

INFOPAGE

BUSH FIRE BRIGADE LOCAL LAWS, January 2023

WALGA was recently contacted by the Department of Fire and Emergency Services (DFES), who informed of State Solicitor's Office advice questioning the legality of Bush Fire Brigades established by Local Governments in the absence of an associated Bush Fire Brigades Local Law.

WALGA obtained its own separate, independent legal advice that confirmed the same; having established a Bush Fire Brigade, it is a requirement that the Local Government also adopt an associated Bush Fire Brigades Local Law.

The Issues

1. DFES and WALGA have received separate, independent legal advice on the establishment of Bush Fire Brigades (BFB) by Local Governments under s.41 of the Bush Fires Act 1954 (BF Act);
2. The consistent legal position is that a Local Government, having exercised discretion to establish a BFB, **must do so by making a Local Law** – ref s.41(1) of the BF Act;
3. The head of power to make a BFB Local Law is under s.62 of the BF Act.
4. The Parliamentary Joint Standing Committee on Delegated Legislation has reported a similar requirement: 'Where a local government elects to establish a bush fire brigade it must do so in accordance with local laws it has made for that purpose' (Ref: Report 16, June 2019 at 2.2)

Relevant Consequences

5. Where a BFBs has been established in the absence of a Local Law, WALGA's legal advice indicates that the registration of the Brigade and Brigade membership under s.41(2) is likely to be invalid;
6. In the absence of a Local Law, the election and duties of BFB officers under s.43 is likely to be invalid.
7. In the absence of a Local Law, the powers of BFB officers relevant to preventing, controlling and extinguishing a bush fire under s.44 is likely to be invalid.

WALGA's requested legal advice on other matters that we believe will provide some reassurances in the short term.

Although not having adopted a BFB Local Law will mean that Brigades are not properly constituted, we have been advised that the appointment of Bush Fire Control Officers will mean that Local Governments can effectively ensure the conduct of normal brigade activities, including responding to bush fires and directing firefighting assets and volunteers.

Our legal advice provides further reassurances that volunteers will be covered for compensation and protected from liability if conducting normal brigade activities under the direction of a BFCO.

Arrangements – Short Term

1. In the short term, Local Governments should ensure that a sufficient number of bush fire control officers (BFCO) are appointed under s.38(1) of the BF Act:
'A local government may from time to time appoint such persons as it thinks necessary to be its bush fire control officers under and for the purposes of this Act, and of those officers shall subject to section 38A(2) appoint 2 as the Chief Bush Fire Control Officer and the Deputy Chief Bush Fire Control Officer who shall be first and second in seniority of those officers, and subject thereto may determine the respective seniority of the other bush fire control officers appointed by it';
2. BFCO's special powers are set out in s.39 of the BF Act and this appointment will also ensure the proper direction of Brigades in responding to a bush fire, as set out in s.44(4) of the BF Act:
'(4) Subject to the provisions of sections 13(6) and 45, where a bush fire control officer of a local government is present at a fire which is burning in the district of the local government, he has supreme control and charge of all operations, and the officers and members of all bush fire brigades present at the fire are subject to and shall act under his orders and directions.'
3. WALGA's legal advice notes that a BFCO could manage a BFB established without a Local Law however this is not recommended as a permanent solution as BFBs will not have direct authority and powers otherwise provided under the BF Act.

Protections

4. WALGA sought legal advice on the application of Part 6B And Part 7 of the Fire and Emergency Services Act 1998 (FES Act);
5. Part 6B applies to compensation entitlements for volunteers engaged in emergency response activities including firefighting;
6. Legal advice is that the compensation provisions will cover a person who engages in volunteer activities by participating in 'normal brigade activities' under the direction of a BFCO;
7. Part 7 applies to protection of persons acting in good faith when performing functions under emergency services Acts, including volunteer firefighters;
8. Similarly, legal advice confirms that a volunteer acting under the direction of a BFCO when carrying out 'normal brigade activities' will be able to rely upon the statutory protection under s.37 of the FES Act.

Arrangements – Intermediate Term

1. The Local Government is required to adopt a BFB Local Law to ensure its Bush Fire Brigades are properly established and Brigade officers are properly registered and empowered.
2. WALGA has developed a template BFB Local Law addressing the BF Act local law-making requirements. This can be made freely available upon request.
3. WALGA can also provide general advice on the local law-making process and the development of a Council agenda item for this purpose;
4. Alternatively, the Local Government can obtain its own legal advice for the purpose of drafting a BFB Local Law.

