



tasmanian conservation trust inc

9 December 2020

John Ramsey
Delegate (Chair)
Tasmanian Planning Commission

Further submission in response to Commission's directions relating to the jurisdictional issues arising from the Spotted Handfish Specific Area Plan

- 1 We refer to the Tasmanian Planning Commission's directions dated 20 November 2020 and further letter dated 25 November 2020 (which was reissued to correct a material error on 8 December).
- 2 We also refer to our previous written submissions to the Commission on the Spotted Handfish Specific Area Plan (SAP) dated 17 March 2020 and 17 November 2020 submitted for the purposes of the draft Clarence Local Provision Schedule (LPS).
- 3 By way of letter dated 25 November (and reissued on 8 December), the Commission advised that:

...it believes it is without jurisdiction to consider the requested Spotted Handfish Specific Area Plan. The reason is that the proposed SAP would apply to an area outside of the municipal area, and the Tasmanian Planning Scheme (including the Local Provisions Schedules) can only apply to municipal areas, and limited areas adjoining or adjacent to a municipal district under section 10 and section 7 of the Land Use Planning and Approvals Act 1993 (the LUPA Act) respectively. Section 7 refers to a planning scheme applying to a 'municipal district', which is defined under Section 3 of the LUPA Act as a municipal area.

Municipal areas are defined under the *Local Government Act 1993* (the Local Government Act). Section 16(2) of the Local Government Act notes that a municipal area is an area listed in Column 1 of Schedule 3 of that Act. Column 1 of Schedule 3 identifies the area of the municipality of Clarence is established by reference to CPR 2976. This document is a plan in the central plan register and was displayed at the hearing. Examination of the CPR 2976 plan indicates that the municipal area of Clarence is limited to low water mark, with an annotation that

Floor 2, 191 Liverpool Street, Hobart TAS 7000 Australia

p (03) 6234 3552 f (03) 6231 2491 e tct6@bigpond.com ABN 63091237520

also includes all island and offshore rocks adjacent to the coastline of the municipality. A copy of CPR 2976 is attached.

Section 16(3) of the Local Government Act outlines what is also included in a municipal area.

Other than what is enabled by section 16(3) of the Local Government Act and section 7 of the LUPA Act, the Commission does not consider it has the jurisdiction to apply the planning scheme beyond low water mark in the Clarence municipality.

In your submission dated 17 November 2020 you consider that the LUPA Act allows for a SAP to apply to those developments listed in section 7, such as bridges, jetties, wharves, and pipelines. However, the Commission considers that section 7(a), (b), and (c) only allow the application of zoning or other mapping (such as a SAP boundary) with respect to **existing** accretions or structures.

The submission requested from the Tasmanian Conservation Trust should address the Commission's opinion expressed at the hearing, and outlined above, with particular regard to section 7(d) of the LUPA Act. (Footnotes omitted, emphasis in original).

- 4 The TCT agrees with the Commission that sections 7 and 10 of the *Land Use Planning and Approvals Act 1993* (LUPA Act) limit the application of the Tasmanian Planning Scheme and the powers that might be exercised under the Scheme. For the reasons set out in detail below, the TCT considers that the Tasmanian Planning Commission's opinion of those limitations, particularly in respect of section 7(a) – (d) of the LUPA Act, cannot be sustained on a proper reading of the law.
- 5 In summary of our detailed submission:
 - (a) There is no jurisdictional impediment to the Commission applying the SAP to the areas identified in that document, albeit they fall outside Clarence City's Council's municipal area;
 - (b) Section 7 of the LUPA Act, allows the Tasmanian Planning Scheme (including zones, overlays and SAPs) to apply to the sea adjacent to municipal districts;
 - (c) There is no reason for the Commission to adopt a narrow interpretation of section 7 such that it only allows the Tasmanian Planning Scheme to apply to existing:
 - o accretions from the sea (whether natural or unnatural),
 - o parts of the sea shore to the low water mark; and
 - o bridges, jetties, wharves, boat-houses, or other structures partly within the municipal district and partly in or over the sea adjacent to the municipal district; and
 - o uses or developments related to, or affecting, the use of any adjacent land within an area of the sea directly adjoining a municipal district; and
 - (d) Adopting a narrow interpretation of section 7 of the LUPA Act such that the Tasmanian Planning Scheme cannot apply to proposed new uses and developments in seas adjacent to municipal areas is not consistent with:
 - o the plain and ordinary meaning of the provision;

- the purposes and objectives of the Act; or
- the legislative context of the provision, and its historical interpretation by the TPC;

and therefore ought not be adopted by the Commission in the performance of its functions under the LUPA Act.

