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Chairperson,
State Biodiversity Committee,
Nature Conservation Branch,
DPIWE,
GPO Box 44, Hobart, Tas.
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17 September 2001

Dear Sir/Madam
Re: *Draft Nature Conservation Strategy*

Thank you for the opportunity to comment on the above.
The EDO is a non-profit, community based legal service specialising in environmental law. Our comments will therefore concern primarily the legal aspects of the draft strategy and recommendations.

Statutes and Planning

We support all the recommendations in part 2 of the strategy and make the following additional comments:

1. There needs to be simplification and consistency of application of legislative planning processes across the board. All state environment and planning legislation should be consolidated and brought within the RMPS. Separate tribunals, such as the Forest Practices Tribunal, should be incorporated into the Resource Management and Planning Appeals Tribunal. Exemptions afforded to particular primary industries from the RMPS, i.e. forestry, mining, aquaculture, are anachronistic and do not enjoy broad community support (eg see goal 21 of the Tasmania Together benchmarks). All such exemptions should be removed and the planning processes for land use and development should allow for public participation and review regardless of industry type.
2. We support the creation of the "Nature Conservation Act" through consolidation of the National Parks and Wildlife Act and the Threatened Species Protection Act.
3. The definition of "take" within the threatened species protection legislation should be extended to specifically include significantly damaging or destroying identified habitat of a threatened species, thereby making it an offence to engage in such conduct without a permit.
4. The legislation should include provisions similar to Division 14 of the (Commonwealth) Environmental Protection and Biodiversity Conservation Act enabling interested persons to apply for an order through the Resource Management and Planning Appeals Tribunal restraining a person from engaging in conduct that contravenes the Act. The definition of "interested person" afforded standing to apply for

such an order should mirror the definition in the Commonwealth EPBC Act. As with Section 478 of the EPBC Act there should be a specific prohibition on the Tribunal requiring an undertaking as to damages as a condition of granting the order restraining contravention.

5. The issuing of a permit to "take" a threatened species should be subject to review by the RMPAT. Interested persons as defined above should have standing to appeal the issuing of such a permit or otherwise participate in the permit application process.
6. Where a development that requires a council permit (or other form of planning approval) could impact on threatened species there should be a requirement that the application include a "species impact statement" or the like. The application and review process for a permit to take threatened species and development permits should be capable of being consolidated and/or dealt with together. All municipal planning schemes should be amended to incorporate the process.

7. No industry or land use activity should be exempt from any of the key provisions of the Act.

Vegetation Clearance

8. We support the recommendations with respect to land clearance generally however we feel there are problems with making the Forest Practices Board (in its current form) primarily responsible for overseeing and enforcing all land clearance control.

9. The Forest Practices System, of which the Forest Practices Board is a central feature, is self-regulatory – see Schedule 7 (a) Forest Practices Act. Employees and executives of commercial forestry companies (including Forestry Tasmania) make up the bulk of Forest Practices Board members and Forest Practices Officers. Effectively the Forest Practices System is formulated by the forestry industry, for the industry and enforced by the industry. The dominant consideration of the forestry industry is to maximise the availability of forests for commercial production. For the industry, protection of threatened species and ecological values will always be ancillary to commercial considerations.

10. The focus on resource security over nature conservation is manifest in various aspects of the Forest Practices System and its operation. For example, there is the total absence of any process of review enabling third parties to appeal the approval of a forest practices plan or to take action to secure compliance with the Act or Forest Practices Code. This is in stark contrast to the position of applicants seeking approval of a Forest Practices Plan who, if such plan is amended or rejected by the Board, can appeal to the Forest Practices Tribunal.

11. Under the Forest Practice Systems "duty of care policy" designed to protect threatened and inadequately reserved flora and fauna, landowners can only be required to reserve up to 5% of existing forest on the property for conservation purposes regardless of the ecological elements present (see pages 52 and 64 of the Forest Practices Code). This is inadequate.

12. The environmental protection prescriptions contained in the Forest Practices Code, particularly with

respect to threatened fauna and flora, are expressed in very broad and generalised terms. Prescriptions often consist of a series of elaborate (and circular) internal consultation procedures that ultimately seem designed to avoid conservation of vegetation.

