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GPO Box 1751
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Dear Warren

Environmental Management and Pollution Control (Air Quality) Regulations 2006

I refer to your letter dated 13 June 2006 inviting Local Government comment on the above regulations and accompanying regulatory impact statement (RIS).

It is noted that there has been wide consultation with Councils in relation to the previous draft Environment Protection Policy on Air Quality and through the more recent process associated with the release of the draft Air Quality Regulations, which relate primarily to domestic solid fuel burning appliances and backyard burning. As part of this process a consultation forum was held on 6 July between State and Local Government representatives, which allowed Councils to provide feedback and seek clarification on the regulations. Following this the Department of Tourism, Arts and Environment (DTAE) provided the Association with a detailed feedback report, addressing some of the concerns raised by Councils, and guidelines for assessing excessive smoke, under Regulation 11, adapted from relevant sections of NSW Smoke Abatement Notice guidelines. These have been circulated to all Councils to assist them in formulating their comments.

Formal comments on the draft air regulations, associated RIS and additional guidelines have now been received from 18 Councils, some of which have also provided direct responses to DTAE. These comments indicate that there is general support for the intent behind the regulations to improve air quality. This is particularly the case with urban Councils, although there are specific concerns about Local Government's ability to implement and enforce some of the provisions, especially under Regulations 5, 10 and 11; the potential cost impost of implementation on Councils; and the provision of training for Council officers. With some exceptions, smaller Councils are less supportive of the regulations with several opposing Regulation 11 outright. There is a view that the problem of wood heater smoke is not experienced uniformly across the State and thus a 'one size fits all' approach may not be the most appropriate solution to a problem that is perceived to be largely restricted to urban centres. That said, the Association notes DTAE's comments regarding the need to broadly address nuisance arising from wood heater smoke, which is not necessarily restricted to urban areas.

There is general support for the provisions in relation to backyard burning, with the exception of the stipulation concerning the size of the land (2,000 sq metres), which some Councils consider too small.

Before moving on to address in more detail these and other issues raised in Council responses, it needs to be stressed that many of them reiterate points brought up at the consultation forum which have either already been noted and addressed through DTAE's response report or identified as requiring further legal advice or investigation. The Association notes DTAE's advice that once it has clarified these latter issues the Regulations will be amended if necessary or the outcome of investigations reported to LGAT.

Council comments and concerns are addressed as follows:

Responsibility

While it was generally acknowledged that there is merit in the regulation of wood heaters, there was a fairly broad view expressed that it should not be the responsibility of Councils to enforce some of the provisions, particularly those under Regulation 5 related to ensuring the compliance of wood heaters in existing dwellings; the sale and installation of second hand wood heaters; and, those under Regulation 10, concerning wood heater modifications. These views rest on the proposition that as Local Government is not currently responsible for this activity why should it now be induced to have charge of it.

Resource Implications

One of the most common concerns raised was the assumption that Councils would be able to absorb the additional responsibilities flowing from the enforcement of the regulations within existing resources and as part of their normal duties. This was considered unrealistic. There is concern at the lack of funding and logistical support available to assist Local Government in implementing and discharging its responsibilities under the proposed regulations and it is widely considered that the projected resources required for this purpose have been severely underestimated in the RIS.

Training for Council Officers

It was considered important that Council officers be supported in implementing the regulations through the provision of appropriate training and clarification of how this would be delivered and resourced would be appreciated.

Community Impact

There was fairly widespread concern that the regulations would impact most severely on those in the community with the least capacity to afford new heaters, alternative forms of heating or dry firewood, especially the elderly, low income earners and those in rural areas.

Public Education

It was considered imperative that before the regulations are implemented there should be a comprehensive public education campaign to educate the broader population of the correct methods for using wood heaters and the importance of using appropriate fuel. It is pointed out that currently there is nothing in the regulations referring to the sale of firewood and what constitutes dry, green or wet wood. This is a critical issue because although a person may have a compliant heater there is still potential to cause smoke nuisance if it is not correctly operated.

Comments on Individual Regulations

Regulation 3: Interpretation

AS/NZS 40123: Clarification of the standard AS/NZS 4013 was sought. It was suggested that it was unclear from the definition whether the standard applies to all wood heaters or only to those manufactured, sold and installed after the Regulations have been adopted.

