

The Hon Lily D'Ambrosio
Minister for Energy, Environment and Climate Change
Minister for Solar Homes
8 Nicholson Street
EAST MELBOURNE 3002
Email: lily.dambrosio@parliament.vic.gov.au

21 August, 2020

Ref: 478450

Dear Minister,

Re: Environment Protection (Management of Tunnel Boring Machine Spoil) Regulations

We refer to the Environment Protection (Management of Tunnel Boring Machine Spoil) Regulations 2020 S.R. No. 62/2020 (**Regulations**), the Subordinate Legislation Act 1994 Guidelines (**Guidelines**) and to the Subordinate Legislation Act 1994 (**Act**).

Council understands that the Regulations were made on 30 June 2020. Notice of their making was published in the Government Gazette on the same day. The Regulations came in operation on 30 June 2020.

Council did not become aware of the Regulations until after their gazettal.

Given this, we assume that a decision not to consult with the public, including with Council, was made by you and the necessary certificate of exemption issued.

The Guidelines make explicit the importance of consultation, both within government and outside of government.

As noted in the Guidelines:

“The Act generally requires proposed statutory rules and legislative instruments to undergo two separate consultation processes:

- The initial consultation occurs in the early stages of policy development. This ensures the responsible Minister identifies other Ministers, agencies and stakeholders who may be affected by the proposed changes and considers the impact the proposed statutory rule or legislative instrument is likely to have on those groups (see sections 6 and 12C of the SL Act).*
- The second is formal public consultation. Where a RIS has been prepared, public consultation occurs following the public release of the proposed statutory rule or legislative instrument along with its RIS. This gives members of the public the change to comment on the proposed instrument before it is made. Public consultation is discussed at Part 3, Division 5 of these Guidelines.”¹*

¹ At 68

Consultation must occur with other Ministers² and with the public, including Council:

“The responsible Minister must ensure that consultation is carried out, in accordance with these Guidelines, with any sector of the public on which a significant economic or social burden may be imposed by a proposed statutory rule or legislative instrument. This may include, for example, business groups, community groups, special interest groups and local government.”³

In order to avoid consultation, a Certificate must be issued under s8 of the Guidelines.

Before such a decision is made and before a Certificate is issued under s8, the relevant Minister, in this case the Minister for Energy, Environment and Climate Change, must follow the process set out in the Guidelines.

In particular, the Minister must, before forming the view that there will be no significant burden and that the proposed legislative instrument will “yield the maximum net benefit”, identify and assess all relevant impacts.

“Agencies and responsible Ministers can only state that the proposed statutory rule or legislative instrument will yield the maximum net benefit if they have identified and assessed all the relevant impacts.”⁴

Impacts on Council must be considered:

“A statutory rule or legislative instrument may impose a burden on either the whole community to impact a ‘sector of the public’ or on one or more identifiable groups of people within the community. Public sector bodies (within the meaning of the Public Administration Act 2004) are excluded from these considerations but local government are not.”⁵

Pursuant to the Freedom of Information Act 1982, Council seeks all the documents relating to the process required under the Guidelines before a Certificate is issued under s8 and the resulting certificate, if any.

As you are aware, Council has been in correspondence with the Minister for Planning in relation to the proposal by Maddingley Brown Coal to accept tunnel spoil at its side in Maddingley.

The interplay between any EMP approved under the Regulations and any required by the Minister for Planning pursuant to his response to the proposal before him, is critical.

We assume that the documents we seek clearly explain the role of the EMP contemplated by the Regulations. The EMP is essentially a substitute for the normal process of works approval and licence.

² At 75

³ At 76

⁴ At 83

⁵ At 103

To the extent that the documents we seek have a bearing on that question, the matter is time critical and we hope to have a response from you at your earliest convenience.

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'D. Madden', with a stylized flourish at the end.

Derek Madden
Chief Executive Officer