

# **ATTACHMENT TO AGENDA ITEM**

**Ordinary Meeting**

**16 February 2016**

<b>Agenda Item 8.1</b>	<b>CFA Schedule 13 Permit To Burn issued to a Person by Council during a Declared Fire Danger Period</b>	
<b>Attachment 1</b>	<b>Legal Advice - Maddocks - Issuing CFA Schedule 13 Permits - 7 July 2015.....</b>	<b>286</b>



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## Advice

<b>To</b>	Peter Gunn Emergency Management Coordinator Greater Shepparton City Council & Moira Shire Council Peter.Gunn@shepparton.vic.gov.au
<b>Date</b>	7 July 2015
<b>Subject</b>	<b>Fire Permits</b>
<b>Questions</b>	<ol style="list-style-type: none"> <li>1. What is the role of municipal councils in granting and issuing a Schedule 13 Permit to Burn (<b>Permit</b>) under the <i>Country Fire Authority Regulations 2014</i> (the <b>Regulations</b>)?</li> <li>2. What constitutes granting and issuing a Permit?</li> <li>3. What is the role of the Country Fire Authority (<b>CFA</b>) in relation to the issuing of Permits?</li> <li>4. Does the immunity in section 94 of the <i>Country Fire Authority Act 1958</i> (<b>CFA Act</b>) apply to Councils when issuing Permits?</li> </ol>
<b>Answer</b>	<p><i>Below is a summary of our advice. Please read it in conjunction with the detailed advice that follows.</i></p> <ol style="list-style-type: none"> <li>5. Municipal councils, through the MFPOs, can issue Permits. The MFPO should do so when satisfied that they are comfortable in determining what conditions and/or restrictions are reasonably required, in addition to those provided for in Schedule 13. The MFPO has a role in considering applications and is not merely acting as an administrative arm of CFA. The MFPO should, however, take advice from the CFA and make enquiries from the CFA about relevant conditions and restrictions.</li> <li>6. The MFPO must determine what conditions and/or restrictions are reasonably required, in addition to those provided for in Schedule 13 and must sign the permit and provide a copy to the relevant Brigade. Our advice also contains guidance on a number of procedural questions.</li> <li>7. The CFA can also issue permits and should provide information and policy guidelines to Councils.</li> </ol>

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8. Councils, and MFPOs will be covered by the immunity provisions in the CFA Act provided that they act in good faith. This means more than an absence of bad faith, as outlined in the advice.
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## Detailed analysis

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### Background

9. Council issues Permits under the Regulations. You have instructed us in writing that:
- 9.1 'This role (function) relates to the declared fire danger periods. During this period the CFA manage a weekly meeting process involving CFA Brigade representatives and Municipal Fire Prevention Officers (MFPO's) to determine if Permits to burn will be issued and if so the conditions to be included in the Permits to burn. During the declared fire danger period this process generally relates to the rural sector and agricultural practices (stubble burning). The MFPO's do not input into decisions relating to these Permits, it is a CFA process. The MFPO's are involved for awareness of the decisions and on request to advise the CFA if Permits are able to be issued by council. At the conclusion of that meeting process community is advised to obtain a Permit from municipal councils, municipal councils then grant and issue a Schedule 13 Permit to Burn to a person. The MFPO does have the ability to include other conditions into a Permit.'
- 9.2 'The CFA does not provide municipal councils with Policy or guidelines relating to the granting and issuing of a Schedule 13 Permit to Burn to a person. The CFA does request that municipal councils implement a process to issue a Schedule 13 Permit to Burn.'
- 9.3 'In the absence of CFA policy or guidelines of what constitutes the granting and issuing of a Permit municipal councils are expected to develop a process that addresses considerations that include, but is not limited too;
- 9.3.1 consideration of all information needed to be provided by the applicant.
- 9.3.2 is the Permit to be granted/issued personally to the person named in the Permit?
- 9.3.3 can the Permit be granted/issued to another person on behalf of the person named in the Permit?
- 9.3.4 can the Permit be granted/issued in any way other than personally such as mail, email or fax?
- 9.3.5 what identification requirements, both of the applicant and the land proposed to be burnt, are to be produced in support of an application?
- 9.3.6 can a Permit that has been granted/issued be re- granted/reissued?
- 9.3.7 how long is a Permit valid for?
- 9.3.8 what should a re-grant/reissue process include?
- 9.3.9 can these Permits be granted/issued on a seasonal basis?
- 9.3.10 are municipal councils obliged to assess an application?
- 9.3.11 to what extent municipal council will assess each application?'

