

MAKING BY-LAWS (3)

REGULATORY IMPACT STATEMENTS

SECTION 156A 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 11 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

1. Purpose and Process of a Regulatory Impact Statement

When a council seeks to make a new by-law or a significant amendment to an existing by-law, the *Local Government Act 1993* requires that a Regulatory Impact Statement (RIS) is prepared.

The preparation of an RIS is a rigorous process aimed at analysing the most efficient and effective options available to address a particular issue and avoiding unnecessary regulation.

An RIS is required to identify whether the benefits of regulation outweigh the costs of a restriction on competition or an impact on business imposed by the by-law. This requires an assessment of direct and indirect social, economic and environmental impacts of the proposed by-law and alternatives considered.

An RIS should also briefly detail its purpose and the statutory context in which it operates to help the general public understand the function and role.

Once the RIS has been prepared, the council must submit it to the Director of Local Government for assessment. If the director is satisfied the RIS meets the statutory requirements, a certificate will be issued and the council may then commence the public consultation process.

2. By-law objectives and how to achieve them

The Competition Principles Agreement requires that a review of any proposed legislation (including council by-laws) should at least clarify the objectives of the legislation.

Under section 156A(2)(a) of the *Local Government Act* councils are required to outline the objectives of a by-law and the means by which the by-law will achieve those objectives.

Councils need to clearly detail:

- the issue to be addressed by the by-law
- what the by-law will do to address the issue (objectives)
- how the by-law will achieve the objectives

The objectives of a by-law are the outcomes, goals, standards or targets needed to address the issue.

Key provisions within the by-law should demonstrate how it will address the issue and achieve the stated objectives.

Example

What is the issue to be addressed by the by-law?

To find an economically efficient and environmentally sustainable solution for the disposal of green waste.

What will the by-law do to address this issue?

The by-law has the following objectives:

- *prohibit green waste being disposed to landfill*
- *prohibit all domestic and industry outdoor burning of green waste*
- *establish a system whereby green waste is traded for renewable energy*

How will the by-law achieve these objectives?

The by-law will:

- *provide for a green waste collection service, operated by council – refer clauses 5 to 8*
- *provide for a license system allowing, under specified standards, the disposal of green waste – refer clauses 10 to 15*
- *include, as a condition of licence, that energy produced by appropriate disposal of green waste will be provided to residents at a subsidised rate – refer clauses 12(a) to (g)*

3. Background/context

Background information helps show the public why a by-law is necessary and preparing it can help a council to clarify whether a by-law is the best way of dealing with a problem.

Councils are encouraged to address:

- the nature of the identified problem and its causes
- why the by-law is needed
- any complaints from members of the public
- if it is a general initiative by the council
- the extent of the by-law
- if it affects the community as a whole, or just particular parts of the municipal area?
- the risks if the by-law were not introduced
- other important characteristics of the current environment

- why the issue needs to be resolved
- relevant existing laws
- possible administrative solutions
- why current laws can't adequately deal with the problem
- plans/policies/strategies/guidelines/laws etc the by-law will work in conjunction with or support
- previous public consultation
- the result of independent legal advice sought in the development of the by-law

Example

The council generates up to 5000 cubic metres of green waste a year, which is currently stockpiled and burnt twice a year.

Burning of green waste stockpiles is no longer considered a feasible method of disposal because of:

- *State Government policy aimed at phasing out the practice of burning green waste*
- *council environmental policy that requires sustainable development and intergenerational equity*
- *community concerns about spontaneous combustion of stock piles*

The introduction of the Green Waste Disposal by-law addresses community and council concerns about the current method of green waste disposal and also enables council to adapt and conform to State Government policies and pressures.

The by-law licensing system authorises only those disposal methods which create renewable energy. This requirement enables council to use a newly established private facility which will provide residents with power at a subsidised rate in return for the green waste supplied by the council.

