

Communication to the Aarhus Convention's Compliance Committee: from Road Sense May 7th 2009

Organisation submitting the Communication

Road Sense

Road Sense is an organisation from North East Scotland representing the interests of the communities and individuals affected by the proposed Aberdeen Western Peripheral Route (AWPR). Road Sense was established to garner information and represent opposition to the AWPR as proposed by Transport Scotland, an agency of the Scottish Government.

The constitution of Road Sense is appended hereto.

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State Concerned

The United Kingdom Government of Great Britain and Northern Ireland through the devolved Government of Scotland

This communication has been copied to:

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Subject Matter of this Communication

Road Sense maintains that there has been a breach of the Aarhus Convention by the devolved Government of Scotland with respect to the planning and implementation of a transport proposal, the Aberdeen Western Peripheral Route (AWPR). The AWPR will have adverse impact upon the environment, including effects upon a Special Area of Conservation and upon European Protected Species designated under Council Directive 92/43/EEC on the Conservation of natural habitats and of wild fauna and flora (the Habitats Directive).

Road Sense argues that the Scottish Government with its agents has breached **Articles 1, 3 & 4 of the Aarhus Convention** by failing to provide information on the state of the environment and the status of protected species which would be impacted by the AWPR. It has also breached **Article 5** by not providing information which could enable the public to take measures to prevent or mitigate harm arising from a threat to those protected species.

The Scottish Government with its agents also failed to seek public comment on a particular route proposal for the AWPR in an open way, failed to provide information on new objectives for the proposal and did not invite the public to submit, in writing at a public hearing or inquiry any comments, information, analyses or opinions on the route proposal, although these are required under **Article 6**.

The Scottish Government through its agents introduced a new objective for the strategic transport plan for the region without any public presentation or discussion and therefore breached **Article 7**.

The Scottish Government and its agents failed to ensure that the environmental information provided in the Environmental Statement for the AWPR and the Report to Inform Appropriate Assessment for the crossing of the Dee SAC was fit for purpose, and thereby failed to meet the requirements of the **Preamble to the Aarhus Convention** and **Article 3**.

The Scottish Government restricted the scope and circumstances of a Public Inquiry into the AWPR in a manner contrary to the principles of justice enshrined in **Articles 7 & 9**.

Because there is no access for the public in Scotland to an open and inexpensive review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of the AWPR as proposed, the Scottish Government has breached **Article 9**.

Executive Summary

Road Sense is an organisation representing the interests of the communities and individuals affected by the proposed Aberdeen Western Peripheral Route (AWPR). It is Road Sense's contention that the AWPR will have adverse impact upon the environment, including a Special Area of Conservation (SAC) and European Protected Species designated under the European Habitats Directive.

Road Sense maintains that the Aarhus Convention has been breached by the Scottish Government and its agents in three important respects:

1. Access to Environmental Information

Road Sense submits that the procedures of the Scottish Government and its agents in planning, implementing and assessing the environmental impact of the AWPR have failed to provide adequate access to environmental information. In particular, Road Sense has been refused access to a report containing information relating to the state of local populations of the freshwater pearl mussel (*Margaritifera margaritifera*), a designated species within the River Dee SAC.

Access to this information was denied in August 2008 by Scottish Natural Heritage (SNH), the Government's own conservation advisers, on the grounds that its release could increase the risk of persecution of freshwater pearl mussels. However, Road Sense has made it plain to SNH that it is prepared to restrict access of the information on freshwater pearl mussels to suitable qualified individuals and to sign an undertaking not to release any information in relation to the location of breeding sites to other parties. Road Sense notes that the report has previously been made available to independent consultants employed by Transport Scotland.

Road Sense argues that the refusal to provide information on the state of the environment by an agency of the Scottish Government is a breach of **Articles 1 and 4 of the Aarhus Convention** and fails to take account of the provisions of **Article 3**. Lack of access to the information on freshwater pearl mussels contained within the report has prevented Road Sense from taking action in two important respects:

Firstly, without the report Road Sense is unable to query the adequacy of measures taken by the Scottish Government and its agents to avoid deterioration of habitats for the freshwater pearl mussel within the Dee SAC. In denying access to an independent report SNH is protecting its own position and preventing Road Sense from holding the Scottish Government to account for their failure to act. In this respect the Scottish Government is failing to comply with **Article 5 (c) of the Aarhus Convention**, which requires in the event of any imminent threat to the environment (in this case to freshwater pearl mussels) there should be access to information which could enable the public to take measures to prevent or mitigate harm arising from the threat.

Secondly, Road Sense contends that failure to provide the report, which includes information on the distribution of freshwater pearl mussels in relation to a new bridge proposed for the AWPR, has impaired the ability of Road Sense to oppose effectively the construction of the Aberdeen Western Peripheral Route (AWPR), a major road development which crosses the Dee SAC. This refusal has been compounded by the willingness of SNH to provide that report to consultants assisting Transport Scotland in making their case for the construction of the AWPR.