- 9.4 You have further instructed us that:
- 9.4.1 During the weekly teleconferences, CFA representatives discuss Permits and the relevant conditions, but that Council is not provided with anything in writing from CFA:
  - 9.4.2 The guidance provided from the CFA is based on conditions for the following week. Council MFPOs are not provided with guidance about what to do with Permit applications for periods after that week; and
  - 9.4.3 Permit conditions may differ from municipality to municipality and in some cases where a property borders two properties, the CFA will advise that different conditions apply.

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## Legal analysis

### 10. What is the role of municipal councils in granting and issuing a Permit under the Regulations?

#### 10.1 *Issuing Permits*

- 10.1.1 As you know, section 38 of the CFA Act provides that a person can be issued with a Permit during the fire danger period. This Permit enables the person to burn in accordance with a written Permit.
- 10.1.2 Section 38(1) provides that either the fire prevention office of the municipal council (the MFPO) or the Chief Officer can issue such a Permit. There is no requirement for a MFPO to issue a Permit. A Council could, if it chose to, refer all applications for a Permit to the CFA. The CFA Chief Officer, or more likely his or her delegate at a District, would then have to consider Permit applications.
- 10.1.3 A Permit is an instrument for the purposes of the *Interpretation of Legislation Act 1984* (Vic). Section 41A of the Act provides that where an Act confers power to grant an instrument, that power also includes a power to repeal, revoke, rescind, alter or vary an instrument. This means that Council can, if it grants a Permit, amend or vary or cancel that Permit if it sees fit.

#### 10.2 *Conditions and/or Restrictions in a Permit*

- 10.2.1 Section 38A (2) provides that a Permit must contain conditions as prescribed (meaning as listed in section 13 of the Regulations) and '*any further conditions and restrictions which the officer granting the permit may reasonably require*'.
- 10.2.2 It is therefore a matter for the MFPO to form a view about what conditions and restrictions are reasonably required and include them in the Permit. This should include consultation with and seeking advice from the CFA as the subject matter experts with a statutory duty to prevent fires and protect life and property.
- 10.2.3 This consultation can be said to occur during the weekly teleconference. If an MFPO did not include additional conditions and/or restrictions in the Permit when they might be said to be reasonably required, you may not be acting in good faith and therefore the immunity provision in section 94 will not apply, as addressed in 13 below.
- 10.2.4 If a MFPO formed a reasonable belief that they did not agree with the conditions suggested by CFA, it would be open to the MFPO to not follow CFA's advice and choose to impose other conditions or fewer conditions in a Permit.

- 10.2.5 It is also open to a MFPO to include in a Permit a note that a Permit holder who has any questions about their compliance with this Permit should raise questions with the Captain or Senior Officer of the relevant Fire Brigade. It is appropriate to place the responsibility on the CFA given CFA's statutory functions and purposes under its Act referred to above.

### 10.3 *Compliance with a Permit*

We have also addressed Council's responsibility for ensuring compliance with a Permit. In our view Council does not generally have such a responsibility. As discussed, it may be that the CFA has a different view.

- 10.3.1 Our analysis is supported by an examination of the relevant provisions. Section 38(3) of the CFA Act provides that

A person to whom a permit is issued under subsection (1) must comply with each of the conditions and restrictions contained in the permit.

Penalty: 120 penalty units or imprisonment for 12 months or both.

A penalty unit is \$151.61 meaning that the maximum fine applicable is \$18,200.40. Section 46A of the CFA Act provides that police can arrest a person who fails to comply with Permit conditions. It is clear that the primary responsibility for ensuring compliance with a Permit lies with the Permit holder.

- 10.3.2 There is no authority (in legislation or common law) to support the proposition that if a public body such as a local council issues a Permit, that there is an expectation or a duty to ensure compliance with that Permit. This analysis is also supported by the provisions of the CFA Act which do not give councils or MFPOs any inspection or enforcement powers in relation to Permits.
- 10.3.3 Section 48(1) provides that a number of persons can direct a person to extinguish a fire, even if it was lit in accordance with a Permit. Those persons are
- (a) a police officer; or
  - (b) the Chief Officer; or
  - (c) any officer exercising the powers of the Chief Officer; or
  - (d) the captain of any brigade; or
  - (e) any officer of a brigade appointed generally or specially in respect of any district for the purpose of this section.
- 10.3.4 Section 48 does not authorise Council or a MFPO to do direct extinguishment, from which we can conclude that neither a council nor an MFPO could have this responsibility.
- 10.3.5 We also note that section 55 of the CFA Act sets out the responsibility of the Municipal Fire Prevention Committee. It does not provide for any oversight role in relation to the audit or monitoring of Permits.
- 10.3.6 Subsection 38(4) of the CFA Act also provides, in relation to a Permit holder that
- Compliance with the conditions of a permit does not of itself relieve the holder of a permit from liability for any damage sustained by another person as a result of any fire lit by the holder of the permit pursuant to that permit.