A discussion paper was distributed to key stakeholders and made available to the public via council's website and at the council's offices. The paper covered significant issues including the prohibition of traditional methods of green waste disposal, renewable energy, the suggested process for delivering subsidised power and various alternatives. Comments received on the discussion paper then formed the basis of a public meeting/workshop where participants were able to directly voice their concerns and ideas. As required by the Local Government Act the council considered all feedback received and, where appropriate, incorporated suggestions into the development of the by-law.

The council also sought independent legal advice and was advised there were no legal issues to be addressed.

4. Restriction on competition and impact on the conduct of business

Councils are required to identify and describe any restriction on competition or impact on business that may emerge as a result of the by-law.

If these are numerous they can be categorised appropriately. However, they should not be grouped together if they impact on different markets, or if they relate to different forms of restriction. For more information - refer to appendix I.

If a council assesses that a proposed by-law is **unlikely** to restrict competition or impact on business it is to state the reasons for that assessment.

Restrictions on competition may include:

- restrictions on market entry – outright prohibitions, licensing or registration requirements, allocation of quotas;
- competitive conduct – hours of operation, permissible advertising;
- product/service innovation – quality/standard of a product or service; and
- administrative discretion – preferential purchasing, public versus private sector providers.

Example

The Green Waste Disposal by-law introduces a licensing system for the disposal of green waste. To obtain a licence the specified standard must be met.

Both the licensing system and its requirements could be considered as restricting competition. The licensing system could limit participation in the market place and its compliance requirements may stifle innovation.

However, the significant environmental, economic and social benefits which the by-law will achieve more than justify these restrictions. Further, without the restrictions council would not be able to take advantage of the service offered by the disposal company.

Impacts on business may include:

- added costs
- additional compliance and/or reporting
- disincentives

Example

There are no other businesses operating in the disposal of green waste or in the production of renewable energy in the municipal area. The by-law does not provide any disincentives and there are no additional compliance or reporting costs other than those required by the license system. Therefore, it is unlikely the by-law will have a significant impact on business.

Primary industries operating in the region may be affected by the prohibition on disposing of green waste to landfill or by burning but the council green waste collection service and the provision of subsidised power should offset this impact.

In addition, it is likely that there will be increased employment and investment in the area as a result of the by-law and this should have a positive impact for businesses already in the area.

5. Assessment of the costs versus the benefits of any restriction on competition or on the conduct of business

The council should attempt to identify and quantify the costs and benefits of any restriction on competition or the conduct of business. Where costs and benefits cannot be quantified, any restrictions must be stated and presented to enable a comparison of the costs and benefits.

Costs/benefits should include those:

- readily identifiable and valued in monetary terms, such as penalty or licence fees;
- identifiable and measured in physical terms but not easily in monetary terms, such as a reduction/increase in pollution; and
- known to exist but which cannot be precisely identified and accurately quantified, such as aesthetic effects from the maintenance of parks.

When assessing the costs and benefits of restrictions councils need to identify the groups that will be affected. They may include consumers, business, government (including the council in question, other councils and the State Government) and/or the community.

Example

Costs and benefits of restrictions.

(Key: *Con* = effect on consumers; *Bus* = effect on business; *Gov* = effect on Government; and *Com* = effect on community).

	Costs	Benefits
Restrictions on market entry (licence)	<ul style="list-style-type: none"> • <i>may limit participation (Bus)</i> • <i>increased compliance costs (Bus)</i> • <i>increased maintenance and enforcement costs (Bus, Gov)</i> 	<ul style="list-style-type: none"> • <i>ensures compliance with and maintenance of safety and workplace standards (Bus, Com)</i> • <i>enables council to obtain subsidised power for its constituents (Com, Con)</i> • <i>environmental benefits are innumerable (Com, Bus, Gov, Con)</i>
Compliance with specified standard	<ul style="list-style-type: none"> • <i>may stifle innovation (Bus, Gov, Com, Con)</i> • <i>may limit participation (Bus, Gov, Com, Con)</i> • <i>may reduce variety of goods and services available (Con, Com, Gov)</i> • <i>current technology may</i> 	<ul style="list-style-type: none"> • <i>ensures all green waste disposed of produces renewable energy (Com, Gov)</i> • <i>provides increased choice for consumers (Con, Com)</i> • <i>enables a more economical and efficient use of natural resources (Gov, Com, Con)</i> • <i>supports and encourages</i>

