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## LOCAL GOVERNMENT ASSOCIATION OF SOUTH AUSTRALIA

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R U Y 2 K O K ?

Mr John Cosgrove  
Presiding Commissioner  
Productivity Commission  
Inquiry into the Impact of Competition Policy Reforms  
on Rural and Regional Australia  
PO Box 80  
**BELCONNEN. ACT 2616.**

Dear John

We appreciated the opportunity to present a submission on behalf of the Local Government Association of South Australia to a Public Hearing on 22 June 1999.

During our presentation mention was made of the best practice model guidelines, prepared by the Local Government Association (LGA), with funding support of the LGA Research Foundation, addressing the impact of existing bylaws as they relate to competition policy reforms.

The following is a brief synopsis of the issues addressed in the guidelines.

Their purpose was to consider the implications on Local Government of National Competition Policy and a requirement to review existing Council bylaws which may restrict competition. The review to which the guidelines refer is within the framework of the Clause 7 Statement negotiated between the State Government and the LGA on the application of competition principles to Local Government.

The review required Councils to:

Clarify the objectives of the bylaw, with Councils also advised to have regard for the objects of Local Government as set out in the Local Government Act. Identify the nature of the restriction on competition. Analyse the likely effect of the restriction on competition and on the economy generally. Assess and balance the costs and benefits of the restriction. This component was supported by a supplementary checklist which provided a number of indicators (but not exclusive) which Councils were able to address when considering costs and benefits. Consider the alternative means of achieving the same result including non-legislative approaches.

Councils were required, before 30 September 1997, to:

- Identify existing Bylaws which may restrict competition, and
- Provide a report identifying the Bylaw and the potential restriction and indicating when, before the end of the year 2000, the bylaws identified will be reviewed.

The reporting requirements also required advice on the timetable according to which by-laws would be reviewed. The LGA, following discussions with the Office of Local Government, issued a circular in 1997 designed to simplify the reporting process by providing examples of the by-laws likely to be captured by the NCP as well as a listing of typical by-laws. Councils were simply required to fill in the blanks in the reporting format.

The LGA promoted to Councils the need to gain legal advice on this matter and offered the services of our legal advisors who in fact prepared the guidelines.

The reporting requirements have been met fully by all Councils in the State. Councils are now working through the review, having regard for the timetables that they have established.

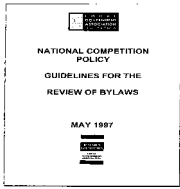
I have attached a copy of the guidelines for the review of bylaws, May 1997, referred to previously.

I would be happy to discuss any matter arising from this letter and can be contacted on 08.8224 2025.

Yours sincerely

Wendy Campana  
**Director, Strategic Development**

Attach



## NATIONAL COMPETITION POLICY - REVIEW:OF BYLAWS

### SUMMARY

- The purpose of these guidelines is to consider the implications on Local Government of National Competition Policy and a requirement to review existing Council bylaws which may restrict competition.
- This review is within the framework of the Clause 7 Statement produced by the State Government on the application of competition principles to Local Government.
- The report should be considered as a companion document to the comprehensive report prepared to assist Councils with the application of National Competition Policy in relation to the identification of business activities and the principles of competitive neutrality.
- The guidelines explain the background to National Competition Policy, outlines the principles of the legislation review and the requirements of the Clause 7 Statement.
- The purpose of the review is to comply with the guiding principle for the legislation review which is that legislation, including bylaws, should not restrict competition unless it can be demonstrated that the benefits of the restriction to the community as a whole outweigh the costs and the objectives of the legislation can only be achieved by restricting competition.
- In summary, the review of bylaws will require Councils to:
  - clarify the objectives of the bylaw.
  - identify the nature of the restriction on competition.
  - analyse the likely effect of the restriction on competition and on the economy generally.
  - assess and balance the costs and benefits of the restriction.
  - consider alternative means of achieving the same result including non-legislative approaches.
- The guidelines identifies the tasks which local Councils will have to take in carrying out this review and by means of Checklists aims to assist Councils in the process, giving a practical example of the review of a particular bylaw.
- Councils have been required by the State Government to report to the Minister by 1 June 1997 with details of the preliminary assessment of bylaws which may restrict competition and a timescale for the review. The further action to be taken by the Council to review the bylaws restricting competition is then to be taken in accordance with the timescale set out in the report to the Minister.

## 1. Purpose of Report

- 1.1 The primary purpose of these guidelines is to help Local Government in South Australia to comply with the requirements of National Competition Policy that all States review legislation which may restrict competition, which includes a requirement for Local Government to review all existing bylaws. National Competition Policy is being progressively introduced throughout Australia to ensure that there are no unnecessary legislative restrictions on competition and that laws and policies for all business, whether publicly or privately owned.