- 10.3.7 This section again indicates that Parliament did not intend for Council to have additional responsibilities above the issuing of the Permit.
- 10.3.8 For completeness we note that the CFA publication entitled 'Municipal Fire Prevention Planning Role Statement' dated 9 April 2012 includes a section on the role of MFPOs but does not include any obligation to monitor compliance with a Permit. This document is not legally binding.
- 10.3.9 The only time we think that liability may attach to a council or MFPO to do more than simply issue the Permit would be if a Council was aware of a particular vulnerability that related to the issuing of a Permit, for example a person who obviously did understand their responsibilities, or where there is an extreme risk if a permitted burn got away. We say this because there is High Court authority that where a Council is aware of a particular vulnerability, it may have an obligation to do more in relation to the protection of life and property, by exercising its relevant statutory powers (*Pyrenees Shire Council v Day* (1998) 192 CLR 330 (**Pyrenees**)). The Court has held that where a statutory authority or municipal council has a power which could be exercised for the protection of vulnerable people, it would be negligent for failing to exercise that power and identified fire control as one issue likely to attract such a responsibility (*Sutherland Shire Council v Hayman* (1985) 157 CLR 424).
- 10.3.10 A Council does have powers to take action to prevent risk, namely it could require work be undertaken pursuant to section 41 by issuing a fire prevention notice, or it could request that the Police arrest a person for lighting or maintaining a fire contrary to the provisions of a Permit under section 46A of the CFA Act.
- 10.3.11 In practical terms this means that a Council should be vigilant when issuing Permits to vulnerable members of the community who may lack the capacity or skill in relation to what is required, or in relation to any matters where there is a particularly high risk. In such cases, a Council might be better to refer the matter of the issuing of the Permit to the CFA and the CFA Chief Officer.
- 10.3.12 We recommend that to avoid doubt, a Council should formally adopt a policy that it does not regularly or generally monitor compliance with section 38 Permits. In that policy a Council can note that it does not have a responsibility to do so, and that it does not have the resources to do so. The courts have indicated that they will not impose a duty in such circumstances because it involves an impermissible interference with policies of government bodies (see the Pyrenees case).

## 11. What constitutes granting and issuing a Permit?

- 11.1 Regulation 109 sets out some formal requirements for the granting/issuing of a Permit. In short this regulation provides that:
- 11.1.1 A Schedule 12 Permit is to be used if a Permit is granted to the officer in charge of a (CFA) brigade;
- 11.1.2 A Schedule 13 Permit is to be granted to a person, other than the officer in charge of a brigade, to enable the person to burn off grass, stubble, weeds, scrub, undergrowth or other vegetation (whether dead or alive) or other material;
- 11.1.3 A Schedule 14 Permit is to be used for other cases (which would involve fires for the purposes of converting wood into charcoal or any other fire in accordance with section 38A(1)(b) and (c));
- 11.1.4 The person granting the Permit (the MFPO, Chief Officer or Chief Officer's delegate) must sign the Permit; and

- 11.1.5 Schedule 13 and 14 Permits must be sent by the person granting the Permit to the officer in charge of the brigade in whose brigade area the fire is lit.

11.2 *Procedural issues and Procedural Fairness/Natural Justice*

- 11.2.1 You have suggested 'that the lack of procedural correctness with granting and issuing a Permit could have an adverse effect on a court process' and that there may be a 'risk the lack of correct procedural process could be interpreted as a denial of natural justice.'

- 11.2.2 The provisions of the CFA Act make it clear that a Permit Holder has responsibility for complying with the Permit and that even when a Permit Holder has complied with the conditions of a Permit, they might still be liable for damages for loss by fire (38A (3) and (4)). The responsibility of the MFPO generally extends to considering Permit applications, seeking information from the CFA (as available) and making a decision about whether to issue a Permit and what conditions/restrictions are reasonably required. We do not think a MFPO is generally required to conduct a detailed investigation into all the circumstances of why the Applicant has made the request, or to provide a detailed procedural process to allow an Applicant to challenge a decision of the MFPO.

- 11.2.3 Procedural fairness or natural justice applies depending on the circumstances of the case<sup>1</sup> to provide a person whose rights and interests may be adversely affected with an opportunity to be heard (including by the review of written material) about the decision affecting their rights and interests. In the case of a Permit application if the principle applies it would be satisfied by the MFPO giving appropriate consideration to the Applicant's request. It does not require that the MFPO provide reasons for not granting a Permit or for imposing conditions/restrictions.

