4.10 Expressed plainly



Local Laws should be in Plain English.

4.10.3 Issues – problems with expression

As the Manual indicates, a number of problems consistently arise in legal drafting.

Following are some examples.

Ambiguity

Ambiguity is one of the most common problems to emerge in legal drafting. It quite often results from grammatical errors such as incorrect phrasing within a sentence.

A Local Law provides:

A person must not remove material from a residential premise that contains or is liable to contain asbestos ...

The Local Law intends to refer to the removal of asbestos-containing materials. However, the way it is worded seems to prevent the removal of any material at all, such as carpet, if the residential premise itself contains asbestos.

The following is an example of both ambiguity and the misplaced use of "shall".

A Council's Local Law provides:

On breach of any permit condition, the permit shall be cancelled.

It is unclear whether a permit is automatically cancelled on breach of a condition or whether this is a direction that if a permit condition is breached, someone should cancel the permit. If the latter is the case, it remains unclear as to who is the responsible person.

Definitions

Over-defining can make Local Laws cumbersome or confusing. Problems include:

- defining words that have a readily understood common meaning;
- defining words that only appear in other definitions;
- defining words which then do not appear in the document (surprisingly common); and
- defining words that already have a statutory meaning, for example, as outlined in the *Interpretation of Legislation Act 1984*:
 - month means calendar month;
 - person includes a corporation;
 - masculine includes the feminine and vice versa; and
 - singular includes the plural and vice versa.

Stretched definitions contain more than just a definition; they contain an operative element. For example:

“**site fencing** means a fence around the entire perimeter of a building site at the commencement and for the duration of the building works”.

The period of erection is an operative element of an offence; it is not a necessary part of the definition.

Deeming

Deeming is often used unnecessarily:

“A person depositing litter shall be deemed to be guilty of an offence”.

What is meant is:

“Depositing litter is an offence”.

Overuse of “shall”

“This clause shall not apply to”.

What is meant is:

“This clause does not apply to...”.

“Every person who for the time being has care of a dog shall remove and dispose of faeces deposited in a public place by the dog.”

What is meant is:

“Every person who for the time being has care of a dog must remove...”

“Any person who contravenes or fails to comply with any provision of this Local Law or contravenes or fails to comply with a notice to comply shall be guilty of an offence and shall be liable to a penalty of 10 penalty units...”

What is meant is

“Any person who contravenes any provision of this Local Law or fails to comply with a notice to comply is guilty of an offence and liable to a penalty of 10 penalty units...”

Use of “where” rather than “if” to indicate a condition

“Where a person is required to undertake any works on Council land or a road other than under the *Road Management Act 2004*, that person must: ...”

What is meant is:

“If a person is required to undertake any works on Council land or a road other than under the *Road Management Act 2004*, that person must: ...”

4.11 Not exceed powers



Council’s Local Law must not exceed the powers of the Act(s) under which it is made.

4.11.2 Issues

As the Manual states, this is a problem in a number of areas, particularly when Local Laws stray into telling courts how to act and what evidence the court may take into account.

A Local Law provides:

In determining whether a person is guilty of an offence against clause 3.2 (b), a court must not rely on the provisions of subclause (a).

A Council cannot write rules of evidence for courts established under State Government legislation.

A related problem arises when there is a failure to fully specify the provisions under which a Local Law is made.

The Local Law of a Council provides:

This General Local Law is a Local Law made under –

- (a) Part 5 of the *Local Government Act 1989*; and
- (b) Part 3 of the *Domestic Animals Act 1994*.

A clause in the Local Law provides:

Where an authorised officer reasonably believes that a person has committed an offence against this Local Law or the *Food Act 1984*, the officer may issue to that person an infringement notice.

The Local Law is expressed to be made under the *Local Government Act 1989* and the *Domestic Animals Act 1994*. It makes no mention of the *Food Act 1984*. The Local Law cannot therefore authorise an officer to issue any infringement notice in relation to the *Food Act 1984*.

4.14 Not shift onus of proof



A Local Law must not reverse the onus of proof unless there is specific authority in the enabling Act.

- The *Local Government Act 1989* does not provide authority to reverse onus of proof.
- Other Acts under which Council is able to make Local Laws are unlikely to provide authority.