- (e) Finally, if a different approach is taken by the Commission to the interpretation of section 7(d), such that it might apply to both existing and new uses and developments, then the correct approach would be to read that provision as providing a broad power for the Tasmanian Planning Scheme to regulate all aspects of the uses or developments once it has been established that they relate to or impacts on adjacent uses on land. On this basis alone, the Commission should recommend the adoption of the SAP into the Clarence LPS, and thereby, the Tasmanian Planning Scheme.
- 6 The following detailed submission briefly sets out the applicable legislative framework relating to the scope of the application of the Tasmanian Planning Scheme in adjacent coastal waters. It then addresses outlines the approach the Commission appears to have taken to the interpretation of the relevant provisions, and then in contrast, sets out the appropriate and legally preferable approach to the interpretation of the provisions.
- 7 The TCT gratefully acknowledges the assistance of the Environmental Defenders Office in the preparation of this submission.

Legislative framework for the application of the Tasmanian Planning Scheme

- 8 Section 7 of the LUPA Act provides:

7. Application of Tasmanian Planning Scheme, and exercise by municipalities of powers, in respect of accretions from sea, &c.

A planning scheme and the Tasmanian Planning Scheme may apply to, and a municipality may exercise its powers under this Act in respect of—

- (a) any accretion from the sea, whether natural or unnatural, adjoining its municipal district; and
- (b) any part of the sea-shore to the low-water mark adjoining its municipal district; and
- (c) all bridges, jetties, wharves, boat-houses and other structures partly within its municipal district and partly in or over the sea adjacent to its municipal district; and
- (d) any area of the sea directly adjoining its municipal district in, on, over or under which any use or development is related to, or affects, the use of any adjacent land, subject to section 11(3)(c) and (d).

- 9 Section 10(1) of the LUPA Act also relevantly provides:

10. Tasmanian Planning Scheme in relation to particular municipal area

- (1) The Tasmanian Planning Scheme, in relation to a municipal area, consists of –
- (a) the State Planning Provisions that are, under section 30(2) , in effect in relation to the municipal area, as the State Planning Provisions are amended by any amendment, of the State

Planning Provisions, that is, under section 30S(2) , in effect in relation to the municipal area; and

- (b) the Local Provisions Schedule that is, under section 35M(3) , in effect in relation to the municipal area, as the Local Provisions Schedule is amended from time to time by any amendment of an LPS, that is, under section 40S(1) , in effect in relation to the municipal area; and ...

- 10 Sections 7 and 10 of the LUPA Act variously define the Scheme and the powers that may be exercised under it by reference to “municipal districts” and “municipal areas”. Section 3(1) of the LUPA Act defines “municipal district” as a “municipal area”. “Municipal area” is in turn defined as including “a part of a municipal area”. Section 3(2) of LUPA Act provides that terms used in the LUPA Act are to be given the same definition as in the *Local Government Act 1993* (the LG Act) unless a contrary intention is apparent.
- 11 Section 3 of the LG Act provides that “*municipal area* means an area referred to in section 16 ...”. Section 16 of the LG Act relevantly provides:

16. Municipal areas

- (1) The State is divided into municipal areas.
- (2) A municipal area is an area specified in Column 1 of Schedule 3 .
- (3) A municipal area includes –
- (a) any accretion from the sea adjoining it; and
 - (b) any part of the sea-shore to the low-water mark adjoining it; and
 - (c) any bridge, jetty, wharf, boat-house, or other structure, that –
 - (i) adjoins the municipal area; or
 - (ii) is situated partly within a municipal area and partly on or over an area of the seabed that is adjacent to the municipal area –
 and any area of land, adjoining the bridge, jetty, wharf, boat-house, or other structure, over which has been granted a right to occupation of the seabed, which right is necessary to enable the use of the bridge, jetty, wharf, boat-house, or other structure.