## 6. Background Information

- 2.1 Following consideration of the National Competition Policy Review (the Hilmer Report) the Council of Australian Governments (COAG), which represents the Heads of the Commonwealth Government and those of all States and Territories, on 11 April 1995 entered into three Agreements as follows:

- 2.1.1 The **Competition Principles Agreement** has the objective of introducing uniform competition laws and policies throughout Australia. The various components are:-

- Prices oversight of government business enterprises.
- Competitive neutrality.
- Structural reform of public monopolies.
- Legislation review.
- Access to infrastructure facilities.

Clause 7 of this agreement provides that the principles set out in it will apply to Local Government even though local Councils are not parties to the agreement. Each State Government has accepted responsibility under the agreement to apply the principles to Local Government.

Main features of the Competition Principles Agreement affecting Local Government in South Australia are the provisions for competitive neutrality of significant businesses and those requiring review of legislation for restriction of competition.

These guidelines deal with the legislation review requirement. They are complementary to those prepared to help Councils with the application of National Competition Policy in relation to the identification of business activities and the principles of competitive neutrality.

- 2.1.2. The **Conduct Code Agreement** provides that a competition code (in effect the restrictive trade practices provisions of the Commonwealth Trade Practices Act 1974) should apply by way of State legislation to all businesses not covered by the Commonwealth legislation. This is designed to ensure that anti-competitive conduct in business is limited no matter who is conducting the business.

The Commonwealth has introduced legislation to give effect to the Conduct Code Agreement in **the Competition Policy Reform Act 1995** introducing the Competition Code. This has been followed in South Australia by the passing of the **Competition Policy Reform (South**

**Australia) Act 1996.** This Act introduces a modified version of Part IV of the Trade Practices Act to be known as the Competition Code of South Australia and prohibits certain forms of anti-competitive conduct. The Competition Code will also apply to the South Australian crown and statutory authorities to the extent that they are carrying on defined business activities.

- 2.1.3 The **National Competition Policy Implementation Agreement** provides for financial assistance by the Commonwealth to State and Local Governments to be conditional on State and Local Governments making satisfactory progress with the implementation of National Competition Policy and related reforms.

The competition payments are to be made annually based on the State and Local Government giving effect to the Competition Policy Intergovernmental Agreements and in particular meeting deadlines in relation to the review of legislation and competitive neutrality.

An early condition, which has been met by South Australia, was that the State should have published by June 1996 a statement specifying the application of the principles in the Competition Principles Agreement in Local Government activities and functions, arrived at in consultation with Local Government (**the Clause 7 Statement**).

- 2.2 Although there is no statutory requirement as yet for Local government to review bylaws for restriction of competition, requirements giving effect to the COAG undertaking can be expected in the new Local Government Act. The additional financial incentive for Local Government to comply has been mentioned above. In view of the nation-wide Agreements and in the interests of cooperative intergovernmental relations, the LGA has endorsed the Clause 7 Statement as underpinning the approach Local Government should take in relation to Competition Policy.

### 3. The: **Clause 7 Statement**:

- 3.1 In relation to the review of bylaws, the Clause 7 Statement recognises that Local government in this State is already undertaking extensive reform activity.
- 3.2 Paragraph 41 of the Statement sets out that in view of the current process of structural reform of Local Government in South Australia and the likely establishment of many new Councils after elections in May 1997 it is not reasonable to expect existing Councils to begin immediately the process of identifying existing bylaws which restrict competition, reviewing them and reforming them as appropriate.

The proposal therefore is that Councils will be required to *identify* existing bylaws which restrict competition by 30 September 1997. At that time Councils will advise the State Government of the timetable according to which they will review and, where appropriate, reform all the bylaws identified. The Clause 7 Statement's deadline for identification of restrictive bylaws is 1 June 1997. It has been agreed that this timeframe

be extended to 30 September 1997 on the basis that any Council which has been unable to achieve the task by 31 August 1997 should contact the LGA for help with its completion.

3.3 In relation to the review of proposed or existing Council bylaws, clause 5 of the Competition Principles Agreement provides that:-

*'the guiding principle is that legislation (including acts, enactments, ordinances or regulations) should not restrict competition unless it can be demonstrated that:*

- (a) the benefits of the restriction to the community as a whole outweigh the costs; and*
- (b) the objectives of the legislation can only be achieved by restricting competition."*

3.4 Paragraph 43 of the Statement adopts the following terms of reference for the review of bylaws:-

- Clarify the objectives of the legislation.
- Identify the nature of the restriction on competition.
- Analyse the likely effect of the restriction on competition and on the economy generally.
- Assess and balance the costs and benefits of the restriction.
- Consider alternative means of achieving the same result including non-legislative approaches.