4.14.2 Issues

A Council has a Local Law which provides:

6.2 Provision of effective fencing

- (a) The owner and/or occupier of land used for the grazing of livestock must take all reasonable care to ensure that fencing is adequate for the purpose of preventing livestock from straying onto any highway.
- (b) The onus of proving that all reasonable care has been taken shall be upon the owner or occupier.

The Local Law clause reverses the onus of proof and appears to be in breach of Schedule 8.

A number of Councils have Local Laws providing that a person whose name appears on an unauthorised advertising poster is guilty of an offence unless they can prove they were not involved. In that instance such a provision reverses the onus of proof.

Again, a Council has a Local Law which provides that a person referred to in a document affixed to any structure “shall be deemed to have affixed the document unless that person can prove that he or she did not ... “ affix and otherwise had no knowledge. This would appear to be a breach of the Schedule 8(2)(b)(iii) prohibition against purporting to shift the onus of proof without clear and express authority in the enabling Act.

A number of Councils have Local Laws requiring persons to remove graffiti from their premises within a certain period. In some cases owners are required to apply for a permit to allow graffiti to remain longer than the period. In other cases, they are guilty of an offence if graffiti is not removed. While these provisions do not strictly reverse the onus of proof, they could be considered objectionable. The clauses are similar in concept to provisions requiring property owners adjoining public property to treat their properties with graffiti protection paint.

In a 2003 circular the Western Australian Joint Standing Committee on Delegated Legislation outlined a number of concerns in relation to such matters, that Councils would be wise to consider.

“The Committee considers that the prescriptive nature of such clauses is ultra vires of the *Local Government Act 1995* to make on the grounds of unreasonableness. Such clauses:

- expose individuals to a financial burden; and
- punish home owners/business owners for the criminal activities of others by making

them “offenders” if they fail to comply with the Local Law.

While the end sought to be achieved by a local government is the removal of graffiti in the district so as to maintain amenity, the means of achieving this is disproportionate. Its effect is to punish the home owner/occupier who may not be able to pay either for the non-sacrificial paint or the modified penalty if there is a failure to comply with the Local Law. That home owner/occupier has already suffered damage to his or her property and is not given the option of less expensive means of ameliorating the problem. Further, the Committee views graffiti eradication as essentially a ‘whole of community’ problem, rather than an individual home owner/occupier problem. Accordingly, the Committee considers that the community should bear the cost of graffiti protection and removal and will therefore continue to require the repeal of such clauses in Local Laws, or recommend their disallowance.”

4.19 Reviewing the draft - Charter of Human Rights



- The *Charter of Human Rights* requires that Local Laws not be incompatible with human rights.
- A thorough and detailed review is the only way of establishing this.
- The Charter applies to all materials such as policies, guidelines and manuals used in conjunction with the Local Law.

4.19.3 Issues

The areas covered by the Charter are extremely broad. A lot of the better practices recommended by these Local Laws Guidelines will be overlaid by the Charter, effectively making them mandatory.

There was a transition period when the Charter was introduced. On 1 January 2008, the provisions of the Charter became fully operational. The Charter is now law with which Councils must comply.

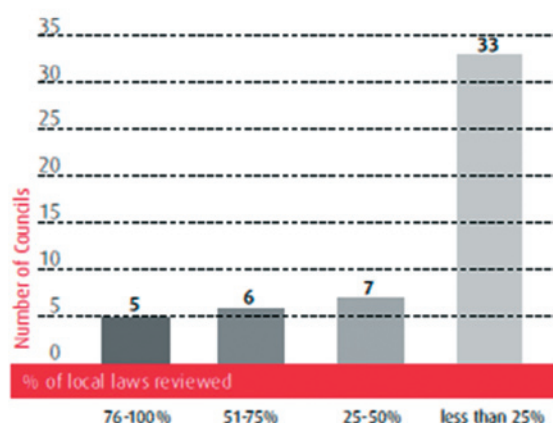
The 2008 report of the Commission highlighted the significant impact of Local Laws on human rights. It also noted that given this impact, Councils as regulators and policy makers need to pay greater attention to the Charter and its requirements.

