Aboriginal Heritage Protection Bill

December 2012

Contact:

Dr Katrena Stephenson – Policy Director

GPO Box 1521, Hobart 7001

Ph: 03 6233 5973

Introduction

The Local Government Association of Tasmania (LGAT) is the representative body of Local Government in Tasmania. Established in 1911, the LGAT is incorporated under the Local Government Act 1993 with membership comprising 28 of the 29 Tasmanian councils.

The objectives of the Association are:-

- To promote the efficient administration and operation of Local Government in the State of Tasmania;
- To watch over and protect the interests, rights and privileges of municipal Councils in the State of Tasmania;
- To foster and promote relationships between Local Government in the State of Tasmania with both the Government of Tasmania and the Government of the Commonwealth of Australia;
- To represent the interests of the members of the Association generally, and in such particular matters as may be referred to the Association by its members; and
- To provide such support services to the members of the Association as the Association may by resolution in meeting determine.

General Comments

This submission has been compiled following consultation with councils via email and a workshop.

In preparing this submission, LGAT has tried to focus primarily on common issues or higher order issues. Some more detailed and/or technical comments provided by councils have been tabulated for ease of review.

Some councils may make direct submissions. Any omission of comments they have made should not be viewed as lack of support by the Association for that specific issue.

LGAT Position

The need to provide up to date legislation in respect of the protection of Aboriginal Heritage is recognised, but Local Government has focussed on the interface between the legislation and planning authorities, rather than making comment on the principles and objectives.

The *Aboriginal Heritage Protection Bill 2012* (the Bill) seems to be more reactive than proactive (with no ability to provide for strategic areas of exemption and no listing) and in that way it differs significantly from the *Historic Cultural Heritage (Amendment) Bill 2012*. Further the tone of the Bill is highly aspirational but there are a range of issues in delivering against those aspirations.

Interface with Planning Authorities

Local Government notes that while culturally sensitive, the Bill as drafted, particularly in relation to Part 6, is impractical. There are a number of unresolved issues and unintended consequences. Further, the Aboriginal Heritage Bill is not strongly consistent with the *Historic Cultural Heritage (Amendment) Bill 2012* (HCH) particularly as relates to process/timeframes and so we would urge greater alignment wherever possible.

As the Bill stands, there is the potential to significantly increase the number of discretionary planning applications received by councils. This runs counter to the State Government's planning reform agenda which is set to include standards for multiple dwelling units. These standards, currently out for consultation, would likely be negated by the Aboriginal Heritage legislation. Further, proposal which would, were it not for the Aboriginal heritage, be permitted, will then be able to be appealed by third parties on a broad range of matters not confined to Aboriginal Heritage.

Under the exposure draft it is only once s.57 is invoked that the Minister can advise as to whether there is NOT an Aboriginal heritage matter of concern. One alternative suggested is for the Minister to issue a formal exemption, equivalent to that in s.79(1)(a) before a planning application is made. This could allow an activity permitted by the planning scheme to remain permitted (unless there are Aboriginal heritage matters to consider). Such an approach would prevent distortion of the planning scheme objectives. Local Government understands that the Tasmanian Planning Commission expects that a permitted use will have a permitted application pathway available; the Bill runs counter to that.

The scope of exempt land activity is too limited. Consideration needs to be given to strategic areas of exemption – for example in urban locations where the redevelopment of land is involved, or there has already been other significant ground disturbance.

The Bill leaves a high level of uncertainty for regulatory authorities and developers. There is a need to improve definitions (particularly so they align to the *Land Use Planning and Approvals Act (LUPAA)*) and introduce trigger criteria – similar to those in the *Environmental Management and Pollution Control Act (EMPCA).*

There seems to be a significant reliance on yet to be developed Regulations (e.g. 32(f) and s43 (1) in respect of Management Plans) (see in detailed comments), which adds to the uncertainty in terms of the ambit of the legislation and its impact on landowners.

Planning authorities need the right of appeal in cases where there is conflict between permit conditions which would be set by the Aboriginal Heritage Protection legislation and other permit conditions.

There is a clear need to be able to stop the clock if the permit conditions of government authorities are in conflict, and the need to avoid the potential for unintended cost shifting.

Councils will not know whether an application is discretionary or permitted at the time the application is lodged. This has an impact on the way fees are charged and technically the application is not validated until all fees paid. In New South Wales, the clock doesn't start until all fees are paid for referrals and it is suggested that similar provisions be looked at here.

The loss of exempt status if Aboriginal heritage is found is of concern. It is suggested that there should be an alternative means of regulating activity in these circumstances other than invoking a discretionary planning application. As outlined earlier, this would allow an unintentionally large range of appeal rights over which the Minister has no control.