3.5 Whilst the review relates to existing bylaws. in accordance with the Clause 7 Statement from 1 July 1996 Councils should not forward to State Parliament for review any new bylaw restricting competition unless it is accompanied by a report containing evidence that the benefits of the restrictions to the community as a whole outweigh the costs and the objectives of the legislation can only be achieved by restricting competition (clause 5 guiding principle - see paragraph 3.1 above).

#### **4. The Council's Responsibilities**

4.1 As indicated above, the Council must undertake a review of all its existing bylaws to ensure that they do not restrict competition except where this is necessary for the benefit of the whole community.

4.2 The first step is for the Council to identify bylaws restricting competition and prepare a timetable for their review. This information should be included in a report to be sent to the Minister by 30 September 1997 (refer para 3.2). (Appendix 1 to this paper provides a model Council report).

4.3 The next step is for the Council to review these bylaws in accordance with the timescale submitted to the Minister.

6.2 Councils will have undertaken reviews of their bylaws in the past as a result of the 7 year sunset provision in Section 672 of the Local Government Act and it is likely that many bylaws which could be made under the long list of statutory provisions in Section 667 will have been revoked as being

obsolete and incompatible with modern society. Councils should note that Section 672 provides that any bylaw made before 1st July 1992 (the date the section came into operation) will expire on 1 January 1998 unless it is renewed. This provision will have consequences for the review bearing in mind the bylaws generally do not come into operation until four months after the day on which they are published in the Gazette.

- 4.5 In order to assist Councils in undertaking the **exercise Checklist 1** outlines the steps to be taken and Section 10 of this report and the Appendix give a practical illustration of a review of a specific bylaw.
- 4.6 In relation to any proposed new bylaw the Clause 7 Statement in paragraph 46 provides that after 1. July 1996 Councils should not forward to State Parliament for review any new bylaw restricting competition unless it is accompanied by a report containing evidence that the benefits of the restriction to the community as a whole outweigh the costs and the objectives of the legislation can only be achieved by restricting competition.

## **5. Restrictions on Competition**

- 5.1 The Clause 7 Statement provides examples of restrictions which could be used as criteria by the Council and might be held to be anti-competitive. These are listed below, together with illustrations of them in practice which could be contained in existing bylaws. The possible restrictions are also listed in **Checklist 2. Councils** are required to report annually on their progress in reviewing and reforming bylaws, according to the timetable and the guidelines. This information is to be provided to the State Government within two months of the close of each financial year.

The following restrictions could be anti-competitive:

1. The creation of a monopoly - eg one flower stall in Rundle Mall.
2. A limit to the number of providers of goods or services - eg 20 ice cream licences in Adelaide.
3. A limit on the amount of the product - eg 50 tonnes of waste per week to a tip.
4. Occupational or business licensing/registration - eg street trading or street cafes.
5. Product or service standards - eg quality assurance, accreditation, trade certificates.
6. Product or service quality - eg specifications, materials, etc.
7. The origin of the provider, the goods or services - eg local preference, regional, State, no overseas.



## 8. Control of conduct:

- Prices - eg minimum, maximum fares or fees.
- Hours of operation - eg waste tips closed on Sundays or bar shuts at 11.00 pm.
- Advertising - eg regulation of size or type of advertisements or moveable signs.
- Particular techniques - eg construction of drains and sewers. (STED schemes)
- Particular equipment - eg only Australian vehicles, noise reduction.
- Administrative discretion - eg taxi licensing, "fit and proper person", or the character of the applicant.

5.2 If having considered the above criteria the Council considers that the bylaw does restrict competition it must then be "satisfied":

- (a) that the benefits outweigh the costs; and
- (b) that the bylaw is the only way to achieve the objectives.

## **6. Objectives of the Bylaw**

6.1 The Council must expressly identify the "objective" of the bylaw. The current provisions of the Local Government Act 1934 do not require that a Council when making a bylaw should identify its objective, but Section 668(1)(b) provides that a bylaw should be "directed towards the objectives of the provision that authorises the bylaw and not beyond those objectives". Section 667 provides illustrations of "objectives", which would include the prevention of nuisances, activities injurious to health, pollution of water, the risk of disease and protecting the health and comfort of the inhabitants of the areas. It may be advisable for Councils when preparing new bylaws or amending existing bylaws to have regard to this "requirement" and wherever practicable use the express statutory words in the Act to describe the objective of the bylaw.

