

Keywords: order

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Next Review Due:	<i><u>Regulatory Requirement:</u> Within 12 months of the General Elections 2018 <u>Good Governance Practice:</u> Annually – 2019</i>
Responsible Officer(s):	<i>MES/GI</i>
Council File Reference:	<i>Council Policies (P)</i>
Applicable Legislation:	<i>Local Government Act 1999 Section 254 and Section 259</i>
Relevant Policies:	<i>(Includes) Community Wastewater Management Scheme (CWMS); Abandoned Vehicles; Election Signs; Permit Parking</i>
Related Procedures:	Public Consultation not required.
Delegations:	<i>Berri Barmera Council Delegations Register</i>

Principles

This Order Making Policy is prepared and adopted pursuant to Section 259 of the *Local Government Act 1999* ("the Act") and sets out the steps Council will take in the making of orders.

Under section 259 of the *Local Government Act 1999* ("the Act") each Council is required to develop an Order Making Policy.

The Berri Barmera Council is committed to using the order making powers available to it under the *Local Government Act 1999* in such a way as to facilitate a safe and healthy environment, to improve the amenity of a locality, and generally for the good governance of its area.

Scope

Section 259 of the Act requires each Council to take reasonable steps to prepare and adopt policies concerning the operation of Part 2 of Chapter 12 of the Act. Part 2 deals with the making of orders.

This Policy will apply to those circumstances listed in Section 254 which states that Council may order a person to do or refrain from doing a thing under certain circumstances, as specified in the table included within that Section of the Act (refer Attachment 1).

In accordance with the requirements of the Act, this Policy also applies in respect of orders issued by Council under Section 216 (power to order the owner of private road to carry out specified roadworks), Section 217 (power to order owner of infrastructure on road to carry out specified maintenance or repair work), Section 218 (power to require owner of adjoining land to carry out specified work) and Section 299 (vegetation clearance)¹.

¹ See sections 216(2), 217(1), 218(2) and 299(2)

Guiding Principles

When considering making an order within the scope of this policy the Berri Barmera Council will consider the following principles, which are considered central to the effective resolution of local nuisances on private land:

- *Severity of the incident*
- *Hazard/danger posed to the community*
- *Risk to health/safety of the community*
- *Detraction from the amenity of the locality*
- *Repeated occurrence of the activity/incident (e.g. duration, previous offences)*
- *Impact of any previous actions to overcome the problem*
- *Is the breach significant/substantial?*
- *Would an informal warning letter be sufficient?*
- *Are there any public interest issues?*
- *Whether there is sufficient evidence upon which Council may rely to exercise its order making powers*
- *The offender's attitude*
- *Number of complaints received in respect of the matter (if any).*

When considering making an order within the scope of this policy regarding vegetation clearance, the Berri Barmera Council will include the following principles, which are deemed to be specific considerations to assist in determining what circumstances might effectively be a private dispute between neighbours:

- *Have the parties exhausted all other reasonable steps (including civil action)*
- *Does the vegetation pose an immediate and/or serious threat to health and safety;*
- *The apportionment of costs of complying with the order.*

Process and Procedure

Except in the case of an emergency described below, Council will take reasonable steps, within available resources, to resolve cases of local nuisance by negotiation and agreement before issuing an order, including:

- *Personal approach by Council officers; and*
- *Informal warning letter prior to commencing the formal order making process.*

Except in the case of an emergency described below, before making an order Council will give notice of its intention to make an order in accordance with section 255 of the Act by:

- Giving the person to whom an order is intended to be directed a notice in writing stating the:
 - proposed action
 - terms of the proposed order (i.e. what it requires the person to do or refrain from doing)
 - period within which compliance with the order will be required
 - penalties for non-compliance; and
 - reasons for the proposed action; and
- Inviting the person notified of the opportunity to give reason/s, within a specified time, why the proposed action should not be taken.

Council will proceed to make an order without negotiation or notice, in accordance with section 255(12) where Council considers the circumstance or activity constitutes, or is likely to constitute:-

- a threat to life; or
- an immediate threat to public health or public safety; or
- an emergency situation.

Review Rights

Pursuant to section 256 any person to whom an order is issued (including an order issued under sections 254, 216, 217, 218 or 299 of the Act) has a right to appeal against the order. Any such appeal must be lodged within 14 days of that person's receipt of the order. The Council will ensure that reference to this right of review is included in any order issued.

Non-compliance with an order

If an order is not complied with within the time fixed for compliance (or if there is an application for review, within 14 days after the determination of the review) the Council may (subject to the outcome of any review) take the action required by the order.

The reasonable costs and expenses incurred by Council in taking action under this section may be recovered by Council as a debt from the person who failed to comply with the requirements of the order.

Where an amount is recoverable by Council, Council may, by notice in writing to the person, fix a period, being not less than 28 days from the date of the notice, within which the amount must be paid and, if the amount is not paid by the person within that period, the person is liable to pay interest and Council may impose a charge over the land for the unpaid amount, together with interest, in accordance with section 257(5) of the Act.

Non-compliance with an order of Council is an offence for which a person may incur a statutory penalty provided for in the Act. Section 258 of the Act provides for a maximum penalty of and an expiation fee for failure to comply with an order issued under the Act.

