

Banana Shire Council

Public Interest Test Plan

Local Law No. 1 (Administration) 2011

Introduction

As part of the National Competition Policy reforms, a public interest test on possible anti-competitive provisions identified in Local Law No. 1 (Administration) 2011 including Subordinate Local Law No. 1 (Administration) 2011, will be conducted. The public interest test will be conducted against the principles and objectives set by the Competition Principles Agreement (CPA).

Under clause 5(1) of the CPA, all governments agreed to the principle that legislation 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 reviewing legislation that restricts competition, clause 5(9) of the CPA requires that the review should:

- ◆ 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; and
- ◆ consider alternative means of achieving the same result including non-legislative approaches.

Without limiting the matters to be taken into account in a review, Clause 1(3) of the CPA sets out matters which should be taken into account, as follows:

- ◆ government legislation and policies relating to ecologically sustainable development;
- ◆ social welfare and equity considerations, including community service obligations;
- ◆ government legislation and policies relating to matters such as occupational health and safety, industrial relations and access and equity;
- ◆ economic and regional development, including employment and investment growth;
- ◆ the interests of consumers generally or of a class of consumers;
- ◆ the competitiveness of Australian businesses; and

- ◆ the efficient allocation of resources.

This public interest test plan has been prepared in accordance with guidelines issued by the Department of Infrastructure and Planning to provide a basis for community consultation. The guidelines have been applied by regulation under the *Local Government Act 2009*. The plan details activities to be conducted during the test and identifies the depth of analysis to be carried out on the possible anti-competitive provisions.

Purposes and how they are to be achieved

- (1) The purposes of this local law are to provide a legal and procedural framework for the administration, implementation and enforcement of the local government's local laws, subordinate local laws and specified regulatory powers under legislation, and to provide for miscellaneous administrative matters.
- (2) The purposes are to be achieved by providing for—
 - (a) consistent and comprehensive processes for the local government to grant and regulate approvals to undertake prescribed activities; and
 - (b) authorised persons for enforcing local laws; and
 - (c) review of certain decisions made under local laws; and
 - (d) enforcement of local laws; and
 - (e) matters relating to legal proceedings; and
 - (f) miscellaneous administrative matters relating to meetings, fees, abandoned goods and seized and impounded items.

Details of Anti-Competitive Provisions

The anti-competitive provisions identified in Local Law No. 1 (Administration) are contained in Part 2, sections 5 through to 18 inclusive.

Part 2..... Approvals for prescribed activities.

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| 5 | Meaning of <i>prescribed activity</i> . |
| 6 | Offence to undertake local law prescribed activity without approval. |
| 7 | Approvals for prescribed activities to be obtained under this part. |
| 8 | Form of application. |
| 9 | Local government's discretion in granting approvals. |
| 10 | Conditions of approval. |
| 11 | Compliance with conditions of approval. |
| 12 | Third party certification. |
| 13 | Term of approval. |
| 14 | Renewal of approval. |
| 15 | Transfer of approval. |
| 16 | Amending conditions at request of approval holder. |
| 17 | Grounds for amending, suspending or cancelling approval. |
| 18 | Procedure for amending, suspending or cancelling approval |

Prescribed Activities

The prescribed activities applicable in the Banana Shire which are considered by Council to contain anti-competitive conditions and which are detailed in the Subordinate Local Law are as follows—

Schedule 8 - Commercial use of local government controlled areas and roads

Schedule 12 - Operation of camping grounds

Schedule 14 - Operation of caravan parks

Schedule 15 - Operation of cemeteries

Schedule 16 - Operation of public swimming pools

Schedule 17 - Operation of shared facility accommodation

Schedule 18 - Operation of temporary entertainment events

Subordinate Local law No. 1 (Administration) 2011

Schedule 8 - Commercial use of local government controlled areas and roads

Commercial use of local government controlled areas¹ and roads means the use of a local government controlled area or road for soliciting or carrying on the supply of goods and services (including food or drink) for profit, but does not include the following—

- (a) the provision of a public passenger service under the *Transport Operations (Passenger Transport) Act 1994*;
- (b) a business on part of a road if the person carrying on the business is authorised by an approval under the *Land Act 1994* to occupy the relevant part of the road for carrying on the business;
- (c) a business that a person is authorised to carry on under the *Transport Infrastructure Act 1994*;
- (d) using a road for a particular purpose if the use constitutes development under the *Planning Act*;
- (e) operation of a temporary entertainment event;
- (f) undertaking a regulated activity on a local government controlled area or road where the activity is the holding of a public place activity.

Objective of Schedule 8

The objectives of the local law are to:

¹ See footnote 36.

- regulate soliciting of business on roads and associated public places; and
- regulate the use of roads and associated public places for the conduct of business.

Details of Anti-Competitive Provisions

Part 2 of the local law and Schedule 8 of the subordinate local law:

- forbids the soliciting or carrying on of a business on a road unless it is authorised by an approval; and
- establishes the approval regime.

For further information, please see the copy of Local Law No. 1 – (Administration) 2011 and Subordinate Local Law (Administration) 2011 attached to this plan.

Current Environment

Business has the potential to operate anti-competitively by failing to take into account the cost of conducting business in public places. This additional cost includes impact on public health and safety, environmental damage and public nuisance. To ensure business includes these costs, the local law was adopted. The objective is to ensure the minimum standard the community has regarding safety, environmental damage and nuisances is maintained. Without the restriction, costs would be imposed on the community when essentially they should be included as part of the original transaction between business and consumers. The costs potentially imposed are a decrease in public health and safety, decrease in aesthetic levels and an increase in environmental damage.

Public health and safety is maintained by:

- limiting the activities authorised by the approval to a single specified location or to a specified area;
- allowing the local government to change the conditions of an approval if the change is urgently needed in the interests of safety; and
- requiring the holder of the approval to take specific measures to protect the safety of persons who may be involved in, or affected by, the activities authorised by the approval.

Environmental standards and nuisance levels are maintained by:

- requiring the holder of the approval to take specified measures to ensure that the activities authorised by the approval do not cause a nuisance;
- limiting the activities authorised by the approval to a single specified location or to a specified area; and
- allowing the local government to change the conditions of an approval if the change is urgently needed to prevent a nuisance.

The local law is restrictive by ensuring that no business is conducted unless with an authorised approval, the conditions for obtaining an approval are decided by local government and these conditions can be changed under certain circumstances.

The local law also maintains an economic balance between established local business and itinerant vending by regulating the number of itinerant vendors and restricting that number by allocation of approvals.

Realistic Regulatory and Non-Regulatory Alternatives to Existing Local Law

The objective of the local law is to ensure adequate standard of safety and environmental protection by regulating the size, location, nature and time of the business. This is achieved by using an approval based system, where upon application to local government, persons are granted an approval with conditions to conduct roadside business.

By meeting its objective, the local law has the potential to induce strongly anti-competitive conduct or confer monopoly power to a business or monopoly power to a business supplying particular goods. However, allowing commercial itinerant activities on roads could be to the detriment of established business.

Regulatory and non-regulatory options which are not considered viable include:

- No regulation. It is considered that the risks to public safety and amenity are too great for this to be a realistic alternative.
- Self-regulation: Is there a strong industry body which provides or can provide standards or a code of conduct for itinerant vendors? No knowledge exists of any standards set by an industry body. Therefore, at this point in time, this alternative is not considered realistic. This may change in time.
- Co-regulation: Again we must consider the strength of any industry body. Therefore, at this point in time, this alternative is not considered realistic.
- Public information and education programs: This is not considered realistic as at present there is no body, other than the local government, to which the public can take its complaints.
- Economic incentives: This is not considered realistic.
- Industry accreditation: This is a means of self-regulation and at present, is not considered a realistic alternative.
- Master licensing: This is not considered a realistic alternative.
- Empowering consumers: This is not considered realistic as at present there is no body, other than the local government, to which the public can take its complaints.

Considering the need to monitor commercial activities on roads only one type of intervention is considered realistic:

- Negative licensing. Amend local law to remove the approval system and replace with prescribed minimum standards and attending negative licensing regime.

Negative licensing assumes that an operator has the right to be in business and is prepared to comply with a clarified minimum standard of behaviour. No approvals are issued and it is expected that this regime would be adopted as follows:

- Vendor/operator will notify local government that they have begun a business which falls under the definition of commercial use of road.
- Operators are charged a token fee for processing and certification that their business comply with standards.
- Operators who fail to comply with the local law will be fined heavily and immediately and will not be allowed to operate unless they comply with the local law requirements.
- The minimum standard and requirements are constantly published and reinforced by local government.
- Consumers and business operators are well educated on requirements.
- Complaints are responded to swiftly and forcefully.