6.2 It may also be advisable to have regard to the "objects" of Local Government set out in Section 5A of the Act which includes:

- "(a) to provide a representative, informed and responsible decision-maker in the interest of developing the community and its resources in a socially just and environmentally sustainable manner; and*
- (b) to ensure a responsive and effective provider and co-ordinator of public services and facilities at the local level; and*

- (c) *to provide an initiator and promoter of effort within a local community; and*
- (d) *to represent the interests of a local community to the wider community.*

6.3 The above examples are illustrations and not exclusive. A more comprehensive list of possible objectives is **attached as Checklist 3**.

## **7. Consideration of Alternative Means**

- 7.1 The Council must also consider what other means are available to achieve the objective of the bylaw. This could include consideration of relevant Commonwealth or State legislation, orders and regulations - eg public health controls or other approval processes which could legitimately regulate the activity - eg a development authorisation under the Development Act 1993. Regard should also be had to any reviews of that other legislation which the State itself may be undertaking as part of its own obligations under the National Competition Policy. It would be unwise for a Council to rely on that other legislation and propose the repeal of a bylaw only to find that the other legislation itself is repealed.
- 7.2 Parliament may have determined by means of specific legislation that certain activities will be regulated or prohibited in a specific manner. If such specific regulation is already in force it will be for the local Council to identify and explain why it is essential for a bylaw to supplement that legislation. One issue which is relevant in relation to this exercise is the effect of Section 668(2)(h) of the Local Government Act 1934. This provides that a bylaw must not "*duplicate, overlap or conflict with other statutory rules or regulation*". In the knowledge that all existing bylaws have been subject to previous parliamentary scrutiny it is arguable that bylaws cannot be challenged by Parliament for failing this test unless the legislation has been passed since the bylaw was made.

## **8. Analysis of Costs and Benefits of the Bylaw**

- 8.1 The Clause 7 Statement provides that in evaluating the costs and benefits of a bylaw "*all relevant policy considerations should be taken into account*". It then lists examples drawn from clause 1(3) of the Competition Principles Agreement (see Checklist 4)
- 8.2 A balance must be struck between open and free competition – the right of the individual - and the public interest in regulating or restricting the individual's activities. In the absence of anything better reliance must be placed on the informed judgement of the local Council. It is therefore necessary to consider the discretion available to a local Council to reach the judgement it determines as appropriate for its own community and area. That judgement may be questioned either through the courts in relation to an existing bylaw or parliamentary disapproval of any proposed new bylaw.

8.3 The Clause 7 Statement recognises that it is not always possible to put a financial figure on the costs and benefits of particular issues and certain factors will carry more weight than others in such an analysis. Notwithstanding this difficulty the exercise must be undertaken. It is suggested that Councils should seek to avoid a technical financial exercise and undertake a practical assessment which is administratively simple.

8.4 Some of the costs on the individual or business in having to comply with the bylaw will be readily quantifiable. These could include the direct costs of providing specialist equipment or meeting prescribed standards. Other direct costs which are quantifiable would include the costs of training staff to enable accreditation to be obtained, the administrative costs in applying for a licence, licence fees imposed by the local Council and technology support.

Indirect costs will arise in certain cases to the local Council itself in the administrative costs of enforcing the regulation, including staffing costs. Other costs of imposing a restriction on the number of operators through licensing may be some market distortion leading to consumers paying a higher price than might otherwise be the case, reduced variety of product and choice of suppliers.

8.5 Illustrations of "community benefit" which would be relevant factors to a local Council could include:

- The bylaw may restrict commercial activities in public streets or land under the management of the Council. The Council is acting as trustee for the community over such areas and has a legitimate role to protect the community's wider interests.
- The bylaw applies to a special area which requires higher standards than are provided for in general State legislation. This could apply in relation to environmental standards of cleanliness, amenity and removal of obstructions in the Adelaide Parklands or Rundle Mall.
- Local circumstances apply to the activity which has been regulated by the bylaw which is not satisfactorily covered by general legislation.
- Local revenue would be raised from the bylaw which would be reinvested in the local community to maintain and restore the land affected by the bylaw. This would work on the "polluter pays principle".

8.6 As can be seen from the above comments it is impracticable to set out precise guidelines which Council officers must follow in undertaking an analysis of the costs and benefits of a bylaw restricting competition. The Council will have the task of satisfying itself that the officers' report deals with all the relevant matters. A list of potential relevant policy considerations, which can be taken into account by the officers in undertaking the review is attached as **Checklist 4**, together with a list of examples of "public benefit".

None of these lists should be treated as exhaustive and different factors may arise in any given set of circumstances.

## 9. Practical Example of the Process

- 9.1 These guidelines have attempted to explain the principles with which Councils must comply in order to meet the requirements of the Clause 7 Statement. The Appendix to the guidelines illustrates the exercise in practice and has been applied to a fairly common bylaw dealing with street trading.