Road Sense also sought to obtain and lodge at the Public Inquiry into the AWPR a report on badgers along the route of the AWPR, prepared by agents of Transport Scotland. The 'badger report' was withheld from Road Sense on the grounds that if the information was divulged to the public it would increase the risk of persecution of badgers. Subsequently, the Reporters conducting the Public Inquiry for Scottish Ministers would not allow evidence to be given on the badger report by Road Sense, and did not wish to have the report itself presented to the Inquiry. The absence of the report prevented Road Sense witnesses from

arguing that insufficient was being done to protect badgers from the effects of the route, especially in terms of separation of badger setts from foraging and feeding areas by the construction of the road. Moreover, Road Sense was unable to question effectively the adequacy of the mitigation measures proposed by Transport Scotland.

2. Failure to involve the public in environmental decision taking

Road Sense argues that the Scottish Government has failed to allow Road Sense and other parties affected by the AWPR the opportunity to comment on the route to be taken by the AWPR and its environmental effects. The Scottish Government has also failed to provide information on the reasons for its decisions on the choice of route. Road Sense maintains that the public were not informed in advance of any proposal for the particular route option which was chosen, or invited to comment on that route option, as required under **Article 6 (2)**. Effective public participation in all options in an open way was not provided, although this is required under **Article 6 (4)**. The public were not informed of new objectives established for the route (which were defined only after the route had been selected), although this is required under **Article 6 (5)**. The public were not able to submit, in writing at a public hearing or inquiry with the applicant, any comments, information, analyses or opinions on the final choice of route, although this is required under **Article 6 (7)**.

Road Sense sought information from the Scottish Government on the reasons for choosing the particular route selected. That information was not been provided. A representative of the Scottish Government replied that "*communication took place between officials and the Minister in the period leading up to the decision announced on December 1st 2005. A meeting was held on 14 November 2005 attended by the Minister and officials however there was no agenda and no notes or minutes were kept. Discussions were also held between officials but there were no agendas, notes or minutes taken*". Road Sense questions the veracity of this reply.

Road Sense contends that in failing to provide evidence on the reasons for the change to a new route for the AWPR announced on December 1st 2005 the Scottish Government has breached **Article 6 (9) of the Aarhus Convention**, which requires each party to ensure that, when the decision has been taken by the public authority, the public is promptly informed of the decision in accordance with appropriate procedures. Each party shall make accessible to the public the text of the decision along with the reasons and considerations on which the decision is based. In the case of the AWPR, reasons for the choice of route were provided only retrospectively, and those reasons were unconvincing. The inescapable conclusion can only be that the route was chosen for reasons which the Minister and officials did not wish to disclose, perhaps because the decision may have conflicted with important, relevant European Directives and Conventions.

The choice of route was subsequently justified by the introduction of a new objective for the strategic transport plan for the region. Road Sense maintains that there should have been public discussion of the introduction of such a new and far-reaching objective, and that the Scottish Government therefore breached **Article 7 of the Aarhus Convention**. In this case a major amendment to the strategic transport plan was made without any discussion or public participation.

3. Failure to provide access to justice

Road Sense argues that with respect to the AWPR environmental justice has not been served in three important respects.

- a) There was a failure to ensure that the environmental information provided by the Scottish Government and its agents, including the Environmental Statement for the AWPR, and the Report to Inform Appropriate Assessment for the crossing of the Dee SAC, was fit for purpose. By providing inadequate and inaccurate environmental information the Scottish Government adversely affected the ability of the public to oppose a public decision with adverse effects upon the environment. **Article 3 of the Aarhus Convention** requires that each party shall endeavour to ensure that officials and authorities assist and provide guidance to the public in seeking access to information, in facilitating participation in decision-making and in seeking access to justice in environmental matters. This was not done. The information provided to the public and to the Scottish Government was not complete and was not of a high enough standard to enable informed environmental decisions to be made.
- b) Road Sense maintains that the procedure for reviewing the impact of the AWPR upon the environment and especially upon the Dee SAC and European Protected Species has not been in accord with environmental justice. The Scottish Government has conducted a Public Local Inquiry into the proposed AWPR. Scottish Government Reporters (employed by the Scottish Government) were appointed to conduct the inquiry and report to Ministers. At the Pre-Inquiry meeting, the Reporters stated that Scottish Ministers had accepted the need in principle for the road and did not wish to be advised on the justification for the principle of the scheme in economic, policy or strategic terms. The Ministers considered that strategies and policies referring to the scheme were relevant to the inquiry only insofar as these set out the context for the AWPR. The Ministers also directed that they wished to be advised only on the technical aspects of the route choice, including the environmental statement and any opinions expressed on it. In response to these instructions the Reporters decided to disallow any evidence which had, as its objective the calling into question of the need for the scheme. Now, following the Inquiry, the findings of the Reporters will be presented to Scottish Ministers, who will deliver their final decision on the AWPR. Road Sense has serious doubts whether Ministers can be expected to be impartial with respect to the merits of a scheme that they are themselves promoting. Road Sense also has serious doubts whether the Inquiry should have been conducted by Reporters working closely to the instructions of the Scottish Government. Road Sense also questions whether an Inquiry of such restricted scope properly meets the requirement of the Aarhus Convention for 'procedures to challenge public decisions'. In this case the public was not able to question the decision to build an AWPR. Road Sense contends that the restricted scope and circumstances of the Public Inquiry was contrary to the principles of justice enshrined in **Articles 7, 9 (2) and 9 (3) of the Aarhus Convention**. Road Sense contends that this is a particularly serious breach of the Aarhus Convention, which may well apply in all cases where a Public Local Inquiry is held into projects promoted by Scottish Government itself. The inquiry could not possibly be regarded as independent, or fair to the interests of the public and those affected by the proposal.
- c) Road Sense argues that there is restricted ability to seek justice through the Scottish Judicial Review system. Judicial Review involves a challenge to the legal validity of

