edotasmania
using the law to protect the natural and built environment

131 Macquarie Street
Hobart TAS 7000

tel: (03) 6223 2770
email: edotas@edotas.org.au

20 September 2019

Mr John Ramsey
Chair, Forest Practices Authority
30 Patrick Street
Hobart TAS 7000

By email: ***code_review@fpa.tas.gov.au***

Dear Mr Ramsey

Draft Forest Practices Code 2019

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 draft Forest Practices Code 2019 (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] We also attach our comments on the draft Forest Practices Code 2015, as the majority of those comments remain relevant.

This submission addresses only issues related to the content and application of the Code. We would welcome an opportunity to discuss broader regulatory issues with Forest Practices Authority (**FPA**) officers.

In summary we support:

- the clarification of the scope of the Code to ensure that it applies irrespective of whether or not a Forest Practices Plan (***FPP***) has been certified;
- the inclusion of a mandatory statement in all FPPs that references the Code and thus clearly links the Code to an enforceable instrument;
- the requirement that a standardised map be included in all FPPs.

We object to the removal of:

- The Preamble Part A;
- The reference to the general environmental duty under the *Environmental Management and Pollution Control Act 1993* (**the EMPC Act**);
- References in the Duty of Care provisions to "All measures that are required under relevant legislation (Table i)";
- Emphasis on sustainable outcomes in the Code, for instance at 380-382.

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

We also recommend that certain "should" statements be made "will" statements. This is relevant to the mandatory statement required by the draft Code that all FPPs will comply with the Code.

Our detailed submission, including why we make the above objections, are set out in the Appendix to this letter.

Thank you for the opportunity to consider the review of the Forest Practices Code. If you would like to discuss any aspect of this submission further, please do not hesitate to contact me on 03 6223 2770.

Yours faithfully

Nicole Sommer
CEO & Principal Lawyer
EDO Tasmania

Appendix – Detailed submission and objections

Preamble & general environmental duty

We object to the removal of the reference to Schedule 7 of the Forest Practices Act 1985 (**FP Act**) and to the general environmental duty under the EMPC Act.

Our objection to the removal of these provisions is because unless included in the Code, a landowner is not made aware of these obligations and in relation to Schedule 7 is arguably not bound by the obligations. Only an FPP binds a landowner under the FP Act.

Schedule 7 provides the context for the forest practices system. It states that the objective of the forest practices system is to deliver *inter alia* the "conservation of threatened native vegetation communities" (clause eb). The Code is otherwise lacking without this explicit statement.

Further, Schedule 7 is the foundation of forest management practices in this State. Retention of this in the Code provides a landowner with appropriate guidance of what is expected of them (and the FPA Officer) in preparing an FPP and in conducting forestry operations.

Forestry operations also have an intersect with the EMPC Act and all landowners are bound by the general environmental duty. By way of example, forestry operations can create pollution of waterways through run-off and inappropriate riparian practices. The general environmental duty is therefore relevant to provide context to the other management requirements of the Code and should be retained.

Duty of Care provision

We submitted in relation to the 2015 Code that it should not include the duty of care provisions, as these provisions limit the discretion available to the FPA in particular in relation to threatened species and communities. We adopt that submission and say this should be removed from the Code.

If the duty of care provision is to remain in the Code, it must be amended. We expressly object to the removal of references in the Duty of Care provision to "All measures that are required under relevant legislation (Table i)".

If retained, the 5% or 10% requirement should be for general natural values, but not for threatened species or communities. The 2015 Code states that (p64):

> *The conservation of threatened species and threatened native vegetation communities may be achieved by reservation or prescription in accordance with the duty of care policy, voluntary arrangements such as the Private Land Reserve Program, or through legislative processes as mentioned above.*

The 2015 Duty of Care provisions require:

> *The contribution of forest owners to the conservation of environmental and social values and the sustainable management of Tasmania's forests is determined by:*
>
> 1. *All measures that are required under relevant legislation (Table (i)); and*
>
> 2. *The prescribed duty of care under the Forest Practices Code, which includes:*
>   - *All measures required to protect soil and water values as detailed in the Forest Practices Code; and*

- *The exclusion of forest practices from areas containing other significant environmental and social values at a level up to an additional 5% of the existing and proposed forest on the property for areas totally excluded from operations or at a level of up to an additional 10% where partial harvesting of the reserve area is compatible with the protection of the values.*

The conservation of values beyond the duty of care in the Forest Practices Code is deemed to be for the community benefit and beyond what can be reasonably required of landowners and should be achieved on a voluntary basis through relevant governmental and market-based programs and incentives.