- 12 Pursuant to section 16(2), Column 1 of Schedule 3 of the LG Act identifies the municipal area of Clarence by reference to central plan register (CPR) 2976.
- 13 The Tasmanian Planning Commission provided a copy of the CPR 2976 with its letter dated 25 November 2020. The note on this CPR indicates that “the municipal boundary extends to the Low Water Mark and includes all islands and offshore rocks adjacent to the coastline of the municipality”. This note is generally consistent with section 16(3)(a) of the LG Act, however, it does not cover those areas set out in section 16(b) and (c) which, the TCT submits, are also within a municipal area notwithstanding they are not depicted in the CPR.

Commission's approach to the application of Tasmanian Planning Scheme to accretions and structures adjacent to municipal area

- 14 Based on the Tasmanian Planning Commission's letter dated 25 November 2020, there appears to be no dispute that, pursuant to sections 7 and 10 of the LUPA Act, and section 16 of the LG Act, the Tasmanian Planning Scheme can apply to existing accretions from the sea (whether natural or unnatural), parts of the sea shore to the low water mark; and bridges, jetties, wharfs, boat-houses, or other structures partly within the municipal district and partly in or over the sea adjacent to the municipal district.
- 15 It appears that the Tasmanian Planning Commission does not accept that the Tasmanian Planning Scheme could regulate any new uses or developments fitting these categories, broadly falling within section 7 (a)-(c) of the LUPA Act. It is unclear whether the Commission considers section 7(d) of the LUPA Act might also be limited to existing developments or uses, and so the following submissions have addressed this possibility for the avoidance of any doubt.
- 16 In *Project Blue Sky v Australian Broadcasting Authority* [\[1998\] HCA 28](#) ("Project Blue Sky"), McHugh, Gummow, Kirby and Hayne JJ held that (at [78]):

...the duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have. Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning. (Footnotes omitted).

- 17 The construction of section 7 of the LUPA Act adopted by the Tasmanian Planning Commission in its letter dated 25 November 2020 does not accord with the ordinary meaning of the text of that provision. Rather, it requires the word "existing" be read in as follows:

7. Application of Tasmanian Planning Scheme, and exercise by municipalities of powers, in respect of accretions from sea, &c.

A planning scheme and the Tasmanian Planning Scheme may apply to, and a municipality may exercise its powers under this Act in respect of—

- (a) any *existing* accretion from the sea, whether natural or unnatural, adjoining its municipal district; and
- (b) any *existing* part of the sea-shore to the low-water mark adjoining its municipal district; and
- (c) all *existing* bridges, jetties, wharves, boat-houses and other structures partly within its municipal district and partly in or over the sea adjacent to its municipal district; and
- (d) any *existing* area of the sea directly adjoining its municipal district in, on, over or under which any use or development is related to, or affects, the use of any adjacent land, subject to section 11(3)(c) and (d).

and section 16 (3)(a) - (c) of the LG Act as follows:

16. Municipal areas

...

- (3) A municipal area includes –
- (a) any *existing* accretion from the sea adjoining it; and
 - (b) any *existing* part of the sea-shore to the low-water mark adjoining it; and
 - (c) any *existing* bridge, jetty, wharf, boat-house, or other structure, that –
 - (i) adjoins the municipal area; or
 - (ii) is situated partly within a municipal area and partly on or over an area of the seabed that is adjacent to the municipal area –
 and any area of land, adjoining the *existing* bridge, jetty, wharf, boat-house, or other structure, over which has been granted a right to occupation of the seabed, which right is necessary to enable the use of the bridge, jetty, wharf, boat-house, or other structure.

18 As was observed by Lord Mersey in the well-known passage from *Thompson v Gould & Co* [1910] AC 409 at 420:

[i]t is a strong thing to read into an Act of Parliament words which are not there and in the absence of clear necessity it is a wrong thing to do.

19 The Tasmanian Planning Commission has not identified any ambiguity in the text of subsections 7(a) - (d) of the LUPA Act or section 16(3) of the LG Act, or any adverse or nonsensical consequences of a literal or grammatical construction of those provisions that are required to be cured by way of reading in the word “existing” into the subsections. It is simply not necessary to read the provisions that way.

20 For the following reasons, the TCT submits that the ordinary reading the text of these subsections, without the addition of term “existing”, accords with both their context in the Acts and the purposes and objects of the Acts.