the decision. It does not allow the court of review to examine the evidence with a view to forming its own view about the actual merits of the case. There is therefore a deficit of justice, in that the actual merits of an environmental decision taken by the Scottish Government cannot be challenged unless there has been a breach of its own procedures. The court may not form its own view on the environmental merits of the evidence. Road Sense also contends that the very high cost of seeking Judicial Review in Scotland effectively precludes any individual or small organisation seeking environmental justice against the Scottish Government through this procedure. **Article 9 (2) of the Aarhus Convention** provides that the public must have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission. With respect to members of the public and persons affected by the AWPR there is no such access.

Full Substance of the Communication

Road Sense submits that the procedures of the Scottish Government and its agents in planning, implementing and assessing the impact of the AWPR have been deficient in three key aspects:

1. Failure to provide access to environmental information which is important in considering the environmental impact of the AWPR
2. Failure to provide for full public participation in environmental decision-making with respect to the AWPR
3. Failure to provide access to justice with respect to consideration of the AWPR

Those deficiencies will be described under these same three headings

1. Access to environmental information

The Aarhus Convention guarantees the right of access of the public to receive information on the state of the environment. Road Sense has requested a number of documents from agents of the Scottish Government, but has been refused access to them.

To give one example, Road Sense has been refused access to information relating to the state of local populations of the freshwater pearl mussel (*Margaritifera margaritifera*), a designated species within the River Dee Special Area of Conservation (SAC). The AWPR will cross the River Dee SAC by a large new bridge. Scottish Natural Heritage (SNH), the agency of the Scottish Government responsible for providing advice on wildlife, has accepted that the AWPR is likely to have a significant effect on the qualifying interests for the site, including freshwater pearl mussels. SNH has also made it clear that the state of freshwater pearl mussel population in the River Dee gives cause for concern as the population would seem unable to naturally sustain itself.

The information requested by Road Sense is contained within a report presented to SNH, the Scottish Government's conservation advisers, by independent contractors. Access to the report was requested by Road Sense in July 2008, in preparation for a forthcoming Public Inquiry, under the Freedom of Information Scotland Act, but was denied in August 2008 on

the grounds that “*any release of this data could increase the risk of persecution. If SNH was to release this data to you we would also be obliged to release it to any other person who asked for it, reducing the current level of protection afforded to fresh water pearl mussels in the Dee*”. A further request for that same information has since been submitted but not yet complied with.

Refusal to provide information on the state of the environment by an agency of the Scottish Government is a breach of **Articles 1 and 4 of the Aarhus Convention**.

Road Sense appreciates that the Convention may provide for derogation from rights of access to information on, for example, the breeding sites of rare species. However, Road Sense has made it plain to SNH that it is prepared to restrict access of the information on freshwater pearl mussels to suitable qualified individuals and to sign an undertaking not to release any information in relation to the location of breeding sites to other parties. Road Sense notes that the report has previously been made available to independent consultants employed by Transport Scotland. It should be noted that a number of Road Sense members are professional biologists occupying positions of environmental responsibility. They are well used to handling confidential environmental information.

Road Sense was aware that procedures exist under the Freedom of Information Scotland Act (FOISA) for appealing against a refusal to provide information, and has used these procedures in the past. However, in this case the information was required for the preparation of precognitions and other documents for an imminent Public Inquiry. There was insufficient time to go through the long drawn out procedures required by FOISA.

Lack of access to the information on freshwater pearl mussels contained within the report has prevented Road Sense from taking action in two important respects:

Road Sense wishes to query the adequacy of measures taken by the Scottish Government to avoid deterioration of habitats for the freshwater pearl mussel within the Dee SAC. One of the conservation objectives of the River Dee SAC is to avoid deterioration of the habitats of the qualifying species, including the freshwater pearl mussel. Road Sense argues that sedimentation and pollution is currently causing deterioration in habitat suitability for adult and juvenile freshwater pearl mussels within the River Dee SAC, resulting in an adverse impact upon mussel populations. Road Sense maintains that SNH and the Scottish Government (and indirectly the UK Government) have been derelict in their duties with respect to the Habitats Directive by failing to prevent habitat deterioration within the SAC. The construction of the AWPR will make that deterioration worse. Article 12 of the Directive requires Member States to take requisite measures to establish a system of strict protection for the certain animal species, including the freshwater pearl mussel, prohibiting deterioration or destruction of breeding sites or resting places. Road Sense argues that SNH and the Scottish Government have not enforced the provisions of the Habitats Directive effectively, and that it is their failure to enforce those provisions that has resulted in the deterioration of habitats for the freshwater pearl mussel. In denying access by Road Sense to an independent report on the state of mussel populations SNH is protecting its own position and preventing Road Sense from calling SNH and the Scottish Government to account for their failure to act. In this respect SNH and the Scottish Government are failing to comply with **Article 5 (c) of the Aarhus Convention**, which in the event of any imminent threat to the environment (in this case to freshwater pearl mussels, a strongly protected species) requires that there must be access to information which could enable the public to

take measures to prevent or mitigate harm arising from the threat. Unless Road Sense has access to the report commissioned by SNH, which points to deterioration in the status of freshwater pearl mussels, it will be unable to draw the attention of the European Commission to the lack of enforcement of the Habitats Directive by the Scottish and UK Governments.

