

MAKING BY-LAWS (I)

PART II OF THE *LOCAL GOVERNMENT ACT 1993*

GOOD PRACTICE GUIDELINES
AUGUST 10

Note: This information sheet should be read in conjunction with the other information sheets in this series:

- **Making By-laws (1):** Part II of the *Local Government Act 1993*
- **Making By-laws (2):** Steps in making a by-law
- **Making By-laws (3):** Regulatory Impact Statements Section 156A *Local Government Act 1993*
- **Making By-laws (4):** Penalties and Infringement Notices - The *Monetary Penalties Enforcement Act 2005*
- **Making By-laws (5):** Tabling a by-law in parliament & the requirements of the Standing Committee on Subordinate Legislation
- **Making By-laws (6):** Making a by-law for which a Regulatory Impact Statement is not required

Power to make by-laws

By-laws relate to council functions or powers and enable councils to regulate local issues and conditions.

They are made under the *Local Government Act 1993* (the Act).

Once made, a by-law must be tabled in both houses of the Tasmanian Parliament and can be disallowed by a motion of either house.¹

The Act details the requirements and procedures that must be followed when making by-laws. It also imposes some restrictions on their extent and nature. Other Acts may also have an impact on the making and scope of a by-law. These include the *Acts Interpretation Act 1931*, the *Subordinate Legislation Committee Act 1969*, and the *Monetary Penalties Enforcement Act 2005*.

Restrictions on making by-laws

Councils must not make by-laws that:

- apply retrospectively
- shift the burden of proof unless specifically provided for in an Act
- are contrary to law, or conflict with a planning scheme in the municipal area
- restrict competition or have a significant impact on business, unless the outcome is justified in the public interest
- exempt a person from prosecution for nuisance under common law
- exempt a council from any liability
- permit rates, charges, fees or fines to be set, altered or substituted other than by amending the by-law.

Where any by-law is made in contravention of these restrictions, it is invalid.

¹ Section 47 of the *Acts Interpretation Act 1931*

Decision to make a by-law

A council intending to make a by-law must first pass a resolution of intent to that effect by an absolute majority of councillors.

A by-law is invalid if such a resolution is not passed.

The resolution of intent may be passed at various stages in development of the by-law. However a council would normally make its resolution based on a draft by-law or explanatory materials setting out what the by-law will cover and the impact it will have.

Preparing a Regulatory Impact Statement (RIS)

A council must prepare a Regulatory Impact Statement (RIS) for a by-law (apart from certain exceptions set out in Section 156A(1A) of the Act which are discussed in more detail in information sheet 'Making By-laws (5)²').

A RIS must include:

- the by-law's objectives and the means by which they are to be achieved
- the nature of any restriction on competition and impact on business
- assessment of the direct and indirect economic, social and environmental impact of the by-law
- assessment of the benefits or costs to the community
- any alternative options
- details of the proposed consultation process.

If a council believes there will be no impact on business, supporting evidence must be included in the RIS.

Similarly, if a council is of the view the by-law will impact on business, an assessment of whether the benefits outweigh the costs should be included.

The documents must be submitted to the Director of Local Government in the final versions of the RIS and by-law that will be made available for public consultation.

The director has responsibility for issuing a certificate certifying the statement is satisfactory and the council may commence the public consultation process.

Before issuing such a certificate the director will consider all aspects of the RIS including details of how the community and any specific stakeholders will be consulted during the public consultation process. If the RIS is unsatisfactory, the director will advise the council of matters requiring amendment.

2. See by-law information sheet (5) 'Making By-laws (5): Making a by-law for which a Regulatory Impact Statement is not required'.

Notice of proposed by-law

Once the director has issued a certificate for the RIS, the council must publish a notice in a daily newspaper circulating in the municipal area and display a notice in accordance with Section 157 of the Act.

The notice must contain the following information as specified by regulation 35 of the *Local Government (General) Regulations 2005*:

- the title of the by-law
- the objectives of the by-law
- the potential impact and the primary features of the proposed by-law affecting the community or particular groups within the community
- an invitation for submissions from the public
- the manner in which submissions may be made
- the period in which submissions may be made
- the availability of the RIS and either a copy of the by-law or the means of obtaining a copy
- a contact person or persons for inquiries on the content and effect of the proposed by-law.

The notice must specify that public comment can be made for at least 21 days after the notice is published.

In addition to this notice, councils will be expected to consult with their communities in a number of other ways.

For example:

- media releases
- mention in the Mayor's column in local newspapers or council newspaper
- posting information and an invitation for submissions on the council website
- articles in council and community newsletters
- direct mail contact /approaching identified stakeholder or community organisations and/or individuals.
- The second *Statewide Communication and Consultation Partnership Agreement* between State Government and local government also provides that councils will consult with relevant state agencies during the public consultation phase of any by-law making process. It is expected that councils will identify any relevant agencies and write to them inviting submissions during the public consultation phase.

Consultation and role of Regulatory Impact Statements (RIS)

Any person may make a submission to a council in relation to a proposed by-law. A council must consider every submission made to it.

If a council decides to alter the draft by-law, it may do so only by an absolute majority. However the alteration should not substantially change the purpose or effect of the by-law unless it is first publicly notified.

Once submissions have been considered, council may formally make the by-law.

Making the by-law

The council may make a by-law under its common seal after the following steps have occurred:

- council has passed a formal resolution of its intention to make a by-law,
- the RIS has been certified by the Director of Local Government, and
- the relevant notice and public consultation procedures.

The by-law must then be certified by:

- a legal practitioner to ensure its provisions are in accordance with the law, and
- the general manager of the council to ensure the by-law has been made in accordance with the Local Government Act.³

A by-law is of no effect if it is not certified in accordance with these requirements.

The Local Government Act and the Acts Interpretation Act require a by-law to be published in the *Tasmanian Government Gazette*. A by-law commences on its date of publication in the Gazette or on a later date specified in the by-law. **The by-law must be published in the Gazette within 21 days of a council's formal resolution to make the by-law.**⁴ If this requirement is not met, the by-law can be disallowed by the Parliament.

Expiry of a by-law

Unless repealed earlier, a by-law made under the Local Government Act expires 10 years from the date it was enacted⁵, regardless of whether it is amended during those 10 years.

Role of the Local Government Division

Under the *Local Government Act 1993* the primary role of the Director of Local Government is to certify that the RIS meets the requirements of the Act and advise the council that its public consultation process for the by-law may commence. The Local Government Division will provide assistance in explaining the process of developing a by-law and preparing the RIS although it cannot provide legal advice.

The division maintains a directory of council by-laws in Tasmania on its website at:

<http://www.dpac.tas.gov.au/divisions/lgd>.

3. Section 162 of the Act

4. Section 47 of the *Acts Interpretation Act 1931*

5. Section 155 of the Act

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