Local laws

During 2008, an additional 26 councils modified their processes for developing local laws to ensure compliance with the Charter, bringing the total number of councils reporting modified procedures to 44. While acknowledging the increased efforts by individual councils, the Commission is concerned that almost half of the sector (35 councils) has not pursued proactive strategies in relation to one of the Charter's most obvious impacts.

Reviews of existing local laws are similarly patchy: 17 councils reported having completed a review of all local laws (up from 5 in 2008). Of the councils reporting incomplete reviews, progress was varied (graph 5):

Graph 5: Progress on reviews of local laws against the Charter



Despite the survey responses identifying gaps, the Commission was encouraged by some councils being able to provide illustrations of how reviewing local laws for Charter compliance had resulted in enhancements to the relevant laws. For example:

- Darebin City Council reported that it had modified its procedures governing appeals in relation to actions and decisions by council, including cancellation of permits and the issuing of traffic infringement notices. The City of Greater Dandenong also reported planned amendments to local laws to ensure appropriate review of decisions by council in relation to permits and other regulatory matters.
- Latrobe City Council advised that it is considering changes to enhance opportunities for public participation in council meetings through extending the time allocated in council meetings to public questions and submissions. The council has already acted to ensure council meeting papers are made available in accessible formats.
- In Hepburn Shire, the review of local laws for Charter compliance has complemented and helped to progress existing initiatives to promote compliance with the *Federal Disability Discrimination Act 1992*. The council reported further work in relation to regulating use of footpaths and ensuring access by all, as well as renewed efforts concerning the accessibility of premises.
- The City of Casey has identified that a local law preventing worship outside of prescribed hours may be in conflict with the Charter's protection of freedom of religion⁵⁰ and is considering the issue further.

Applying the Charter to Local Laws

The Charter sets out a number of rights. These rights are often displayed under the headings of Freedom, Respect, Equality and Dignity (FRED). A Local Law must be compatible with these rights.

Freedom

- freedom from forced work
- freedom of movement
- freedom of thought, conscience, religion and belief
- freedom of expression
- right to peaceful assembly and freedom of association
- property rights
- right to liberty and security of the person
- fair hearing
- rights in criminal proceedings
- right not to be tried or punished more than once
- protection from retrospective criminal laws.

Respect

- right to life
- protection of families and children
- cultural rights, including recognition of the distinct cultural rights of the Aboriginal people of Victoria.

Equality

- recognition and equality before the law
- entitlement to participate in public life (including voting).

Dignity

- protection from torture and cruel, inhuman or degrading treatment
- protection of privacy and reputation
- humane treatment when deprived of liberty
- appropriate treatment of children in the criminal process.

Assessing compliance with the Charter

Determining whether a Local Law is compatible with the Charter and human rights involves a thorough checking process. The process has to be carried out in respect of each operative provision of a Local Law. This includes more than just provisions creating offences. Conditions related to permits or the steps required to ask for a review of a decision may affect human rights. The checking process, modified from Department of Justice Guidelines, is as follows:

Step 1

Consider whether the proposed Local Law raises human rights. Identify each human right that the Local Law might impact on.

Step 2

Consider the scope of each human right raised by the proposed Local Law. Take into account any specific limitations or express exceptions that appear in the section providing for the right.

Step 3

Decide whether the proposed Local Law limits, restricts or interferes with the scope of the right.

Step 4

Consider whether the limitation or restriction is reasonable and demonstrably justified under section 7 of the Charter. For example, consider whether there is another way to achieve the objective that impacts less on the right, whether a provision could be drafted more narrowly, or contain safeguards to better protect affected rights. You will need to identify all of the reasons why the limitation or restriction on the right is justified. These may be extensive.

Step 5

Modify the proposed Local Law if the limitation or restriction on the right is not reasonable or demonstrably justified.

A review in accordance with the Charter is a complex process. In part, this is because of the sheer number of rights that need to be assessed against each provision of the proposed Local Law. It is also because it is time-consuming to properly consider all scenarios and variables. This process is however very important as it can reveal that a seemingly innocuous provision can have human rights implications.

It is easy to be distracted by the apparent reasonableness or simplicity of a proposal put forward to address an issue of concern. The following case study illustrates an instance where a Council needed to take the time to consider human rights principles against the proposed solution and consider an alternative approach.

