

Cat Curfew By-law Update and Legal Advice

Originating Officer	Team Leader Community Safety - Luke Manuel
Corporate Manager	Manager Development and Regulatory Services - Warwick Deller-Coombs
General Manager	Acting General Manager City Development - Fiona Harvey
Report Reference	GC190827F01

Confidential



Confidential Motion

1. That pursuant to Section 90(2) and (3)(h) of the Local Government Act 1999, the Council orders that all persons present, with the exception of the following persons: Adrian Skull, Ray Barnwell, Fiona Harvey, Tony Lines, Kate McKenzie, Victoria Moritz, Warwick Deller-Coombs, Luke Manuel, Sharon Perin and Craig Clarke, be excluded from the meeting as the Council receives and considers information relating to the Cat Curfew By-Law Update and Legal Advice, upon the basis that the Council is satisfied that the requirement for the meeting to be conducted in a place open to the public has been outweighed by the need to keep consideration of the matter confidential given the information relates to legal advice.

REPORT OBJECTIVE

The purpose of this report is to provide Council with legal advice and two options to proceed with the Cat (Confinement) Variation By-law 2019.

EXECUTIVE SUMMARY

At the General Council Meeting on 11 December 2018, Council made the following resolution:

1. Endorse the proposed draft Cats (Confinement) Variation By-law No. 7 2019 as attached as Appendix 1 to this report for community consultation.
2. Endorse the draft Cats (Confinement) Variation By-law No. 7 2019, as attached to the report for the purposes of public and Dog and Cat Management Board consultation in accordance with Section 249 of the Local Government Act 1999 and Section 90 of the Dog and Cat Management Act 1995.
3. Endorse that Administration be authorised to provide a report to the Dog and Cat Management Board in accordance with Section 90(5) of the Dog and Cat Management Act 1995.
4. Authorise Administration to:
 - make copies of the draft By-law available for public inspection without charge at the principal office of the Council during ordinary office hours; and
 - publish notice informing the public of the availability of the draft By-law in The Advertiser no sooner than 21 days after referring the by-law to the Dog and Cat Management Board.

As required by the provisions of the Local Government Act 1999 and the Dog and Cat Management Act 1995, the Council has undertaken public consultation, including with the Dog and Cat Management Board (DCMB) regarding its proposed Cats (Confinement) Variation By-Law 2019. A separate report is presented to Council containing the results of the community consultation (GC190827R13). During the consultation period, staff of DCMB and the Crown Solicitor's Office (CSO) raised concerns regarding Council's ability to include provision in the By-Law relating to the seizure, detention and destruction of cats.

Legal advice has been obtained and this report provides Council with two options to consider.

RECOMMENDATION

That Council:

1. **Receives and notes this report, including the attached legal advice (Appendix 1).**
2. **Endorses Administration write to the Dog and Cat Management Board (and the State Government) for amendments to the Dog and Cat Management Act 2017 and associated Regulations to put beyond doubt the Council's power to make a by-law dealing with this subject matter.**
3. **Endorses Administration pursue one of the following two (2) options:**

Option 1:

Delays making the By-law until formal correspondence is received from the Dog and Cat Management Board (DCMB) outlining its position and present an updated report back to Council after the correspondence has been received.

Option 2:

Endorses Administration to continue the process of making the By-law (as originally drafted and put to the community) without formal comment from the Board.

4. ***In accordance with Section 91(7) and (9) of the Local Government Act 1999 the Council orders that this report, Cat Curfew By-Law Update and Legal Advice, and any associated appendices arising from this report having been considered in confidence under Section 90(2) and (3)(h) of the Act, except when required to effect or comply with Council's resolution(s) regarding this matter, be kept confidential and not available for public inspection for a period of 12 months from the date of this meeting. This confidentiality order will be reviewed at the General Council Meeting in December 2019.***

Liveable:

The appropriate management of cats contributes to preserving and saving native flora and fauna

Risk Management:

Legal advice highlights risks that the Council should consider

Legal / Legislative / Policy:

Local Government Act 1999 and Dog and Cat Management Act 1999

DISCUSSION

As required by the provisions of the Local Government Act 1999 (the LG Act) and the Dog and Cat Management Act 1995 (the DCM Act), the Council administration has undertaken public consultation regarding its proposed Cats (Confinement) Variation By-Law 2019, including consultation with the Dog and Cat Management Board (the Board). The Board may provide recommendations on the By-law and the Council is required to consider the Board's recommendations, but is not compelled to adopt them.