Road Sense is especially concerned that failure to provide the report, which includes information on the distribution of freshwater pearl mussels in relation to a new bridge, proposed for the AWPR, has impaired the ability of Road Sense to oppose effectively the construction of the AWPR. In arguing its case against the AWPR with the Scottish Government, and most particularly in presenting evidence at a Public Inquiry into the proposed AWPR, Road Sense has been seriously hampered by the refusal of SNH to provide Road Sense with information on the state of freshwater pearl mussel populations within the Dee SAC. This refusal to provide key environmental information has been compounded by the willingness of SNH to provide that report to private consultants assisting Transport Scotland in making their case for the construction of the AWPR.

The right of Road Sense and the public to obtain access from a government agency to key information on the state of a protected species which is known to be in a poor and threatened state has been denied. That denial constitutes a breach of **Articles 1, 4 & 5 of the Aarhus Convention**.

There is a further example of failure to provide environmental information. Road Sense sought to obtain and lodge during the Public Inquiry into the AWPR a report on badgers along the route of the AWPR, prepared by agents of Transport Scotland. The 'badger report' was withheld from Road Sense on the grounds that if the information was divulged to the public it would increase the risk of persecution of badgers. Subsequently, the Reporters conducting the Public Inquiry for Scottish Ministers did not allow evidence to be given on the badger report, and did not wish to have the report itself presented to the Inquiry. The inability of Road Sense to present information on the presence of badger setts along the route prevented Road Sense witnesses from arguing that insufficient was being done to protect badgers from the effects of the route, especially in terms of separation of badger setts from foraging and feeding areas by the construction of the road. Road Sense was also unable to question effectively the adequacy of the mitigation measures proposed by Transport Scotland. Again, denial of access to the badger report constitutes a breach **of Articles 1, 4 & 5 of the Aarhus Convention**. As the need for the information was required during the course of a Public Inquiry, there was insufficient time to engage in lengthy FOISA procedures.

2. Public participation in environmental decision-making

The Aarhus Convention obliges public authorities to enable the public and environmental non-governmental organisations to comment on proposals for projects affecting the environment, or plans and programmes relating to the environment, these comments to be taken into due account in decision-making, and information to be provided on the final decisions and the reasons for it.

Road Sense argues that the Scottish Government has failed to allow Road Sense and other parties affected by the AWPR to comment on proposals for the route to be taken by the

AWPR. The Scottish Government has also failed to provide information on the reasons for its decisions on the choice of route.

The Aberdeen Western Peripheral Route (AWPR) was identified in 2003 by the North East of Scotland Transport Partnership (NESTRANS) as a key element in an integrated transportation strategy for Aberdeen - the Modern Transport System (MTS). In March 2003 Scottish Ministers announced that the AWPR would be taken forward as a national Trunk Road project.

In October 2003 the Managing Agent for the AWPR appointed contractors to develop the Southern Leg of the route, which crosses the Aberdeenshire River Dee Special Area of Conservation (SAC). A particular route had previously been identified as the preferred route - the Murtle Route.

Between October 2003 and August 2004 development and assessment of the Murtle Route was undertaken. However, concern over the impact of this route upon a school for children with special needs resulted in the Transport Minister in September 2004 asking contractors to reassess the route selection decision. Four alternative route options were reviewed in addition to the preferred route. All five of these crossed the River Dee SAC, at four alternative crossing points. The Northern Leg was common to all the route options. The five routes were the subject of a major informal public consultation exercise in spring 2005 intended to enable the general public to view, understand and consider the key issues for each option. The Murtle Route was identified as the preferred option for the public consultation.

A workshop in July 2005 attended by government and local government officials identified the Murtle Route as marginally preferable to the Pitfodels Route; both were considered superior to other more western routes including the Milltimber Brae route. In October 2005, the Chief Road Engineer provided advice on the selection of a preferred option to the then Minister for Transport, in which he affirmed that he was bound to continue to recommend the Murtle option. However, the Minister came to the view that none of the options presented to the public were satisfactory. It is believed that the Minister's decision on this matter was taken having regard to the effective public campaign conducted by and on behalf of those who wished to avoid the impact of the Murtle route on the special needs school.

On 1 December 2005 the Minister, announced that the AWPR would follow a route that was not one of any of the five routes considered during the public consultation. The new route combined elements of an original Milltimber Brae route with the addition of a Fast Link connecting the AWPR to the A90 trunk road at Stonehaven, 15 km south of Aberdeen. **There had been no previous public intimation of a proposed Fast Link, and accordingly no public consultation in respect thereof.** At the time of the announcement, the Fast Link was to be a conventional single carriageway

The change in route was subsequently justified by Transport Scotland on the basis that the transport planning objectives for the AWPR had now changed. Following the Minister's decision an additional, retrospective strategic transport objective was introduced:

Provide traffic relief (including the removal of long distance heavy goods vehicle traffic) on the existing congested A90 route through and to the south of Aberdeen.