Case Study:

Business vendors in a regional CBD were calling on Council to introduce a 'move on and stay away' by-law that would apply to those displaying antisocial behaviour. The Council rejected the move on human rights grounds, saying that the by-law would restrict people's right to be in a public place, contrary to the right of freedom of movement.

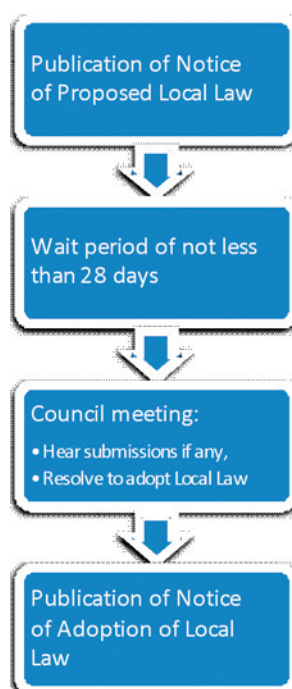
5.1 Starting communication



- Council needs to start communication and consultation on its proposed Local Law well before the statutory section 223 process.
- Council needs to take responses into account and needs to be prepared to make changes to its draft as a result of consultation.

The following diagram shows the minimal statutory process for adopting a Local Law. While this is currently the minimum required it does not meet the standards or objectives of better practice, which would include greater consultation and engagement with stakeholders, and proper consideration of the issues raised by this process.

The minimal statutory process



Implementing and enforcing Local Laws



8.2 Availability of materials incorporated by reference into the Local Law



Council needs to ensure that material incorporated by reference into the Local Law is available to the same extent and in the same ways (for example, on Council's website) as the Local Law itself, preferably alongside or linked to the Local Law.

A Local Law states that the amount of the fixed penalty to be specified in an infringement notice is set out in a document called "Fixed Penalties for Offences dealt with by infringement notice issued under the General Local Law 2008".

Such a document may well exist, but the recipient of an infringement notice wanting to know whether he or she has been "charged" the right amount for the infringement offence will have to personally visit a Council office to find it because it is not available on Council's website.

8.6 Website protocols



- It is not sufficient for Local Laws and related materials to be summarised or buried on Council's website.
- These materials need to be able to be found easily and in full.

In an example of well-intentioned but poorer practice, Council has a website with a menu of items on the home page:

- The menu includes an item "Local Laws".
- Clicking the link does not lead to Council's Local Laws.

- Instead the link leads to a listing of issues arising under the Local Laws (see below)

[Avoiding Neighbourhood Disputes](#)

[Domestic Animals and Livestock](#)

[Fire Safety](#)

[Impounded Vehicles](#)

[Incinerators](#)

[Litter](#)

[Noise](#)

[Overhanging Branches](#)

[Pound Facilities](#)

- None of these links leads to Council's Local Laws.
- A search of the A-Z index shows two listings for Local Laws:
 - One leads back to the issues list page shown above; and
 - The other leads to a listing of some 30 items related to permits, conditions of permits (see below).

[Disabled Parking Permit](#)

[Advertise/Display/Locate Items on Footpath Permit](#)

[Permit Conditions to Display Tables & Chairs](#)

[Permit Conditions to Display A-Frames & Goods](#)

[Hire Agreement for Cat Cage](#)

[Permit Conditions for Hiring Cat Cage](#)

[Driving Livestock Permit](#)

[Grazing Livestock Permit](#)

[Grazing of Livestock Conditions](#)

[Application for Public Protection \(Hoarding\)](#)

[Works Zone Parking Permit](#)

[Application to Busk / Street Entertainment](#)

[Permit Conditions to Busk/Entertain](#)

While having conditions of permits and applications forms on the website is a step in the right direction, none of these items actually leads to the Council's Local Laws. In fact, on this Council's website, there is no indexed item leading to Local Laws. Local Laws can eventually be found after much searching via the pathway: Council/Council documents/Corporate documents/Local Laws.

While the website linkages may make sense to internal Council staff in terms of hierarchy of responsibilities within Council, they make no sense and are not intuitive to a member of the public who is trying to ascertain requirements and obligations.

Another Council has a website page as shown on the following page. The page has some good features:

- It lists the Local Laws.
- It provides a description of the content of each Local Law.
- It provides a direct hyperlink to each Local Law and related material.