Administration provided the By-law to the Board on 12 February 2019. Informal correspondence has been received from the Board in March 2019 in relation to the By-law and a meeting held between Norman Waterhouse Lawyers, officers of the Council, the then-Board Secretary and a solicitor from the Crown Solicitor's Office (the CSO) on 27 May 2019. At the time of writing this report, Council has not received a formal response from the Board.

Paragraph 7 of the By-law inserts a new paragraph into the Council's Cats By-law 2014 to provide the Council's authorised officers with the power to seize, detain and destroy identified cats found in breach of the By-law. The powers are necessary to ensure the Council's authorised officers can effectively police the proposed restrictions on cats wandering at large within the Council's area. However, the Board and the CSO have informally raised concerns regarding the ability of the Council to enforce the By-law through these provisions.

The legal advice (refer **Appendix 1**) advises that Council has legislative authority to support the making of the proposed By-law. However, the concerns of the Board staff and the CSO (although not yet formally communicated to the Council) relate to a risk that the By-law as drafted is inconsistent with the DCM Act in a manner contrary to Section 248(1)(b) of the LG Act.

The CSO's position in this respect appears to be as follows:

- the DCM Act specifies the circumstances under which the Council and its authorised persons can seize, detain and destroy cats (see Division 2 of Part 5A of the DCM Act);
- Section 64(1)(b) of the DCM Act provides that to the extent the DCM Act does not include a power of seize and detention, this can be prescribed by regulation;
- the Council cannot grant itself additional seizure and detention powers by way of a by-law, as to do this would be inconsistent with the powers available to the Governor by regulation.

Under this approach, the Council would be precluded by Section 248(1)(b) of the LG Act from making that part of the By-law that provides for the seizure, detention and destruction of identified cats as this part of the By-law is inconsistent with the DCM Act.

*The legal advice goes on to state; The question of whether the two laws are inconsistent with one another is a complex legal question. It often arises in circumstances where State and Commonwealth laws are said to be inconsistent with each other for the purposes of Section 109 of the Commonwealth Constitution (the Constitution). Given that the DCM Act and the By-law appear in some respects to cover the same areas of operation, there is the **potential** that in some circumstances the two laws might be inconsistent or in conflict with one another.*

In a Commonwealth context, Section 109 of the Constitution provides that 'where a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid'. Inconsistency between Commonwealth and State laws can exist in any one of three situations

- where simultaneous obedience is impossible;
- where one law takes away a right or privilege conferred by the other; and
- where the State law invades a field which the Commonwealth law was intended to cover.

It is expected the State's position will be that these contentions are able to be applied to the suggested inconsistency between the DCM Act and the By-law. Accordingly, it is expected that the State's position with respect to the By-law to be that it both takes away rights or privileges conferred by the DCM Act and invades a field which the DCM Act intends to cover.

Risks to consider

With respect to the first contention, the argument may be that the DCM Act has invested in the State Governor the power to make regulations regarding the seizure and detention of cats. Accordingly, the argument would be the By-law purports, with respect to identified cats, to remove the power of the State Governor to determine a scheme for dealing with such cats. **There is some merit to this contention and the possibility that the By-law is inconsistent in this respect cannot be entirely discounted.**

With respect to the second contention, while linked with the first, would be somewhat more difficult to sustain because while the State Governor has the power to make regulations regarding the seizure and detention of identified cats, no such regulations have been made. The argument would be that the State has not at this stage entered the field 'completely and exclusively' and the Council is simply filling a gap in the legislative framework to assist it in managing cats in light of the new restrictions created by the By-law that were not contemplated by the State at the time of the making of the DCM Act. It would be incongruous to consider that the By-law is inconsistent with State law in circumstances where the State has elected not to regulate cats to the same degree as the Council, and has largely left the regulation of cat behaviour to councils.

The inclusion of such powers is entirely consistent with the legislative authority granted to the Council under both of the DCM Act and the LG Act to make cat management by-laws. **However, the risk that a Court might find the inclusion of these powers within the By-law is inconsistent with the provisions of the DCM Act cannot be entirely discounted based on consideration of the relevant authorities.**

Administration Recommendations

It would be prudent to write to the Board to seek amendments to the DCM Act to clarify Council's powers relating to this matter. Acknowledging the time it would take to make such changes (1-2 years if accepted by State Government), Council may wish to take further action in the interim including communications to the community.

Based on the legal advice provided and taking into consideration the informal view of the CSO, Administration recommends that option 1 to delay the By-law is the appropriate way forward at this stage. Such an approach would seek to avoid any conflict with the Board/State regarding the Council's by-law making power and limit the scope for legal challenge to the validity of the By-law.