13. The effectiveness of the Forest Practices System's environmental protection measures is, in many aspects, unsubstantiated through long-term research; yet it is relied on to justify accelerating levels of native vegetation clearance and to allay public concern over native forest logging.

14. Leaving aside the effectiveness Forest Practices Code prescriptions to protect the environment, the degree of compliance with, and enforcement of those prescriptions is also an issue of concern. The self-regulatory nature of the Forest Practices System means that often the company undertaking forest practices employs the forest practices officer with responsibility to certify the forest practices plan and to enforce compliance. A conflict of interest exists that inevitably places such officers in an untenable position if required to report serious breaches (on the part of their colleagues), when such reporting could negatively impact on their employer's interests and reputation.

15. Logging contractors are usually paid by the tonne so there is also a pecuniary disincentive to comply with a requirement in a forest practices plan to cease harvesting in order to protect a particular species of fauna or flora like, for example, a requirement to stop work and report the discovery of a Wedge Tailed Eagle's nest. Where compliance with the forest practices plan is largely left to the particular contractors carrying out the work, they are unlikely to report a breach that could result in some form of penalty to them or the company employing them.

16. If the self-regulatory Forest Practices System is to apply to non-forestry land clearing there are also ramifications under the National Competition Policy. To illustrate, vegetation clearance as part of a farming or tourism venture will need planning approval through a process controlled by the commercial forestry industry. If different commercial policies and objectives between the industries conflict then forestry companies, through their representation within the Forest Practices System, are placed in a position of unfair advantage.

17. These issues can only be overcome if the commercial and policy/regulatory functions of the forestry industry are separated at both the ministerial and agency level. Perhaps this could be achieved by establishing an independent native vegetation management agency (possibly within DPIWE) with responsibility for regulating all vegetation clearance including the development of codes of practice similar to the Forest Practices Code. The agency should have jurisdiction over all native vegetation clearance activities, including forest practices on both private and public land and be responsible for approving forest practices plans. Municipal planning schemes throughout the State should be amended to incorporate the vegetation clearance approval process.

18. Regulation of native vegetation clearance must also be transparent and publicly accountable. The best way to ensure this is to enable public participation in planning and review processes. With the removal of exemptions for forestry under the RMPS (particularly the abolition of Private Timber Reserves) all vegetation clearance on private land will be subject to planning control enforcement under Part 4 of the

Land Use Planning and Approvals Act, which provides for public participation through planning appeals and civil enforcement provisions.

19. For proposed forest practices on public land (i.e. state forest) an application for approval of a forest practices plan should be publicly advertised and open to objection and appeal to RMPAT in the same way a discretionary development permit is under LUPAA. There would no doubt be significant political opposition to this, however given state forest is supposedly public land, there is perhaps greater justification for public review of its management than in any other case.

20. The Forest Practices Act (or its replacement) should also incorporate civil enforcement provisions with respect to the Forest Practices Code similar to S. 48 of EMPCA and S. 64 of LUPAA.

General

21. Legislation governing all key industry sectors mentioned in the discussion paper should be incorporated into the RMPS and contain public participation provisions as outlined above. Public participation ensures transparency and gives the community a stake in land management making nature conservation more likely to be achieved with community support.

We have attached a copy of a recent decision of the Resource Management and Planning Appeals Tribunal dealing with the issues of forestry and threatened species. We include it because it is one of the first planning appeals to comprehensively examine the issue. It also demonstrates how such issues can be effectively determined through the planning appeals process.

In this case the developer has applied to have the area of land declared a Private Timber Reserve under the Forest Practices Act. This would exempt the development from requiring a planning permit thus rendering the outcome of the appeal practically irrelevant. Thus, the case is also an example of the deficiencies in Tasmania's environmental planning system that, we submit, need to be rectified through the Nature Conservation Strategy.

Yours Faithfully
Environmental Defenders Office (Tas) Inc.
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Stephen Hall
Principal Lawyer