However, the objectives contain "motherhood" statements and lack detail. Notwithstanding that, it is a good example of Local Laws being made accessible to the community.

Council has the following Local Laws with the objectives outlined:

Environmental and Civic Assets Local Law

The objectives of this Local Law are to:

- provide for the peace, order and good government of the municipal district
- protect Council land, Council assets and roads, and
- prevent damage to, or pollution of, Council land, Council assets and roads.

Statements need to be expanded to be more specific and more comprehensive.

[Environment and Civic Asset Local Law 2006 \(DOC 2Mb\)](#)

Direct hyperlink to view the relevant Local Law

City Council General Local Law

The purposes of the Local Law are to provide for all of the following:

- the peace, order and good government of the municipal district
- a safe and healthy environment for the community of the municipal district
- the protection and enhancement of the amenity of the municipal district
- the safe, fair and reasonable use and enjoyment of public places and all premises within the municipal district
- the protection and enhancement of municipal buildings, public assets and assets of Council within the municipal district, and
- uniform and fair administration of the Local Law.

[City Council General Local Law 2007 \(DOC 901Kb\)](#)

Governance Local Legislation

- To provide a mechanism to facilitate the good governance of City Council
- to promote and encourage community leadership by City Council
- to promote and encourage community participation in local government
- to provide for the election of the Mayor
- to provide for the procedures governing the conduct of meetings, and
- to provide for the use of Council's common seal.

9.3 Powers of authorised officers



- Authorised officers have extensive powers including power of entry.
- Powers must be exercised with caution and within authority.

9.3.2 Issues

Authorised officers also need to be aware of provisions in the Act that may assist them in their role:

- Section 238 makes it an offence to obstruct Council or a member of Council staff in anything authorised by a Local Law. The penalty is 10 penalty units. Whether an authorised officer who is not a member of Council staff could

successfully claim it was Council that was being obstructed is not clear.

- Section 239 deals with aiding and abetting, joint offenders, and body corporate offenders against Local Laws. If a body corporate is guilty of an offence, any person who takes part in the management of the body corporate is also guilty of an offence.
- Section 241 deals with evidence of ownership of land.
- Section 242 deals with a range of matters which are accepted as fact unless evidence is provided to the contrary.

9.8 Infringement notices - *Infringements Act 2006* requirements



- The *Infringements Act 2006* sets out extensive provisions related to the issuing of infringement notices.
- Council cannot use its Local Laws to modify these provisions.
- Council must comply with the provisions.

9.8.2 Issues

A common example of a Local Law being inconsistent with the *Infringements Act 2006* is where it contains Council's own form of infringement notice without the "prescribed details" or which provides for the Council or the CEO to approve a form of infringement notice. The prescribed details are contained in the *Infringements (Reporting and Prescribed Details and Forms) Regulations 2006*.

Regulation 8 requires:

8 Infringement notice

- (1) For the purposes of section 13 of the Act, the prescribed details which an infringement notice must contain are—
 - (a) that it is an infringement notice;
 - (b) the date of the infringement notice;
 - (c) the name and address (if known) of the person served with the infringement notice or, if the infringement notice is in respect of an infringement offence that is a parking infringement, the words "the Owner";
 - (d) the name of the enforcement agency;
 - (e) the enforcement agency identifying reference of the infringement notice;
 - (f) subject to paragraph (fa), either the name of the issuing officer or the enforcement agency identifying reference of the issuing officer;
 - (fa) in the case of an infringement notice issued or served on behalf of the Traffic Camera Office or the Toll Enforcement Office, the title or name of the issuing officer;
 - (g) the date and approximate time and place of the infringement offence alleged to have been committed;
 - (h) the Act or other instrument that creates the infringement offence and a brief description of the infringement offence alleged to have been committed;
 - (i) the infringement penalty;
 - (j) the manner in which the infringement penalty may be paid;
 - (k) that the infringement penalty must be paid by a specified due date, being not less than 28 days from the date of service of the infringement notice;
 - (l) that failure to pay the infringement penalty by the specified due date may result in further enforcement action

being taken and the incurring of further costs;

- (m) that the person served with the infringement notice, or a person acting on that person's behalf, may apply to have the decision to serve the infringement notice internally reviewed by the enforcement agency under the Act unless the infringement notice is in respect of an infringement offence to which any of the following provisions apply—

