

29 October 2020

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Dear Simon

Bushfire Mitigation Measures Bill

Thank you for the opportunity to provide a submission on the draft Bushfire Mitigation Measure Bill. This submission has been prepared by the Local Government Association of Tasmania (LGAT) on behalf of the Local Government Sector in collaboration with our Members.

LGAT is incorporated under the *Local Government Act 1993* and is the representative body and advocate for Local Government in Tasmania. Where a council has made a direct submission to this process, any omission of specific comments made by that council in this submission should not be viewed as lack of support by the LGAT for that specific issue.

If you have any questions or would like further information, please do not hesitate to contact Georgia Palmer at Georgia.Palmer@lgat.tas.gov.au or on (03) 6146 3745

Yours sincerely



Dr Katrena Stephenson
Chief Executive Officer

LGAT Submission – *Bushfire Mitigation Bill*

Introduction

It is well recognized that bushfire is one of Tasmania’s most significant natural hazard risks and that the frequency and severity of the bushfire season in Tasmania, as with the rest of Australia, is likely to increase in coming years.

Mitigation of the bushfire risk and building the resilience of the Tasmanian community is an important role for Government. This can be achieved through legislative; policy and program responses and it is important that these are well integrated to achieve the best outcome for the Tasmanian community.

It is essential that the *Bushfire Mitigation Measures Bill* (the Bill), sub regulations and guidelines meet the objectives of the Bill and complement and build on the existing Tasmanian bushfire mitigation framework. To do this the Bill must:

- Support strategic fire planning and not shift the focus to a more ad hoc, landowner driven, property approach;
- Link with the State Vegetation Fire Management Plan and the strategic management of fire risk undertaken by Fire Area Management Committees;
- Clearly articulate how the Bill will meet its stated objective in relation to natural and cultural heritage; and
- Ensure that the legislation is not misused by landowners to further aims other than fire mitigation.

The guidelines and regulations will form an essential part of the Bill. It is important that these guidelines and regulations are developed with appropriate consultation prior to the Bill going to Parliament. Furthermore, the resourcing implications to administer and implement the Bill must be understood and funded to ensure that resources are not diverted from existing proven programs.

General Comments

Part 1 - Object of the Bill

A key object of the Bill is to mitigate the risk of bushfire whilst balancing natural and cultural values. Councils have raised concern at the omission of any detail in relation to how the natural and cultural values will be assessed under the Bill. It is strongly recommended that this detail be included in the Bill or guidelines and that the assessment of natural and cultural heritage is mandatory in relation to the issuing of notices and other actions under the Bill.

Furthermore, the mechanism used to mitigate bushfire risk, whether that be prescribed burning or mechanical treatment has significantly different impacts on the values of the land. This needs to be a key consideration for actions under the Bill.

Part 2 - Obligation to Mitigate Bushfires

Part 2, Section 6 of the Bill provides a duty of a public authority to take bushfire mitigation measures of any land vested in or under their control or management or any highway, road, street, land or thoroughfare in its authority. Many councils currently have strategic bushfire mitigation programs to manage the highest bushfire risk reserves and this is often undertaken in collaboration with local brigades. However, the work does not extend to managing bushfire risk on every road under councils' control. Councils have raised questions as to what increased liability this expanded requirement introduces. The liability risk is likely to be similar with state government agencies.

Clarity is also sought in respect to the duty of a public authority where they have a lease or license on Crown land. It is not clear how this responsibility is proposed to be discharged given that works on Crown land require permission of the Crown irrespective of the lease. Will the requirements of the Bill over-ride any obligation to receive the permission within a lease or license?

Part 3 Bushfire Mitigation Measure Panel

Councils have raised a number of concerns in relation to the proposed Bushfire Mitigation Panel (the Panel). Key issues include:

- The omission of statutory timelines associated with the Panels' deliberations;
- The lack of a legal representative on the panel given its appeal role and the duty to provide natural justice;
- The lack of a representative with detailed cultural and heritage knowledge;
- The ability (or lack of) of the panel members to service the potential demand;
- The omission of a clause to enable panel members to delegate their powers;
- The lack of a requirement of the Panel to consider existing legislated requirements on the land which are in place to protect important values; and
- The expertise of the Panel and the required resourcing to provide specialist advice to ensure approval of a Bushfire Mitigation Plan (BMP) does not result in damage to important cultural, environmental and social values on public and private land.

