Our Ref: ME | SJ

5 December 2023

[redacted]
[redacted]
Department of State Growth

Via email: [redacted]

Dear [redacted]

Submission to the Road Management Legislation Review Discussion Paper

Thank you for the opportunity to provide a submission on the Road Management Legislation Review Discussion Paper (the Review). This submission has been prepared by the Local Government Association of Tasmania (LGAT) on behalf of Tasmanian local government in collaboration with our members; all 29 councils.

LGAT is incorporated under the *Local Government Act 1993* and is the representative body and advocate for local government in Tasmania. Where a council has made a direct submission to this process, any omission of specific comments made by that council in this submission should not be viewed as lack of support by us for that specific issue.

Please contact [redacted] if you have any questions or would like further information, at [redacted]

Yours sincerely

Dion Lester
Chief Executive Officer

Submission: Road Management Legislation Review Discussion Paper

Introduction

We are grateful the Government has embarked on the review of Tasmania's road management legislation, as this has long been desired by local government.

We extend our thanks to the Department of State Growth for the engagement process that it has undertaken to date, it has been of a very high standard and bodes well for the end result.

General Comments

A suite of issues have been raised by councils. In our assessment of council feedback, the following are the most important issues for local road management:

1. To resolve the asset ownership and transfer problems created by section 11 of the *Roads and Jetties Act 1935*. We believe this requires changing from legislation attempting to declare the road or asset manager via spatial description and instead creating an asset ownership and transfer process that ensures assets are never orphaned and can be transferred to the most appropriate road/asset authority.
2. To improve the standard and efficiency of third-party interference and works in the road reserve, particularly that of utilities and adjacent land owners. This requires establishing a risk-based regulatory process that involves high accountability for operators with an unknown or poor track record of performance, and faster, evidence-based self-assessment process for operators with demonstrated good performance of operating in the road reserve.
3. To create a process that assists in bringing unconstructed and unformalised roads up to an acceptable standard to allow them to be adopted by a road manager and formalised in a road authority's asset register. This requires a cost recovery process, such as development infrastructure charging, to ensure that ratepayers are not bearing the burden of legacy problems.

Responses to some of the discussion paper prompts and more detail on the above themes follow.

Principles

We support the three principles proposed in the paper, and suggest a fourth, aiming for a road management framework that:

1. is more efficient
2. promotes better outcomes
3. is easier to understand and apply
4. promotes better service coordination – between road authorities and with other infrastructure providers.

Single consolidated Act

Moving to a single consolidated road management Act is overwhelmingly supported.

Simplifying the road proclamation process

Councils support simplifying the road proclamation process and believe this should remain a state government responsibility.

The actual location of road boundaries should remain with the cadastre, with the real location only able to be properly and legally determined by a registered land surveyor. GIS mapping is useful to show boundaries indicatively, as its accuracy differs from centimetres to metres.

Councils also noted that road closures and small boundary adjustments to add or remove land from the road reserve could be made more efficient.

Subdivisions

Councils noted that roads created by subdivisions that are not constructed to standard, create a legacy of issues that councils and ratepayers then need to rectify in the future. The review should seek to ensure councils have appropriate powers and pathways to hold development proponents and their consultants/contractors accountable. This may include longer defects liabilities periods, more efficient and effective enforcement mechanisms and penalties that promote the right outcomes.

Generally, Acts should set the overall powers and enforcement pathways and leave the detail of standards to subordinate statutory instruments.

Related to this, we note that LGAT is currently upgrading its Tasmanian Subdivision Guidelines into a more comprehensive Tasmanian Development Manual. This will specify a range of standards, including for local road infrastructure, that councils will have the

opportunity to adopt. The Review should seek to connect to and support the standards adopted by councils with appropriate enforcement powers.

Funding for infrastructure

Well developed land development systems have mechanisms for infrastructure contributions (sometimes called development charges). New development, especially subdivisions, place an increased load on infrastructure networks, including road networks. This load may require upgrades to the network, such as new intersections or safety treatments, to support the development and the growth of communities. Other states use infrastructure contributions to support new development and subdivisions with the network upgrades that they need, but Tasmania does not have a clear and effective charging system.