- (i) sections 89A to 89D of the *Road Safety Act 1986*;
- (ii) section 215C of the *Transport Act 1983*;
- (iii) sections 61A and 61BA of the *Marine Act 1988*;

- (n) that the person served with the infringement notice may be eligible for a payment plan under section 46 of the Act, unless that person is a body corporate;

- (o) that further information and information relating to eligibility for payment plans and applying for internal review can be obtained from—

- (i) a nominated telephone number;
- (ii) a designated address;

- (iii) if available, the enforcement agency's website address;

- (p) any further details specifically required to be included in relation to an infringement offence under any Act or other instrument which creates the infringement offence.

Note

Section 13(b) of the Act requires that an infringement notice state that the person is entitled to elect to have the matter of the infringement offence heard and determined in the Court and if that person is a child, in the Children's Court.

- (2) If an infringement notice is in respect of an infringement offence that is a parking

infringement, in addition to the details required under subregulation (1), the infringement notice must contain the registered number or other identification of the vehicle involved in the parking infringement.

Infringement notice checklist

| Requirement | Council notice complies |
|---|-------------------------|
| • States it is an infringement notice. | |
| • Name and address (if known) of the person served with the infringement notice or “the Owner” - for parking infringements, for example: | |
| • Name of the Council. | |
| • Identifying reference of Council. | |
| • Name or Council identifying reference of the issuing officer. | |
| • Date and approximate time and place of the alleged infringement offence. | |
| • Local Law that creates the infringement offence. | |
| • Brief description of the infringement offence. | |
| • Infringement penalty. | |
| • Manner in which the infringement penalty may be paid. | |
| • Specified date by which infringement penalty must be paid (note: <u>specified</u> date, not “within 28 days”). | |
| • Advice that failure to pay the infringement penalty by the specified due date may result in further enforcement action being taken; and | |
| • the incurring of further costs. (note: enforcement action <u>and</u> costs, not “prosecution” or “conviction”) | |
| • Advice of availability of internal review by Council on application or person or someone on their behalf. | |
| • Advice that a natural person may be eligible for a payment plan under section 46 of the <i>Infringements Act 2006</i> . | |
| • Advice that further information and information relating to eligibility for payment plans and applying for internal review can be obtained from— (i) a nominated telephone number; (ii) a designated address; and (iii) Council’s website address (Councils are required to have a website). | |
| • Any further details specifically required to be included in relation to any infringement offence under any Act or the Local Law. | |
| • Advice that the person is entitled to elect to have the matter of the infringement offence heard and determined in the Court; and | |
| • If that person is a child, in the Children’s Court. | |
| • If parking infringement, the registered number or other identification of the vehicle | |

Clearly, the following form of infringement notice contained in a recently introduced Local Law would not be valid as an infringement notice when completed.

LOCAL LAWS - SCHEDULE 2.5

INFRINGEMENT NOTICE

Date of Notice _____ No. of Notice _____

To: Surname or Organisation Name: _____
 Other Names _____
 Address _____
 Postcode: _____

Reg. No. of any Vehicle _____ (State) _____

I, _____ (full name of authorised officer) being a duly authorised officer of the Council have reason to believe that you have committed an offence against the Local Laws of the _____ City Council. The nature of the alleged offence and the penalty is indicated by the ticked box below:

| Local Law Number | Clause Number | Nature of Infringement | Applicable * Penalty Units |
|------------------|---------------|------------------------|----------------------------|
| | | | |
| | | | |
| | | | |

Date: _____ Time: _____ Location: _____

If you pay the penalty indicated within 28 days from the date of this notice to the _____ City Council:
 By CHEQUE, MONEY ORDER, or CASH to the Municipal Offices in _____ St
 this matter will not be brought to Court and no conviction will be recorded.

You are entitled to disregard this infringement notice and defend in Court the prosecution for the offence.

Should you wish to make any submission concerning this infringement notice you should contact me.

 (Signed by Authorised Officer)

* The value of a penalty unit is set by the Monetary Units Act 2004.