Plain and ordinary meaning of section 7(a) – (d) of the LUPA Act

21 As already outlined in the quote from *Project Blue Sky*, the common law approach to statutory interpretation requires that the plain and ordinary construction of statute is to be preferred, providing that construction is consistent with the meaning that the legislature intended.¹

22 This approach is reinforced by the *Acts Interpretation Act 1931* (Tas). Section 8A of that Act provides that:

¹ See also *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27; [2009] HCA 41 at [47]; *Commissioner of Taxation v Consolidated Media Holdings Ltd* [2012] HCA 55 per Court at [39]; see also *Alphapharm Pty Ltd v Lundbeck A-S* [2014] HCA 42 at [85] and [121].

In the interpretation of a provision of an Act, an interpretation that promotes the purpose or object of the Act is to be preferred to an interpretation that does not promote the purpose or object.

- 23 Section 8B of that Act allows reference to extrinsic materials to assist in the interpretation of a provision only where “the provision is ambiguous or obscure”, “the ordinary meaning of the provision leads to a result that is manifestly absurd or is unreasonable” or to “confirm the interpretation conveyed by the ordinary meaning of the provision”.
- 24 The plain and ordinary construction of section 7 of the LUPA Act is that the Tasmanian Planning Scheme may be applied to, and a municipality may exercise powers in respect of:
- (a) any accretion from the sea, whether natural or unnatural, adjoining its municipal district; and
 - (b) any part of the sea-shore to the low-water mark adjoining its municipal district; and
 - (c) all bridges, jetties, wharves, boat-houses and other structures partly within its municipal district and partly in or over the sea adjacent to its municipal district; and
 - (d) any area of the sea directly adjoining its municipal district in, on, over or under which any use or development is related to, or affects, the use of any adjacent land...
- 25 On a plain reading, subsections (a) – (d) of section 7 of the LUPA Act could apply to both existing and new accretions, parts of the sea shore, structures, uses or developments adjacent to a municipal district. Similarly, the scope of a municipal area under section 16(3) of the LG Act can be read as applying to both existing and new accretions, parts of the sea shore, and structures.
- 26 There have been no Supreme Court decisions that have fully considered the scope of section 7 of the LUPA Act,² or of section 16(3) of the LG Act. However, there have been a number of Resource Management and Planning Appeal Tribunal (Tribunal) decisions that have. Short summaries of these cases are set out below:
- (a) In *M Drury v Hobart City Council* [2003] TASRMPAT 228, the Tribunal held that it had the jurisdiction to regulate a proposed new boat slipway at Battery Point that fell partly within the municipal area and partly outside of the municipal area by virtue of section 7(c) of the LUPA Act.
 - (b) In *1 Battery Point Sea Scout Group v Hobart City Council and Royal Yacht Club of Tasmania AND D & K Edwards v Hobart City Council and Royal Yacht Club of Tasmania AND M Foster and Others v Hobart City Council and Royal Yacht Club of Tasmania AND Battery Point Sullivans Cove Community Association Inc AND Hobart City Council and Royal Yacht Club of Tasmania AND O & G Kumpis v Hobart City Council and Royal Yacht Club of Tasmania* [2004] TASRMPAT 143, the Tribunal held that it had the power to regulate the proposed extension of the marina at the Royal Yacht Club of Tasmania outside the relevant municipal

² Mention was made of s 7 of the LUPA Act in matter of *Sorell Council v State of Tasmania* [2004] TASSC 46, however that case did not turn on an interpretation of the section, as the Court found Sorell Council had planning jurisdiction over the Lower Pitt Water lagoon because it was mapped within its municipal area.

district, due to a provision in the relevant scheme that referred to sections 7(c) and (d) of the LUPA Act.

- (c) In *J Groves, K Jenkins and S Kelleher v Kingborough Council and Marine and Safety Tasmania (MAST) (53/13 P)*; *I Mitchell, F Scott and H Hussey v Kingborough Council and Marine and Safety Tasmania (MAST) (54/13 P)*; *SJ Wragge v Kingborough Council and Marine and Safety Tasmania (55/13 P)* [\[2013\] TASRMPAT 083](#) ("*Groves v Kingborough Council*"), the Tribunal held that it had the jurisdiction not only to assess an 13m extension to a jetty and 6m extension of a boat ramp, but also, by virtue of section 7(d) of the LUPA Act, it had the jurisdiction to regulate the proposed new development of a navigational channel and navigational aids and signs outside of the council's municipal district.