	<i>become obsolete (Bus)</i>	<i>economic investment in the region (Com, Gov, Bus)</i> <ul style="list-style-type: none"> • <i>environmental benefits are innumerable (Com)</i>
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All costs and benefits must be identified and quantified wherever possible, rather than simply undertaking a qualitative appraisal. Where costs and benefits cannot be quantified, the impact on business must be stated and presented in a way that enables a comparison of costs and benefits which also extend to the alternative approaches.

Example

Costs and benefits of the impact on business.

(Key: Con = effect on consumers, Bus = effect on business, Gov = effect on Government and Com = effect on community)

Costs	Benefits
<i>Loss of alternative methods of green waste disposal (Bus, Com, Gov)</i>	<ul style="list-style-type: none"> • <i>increased investment in the area (Bus, Com, Con, Gov)</i> • <i>increased employment in the area (Com)</i> • <i>environmental benefits (Com)</i> • <i>subsidised power (Com, Con, Bus)</i> • <i>green waste collection service (Com, Bus)</i>

The Local Government Act requires that if a council assesses that a proposed by-law is likely to restrict competition or impact on business, it is to state whether or not the benefits of the impact outweigh the costs.

6. Assessment of direct or indirect economic, environmental or social impacts

Councils are required to identify and describe the direct and indirect impacts of a proposed by-law.

Direct impacts are those that affect the individuals, groups and organisations that are the target of the proposal.

Indirect impacts are those that flow on to any other party. Some indirect impacts may be unanticipated, but consideration should be given to potential wider implications beyond the target group.

Direct and indirect impacts may be both a cost and/or a benefit. Councils should consider indirect benefits or costs such as:

- externalities¹ as a consequence of the by-law – particularly in relation to environmental impacts

- reduction in the effectiveness of existing regulations
- unacceptable increases in regulations
- reducing market flexibility

Consider issues such as:

- administrative costs
- costs to the community
- enforcement costs
- impact on infrastructure

Example

Direct and indirect social, economic and environmental impacts. (Key: Con = effect on consumers, Bus = effect on business, Gov = effect on Government and Com = effect on community)

		Direct	Indirect
Environmental	Benefits	<ul style="list-style-type: none"> • use of renewable energy (Com) • reduction of pollution as a result of burning green waste (Com) • reduction of green waste to landfill (Com, Bus, Gov) 	<ul style="list-style-type: none"> • supports principles of sustainable development
	Costs	<ul style="list-style-type: none"> • slight increase in diesel pollution from green waste collection service (Com) • slight increase in noise pollution from green waste collection service (Com) 	<ul style="list-style-type: none"> • prohibiting green waste going to landfill will result in loss of material as a ground cover at waste transfer stations (Com)

I. The Tasmanian Government Department of Treasury and Finance provides that externalities arise when, given a free hand, some participants in the market system impose a significant burden (or benefit) on others, which is not reflected in the prices charged. The common example is polluters. In the absence of any regulation, it can be difficult to make polluters accountable for their external effects on the environment. See www.treasury.tas.gov.au