The local law aims to ensure that certain costs are included in the cost of conducting business on roads. This cost is environmental damage, public health and safety and public nuisance. Regulatory alternatives which can achieve this objective are limited to co-regulation and negative licensing. Other alternatives available to local government do not ensure that the objective of the local law is achieved and have a higher risk of non-compliance than acceptable by the community.

Key Stakeholders Affected By Changes to Local Law No. 1 (Administration) 2011 and Schedule 8 - Commercial use of local government controlled areas and roads of Subordinate Local Law No. 1 (Administration) 2011

The following stakeholders and broad impacts have been identified:

Negative Licensing

Stakeholder	Size	Distribution	Impact
Local Government	One Council	n/a	Moderate <i>negative impact</i> There is an increased risk of non-compliance and potential for Council to have to maintain a complex local law system.
Business - Existing and Potential Existing and potential business are impacted because of changes in	<i>The size of the stakeholder is dependent upon the number of businesses in the shire and the additions and removals of such businesses within a financial year (level of growth).</i> <i>A more appropriate method would be to separate the stakeholder</i>	1% large business (> \$600,000 turnover) 20% medium business (\$300,000 < \$600,000 turnover) 79% small business	Moderate <i>positive impact</i> Removal of the restriction on commercial use of roads could lead to an increase in competition,

number of market participants and distribution and competition between participants.	<p><i>group between different classes of business eg. itinerant vendors, established business, potential business etc.</i></p> <p>For the purposes of this exercise, total number of businesses in the shire is 80 of which all are dependent upon local trade and about 8 businesses are primarily dependent on road business as source of trade.</p> <p>There is a monthly market and 3 major fetes</p>	(<\$300,000 turnover)	<p>reduction in costs and removal of restrictions on business ownership.</p> <p>Low <i>negative impact</i></p> <p>Impact on existing businesses may be negative in that new businesses will not have to meet such costs as rent, rates etc.</p>
Stakeholder	Size	Distribution	Impact
<p>Consumers</p> <p>Consumers are impacted because of changes in the product/service choice available resulting from increased competition and level of advertising of business product.</p>	<p><i>Consumers are the final purchasers of products, therefore changes to the market will also have an impact on consumers such as price, availability, location, quality and substitute products.</i></p> <p>For the purposes of this assessment and due to the general nature of the regulation, consumers are classed as any person over the age of 18 in the community, in addition to the potential business from road usage.</p> <p>Over the age of 18 - 5,000</p> <p>Potential Road - 10,000</p> <p>Total - 15,000</p>	15,900	<p>Low positive impact</p> <p>Consumers will receive benefits of increased competition - eg low prices, better service etc</p>
Chamber of Commerce	<p>Chamber of Commerce is an interest group which provides self-regulation and support to shire business.</p> <p>In this example, Chamber of Commerce will have an interest in the control of itinerant vending and products sold by this type of</p>	3	<p>Low negative impact</p> <p>May lead to more businesses in the area which will compete with local businesses without having to meet costs such as rent, rates etc</p>

	vendor.		
Shire Conservation Group and Business and tourism Ass'n	Both interest groups have similar interests and will be treated as one stakeholder. Interests in the level and type of development in the Shire and its impact on the community and environment.	2	Low negative impact Will have an interest if number of businesses increase which could lead to environmental and amenity nuisances

Subordinate Local law No. 1 (Administration) 2011 Schedule 12 - Operation of camping grounds

Operation of camping grounds means to permit access to, or use of, a commercial camping ground but does not include a caravan park.

Objective of Local Law

The objectives of the local law are to:

- ◆ ensure that commercial camping grounds are properly maintained; and
- ◆ ensure that the operator of a commercial camping ground provides basic facilities for users of the camping ground; and
- ◆ ensure that camping grounds comply with appropriate standards of cleanliness and hygiene; and
- ◆ regulate conduct on camping grounds.

Details of Anti-Competitive Provisions

Part 2 of the local law and Schedule 12 of the subordinate local law:

- forbids the operation of a commercial camping ground unless it is authorised by an approval; and
- establishes the approval regime.

For further information, please see the copy of Local Law No. 1 – (Administration) 2011 and Subordinate Local Law (Administration) 2011 attached to this plan.

Current Environment

The local law provides that a person must not carry on the business of operating a commercial camping ground unless they hold an approval issued by Council under the local law. The granting of an approval is subject to Council being satisfied the proposed operation will be consistent with the objects of the local law and with any criteria laid down under the subordinate local law.

In granting an approval, Council may impose conditions relating to the conduct of the business activity which the operator must comply with. Conditions can, for example, impose limits on the number of persons to be accommodated on a camping site, require the operator to provide an adequate supply of water and to provide and maintain adequate toilets and bathing or showering

facilities. However, conditions imposed in an approval must be consistent with any statutory authorisation or approval for the establishment of the camping ground.

The approval regime established under the local law is directed at a business activity - the operation of a commercial camping ground. In its conferring of a discretion as to the grant of an approval and to the content of conditions to which an approval issued will be subject, the approval regime imposes both a barrier to entry to a particular market and a restriction on competitive conduct within the market. Other provisions dealing with the conduct of the business are also anti-competitive, such as the requirement to keep a register detailing activities of the operation of a camping ground.

Council is proposing to adopt the new model local law on the operation of commercial camping grounds to replace its existing local law which has become outdated and which now conflicts with the intention of the *Sustainable Planning Act 2009* (SPA). Specifically, SPA aims to have all development issues dealt with under Council's planning scheme. The establishment of a camping ground falls within the definition of "development" under SPA. Council considers that some form of local government control or regulation over the "operation" of camping grounds is necessary to safeguard public health and safety, protect the environment and amenity of the local area and to minimise nuisances.

Further, it is considered that, without the local law in place business has the potential to operate without proper regard to adequate standards of health, safety and amenity. In doing so, the resultant costs from environmental damage, loss of amenity, public health and safety risks and loss of quality of life through nuisances, would be borne by third parties rather than being included in the transaction between business and consumers.

Confirm Sections are Anti-Competitive

Part 2 of the local law and Schedule 12 of the subordinate local law: are confirmed as anti-competitive provisions and no errors were made during the identification stage.

Realistic Regulatory and Non-Regulatory Alternatives

The objectives of Local Law No. 1 (Administration) 2011 and Schedule 12 of the Subordinate Local Law No. 1 (Administration) 2011 are to:

- ◆ ensure that commercial camping grounds are properly maintained; and
- ◆ ensure that the operator of a commercial camping ground provides basic facilities for users of the camping ground; and
- ◆ ensure that camping grounds comply with appropriate standards of cleanliness and hygiene; and
- ◆ regulate conduct on camping grounds.

This is achieved by using a conventional approval based system, whereby, upon application to Council, persons are granted approvals to conduct the business of operating a commercial camping ground subject to conditions.

Regulatory and non-regulatory alternatives to the approval system are detailed in guidelines developed by the Department of Infrastructure and Planning on conducting public interest tests and include the following (an assessment of the viability of each alternative has been made):

- ◆ **No regulation:** It is considered that the risks to the community in relation to health, safety and amenity, are too great for this to be a realistic alternative.

- ◆ **Market/industry self-regulation:** Self regulation within an industry or service is purely voluntary in the sense that the rules are made and enforced by stakeholders involved. Self regulation is more applicable to the production or sale of a product which is “regulated” against the background of consumer and/or corporate law. Council considers this option is not appropriate for regulating the operation of commercial camping grounds.
- ◆ **Co-regulation:** The legal instruments and administrative arrangements involved with co-regulation are much the same as with local government regulation. The difference is that the “rules” are drafted in close consultation with stakeholders/industry. As no industry body exists to represent the industry, it is considered that stakeholders would be too numerous for this to be a realistic option.
- ◆ **Public information and education programs:** This is not considered realistic as at present there is no body or organisation, other than Council, to which the public can take its complaints to.
- ◆ **Economic incentives:** This is not considered realistic.
- ◆ **Industry accreditation:** This is a means of self-regulation and at present, is not considered a realistic alternative. See above.
- ◆ **Master licensing:** Not applicable to this situation.
- ◆ **Empowering consumers:** This is not considered a realistic alternative.