Regulation 9 read:

9 Withdrawal notice

For the purposes of section 19(a) of the Act, the prescribed details which a withdrawal notice must contain are—

- (a) that it is a withdrawal notice;
- (b) the date of the withdrawal notice;
- (c) the name and address (if known) of the person served with the infringement notice;
- (d) the name of the enforcement agency;
- (e) the enforcement agency identifying reference of the infringement notice;
- (f) the date of the infringement notice;
- (g) the date and approximate time and place of the infringement offence alleged to have been committed;
- (h) the Act or other instrument that creates the infringement offence and a brief description of the infringement offence alleged to have been committed;
 - (i) that further information may be obtained from—
 - (i) a nominated telephone number;
 - (ii) a designated address; and
 - (iii) if available, the enforcement agency's website address.
- (j) that if the infringement penalty and any prescribed costs have been paid, the infringement penalty and prescribed costs will be refunded, unless the person has an ongoing payment plan in which case Part 3 of the *Infringements Act 2006* applies.

Note: Section 19(b) of the Act requires that a withdrawal notice must state how an enforcement agency intends to proceed in respect of the infringement offence alleged to have been committed.

9.9 Infringements Act 2006 reviews



- The *Infringements Act 2006* has extensive provisions in respect of requests for review and the conduct of reviews under that Act.
- These provisions must also be followed.

9.9.1 Legislative provision

Section 22 of the *Infringements Act 2006* contains extensive material related to a review under that Act.

Infringements Act 2006 Reviews

Section 22 of the *Infringements Act 2006* provides:

- (1) If an enforcement agency receives an application for review under section 22, the enforcement agency must—
 - (a) review the decision to serve an infringement notice on the person; and
 - (b) suspend any procedures that are being used for the enforcement of the infringement penalty in respect of the infringement offence until—
 - (i) the review is complete; and
 - (ii) the applicant is sent advice of the outcome.
- (2) An enforcement agency must ensure that a review under this section is conducted by a person who was not involved in making the decision to serve the infringement notice which is the subject of the review.
- (3) An enforcement agency must—
 - (a) review a decision—
 - (i) within the prescribed time; or
 - (ii) if an enforcement agency requests additional information under section 23, within the

prescribed time referred to in sub-paragraph (i) plus the period not exceeding 21 days after service of the request during which the review was suspended, whether or not the additional information was received by the agency; and

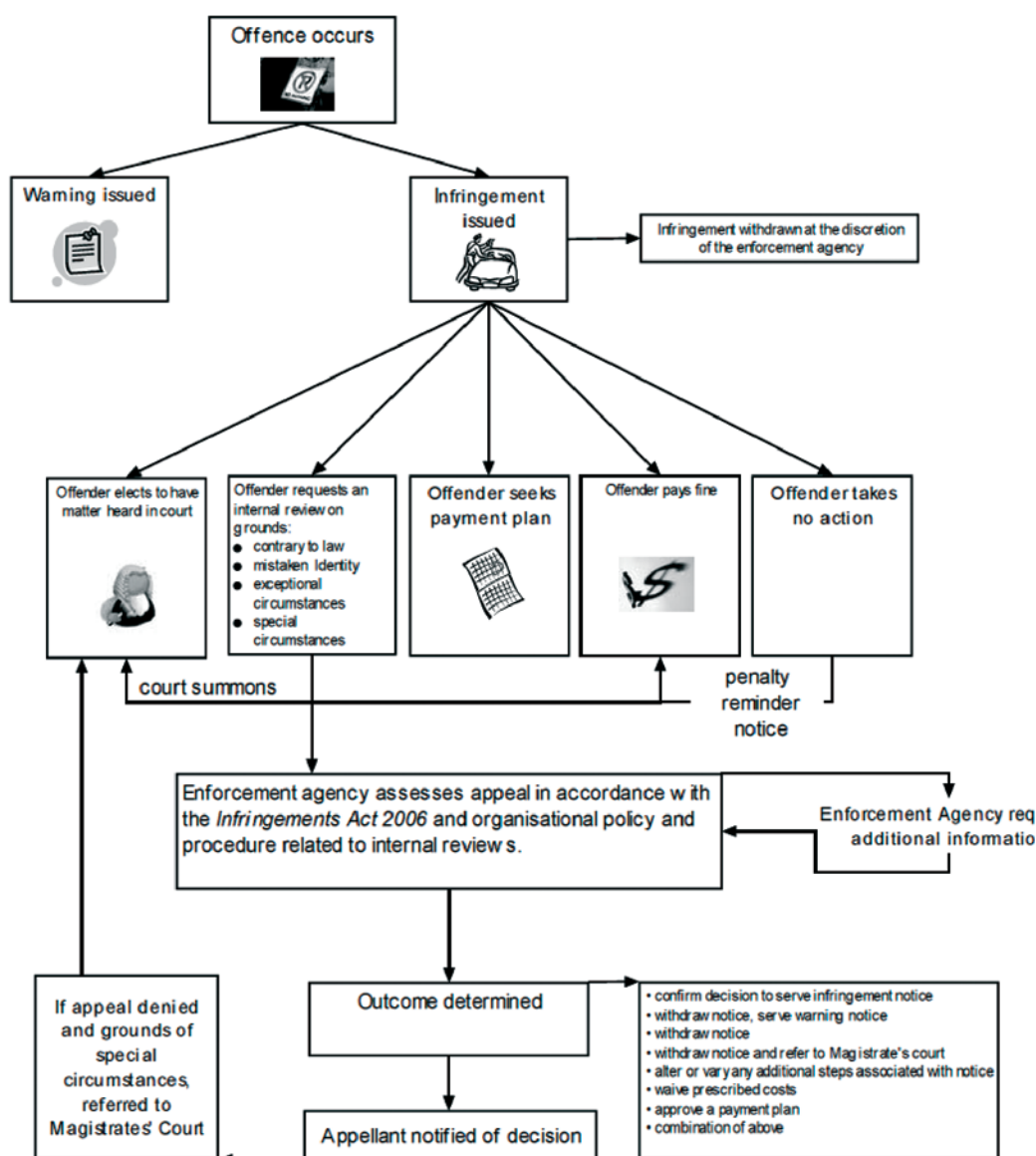
(b) within 21 days of deciding the review, serve on the applicant a written notice advising of the outcome of the review.