Although the relief of traffic on the A90 was a major change to the objectives of the strategic transport plan (the MTS) no Strategic Environmental Assessment (SEA) was performed on the revised plan. No consideration was given to alternative routes which would achieve the new objectives (although this was a requirement under the Scottish Government's own Scottish Transport Appraisal Guidance - STAG). No documented justification was provided for taking the Fast Link (a 15 km dual carriageway) as far south as Stonehaven to reduce congestion close to Aberdeen. It is Road Sense's contention that had an SEA been performed, and had the public been consulted, it would have highlighted the risk of damage to the environment and to the Dee SAC by the new route and directed attention to the need to select a route which would minimise that damage.

The route selected had a number of disadvantages compared with alternatives, especially with respect to its impact upon the environment, the Dee SAC and European Protected Species. The route was longer, traversed several sensitive sites, affected adversely a number of protected species, and came close to the Red Moss SAC. In particular, the route had the potential for impact not just on the main stem of the River Dee SAC but also upon an important tributary of the Dee, the Crynoch Burn, which also forms part of the Dee SAC. As a result, the new choice of route increased significantly the risk of adverse impact upon the Dee SAC. Traffic modelling by Transport Scotland had also shown that the chosen route was less effective at reducing congestion in Aberdeen compared with alternatives.

Subsequently, the promoters proceeded to refine the alignment of the chosen route and to upgrade the Fast Link to a dual carriageway. Transport Scotland sought comment early in 2006 on the alignment of the new route and Fast Link and a preferred alignment was announced on 02 May 2006. Draft Orders for the AWPR were published in September and October 2007 and were followed by a statutory consultation. About 10,000 objections to the proposals were lodged.

Road Sense points out that parties affected by the changes to the route of the AWPR were unable to comment upon the new route or its increased environmental impact either during the consultation in the Spring of 2005 (which did not include the route finally selected) or during the subsequent consultation in 2006 on route alignment (where consideration was not given to the choice of the route itself). In effect, the Scottish Government had consulted the public on 5 routes and then chose a 6th. No consideration was given to alternatives which would meet the new objectives set for the AWPR, and no appraisal was carried out on alternatives which would better respect the environment. The public were unable to comment on the selection of a new route or to its new objectives or to the increased damage that would be caused to the environment.

Road Sense maintains that because of inadequate procedures the public were not informed in advance of the Milltimber Brae/Fast Link route and were unable to comment on this choice of route. The public were therefore deprived of their rights under the Aarhus Convention. In more detail, the public were not informed in advance of any proposal for a Milltimber Brae/Fast Link route option, or invited to comment on that route option, as required under **Article 6 (2)**. Effective public participation in all options in an open way was not provided, although this is required under **Article 6 (4)**. The public were not informed of new objectives

established for the route (which were defined only after the route had been selected), although this is required under **Article 6 (5)**. The public were not able to submit, in writing or, as appropriate, at a public hearing or inquiry with the applicant, any comments, information, analyses or opinions on the final choice of route, although this is required under **Article 6 (7)**.

Under the Freedom of Information Scotland Act, Road Sense asked the Scottish Government to provide information on the reasons for choosing the Milltimber Brae/Fast Link route. That information was not provided. A number of documents were obtained following the intervention of the Information Commissioner which cast light on the way the decision was taken. These papers made it apparent that the advice of officials was to proceed with the original route, the Murtle Route, which had been extensively consulted upon. However, no direct information on the actual reasons for the decision taken by the Minister were obtained. Asked for minutes of the meeting recording that decision, a representative of the Scottish Government replied that "*communication took place between officials and the Minister in the period leading up to the decision announced on December 1st 2005. A meeting was held on 14 November 2005 attended by the Minister and officials however there was no agenda and no notes or minutes were kept. Discussions were also held between officials but there were no agendas, notes or minutes taken*". This is an extraordinary situation for any meeting at which an important decision, with heavy financial implications, was taken. Road Sense questions the veracity of this reply.

Road Sense contends that in failing to provide evidence on the reasons for the change in the route of the AWPR announced on December 1st 2005 the Scottish Government has failed to meet its obligations under the Aarhus Convention. **Article 6 (9) of the Aarhus Convention** requires each party to ensure that, when the decision has been taken by the public authority, the public is promptly informed of the decision in accordance with the appropriate procedures. Each Party shall make accessible to the public the text of the decision along with the reasons and considerations on which the decision is based. Reasons for the choice of route were only provided retrospectively, and these were unconvincing. The inescapable conclusion can only be that the route was chosen for reasons which the Minister and officials did not wish to disclose, and which may have conflicted with important, relevant European Directives and Conventions.

Although the introduction of a new objective, the relief of traffic on the A90, was a major change to the strategic transport plan (the MTS) no Strategic Environmental Assessment (SEA) was performed on the revised plan, although this is a requirement under the SEA Directive. No consideration was given to alternative routes which would achieve the new objectives (although this was a requirement under the Scottish Government's own Scottish Transport Appraisal Guidance - STAG) and no justification was provided for taking the Fast Link (a 15 km dual carriageway) as far south as Stonehaven to reduce congestion close to Aberdeen. Road Sense maintains that there should have been public discussion of the introduction of such a new and far-reaching objective, and that the Scottish Government in failing to allow that discussion therefore breached **Article 7 of the Aarhus Convention**. **Article 7** requires each party to make appropriate practical and/or other provisions for the public to participate during the preparation of plans and programmes relating to the environment, within a transparent and fair framework, having provided the necessary information to the public. In this case a major amendment to the strategic transport plan was made without any discussion or public participation.

