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Anne Beach
State Growth
GPO Box 536
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By email: consultation@stategrowth.tas.gov.au

Dear Anne,

Draft Mount Wellington Cable Car Facilitation Bill 2017

Thank you for the opportunity to comment on the *Draft Mount Wellington Cable Car Facilitation Bill 2017* (***the draft Bill***).

EDO Tasmania is making this submission on behalf of our client, Residents Opposed to the Cable Car (***ROCC***). Individual members of our client's organisation may also make independent submissions commenting on the draft Bill.

Ted Cutlan can be contacted (details provided at the end of this submission) for more information about ROCC and its concerns regarding the impacts of the cable car proposal. This submission addresses issues specifically arising in response to the draft Bill.

kunanyi / Mt Wellington is of significance to Tasmanian Aborigines and to the Tasmanian community more broadly. It is rich with cultural values, beloved for its recreational opportunities, home to a diverse range of flora and fauna, and is one of Tasmania's most abundant sites of endemic species. As the Wellington Park Management Plan notes, "[t]he very presence of the Park near Tasmania's largest population centre creates a strong element of 'place', with the Park's topography playing an essential role in the landscape of southern Tasmania".

kunanyi / Mt Wellington is a place deserving of rigorous protection to ensure its values are maintained.

As a general comment, our client is concerned by the State Government's decision to facilitate a cable car development on kunanyi / Mt Wellington through special legislation. While it is acknowledged that a separate planning assessment will still occur under the *Land Use Planning and Approvals Act 1993*, the proponent is being relieved of an obligation to negotiate with the landowner to obtain consent for both the application and access for preliminary work, and given certainty through securing access to public land. There is no justification for this project being afforded special treatment, and there are unwelcome social, environmental and economic consequences from doing so.

ROCC is also concerned by the scope of work that can be authorised under the draft Bill, and the risks this presents to the natural and cultural values of kunanyi / Mt Wellington.

In short, ROCC does not support the draft Bill. The reasons for this are set out in more detail below.

Acquisition for Public Infrastructure

ROCC strongly believes that the cable car is not public infrastructure within the meaning of the *Land Acquisition Act 1993*, and should not be eligible for acquisition by the Crown on behalf of a private developer.

Under s.7A of the *Land Acquisition Act 1993,* "infrastructure" is defined as:

> *any structure, facility or work arising in connection with the provision to the public or a section of the public of services relating to –*
>
> *(a) water;*
>
> *(b) energy;*
>
> *(c) communications;*
>
> *(d) transport;*
>
> *(e) education;*
>
> *(f) health;*
>
> *(g) emergency response;*
>
> *(h) sewerage;*
>
> *(i) any other service which may be prescribed*

Clause 5(1) of the draft Bill provides that the cable car project is to fall within paragraph (i) of this definition – "any other service which may be prescribed" – thereby making it eligible for acquisition by the Crown under Part 1A of the *Land Acquisition Act 1993*.

Part 1A, which provides for acquisition on behalf of private sector developers, was introduced by the *Major Infrastructure Development Approvals Act 1999*. The new Part 1A recognised that, while public infrastructure was increasingly being provided by the private sector, the government "*maintains a very clear responsibility to facilitate [expansion of utility infrastructure"*[1], and therefore should facilitate infrastructure projects through securing land.

Developers for whom land is secured are afforded a benefit generally reserved for the Crown. Use of the land subject to an acquisition order is also strictly limited to the public infrastructure purpose for which it has been acquired. It is therefore essential that limits are placed on the use of these acquisition powers.

As originally drafted, the *Major Infrastructure Development Bill 1999* authorised the Crown to acquire land for projects declared to serve "a public purpose". Following debate in the Lower House, the government sought to amend the Bill to make the definition of "infrastructure" to which the acquisition power would apply more specific. In his second reading speech when introducing the amended legislation to the Legislative Council, Hon Michael Aird stated:

> *It is noted that this change is designed to ensure that designated major infrastructure projects are confined to those utility projects,* ***the provision of public services which previously have been undertaken by government****. The listing of types of utilities in the amended definition of 'infrastructure' highlights this point.*[2] [emphasis added]

The *Major Infrastructure Development Act 1999* was passed in this amended form, and introduced the definition of infrastructure currently in s.7A (as above). While the definition includes "any other service which may be prescribed", it was the clear intent of the government at the time that this be limited to infrastructure required to deliver a public service that would traditionally have been delivered by government.

It is ROCC's view that a commercial tourist venture like the proposed cable car cannot be characterised as such a public infrastructure service. If the draft Bill is passed and a project of this nature prescribed as "infrastructure" within the definition in s.7A, it raises concerns regarding the breadth of projects that may seek similar treatment in future.

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[1] Hansard, House of Assembly. 25 November 1999. Second reading speech, *Major Infrastructure Development Approvals Bill 1999*, Hon Jim Bacon

[2] Hansard, Legislative Council. 1 December 1999. Second reading speech, *Major Infrastructure Development Approvals Bill 1999*, Hon Michael Aird

Cable car project

The definition of "project" in the draft Bill is very broad, encompassing construction not only of one or more cable cars, but facilities related to the operation of such cable cars and "other developments and uses forming part of the project." The scope of use and development that may form part of the project (such as car parking, retail and food services, shuttles) is unclear.