- 27 Obviously, these cases all dealt with the application of planning schemes that preceded the Tasmanian Planning Scheme, however the substantive content of the relevant provisions and intent of the LUPA Act remain unchanged. These cases support the TCT's submission that, on the ordinary interpretation of section 7 of the LUPA Act, the Tasmanian Planning Scheme applies to both existing and proposed new developments and uses in waters adjacent to municipal areas. This ordinary reading of section 7 is further supported when one looks at the purpose and objects of the LUPA Act.

Purpose and objects of the LUPA Act

- 28 Section 7 of the LUPA Act is directed at setting the scope of the Tasmanian Planning Scheme and municipalities' powers under the Scheme and the LUPA Act in waters adjacent to municipal areas.
- 29 The primary purpose of the Tasmanian Planning Scheme is to establish the "principal way of setting objectives, policies and controls for the use, development and protection of land".³ It is worth observing at this point "land" is defined under section 3(1) of LUPA Act to include land covered with waters and water covering land. The purpose is also evidenced by reference to the contents of the Tasmanian Planning Scheme as set out in section 11(2) of the LUPA Act and to the forward of the Tasmanian Planning Scheme which states:

The Tasmanian Planning Scheme (TPS) sets out the requirements for use or development of land in accordance with the [LUPA Act].

- 30 The effect of the Commission's interpretation of section 7 of the LUPA Act and section 16(3) of the LG Act is that, where new accretions from the sea arise or are proposed, or where new bridges, jetties, wharves, pipelines or developments and uses are proposed adjacent to a municipal area, the primary mechanism for the regulation of land use and development in this State, the Tasmanian Planning Scheme, simply does not apply to them.
- 31 By way of example:
- (a) if a new stretch of land emerged due to a landslip at Goats Bluff, on the Commission's interpretation of section 7(a) and (b) of the LUPA Act, the Clarence City Council would not be able to regulate new uses or

³ Clause (b) Part 2, Schedule 1 of the LUPA Act

- developments on that land as it did not exist and was beyond the low water mark at the time of the creation of the LPS;
- (b) if a new shipping port was proposed in Ralphs Bay involving the dredging of waters and building of new wharfs and jetties, on the Commission's interpretation of section 7(c) of the LUPA Act, it could not be subjected to planning laws;
 - (c) if a floating hotel was proposed to be built at Geilston Bay, to be accessed by boat from an existing jetty from the Hobart municipal area, on the Commission's interpretation of section 7(c) of the LUPA Act, neither Clarence nor the Hobart City councils could regulate that use or development;
 - (d) if a new bridge was proposed to join Rosny to Hobart, on the Commission's interpretation of section 7(c) of the LUPA Act, neither the Hobart nor the Clarence City Councils would be entitled to regulate the development below the low water mark, leaving a stretch of development some 1 kilometre wide free of any planning regulation.
- 32 It would be very strange if a narrow reading of section 7 of the LUPA Act and section 16 of the LG Act were adopted by the Commission in such a way that the Tasmanian Planning Scheme could only regulate existing uses and structures but not future development. That would be contrary to the intention of the Scheme to regulate *development*, which necessarily involves regulation of future projects.
- 33 Plainly, interpreting section 7 of the LUPA Act and section 16 of the LG Act in such that they only apply to existing accretions shorelines, structures, uses and developments would lead to an unsatisfactory situation whereby potentially substantial new uses and developments in waters adjacent to the municipal areas of planning authorities would simply not be regulated from a planning perspective. Such an outcome would neither promote the purpose of the Tasmanian Planning Scheme nor the purpose and objects of the LUPA Act. In particular, limiting the ambit of section 7 in this way would not promote the following objectives of the Resource Management and Planning System of Tasmania – clauses (1)(a), (b), (c) and (e) of Part 1 Schedule 1 of the LUPA Act, and clauses (a) – (f) of Part 2 Schedule 1 of the LUPA Act.

Interpretation of section 7(a) – (d) of the LUPA Act by reference to its context in the Act and the Scheme

- 34 The Commission's interpretation of section 7 of the LUPA Act as only relating to existing accretions, structures is not consistent with the approach taken to the regulation of such uses and developments in other sections of that Act.
- 35 For example, section 11(3) and (4) of the LUPA Act clarifies that the Tasmanian Planning Scheme may relate to the use or development of a bridge, jetty, wharf, boathouse, shed, pipeline, or other structure, that is used in connection with marine farming and that is constructed wholly or in part on, or above, the high water mark; or is on any accretion from the sea. Section 11(3) and (4) would be rendered inutile or unnecessary by reading "existing" into section 7(c) of the LUPA Act because section 12 of the LUPA Act provides that existing lawful uses and developments do not require a permit under the Scheme. That is, due to section 12, only a new marine bridge, jetty, wharf, boathouse, shed, pipeline, or other structure (or parts

thereof) built for the purposes of marine farming would be required to obtain a permit under the Scheme. This strongly suggests that the Commission's current approach to interpreting section 7 is misguided.