The approach which has been taken has been to ask appropriate questions on a step-by-step basis using the checklists, and hopefully will assist Councils in the process of reviewing their existing bylaws.

## 10. Report by Council

- 10.1 The Clause 7 Statement provides that Councils will advise State Government by 30 September (refer para 3.2) 1997 of bylaws which restrict competition and the times at which they will be reviewed, for inclusion in the timetable to be developed by the State Government in accordance with National Competition Policy. Councils should take particular note that the report to the Minister is only to contain details of the identification of bylaws by the Council and a timescale for review. (Steps 1 and 2 of Checklist 1). The further action to be taken by the Council to review the bylaws restricting competition is then to be taken in accordance with the timescale in the report. The Competition Principles Agreement and the Clause 7 Statement both require, reform of all existing legislation restricting competition to be completed by the year 2000.
- 10.2 Councils should, however, note that circumstances may demand that the review should be pursued quickly particularly in relation to any bylaws made before 1 July 1992 which will expire on 1 January 1998, only some seven months after the report is to be submitted to the Minister. (Section 672 of the Act).

Bylaws made after 1 July 1992 will not expire until 1 January in the year following the seventh anniversary of the date on which they were made (eg bylaw made on 2 July 1992 expires on 1 January 2000).



**REVIEW OF BYLAWS  
CHECK LIST 1 - STEPS TO BE TAKEN BY COUNCIL**

**The Council needs to carry out the following steps in reviewing its bylaws**

1. Identify all Council bylaws.
2. Preliminary assessment by Council of whether bylaw restricts competition (**see Checklist 2**).
3. Council prepares and submits report to Minister before 30 September 1997 on decisions and time scale for review. (The review must be complete by 31st December 1999. Council's requiring assistance should contact the LGA by 31st August if it appears that the 30th September deadline may not be met).
4. Council commences the review of bylaws restricting competition.
5. Council does further work on identifying the nature of the restriction on competition and analyses the likely effect of the restriction on competition.
6. Council identifies objective of bylaw (**see Checklist 3**).
7. Council considers alternative means of achieving objective.
  - (a) Consideration of any Commonwealth and State legislation.
  - (b) Consideration of non-legislative means:-
    - (i) by agreement
    - (ii) by voluntary or advisory codes of practice
    - (iii) other means - eg media, press releases, advertisements etc.
  - (c) Consultation with special interest groups and the community (as appropriate).
8. If satisfied that the bylaw is an appropriate method Council identifies and quantifies costs and benefits having regard to all relevant policy considerations (**see Checklist 4**).
9. Council determines whether benefits outweigh costs or vice versa.
10. Council proposes retention, amendment or repeal of bylaw.
11. Council reports on the results of its review in its annual report.
12. Council completes its review and if necessary reform of all by-laws by 31st December 1999.

NOTE, The report in Item 3 does not have to deal with all the issues. It only deals with Items 1 and 2. The further steps which the Council must take are to be taken within the timescale in Item 3.

**REVIEW OF BYLAWS****CHECK LIST 2 - RESTRICTIONS ON COMPETITION**

**The Council needs to determine whether the provisions of the bylaw restrict competition. and the following questions: should be considered, where relevant:**

- o Does the bylaw lead to the creation of a monopoly?
  - o Does the bylaw limit the number of providers of goods or services?
  - o Does the bylaw limit the amount of the product?
  - o Does the bylaw provide for occupational or business licensing?
  - o Does the bylaw provide for occupational or business registration?
  - o Does the bylaw specify product or service standards?
  - o Does the bylaw specify product or service quality?
  - o Does the bylaw place restrictions on the origin of the provider or the goods or services?
- Does the bylaw provide for the regulation or control of conduct in relation to:
- Prices?
  - Hours of operation?
  - Advertising?
  - Particular techniques?
  - Particular equipment?

Does the bylaw contain an administrative discretion which could restrict the number of providers of a service?

Does the bylaw prohibit or restrict a commercial activity?

**NOTE:** Step 2 on Checklist 1 requires a preliminary assessment for the purpose of the report. Step 5 will require an additional analysis which should include the likely effect of the restriction on competition and on the economy generally.

## REVIEW OF BYLAWS

### CHECK LIST 3 - OBJECTIVES OF BYLAW

**The Council needs to. identify the objective of each bylaw,  
particularly those restricting competition**

Other than bylaws which are made under specific functional legislation the primary grounds for making a bylaw which could be classified as an "objective" can be found in Sections 5A and 667 of the Local Government Act 1934. Examples follow:-

- To provide a representative, informed and responsible decision-maker in the interests of developing the community and its resources in a socially just and environmentally sustainable manner.
- To ensure a responsive and effective provider and co-ordinator of public services and facilities at the local level.
- To provide an initiator and promoter of effort within a local community.
- To represent the interests of a local community to the wider community. The prevention and suppression of nuisances.
- The prevention of pollution of water.
- The prevention of contamination of land or water.
- The protection of the health and comfort of the inhabitants. Protection against the risk of disease.
- Protection against injury to public health. Preservation of cleanliness. Avoiding danger to persons. The prevention of obstructions of any street. The prevention of damage or injury to trees, shrubs, etc. The preservation of decency.
- Promoting the convenience of the public.
- Protecting the safety of the public from danger or injury. The good rule and government of the area.
- Protecting the convenience, comfort and safety of the inhabitants.

