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using the law to protect the natural and built environment

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Planning Review
Tasmanian Planning Commission
GPO Box 1691
Hobart TAS 7001

By email: planningreview@justice.tas.gov.au

Dear Mr Fischer

Draft Planning Directive #2

The Environmental Defenders Office (***EDO***) is a non-profit, community based legal service specialising in environmental and planning law. We welcome the opportunity to comment on the draft *Planning Directive No. 2 – Underground and Minor Aboveground Infrastructure* (the ***draft Directive***).

The Resource Management and Planning System in Tasmania is designed to encourage public participation and to facilitate sustainable development. These objectives recognise the value of participatory decision-making to achieving sustainable communities. Public participation helps to ensure fairness and accountability, and can contribute issues to the debate that may otherwise be overlooked.

For the reasons outlined in this submission, we strongly oppose the draft Directive on the basis that it does not further these RMPS objectives.

In October 2008, Michelle O'Byrne, then Minister for Planning, announced that a planning directive would be issued to 'facilitate the government's strategy to drought-proof the State'. On 29 October 2008, Mr Sturges, representing the Minister for Planning, told Parliament:

> *The recent decision to issue a planning directive to deal with irrigation pipelines demonstrates the inadequacy of some planning schemes to deal appropriately with this type of infrastructure. As a consequence of the planning directive, applications for permits for public irrigation pipelines in rural zones and council planning schemes will be treated as permitted developments. This means that third-party planning appeals will not flow from decisions in relation to these applications. However, criteria will be developed against which irrigation pipelines will be assessed to ensure that planning, environment and cultural considerations are taken into account. Where environmental and cultural issues are deemed to impact on a proposal, pipelines might have to be realigned or appropriately conditioned to mitigate any adverse impact…. The planning directive… will only apply to public infrastructure.* (House of Assembly Hansard, 29.10.08 – emphasis added)

The Steering Committee report in relation to the review of the Planning System also stated that:

> *a directive on irrigation pipeline approvals with the purpose of standardising their status as permitted developments where they meet prescribed criteria has been forwarded to the RPDC for consideration*. (Feb 2009, para 3.1.2, p28 – emphasis added)

The EDO disagrees that there is any justification for planning instruments to further restrict third party involvement in relation to infrastructure projects. Regardless of that criticism, the draft Directive submitted to the RPDC in fact goes far beyond the objective expressed by the Minister of reducing third party appeal rights in public irrigation projects. In particular, the draft Directive:

- Is not limited to public infrastructure, or to irrigation infrastructure in rural zones. In fact, the draft Directive does not clearly define exactly what infrastructure is subject to the Directive;
- Treats the specified infrastructure as exempt development, rather than permitted development. This not only excludes third party involvement, it effectively denies Councils the opportunity to impose appropriate conditions on the proposed development;
- Does not prescribe any alternative criteria against which proposed infrastructure developments will be assessed.

These criticisms are discussed in more detail below.

We also note that the draft Directive will potentially facilitate significant irrigation projects throughout the State. This will occur despite findings in the National Water Commission's biennial assessment report, *Australian Water Reform 2009*, that the development and implementation of water management plans throughout Australia is "critically inadequate". The report also records an acknowledgement from the Tasmanian government that water management plans will not be finalised in respect of all areas where new irrigation schemes are proposed prior to the schemes being assessed.

Coverage of the Draft Directive

As drafted, the document will allow 'underground infrastructure', 'minor aboveground infrastructure' and 'minor road works' to be exempt from any requirement to obtain a planning permit. There are no definitions of any of these uses.

The Background Paper for the draft Directive states that the document is based on the exemptions provisions in the Common Key Elements Template established under Planning Directive 1. However, the following significant differences exist between the exemptions proposed in the draft Directive and those outlined in the Template:

- The infrastructure exemptions are not limited to provision of infrastructure within the road reserve (Template provision 5.6.3);
- The exemption for minor road works does not exclude works on heritage properties (Template provision 5.6.4); and
- The exemption for minor road works extends to vegetation clearing, which is not included in the Template exemption.

Though examples are given in the draft Directive to illustrate what is meant by the various use and development terms, the examples are not exhaustive. 'Aboveground infrastructure' could extend to a range of developments with

potentially significant impacts, such as large centre-pivot irrigation hubs, high voltage electrical sub-stations and LPG filling stations.