Definition of heater: It was suggested that the definition should be expanded to include commercial and industrial use as wood heaters are installed in workshops and factories. It is noted from DTAE comments, however, that AS/NZ4013 applies only to domestic heaters and that the matter will be taken up with the Office of Parliamentary Counsel.

Backyard burning/Hazard reduction: A number of Councils considered that precise definitions of backyard burning and hazard reduction should be included in this section.

Regulation 4: Application of Regulations

It was suggested that it might be appropriate for 'appliances built on site' to include those such as wood fired pizza ovens, pottery kilns and similar appliances, which have the potential to cause a smoke nuisance. DTAE's comments on this point are noted.

Regulation 5: Manufacture, importation into Tasmania for sale, sale and installation of heaters

Most Councils commented on this regulation.

5(1) There was general support for the provisions to tighten up regulation of the manufacture, importation and sale of wood heaters.

5 (3) However, there was much less support for the provisions concerning the regulation of the sale and installation of second-hand heaters. As highlighted above, there is a fairly broad view that it should not be the responsibility of Councils to enforce these provisions. Local Government is not currently responsible for this activity and questions why it has been allocated to Councils under the proposed regulations.

There is concern that Councils are expected to assume responsibility for the potentially onerous task of 'policing' the sale and installation of second-hand heaters, which was considered likely to prove a burdensome and time consuming activity that would adversely impact Council's already scarce human and financial resources. The idea put forward in the RIS that officers could proactively enforce this provision by scanning the 'for sale' notices in the newspapers, and presumably following up with vendors and prospective purchasers to check compliance, was considered unrealistic.

Clarification was sought on the following:

- in relation to the sale and/or installation of second hand wood heaters would Councils need to physically inspect them to ensure they are compliant or would notification from the installer would be sufficient?

- how could compliance with the regulation be enforced if the owner doesn't have or cannot produce a certificate of compliance or laboratory certificate? What is a reasonable level of enforcement in these circumstances? Would an owner be required to obtain a laboratory certificate and would Local Government be placed in the difficult position of trying to enforce what might be perceived as an onerous requirement?

Further points of clarification were requested at the forum and It is noted from DTAE's response report that it intends to seek further legal advice on the following matters and modify the regulations if appropriate:

- Responsible party in auction sales of non compliant wood heaters – whether it is the auctioneer, vendor or both.
- Sale of houses with non-compliant heaters installed – has the vendor committed an offence?
- Sale of heaters for recycling – is an offence committed where a persons sells a second-hand heater for the purpose of recycling its parts.

5(4) Concerns in relation to the use by Councils of building surveyors to check compliance with regulations 5(4) and 10, previously expressed at the consultation forum, were reiterated in the formal comments and it is noted that DTAE's response report acknowledges difficulties in this regard.

With respect to proposed installation provisions, it is accepted, in principle, that there would probably be little impost for building surveyors/inspectors to assess the compliance of wood heaters in new dwellings in the course of administering the Building Code of Australia standards for wood heater installations. Indeed, one Council suggested it may be possible to insert conditions into building permits to the effect that wood heaters must comply with AS/NZS 4013 provided that the State Government could provide legal advice that this is a valid condition to apply. However, many Councils no longer provide an in-house building surveying/inspection service and accordingly it would be difficult for those Councils to enforce this regulation. And even where Councils still have in-house building surveyors it is generally held that they do not have the resources or ability to ensure that any new heater installations in existing dwellings comply with the new standard.

It is pointed out that the installation of wood heaters is currently controlled by Regulation 50 (1) and (2) of the *Building Regulations 2004* which require the installer to notify the permit authority of intention to install or commencement of installation and when the installation has been completed. However, this does not prevent an owner installing his or her own wood heater. While it may be acceptable to check for compliance at the time of attending a complaint providing the compliance plate is visible, it is not clear how one would know when the heater was manufactured if there is no plate. If the owner installed it there may not be any record at all.

It is noted that the Tasmanian Air Quality Strategy 2006 acknowledges the difficulty in regulating the sale and installation of non-compliant heaters and it is suggested that a comprehensive community education program would provide great benefit in reducing the sale and installation of second hand heaters.

One Council expressed a strong view that the State Government should give consideration to the strategic introduction of a second-hand wood heater buy-back scheme.