Social	Benefits	<ul style="list-style-type: none"> • <i>employment opportunities with disposal company (Com, Bus)</i> • <i>reduced risk of fire from spontaneous combustion (Com, Gov)</i> • <i>green waste collection service (Com, Bus, Gov, Con)</i> • <i>subsidised power (Com, Bus, Con)</i> 	<ul style="list-style-type: none"> • <i>employment opportunities from increased investment in the area (Com, Bus)</i>
	Costs	<ul style="list-style-type: none"> • <i>prohibition on outdoor burning and disposing of green waste to landfill (Com, Bus)</i> 	<ul style="list-style-type: none"> • <i>some residents may be affected by noise and visual pollution created by the operation of the plant (Com)</i>
Economic	Benefits	<ul style="list-style-type: none"> • <i>reduction of unemployment (Com)</i> • <i>increased investment (Com, Bus, Gov, Con)</i> 	<ul style="list-style-type: none"> • <i>investment will have a positive impact for other businesses in the area (Com, Bus, Gov, Con)</i>
	Costs	<ul style="list-style-type: none"> • <i>potential reduction in market flexibility (Bus, Con, Gov)</i> • <i>potential restriction on competition (Bus, Con, Gov)</i> 	<ul style="list-style-type: none"> • <i>administrative, compliance and enforcement costs (Bus, Gov)</i>

7. Discussion of alternatives

The discussion of alternatives is important as it demonstrates that the chosen option of regulatory intervention is the most suitable method to address the identified issue.

Councils are encouraged to discuss:

- maintaining the status quo
- non-regulatory alternatives
- the option of having no by-law in place
- diluting or fortifying the by-law as it is proposed

When discussing alternatives councils should consider the costs and benefits. This includes assessing restrictions on competition or impact on business as well as economic, social or environmental

impact. Again, these impacts should be attributed to the groups that will be affected (consumers, business, government and/or community).

8. Assessment of public costs and benefits

The public benefit test assesses whether the benefits outweigh the costs and determines whether a by-law is the most effective option for achieving the objectives.

The Local Government Act requires councils to determine whether a by-law is in the public interest. Under the Act a council must not make a by-law that restricts competition or has a significant impact on business unless the outcome is justified in the public interest. Accordingly, councils need to demonstrate that a by-law is for the net benefit of the community.

Alternatively, a council may justify a by-law in the public interest if it can demonstrate it will have the least net cost to the community or imposes the least possible regulation on the community to achieve its objectives.

Assessment of the cost/benefit to the community should include consideration of alternatives. This will further demonstrate that, of the options available to council, developing a by-law imposes the least net cost or the greatest net benefit to the community.

For more information, refer to appendix 2.

Example

The community will benefit from the introduction of the by-law by virtue of:

- *access to renewable energy*
- *reduced pollution from the burning of green waste*
- *reduced risk of spontaneous combustion of green waste stockpiles*
- *introduction of a green waste collection service by the council*

However, in addition to benefiting the current members of the community, this by-law is also for the future. After considering all available options the council finds regulation to be the most feasible option to achieve the objectives. The by-law has been carefully constructed by a certified legal practitioner to ensure it imposes the least possible regulation on the community. Importantly, the by-law targets an issue which is not otherwise addressed by regulation in an effective manner.

9. Details of the public consultation process

Consultation is a vital element of the by-law making process.

In addition to the Act's requirement that councils detail the proposed public consultation process in the RIS, councils are also reminded that under the Act they have a general duty to consult, involve and be accountable to the community.

Consultation with key stakeholders should begin during the early stages of the by-law development process. Consultation will provide the council with valuable feedback enabling exploration of alternative options and resulting in a more effective by-law.

Consultation should occur as widely as possible and as a minimum should include those most likely to be affected. Consultation will provide feedback and support for the proposed regulation as well as informing the council of the costs and benefits of regulation. The RIS and draft by-law should form the basis of the consultation process.

The council should identify key stakeholders including market participants such as producers, suppliers, and consumers, and interest groups which have a personal concern such as environmental groups, ratepayers associations, progress associations and local chambers of commerce.

Best practice consultation methods include consultation within the council and with:

- other councils
- state agencies
- key stakeholders
- affected businesses

This may not be necessary in every case but certainly if other councils have by-laws on the same issue consultation with those councils should take place.

Explanatory notes should be developed to assist understanding and consideration should be given to public meetings and letterbox drops.

The by-law should be published by:

- advertising in a daily newspaper, local newspapers and newsletters
- advertising on council's website
- a media release inviting comment on the intended by-law

The *Second Statewide Communication and Consultation Partnership Agreement* between State Government and local government also requires that councils consult with relevant state agencies during the public consultation phase of by-law development. Councils should seek input/feedback from all relevant agencies.