This means that under the 2015 Code the Duty of Care provision requires:

- soil and water values to be protected through complying with the management requirements of the Code; and
- an exclusion of 5% or 10% of land depending on management practices; and
- the protection of any threatened species through a relevant Act (including under the Code); and
- the protection of threatened native vegetation communities as required by s.19(1AA) of the *Forest Practices Act 1985* (**FP Act**).

However, under the draft Code, the duty of care provision only requires measures relating to soil and water values to be complied with and the exclusion of 5% or 10% of land. It does not require any consideration of threatened species or communities.

We object to this change. This changes the duty of care provisions in a fundamental way and imposes a lower duty of care than the current 2015 Code.

Lower duty of care affects compensation

First, it changes whether compensation is required under s41A(1)(a) of the Nature Conservation Act, and the calculation of that compensation under s42(2)(c)(va).

Section 44(1)(a) of the *Nature Conservation Act 2002* specifically allows for compensation for "affected landowners" where:

> *the conservation determination has the effect of requiring the landowner to exercise a higher duty of care for the conservation of natural and cultural values on the relevant land that is required under the Forest Practices Code as in force at the date of the determination*

Therefore, a refusal under the draft Code, if made on the basis of listed threatened communities or threatened species will trigger compensation under the Nature Conservation Act where it presently should not, on our reading.

Under the 2015 Code arguably compensation is not triggered where reservations are made for threatened species or communities because legislative requirements are included in the duty of care provisions.

If the change were to be made, it would have a flow on effect of discouraging the FPA from refusing or amending plans on this basis. The FPA will instead work to bring the reserved area into line with the 5% or 10% requirement.

We do not believe that is what is intended for the Code by the FP Act or the Nature Conservation Act.

The Nature Conservation Act provides that legislative restrictions are relevant to determining the amount of compensation payable. That is, if there is no restriction on clearing, the level of

compensation necessarily increases.

The Nature Conservation Act indicates that a forest practices code can provide for restrictions on clearance and conversion of threatened vegetation communities (s42(2)(c)(va) of the Nature Conservation Act) and "government restrictions" relating to threatened flora and fauna species (s42(2)(c)(v) of the Nature Conservation Act). We infer the latter includes any restrictions under the Code. Both form of restriction is then relevant to the level of compensation payable under s42 of the Nature Conservation Act.

We say that the FP Act and Nature Conservation Act should be read together.

What is required of the Code is to identify the circumstances in which reservation may be required, in order to preserve:

- Listed threatened flora and fauna species;
- Listed threatened native vegetation communities;
- Soil and water values, including riparian vegetation;
- Other natural and cultural values, which must include landscape/visual values, aboriginal heritage and geomorphic values.

Higher duty of care not achieved through voluntary & other mechanisms

Second, it is not correct to say that the Code or FPA cannot reasonably require a higher duty of care from landowners. It is also not correct to say that such higher duty of care can only be achieved through "voluntary mechanisms, governmental or market-based programs or compensation mechanisms where available".

A higher duty of care can and should be provided through FPPs consistent with the FPA's obligations under the FP Act and Nature Conservation Act. This can only be the case if a higher duty of care is allowed for in the forest practices code.

Criteria for assessment and threatened native vegetation communities

Third, it is inconsistent with the FPA's requirements under s19(1AA) of the FPA. Section 19(1AA) of the FP Act requires the FPA not to certify a plan involving clearing of a threatened native vegetation community unless certain requirements are met. Section 19(1AA) states:

> *(1AA) However, the Authority is not to certify a forest practices plan involving the clearance and conversion of a threatened native vegetation community unless the Authority is satisfied of one or more of the following:*
>
> *(a) the clearance and conversion is justified by exceptional circumstances;*
> *(b) the activities authorised by the forest practices plan are likely to have an overall environmental benefit;*
> *(c) the clearance and conversion is unlikely to detract substantially from the conservation of the threatened native vegetation community;*
> *(d) the clearance and conversion is unlikely to detract substantially from the conservation values in the vicinity of the threatened native vegetation community.*

Yet, the draft Code indicates that all that is required of landowners is to meet the Duty of Care obligation is to comply with the water and soil requirements of the Code and reserve only up to 5% or 10% (as relevant) of the total area to be cleared under the FPP. It says nothing of the requirement in s19(1AA) of the FP Act.