3. Access to Justice

The Aarhus Convention obliges governments to provide review procedures which enable the public to challenge decisions that have been made without respecting the two aforementioned rights or environmental law in general.

Road Sense argues that with respect to the AWPR environmental justice has not been served in three important respects.

a) Failure to ensure that environmental information is fit for purpose

Transport Scotland, having accepted the potential for the construction and operation of the AWPR to cause significant and adverse impacts on the Dee SAC, decided that an Appropriate Assessment was necessary to meet the provisions of the Habitats Directive. Transport Scotland commissioned a Report to Inform Appropriate Assessment from consultants. That Report was completed in April 2008, and was submitted to SNH whose response became available in a letter dated 8th August 2008.

Road Sense argues that there are major deficiencies in the Report to Inform Appropriate Assessment and that these deficiencies negate any significance which might be attached to its findings or to the response of SNH as contained in its letter of 8th August 2008.

Road Sense contends that the procedure for commissioning an environmental statement from consultants by the promoter of the route resulted in an environmental statement and a Report to Inform Appropriate Assessment which presented information especially tailored to the needs and requirements of Transport Scotland. In effect, the consultants were acting at the behest of Transport Scotland and supporting its case for the AWPR, rather than providing independent advice to the public and to the Scottish Government on the environmental impact of the route. Road Sense argues that commissioning information in such a way, without stressing the need for the information to be independent and to serve the interests of the general public, constituted a failure by Transport Scotland and the Scottish Government to ensure that environmental information was independent and fit for purpose. The procedures followed by Transport Scotland and the Scottish Government, and the procedures subsequently adopted at the Public Local Inquiry, did not enable the public to challenge effectively the advice and information provided and the decisions made.

Transport Scotland accepts that the construction and operation of the AWPR has the potential to cause significant and adverse impacts on the Dee SAC. It also accepts that the AWPR is not a plan or project which is directly connected with or necessary to the management of the River Dee SAC. As a consequence it accepts that an Appropriate Assessment is needed, as required by the Habitats Directive. The Report to Inform Appropriate Assessment concludes that the construction and operation of the AWPR road scheme, where it crosses the River Dee SAC, "*will not have an adverse impact on the conservation objectives for the qualifying species ... and that there will be no adverse effects on the integrity of the River Dee SAC.*" The authors of the Report further concluded that "*no other plans and projects have been identified which could have a potential effect, in combination with the AWPR Dee crossing, on the conservation objectives or integrity of the site*".

The Report to Inform Appropriate Assessment in fact identifies a large number of significant impacts upon the Dee SAC, not only for the qualifying species but also for European

Protected Species. However, the solution put forward by Transport Scotland is that these adverse impacts would be overcome through generic and non-specific mitigation measures.

It is Road Sense's submission that the Report to Inform Appropriate Assessment is deficient in at least two (and indeed other) significant respects:-

Appendix 9 to the Report dealing with River Dee Salmon – Underwater Noise Investigation - is flawed to a significant extent. Road Sense has provided evidence on this matter and that evidence has not been contradicted. It cannot be concluded beyond reasonable scientific doubt that the project will not adversely impact on the integrity of the Dee SAC. Basic mistakes in Appendix 9 indicate a failure to review the document properly, and the fact that the mistakes were not picked up by SNH in its assessment of the Report indicates a lack of a critical approach to the assessment, an approach reflected, perhaps, in the reliance upon the terms of the Report in the SNH response.

The Habitats Directive requires that all developments which might affect a protected site have to be taken into account in preparing an Appropriate Assessment. The European Commission refers to this exercise as an 'in combination' procedure. The in combination exercise carried out on behalf of Transport Scotland was concluded with the deliberate exclusion of two developments, namely a major proposed development at Aberdeen Harbour and a housing development at Blairs. The development at Aberdeen Harbour involves redevelopment in five phases with reconstruction of the quayside and dredging of the main river channel. The proposal at Blairs involves the construction of a hotel, conference centre, 280 residential units, a golf course and an equestrian centre, all of which has received planning permission. The development involves a sewage pipeline crossing the Dee and drainage of effluent into ponds on the river bank. If one has regard to the advice on the proper interpretation of Article 6 of the Habitats Directive issued by the Commission it is clear that these are development proposals which should have been included in an in combination assessment. The view apparently taken by Transport Scotland is that for a development to be included in this exercise, it should be concurrent with the principal development. That is a fundamental misunderstanding of the provisions of the Habitats Directive.

For the reasons given above, it cannot be concluded that the Appropriate Assessment process itself will be carried out with the required attention to the quality and detail of the environmental information provided. Road Sense argues that The Report to Inform Appropriate Assessment is not fit for purpose in a number of respects and provides information which especially fits Transport Scotland's case. In particular, the Report gives few details of the mitigation measures proposed, and much of the mitigation is left to contractors to perform. The process for arriving at the Appropriate Assessment itself will therefore not result in justice for those concerned about the adverse effects of the AWPR upon the Dee SAC.