Part 4 - Bushfire Mitigation Plans (BMP)

Feedback from councils on the Bill has identified that there is some confusion in relation to the clause about when a BMP is required. Some councils interpreted this clause to require that all council land in a bushfire prone area is to have a BMP. The potential for this misinterpretation should be considered as part of the redrafting.

Exemption from other Acts

Section 16 enables measures to be taken consistent with an approved BMP despite any requirement under another Act for a license, approval, permit, consent or other authorisation for work and despite any covenant or other restriction.

This clause overrides all other state legislation including the *Land Use Planning and Approvals Act 1993*, *Threatened Species Protection Act 1995*, *Aboriginal Heritage Act 1975*, etc.

The clause requires the Panel to make a determination about whether the risk abatement is more important than the other values of the land. This is a very broad power able to be exercised by the Panel and there is significant concern from the sector that this clause could be misused and result in permanent loss of significant natural and cultural values in Tasmania.

This blanket exemption ignores the responsibility to give due consideration to the existing assessments and decisions that have been made to protect such values on the subject land. These values exist and have been considered worthy of protection in the relevant legal instruments on the land for which a plan has been submitted.

It is important to note that no other jurisdiction has found it necessary to apply such a broad exemption clause for bushfire risk management. A comprehensive regulatory impact assessment should be undertaken to fully understand the impact of this clause.

Section 16 is also silent on the requirement for the Panel or the Chief Officer to inform councils of BMPs approved in their municipal areas. This should be addressed given the sweeping powers of Section 16 and councils' compliance roles under other legislation. This can be addressed by requiring the local council to be notified of any BMP approved in their municipal area under section 15 (4).

Part 5 - Bushfire Hazard Reduction Notices and Fuel Breaks

Concern has been raised in relation to councils being given the authority to issue Bushfire Hazard Reduction Notices. Many councils do not have the necessary expertise to undertake this role.

Whilst it is understood that it is an enabling provision, it may create an expectation within the community that a council will act on requests to review and issue notices and that a failure to do so may incur liability for the council.

If the Bill continues to provide councils with the ability to serve Bushfire Hazard Reduction Notices then the Bill must provide councils with protection from liability or immunity as it has for all other parties who have functions under the Bill (see Clause 31). Furthermore, if councils do have a role in administering the Bill then it is important that councils also have the same ability to cost recover for any works undertaken, as is proposed for the State Fire Commission.

Given the expertise held within the Tasmania Fire Service (TFS), there is an expectation that the TFS will resource the administration and compliance associated with Part 5 of the Bill.

Part 6 - Miscellaneous

Bushfire Nuisance may be treated as a nuisance

The current drafting of section 24 creates legal uncertainty when considered in conjunction with the nuisance provisions of the *Local Government Act 1993*. It is suggested that this clause be removed from the Bill. Further detail around the concern is articulated in the table below.

Guidelines

Section 33 of the Bill states that the relevant Minister 'may' issue guidelines for the purposes of the Act. As the guidelines may (rather than must) be developed, there are no statutory protections to ensure that the guidelines will be in place in relation to the Bill.

In addition, the potential exists for competing sets of guidelines to be developed because under the Bill more than one Minister can prepare guidelines. This Bill must be amended so that the guidelines and sub regulations must be developed.

Specific Comments

A summary of the specific feedback relating to sections of the Bill are provided below.