Regulation 6: Certificates of Compliance

It was suggested that it might be useful to compile and make available a list of authorised persons who can issue certificates of compliance.

Regulation 7: Certificates of compliance and superseded AS/NZS 4013

One Council suggested that the 2-year 'period of grace' during which a heater may be sold or installed after the day on which the superseding version of AS/NZS 4013 was published should be extended to 4 years. Notwithstanding this comment, the Association supports DTAE's observation in its response report that once the regulations are implemented the public needs to be made aware of restrictions on the sale of second-hand heaters generally.

Regulation 10: Modification of heaters

Local Government is strongly opposed to assuming responsibility for enforcement in regard to heater modifications. There is particular concern that Local Government should be held responsible for authorising the 'reversal of modifications' under 10(4).

10 (3) Clarification of the intent of the wording in this sub-regulation was sought. In its current form it is considered unclear whether it relates to modifications or the way the heater is operated.

10(4) There was a query as to how an authorised officer would determine or be satisfied that the 'modifications have been reversed and the heater now complies.' It is understood that most modifications involve the removal of a pin. It is suggested that authorising the reversal of such modifications may be pointless as pin removal could easily occur after an authorisation had been issued. How are officers to determine that modifications have occurred in the first place?

Clearly there is uncertainly about how Councils are to deal with the modification of heaters. It is suggested that if Local Government officers are expected to check for compliance of wood heaters that may have been modified and, as outlined above, a number of Councils are opposed to this proposal, there would need to be adequate training provided to assist them with this. Some indication of how this is to be delivered and resourced would be appreciated.

Regulation 11: Service of nuisance abatement notices

The Association notes the intention to use nuisance abatement notices as part of the enforcement process but is aware that such an instrument currently does not exist. It is understood that it was originally planned to bring this instrument into effect through amendments to EMPCA as part of the response to the statutory review of that legislation. It is not clear what the timetable is for introducing this instrument nor what might be the intended interim practice in regard to these Regulations. Clarification of this matter would be appreciated.

The concerns with these provisions are in many ways similar to those expressed on the previous draft air policy concerning the subjective nature of the regulation and the difficulties for officers of measuring smoke plumes with a reasonable degree of accuracy. While it is acknowledged that this provision was intended to provide a simple test for a smoke nuisance based on a reasonable person precept there is concern about its application in practice and, indeed, how robust a ruling made under the regulations will be on appeal. For instance, will the opinion of an authorised officer be sufficient? How is the plume measured? Will a magistrate require some verification or authentication for example on appeal? Will photographic evidence be sufficient? Notwithstanding advice provided in the additional guidelines, these matters will probably require further clarification prior to the commencement of the regulations.

It is acknowledged that the issue of wood heater smoke may eventually resolve itself with alternative sources of heating being installed in many new dwellings and the requirement for new wood heaters to comply with the stipulated standard. However, until that situation is achieved, Local Government officers could expect to experience a difficult period in attempting a practical implementation and enforcement of regulation 11. There is concern that once the regulations are in place they will raise community expectations and this will inevitably lead to more complaints, some of which are likely to be vexatious, and the consequent need for investigations which will impact on Council resources.

As already intimated there was greater support from urban Councils for this regulation, although only Launceston City Council indicates a likelihood of proactively enforcing it. Some Councils indicate an inability or unwillingness to dedicate already overstretched resources to this task and others suggest they would only be willing to respond reactively to individual complaints during daylight hours given the unreliability of evidence yielded from investigations conducted at night. It was also suggested that it would be helpful for Council officers investigating complaints during the day to be provided with a standard colour/shade index of varying smoke emissions for comparison on-site as an evidence gathering tool.

Local Government is of the view that if there are to be successful prosecutions under the Regulations the processes surrounding these need to be as simple as possible. Some Councils have suggested that they will need a range of equipment, such as digital cameras with video capability, in order to gather evidence that will stand up under appeal. However, the Association wants to be sure that the enforcement of the regulations involves a straightforward evidence gathering process that will be legally acceptable and not resource intensive. There is no desire to see officers engaged in lengthy evidence gathering procedures that will not stand up under legal challenge. This would certainly undermine confidence in the ability of the Regulations to achieve their objectives. Confirmation that the recommended procedures are suitable and likely to be acceptable under appeal would be appreciated.