- 36 Furthermore, the approach taken by the Commission is not consistent with the content of the SPPs endorsed by the Tasmanian Planning Commission and made by the Minister. In particular, cl 7.11 of the SPPs provides:

7.11 Use or Development Seaward of the Municipal District

7.11.1 Use or development of a type referred to in section 7(a) to (d) of the Act that is unzoned in the zoning maps in the relevant Local Provisions Schedules must be considered in accordance with:

- (a) the provisions of the zone that is closest to the site; or
- (b) in the case of a use or development that extends from land that is zoned, the provisions of the zone from which the use or development extends. (Emphasis added)

- 37 Again, due to the operation of section 12 of the LUPA Act, this clause would be unnecessary were section 7(a) – (d) of the LUPA Act to only apply to existing uses and developments.

- 38 In *Project Blue Sky* at [71] it was stated:

Furthermore, a court construing a statutory provision must strive to give meaning to every word of the provision^[52]. In *The Commonwealth v Baume*^[53] Griffith CJ cited *R v Berchet*^[54] to support the proposition that it was "a known rule in the interpretation of Statutes that such a sense is to be made upon the whole as that no clause, sentence, or word shall prove superfluous, void, or insignificant, if by any other construction they may all be made useful and pertinent".

- 39 Therefore, the Commission must adopt an approach to the construction of section 7 such that it would not render other provisions of the LUPA Act or of the SPPs superfluous, void, or insignificant.
- 40 Finally, we note that there has been no substantial change to the drafting of section 7 of the LUPA Act that would require such a radically a different approach to that previously taken by the Commission in applying planning schemes to coastal waters.
- 41 For example, the application of Tasmanian Planning Scheme zoning and overlays seaward of the high water mark is entirely consistent with *Guideline No. 1 Local Provisions Schedule (LPS): zone and code application* issued pursuant to section 8A of the LUPA Act (the Guidelines). The Guidelines relevantly state with respect to the Environmental Management Zone (EMZ):

EMZ 2 The Environmental Management Zone should be applied to land seaward of the high water mark unless contrary intention applies, such as land with existing, or intended for:

- (a) passive recreation opportunities (see Open Space Zone);
- (b) recreational facilities (see Recreation Zone);

- (c) large scale port and marine activities or facilities (see Port and Marine Zone);
- (d) industrial activities or facilities (see industrial zones); or
- (e) major utilities infrastructure (see Utilities Zone)
- ...

Note: If the land seaward of the high water mark that is outside the municipal area is unzoned, the General Provision at clause 7.11 of the State Planning Provisions will be applicable for any use subject to section 7 of the Act. Clause 7.11 requires the consideration of the provisions of the zone that is closest to the site, or the provision of the zone from which the use or development extends. (Emphasis added)

- 42 In many other parts of the Guidelines, the Commission also states other zones could be extended to land seaward of the high water mark (see OSZ 2, RecZ3, LIZ 4, GIZ 6, UZ 5, PMZ 2). It bears repeating at this stage that under section 3(1) of the LUPA Act, "land" is defined to include water covering land and land covered by water, therefore we would expect that this Guideline would reflect that meaning.
- 43 The contents of the Guideline in allowing zoning and overlays to extend into the sea is also reflected in the Commission's *Practice Note 7 Draft LPS mapping: technical advice*, which states at [2.1] that "Planning authorities may extend zone maps or overlay maps to include areas outside their LGA (and adjoining LGAs) and adjacent to the coast, such as wharves, jetties, offshore islands, or to map the full extent of overlay maps. Any mapping seaward of the LGA boundary must be coordinated to prevent overlap with the adjoining LPS maps."
- 44 The TCT considers that the Guidelines and Practice Note reflect the correct approach to the interpretation of sections 7 and 10 of the LUPA Act, and section 16(3) of the LG Act, and is consistent with the plain and ordinary meaning of the provisions that we have set out above.
- 45 The TCT lastly notes that there have been no relevant or consequential changes to the drafting of section 7 of the LUPA Act since the Commission approved the application of the environmental management zone (EMZ) at least 200 m from the low water mark into the sea for most interim planning schemes, including the Clarence Interim Planning Scheme 2015. It is not clear what has changed to cause such a substantial shift in the approach now taken by the Commission.