Draft Bushfire Mitigation Bill

Section/Clause	Comments / Concerns
Part 1 - Preliminary	
Section 3 Interpretation	Does the bushfire prone vegetation also include lucerne, oats and other crops used for feeding stock or harvesting?
Part 3 - Bushfire Mitigation Measure Panel	
Section 7(2) (a)	This clause should include gender neutral language. This should be consistent throughout the Bill. Refer to S.24A of the Acts Interpretation Act 1931.
Part 4 - Bushfire Mitigation Plans	<p>It is not clear whether other models were considered in determining the best approach to address the perceived impediments to bushfire mitigation.</p> <p>A number of other jurisdictions have implemented successful models for smaller parcels of land. For example, the “10/50” rule to allow landowners to undertake works on their land to protect existing dwellings from bushfire in Victoria and NSW.</p>
	<p>In the absence of guidelines for the preparation of a BMP it makes it impossible to comment on the rigor of the plans in assessing other values likely to be associate with the land.</p> <p>Furthermore, the absence of guidelines makes it difficult to understand the criteria on which the Chief Officer assesses that a BMP specifies appropriate bushfire mitigation measures.</p>
Section 12	Reword the section to remove doubt concerning persons who are not the occupier of owner applying to the Panel for a BMP.

Section/Clause	Comments / Concerns
Section 12 (2) c)	<p>It is not clear from the Bill how the application to the Panel may be made by the Chief Officer where the Chief Officer is not the owner of the land and given Section 11 (2), which requires owner consent when the plan relates to more than one parcel of land.</p> <p>It is also not clear how such an application would be properly assessed when it must be endorsed by the Chief Officer and the BMP Panel cannot make changes to the bushfire mitigation measures in the endorsed plan.</p>
Section 14 (1) (c)	Public interest should be defined.
Section 14 2(a) (b)	Section 14 (2) (a) and (b) should be included in section 14 (1) as mandatory requirements for the approval of a plan.
Section 15 (3)	<p>Section 15 (3) Requires that the Panel must not impose conditions that alter the bushfire mitigation measures contained in the BMP.</p> <p>It is therefore difficult to understand what conditions can be placed on the approval by the Panel that would mitigate damage or loss of the natural, cultural and social values including, water quality, geotechnical stability, biodiversity conservation, landscape protection, cultural heritage, threatened species and human health.</p>
Section 15 (4)	Include informing the council.
	The current Bill does not provide for any input or consultation with Local Government, either by the applicant of the BMP or by the panel prior to its consideration.

Section/Clause	Comments / Concerns
<p>Part 5 - Bushfire Hazard Reduction Notices and Fuel Breaks</p>	<p>The power to issue bushfire hazard reduction notices currently exists within Section 49 of the <i>Fire Services Act 1979</i>.</p> <p>It is understood that this power has only been used on a few occasions. It is important to understand why these provisions have not been used in the past. By repeating the powers in this Bill, it may not further the objective of the Bill to prevent and minimize the spread of bushfire.</p> <p>It is highly likely that resourcing to assess and enforce the power may be the reason behind the failure to use the powers. This will need to be addressed if the Bill is to further its proposed objectives.</p>
<p>Section 19</p>	<p>Provides for the Chief Officer to issue bushfire hazard reduction notices to reduce fire risk and or require a fuel break to arrest the spread or facilitate the suppression of bushfire.</p> <p>The statutory guidelines and sub-regulations (yet to be developed) will be critical in defining when and how these notices can be issued. It is important that the issuing of notices includes the assessment of cultural and heritage values.</p>
<p>Section 19 (2)</p>	<p>The section provides powers for councils to issue Bushfire Hazard Reductions Notices. This is not supported. Refer to General comments above for further information</p> <p>Local councils have a role in managing fire risk through the Local Government Act Nuisance provisions. This is the appropriate role for Local Government.</p>

Section/Clause	Comments / Concerns
Section 20	<p>Aligned with section 19 (2), section 20 allows for a council to make arrangements for a fuel break where a person fails to comply with a bushfire reduction notice. It is noted that many councils do not want the power to issue notices, but if this clause is retained then provisions need to be included for cost recovery for council.</p>
Section 21	<p>This section raises a number of issues of concern:</p> <p>Clause (1) relates to powers of the State Fire Commission to enter land and carry out works and should sit with clause 20. No corresponding provision is available to councils who have the same powers under clause 20.</p> <p>Clauses (2), (3) and (4) limit cost recovery to expenses of the State Fire Commission. There are no provisions whatsoever for council cost recovery as a result of any action under the Bill. See also clause 28.</p> <p>Clause (2) e allows the State Fire Commission to recover costs against council for failing to act on a notice under clause 24. This is unreasonable.</p>
Section 22 (1)	It is considered reasonable to extend the time to 14 days.
Section 23 (1) (b)	It is considered necessary to extend the time to 14 days.
Part 6 Miscellaneous	
Section 24	<p>The current drafting of this section creates legal uncertainty when considered in conjunction with the nuisance provisions of the Local Government Act.</p> <p>Clause 19(1) provides the power to the Chief Officer to issue a bushfire hazard reduction notice in relation to bushfire hazard. There is no rationale or reason that the Chief Officer should then pass over responsibility to a council via section 24. The Chief Officer can simply issue a notice under clause 19 without the need for reference to</p>