Negative licensing - Council considers negative licensing to be a viable option at this stage. Under a negative licensing regime there is no requirement to first obtain an approval to enter the market. The presumption in this regime is that an operator is prepared to play by the “rules” if they know what they are. No approval is required and no fees are paid. Other characteristics of a negative licensing regime include:

- ◆ notification that an operator is in a particular line of business is “collected” during the course of day-to-day business, rather than prior to commencement;
- ◆ operators are charged a token fee for certification that their operations comply with standards;
- ◆ operators who wilfully fail to comply are fined heavily and immediately - the greater the breach, the greater the fine;
- ◆ the rules/requirements are published periodically, together with details about the availability of training;
- ◆ consumers are educated as well as operators;
- ◆ complaints are responded to swiftly and forcefully.

Changes Required to Local Law under a Negative Licensing System and Implications:

Under a negative licensing regime, the local law would need to be amended to remove the requirement for operators to obtain an approval before operating a commercial camping ground and to set generic conditions which would apply to the operation of all camping grounds (in place of individual approval conditions) in the local government area. The opportunity to set site specific conditions would thus be removed.

As a consequence, if Council wanted subsequently to change the generic conditions, the local law would need to be amended. Under the approval system, Council could change the conditions imposed in an approval either with the agreement of the operator or after giving written notice. However, it is considered the impact of this loss would be low, as most of the site specific conditions would have been determined under the development application. As well as setting generic conditions, the local law could be amended to include a requirement for operators to comply with any conditions placed on the development application establishing the camping grounds.

Under a negative licensing regime, the discretionary power as to the grant of an approval would be removed. However, the local law could be amended to require written notification be given to Council when new operators take over the operation of a camping ground. This would be in line with the negative licensing model.

Council could still issue compliance notices but the power to suspend or cancel an approval for failure to comply with a compliance notice would be removed. However, heavier fines apply under a negative licensing system to ensure compliance with the “rules”. The local law would need to be amended to provide for heavier fines for non-compliance. Additionally, the local law could be amended to give Council the power to issue a “stop order” for failure to comply with a compliance notice. Council can issue a stop order under the local law if an operator is operating without an approval.

Under a negative licensing system, Council would still be able to have work carried out and seek to recover damages if an operator does not comply with a compliance notice.

Council may suffer a financial loss through the loss of approval fees under a negative licensing regime. However, this loss may be offset by charging an annual inspection fee. This is consistent with charging a nominal fee for certification that operations comply with the “standards” under the negative licensing model. The loss of fees would also be offset by heavier fines for non-compliance.

In summary, the main impacts on Council from moving to a negative licensing regime would be a loss of ability to set site specific conditions and loss of discretionary power as to the grant of an approval.

Key Stakeholders Affected By Changes to Local Law No. 1 (Administration) 2011 and Schedule 12 - Operation of Camping Grounds of Subordinate Local Law No. 1 (Administration) 2011

The following stakeholders and broad impacts have been identified by a move to a negative licensing regime:

Stakeholders / broad impacts	Size	Distribution	Impact rating and rationale
<p>Council</p> <p>Council would be impacted by having to implement a new regulatory system ie. amend local law, educate staff, camping ground operators and community etc.</p> <p>Saving in administration costs through not having to process approval applications.</p> <p>Loss of fees.</p> <p>Loss of flexibility and control in regulating camping grounds ie. loss of ability to set site specific conditions and loss of ability to cancel or suspend an approval.</p>	1	N/A	<p>Low negative impact - mostly a one off impact but some ongoing impacts with requirement for periodic training/publication of “rules”.</p> <p>Low positive impact - saving not estimated to be large.</p> <p>Low negative impact - loss would not be substantial.</p> <p>Moderate negative - Council would need to amend the local law to be able to change conditions.</p>
<p>Existing camping ground operators</p> <p>Reduction in “red tape” (ie. no requirement to renew approval) and therefore reduction in operating costs.</p> <p>Heavier fines for non-compliance.</p>	Nil		<p>Low positive impact - reduction in costs would be minimal.</p> <p>Low negative impact - large fines not always given by court.</p>

<p>Potential camping ground operators</p> <p>Removal of barrier to entry for operators.</p> <p>Heavier fines for non-compliance.</p>	Unknown	Local government area	<p>Low positive impact - In practice, Council did not reject approval applications or renewals rather, would issue approvals subject to conditions.</p> <p>NB: Local law now relates only to the operation of a camping ground and not establishment.</p> <p>Low negative impact - large fines not always given by court.</p>
<p>Camping ground occupants</p> <p>Possible decrease in standards resulting from Council's loss of discretionary power as to the grant of an approval and loss of ability to set site specific conditions.</p> <p>Lower costs if operational savings passed on.</p> <p>Greater consumer choice and product differentiation through increased competition.</p>	n/a	N/A	<p>Low negative impact - generic conditions and conditions of development approval will apply.</p> <p>Low positive impact - any price reduction likely to be minimal.</p> <p>Low positive - currently market is saturated and growth not likely to be significant.</p>

<p>General community and residents living in close proximity to camping grounds</p> <p>Possible decrease in amenity and increase in nuisances resulting from Council's loss of discretionary power as to the grant of an approval and loss of ability to set site specific conditions.</p>	n/a	Local government area	Low negative impact - generic conditions and conditions of development approval will apply. Council can also use its powers under its Control of Nuisances local law to address nuisance problems.
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Subordinate Local law No. 1 (Administration) 2011

Schedule 14 - Operation of Caravan Parks

operation of caravan parks means to operate, on a commercial basis, a place for parking and residing in caravans, including a place that provides also for complementary accommodation.

Objective of Local Law

The objectives of the local law are to:

- ◆ ensure that caravan parks are properly operated and maintained; and
- ◆ safeguard the health and safety in caravan parks; and
- ◆ provide for the comfort and convenience of short term and long term caravan park residents.

Details of Anti-Competitive Provisions

Part 2 of the local law and Schedule 14 of the subordinate local law:

- forbids the operation of a commercial caravan park unless it is authorised by an approval; and
- establishes the approval regime.

For further information, please see the copy of Local Law No. 1 – (Administration) 2011 and Subordinate Local Law (Administration) 2011 attached to this plan.

Current Environment

The local law provides that a person must not carry on the business of operating a caravan park without an approval issued by Council under the local law. The granting of an approval is subject to Council being satisfied the proposed “resident manager” is a suitable person and the operation and management of the caravan park will comply with the criteria laid down under the subordinate local law.

In granting an approval, Council may impose conditions relating to the conduct of the business activity which the operator must comply with. Conditions can, for example, impose limits on the number of persons to be accommodated on a site, require the operator to maintain buffer zones and require the provision of adequate amenities. However, conditions imposed in an approval must be consistent with any statutory authorisation or approval for the establishment of the caravan park.

The approval regime established under the local law is directed at a business activity - the operation of a caravan park. In its conferring of a discretion as to the grant of an approval and to the content of conditions to which an approval issued will be subject, the approval regime imposes both a barrier to entry to a particular market and a restriction on competitive conduct within the market. Other provisions dealing with the conduct of the business are also anti-competitive, such as the requirement to keep a register detailing activities of the operation of a caravan park.

Council is proposing to adopt the new model local law on the operation of caravan parks to replace its existing local law which has become outdated and which now conflicts with the intention of the *Sustainable Planning Act 2009* (SPA). Specifically, SPA aims to have all development issues dealt with under Council’s planning scheme. The establishment of a caravan park falls within the definition of “development” under SPA. Council considers that some form of local government control or regulation over the “operation” of caravan parks is necessary to safeguard public health and safety, protect the environment and amenity of the local area and to minimise nuisances.

Further, it is considered that, without the local law in place business has the potential to operate without proper regard to adequate standards of health, safety and amenity. In doing so, the resultant costs from environmental damage, loss of amenity, public health and safety risks and loss of quality of life through nuisances, would be born by third parties rather than being included in the transaction between business and consumers.

Confirm Sections Are Anti-Competitive

Part 2 of the local law and Schedule 14 of the subordinate local law are confirmed as anti-competitive ie. it is considered that no errors were made during the identification exercise.

Regulatory and Non-Regulatory Alternatives

The objectives of Part 2 of the local law and Schedule 12 of the subordinate local law are to:

- ◆ ensure that caravan parks are properly operated and maintained; and
- ◆ safeguard the health and safety in caravan parks; and
- ◆ provide for the comfort and convenience of short term and long term caravan park residents.

This is achieved by using a conventional approval based system, whereby, upon application to Council, persons are granted approvals to conduct the business of a caravan park subject to conditions.

Regulatory and non-regulatory alternatives to the approval system include:

- ◆ No regulation
- ◆ Self-regulation
- ◆ Co-regulation
- ◆ Public information and education programs
- ◆ Economic incentives
- ◆ Industry accreditation
- ◆ Master licensing
- ◆ Negative licensing
- ◆ Empowering consumers

Further information on each type of alternative is provided in the Department of Local Government and Planning's guidelines on conducting public interests tests.