Our view is that the infrastructure contributions systems are best integrated into planning legislation to capture a wide range infrastructure, including roads. We ask that the Review make a recommendation for a consolidated infrastructure charging framework, including for road and transport upgrades, to be built into planning legislation, as it is in other Australian jurisdictions. This is a recommendation of LGAT's Infrastructure Contributions Discussion Paper[1] that provides further analysis. It is also a recommendation of the Future of Local Government Review Final Report (Recommendation 18, page 18[2]).

Unconstructed, unformalised roads

Related to subdivisions and creating new roads, many councils experience problems with unconstructed or unformalised roads. These may also be referred to as common law highways, 'right of user roads', or user roads.

These are roads that have not been fully constructed or formalised into the road network, are not of an acceptable standard, contain legacy issues, may have no clear asset owner or manager, or may be the responsibility of private landowners to maintain. These roads often only service a small number of properties providing only marginal and general public benefit, making it difficult to justify resourcing their upgrade and formalisation.

These roads need a legal mechanism to bring them into formal road management to support the often significant work required to bring these roads up to contemporary standards. Both needs should be addressed simultaneously to avoid substantial budgetary impacts of taking

[1] See: https://www.lgat.tas.gov.au/__data/assets/pdf_file/0030/1139691/LGAT-Infrastructure-Contributions-Discussion-Paper-11-April-2022.pdf
[2] See: https://engage.futurelocal.tas.gov.au/

on these orphaned assets. This review should assess the suitability of the full suite existing financing mechanisms available to road managers, such as the *Local Government Act 1993*, to address this issue.

This is a very common issue for council road managers who are interested in forming a working group to work on solutions to address this issue. We recommend the review support this process and develop pathways to address unformalised roads.

Defining the road manager

Defining the road manager is a critical component of this review and requires work. The Victorian model would be a significant improvement for Tasmania. However, we need to understand the problem properly to develop the right model.

Our current road management framework takes the declaration approach, where it attempts to declare which parts of a road are different agencies responsibility without creating a process to responsibly transfer assets to the appropriate party. This creates problems as road assets are created by one party (usually the State Government) and assumed to belong to another party (usually a council), without a proper transfer process. This leaves orphaned assets, not on any asset register, and not being properly accounted for and maintained.

The road width measurement approach of section 11 of the *Roads and Jetties Act 1935* means that sometimes even assets that are integral to the state road can be suggested to belong to a council. For example, councils report that they receive allegations of owning road structural components like retaining walls supporting a state road as a result of the declaration approach to defining the road manager.

We believe this must change and new legislation should focus on a natural asset ownership and transfer process.

Such an asset ownership and transfer process should feature the following principles or rules:

1. **Natural ownership** – When first constructed, assets should be owned by the authority constructing it and immediately appear on their asset register.
2. **Traceable and accountable** – An asset should not be removed from the asset register without being transferred to another road manager's asset register.
3. **Respect and agency** – Assets should be transferred voluntarily, through agreement and good faith negotiations. Disputes should be mediated and adjudicated where negotiations do not resolve.

4. **Service oriented** – Road managers should strive to align road asset ownership with transport function. For example:
    a. State road management should seek to adopt assets that have a state transport function. This would need to be defined, but we suggest primarily weighted to speed and throughput (at an inter-municipal, regional or greater scale) over local access and interchange (at a sub-municipal locality and property scale).
    b. Local road management should seek to adopt assets that have a local transport function. Again, this would need to be defined, but we suggest weighted to local access and interchange over speed and throughput.

Any currently unowned road assets that do not appear on any road manager's asset register should go through this process to resolve. This starts with natural ownership (who constructed it?) and proceeds through an accountable and respectful asset transfer process to achieve service oriented ownership (whose transport function or service does it support?).

These principles and rules will prevent the creation of orphaned assets. Repeating the declaration approach of the current legislation will reproduce the same set of problems.

The new legislation should define road manager functions and the asset transfer process, rather than arbitrary declarations of ownership.

Ambiguity

Ambiguity of road management responsibility needs to be addressed, with councils providing many examples of when road management responsibility for a particular asset or road component has been ambiguous. The asset transfer process proposed above should help with council case studies used to test legislative proposals.

Bus stops

An example of this ambiguity is bus stops on local roads. Bus stops are rarely constructed by councils and typically established by either developers or the public transport authority (Department of State Growth). Tasmanian councils also do not operate the service so have very little influence on their operational costs and no ability to impose a user charge to recover costs. Bus stops are also part of a larger transport function, beyond the scope of any council. In their role in public transport services, bus stops more closely resemble utility infrastructure, like transformers for electricity supply or pump stations for water and wastewater services, both of which are the responsibility of the service provider, not the land owner or road reserve manager.