Under the Aarhus Convention the public are entitled to engage with knowledgeable and independent professionals. In this case, the evidence presented by Transport Scotland's agents was seriously flawed. The procedure whereby Jacobs, as agents of Transport Scotland, both planned the road from an engineering standpoint and also conducted the environmental surveys and assessments was especially inappropriate. Road Sense maintains that this procedure produced a conflict of two interests and led to engineering design being given priority over environmental considerations. By accepting inadequate and

inaccurate environmental information from its agents the Scottish Government has adversely affected the ability of the public to oppose a public decision which will have damaging effects upon the environment. Removal of this ability to challenge a major road scheme is an affront to justice and is contrary to the Aarhus Convention. The preamble to the convention recognises “*the importance of fully integrating environmental considerations in governmental decision-making and the consequent need for public authorities to be in possession of accurate, comprehensive and up-to-date environmental information.*” In this case the information provided by the agents of the Scottish Government was neither accurate nor comprehensive, nor did it make use of the most recent information. **Article 3 of the Aarhus Convention** requires that each party shall endeavour to ensure that officials and authorities assist and provide guidance to the public in seeking access to information, in facilitating participation in decision-making and in seeking access to justice in environmental matters. This was not done. Information must be made available to the public and to the Scottish Government in a manner which enables informed environmental decisions to be taken. In this case the information provided was not complete and was not of a high enough standard to enable the Scottish Government to make an informed decision on the environmental impact of the AWPR.

b) The restricted scope and circumstances of the Public Inquiry

Road Sense maintains that the procedure for reviewing the impact of the AWPR upon the environment and especially upon the Dee SAC and European Protected Species has not been in accord with environmental justice.

The Scottish Government has conducted a Public Local Inquiry into the proposed AWPR. Scottish Government Reporters (employed by the Scottish Government) were appointed to conduct the inquiry and report to Ministers. At a Pre-Inquiry meeting, the Reporters stated that Scottish Ministers had accepted the need in principle for the road and did not wish to be advised on the justification for the principle of the scheme in economic, policy or strategic terms. The Ministers considered that strategies and policies referring to the scheme were relevant to the inquiry only insofar as these set out the context for the AWPR. The Ministers also directed that they wished to be advised only on the technical aspects of the route choice, including the environmental statement and any opinions expressed on it. **In response to these instructions the Reporters decided to disallow any evidence which had, as its objective the calling into question of the need for the scheme.** In addition, while acknowledging the intention of certain objectors to present evidence “on alternative routes and alternative designs” the Reporters specifically commented that the inquiry was into the scheme proposed by Transport Scotland and “*cannot turn itself into an inquiry into a series of assumed alternative proposals*”. The Inquiry started in September 2008 and terminated in January 2009, but the findings of the Inquiry have yet to be announced (as at April 28th 2009). The findings will be presented to Scottish Ministers, who will deliver their final decision upon the Orders. **Road Sense has serious doubts whether Ministers can be expected to be impartial with respect to the merits of a scheme that they are themselves promoting.** Road Sense also has serious doubts whether an Inquiry conducted by Reporters working closely to the instructions of the Scottish Government, and restricted in scope by Scottish Ministers, properly meets the requirement of the Aarhus Convention for ‘procedures to challenge public decisions’. In this case the public and affected individuals were not able to question to decision to build an AWPR. Moreover, the Public Inquiry could not be regarded as independent.

The inability of the public to question the actual decision to build the AWPR is especially significant in the context of the impact of the AWPR upon the Dee SAC. In taking a route to the west of Aberdeen, as the Aberdeen Western Peripheral Route must, it is inevitable that it will cross the River Dee SAC, which flows from the west into the city of Aberdeen. Under the Habitats Directive it is important to consider alternatives to any proposal which will have an adverse impact upon an SAC, and those alternatives include a do-nothing option. By preventing the public raising the issue of alternatives which would do less damage to the Dee SAC, including the do-nothing option, the Scottish Governments and its agents effectively precluded any discussion of key environmental issues with relevance to the conformity of the route with the Habitats Directive.

At the Public Inquiry, Road Sense called into question the compliance of the scheme with provisions of the Habitats Directive. In particular, Road Sense emphasised the lack of consideration which had been given to resorting to alternative solutions which would better respect the integrity of the Dee SAC. Road Sense also pointed out that the route under consideration would cause disturbance to European Protected Species, including bats and otters. Road Sense also argued that by restricting the ambit of the Inquiry Scottish Ministers had removed from consideration certain matters which, in terms of a proper compliance with the Habitats Directive, required to be addressed. Moreover, Scottish Ministers had organised the Inquiry in a manner which was favourable to the scheme and which minimised consideration of its environmental impact. These concerns can be expressed as follows:-

- It is apparent, in particular having regard to the observations of the Reporters in the Minute of the Pre-Inquiry Meeting to the effect that the inquiry should not be turned into one into a series of assumed alternative proposals, that the scope for consideration of alternatives was confined to what might be seen as marginal alternatives within the context of the proposed route. That is not what is envisaged in Articles 6(3) and 6 (4) of the Habitats Directive.
- The refusal to allow consideration to be given to the need for the scheme, and in particular the economic case for the scheme, both current and historic, has resulted in a failure to address important environmental matters. If it were to be the case that, contrary to the assertion of Transport Scotland, the case for a positive assessment under the Appropriate Assessment process had not been made out, then the logic of Article 6 directs one to considering Article 6(4) of the Habitats Directive. That provision involves, of course, a consideration of alternative solutions and overriding public interest. As it was not been possible to subject the question of the need for the road to public scrutiny in the inquiry, and, in particular to consider the estimates of cost, or to weigh these against the environmental damage being done, then no conclusion can be drawn on the overriding public interest justification in terms of Article 6(4). Accordingly, if the Reporters were not satisfied that Article 6(3) had been properly complied with and/or were not satisfied that Transport Scotland had established that a positive assessment would be achieved in the Appropriate Assessment process, then no further recommendation could be made in accordance with Article 6(4).
- In order to obtain a derogation under Article 16(1) (c) of the Habitats Directive (which, it is understood, Transport Scotland accepts it has to achieve) it is necessary for the developer who wishes to destroy or allow the deterioration of a breeding site or a resting place of a European Protected Species to show that the prohibition may be derogated from for imperative reasons of overriding public interest. That is not a matter in respect of which the Reporters or the Inquiry could make any finding

