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Professor Gordon Duff
Chair, Forest Practices Authority
30 Patrick Street
Hobart TAS 7000
By email: info@fpa.tas.gov.au

Dear Professor Duff,

Review of the Forest Practices Code 2000

EDO Tasmania is a non-profit, community legal service specialising in environmental and planning law. Our organisation provides legal advice and representation, community legal education services and engages in law reform to secure best practice environmental regulation outcomes. Thank you for the opportunity to comment on the proposed amendments to the Forest Practices Code 2000 (the *Code*).

Our analysis of the overall operation of the forest practices system, including recommendations to improve the implementation of ecologically sustainable forest management, is set out in detail in the recent report *State Forests, National Interests*.¹ This brief submission addresses only issues related to the content and application of the Forest Practices Code. We would welcome an opportunity to discuss broader regulatory issues with Forest Practices Authority officers.

Planning tools

At the outset, we wish to congratulate the Forest Practices Authority on the comprehensive suite of planning and management tools developed in recent years. The practical guidance provided by these tools is critical to the rigour and consistency of assessments in relation to proposed forest practices. However, in light of the critical role that they play, it would be preferable for those tools to be:

- subject to public input; and
- formally adopted in the Code or *Forest Practices Regulations 2007* to ensure they can be enforced.

We recognise the benefits of maintaining a flexible suite of non-statutory documents that can be readily adapted in light of practical experience or new information. However, without explicit statutory recognition, it is difficult to ensure that the planning tools are fully and consistently implemented.

We support amendments to the Code to refer explicitly to particular guidelines, and recommend that all available tools be explicitly referred to (including any updates to those tools). This would allow the individual guiding documents to be updated without requiring a full review of the Code, while mandating that the current version of that tool be applied in

¹ EDO Tasmania. 2015. *State Forests, National Interests: A Review of the Tasmanian RFA*. Available at <http://www.edotas.org.au/?p=2441>

order to comply with the Code. We strongly urge the Forest Practices Authority to provide opportunities for public comment on proposed updates / amendments to planning tools, and to release supporting documents identifying and explaining changes from previous tools.

We also recommend that directions in the Code relating to the application of guidance documents be strengthened to be mandatory, rather than advisory. For example:

- **Page 59:** Flora Conservation General Principle – should say “Assessment and regulation of impacts on flora values are to be carried out in accordance with the [specify relevant FPA planning tool/s]” [our emphasis]
- **Page 72:** fourth dot point – should say “will be managed in accordance with...” [our emphasis]. This is consistent with the approach taken in the third dot point in relation to Aboriginal cultural heritage. The fifth dot point should also be amended to provide that monitoring will be undertaken in accordance with the *Resource Guide for Managing Cultural Heritage in Wood Production Forests*.

Strengthening the Code by replacing “should” with “must” (or equivalent) will impose clearer obligations and allow for judicial review of decisions made without adequate compliance with those obligations.

The agreed procedures set out in D3.3 should be amended to reflect the current arrangements. As outlined below, we recommend that the duty of care policy set out in the Guiding Principles be amended to ensure that the agreed procedures can result in adequate protection for threatened species and threatened native vegetation communities.

Guiding Policy

We do not object to the insertion of a Guiding Policy to guide implementation of the Forest Practices Code. However, we have a number of comments regarding the content of the Guiding Policy:

Sustainable forest management

The preamble to the Guiding Policy articulates the broad objectives of the forest practices system, as set out in Schedule 7 of the *Forest Practices Act 1985*, and provides context by the UNFAO definition which explicitly recognizes the need to maintain regenerative capacity and not damage ecosystems. This is a welcome recognition of the primacy of environmental values in an assessment of “sustainable” forest management practices.

Against that background, we recommend that clause 6.2.4 be amended to clarify that the application is to take account of social and economic factors only to the extent that environmental values can be adequately protected. For example, the clause could be amended to read:

6.2.4 The Forest Practices Code is to be applied in a manner that provides adequate protection for environmental values, including threatened species and threatened native vegetation communities, having regard to social and economic factors and the legislated wood supply obligations of the Forestry corporation (s.4DA of the Forest Practices Act).

This is a small change, but properly reflects the hierarchy of considerations to be balanced in applying the Code and the UNFAO definition of sustainable forest management. It is also consistent with the statements made in clause 8.3 of the Guiding Policy.

In general, EDO Tasmania does not support the approach of a legislated minimum wood supply, believing that it is contrary to the idea of sustainable management to prescribe a minimum supply irrespective of the environmental impacts of delivering that supply. However, we recognise that is not a matter that can be resolved through the Code review.

Duty of care

We are concerned that the duty of care policy (currently articulated on p52 of the Code and clause 8.4 of the Guiding Policy) is being applied in a manner that compromises sustainable forest management practices.