As stated earlier, Council believes that some form of local government regulation or control is required to ensure that caravan parks are properly maintained. It is therefore considered that there are no non-regulatory alternatives which are viable. Given the need to monitor operations in caravan parks Council considers there is only one regulatory alternative which is a realistic option - negative licensing.

Negative licensing - Under a negative licensing regime there is no requirement to first obtain an approval to enter the market. The presumption in this regime is that an operator is prepared to play by the "rules" if they know what they are. No approval is required and no fees are paid. Other characteristics of a negative licensing regime include:

- ◆ notification that an operator is in a particular line of business is "collected" during the course of day-to-day business, rather than prior to commencement;
- ◆ operators are charged a token fee for certification that their operations comply with standards;

- ◆ operators who wilfully fail to comply are fined heavily and immediately - the greater the breach, the greater the fine;
- ◆ the rules/requirements are published periodically, together with details about the availability of training;
- ◆ consumers are educated as well as operators;
- ◆ complaints are responded to swiftly and forcefully.

Changes Required to Local Law under a Negative Licensing System and Implications:

Under a negative licensing regime, the local law would need to be amended to remove the requirement for operators to obtain an approval before operating a caravan park and to set generic conditions which would apply to the operation of all caravan parks (in place of individual approval conditions) in the local government area. The opportunity to set site specific conditions would thus be removed.

As a consequence, if Council wanted subsequently to change the generic conditions, the local law would need to be amended. Under the approval system, Council could change the conditions imposed in an approval either with the agreement of the operator or after giving written notice. However, it is considered the impact of this loss would be low, as most of the site specific conditions would have been determined under the development application. As well as setting generic conditions, the local law could be amended to include a requirement for operators to comply with any conditions placed on the development application establishing the caravan park.

The opportunity to vet approval applications and the discretionary power to reject them if Council is not satisfied that the proposed “resident manager” is a suitable person or not satisfied the operation of the caravan park can comply with criteria laid down under local law policies, would be removed. However, the local law could be amended to require written notification be given to Council when new operators and managers take over the operation or management of a caravan park. This would be in line with the negative licensing model. Council could retain the power to require an operator to replace a manager if they are deemed to be unsuitable.

Council could still issue compliance notices but the power to suspend or cancel an approval for failure to comply with a compliance notice would be removed. However, heavier fines apply under a negative licensing system to ensure compliance with the “rules”. The local law would need to be amended to provide for heavier fines for non-compliance. Additionally, the local law could be amended to give Council the power to issue a “stop order” for failure to comply with a compliance notice. Council can issue a stop order under the local law if an operator is operating without an approval.

Under a negative licensing system, Council would still be able to have work carried out and seek to recover damages if an operator does not comply with a compliance notice. Council may suffer a financial loss through the loss of approval fees under a negative licensing regime. However, this loss may be offset by charging an annual inspection fee. This is consistent with charging a nominal fee for certification that operations comply with the “standards” under the negative licensing model. The loss of fees would also be offset by heavier fines for non-compliance.

In summary, the main impacts on Council from moving to a negative licensing regime would be a loss of ability to set site specific conditions and loss of discretionary power over who can operate a caravan park.

Key Stakeholders Affected By Changes to Local Law No. 1 (Administration) 2011 and Schedule 14 - Operation of Caravan Parks of Subordinate Local Law No. 1 (Administration) 2011

The following stakeholders and broad impacts have been identified by a move to a negative licensing regime:

Stakeholders / broad impacts	Size	Distribution	Impact rating and rationale
<p>Council</p> <p>Council would be impacted by having to implement a new regulatory system ie. amend local law, educate staff, caravan park operators and community etc.</p> <p>Saving in administration costs through not having to process approval applications.</p> <p>Loss of fees.</p> <p>Loss of flexibility and control in regulating caravan parks ie. loss of ability to set site specific conditions and loss of ability to cancel or suspend an approval.</p>	1	N/A	<p>Low negative impact - once off impact</p> <p>Low positive impact - saving not estimated to be large</p> <p>Low negative impact - loss not substantial</p> <p>Moderate negative - Council would need to amend the local law to be able to change conditions.</p>
<p>Existing caravan park operators</p> <p>Reduction in “red tape” (ie. no requirement to renew approval) and therefore reduction in operating costs.</p> <p>Heavier fines for non-compliance.</p>	9		<p>Low positive impact - reduction in costs would be minimal.</p> <p>Low negative impact - large fines not always given by court.</p>
<p>Potential caravan park operators</p> <p>Removal of barrier to entry for operators.</p>	Not known	Local government area	<p>Low positive impact - In practice, Council did not reject approval applications or renewals if operators complied with the objects of the local law, therefore it is considered that this impact would be low.</p>

Heavier fines for non-compliance.			<p>NB: Local law now relates only to the operation of a caravan park and not establishment.</p> <p>Low negative impact - large fines not always given by court.</p>
<p>Caravan park occupants</p> <p>Possible decrease in standards resulting from Council's loss of discretionary power to refuse approval applications to operate caravan parks and loss of ability to set site specific conditions.</p> <p>Lower costs if operational savings passed on.</p> <p>Greater consumer choice and product differentiation through increased competition.</p>	442 sites and cabins	N/A	<p>Low negative impact - generic conditions and conditions of development approval will apply and Council can require an operator to replace the resident manager if the person is not suitable.</p> <p>Low positive impact - any price reduction likely to be minimal.</p> <p>Low positive - currently market is saturated and growth not likely to be significant.</p>
<p>General community and residents living in close proximity to caravan parks</p> <p>Possible decrease in amenity and increase in nuisances resulting from Council's loss of discretionary power to refuse approval applications to operate caravan parks and loss of ability to set site specific conditions.</p>	15,900 people in the local government area of which 30 live near a caravan park	Local government area	<p>Low negative impact - generic conditions and conditions of development approval will apply and Council can require an operator to replace the resident manager if the person is not suitable. Council can also use its powers under its Control of Nuisances local law to address nuisance problems.</p>
<p>Qld Caravan Park Owners Association</p> <p>Association may be called on to play a greater role in setting standards for the operation of caravan parks.</p>	n/a	N/A	<p>Low positive impact - degree of impact uncertain.</p>

Subordinate Local law No. 1 (Administration) 2011 Schedule 15 - Operation of Cemeteries

operation of cemeteries means to operate a place for disposing of human remains by—

- (a) burial; or
- (b) cremation; or
- (c) placement in a columbarium, mausoleum or vault.

Objective of Local Law

The objectives of the local law are to:

- ◆ provide for the proper management and control of public cemeteries in the local government's area established by person (s) other than the local government ; and
- ◆ regulate the disposal of human remains in the local government's area inside a public cemetery); and
- ◆ ensure that proper records are kept about the disposal of human remains within and outside public cemeteries.

Anti-Competitive Provisions

Part 2 of the local law and Schedule 15 – Cemeteries of the subordinate local law:

- forbids the establishment of a public cemetery unless it is authorised by an approval; and
- establishes the approval regime.

For further information, please see the copy of Local Law No. 1 – (Administration) 2011 and Subordinate Local Law (Administration) 2011 attached to this plan.

Current Environment

The local law provides for the regulation of a public cemetery established by person (s) other than the local government. The anti-competitive aspects of the local law pertain to Part 2 which provides an approval system for the regulation of other cemeteries. The local law provides that a person must not operate a cemetery unless they hold an approval issued by Council under the local law.

Council may grant an approval if satisfied of certain requirements including that the operation of the cemetery would be consistent with criteria laid down under local law policies. In granting an approval, Council may impose conditions, in relation to such things as, the hours when burials can be conducted, the size of and position of grave sites and the maintenance of memorials and other buildings and structures in the cemetery. However, Council is not limited to these conditions.

The approval regime established under the local law is directed at a business activity - the operation of cemeteries. In its conferring of a discretion as to the grant of an approval and to the content of conditions to which an approval issued will be subject, the approval regime is restrictive and imposes both a barrier to entry to a particular market and a restriction on competitive conduct within the market. Other provisions dealing with the conduct of the business are also anti-competitive, such as the requirement to keep records detailing the names of people whose remains have been buried, cremated or placed in a cemetery.

Council is proposing to adopt the new model local law on the operation of cemeteries to replace its existing local law which has become outdated and which now conflicts with the intention of the *Sustainable Planning Act 2009* (SPA). Specifically, SPA aims to have all development issues dealt with

under Council's planning scheme. The establishment of a cemetery falls within the definition of "development" under SPA. However, Council considers that some form of local government control or regulation over the "operation" of cemeteries is necessary to ensure the proper disposal of human remains.