It is worth noting that small developments which were previously exempt will be financially penalised (eg, fees, advertising, Aboriginal Heritage study) compared to current requirements.

More specifically it: is suggested that:

- there needs to be a definition of what an Aboriginal Heritage Study will deliver;
- a model of a social impact study is developed;
- a proper listing system is developed, with investment in the research prior to the enactment of legislation;
- consideration be given to narrowing down areas of high aboriginal heritage significance – eg the framework being used in relation to land hazards could be applied and criteria developed to trigger different actions or corridors of risk identified;
- there be a requirement that any such study be provided to State Government or that the State work with assessors to develop a professional code/mandate, in order to prevent land owners hiding findings from Aboriginal Heritage Studies;
- there is consideration given to the interface with projects of regional or state significance; and
- there may be a need to liaise with other regulatory bodies for comment in relation to their processes.

The table below references components of the Bill specifically.

Section/Clause	Wording	Comment
Part 1 - Interpretation	**Serious ground disturbance –** means the disturbance of a) the topsoil	A tighter definition is needed.
Part 1 - s8	**Meaning of exempt land activity**	• Much development will not be exempt. • Need to resolve details first before Bill goes through – commit to how to manage. • Align dwelling number with subdivision lot number. • Conflict with permitted residential – multi unit. • Needs to reflect the outcome of the planning directive. • Does d) refer to building or corridor – needs to be clear • g) not clear or useful. Attached vs detached apartments? 1 strata lot? 1 title lot? What is meant? • Should it be exempt land activity or exempt use or development?
8) (3)	**Associated infrastructure**	Does not seem to appear anywhere else in the text.
S 32 (f)	A land activity or other activity prescribed by the regulations for this definition	What land activity will be prescribed as restricted? As currently worded means 'all land activity' is 'restricted' bar that which is exempted.
S43(1)	Management Plan – uncertainty and impact	High impact land activity /regulations/ministerial notice; recognise that discretion is needed in the administration in the development of related legislation. These mechanisms will need to avoid excessive and unnecessary burden through 'setting the bar too low' as an outcome of seeking increased certainty.
s.66(2) (b)	"for all purposes – the relevant planning scheme or relevant special planning order, if it does not do so, is taken to require a permit for that	What is the purpose of this section given s.66(1) provides that s.66 (c) can only apply to a restricted land activity which is defined by s.63(1) as an activity that requires external regulatory approval.

	development"	
s.69 (2)		This will require the Department to deal with the applicant if it is to work.
s.69 (3) – (5)		• Uncertainty as no time frame for Minister to advise external regulator re satisfaction with information and information gathering and no right of appeal. • Deemed approval like Historic Cultural Heritage (HCH) Amendment Bill would be preferable to open ended timeframes. • Mismatch with LUPAA – which one prevails? • Should be better aligned with HCH Amendment Bill • Consider using EMPCA process – take it out of hands of councils so that Local Government is not penalised as relates to statutory timeframes.
s. 71 (2)(c)		Unreasonable to specifically allow the Minister to consider representations that are not relevant to the Minister's own particular responsibilities. Beyond the scope of the Bill's objectives.
s. 71 (4)	After receiving a representation etc	This clause doesn't work as the provisions haven't yet got to the point where it is back with Council and advertised. How does the Minister get representations? Risk of s.59 not being aligned with HCH or LUPAA – needs to be specific.
s. 71(5)	If an extension period etc	What if the extension is not agreed? The extension is presumably between the planning authority and the applicant. There is no reference after this to a circumstance where it isn't agreed. Wouldn't it be more logical for the period for determination to be automatically extended 14 days given the provisions of s13(b)?

s. 71(6)(c)	The external regulatory approval should be refused	'must' not 'should'.
s. 71(13)	Needs to align to amendments agreed by Government in relation to HCH	Needs to align to amendments agreed by Government in relation to HCH/LUPPA (HCH) amendment bills – ie 49/63 days. (s57)
s. 73		Local Government shouldn't have to enforce Aboriginal Heritage conditions as they have no option as to whether conditions are attached. Once conditions are attached to a permit LG has an enforcement obligation – this may result in significant resource impacts and liabilities. Needs waiving. Need to negate planning authority responsibility which is obliged under criminal law – especially given planning officers are not necessarily qualified to make the judgement.
s. 74 (7)		Would appear to be ultra vires. Can't take away rights of appellant. Would need consequential amendments to LUPAA.
s. 74 (5)		Needs to be clear the planning authority is not the respondent in relation to AHP matters but are still an interested party. Important given potential risk to other conditions (look at s63 LUPAA).
S75.		Clumsy wording. What is an 'area of planning interest'. Would appear to be every municipal area. There may be simpler way to deal with principle of alerting AHC through requirement to issue notice under LUPAA (21)(2)
s. 75 (7)	Interpretation	Put at front not end.
s. 76 (4)	Application for dispensation	Means a lot will go to the Minister and resultant significant workload for State Government.
s.77(4)		Does this mean a condition could not be imposed on a permit under LUPAA – arising from a condition imposed by the Minister under s71(8)(a) or (b)? And if not, how will a permit and an agreement be reconciled with a LUPAA permit