Note: It must be assumed that the existing bylaw has been made correctly and in accordance with the principles set out in Section 668 of the Local Government Act, 1934. However a Court may consider that a bylaw has been made against those principles.



**REVIEW OF BYLAWS**  
**COST BENEFIT ANAO(SIS**  
**CHECK LIST 4 - POLICY CONSIDERATIONS**

The Council needs to have regard to "all relevant policy considerations"  
These include:

**STATE & LOCAL GOVERNMENT POLICIES**  
**(including LGA Policies)**

Ecologically Sustainable Development  
Social Development, Welfare and Equity  
Community Service Obligations  
Occupational Health and Safety  
Industrial Relations  
Access and Equity  
Economic Development  
Regional Development  
Employment  
Investment Growth  
Interests of Consumers  
Competitiveness of Australian Business  
Efficient Allocation of Resources  
Equal Employment Opportunities  
Racial Equality/Harmony  
Aboriginal Reconciliation  
Council's Strategic Plan  
Council's Corporate Plan  
Council's Operational Plans  
Development Plan

## PUBLIC BENEFIT

In previous matters the ACCC and the Australian Competition Tribunal have recognised the following as public benefits even though the conduct of the parties has restricted trade:

- fostering business efficiency, especially when this results in improved international competitiveness;
- industry rationalisation resulting in more efficient allocation of resources and in lower or contained unit production costs;
- expansion of employment or prevention of unemployment in efficient industries or employment growth in particular regions;
- promotion of industry cost savings resulting in contained or lower prices at all levels in the supply chain;
- promotion of competition in industry;
- promotion of equitable dealings in the market;
- growth in export markets;
- development of import replacements;
- economic development, for example of natural resources through encouraging exploration, research and capital investment;
- assistance to efficient small business, for example guidance on costing and pricing or marketing initiatives which promote competitiveness;
- industrial harmony;
- improvement in the quality and safety of goods and services and expansion of consumer choice; and supply of better information to consumers and business to permit informed choices in their dealings.

**Note:** It is unlikely that, many of these will be particularly relevant to local Council bylaws, since it is difficult to identify a bylaw which would, for example, promote competition. Some of them may be available in a specific case to support the retention of a bylaw: restricting competition.

Additionally reference back to the, identified objective of the, bylaw: may support a community benefit - eg. protection of the environment.

## APPENDIX 1

## EXAMPLE PROCESS - REVIEW OF STREET TRADING BYLAW

STEP 1 - CHECKLIST 2  
DOES THE BYLAW RESTRICT COMPETITION?

The bylaw provides as follows:-

*"No person may without a licence issued pursuant to this bylaw sell or offer to sell any goods or chattels of any kind in any street, road or public place within the area of the Council".*

*"The Council may issue a licence to any person deemed fit by the Council to be so licensed as a street hawker or trader".*

*"Every such licence -*

*may be issued for such term and upon such conditions as may be fixed by the Council and set out in the licence including the condition that the licensee may carry on business as a street hawker or street trader only in such street or streets or public place or places as may be appointed in the licence".*

Checklist 2 provides that a restriction on competition could include limiting the number of providers of goods or services; providing for occupational or business licensing; providing for the regulation of conduct and contains an administrative discretion.

The requirement to obtain a permit or licence restricts or has the potential to restrict competition by restricting the number of providers of goods and by restricting the space or area the licence holder could occupy. Additionally it contains an administrative discretion in favour of the Council which can be used selectively without any objective criteria.

The bylaw therefore restricts competition.

Additionally the Council should analyse the likely effect of the restriction on competition and on the economy generally. The bylaw is likely to reduce the number of competitors, could reduce the variety of goods available in the area and lead to increased prices. This would be dependent on the availability of other retailers in the area.

**STEP 2 - CHECKLIST 3  
WHAT IS THE OBJECTIVE OF THE BYLAW?**

The approval of commercial activities on roads and other public places by licence or permit provides an effective method for Councils to manage the conflicting interests of public and private use of public land.

The objectives of this bylaw will include:

- the prevention of obstructions of streets;
- the prevention and suppression of nuisances;
- protecting the safety of the public;
- protecting the convenience, comfort and safety of the inhabitants.