What if the Commission adopts a different approach to the interpretation of section 7 (d) of the LUPA Act?

- 46 Although it is far from clear, it appears that the Commission may be open to an interpretation of section 7 of the LUPA Act that allows for new uses or developments to be regulated by the Tasmanian Planning Scheme and municipalities, where the use or development is "related to, or affects, the use of any adjacent land" pursuant to section 7(d) of the LUPA Act.
- 47 As the examples set out at [31] above demonstrate, there may be many uses or developments that do not neatly fall within the category of

developments and uses outlined in section 7(d). However, even if the examples set out at [31] could be said to fall within the ambit of section 7(d), the Commission raised questions at the hearing about how the relevant Scheme provisions could and should be applied to the use or development.

- 48 At the hearing, the Council's position was that a use or development can only be regulated pursuant to section 7 (d) to the extent that it "affects" an adjacent land use. However, it would be both incorrect and impracticable to interpret the clause in this way.
- 49 The Council's approach overlooks the word "relates" in section 7(d), which requires there to be some connection between the proposed use and development to an adjacent use of land, however it does not require there to be an impact on or affectation of that adjacent use. Furthermore, the Council's interpretation of section 7(d) would only allow for an assessment of the development or use to the extent that it "affects" the use of adjacent land requiring the Council to make a forensic decision for every applicable scheme requirement about whether or not the requirement should be applied and then to what extent. Not only would this be impracticable, but this would not promote the objectives of the LUPA Act, but rather, would hinder their realisation.
- 50 The TCT submits that a legal, purposive approach to the interpretation of section 7(d) should not overlook the word "relates". Taking this approach, once it has been established that the development or use relates or impacts on uses on adjacent land, section 7 (d) authorises the regulation of *all* aspects of the development or use (to the extent allowed under section 11(3) & (4) LUPA Act and clause 7.11 of the State Planning Provisions (SPPs)). We note that this is how the Tribunal approached the interpretation of this provision in *Groves v Kingborough Council*, and that such an interpretation is in keeping with the purposes and objects of the LUPA Act.
- 51 The TCT submits that by taking this correct approach to the interpretation of section 7(d) of the LUPA Act, the Tasmanian Planning Commission can and should recommend the adoption of the SAP into the Clarence LPS, and thereby the Tasmanian Planning Scheme.

Conclusion

- 52 The TCT is concerned that the Tasmanian Planning Commission proposes to substantially restrict the regulation of developments and uses in coastal waters adjacent to municipal areas to through adopting an overly narrow interpretation of section 7 of the LUPA Act. This narrow approach is a change the approach taken by the Commission both in its Guidelines and in creation of previous planning schemes and has no apparent legal justification.
- 53 In this submission, the TCT has outlined that the plain and ordinary meaning of section 7 of the LUPA Act is that the Tasmanian Planning Scheme and municipalities may exercise the powers in relation to both existing and new accretions, parts of the sea shore, structures, uses or developments.

- 54 A restrictive interpretation of section 7 that would have the effect that the Tasmanian Planning Scheme only applies to existing structures or developments in waters adjacent to municipal areas would not be in keeping with the purposes of the provision or the LUPA Act, and would have unsatisfactory outcomes both for the community and the environment.
- 55 On this basis, we submit that there is no jurisdictional impediment to the Commission applying the SAP to the areas identified within that document.
- 56 Finally, the TCT notes that the draft Clarence LPS that was notified for public comment contained an EMZ to a distance of approximately 200m from the shoreline around much of the Clarence municipal area. Based on the directions issued to the TCT concerning the scope of the power to apply the SAP to areas outside the municipal area, the Commission appears to be also considering directing the removal of this EMZ zoning from along the coastline. Given that such a change could have substantial planning consequences, the TCT seeks to be heard on this point, and at the very minimum, the TCT submits that such a substantial modification to the LPS (having no legal justification) should only be made by way of a notice issued to the Council under section 35K(1)(c)(ii) of the LUPA Act which would allow for further consultation.

Peter McGlone



CEO
Tasmanian Conservation Trust