Despite this, there is ambiguity around who owns and is responsible for maintaining bus stops. The Tasmanian Government claims that bus stops, both on local roads and even on state roads in urban areas, belong to and are the responsibility of councils. This claim implies that ratepayers should pay for bus stop maintenance and councils should increase rates to provide this service. Councils reject this as they have no natural or active role in public transport provision – they are incidental to the service.

To compound this, these assets are never responsibly transferred to councils with any formal process. It is merely claimed that councils are the owners and must suddenly start to maintain, upgrade, and fully account for these assets, raising rates to do so.

The review should use the natural asset ownership and transfer process proposed above to start resolving the ambiguity around bus stops.

For the reasons explained above, it clear to local government that we are not the natural owner of bus stops, nor are councils responsible for the transport function they deliver. If the Tasmanian Government believes that ratepayers should subsidise the ownership, maintenance, upgrade, and full accounting of bus stop infrastructure, it should make that case honestly and explicitly with ratepayers to justify this subsidisation. There may be a case there, but it is irresponsible to leave this implication unspoken and force councils to have to negotiate this cost increase with communities alone.

Retaining walls

Retaining walls are another case where ownership is ambiguous and often disputed. Councils are often on the receiving end of assertions from the Tasmanian Government that a retaining wall belongs to them, even though it has never been transferred to the council. In these cases, the retaining wall is typically performing a critical structural role for a State road, either by supporting its foundations, or by holding back land above it, which is typically private land. As for bus stops, council's relevance to the retaining wall is purely incidental.

These claims and disputes occur (often repeatedly over the same asset) because section 11 of the *Roads and Jetties Act 1935* makes abstract delineations of responsibility based on spatial references and descriptions, rather than being based on natural ownership and transport function, and a responsible process of asset transfer is not being applied.
The review should employ an asset ownership and transfer process such as that proposed above.

Liability

We do not support an explicit statutory duty for road managers to inspect, maintain and repair roads to a to-be-defined minimum standard. For many councils this is not practical or feasible. We appreciate the intent and aspire to its achievement. However, the majority of councils are not resourced to undertake this task, resulting in upwards pressure on rates, that many communities will not be able to bear. There are no plans to substantially overhaul the road funding model. It must be remembered that local government collectively manages 80 per cent of Tasmania's road network, compared with the Tasmanian Government's 20 per cent. And further, these assets are not distributed between councils according to rates revenue.

Generally, where seeking to achieve a minimum service level, the appropriate and pragmatic approach is to start by building the practice first to ensure that organisations (in this case, road managers) have the capacity and capability. Then, when the standard and its required resourcing is demonstrated to be achievable, best practice can be scaffolded with a statutory duty for minimum standards in legislation.

The problematic way to do this is to legislate a minimum standard before building capacity and capability to deliver it.

We recommend not including a statutory duty at this stage, but exploring it in the future. Should further work be undertaken, the steps should be:

1. Determine the service level standards with close engagement with council road and asset management, and consultation with communities around their desired service levels and preparedness to pay.
2. Determine the funding model to achieve the service level standards, including Australian Government roads funding[3], Tasmanian Government roads revenue streams and distribution[4], and local government rates revenue.
3. Implement the required funding model to build capacity.
4. Implement a non-statutory service level standard supporting framework to build best practice and technical capability.
5. Incorporate the service level standards in legislation.

[3] We note the promising but slow to progress work nationally on Heavy Vehicle Road Reform: https://www.infrastructure.gov.au/infrastructure-transport-vehicles/transport-strategy-policy/heavy-vehicle-road-reform

[4] We note the unsustainably inequitable distribution of heavy vehicle cost recovery revenue: https://www.lgat.tas.gov.au/lgat-advocacy/infrastructure

Legislating minimum service level standards should be the last step, once the capability and capacity to deliver it has been substantially validated.

This stepped approach is essential to gaining support from councils ahead of any legislated mandate and importantly lifting the standards of Tasmania's roads.

Maintenance standards of State roads

Related to service standards, at the September 2022 LGAT General meeting, councils resolved:

> *That LGAT raise concerns with the Tasmanian Government in relation to the quality of maintenance and new construction work which is being undertaken on the network of roads which are the responsibility of the Department of State Growth, and ask the Tasmanian Government to implement an independent review of the construction and maintenance methodology being used.*

Councils are concerned that the deterioration of State roads is undermining their critical function in Tasmania's road network.