Section/Clause	Comments / Concerns
	<p>the council. Clause 24 enables a clear shift in responsibility and associated costs to councils.</p> <p>Whether or not a bushfire hazard constitutes a nuisance under the Local Government Act is a matter of law. That is, a council having formed an opinion of a nuisance, serves an abatement notice on a person. That person is not bound to take the action solely on the issue of the notice, but they may appeal the notice and challenge the existence of a nuisance.</p> <p>There is nothing in this Bill which deems a notice from the Chief Officer to be a nuisance and yet the council is expected to act as if it were. A failure to do so then creates a potential cost liability for a council under clause 21, even if the council were not legally able to act on that Notice. This is an untenable position.</p> <p>Whilst this clause is not necessary or supported, if it is retained there must be a deeming provision contained within the Bill otherwise all this is doing is shifting a responsibility and cost directly to the council which should otherwise be dealt with by the Chief Officer. Any deeming provision must also ensure the rights of the person serviced the notice.</p> <p>There is absolutely no sense of urgency or need demonstrated within the clause to suggest that the proposed power to direct councils is necessary. The “reasonable period” of not less than 30 days is usually irrelevant with the existence of fire hazard abatements which are required to be addressed in a short period due to the changing nature of vegetation and forming a fire threat. The provisions simply do not work with how fire hazard abatement provisions are administered under the <i>Local Government Act</i>.</p>

Section/Clause	Comments / Concerns
	<p>The clause is unclear as to how a council is “to deal with the bushfire danger”. Under the Nuisance provisions a council would issue a notice on the person responsible and they have appeal provisions available to them. Council can only act to undertake works if there is a failure to comply or there is an immediate danger (which is clearly not the case in the instance of these notices where at least 30 days is given). Where a council acts it can recover costs as a charge to the land if it does the work.</p> <p>Should works not be done then clause 21 seeks to pass responsibility from the landholder to the council. Should the council undertake the works there is no clear ability of the council to recover costs from the responsible person who did not undertake the works.</p> <p>This clause is unnecessary and is a clear responsibility and cost shifting exercise to councils. It is not required in the Bill which should clarify Chief Officer powers and these can work in conjunction with existing provisions in the Local Government Act.</p> <p>The lack of definition of bushfire danger is also concerning and is not consistent with the nuisance provisions under the Local Government Act.</p>
Section 29 and 31	<p>Councils are proposed to have powers under the Bill but are not provided with protection. Whilst council involvement is not supported by this submission, should a council be required to take action under the Bill then councils should have a similar level of protection as the Chief Officer.</p>
Section 32	<p>No provisions have been proposed to deal with inconsistency with the <i>Local Government Act 1993</i> or how that Act operates in relation to fire hazard abatement. There should also be clarity provided.</p> <p>See also comments on Clause 24 above.</p>

Section/Clause	Comments / Concerns
Section 33	<p>Guidelines</p> <p>The Object of the Bill is to balance natural and cultural heritage values. However, proper consideration of these values appears to be limited within the Bill.</p> <p>It is considered that this should be strengthened in the Bill by including the need for the guidelines to be adopted under section 33 to specifically include natural and cultural heritage values as a consideration. The guidelines should then also guide decision making in the issuing of notices and taking action under the Bill. This would effectively meet the objects of the Bill</p> <p>The guidelines should also go through an appropriate consultation process and be gazetted so that the community has an opportunity for input and is aware of the final guidelines.</p>