Validity of Bush Fire Brigades Local Laws (Bylaws)

Introduction

WALGA is assisting the Department of Fire and Emergency Services with communications to Local Governments regarding Bush Fire Brigade Local Laws (BFB LL). WALGA has previously sought and distributed independent legal advice on the contemporary operation of Bush Fire Brigades and the role of appointed Bush Fire Control Officers, in the absence of a Bush Fire Brigades Local Law.

Questions have since been raised by Local Government that adopted, and have not repealed, a BFB LL prior to the commencement of the current Bush Fires Act 1954.

WALGA sought specific legal advice on the following question: “...*whether local laws (bylaws) which validly established Bush Fire Brigades under Bush Fires Act 1937 (WA) validly survive the repeal of that Act and the commencement of the Bush Fires Act 1954 (WA) specifically via the operation of section 36 of the Interpretation Act 1984.*”

Summary of Legal Advice

- Section 6 of the *Bush Fires Act 1954* ‘as passed’ expressly declared that the “repealing and re-enacting of a provision” section of the *Interpretation Act* (s.15 of the *Interpretation Act 1918* (reprinted in 1953) and s.36 of the *Interpretation Act 1984* (WA)) applies to the *Bush Fires Act 1954*.
- Legal advice is that it is apparent at the time of passing the *Bush Fires Act 1954*, Parliament intended for local laws (formerly ‘bylaws’) establishing Bushfire Brigades under the *Bush Fires Act 1937*, to continue to have effect and therefore for those Brigades to continue. However, it is extremely unlikely that the Parliament would have intended those local laws to have continued in place for an extended period.
- Attention then turns to whether the other requirements of the *Bush Fires Act 1954* have been complied with, namely have there been any substantive changes to s.36(d) following the ‘as passed’ Act.
- Legal advice confirms that the clear and ordinary meaning of s.36(d) of the *Bush Fires Act 1954* has not changed in a manner relevant to the issue of establishment of Bush Fire Brigades between 1954 and 2023. Therefore, a local law made under the *Bush Fires Act 1937* which has not been repealed and where a Local Government does not have a local law to a similar effect made under the *Bush Fires Act 1954*, **is likely to still be in force**.
- Legal advice notes that a local law made under the *Bush Fires Act 1937*, whilst valid, may well not be fit for purpose now.

Note: For the purposes of the legal advice obtained, it was assumed that the local laws which established the Bush Fire Brigade under the *Bush Fires Act 1937*, did so validly at the time they came into effect.

Good Governance Considerations

From the perspective of the legal advice received, it might be said that a BFB LL made under the Bush Fires Act 1937 is technically valid but likely to be practically obsolete. In accordance with our previous legal advice, it is therefore recommended that Local Governments with a local law established under the Bush Fires Act 1937:

- a. ensure there are an adequate number of appointed Bush Fire Control Officer to conduct 'normal brigade activities' and manage fires in its district in the short term; and
- b. consider making a local law to establish the Bush Fire Brigade under the Bush Fires Act 1954 and to repeal the local law made under the Bush Fires Act 1937.

Bush Fire Brigade Local Laws – 1954 to 1996

Further investigation of the Government Gazette has identified that many Local Governments have adopted a BFB LL since the commencement of the *Bush Fires Act 1954* and there is no doubt as to the validity of these local laws.

However it is clear that many Local Governments were until recently, unaware of the existence of a BFB LL (for example, the local law is not published on the Local Government's website) and the *Local Government Act 1995* requirement to conduct an 8 year review of local laws has not been applied to BFB LLs. (Please note that the lack of an 8 year review does not invalidate any local law).

WALGA therefore suggests that Local Governments with BFB LLs adopted as bylaws prior to the commencement of the *Local Government Act* in 1996 give similar consideration as to whether this local law remains fit for purpose to the contemporary operation of Bush Fire Brigades within the district.

WALGA Local Laws Service

If you require assistance with any aspect of the local law-making process relating to Bush Fire Brigades, please contact WALGA's Governance & Procurement team at governance@walga.asn.au or call 9213 2514.