The “prescribed duty of care” effectively provides that forest practices plans may be subject to the following restrictions:

- Where soil and water values need protection, any required management restrictions;
- Where harvesting may impact on “other significant environmental and social values”,
 - No more than 5% of the area can be excluded from harvesting; and
 - No more than 10% of the area can be limited to partial harvesting.

Any restrictions beyond those levels are “deemed to be for the community benefit and beyond what can reasonably be required of landowners and should be achieved on a voluntary basis through relevant governmental and market-based programs and incentives”. Clause 8.19 of the Guiding Policy confirms that broad forest planning is limited by the operation of the duty of care provision.

We understand the financial impact that harvesting restrictions impose on landowners, and support efforts to allocate more resources to compensating for such restrictions. However, the practical implication of the duty of care provisions is to prevent stronger restrictions, even where proposed harvesting would have significant impacts on threatened species habitat.

The Forest Practices Authority’s view of the operation of s.44 of the *Nature Conservation Act 2002* compounds our concerns regarding the application of the duty of care provision. Essentially, this creates a situation where the FPA is constrained from preventing loss or fragmentation of threatened species habitat as:

- The duty of care prescriptions make it difficult to impose conditions on a forest practices plan to confine harvesting to areas representing less than 95% of the area proposed; and
- If the FPA does attempt to impose more stringent restrictions on advice from the Threatened Species Unit, the landowner can seek compensation for the loss of productive capacity on their land. However, if compensation is not provided (even where the reasons for the refusal of compensation does not relate to an assessment of the needs of the relevant threatened species), the FPA believes it is prevented from subsequently refusing a fresh application for harvesting, even at the minimum duty of care thresholds.

In this way, the application of the duty of care prescriptions is contrary to clause 8.8 of the Guiding Policy, which provides that forest practices will maintain “viable breeding populations and habitat for all species”.

We acknowledge that there are a wide range of management practices that can be implemented to minimise loss and fragmentation of habitat. However, the duty of care prescriptions, as currently applied, unduly inhibit the options that are available to the FPA to protect natural values.

We recommend that the duty of care thresholds be removed from the Code and the Guiding Policy. Compensation provisions will remain available under the *Nature Conservation Act 2002* (and other voluntary programs), and the State government should ensure that adequate resources are available to provide adequate compensation to affected landowners. However, the absence of immediate compensation options should not be a sufficient justification for allowing harvesting that will detract from the conservation and recovery of threatened species.

Cultural heritage

We welcome the statement in clause 8.12 that forest practices will be conducted in a manner that respects and manages Aboriginal and historic cultural heritage. However, this is qualified by “through prescription or reservation in accordance with legislative requirements”. The current *Aboriginal Relics Act 1975* is outdated and ineffective as a cultural heritage management tool – this has been

recognised by successive governments, yet no alternative legislation has been finalised to date.

In our view, restricting management of Aboriginal heritage to current legislative requirements is inadequate. We recommend that clause 8.12 be amended to read

8.12 Cultural heritage

Forest practices will be conducted in a manner that respects and manages Aboriginal and historic cultural heritage. In assessing impacts and determining appropriate management prescriptions, regard will be had to the Resource Guide for Managing Cultural Heritage in Wood Production Forests.

The *Resource Guide* should be updated to reflect ongoing consultation with the Tasmanian Aboriginal community regarding the protection of their cultural heritage.

Visual landscape and amenity

The current provision in clause 8.13 requires only that forest practices have regard to visual sensitivity. The provision should be strengthened to read:

8.13 Visual landscapes and amenity

Forest practices will be conducted in accordance with the Manual for Forest Landscape Management [or any updated tools] to minimise impacts on visual landscapes and amenity values.

Forest carbon

We welcome the recognition of carbon storage opportunities in clause 8.15 of the Guiding Policy. However, the clause refers to “avoiding unnecessary damage to forest growing stock and soils”, rather than any active investigation of opportunities for avoided deforestation.

We acknowledge that the decision to seek compensation for avoided deforestation is for individual landowners to make. However, the Guiding Policy could note that forest planning will have regard to sequestration opportunities. Clause 8.15 should also discuss the management of forest residues.

Climate change

The measures set out in clause 8.18 to address climate change relate primarily to adaptation through using seed banks for regeneration. This clause should be strengthened to ensure that forest planning, including the assessment of whether harvesting should be permitted, takes into account the impacts of climate change on the extent and health of existing habitat, the risk of bushfire and opportunities to mitigate emissions through avoided deforestation.

Monitoring and reporting

We support the commitment to regular and accessible reporting on compliance.

Thank you for the opportunity to make these comments. If you would like to discuss the comments further, please do not hesitate to contact me on 03 6223 2770.

Yours sincerely,
EDO Tasmania



Jess Feehely
Principal Lawyer