As outlined above, we do not recommend attempting to solve this with legislative changes before the appropriate practice to achieve the standard is well established. Building this best practice requires such an investigation or independent review of road construction and maintenance methodology first, to determine the nature and extent of the problem.

We suspect that a substantial part of the problem is that Tasmanian Government financial and asset management is different from Tasmanian councils. Councils have legislative requirements to complete a comprehensive set of financial and asset management policies, plans and strategies to allocate resources and deliver asset service levels over the long term (see Division 2 of the *Local Government Act 1993*[5]). The Tasmanian Government tends to allocate funding to asset management operations on an as-needed basis. This creates a divergence in expected service levels by the community.

We suggest that the most important and foundational step for the Tasmanian Government is to significantly raise the sophistication and maturity of its financial and asset management practices. This can be achieved by establishing a best practice financial and asset

[5] See: https://www.legislation.tas.gov.au/view/html/inforce/current/act-1993-095#HP7@HD2@EN

management framework, such as that required of local government and detailed in the *Local Government (Content of Plans and Strategies) Order 2014*[6]. This includes:

- Long-term financial management plan
- Financial management strategy
- Long-term strategic asset management plan
- Asset management policy
- Asset management strategy

Employing such an approach and raising the standard of asset management in Tasmania would be challenging, but an outstanding public service achievement and would better align local and State government asset management practices. It could also, potentially, begin to set the basis for better coordination of asset management between councils and the State.

We recommend that the Tasmanian Government embark on a process of financial and asset management maturing and improvement. This would form a sound basis for best practice that potentially could later be established in legislation with minimum standards and/or a statutory duty.

Service authorities and utilities in road reserves

We are highly supportive of a better model for third parties interfering in the road reserve. Councils are all too frequently on the receiving end of poor work by third parties, including service authorities, adjacent landowners, and their contractors. Councils often get unfairly implicated in, or targeted for blame for, poor standards of third-party work, leaving those who caused the problem to avoid or minimise accountability.

Councils want better performance of third party work in the road reserve and better accountability of proponents for their work, which go hand in hand. Councils also do not want an unnecessarily burdensome system for operators or themselves.

The key issue is how to achieve the quality of outcome as efficiently as possible with minimal administrative overhead for road managers and those interfering in the road reserve, utilities, adjacent landowners, and their contractors alike.

Our suggestion is to develop a way of operating that incentivises the good performance in the road reserve through regulatory efficiency, streamlining and operational flexibility, and disincentivises bad performance through higher accountability and regulatory requirements.

[6] See: https://www.legislation.tas.gov.au/view/whole/html/inforce/current/sr-2014-035

This can be achieved with the Review creating a regulatory framework that supports a code of practice for managing utilities and undertaking works in the road reserve. We suggest the following in helping to achieve this:

1. **A self-assessment process** – in such a process, a trusted operator can initiate work without permitting procedures and with some simple accountability steps:
    a. Prior notification to the road manager and demonstration of due diligence (e.g., Dial Before You Dig searches or other), and providing clear evidence of their restoration work to road manager requirements. These steps should be simple, with a clear purpose of maintaining a sufficient level of accountability and minimising hold points for operators.
    b. Simple self-assessment processes might be applied for specific low-risk circumstances or trusted operators.
2. **Validation or accreditation** for trusted operators –
    a. Where operators demonstrate good performance and accountability of works in the road reserve they should be validated or accredited in a way that allows them to access self-assessment processes and undertake works with the minimum of administrative steps and hold points.
    b. Road managers would need to be able to retract accreditation or validation for poor operator performance, in order to incentivise the interactions and minimum standards in the road reserve that are needed.
3. **Permitting and higher accountability processes** – operators with no performance history, or a history of substandard performance need to operate under a higher accountability pathway for works in the road reserve, such as a permitting system, including hold points for due diligence checks and conditioning.

Austroads is currently undertaking Project AAM6327 – *Strategy and action plan for a national code of practice to manage utilities in roads*[7]. The Review could propose a Tasmanian code of practice, or ideally inform this national work and adopt this code of practice.