- 11.3 You have noted that the CFA has not provided guidance on a number of matters relating to the granting/issuing of Permits (as noted in 9.3 above). Dealing with these in turn:

- 11.3.1 *Consideration of all information needed to be provided by the applicant*

The person granting the Permit (the MFPO in the case of Council) should consider all the information provided by the applicant. A failure to do so may mean that there has been a failure to act in good faith and the immunity provision in the CFA Act will therefore not apply.

- 11.3.2 *Is the Permit to be granted/issued personally to the person named in the Permit?*

Yes. Regulation 110 refers to a 'holder' of a Permit to light a fire. Schedule 13 refers to a Permit granted to 'insert name' to 'light a fire' and notes that 'the person performing the burning operation ... must be in possession of the Permit or a copy of it'. We can therefore assume the holder of the Permit is the person authorised to 'light the fire' and to perform the burning operations.

- 11.3.3 *Can the Permit be granted/issued to another person on behalf of the person named in the Permit?*

No, for the reasoning referred to above.

- 11.3.4 *Can the Permit be granted/issued in any way other than personally such as mail, email or fax?*

Yes. There is no specific requirement that the Permit is issued personally or that the person who is granted the Permit must be provided with the original.

<sup>1</sup> *Kioa v Minister for Immigration and Ethnic Affairs (West)* (1985) 159 CLR 550,585.



Regulation 110 and Schedule 13 both envisage that a person can satisfy the requirement to produce the Permit by producing the Permit or a copy of it.

- 11.3.5 *What identification requirements, both of the applicant and the land proposed to be burnt, are to be produced in support of an application?*

The person granting the Permit (the MFPO) should be satisfied of the name and address of the applicant so that these details of the Schedule 13 Permit can be completed. Schedule 13 also contemplates that the applicant will conduct burning on land where they are authorised to burn, presumably because they are the owner or tenant or that they are authorised by the owner. It would be appropriate to require an applicant to provide proof (by way of address, rates notice or some other note of permission) that they have the relevant authority.

- 11.3.6 *Can a Permit that has been granted/issued be re-granted/reissued?*

Yes, pursuant to the general provision in section 41A of the *Interpretation of Legislation Act 1984* (Vic) about the power to grant, amend, vary or repeal an instrument.

- 11.3.7 *How long is a Permit valid for?*

There is no specific time limitation. It is recommended that the MFPO issue the Permit only for so long as they can be satisfied that the conditions and/or restrictions are reasonably required. For example, it would not be appropriate for a Permit to be issued for a 6 week period if the conditions were only relevant for current weather conditions and fire risk and where it was expected or possible that weather conditions and hence fire risk would change significantly during that 6 week period.

- 11.3.8 *What should a re-grant/reissue process include?*

The person granting the Permit (the MFPO) should be satisfied that they have sufficient information from the Applicant and that they are imposing the conditions and/or restrictions reasonably required.

- 11.3.9 *Can these Permits be granted/issued on a seasonal basis?*

Yes, if the conditions and/or restrictions were able to be said to be reasonably required for the entirety of the season.

- 11.3.10 *Are municipal councils obliged to assess an application?*

No in relation to any specific application. A Council could refer applications to the CFA.

A Council might also choose to refer all applications if it formed the view that it could not make an assessment about what conditions and/or restrictions were reasonably required.

However if a Council (or MFPO) chose to refer all applications for expediency or resourcing issues, the CFA Board might make use of section 45 of the CFA Act. This section provides that the CFA Board may report to the Governor in Council that a MFPO is not properly and efficiently carrying out his or her function and the Governor in Council may transfer that responsibility to some other person.

- 11.3.11 *To what extent municipal council will assess each application?*

A Council, through the MFPO, must assess each application separately to determine if the Permit should be granted and what conditions and/or restrictions are reasonably required for that Permit. A Council, through the MFPO, should seek information from CFA. A Council could not adopt a 'rubber stamp' process to assessing applications. If it did it would not be acting in good faith and hence the immunity provision in the CFA Act may not apply.

**12. What is the role of the CFA in relation to the issuing of Permits?**

You have asked a number of questions regarding the role of CFA. Dealing with these in turn:

*12.1 Is the CFA responsible for developing regulation policy, policy guidelines and the promotion of a consistent approach to support compliance and enforcement?*

There is no formal requirement for the CFA to develop such a policy or guideline. However, given CFA's statutory functions and purposes (referred to above) it is desirable that the CFA do so and that the CFA promotes efficient regulation by a consistent approach across Victoria.