Further, it is considered that without the local law in place business has the potential to operate without proper to minimum community standards. Council believes that it is important to ensure integrity in this area of business by setting certain minimum standards for the operation of cemeteries and to have the power to assess the suitability of applicants and ultimately to be in a position to cancel or suspend an approval for contravention of the local law or a condition of an approval.

Confirm the Sections Are Anti-Competitive

Part 2 of the local law and Schedule 15 – Cemeteries of the subordinate local law: are confirmed as anti-competitive provisions and it is considered that no errors were made in the identification process.

Realistic Regulatory and Non-Regulatory Alternatives to the Approval System

As stated above, Council is of the opinion that some form of government intervention is required to ensure that cemeteries meet accepted community standards. No non-regulatory alternatives are considered to be viable options and of the regulatory options, only negative licensing was assessed as being a realistic alternative, as follows:

- ◆ **No regulation:** It is considered that the risks to the community regarding levels of health, safety and amenity, are too great for this to be a realistic alternative.
- ◆ **Self regulation and co-regulation:** At the present time these are not considered to be viable options as no industry body exists which could set standards or represent cemetery operators in a self-regulation or co-regulation environment. However this may change over time.
- ◆ **Public information and education programs:** This is not considered realistic as at present there is no organisation, other than the local government, to which the public can take complaints to.
- ◆ **Economic incentives:** This is not considered realistic.
- ◆ **Industry accreditation:** This is a means of self-regulation and at present, is not considered a realistic alternative. See above.
- ◆ **Master licensing:** Not applicable to this situation.
- ◆ **Empowering consumers:** This is not considered a realistic alternative.

Further information on each type of alternative is provided in Department of Local Government and Planning's guidelines on conducting public interests tests.

Negative licensing - Under a negative licensing regime there is no requirement to first obtain an approval to enter the market. The presumption in this regime is that an operator is prepared to play by the "rules" if they know what they are. No approval is required and no fees are paid. Other characteristics of a negative licensing regime include:

- ◆ notification that an operator is in a particular line of business is "collected" during the course of day-to-day business, rather than prior to commencement;

- ◆ operators are charged a token fee for certification that their operations comply with standards;
- ◆ operators who wilfully fail to comply are fined heavily and immediately - the greater the breach, the greater the fine;
- ◆ the rules/requirements are published periodically, together with details about the availability of training;
- ◆ consumers are educated as well as operators;
- ◆ complaints are responded to swiftly and forcefully.

Changes required to local law in moving to a negative licensing regime:

Under a negative licensing regime, the local law would need to be amended to remove the requirement for operators to obtain an approval before operating a cemetery and to set generic conditions which would apply to the operation of all cemeteries (in place of individual approval conditions) in the local government area. The opportunity to set site specific conditions would thus be removed.

If in the future, Council wanted subsequently to change the generic conditions, the local law would need to be amended. Under the approval system, Council could change the conditions imposed in an approval either with the agreement of the operator or after giving written notice. Hence, some flexibility and measure of control by Council over the operations of cemeteries would be lost. However, the impact of this is considered to be low as most of the site specific conditions can be determined under the development application. The local law could be amended to include a requirement that operators comply with any conditions placed on the approval of the development application establishing the cemetery as well as the generic conditions.

Under a negative licensing regime, Council would not have the opportunity to vet approval applications and the discretionary power to reject applications would not exist. However, the local law could be amended to require written notification be given to Council when new operators or managers take over the operation or management of a cemetery and provide for certification by an authorised officer that the operation of the cemetery complies with the local law. This would be consistent with the negative licensing model.

Council could retain all the enforcement provisions under the local law with some minor amendments. For example, Council could still issue compliance notices but the power to suspend or cancel an approval for failure to comply with a compliance notice would not apply. Heavier fines apply under a negative licensing system and the local law would need to be amended to provide for heavier fines for non compliance with the “rules”. Council’s ability to have work carried out and seek to recover damages if an operator does not comply with a compliance notice could be retained (this power is provided in the *Local Government Act 1993*).

Heavier fines apply under a negative licensing system and the local law would need to be amended to provide for heavier fines for non compliance with the “rules”.

Under a negative licensing system, Council would lose the administrative revenue generated from charging an approval application fees. However, this loss may be offset by charging a fee for certification and/or and annual inspection fee. The loss of fees would also be offset to some degree by heavier fines for non-compliance.

In summary, the main impacts on Council from moving to a negative licensing regime would be a loss of ability to set site specific conditions and loss of discretionary power over who can operate a cemetery.

Key Stakeholders Affected By Changes to Local Law No. 1 (Administration) 2011 and Schedule 15 - Cemeteries of Subordinate Local Law No. 1 (Administration) 2011

The following stakeholders and broad impacts have been identified by a move to a negative licensing regime:

Stakeholders / broad impacts	Size	Distribution	Impact rating and rationale
<p>Council</p> <p>Council would be impacted by having to implement a new regulatory system ie. amend local law, educate staff, cemetery operators and community etc.</p> <p>Saving in administration costs which would result from not having to process approval applications.</p> <p>Loss of approval application fees.</p> <p>Loss of flexibility and control in regulating cemeteries ie. loss of ability to set site specific conditions and loss of ability to cancel or suspend an approval.</p>	1	N/A	<p>Low negative impact - one off impact.</p> <p>Low positive impact - saving not estimated to be large.</p> <p>Low negative impact - loss would not be substantial and may be offset by charging a fee for certification and annual inspections.</p> <p>Moderate negative - Council would need to amend the local law to be able to change conditions.</p>
<p>Existing cemetery operators</p> <p>Reduction in “red tape” (ie. no requirement to renew approval) and therefore reduction in operating costs.</p>	2		<p>Low positive impact - reduction in costs would be minimal.</p>
<p>Potential cemetery operators</p> <p>Removal of barrier to entry for operators.</p>	None known	Local government area	<p>Low positive impact - in practice, Council did not reject approval applications or renewals but rather, would approve applications subject to various conditions being met. NB: Local law now relates only to the operation of private cemeteries, not establishment.</p>
<p>General community and residents living in close proximity to cemeteries</p> <p>Possible decrease in amenity and increase in nuisances resulting from Council’s loss of discretionary power to refuse approval applications to operate private cemeteries and loss of ability to set site specific conditions.</p>	15,900 people in the local government area of which approximately 3 live near a cemetery	Local government area	<p>Low negative impact - generic conditions and conditions of development approval will apply. Council can also use its powers under its Control of Nuisances local law to address nuisance problems.</p>
Consumers	15,900		

Stakeholders / broad impacts	Size	Distribution	Impact rating and rationale
Reduced costs through increased competition. Greater choice and differentiation between cemeteries.			Low positive impact - rated low as market is over supplied at present and there is little potential for new operators to come into the market. Low positive impact - as above.

Subordinate Local law No. 1 (Administration) 2011

Schedule 16 - Operation of Public Swimming Pools

operation of public swimming pools means the operation of a swimming pool that is made available for use to—

- (a) members of the public or a section of the public; or
- (b) participants in organised swimming or diving competitions or in training for organised swimming or diving competitions; or
- (c) persons who have a commercial relationship with the owner of the pool

Objective of Local Law

The objects of this local law are to ensure:

- (a) swimming pools generally comply with essential standards of health and safety; and
- (b) the operation or use of swimming pools does not result in nuisance to adjoining occupiers or others; and
- (c) public pools are properly managed and supervised.

Anti-Competitive Provisions

Part 2 of the local law and Schedule 16 – Operation of Public Swimming Pools of the subordinate local law:

- forbids the establishment of a public cemetery unless it is authorised by an approval; and
- establishes the approval regime.

For further information, please see the copy of Local Law No. 1 – (Administration) 2011 and Subordinate Local Law (Administration) 2011 attached to this plan.

Current Environment

The local law provides that the owner of a swimming pool must not operate the pool as a public pool unless authorised to do so by an approval issued by Council under Part 3 of the local law. Council may grant an approval if satisfied the operation would comply with a range of factors and any criteria laid down by local law policies. Council may apply conditions it considers appropriate to the grant of an approval.

The approval regime established under Part 3 is directed at a business activity - the operation of a public pool. In its conferring of a discretion as to the grant of an approval in a particular case and to the content of conditions to which an approval issued will be subject, the approval regime is discriminatory and imposes a barrier to entry to a particular market and restricts competitive conduct within the market.