In fact, the draft Code does not detail the requirements for threatened species and communities:

- The draft Code specifies as requirements for threatened native vegetation communities (at 2826-2830) only the legislation and duty of care requirements.
- For State listed threatened species, the draft Code says these will be managed under the "Agreed Procedures", defined as the 'Procedures for the management of threatened species under the forest practices system'.
- There is no management requirement for Commonwealth listed threatened species.

Going to the Agreed Procedures, this documents indicates how DPIPWE and FPA will work together in the assessment of a FPP. It does not specify criteria for particular species or general criteria to assist in this assessment.

The Agreed Procedures indicate that all threatened species habitat will fall within the 5%/10% thresholds. The Agreed Procedures also indicate that both DPIPWE and the FPA will work to bring any threatened native vegetation communities reserved within the 5%/10% limit. The Agreed Procedures expressly indicate that compensation will be payable for anything above that limit.

The draft Code does not reference the Agreed Procedures for threatened native vegetation communities. And yet, that is primarily what the Agreed Procedures is addressed to (see Flowchart on page 6).

In our submission, the way in which threatened native vegetation communities is addressed in the draft Code and Agreed Procedures is inconsistent with the FPA's obligation under s19(1AA) of the FP Act. Likewise, the way in which threatened species is dealt with means that it does not provide any reasonable protection to habitat for these species.

<u>Recommendation</u>

For these reasons, we recommend that the Code prescribe:

- circumstances in which more extensive reservation may be required or an FPP may be refused;
- requirements for protection of threatened native vegetation communities and criteria for assessment under s19(1AA) of the FP Act;
- requirements for protection of habitat for threatened species, both flora and fauna.

We recommend that such criteria differentiate between the three values we have identify above.

As an example of a criterion that might be used, the Code might say that an FPP may be refused or a duty of care may be required of the landowner where the FPP involves clearing of habitat for threatened species or communities that are listed as critically endangered under the EPBC Act, such as the Swift Parrot or the recently listed Ovata Forest and Woodland ecological community. There is substantial evidence that harvesting practices are impacting on Swift Parrot habitat, which is unacceptable.

We are willing to work with the FPA on the appropriate wording of any such criteria.

<u>Summary</u>

In summary, the provisions relating to biodiversity management are lacking. The amendments represent a missed opportunity to identify prescriptions and management actions to better protect biodiversity.

In particular:

- There are no management prescription on how to preserve threatened ecological communities listed under the Nature Conservation Act
- There is no management prescriptions prescribed for threatened flora or fauna
- There is no management prescriptions for habitat for threatened flora or fauna.
- The duty of care provisions in D4 do not identify protection of threatened species or communities as forming part of the duty of care.

This is critical in circumstances where:

- The Regional Forest Agreement acts as an approval for all forestry operations under the *Environment Protection and Biodiversity Conservation Act 1999*;
- An FPP exempts a person from the offence provisions under the *Land Use Planning and Approvals Act 1993* (LUPA Act), the *Wildlife (General) Regulations 2010*[2], the *Threatened Species Protection Act 1995*;[3]
- Compensation from refusal of private timber reserve applications is dependent on the restrictions in the Forest Practices Code, namely the duty of care provisions[4] and the restrictions relating to threatened flora and fauna,[5] listed threatened ecological communities[6], and natural and cultural values.[7]

Clarity around planning tools

The planning tools that are to be incorporated should be clarified. What is meant is not sufficiently certain so as to be enforceable. For instance, at 412-414 the draft Code states:

> *Soils, water and air, site productivity, biodiversity, landscape, cultural heritage and landforms are potentially affected by forest practices and will be considered at the planning stage, using the evaluation processes detailed on the FPA website*

While we agree that these issues are required to be considered, if we go to the tools on FPA website, they are vague and do not prescribe evaluation processes. For instance, for biodiversity, the FPA website references various identification tools. Identification is a helpful starting point at the planning stage. However, it does not inform you what might need to be protected and how to evaluate what is important. There are no criteria specified and is entirely up to the forest practices officer to "evaluate" how those issues are to be considered.