These are all statutory objectives of bylaws taken from Section 667 of the Local Government Act 1934.

**STEP 3 -SECTION .8: OFREPORT  
ARE THERE ANY, ALTERNATIVE MEANS OF ACHIEVING THE SAME  
RESULT INCLUDING NON LEGISLATIVE. MEANS?**

There appear to be no directly relevant alternative means of regulating commercial activities in public streets or public places which could achieve the same results as the bylaw.

Certain elements of specific Acts of Parliament might partially assist, for example:

- the Food Act 1985 in seeking to ensure that hygiene requirements are met in respect of sales of food.
- the Development Act 1993 if structures were to be used which came within the definition of "development".
- Section 369 of the Local Government Act 1934 which makes it an offence to unlawfully obstruct a street by placing any goods or other thing in it so that public use is hindered.
-

However none of these will provide the comprehensive means which a licence with appropriate conditions attached to it can provide to regulate the use or activity. Non-legislative means, such as a code of practice, with no sanction would be unlikely to be successful in relation to this particular bylaw. Consultation with special interest groups may assist both in relation to whether alternative means are available to achieve the objectives of the bylaw and to obtain feedback on Step 4.

**STEP 4 - CHECKLIST 4  
IF SATISFIED THAT THE BYLAW IS AN APPROPRIATE  
METHOD DO THE BENEFITS OF THE RESTRICTION  
OUTWEIGH THE COSTS**

The costs to the person requiring the licence will include:

- The administrative costs in making the application.
- The licence fee.
- The costs of compliance with conditions.
  - eg. Particular types of equipment or stalls, no motor vehicle to remain with the stall, arrangements for the disposal of litter, etc.

The costs to the Council will include:

- The administrative costs in making the bylaw.
- The administrative costs in considering the application.
- The staffing costs of supervision and enforcement of the bylaw.

The benefits to the community will include:

- Proper management of public streets and public places on behalf of the community.
- The approval of suitable applicants who will comply with safety, health and hygiene standards.
- Reduction in the level of inconvenience which could be caused to members of the public by unregulated conduct.

The costs to the community may include:

- Increased costs of goods and services.
- Reduced variety and choice of suppliers.

The balance will in this case favour the community benefit of proper control of activities and conduct in public streets and public places which the Council has a responsibility to manage as trustee for the community at large. The costs to the applicant and the community are outweighed by the benefits to be achieved from the bylaw.

It should be noted that very few of the costs and benefits are likely to be measurable in financial terms.

## **STEP 5**

Since the community benefits outweigh the costs it is not necessary to prepare an amendment of the bylaw and it will simply be necessary to report on the results of the review at an appropriate time in the Council's annual report.

A review of a different bylaw could produce a different result which might lead to the Council seeking to amend the bylaw to remove certain restrictive aspects of it and retaining the bylaw in a different form.

There is no statutory requirement for any public consultation to be undertaken in any review of the bylaw but clearly this would be a matter for the Council to determine in any particular case.

## APPENDIX 2

## EXAMPLE REPORT TO COUNCIL

[COUNCIL/COMMITTEE]

(Date)

## REVIEW OF BYLAWS

## Report of Chief Executive Officer

**1 Purpose of Report**

- 1.1 The purpose of this report is to advise members of the requirements of National Competition Policy and the provisions for the review of legislation, including bylaws, which may restrict competition.
- 1.2 Members are requested to consider the contents of this report and are recommended to advise the Minister for Local Government of those current Council bylaws which may restrict competition and a timescale within which they will be reviewed by Council.
- 1.3 The [Council/Committee] is also asked to authorise the Chief Executive Officer to undertake the administrative task of carrying out the detailed review in accordance with the timescale and report back to the [Council/Committee].

**2. Background Information**

- 2.1 The [Council/Committee] has previously considered reports on the subject of National Competition Policy and its likely impact on the work of the Council at its meeting(s) on (give date). Since this is the first time formal decisions are required on a particular aspect of this policy it will be useful to remind members of the background, particularly so far as it relates to the review of legislation which may restrict competition.
- 2.2 Clause 7 of the Competition Principles Agreement between the Commonwealth and the States provides that the principles set out in it will apply to Local Government.

Each State Government has accepted responsibility under the agreement to apply the principles to Local Government. One of the requirements of this agreement is that all States review legislation which may restrict competition, which includes a requirement for Local Government to review all existing bylaws. The State Government has the responsibility for reviewing all State legislation.