Some clarification was also sought regarding the service of abatement notices and it is noted that DTAE intends seeking legal advice on this matter and will advise LGAT of the outcome but that the procedure is likely to be similar to that associated with the service of notices under other legislation

Regulation 12: Backyard burning of wastes

12(1) There is broad agreement that controlling backyard burning has merit. However, the 2,000 square metres property threshold is considered by many Councils to be too small and unlikely to achieve the intended outcome, which is to control the impact of backyard burning on other properties. As there are many properties that exceed 2,000m^2 within urban areas, a number of Councils suggested that consideration be given to increasing the minimum size of land to 4,000m^2 before a person can burn waste. Several Councils suggested 5,000m^2 was more appropriate and would ensure that amenity is protected throughout all but an absolute minority of urban areas.

As noted previously, there is clearly a need to tighten up the definition of what constitutes waste.

Based on experience that smoke nuisance from backyard burning is equally likely to occur on larger blocks, several Councils suggested that a person should not be allowed to burn any waste within a minimum of 150 metres of any dwelling not on a person's land, considering this a more appropriate condition than the 2000m^2 property size. It is pointed out that a person could burn on the very boundary of a 2000m^2 or 4,000m^2 property and cause considerable nuisance to a neighbour whose dwelling may be only 10 metres away. It is argued that this approach is consistent with existing practices under EMPCA legislation in dealing with noise nuisances.

12(2) While it is noted that there is provision under 12 (2) for individual Councils to override 12(1) by creating a by-law, it was widely considered that this may not be an ideal way to make changes to the regulation and brings into question the validity of the standard it seeks to establish.

It is suggested that enabling Councils to make local variations is likely to remove consistency and create the potential for confusion between municipal areas. Some Councils indicated they were not prepared to develop by-laws to rectify weaknesses in the regulations, particularly given the difficulties associated with the development of new by-laws.

12 (3) (a) It is pointed out that barbeque structures are sometimes used outside for the burning of waste and it is suggested that the words 'whilst food is being cooked' be added after the word 'barbeque.'

It was also suggested that this clause might need rewording to preclude the burning of waste in domestic fuel heaters, stoves or barbeques. As it stands it doesn't preclude the burning of waste in a wood heater or fireplace unless the smoke is greater than 5 or as per revised guidelines, 10 metres.

12(3) (b) (ii) It was suggested that there is a need to define what it means to 'reduce fire hazard.' The Tasmanian Fire Service only issues fire permits during the Fire Permit Period and at other times it is a mater usually referred to Council. It is suggested that this could lead to inconsistency and create issues between Councils in regard to burn offs near municipal boundaries.

General Comments

While there is support for the intention behind the regulations to improve air quality, Local Government has some concerns with their implementation and management.

As noted above, the principal concerns relate to the imposition of new responsibilities in relation to the regulation, sale and installation of second-hand heaters, inspecting new wood heaters for compliance in existing dwellings, 'policing' heater modifications and measuring and monitoring excessive smoke. Certainly, there will be a need for appropriate training to be provided to assist Council officers in addressing some of these issues.

It is expected that there might be a heavier workload for Councils following the introduction of the regulations as the community becomes aware of them. However, it would be anticipated that as new forms of heating replace wood heaters in new dwellings, new wood-heaters are required to be compliant with the stipulated standard and public education encourages the improved operation of wood-heaters, the level of smoke nuisance will gradually abate and there will be less pressure on Councils.

With regard to concerns that the regulations will impact adversely on Council resources and that the projected costs to Local Government of enforcing the regulations, as outlined in the RIS, appear to be underestimated, it is recommended that once the regulations are implemented a formal evaluation process be put in place to assess their impact on Councils in terms of workload and resources after the first 12 months of operation.

Finally, it will clearly be critical to ensure that a comprehensive public education campaign is conducted, in conjunction with the release of the regulations, to raise community awareness of the need to be responsible in relation to the installation and operation of wood-heaters.

Thank you for the opportunity to comment on the Regulations and I trust these comments are of some assistance. If you require further clarification on any matters raised in this response please contact Dr Christine Standish on 6233 5967 or email at christine.standish@lgat.tas.gov.au.

Yours sincerely

Allan Garcia
CHIEF EXECUTIVE OFFICER