The same comment applies to 426-427 which states:

> *The FPA's evaluation sheets for natural and cultural values, available on the FPA website, will be used in the FPP preparation process (see D).*

Again, there are no evaluation sheets that we could see on the website.

If there are evaluation sheets, they should be clearly identified in the Code by name. These evaluation sheets should also then be identified clearly and available on the website.

Language is important. It assists forest practitioners using the Code, ensuring that forest owners and officers are clearly put on notice as to what the requirements are. The ability of the FPA to enforce the Code in certifying plans and in the courts depends on it.

---

[2] Regulation 35(3)(a) of the *Wildlife (General) Regulations 2010*
[3] Section 51(3) of the *Threatened Species Protection Act 1995*
[4] Section 41A(1)(a) of the *Nature Conservation Act 2002*
[5] Section 42(2)(c)(v) of the *Nature Conservation Act 2002*
[6] Section 42(2)(c)(va) of the *Nature Conservation Act 2002*
[7] Section 42(2)(c)(vb) of the *Nature Conservation Act 2002*

Mandatory provisions

We support the use of mandatory provisions, however we recommend that "will" be changed to "must" for clarity and to ensure these provisions are enforceable.

In the draft Code, provisions relating to protection of the environment are "should" statements and not enforceable where other provisions are "will" statements. We have not undertaken the exercise to determine whether this is consistent with the 2015 Code.

We are concerned that any reference to cultural and natural values is a "should" statement and therefore discretionary.

We consider that there are certain provisions that should be "will", as set out below. Where a discretion is needed, an exception should be made.

We suggest that "should" be replaced with "will" as follows, with rewording where necessary to provide for some flexibility:

- At 212, replace "should" with "will". There is no reason that forest practices cannot be conducted in a manner that maintains sequestration of carbon storage. Indeed, now that forestry is included in the State's climate accounting under the LULUCF procedures, forestry practices must ensure sequestration is addressed.
- At 419 – replace "should" with "will". This is a general principle, which is already not mandatory.
- At 476 – replace "should" with "will". There is no reason FPPs and the Code should not be kept on site while the forestry operation is in progress.
- At 492 – replace "should" with "will". Boundaries must be clearly described.
- At 517 – replace "should" with "will". It is important that neighbouring landowners and councils be informed well in advance. There can be no practical reason why this should not be mandatory.
- At 518 – replace "should" with "will". It is important that "affected parties" be provided with information on request. This requires a person to first demonstrate that are affected, which will remove risk of vexatious requests.
- At 566 – replace "should" with "will". "New roads <u>will</u> be located to avoid unstable areas and locations where important natural and cultural values are known to be present <u>unless impracticable</u> – all this requires is "avoidance" of those areas and provides an exception.
- At 585 - replace "should" with "will". Rocky or exposed knolls "will" be avoided, as they may be important for threatened 585 species or threatened native vegetation communities or be visually sensitive.
- At 598 - replace "should" with "will". Watercourses should be protected by ensuring that crossings are in accordance with good practice. If this is not mandatory, it has the potential to impact water quality and have downstream impacts.
- At 609 - replace "should" with "will". Same comments apply as 598.
- At 626 - replace "should" with "will". This only requires "consideration" and the matters to which consideration must be given include environmentally sensitive sections of road and water crossings.
- At 722 - replace "should" with "will". This already has a qualifier of "where practicable".
- At 820 - replace "should" with "will".
- At 861 & 866 - replace "should" with "will". This should be mandatory to ensure protection of watercourse values.
- At 897 - replace "should" with "will". There is already the qualifier of "where required".
- At 901 - replace "should" with "will".
- At 929 - replace "should" with "will". This only requires "consideration".
- At 948 - replace "should" with "will". There is already the qualifier of "be minimised".
- At 995, 998 & 1001 - replace "should" with "will". There are already qualifiers of "be minimised" and "where possible". It is a "general" requirement.