Land use planning

We strongly support and applaud the Review considering its implications for related legislation, especially planning under the *Land Use Planning and Approvals Act 1993*. We understand that direct amendments are likely to be out of scope, but strongly support recommendations being made that improve our road management tasks under other Acts.

[7] See: https://austroads.com.au/projects/project?id=AAM6327

For planning, this includes:

1. Referrals to the State road and/or public transport authority.
    a. Other states have extensive referrals, not just for proposals that directly impact state roads and public transport infrastructure or operations, but also for proposals that may have no direct impact but carry significant implications for state road or public transport operation or management. Tasmania should be contemplating its need for the similar referrals to achieve its transport objectives.
    b. Tasmania's referrals system requires further development to improve its limited integration into the planning system and improve clarity for all involved. The review should seek to improve this situation.
2. Exemptions for public infrastructure works, which can help efficiency in public infrastructure delivery but can impact design outcomes and public reception.
3. Infrastructure planning and financing in regards to development infrastructure charging (see **Subdivisions** section above), as well as bespoke infrastructure agreements (see **Cost recovery** section below).

We also support the preference for these matters to be dealt with within the planning scheme and *Land Use Planning and Approvals Act 1993*, rather than outside the planning framework.

Traffic control including signs and line-marking

Line marking is an area that has seen some confusion and disagreement about who is responsible and who should pay. Following our November 2023 General Meeting, our members resolved:

> *That LGAT undertake advocacy on behalf of Councils to have road line marking responsibilities legislated and additional funding provided by the State Government.*

Our understanding is that line-marking as the responsibility of the relevant road manager, including councils, and we welcome the State program that collectively procures line marking services and contributes some funding towards local line-marking as a public service in the interests of road safety. We note that some councils see line marking as a State responsibility that is underfunded, which shifts the cost to councils.

It is our view that responsibility for line-marking and other traffic control mechanisms should be made explicit in the legislation to help communicate the delineation of responsibilities.

We support the State-coordinated line marking program and request increased funding to improve its delivery and road safety outcomes. This may require expansion of the program with consideration of funding by all parties.

Cost recovery

A cost recovery mechanism for unusual impacts on roads is supported. The intent is to facilitate the economic uses behind these impacts and make road managers' support of these uses sustainable. The example used in the Discussion Paper is that of wind farms, where transport of very heavy turbine components has an extreme impact on roads or may require road strengthening or widening beyond normal use requirements. Another example is quarries, where the continual operation of heavy vehicles down access roads generates a disproportionate impact over time and demands significantly higher maintenance or even road strengthening.

In order to inform the capabilities of the new road management legislation, the review should build on this list of examples that may need specific cost recovery.

Road user licencing vs planning permit infrastructure agreements

We support future road management legislation containing cost recovery mechanisms to assist in facilitating unusual uses. The discussion paper proposes licencing arrangements to recover cost associated with these cases. It may also be possible to use access arrangements under the Heavy Vehicle National Law.

However, as the examples described above are typically associated with new or intensified land uses requiring a permit under planning legislation, we suggest exploring mechanisms that are integrated into planning approvals. This may be more effective for the financial planning of these businesses, giving them more advanced indication of costs and avoid creating an additional process.

We recommend that the review investigate the potential for infrastructure agreements to be integrated into planning permits, to enable cost recovery for such development proposals. An example is the Part 4 Infrastructure Agreements of Queensland's *Planning Act 2016*[8]. Tasmania does have Part 5 Agreements under the *Land Use Planning and Approvals Act 1993*, but these have various limitations that may not make them suitable.

[8] See: https://www.legislation.qld.gov.au/view/html/inforce/current/act-2016-025#ch.4-pt.4

For operations impacting roads disproportionately that don't require planning approval, licencing or access arrangements may be the only pathway. An example would be some forestry operations.

Heavy vehicle motor tax

A longstanding issue for councils is that the Tasmanian Government collects the heavy vehicle motor tax (HVMT) from heavy vehicle road users as cost recovery[9], but does not distribute this equitably to councils. This means councils are providing road access to heavy vehicles that incurs an impact cost on local roads, effectively subsidising this revenue stream for the State Government.

Recommendation 21 of the Future of Local Government Review specifically identifies this and recommends this revenue be distributed according to road usage to properly implement cost recovery. We urge the review to investigate this recommendation and its relationship to cost recovery.

[9] Heavy vehicle cost recovery charges: https://www.legislation.gov.au/Details/F2023L00681/Explanatory%20Statement/Text