Appendix I – Restrictions on competition

1. Restrictions on market entry

Market entry relates to the processes an individual or firm needs to undertake to begin trading in a particular market. In most instances there will be commercial barriers to market entry, such as the purchase of suitable plant and equipment, but in many cases there are also regulatory barriers.

These barriers can include:

- an outright prohibition in regard to a particular business activity
- a statutory monopoly concerning a business activity that operates either statewide or in a particular locality
- licensing or registration requirements restricting the number of market participants or limiting participation to those that meet defined standards, hold certain qualifications or are members of particular occupational or professional organisations
- allocation of quantitative entitlements, quotas or franchises among participants in particular business activities
- the allocation of licences that allow the holder access to natural resources (including water, minerals, forests and fisheries) or which create rights, or permit specified activities

The removal of entry barriers can have an important impact, even if few or no new firms actually enter the market. In this situation, firms that were once isolated from competition realise that, unless they become more competitive, new entrants reacting to market signals may seize opportunities and erode the market share of existing firms.

2. Restrictions on competitive conduct

By-laws can potentially limit the competitive conduct of firms in the marketplace by restricting ordinarily acceptable forms of competitive behaviour. Such restrictions might include matters like:

- price controls in relation to goods and services
- hours of operation and size of premises
- provision of specified facilities or the use of specific equipment
- geographical area of operation
- permissible advertising
- business ownership
- type of goods or services that can be offered for sale

3. Restrictions on product or service innovation

By-laws can potentially restrict competition by regulating the quality or standard of a product or service, thereby reducing the scope for innovation. Such restrictions can include prescribed quality or technical standards in the production or packaging of a product or the delivery of a service.

4. Administrative discretion

By-laws can also restrict competition by providing for administrative discretion that has traditionally been exercised to inhibit competition.

This discretion can include:

- favouring existing suppliers
- preferential purchasing arrangements
- financial assistance available if a business is carried on in a certain location including direct grants or subsidies or waiver of various local government taxes or charges
- treating public and private sector providers differently

- setting technical specifications that are only available from a single supplier

Appendix 2 – Public benefit test

The following list of issues, while not exhaustive, can be used to assist in determining whether a regulatory restriction on competition is in the public benefit.

Does the restriction:

- promote competition in an industry
- assist economic development (e.g. in natural resources, through encouragement of exploration, research and capital investment)
- foster business efficiency, especially where this results from improved international competitiveness
- encourage industry rationalisation, resulting in more efficient allocation of resources and lower production costs
- expand employment growth or prevent unemployment in efficient industries or particular regions
- foster industry harmony
- assist efficiency in small business (e.g. by providing guidance on costing and pricing or marketing initiatives which promote competitiveness)
- improve the quality and safety of goods and services and expand consumer choice
- supply better information to consumers and business, thereby permitting more informed choices in their dealings at a lower cost
- promote equitable dealings in the market
- promote industry cost savings, resulting in lower prices at all levels of the supply chain
- encourage the development of import replacements
- encourage growth in export markets
- implement desirable community standards with the minimum impact on competition in the market place
- protect the environment

Appendix 3 – Useful resources

The Legislation Review Handbook and the Subordinate Legislation Act Handbook – both available at:

<http://www.treasury.tas.gov.au>

Queensland documents

Guidelines for conducting public interests tests on possible anti-competitive provisions in local laws and local law policy, and Guidelines to assist Local Governments identify possible anti-competitive provisions in proposed local laws and proposed local law policies, both available at:

<http://www.dip.qld.gov.au/local-government/local-laws-public-interest-test.html>

Australian Capital Territory Government document

Best Practice Guide for Preparing Regulatory Impact Statements, available at

http://www.treasury.act.gov.au/documents/regulatory_impact_statement_guide.pdf

Local Government division of the National Competition Policy website

http://www.npc.ncc.gov.au/pages/local_government

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