In the event the Council wishes to proceed to make the By-law (option 2), then Council should consider the outcome of the public consultation process as per the further Council report in this agenda (GC190827XX). A future report will need to be considered with relevant reports on National Competition policy, a report to the Legislative Review Committee and a solicitor's certificate of validity as per the By-law making process.

The detailed legal advice can be found attached in Appendix 1.

Attachment

#	Attachment	Type
1	Appendix 1 - Norman Waterhouse Lawyers Legal Advice	PDF File

CONFIDENTIAL

By Email: <Luke.Manuel@marion.sa.gov.au>
Ref: DZMM00293576F05913245

6 August 2019

Mr L Manuel
Team Leader Community Safety
The Corporation of the City of Marion
245 Sturt Road
STURT SA 5047

Dear Luke

Proposed Cats (Confinement) Variation By-Law 2019

We refer to previous communications regarding the above matter.

As required by the provisions of the *Local Government Act 1999* (**the LG Act**) and the *Dog and Cat Management Act 1995* (**the DCM Act**), the Council has undertaken public and Dog and Cat Management Board (**the Board**) consultation regarding its proposed *Cats (Confinement) Variation By-Law 2019* (**the By-law**).

In accordance with Section 90(5) the DCM Act, the Council was required, at least 42 days prior to making the By-law (and consequently 21 days before commencing public consultation on the By-law), provide a copy of the By-law and a report on the By-law to the Board. The Board may provide recommendations on the By-law and the Council is required to consider the Board's recommendations, but is not compelled to adopt them.

The Council provided the By-law to the Board on 12 February 2019. While informal correspondence has been received from the Board in March 2019 in relation to the By-law, and a meeting held between us, officers of the Council, the then-Board Secretary and a solicitor from the Crown Solicitor's Office (**the CSO**) on 27 May 2019, the Board has not provided a formal response regarding the By-law at the time of writing.

Based on our meeting with the then Board Secretary and representative of the CSO, we understand that (at least at officer level) the Board is generally supportive of the By-law. However, we understand that the Board (and the CSO) have concerns regarding the ability of the Council to include provisions within the By-law regarding the seizure, detention and destruction of cats (paragraph 7 of the By-law).

As you are aware, Paragraph 7 of the By-law inserts a new paragraph 11 into the Council's *Cats By-law 2014* to provide the Council's authorised officers with the power to seize, detain and destroy identified cats found in breach of the By-law. The powers mirror those already available to deal with dogs under the DCM Act in analogous circumstances. The powers are necessary to ensure the Council's authorised officers can effectively police the proposed restrictions on cats wandering at large within the Council's area.

In our view, the Council has ample legislative authority under both Section 90(1) and (2) of the DCM Act and Section 246(2) of the LG Act to support the making of such a by-law. The by-law addresses the control and management of cats and provides for the good government of the Council's area and the convenience, comfort and safety of the Council's community¹. The By-law effectively fixes periods of confinement for cats and requires cats to be controlled, secured and confined in specified manners and circumstances.

However, we have imputed that the concerns of the Board staff and the CSO (although not yet formally communicated to the Council) relate to a risk that the By-law as drafted is *inconsistent* with the DCM Act in a manner contrary to Section 248(1)(b) of the LG Act.

The CSO's position in this respect appears to be as follows:

- the DCM Act specifies the circumstances under which the Council and its authorised persons can seize, detain and destroy cats (see Division 2 of Part 5A of the DCM Act);
- Section 64(1)(b) of the DCM Act provides that to the extent that the DCM Act does not include a power of seizure and detention, this can be prescribed by regulation;
- the Council cannot grant itself additional seizure and detention powers by way of a by-law, as to do this would be *inconsistent* with the powers available to the Governor by regulation.

Under this approach, the Council would be precluded by Section 248(1)(b) of the LG Act from making that part of the By-law that provides for the seizure, detention and destruction of identified cats as this part of the By-law is inconsistent with the DCM Act.

The question of whether two laws are inconsistent with one another is a complex legal question. It often arises in circumstances where State and Commonwealth laws are said to be inconsistent with each other for the purposes of Section 109 of the *Commonwealth Constitution (the Constitution)*. Given that the DCM Act and the By-law appear in some respects to cover the same areas of operation, there is the *potential* that in some circumstances the two laws might be inconsistent or in conflict with one another.

In a Commonwealth context, Section 109 of the Constitution provides that '*where a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid*'. Inconsistency between Commonwealth and State laws can exist in any one of three situations²:

- where simultaneous obedience is impossible;
- where one law takes away a right or privilege conferred by the other; and
- where the State law invades a field which the Commonwealth law was intended to cover.