Council is proposing to adopt the new Model Local Law on swimming pools to replace its existing local law which has become outdated and conflicts with the intent of the *Sustainable Planning Act 2009* (SPA). Specifically, the SPA requires all development issues to be dealt with under a local government's planning scheme. The establishment of a public swimming pool falls within the definition of "development" under the SPA. The new Local Law deals only with the "operation" of public swimming pools, not establishment.

Council is of the view that some degree of regulation is needed to ensure that public swimming pools are properly supervised and managed to safeguard the health and safety of patrons. There are considerable public health and safety risks which the local law addresses. Poorly maintained pools can expose people to risk of infection caused by a range of micro-organisms. Infections may be transmitted by inadequately treated pool water or surfaces, such as shower floors. The disease causing agents known to exist in water and which have been linked to swimming pools include bacterial, protozoan, viral, yeast and fungal pathogens. Some of these pathogens are known to cause serious illness and in some circumstances death. However, proper testing, treatment and filtration of water reduces these risks².

As well, there is the risk of drowning or personal injury. There is also the risk of heat illnesses, such as dehydration and sun burn.

Realistic Regulatory and Non-Regulatory Alternatives to Existing Local Law

The objectives of the local law are to safeguard public health and safety, prevent nuisance and ensure public pools are properly managed and supervised.

Regulatory and non-regulatory alternatives which may achieve the objectives of the local law are listed in the Department of Local Government and Planning's guidelines on conducting public interest tests and include the following:

- ◆ Regulation (the proposed regime is of this kind);
- ◆ Co-regulation;
- ◆ Market/industry self-regulation;
- ◆ No regulation;
- ◆ Public information and education programs;
- ◆ Economic incentives;
- ◆ Industry accreditation;
- ◆ Master licensing;
- ◆ Negative licensing;
- ◆ Empowering consumers.

Further information about each of these alternatives is provided in the Department's guidelines. It is considered that none of the above alternatives are viable. A summary of the assessment of each alternative is provided below:

- ◆ **No regulation** - the potential health and safety risks are considered too great for this option to be viable.
- ◆ **Market/industry self-regulation** - self regulation within an industry or service is purely voluntary in the sense that the rules are made and enforced by stakeholders involved. Council believes self-regulation is not an appropriate approach for the type of business activity. Self-regulation is more applicable to the production or sale of a product which is "regulated" against the background of consumer law and/or corporate law.
- ◆ **Public information and education programs** - Council feels that public information and education programs are only part of any arrangements to protect public health and safety. Each year, Council conducts a Summer Safety program during the spring and summer months to educate people about safe practices when enjoying water and outdoor sports. The program includes advice on safe pool practices.
- ◆ **Economic incentives** - this type of control is not applicable to the nature of the business activity.

² Department of Health NSW, Public Swimming Pool and Spa Pool Guidelines, June 1996

- ◆ **Industry accreditation** - this is a form of self-regulation which relies on a self-governing organisation to set up and administer an accreditation system. The system relies on the willingness of participants to comply with the rules set by the organising body and the availability of punitive measures which can contribute towards enforcement.
- ◆ Industry accreditation can also take the form of co-regulation whereby the “rules” are backed up by statutory provisions. An example of how this might work at the local government level would be to require all public swimming pool operators to have industry accreditation and comply with any standards set by the industry body. Council is not aware of a body which could satisfy this role at the present time.
- ◆ **Master licensing** - not applicable to this situation.
- ◆ **Empowering consumers** - not applicable to this situation.
- ◆ **Co-regulation** - the legal instruments and administrative arrangements involved with co-regulation are much the same as with local government regulation. The difference is that the “rules” are drafted in close consultation and co-operation with affected parties. Given the large number of operators and patrons of public pools in the area and also the Council’s concerns about the risks to public health and safety of patrons of public pools, the Council does not consider this a viable option at this stage.
- ◆ **Negative licensing** - Under conventional licensing regimes there is usually a requirement to obtain an approval or similar approval prior to entering the market to engage in a particular business activity. Under a negative licensing regime there is no requirement to first obtain an approval to enter the market. The presumption in this regime is that an operator is prepared to play by the rules if they know what they are. No approval is required and usually no fees are paid. The Council does not consider this a viable option given the possible risk to public health and safety if high standards are not maintained.

Key Stakeholders Affected By Changes to Local Law No. 1 (Administration) 2011 and Schedule 16 - Operation of Public Swimming Pools of Subordinate Local Law No. 1 (Administration) 2011

The following stakeholders and broad impacts have been identified by a move to a negative licensing regime:

Stakeholders / broad impacts	Size	Distribution	Impact rating and rationale
<p>Council</p> <p>Council would be impacted by having to implement a new regulatory system ie. amend local law, educate staff, swimming pool operators and community etc.</p> <p>Saving in administration costs which would result from not having to process approval applications.</p> <p>Loss of approval application fees.</p> <p>Loss of flexibility and control in regulating swimming pools ie. loss of ability to set site specific conditions and loss of ability to cancel or suspend an approval.</p>	1	N/A	<p>Low negative impact - one off impact.</p> <p>Low positive impact - saving not estimated to be large.</p> <p>Low negative impact - loss would not be substantial and may be offset by charging a fee for certification and annual inspections.</p> <p>Moderate negative - Council would need to amend the local law to be able to change conditions.</p>
<p>Existing Swimming Pool operators</p> <p>Reduction in “red tape” (ie. no requirement to renew approval) and therefore reduction in operating costs.</p>	3		<p>Low positive impact - reduction in costs would be minimal.</p>
<p>Potential Swimming Pool operators</p> <p>Removal of barrier to entry for operators.</p>	Not known	Local government area	<p>Low positive impact - in practice, Council did not reject approval applications or renewals but rather, would approve applications subject to various conditions being met.</p> <p>NB: Local law now relates only to the operation of private cemeteries, not establishment.</p>
<p>General community and residents living in close proximity to swimming pools</p> <p>Possible decrease in amenity and increase in nuisances resulting from Council’s loss of discretionary power to refuse approval applications to operate private cemeteries and loss of ability to set site specific conditions.</p>	15,900 people in the local government area of which approximately 40 live near a Swimming Pool	Local government area	<p>Low negative impact - generic conditions and conditions of development approval will apply. Council can also use its powers under its Control of Nuisances local law to address nuisance problems.</p>
<p>Consumers</p>	5,000		

Stakeholders / broad impacts	Size	Distribution	Impact rating and rationale
Reduced costs through increased competition. Greater choice and differentiation between cemeteries.			Low positive impact - rated low as market is over supplied at present and there is little potential for new operators to come into the market. Low positive impact - as above.

Subordinate Local law No. 1 (Administration) 2011

Schedule 17 - Operation of Shared Facility Accommodation

operation of shared facility accommodation means the provision of shared facility accommodation to holiday makers or travellers, but does not include accommodation in a hotel or motel.

Objective of Local Law

The object of this local law is to ensure that rental accommodation provided on a basis involving sharing of facilities complies with adequate standards of health, safety and amenity.

Anti-Competitive Provisions

Part 2 of the local law and Schedule 17 – Operation of Shared Facility Accommodation of the subordinate local law:

- forbids the establishment of a shared facility accommodation unless it is authorised by an approval; and
- establishes the approval regime.

For further information, please see the copy of Local Law No. 1 – (Administration) 2011 and Subordinate Local Law (Administration) 2011 attached to this plan.

Current Environment

The local law provides that a person must not carry on the business of providing rental accommodation to which the local law applies unless they hold an approval issued by Council under the local law. Certain types of accommodation are excluded from application of the local law eg. hotels, motels, hospitals, nursing homes, boarding schools etc as the local law is directed as backpacker and boarding houses type accommodation.

Council may grant an approval if satisfied the premises can be lawfully used, that they do not pose a health or safety risk and are consistent with any conditions prescribed in a subordinate local law and, after taking into account a range of other factors, including the needs of socially disadvantaged people and the need for a reasonable degree of uniformity between local government areas.

The Council has discretion in the granting of approvals and can place conditions on approvals. For example, a condition could limit the number of people for whom the accommodation can be provided or require the regular cleaning of the premises. Additionally, a subordinate local law may prescribe conditions which must be or will ordinarily be applied on approvals.

Under the enforcement provisions of the local law Council has the power to inspect premises, issue compliance notices where non-compliance is found, have work carried out and seek to recover the costs following non-compliance with a notice. Council has the power to close premises for non-compliance following issue of a notice or where premises are operating without an approval. Council also has the power to close premises summarily if the premises pose a serious risk to health or safety. However, in taking such action Council must first consider the needs of socially disadvantaged people who depend on the accommodation. This reflects government policy to ensure the welfare of disadvantaged people.