Underground infrastructure could include underground petroleum storage tanks. Under the new *Dangerous Substances (Safe Handling) Regulations 2009*, an underground tank with storage capacity up to 20,000L can be installed on rural land without a handling licence or inclusion on the Register of Notifications. Therefore, without a planning permit, there are few regulations applying to the operation, maintenance and decommissioning of these tanks.

Many planning schemes include exemptions in relation to vegetation clearing for road maintenance, however the proposed draft Directive would potentially extend the exemption to clearing associated with road construction. Vegetation clearing associated with road construction can be significant, and the draft Directive provides no qualifications to the exemption in terms of protecting threatened vegetation communities or important habitats or minimising clearing in Environmental Protection / Skyline Conservation zones. We consider it inappropriate to provide a blanket exemption for potentially extensive land clearing.

Exempt vs permitted development

The draft Directive was initially proposed by the Minister as requiring infrastructure to be treated as permitted development. Provided they meet the Planning Scheme standards, permitted developments must be approved by a planning authority, but may be subject to appropriate conditions. In October 2008, Mr Sturges noted:

> *where environmental and cultural issues are deemed to impact on a proposal, pipelines might have to be realigned or appropriately conditioned to mitigate any adverse impact.*

However, the draft Directive in fact treats underground and minor aboveground infrastructure and minor road works as exempt development. Exempt development does not require *any* permit, and therefore does not provide any opportunity for the planning authority to impose conditions.

The Background Paper notes that infrastructure service providers are required to meet industry codes in relation to corridor planning and maintenance. However, the exemptions provided by the draft Directive are not limited to public infrastructure or industry utility providers. The draft Directive would cover a range of private developments, including the pipeline to supply water to the proposed pulp mill and large irrigation installations by individual farmers.

The Background Paper also notes that it is appropriate to exempt these developments on the basis of their "*low impact nature*". In our view, it is not possible to assert that the exempt uses and developments are '*low impact*' without a clearer definition of what falls within 'underground and minor aboveground infrastructure' and 'minor road works'.

As noted above, vegetation clearance associated with road construction can be extensive. Furthermore, the impact of infrastructure will often be determined by its location. For example, the impact of clearing associated with an underground utility corridor will be significantly higher in areas of native vegetation on exposed ridgelines, than adjacent to an existing road. It is not appropriate to state that *every* underground or minor aboveground infrastructure project, or minor road works will have a low impact.

For these reasons, we strongly believe that the opportunity must exist for a planning authority to impose conditions to address the impacts of specific infrastructure and road developments, including realignment of infrastructure corridors, restrictions on clearing and rehabilitation requirements.

Prescribed criteria

The draft Directive would impose a blanket exemption on infrastructure developments and remove any possibility for a Planning Scheme to provide criteria against which these developments could be assessed.

Some Planning Schemes currently provide exemptions for minor infrastructure, but include qualifications such as:

- The exemptions applies only to public authorities carrying out the work;
- The exemptions may be overridden by a Planning Scheme Overlay, or do not apply in particular zones (e.g the exemption for Minor Utilities does not apply in the Landscape and Skyline Conservation Zone under the *Clarence Planning Scheme 2007*; exemption provisions do not apply to development within a Historic Protection Area under the *Northern Midlands Scheme*);
- Vegetation clearing associated with infrastructure is only exempt if carried out in accordance with an approved vegetation management plan (for example, see cl 6.1.4 of the *Kentish Planning Scheme 2005*).

These kinds of limitations would be lost if the draft Directive was implemented, as the exemptions in the draft Directive apply regardless of the location, the purpose of the works or the nature of the proponent.

Both the Minister's statements and the Steering Committee report indicated that infrastructure developments subject to the draft Directive would be assessed against appropriate criteria. As discussed, infrastructure and road works can have significant consequences and it is important that criteria be adopted to ensure that the environmental, social and cultural impacts of a proposed development can be assessed.

We acknowledge that infrastructure developments will remain subject to other legislation. We also acknowledge that the draft Directive will not remove the need for the proponent to obtain an easement or other access agreement with the landowner to carry out works on any other land required for the infrastructure.

However, it is our view that, in practice, reliance on other legislative regimes will lead to gaps in the assessment of environmental impacts and to reduced options for enforcement. Some examples are described below.

Heritage impacts

Where an infrastructure proposal will impact on a place listed in the Tasmanian Heritage Register, works approval will be required under the *Historic Cultural Heritage Act 1995*.