In this case, we expect that the State's position will be that these contentions are able to be applied to the suggested *inconsistency* between the DCM Act and the By-law for the purposes of Section 248(1)(b) of the LG Act.³ Accordingly, we expect the State's position with respect to the By-law to be that it both takes away rights or privileges conferred by the DCM Act and invades a field which the DCM Act intends to cover.

With respect to the first contention, we expect the argument to be that the DCM Act has invested in the State Governor the power to make regulations regarding the seizure and detention of cats.

¹ For an analysis of the breadth of the Council's by-law making power see *Attorney General (SA) v Corporation of the City of Adelaide* [2013] HCA 3.

² *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466.

³ See for example, *Cullis v Ahern* (1914) 18 CLR 540 and *Tucker v Dickson* (1980) 27 SASR 321. However, see also *Hallion v Eade* [1938] VLR 179.

Accordingly, the argument would be the By-law purports, with respect to identified cats, to remove the power of the State Governor to determine a scheme for dealing with such cats.

In our view there is some merit to this contention and the possibility that the By-law is inconsistent in this respect cannot be entirely discounted. Having said that, we consider that there is also a good argument that the By-law is not inconsistent on this basis because the State Governor can still enter this field and make State-based regulations regarding the subject matter, should he so determine. In that circumstance, the Council would be able to act on both the authority of the regulations and the By-law. The two laws could exist harmoniously with one another.

With respect to the second contention, while linked with the first, would be somewhat more difficult to sustain because while the State Governor has the power to make regulations regarding the seizure and detention of identified cats, no such regulations have been made.

Accordingly, the argument would be that the State has not at this stage entered the field '*completely and exclusively*'⁴ and the Council is simply *filling a gap* in the legislative framework to assist it in managing cats in light of the new restrictions created by the By-law that were not contemplated by the State at the time of the making of the DCM Act. It would be incongruous to consider that the By-law is inconsistent with State law in circumstances where the State has elected not to regulate cats to the same degree as the Council, and has largely left the regulation of cat behaviour to councils.

As we have outlined above, the inclusion of seizure, detention and destruction powers within the By-law that are equivalent to those available to deal with cats is a critically necessary provision within the By-law. Without these powers the Council's powers to enforce the By-law will be dramatically curtailed.

The inclusion of such powers is entirely *consistent* with the legislative authority granted to the Council under both Section 90(1) and (2) of the DCM Act and Section 246(2) of the LG Act to make cat management by-laws. However, the risk that a Court might find the inclusion of these powers within the By-law is *inconsistent* with the provisions of Section 64(1)(b) of the DCM Act cannot be entirely discounted based on consideration of the relevant authorities – although our opinion is that the better view is that the By-law, when taken as a whole, is not inconsistent with the DCM Act.

In these circumstances, the Council has a number of options:

1. delay making the by-law until formal correspondence from the Board outlining its position is received (although the timeline for receipt of such correspondence is unknown);
2. lobby the Board (and the State) for amendments to the DCM Act and/or *Dog and Cat Management Regulations 2017* to put beyond doubt the Council's power to make a by-law dealing with this subject matter; or
3. proceed to make the By-law without formal comment from the Board and run the risk that either the Parliament (upon recommendation of the Legislative Review Committee) disallows the By-law or that a person aggrieved with the provisions of the By-law commences proceedings in the District Court of South Australia to invalidate the By-law (and potentially put at risk any action taken by the Council to deal with cats under the By-law).

In our view, in the present circumstances there is real merit in engaging with the Board in order to determine whether (for example) there is an appetite for the making of regulations to put the Council's by-law making power in this area beyond doubt. Such an approach would seek to avoid (at least initially) any conflict with the Board/State regarding the Council's by-law making power and limit the scope for legal challenge to the validity of the By-law.

⁴ *Cullis v Ahern* (1914) 18 CLR 540.
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However, in the event that the Council wishes to proceed to make the By-law, then the Council should consider a report at an upcoming meeting regarding the outcome of the public consultation process, together with relevant reports on National Competition policy, a report to the Legislative Review Committee and a solicitor's certificate of validity. We refer to our letter of 7 January 2019 in this respect.

We look forward to your further instructions. Please do not hesitate to contact the writer if you have any further queries in relation to this matter.

Yours faithfully
Norman Waterhouse

A handwritten signature in blue ink, appearing to read 'Dale Mazzachi', with a horizontal line extending to the right.

Dale Mazzachi
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