- 2.3 Both the State and Local Government have a financial interest since the National Competition Policy Implementation Agreement provides for financial assistance by the Commonwealth to be conditional on satisfactory progress with the implementation of National Competition Policy and related reforms. The competition payments are to be paid annually based on results, which includes the State giving effect to the Competition Policy Intergovernmental Agreements and in particular meeting deadlines in relation to the review of legislation, including bylaws, and the implementation of the principles of competitive neutrality. These principles and their implications for the Council will be subject of a separate report based on work commissioned by the LGA.
- 2.4 The State has prepared a Clause 7 Statement in consultation with Local Government which provides guidance on the application of competition principles to particular Local Government activities and functions. Paragraph 40 of the Statement provides that the review of the Local Government Act 1934 will take into account the State Government's obligations under the Competition Principles Agreement to ensure that laws do not restrict competition except where this is necessary for the benefit of the whole community.
- 2.5 The main reason for the legislation review is that legislation, including bylaws, should not restrict competition unless it can be demonstrated that the benefits of the restriction to the community as a whole outweigh the costs and the objectives of the legislation can only be achieved by restricting competition.
- 2.6 In summary, the review of bylaws will require Councils to:
- clarify the objectives of the bylaw; identify the nature of the restriction on competition;
  - analyse the likely effect of the restriction on competition and on the economy generally;
  - assess and balance the costs and benefits of the restriction;
  - consider alternative means of achieving the same result including non-legislative approaches.
- 2.7 Whilst this task looks very demanding Members will be aware that Council bylaws have been regularly updated and obsolete bylaws have been revoked. Guidelines have been prepared by the Solicitors to the LGA and these will be of considerable assistance in undertaking the review.



- 2.8 The first step in the review is for the Council to identify bylaws restricting competition and prepare a timetable for their review. Councils have been required by the State Government to report to the Minister by 1 June 1997 but this has been extended to 30 September 1997 by agreement with the LGA. The report is to contain details of the identified bylaws which may restrict competition and a timescale for the review. The further action to be taken by the Council to review the bylaws restriction competition is then to be taken in accordance with the timescale set out in the report to the Minister. All must be completed by 31st December 1999.

### 3. Consideration of Council Bylaws

- 3.1 Members will see from the list of bylaws on the Appendix to the report the types of uses and activities which are regulated by the Council. Guidelines from the State in the Clause 7 Statement and from the LGA Solicitors have outlined the type of provision in a bylaw which could potentially restrict competition. An example could be the need to obtain a permit or licence from the Council which could restrict the number of providers of a service [bylaw no. .... in relation to ].
- 3.2 At this stage all that is required is to identify the bylaw and the potential restriction by 30 September. During the actual review it will be necessary to carry out a more detailed analysis of the objectives of the bylaw, its likely effect on competition and balance the costs and community benefits of the bylaw. This exercise is required to enable the Council to be satisfied that retention of the bylaw is justified and to be able to demonstrate to the Minister, Parliament and others when necessary that the Council has good reasons in the interests of the community for taking that decision. The results of the review are to be included in the Council's annual report.
- 3.3 Your officers have undertaken the preliminary exercise and identified those bylaws which potentially restrict competition. The officers will be able to answer any questions members may have. Members are invited to adopt the recommendations of your officers on this aspect of the matter.
- 3.4 The second part of the exercise is to suggest a timescale within which the review of bylaws should be completed. A period of twelve months would not seem to be unreasonable for the Council to perform this task dependant on the number of bylaws to be reviewed. This is in the knowledge that the Competition Principles Agreement and the Clause 7 Statement review, and where appropriate, reform of all existing legislation restricting competition to be completed by the year 2000 (ie by 31 December 1999).
- 3.5 Your officers have recommended a timescale for a review of those bylaws potentially restricting competition and members are invited to adopt these recommendations. [It should be noted that because certain bylaws were made by the Council before 1st July 1992 they will expire automatically on 1st January 1998 unless the review commences immediately as a result of the effect of Section 672 of the Local Government Act 1934 **only use this sentence if appropriate**].

#### 4. Recommendations

It is recommended that:

- 4.1 The Minister for Local Government be informed that the Council has undertaken a review of its existing bylaws and identified those bylaws listed in the Appendix to this report as ones which may restrict competition.
- 4.2 The Minister be informed that the Council will undertake a review of these bylaws by [give date] in accordance with the guidelines in the Clause 7 Statement.
- 4.3 The Chief Executive Officer be requested to commence the review of the bylaws listed in the Appendix and submit a report to the [Committee/Council] in order that the timescale in recommendation 4.2 can be compiled with.

Chief Executive Officer

Reference

Date

## COUNCIL BYLAWS

BYLAW	TYPE OF RESTRICTION	SUGGESTED REVIEW DATE
No.1 Use of Council Land	Need for licence	1st June 1998

[EXAMPLE ONLY]

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