		and any Part 5 Agreement.
s.84 (2)	Audits	Need for monitoring and response is recognised, but s84 (2) (c) facilitates supplementary conditions after an approval is granted. Appears to give the Minister the ability to re-regulate an activity if the initial process turns out to be deficient. Would be unfair on proponents and other regulatory bodies who do not enjoy such a luxury. Creates an uncertain regulatory environment for investment decisions. Sub section (f) is very open ended
s.88(5)	Approval of Audit Reports – implementation of recommendations	Minister may request that the relevant external regulator implement a recommendation 'in accordance with the applicable procedure under the relevant external Act'. Need to be clear what this is considered to be in respect of LUPAA.
s.92	Aboriginal heritage stop orders	Too open ended. Need to define activities. Practice notes will be required.
s. 95 (1) (b)	Duration of AH stop orders	What happens during the 30 days? What do you have to do? No incentive to invest in Aboriginal Heritage Management Plans (AHMPs) as can still be subject to the requirements under this section. AHMPs need to benefit the application process. There is not end point. If Aboriginal heritage is discovered how does a development move forward?
s. 100	Effect of stop orders on audits	Might undermine implementation of development – who pays?
s. 114	Register	See earlier issues re notification, disclosure etc.

Maps, Tools and Resources.

There needs to be consideration of requirements under LUPAA re disclosure vis-a-vis the view that all Aboriginal Heritage locations be kept secret. Once an application is discretionary and is subject to the public notification process

everything becomes public including AHMPs. While there inevitably will be items of aboriginal cultural heritage that will continue to need protection in this way e.g. paintings, other sites, such as middens, could perhaps be recognised as being of cultural significance in archaeological terms and publically listed. The Sullivans Cove Planning Scheme 1997 Schedule E may be a useful example of how both places of cultural significance and sites of archaeological sensitivity are separately listed with provisions that recognise the difference in approach required in respect of process and treatment.

Access to up to date maps will be critical and should be in place before implementation of the legislation, as should be a range of guidelines, appropriate levels of resourcing for heritage assessment (how will the number of accredited assessors be improved?), major community education campaigns and for compliance activities.

There needs to be a commitment to a timeframe for assessment by the Aboriginal Heritage Council – it should not be open ended (see s38(1)(b), 38(2), 39 of the HCH). The implementation of legislation needs to be costed and budgeted for prior to enactment.

There should be no expectation that Councils, as regulatory authorities, should bear the burden of information, advice and compliance activities related to the introduction of legislation. This would be viewed as a cost shifting exercise. For example:

- s71(5) as stands may results in the risk of councils being faced with s 59 determinations by default.
- s 73 requires enforcement which always comes with resource impacts and liabilities.
- Double processing of fees if application shifts from permitted to exempt under Aboriginal Heritage Protection Bill requirements.
- The reliance on section 57 of LUPAA is of concern given that it incurs additional costs and time on planning applications and exposes the proposal to broad third party appeal rights on matters not related to Aboriginal Heritage.

Local Government agrees with the principle of bringing processes into the system, but there is a need to consider who is properly trained and resourced to make and enforce decisions in relation to Aboriginal Heritage. Local Government would not welcome cost shifting through lack of consideration of such issues.

Suggested Next Steps

Local Government suggests that the draft Bill (or a revised version) be thoroughly tested in relation to LUPAA 1993 (and other legislation as appropriate) through specimen applications that cover a number of application types provided for in the Planning Scheme Template for Tasmania. That is:

- General Exemptions
- Limited Exemptions
- No permit required
- Permitted Use or Development
- Discretionary Use or Development

The use of flow diagrams for this would identify precisely how the proposed legislation would operate at all of its stages in relation to LUPAA, and unintended conflicts, consequences or anomalies.

Ideally this should be done once the *Historic Cultural Heritage (Amendment) Bill 2012* has passed through Parliament.