*12.2 Who has the responsibility of developing a procedural process for the granting and issuing of a Schedule 13 Permit to Burn, municipal councils or the CFA?*

Given CFA's statutory functions and purposes and that the Permit process is contained in the CFA Act, this responsibility sits with CFA.

*12.3 In relation to the role of the municipal councils and the MFPO in this process. In practice and on face value municipal councils are seen as providing administrative support to the CFA for the process of issuing Permits during the fire danger period. Converse to this is a view in some areas of the CFA that municipal councils and the MFPO are responsible for aspects of the process including assessing applications and responsibility of compliance and enforcement of conditions and offences relating to these Permits. Does the role of municipal councils extend beyond that of performing an administrative function on behalf of the CFA?*

As addressed above, a MFPO has to exercise his or her own judgement in issuing any particular Permit. This is more than a mere administrative function to support CFA.

It is our view however that, as detailed in 10.3 above, neither the MFPO nor Council has any role in ensuring compliance or enforcement with a Permit, or for prosecution of offences.

The CFA should provide information, as it has been doing, for MFPOs about likely conditions and risks, and appropriate conditions for Permits. The CFA should also confirm this in writing, particularly if the information is provided by way of teleconference, so that all involved have an accurate view of the CFA's advice.

*12.4 The CFA have not provided a standardised application form in support of the process and the Schedule 13 Permit does not include risk adjoining or nearby the land that is proposed to be burnt. The risks on adjoining land are many and include hazardous materials, commercial enterprises, peri urban areas and close proximity to residential and industrial areas, aged car facilities, high value utility service provider assets etc. Does the role of a municipal council in this process include assessing the risk and determining appropriate recommendations for each application?*

Yes. A MFPO should consider these matters as part of determining what conditions and/or restrictions are reasonably required. If the MFPO does not have sufficient information or experience to make this decision, the MFPO could refuse to issue the Permit and refer the Applicant to the CFA.

- 12.5 *In the absence of policy or guidelines from the CFA, what are the considerations and risks to municipal councils in developing their own process?*

A Council could develop their process to address the matters raised in 11.3 above. The process could also address policy issues such as Council's acknowledgement that it will not address compliance and enforcement issues (see 10.3) and that, in some cases, Council will refer applications to the CFA to consider where the CFA is the more appropriate decision maker. It could also include reference to a note to be included in all Permits that a Permit holder who has any questions about their compliance with this Permit should raise those questions with the Captain or Senior Officer of the relevant Fire Brigade.

We note for your consideration that some of the material in the CFA publication *Operating Private Equipment at Fires* found on the CFA website. This document may assist Council in determining some general conditions/restrictions to be included, as reasonably required, in Permits.

- 12.6 *If municipal councils develop and implement processes associated with the granting/issuing of these Permits are municipal councils liable for the risks associated with deficiencies associated with that process?*

Yes, if those processes do not require the MFPO to assess what conditions and restrictions are reasonably required.

**13. Does the immunity in section 94 of the CFA Act apply to Councils when issuing Permits?**

- 13.1 Section 94(1) of the CFA Act does provide immunity to councils and MFPOs. It reads

A municipal council, a public authority and a fire prevention officer of a municipal council, public authority or administrative unit shall not be liable in respect of any loss or damage sustained by any person as the result of the doing of any act matter or thing pursuant to any direction given or permit granted by any such officer pursuant to this Act if such direction or permit was given or granted in good faith.

- 13.2 Section 94(1) would operate to mean that if a person suffered damage as a result of a burn getting away when a Permit had been issued under section 38 by a MFPO, that person could not sue and recover from a council or that council's MFPO.
- 13.3 Section 94(1) operates when a MFPO is acting in good faith. There are common law cases about the meaning of this term, notably *Mid Density Developments Pty Ltd v Rockdale Municipal Council* (1993) 116 ALR 460. In that case the Federal Court held that the question of what is considered to be in good faith involves both a consideration of the subjective intention of the person conducting the activity, and also an objective test as to what a notional or reasonable person would have done in the circumstances, having regard to whether they made an honest attempt to perform the task in question.
- 13.4 Therefore, provided that a MFPO has made an honest attempt to consider relevant matters issues when issuing a Permit, they have acted in an honest way, and have not acted with any misfeasance or lack of good faith, they would be protected by the immunity provision in section 94. A MFPO could be negligent and still be protected. The MFPO would however have to give consideration to information provided by CFA, sought additional information if this was required and made their own assessment as to whether other conditions/restrictions were reasonably required.

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