- At 1104 - replace “should” with “will”. There is no reason not to manage a quarry consistent with the Quarry Code of Practice.
- At 1106 - replace “should” with “will”. There is already a qualifier of “be minimised”.
- At 1138 - replace “should” with “will”. “When work on any quarry or borrow pit commences: the area of disturbance and vegetation clearance will be kept to the minimum necessary (accepting that trees adjoining the 1140 site may need to be removed for safety reasons)” – the requirement is to the “minimum necessary” and an exception is made.
- At 1171 - replace “should” with “will”. If it is a “should”, the timeliness of rehabilitation will not be enforceable.
- At 1200 - replace “should” with “will”. The requirement is only to “minimise disturbance”.
- At 1228 - replace “should” with “will”. The requirement is “to minimise disturbance”.
- At 1293 - replace “should” with “will”. “Harvesting and reforestation regimes appropriate to the specific forest type and site will be applied to ensure prompt re-stocking and the maintenance of local gene pools in native forest.”
- At 1293 & 1295 - replace “should” with “will”. This is only a principle and discretionary in any event.
- At 1296 – replace “should” with “will”. “Harvesting will be dispersed across space and time to reduce localised impacts on natural and cultural values.” This ensures that all new forestry operations are conducted in accordance with good practice. See comments on 1470 et al.
- At 1358 - replace “should” with “will”. The requirement is only to “consider” these at the planning stage.
- At 1470, 1471, 1473 & 1480 – regarding coupe dispersal. Default should be that coupe dispersal is mandatory and then allow for alterations where appropriate. For example, 100ha should be the mandatory minimum (1471), the qualification in 1471-1472 allows a discretion for safe burning boundaries. 1482-1484 also appears to be an alternative to the mandatory requirement for landscape scale approaches and 1485 refers to historical practices, which should be allowed to continue but brought into compliance over time.
- At 1515 – replace “should” with “will”. The requirement is only to consider not to implement.
- At 1533 - replace “should” with “will”. The requirement is to avoid “where practicable”, there is already a qualifier.
- At 1537 & 1539 - replace “should” with “will”. The requirement is only to “consider”.
- At 1640 - replace “should” with “will”. There seems no reason to have this read “should” in the context.
- At 1666 - replace “should” with “will”. If trees are felled into reserved areas, it can impact the values for which that area is reserved. This is particularly relevant given the limited reservation allowed for in the draft Code.
- At 1810 - replace “should” with “will”. The requirement is only to “avoid”.
- At 1849 - replace “should” with “will”.
- 56jhAt 1961 – replace “should” with “will”. There is already a qualifier of “as small as practicable”.
- At 1968 - replace “should” with “will”. There is already a qualifier of “as far as practicable”.
- At 2090 - replace “should” with “will”.
- At 2041 – should replaced with will – if there needs to be carve outs these can be made, but “should” is not enforceable, and the pictures on p69 are not enforceable.
- At 2347 - replace “should” with “will”. There is already discretion in the planning tools.
- At 2354 - replace “should” with “will”. There is already a qualifier of “where practicable”.
- At 2358 and 2360 - replace “should” with “will”. There are qualifiers in both these statements.
- At 2543 – replace “should” with “will”. The qualifier is “where necessary to provide reasonable protection”.
- At 2673 & 2674 - replace “should” with “will”.
- At 2677 (biodiversity) replace “should” with “will”. It only requires FPPs “take account” of the environment beyond the boundary.

- At 2682 – replace “should” with “will”.
- At 2685 replace “should” with “will” to require “consideration” of dispersal. See comments on coupe dispersal above.
- At 2708 replace “should” with “will”.
- At 2719 replace “should” with “will”.

We note that there are a large amount of “should” statements in the Code. The above represents only a small portion and is necessarily incomplete. It should not be taken as a statement of what we say should be changed, only an example.

Further, there are other examples of “should” provisions that appear should be mandatory requirements, which relate to road design, drainage, run off, stability, fire, flood and other operational issues. We have confined the above to impacts on natural or cultural values.

We recommend that a review of the should statements be undertaken with a view to ensuring that they are applied so as to be enforceable.

Other comments

From 1316 – the operational approach is outlined. It does not specify that there must be clear boundaries delineated to protect natural and cultural values, or dispersal of harvesting across time and space. We recommend that after 1343 there be another dot point “harvesting boundaries” which requires boundaries to be identified where required to protect natural and cultural values.

In 1339 “Felling Prescriptions” – sequencing – we recommend that this identify how harvesting will be dispersed across time and space to minimise impacts to natural and cultural values.