(4) If an enforcement agency fails to comply with subsection (3), the infringement notice is deemed to be withdrawn.

(5) Nothing in this section limits the power of an enforcement agency to review a decision to serve an infringement notice on any other basis.

In June 2009, the Auditor-General issued a report on the Withdrawal of Infringement Notices.

Appendix C of that report contained a schematic of the infringement notice process which is reproduced below:



The Auditor-General's report also contained "Examples of better practices in procedural guidance," which is also reproduced below:

Examples of better practices in procedural guidance

- Standard form letters for use in rejecting applications for internal review. The letters cover 50 recurrent situations, for example, stopping in a no-standing zone and parking longer than the metered time—*City of Greater Geelong*.
- Proforma medical certificates to assist health services provide appropriate and adequate supporting evidence for appellants claiming medical emergency—*City of Greater Geelong*.
- Templates for applications for internal review—*City of Greater Geelong, Victoria Police*.
- Specially designed plastic envelopes issued with permits that attach to the dashboard—*City of Greater Geelong*.
- *City of Stonnington's* comprehensive code of conduct provides useful guidance in:
 - the need to consider whether or not a prosecution is likely to be successful
 - when and how warnings are to be issued
 - the issue of infringement notices in routine situations including:
 - **where a driver is in the vehicle**, caution and give the opportunity to move the vehicle, if cooperative, no infringement issued.
 - **where a person is asleep in a vehicle**, make reasonable efforts to arouse the person so as not to cause a confrontation. If the person cannot be aroused, contact a supervisor for the police to be called. Do not issue an infringement.
 - in the interests of public safety, **armed security vehicles** are not booked while engaged in security related business.
 - **meals on wheels delivery vehicles**: Vehicles parked in a position deemed a hazard or danger to pedestrians or road users are to be issued an infringement notice. Officers may exercise some discretion and not issue an infringement notice if the duration of an offence is short and it is not safety related.
 - if **approached by a driver** to withdraw the infringement notice, politely indicate that you do not have the authority to do so.
 - allow x minutes **grace period** for time restricted parking periods of greater than one hour parking.
- The *Victoria Police* Penalty Review Guidelines are comprehensive and indicative of their lengthy experience in infringements management.

Source: Victorian Auditor-General's Office review of agency files.