Where an order is issued under section 217, if the order is not complied with within the time specified in the order:

- Council may carry out the action required by the order and recover the cost of doing so as a debt for the owner; and
- The owner is guilty of an offence and liable to a maximum penalty not exceeding \$5,000.

Responsibilities & Delegations

This policy will be enforced by Authorised Persons who have been appointed (in writing) by the Council under Section 260 of the Act².

Council may also choose to delegate the power to issue orders under Sections 254, 216, 218 and 299 of the Act to Council staff, in which case, Council will ensure appropriate delegations are in place.

Council Endorsement of the Policy

Any future amendment or alteration to the policy, or substitution of a new policy, will be subject to the public consultation provisions under section 259(2) of the Act unless the alteration has only minor significance and is likely to attract little or no community interest.

Note: *Public consultation is required on any amended policy, unless the Council determines that the amendment is of only minor significance.*

Availability of the Order Making Policy

This policy will be available for inspection at Council's principal office located at 19 Wilson Street Berri during ordinary business hours and published on the Council's website www.berribarmera.sa.gov.au. Copies will be provided to interested parties upon request.

² Authorised Persons have powers under Section 261 of the Act to enforce breach of orders by way of expiation.

Attachment 1

Local Government Act 1999

254—Power to make orders

- (1) A council may order a person to do or to refrain from doing a thing specified in Column 1 of the following table if in the opinion of the council the circumstances specified opposite it in Column 2 of the table exist and the person comes within the description opposite it in Column 3 of the table.

Column 1 To do or to refrain from doing what?	Column 2 In what circumstances?	Column 3 To whom?
1. Unsightly condition of land		
Refer to Local Nuisance and Litter Act 2016		
2. Hazards on lands adjoining a public place		
(1) To fence, empty, drain, fill or cover land (including land on which there is a building or other structure).	(1) A hazard exists that is, or is likely to become, a danger to the public.	(1) The owner or occupier of the land.
(2) To remove overgrown vegetation, cut back overhanging branches, or to remove a tree.	(2) The vegetation, branches or tree create, or are likely to create, danger or difficulty to persons using a public place.	(2) The owner or occupier of the land.
(3) To remove or modify a flag or banner, a flagpole or sign, or similar object or structure that intrudes into a public place.	(3) The relevant object or structure creates, or is likely to create, danger or difficulty to persons using a public place.	(3) The owner or occupier of the land.
(4) Where the public place is a road—to take action necessary to protect the road or to remove a hazard to road users.	(4) A situation exists that is causing, or is likely to cause, damage to the road or a hazard to road users.	(4) The owner or occupier of the land.

Examples—

- To fill an excavation, or to prevent drainage of water across the road.
- To construct a retaining wall or to remove or modify a fence.
- To fence land to prevent the escape of animals.
- To remove a structure or vegetation near an intersection.

Column 1 To do or to refrain from doing what?	Column 2 In what circumstances?	Column 3 To whom?
3. Animals that may cause a nuisance or hazard		

Refer to Local Nuisance and Litter Act 2016

4. Inappropriate use of vehicle

To refrain from using a caravan or vehicle as a place of habitation.	A person is using a caravan or vehicle as a place of habitation in circumstances that—	The owner or occupier of the land or a person apparently occupying the caravan or vehicle.
	(a) present a risk to the health or safety of an occupant; or	
	(b) cause a threat of damage to the environment; or	
	(c) detract significantly from the amenity of the locality.	

- (2) A reference in the table to an animal or animals includes birds and insects.

216—Power to order owner of private road to carry out specified roadwork

- (1) A council may, by order in writing to the owner of a private road, require the owner to carry out specified roadwork to repair or improve the road.
- (2) Divisions 2 and 3 of Part 2 of Chapter 12 apply with respect to—
 - (a) any proposal to make an order; and
 - (b) if an order is made, any order,
 under subsection (1).

217 – Power to order owner of infrastructure on road to carry out specified maintenance or repair work

- (1) A council may, by order in writing to the owner of a structure or equipment (including pipes, wires, cables, fittings and other objects) installed in, on, across, under or over a road, require the owner –
 - (a) to carry out specified work by way of maintenance or repair; or
 - (b) to move the structure or equipment in order to allow the council to carry out roadwork.

218—Power to require owner of adjoining land to carry out specified work

- (1) A council may, by order in writing to the owner of land adjoining a road, require the owner to carry out specified work to construct, remove or repair a crossing place from the road to the land.
- (2) Divisions 2 and 3 of Part 2 of Chapter 12 apply with respect to—
 - (a) any proposal to make an order; and
 - (b) if an order is made, any order,
 under subsection (1).

299—Vegetation clearance

- (1) *A council may, on the application of the owner or occupier of the land (the **relevant land**), by order under this section, require the owner or occupier of adjoining land to remove or cut back vegetation encroaching on to the relevant land.*
- (2) *Divisions 2 and 3 of Part 2 of Chapter 12 apply with respect to—*
 - (a) *any proposal to make an order; and*
 - (b) *if an order is made, any order,**under subsection (1).*