However, many places of heritage significance in Tasmania are listed in schedules to the relevant Planning Scheme, but have yet to be included in the Tasmanian Heritage Register. Under the draft Directive, if the infrastructure proposal will impact on a heritage place listed in the Planning Scheme's heritage register (but not the Tasmanian Register), no permit will be required. The impact of the proposal on a place of local heritage significance will not be assessed.

This is inconsistent with the Common Key Elements Template which provides that minor road works are exempt "*unless the site or item is on the Tasmanian Heritage Register or listed in the Heritage Schedule in this planning scheme*."

To ensure that heritage issues are appropriately managed, any development at a recognised heritage place should be required to obtain a planning permit.

Vegetation clearing

Where vegetation clearing involves threatened native vegetation communities or threatened species, the proponent may be required to obtain a Forest Practices Plan or a permit to 'take' threatened species under the *Threatened Species Protection Act 1995*.

However, we note with concern the attached article from the latest edition of the *Forest Practices News*. The article states that exemptions for Forest Practices Plans under the *Forest Practices Regulations* will soon be amended to include clearing of trees and threatened non forest vegetation where the clearing is for the purpose of, among other things, electricity infrastructure and infrastructure associated with subdivisions and buildings.

The article notes that the exemptions will only apply where a permit has been issued under LUPAA. If the draft Directive exempts underground and minor aboveground infrastructure from a requirement to obtain a permit, the obligation to obtain a Forest Practices Plan would presumably still apply. However, until the details of the proposed exemptions are available, it is not possible to say with certainty whether *any* assessment will be required for clearing of threatened native vegetation for underground or aboveground infrastructure. This is clearly unacceptable.

Furthermore, clearing of vegetation may be inappropriate for any number of planning reasons not addressed by specific legislative regimes such as those applying to heritage, forestry and threatened species. For example, the clearing may have a significant adverse impact on biodiversity generally, visual amenity or may remove an important barrier attenuating the noise of development on an adjoining property.

As drafted, the Directive will increase the amount of vegetation cleared in Tasmania without any assessment of the environmental and cultural impacts of the clearing.

Notification, Monitoring and Enforcement

Monitoring and enforcement in Tasmania is a major issue, due to the lack of resources experienced by most government agencies. This is particularly true of the Conservation Management Branch within DPIPWE (including the Threatened Species Unit). Without the resources to rigorously monitor impacts on threatened species, critical habitats and vegetation communities throughout the State, the TSU often relies on matters being brought to their attention by Councils or concerned third parties.

Many rural landowners are not able to easily identify threatened vegetation or threatened species habitat on their property. Therefore, while the obligation may exist in the legislation for a proponent to obtain a permit under the *Threatened Species Protection Act 1995* or the *Environment Protection and Biodiversity Conservation Act 1999*, in practice a developer may not be aware that such a permit is required.

If a planning permit is required before works are undertaken, Council officers are able to consult TasVeg maps to identify any issues of concern and may recommend that a developer obtain any further authorities required for the work. We believe that this provides an appropriate level of oversight, and provides an opportunity both for the proponent to be made aware of their obligations, and for the relevant authorities to be advised of potential impacts.

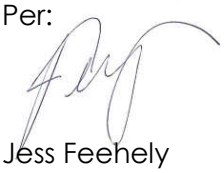
One of the benefits of the *Land Use Planning and Approvals Act 1993* is the opportunity for third party enforcement action in the event that planning instruments are not complied with and the relevant authority fails to take action. If a permitted development is carried out without a permit, or in breach of the permit conditions, an interested third party can seek enforcement orders in the Tribunal to address the breach, including orders to cease work, demolish unlawful structures and undertake rehabilitation work.

In contrast, the *Forest Practices Act 1985* and the *Threatened Species Protection Act 1995* do not allow for third party civil enforcement. That is, where a proponent fails to obtain the necessary permit and the FPA or DPIPWE do not take action to prosecute or require remediation, there is no option for a concerned third party to commence proceedings.

This would be less of a concern if there was a culture of enforcement and adequate resources available for monitoring. However, in our experience this is not the case in Tasmania. For this reason, we are concerned that the draft Directive will reduce the application of LUPAA and remove the option of third party civil enforcement where infrastructure and road works have adverse environmental consequences.

The EDO appreciates the opportunity to make these comments. Please do not hesitate to contact us to discuss anything raised in this submission.

Kind regards,
Environmental Defenders Office (Tas) Inc
Per:



Jess Feehely
Principal Lawyer

Attach: Forest Practices News, September 2009