ROCC maintains that it is not appropriate for specific legislation to facilitate a private commercial development, particularly where the powers created by the legislation are not confined to a clearly defined project. If the draft Bill was to be passed with the existing broad definition, it could have the following implications:

- Due to the absence of any time limitation on the operation of the Act, the acquisition and authorisation powers may apply to multiple cable car projects in various locations and by different proponents over time.
- By allowing the Minister to authorise a wide range of activities "in relation to the project", arguably overriding assessment requirements under other legislation (see below), a broad range of disruptive activities could be authorised on both private and public land without appropriate assessment.
- Acquired land may be used only for the purpose of the cable car project (unless the Minister allows otherwise). This raises the prospect that, for up to 10 years, large tracts of acquired land within Wellington Park may not be used for recreation, mountain biking, small scale food services or similar uses. Given the economic risk that the cable car project will not proceed (even if approved), this is a significant period to effectively sterilise the use of public land.

Landowner consent

Under s.52(1B) of the *Land Use Planning and Approvals Act 1993*, a development application relating to land owned by a local council must be accompanied by the written consent of the general manager.

Landowner consent was previously required for all development applications, whether on private or public land. In relation to private land, this was amended by the *Land Use Planning and Approvals Amendment Act 2001* to require only that landowners be notified in writing. In introducing the amendments, the Hon David Llewellyn noted:

> *This change will not, of course, affect the ultimate rights of landowners to determine if a development on their land should or should not proceed... However, in order to protect the public interest, the proposed change will not affect crown land or land owned by a council. In such cases, and unless the planning scheme does not provide otherwise, written consent from the minister or the mayor respectively will still be required.*[3]

This statement raises the following key points:

- It is in the public interest for the manager of public land to retain the right to refuse landowner consent; and
- Landowners should generally retain the ultimate right to determine access to their property, even where a planning permit has been issued.

Consent to development application

Clause 4 of the draft Bill proposes to exclude the cable car project from the obligation under s.52(1B) to obtain consent from Council to the making of a development application. The Minister maintains that the landowner consent requirement is creating an unnecessary impediment to the cable car project progressing to assessment.

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[3] Hansard, House of Assembly. 19 June 2001, Second reading speech, *Land Use Planning and Approvals Amendment Bill 2001*. Hon David Llewellyn. Note: The requirement for mayoral consent was subsequently amended to require consent from the general manager of Council.

Hobart City Council has recently sought legal advice to clarify s.52(1B), and demonstrated that it understands the inherent limitations of the role of landowner consent and the need for this administrative function to be exercised responsibly by the general manager.

There is nothing to suggest there is any risk that Hobart City Council or Glenorchy City Council would not exercise their powers appropriately in relation to the cable car project. In his report to the Special Governance Committee meeting on 24 July 2017, the General Manager of Hobart City Council states:

> The Government has not tested whether the General Manager will provide the consent required in s52(1B) of the *Land Use Planning and Approvals Act 1993* and therefore is this provision really required?

There is no justification for exempting the cable car project from the requirement to obtain landowner consent from the relevant Council.

Consent to acquisition order

Even if there was evidence that the landowner consent requirements under s.52(1B) were unreasonably preventing assessment of the cable car project (which ROCC disputes), the draft Bill goes beyond the removal of that impediment.

Clause 5(2) of the draft Bill also removes the requirement for the proponent, prior to an acquisition order being made by the Minister, to provide evidence of landowner consent to the acquisition or an explanation as to why consent could not be obtained.

By allowing the State government to acquire the land required for the project, without any evidence as to the relevant Council's willingness to allow the development to proceed, the draft Bill facilitates the removal of Councils' right to ultimately determine whether to allow access to property within Wellington Park under their control.

Again, ROCC does not believe there is anything justifying this level of intervention by the State government, and cannot support the draft Bill.

Authorisations

ROCC notes that development of the cable car project itself will be subject to the *Land Use Planning and Approvals Act 1993*. However, cl. 7(1) of the draft Bill allows the Minister to grant the proponent an authority to "*enter land, and to carry out on the land activities, including testing, that are reasonably required to be carried out*" before applying for a planning permit.

Clause 7(3) provides that an authority granted by the Minister will authorise entry and carrying out of activities "*despite any other Act*".

These provisions raise two principal concerns:

- The power to authorise entry and activity is not limited to Crown land, or land subject to an acquisition order, or to a final footprint for the project. If a number of potential sites, routes and scales are being considered for the cable car, rather than the proponent having settled on a specific design and location, the area of land "in relation to" the undefined project could be vast.
- A range of statutory permissions may be required in relation to preparatory work associated with the cable car project, such as permits to disturb threatened species, planning permits for earthworks, geotechnical surveys or vegetation removal, permits from the Wellington Park Management Trust to conduct works, authority to close a road, or approvals under the *Aboriginal Relics Act 1975*.

The draft Bill could be interpreted to allow authorisations granted under the Bill to override these other statutory assessment and approval requirements. Such authorisations can also be made without any consultation with Wellington Park Management Trust or planning authorities. This is inappropriate and, for the reasons outlined above, unwarranted.

Any development on kunanyi / Mt Wellington must be subject to rigorous, transparent assessment and opportunities for public comment and appeal. ROCC strongly opposes the intent of the draft Bill to allow the Minister to authorise development outside the usual statutory processes and the detailed management plan developed for the mountain.

For the reasons outlined above, ROCC is strongly opposed to the introduction of the *Mount Wellington Cable Car Facilitation Bill 2017*, and urges the government to abandon the draft Bill.

Please do not hesitate to contact me or ROCC representative, Ted Cutlan, if you would like to discuss any issues raised in this submission.

Kind regards,

EDO Tasmania

Jess Feehely
Principal Lawyer

Copy to: Ted Cutlan, ROCC - [redacted]