Without the local law in place, the business of providing rental accommodation to which the local law applies could operate without proper regard to standards of health, safety and amenity.

Realistic Regulatory and Non-Regulatory Alternatives to Existing Local Law

The objective of the local law is to ensure that rental accommodation provided on a basis involving the sharing of facilities, complies with adequate standards of health, safety and amenity.

Regulatory and non-regulatory alternatives which may achieve the objective of the local law are listed in the Department of Local Government and Planning's guidelines on conducting public interest tests, and include the following:

- Regulation
- Co-regulation
- Market/industry self-regulation
- No regulation
- Public information and education programs
- Economic incentives
- Industry accreditation
- Master licensing
- Negative licensing
- Empowering consumers

Of the above, two alternatives were chosen for further consideration. These were:

- Co-regulation
- Negative licensing

Co-regulation - The legal instruments and administrative arrangements involved with co-regulation are much the same as with local government regulation. The difference is that the "rules" are drafted in close consultation and cooperation with affected parties. The advantages of this approach is that a higher level of compliance with the rules can be expected because those who are affected by the rules have agreed to them.

Under a co-regulation regime the local law would be redrafted in consultation with the current approval holders and other stakeholders.

Negative licensing - Under conventional licensing regimes there is usually a requirement to obtain an approval or similar approval prior to entering the market to engage in a particular business activity. Under a negative licensing regime there is no requirement to first obtain an approval to enter the market. The presumption in this regime is that an operator is prepared to play by the rules if they know what they are. No approval is required and no fees are paid. Other characteristics of a negative licensing regime include:

- notification that an operator is in a particular line of business is "collected" during the course of day-to-day business, rather than prior to commencement;
- operators are charged a token fee for certification that their operations comply with standards;
- operators who wilfully fail to comply are fined heavily and immediately - the greater the breach, the greater the fine;

- the rules/requirements are published periodically, together with details about the availability of training;
- consumers are educated as well as operators;
- complaints are responded to swiftly and forcefully.

Under a negative licensing regime the local law would be amended to remove the requirement to hold an approval to carry on the business of providing rental accommodation with shared facilities. The local law would specify a range of generic standards which must be complied with in relation to the conduct of the business and set penalties for non-compliance with the standards. A small fee would be charged for certification that premises comply with the standards set by the local law. The local law would retain the current enforcement framework with any necessary amendments.

Key Stakeholders Affected By Changes to Local Law No. 1 (Administration) 2011 and Schedule 17 - Operation of Shared Facility Accommodation of Subordinate Local Law No. 1 (Administration) 2011

The following stakeholders and broad impacts have been identified in respect of each alternative.

Co-regulation

Stakeholders/broad impacts [!]	Size	Distribution	Impact rating and rationale
Local government Council is impacted because of the change in its activities which would result under the new regulatory arrangement.	One		Low negative Only requires implementation of changes to local law.
Existing operators (eg. backpacker hostels etc.) Participation in developing new local law - opportunity to influence outcome. Implementing any necessary changes to meet new standards.	2		Low positive - Impact likely to be positive but degree of impact uncertain. Low negative - There is likely to be some costs associated with change but degree of impact uncertain.
Potential operators Participation in developing new local law - opportunity to influence outcome.	None known		Low positive Impact likely to be positive but degree of impact uncertain.
Residents/tenants Participation in developing new local law - opportunity to influence outcome.	20		Low positive Impact likely to be positive but degree of impact uncertain.
Immediate neighbours Participation in developing new local law - opportunity to influence outcome.	6		Low positive Impact likely to be positive but degree of impact uncertain.

! In conducting actual public interest tests local governments should attempt to provide the characteristics of size and distribution of stakeholders.

Co-regulation (Cont'd)

Stakeholders/broad impacts [!]	Size	Distribution	Impact rating and rationale
Tourist operators Agreement between Council and business on local law is likely to have a positive effect on tourism ie. increased trade.	2		Low positive Any increase not likely to be huge.
Pensioners' representative bodies* Participation in developing new local law - opportunity to influence outcome.	3		Low positive Impact likely to be positive but degree of impact uncertain.
Backpackers' Association** Participation in developing new local law - opportunity to influence outcome. .	None known		Low positive Impact likely to be positive but degree of impact uncertain.

! In conducting actual public interest tests local governments should attempt to provide the characteristics of size and distribution of stakeholders.

* There is a range of associations and organisations which represent the different interests of older people. Not all will be relevant to this review but an attempt should be made to determine which groups should be consulted.

** For example the Queensland Backpackers and Independent Traveller Industry Association.

Negative licensing

Stakeholders/broad impacts ¹	Size	Distribution	Impact rating and rationale
<p>Local government</p> <p>The local government is impacted because of the change in its activities which would result under the new regulatory arrangement.</p>	1		<p>Low negative</p> <p>Only requires implementation of changes to local law.</p>
<p>Existing operators</p> <p>No approval renewal applications required.</p>	2		<p>Low positive</p> <p>Cost saving would be minimal.</p>
<p>Potential operators</p> <p>Removal of barrier to entry.</p>	None known		<p>Low positive</p> <p>Rated low because, while approvals previously required, Council did not refuse to grant an approval where applications were consistent with local law. Therefore barrier to entry was nominal.</p>
<p>Residents/tenants</p> <p>Some uncertainty as to what impacts might be. Under this regime Council will not have the ability to set specific conditions associated with individual premises. There may be particular situations which are not covered by the generic standards.</p> <p>For example, Council will not be able to specify that certain equipment be provided for tenants in relation to premises providing accommodation for the elderly, such as hand rails and other safety devices unless these are written as generic standards in the local law.</p>	20		<p>Low negative</p> <p>Rated low as uncertain as to degree of impacts.</p>

¹ In conducting actual public interest tests local governments should attempt to provide the characteristics of size and distribution of stakeholders.

Negative licensing (Cont'd)

Stakeholders/broad impacts [!]	Size	Distributio n	Impact rating and rationale
<p>Immediate neighbours</p> <p>As with residents/tenants stakeholder group, immediate neighbours may be negatively impacted through inability of Council to set site specific conditions but again degree of impacts uncertain.</p>	6		<p>Low negative</p> <p>Degree of impact uncertain.</p>
<p>Tourist operators</p> <p>Removal of barrier to entry should be a boost to competition in the market and impact in a positive way on tourist operators.</p>	2		<p>Low positive</p> <p>Degree of impact uncertain.</p>
<p>Pensioners' representative bodies*</p> <p>Because Council is not able to set site specific conditions there may be increased requirement to represent tenants to operators and/or Council.</p>	3		<p>Low negative</p> <p>Degree of impact uncertain.</p>
<p>Backpacker' Association**</p> <p>Because Council is not able to set site specific conditions there may be increased requirement to represent tenants to operators and/or Council.</p>	None known		<p>Low negative</p> <p>Degree of impact uncertain.</p>

! In conducting actual public interest tests local governments should attempt to provide the characteristics of size and distribution of stakeholders.

* There is a range of associations and organisations which represent the different interests of older people. Not all will be relevant to this review but an attempt should be made to determine which groups should be consulted.

** For example the Queensland Backpackers and Independent Travellers Industry Association.

Subordinate Local law No. 1 (Administration) 2011

Schedule 18 - Operation of Temporary Entertainment Events

Operation of temporary entertainment events means the opening to the public, or the preparation for opening to the public, of an entertainment event and for which the opening to the public does not constitute development under the Planning Act.

Objective of Local Law

The objects of this local law are to:

- (a) ensure that temporary entertainment Events comply with appropriate standards of health and safety; and
- (b) protect the amenity of areas in which temporary entertainment Events are situated.

Anti-Competitive Provisions

Part 2 of the local law and Schedule 18 – Operation of Temporary Entertainment Events of the subordinate local law:

- forbids the establishment of a shared facility accommodation unless it is authorised by an approval; and
- establishes the approval regime.

For further information, please see the copy of Local Law No. 1 – (Administration) 2011 and Subordinate Local Law (Administration) 2011 attached to this plan.

Current Environment

The local law provides for an approval regime whereby a person cannot operate or establish a temporary entertainment venue without an approval for the temporary entertainment venue issued by the local government.

The local government may grant an approval if satisfied certain conditions will be met, such as there being an adequate provision of toilets and sanitary conveniences and if satisfied the entertainments provided at the venue will not generate significant noise, dust or light pollution or would have other significantly adverse effects on the surrounding neighbourhood. The local government may place conditions on approvals such as, for example, it can require the operator to provide specified equipment, take specified measures for the safety of the public or provide specified facilities or amenities or place other conditions on approvals to regulate the hours of operation, noise emission and light spillage. Additionally, a local government may specify conditions which must be imposed or that will ordinarily be imposed on approvals by subordinate local law. The local government can change the conditions on an approval.

The local law sets offences for non-compliance with the local law and approval conditions and provides enforcement powers.

Without the local law in place, the temporary entertainment venue business could operate without proper regard to appropriate standards of health and safety and cause a public nuisance and loss of amenity. If the local law was not in place, such costs would be borne by third parties rather than being incorporated as part of the transaction between business and consumers. This is known as an externality market failure.

The local law gives the local government a discretionary power in the granting of approvals and provides powers to regulate the conduct of the business activity. This is both a barrier to entry to the market and a restriction on the conduct of business within the market.

Realistic Regulatory and Non-Regulatory Alternatives to Existing Local Law

The objective of the local law is to regulate the business of temporary entertainment Events to ensure they comply with appropriate standards of health and safety and to protect the amenity of the area in which temporary entertainment Events are located.

Regulatory and non-regulatory alternatives available to a local government which may achieve the objective of the local law are listed in the Department of Infrastructure and Planning's guidelines on conducting public interest tests, and include the following:

- Regulation
- Co-regulation
- Market/industry self-regulation
- No regulation
- Public information and education programs
- Economic incentives
- Industry accreditation
- Master licensing
- Negative licensing
- Empowering consumers

Of the above, five alternatives were selected as “realistic” alternatives for further consideration. These were:

- Co-regulation
- Self-regulation
- Public information and education
- Industry accreditation
- Negative licensing

A further alternative of reliance on **planning instruments** i.e. the planning scheme was included for consideration.

Of the above, all but **negative licensing** and reliance on the **planning scheme** were assessed as being non-viable alternatives.

Co-regulation and self-regulation were considered to be non-viable alternatives due to the potential risks to public health and safety and due also to the absence of an overarching representative body with which to negotiate the “rules” in a co-regulation/self-regulation environment.

Public information and education was also considered to be a non-viable alternative as it was considered to be too resource intensive and the local government does not have the necessary resources to implement and maintain such a system.

Industry accreditation was also assessed as being non-viable due to the disparate groups involved in the business activity and therefore the absence of one overarching representative body which could provide for an accreditation system.

Negative licensing was considered to be a viable alternative at this stage. Negative licensing is a system whereby participants can enter the market if they meet the standards or “rules” set for the particular business activity. There is no requirement to first obtain an approval or similar approval. There is, therefore, no barrier to entry to the market. Under a negative licensing regime, the local law would need to be changed to remove the requirement to hold an approval and prescribe a range of generic standards or “rules”. Of necessity, the standards will need to be output standards as opposed to specifying how to meet the output. The local law could retain offences and penalties for non-compliance.

Under the pure Proposed of negative licensing, no fees are paid and no approvals are issued. However, the penalties for non-compliance are high and should be applied immediately. Some uncertainty exists as to whether large penalties can be obtained due to the inability to set minimum penalties in local laws (only maximum penalties can be set in local laws) and the tendency of judges to apply small fines, particularly for first offences.

Reliance on the **planning scheme** was also considered to be a viable alternative at this stage with the following characteristics. The planning scheme would be amended to require a consent approval to establish an temporary entertainment venue. Conditions can be placed on the approval and therefore specific requirements on individual operators can still be applied.

Key Stakeholders Affected By Changes to Local Law No. 1 (Administration) 2011 and Schedule 18 - Operation of Temporary Entertainment Events of Subordinate Local Law No. 1 (Administration) 2011

The following stakeholders and broad impacts have been identified in relation to each alternative:

Planning scheme

Stakeholders/broad impacts ¹	Size	Distribution	Impact rating and rationale
Local government The local government is impacted because of the change in its activities which would result under the new regulatory arrangement.	One		Low negative Only requires implementation of changes to local law (once-off change).
Existing operators Existing operators would be impacted by the removal of approval renewal fees.	11	Local government area	Low positive Reduction in costs would be minimal.
Potential operators No approval application required but some additional costs would be imposed through the requirement to advertise.	Not Known		Moderate negative Costs through advertising and possible resultant time delays from objections and appeals could be significant.
Temporary entertainment venue users/customers Reduction in operating costs (ie. no approval application/renewal fees) should be passed on to consumers in form of lower prices for product/service.	15,900.		Low positive Price reductions not likely to be large.
Residents in close proximity to existing temporary entertainment Events Some uncertainty exists as to the whether conditions of an approval will be enforceable after removal of the approval regime and what status existing operations will have under the planning scheme. However, it is considered that generally the local government will have less control over existing operators and this may impact negatively on residents.	10 approx		Moderate negative Large number of residents potentially affected.
General community Under the planning scheme residents will be informed of any new proposed temporary entertainment venue and will be able to object to the applications.	15,900		Low positive The opportunity to object would only apply to new developments, unlikely to occur given market situation.
Progress Association The progress association will be aware of any new proposed temporary entertainment venue and will be able to object to the applications.	12		Low positive The opportunity to object would only apply to new developments, unlikely to occur given market situation.

¹ In conducting actual public interest tests, local governments should attempt to provide the characteristics of size and distribution of stakeholders.

Negative licensing

Stakeholders/broad impacts [!]	Size	Distribution	Impact rating and rationale
Local government The local government is impacted because of the change in its activities which would result under the new regulatory arrangement.	One		Low negative Only requires implementation of changes to local law (once-off change).
Existing operators Existing operators would be impacted by the removal of approval renewal fees.	11	Local government area	Low positive Reduction in costs would be minimal.
Potential operators Removal of barrier to entry, ie. no approval required.	Not Known		Low positive Barrier removed. In practice, Council did not reject approval applications if proposed venture was consistent with the objects of the local law, so impact would be minimal.
Temporary entertainment venue users/customers May be negatively impacted through loss of local government power to apply site specific conditions on approval.	15,900		Low negative Existing operators likely to maintain existing approval conditions. Impact from new ventures rated low.
Residents in close proximity to existing temporary entertainment Events Existing Events likely to maintain approval conditions so there is not likely to be any impacts on residents.	10 approx		Neutral
General community Not likely to be any impacts on general community.	15,900		Neutral
Development Association* Removal of site specific conditions may result in lower standards in relation to new Events and therefore require increased activism.	12		Low negative Rated low as impact likely to be in relation to new Events only.

[!] In conducting actual public interest tests, local governments should attempt to provide the characteristics of size and distribution of stakeholders.

* The Development Association is not considered a direct stakeholder but will be consulted with as an interested party.

Type of Assessment and Level of Resources Required

The assessment will be conducted by the local government as a minor assessment, that is, the emphasis will be on qualitative analysis of alternatives with key impacts expressed in monetary terms where data is available. The following characteristics are attributable to the analysis:

- The restrictions impact on the local market, but the impact on the participants is low.
- The number of stakeholders involved in the review is low and impacts on stakeholders are low to moderate.
- The complexity of the issues relating to the review is considered to be low and the level of uncertainty as to the impacts changes will have on stakeholders is also low.
- The level of concern about the issues relating to the review is considered to be low and the review is considered non-controversial.

The review will be conducted in-house by a team of officers.

Extent of Consultation to be Conducted

Consultation will be conducted by giving public notice of the review in all local newspapers and inviting submissions

The public interest test plan and the local law will be open to inspection at Council's public offices and copies will be available for purchase upon request.

Time-Frame for Conducting the Public Interest Test

Commence public interest test	19 August 2011
Estimate of time for completing public interest test	Six weeks
Consultation period	Minimum of 3 weeks (21 days) for receipt of submissions to Friday 9 September, 2011
Target date for presenting report to local government	Council Meeting following completion of consultation process

Content of the Public Interest Test Report

The public interest test report will provide:

- A summary of the consultation process including a list of affected groups consulted and the outcomes of consultation
- A statement of alternatives which are assessed to be not viable
- A summary of the positive and negative impacts associated with the alternatives compared to the existing environment
- A summary of the net impacts associated with the alternatives
- Recommendations

Present Public Interest Test Plan to Local Government

(Once the public interest test plan is prepared, it must be presented to Council for adoption, unless this decision has been delegated by the local government. The Local Government Act 2009 allows this decision to be delegated BUT the Council cannot delegate decisions in respect of recommendations contained in the actual public interest test report.)

Prepared by: Ray Geraghty,
Chief Executive Officer,
Banana Shire Council..... Date: 18 August 2011

Under Delegation from Council 23 February 2011.