because the restricted remit of the inquiry prevented the assertion of the Scottish Ministers being challenged. No conclusion could be reached which would allow the Reporters to conclude that a licence for an essential activity would be granted, and accordingly, and since the granting of such a licence is essential to the construction of the road, no recommendation could be made to on whether the road should go ahead.

Road Sense contends that the restricted scope and circumstances of the Public Inquiry was contrary to the principles of justice enshrined in the Aarhus Convention. **Article 7 of the Aarhus Convention** provides that each party shall make appropriate practical and/or other provisions for the public to participate during the preparation of plans and programmes relating to the environment, within a transparent and fair framework, having provided the necessary information to the public. The Public Inquiry, with its scope restricted by Scottish Ministers to suit their own interests, conducted by employees of the same Ministers, cannot be deemed to be a transparent or fair framework. **Article 9 (2)** provides that each party shall, within the framework of its national legislation, ensure that members of the public concerned (a) having a sufficient interest or, alternatively, (b) maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition, have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission. In the case of the Public Inquiry into the AWPR, it cannot be considered that this arrangement provided an independent and impartial body through which to challenge the legality of the decision to construct the AWPR. There were 10,000 objectors to the proposal to construct the Milltimber Brae/Fast Link route for the AWPR. However, the purpose of the Public Inquiry appears to have been merely to advise Scottish Ministers on technical aspects of the route choice. The Inquiry was not constituted in such a way as to serve the interests of the general public, or those affected by the decision to construct the AWPR. **Article 9 (3)** provides that members of the public must have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment. Road Sense contends that in the absence of a fair and impartial Public Inquiry of sufficiently wide scope there has been no administrative or judicial procedure which would allow breaches of national or international law to be raised and investigated.

Road Sense argues that the absence of a fair and impartial procedure for challenging decisions by Scottish Ministers is a particularly serious breach of **Article 9 of the Aarhus Convention**. Road Sense points out that this breach appears to apply in all cases where a Public Local Inquiry is held into projects promoted by Scottish Government itself. Although it is reasonable for Inquiries into proposals which are not those of the Government to be conducted by Reporters responsive to the Scottish Government's wishes, it is most unreasonable for Public Inquiries into schemes promoted by the Scottish Government to be conducted by their own employees, responsive to the particular wishes of the Scottish Government. The restricted scope of the Inquiry into the AWPR, and the acquiescence of the Reporters with the instructions of a Scottish Minister regarding the scope of that enquiry illustrate this point very clearly. It is evident that the Minister concerned, and the Reporters conducting the inquiry, believed and accepted that the inquiry was constituted simply to advise the Minister, and that the Inquiry was to be conducted along the lines that he dictated. The inquiry could not possibly be regarded as independent, or fair to the interests of the public and those affected by the proposal.

c) Restricted ability to seek justice through Judicial Review

In the event of the AWPR receiving approval by Scottish Ministers subsequent to the Public Inquiry (which has now concluded its hearings), with major potential damage to the environment, Road Sense would wish to challenge both the Public Inquiry process and the Ministerial decision to approve the AWPR. This can normally only be done in Scotland by seeking Judicial Review. Road Sense maintains that the Judicial Review process is so difficult and expensive for individuals or small associations to pursue in Scotland that it prejudices the ability of a non-governmental body to challenge decisions taken, perhaps unlawfully, by the Scottish Government – with its vastly superior financial resources.

Judicial Review is the procedure whereby the exercise of a decision making power is examined by the Scottish Court of Session so as to ensure that the power has been properly exercised for its lawful purpose. Judicial Review involves a challenge to the legal validity of the decision. It does not allow the court of review to examine the evidence with a view to forming its own view about the actual merits of the case. There is therefore a deficit of justice, in that the actual merits of an environmental decision taken by the Scottish Government cannot be challenged unless there has been a breach of its own procedures. The court may not form its own view on the environmental merits of the evidence.

It is only possible to resort to Judicial Review through a suitably qualified legal representative. It is also advisable to employ counsel who has experience of the particular subject area. It is not possible for an organisation or member of the public alone to seek Judicial Review. Inevitably, then, the costs of seeking Judicial Review are high. Certainly the costs are beyond the means of a small environmental organisation. Moreover, in the event of failure the plaintiff is liable for the costs of the other party or parties – which will be significant in the case of a plaintiff taking on the might of both Transport Scotland and the Scottish Government, with their high internal costs. As no legal aid or support is available then these high costs effectively preclude any individual or small organisation seeking environmental justice against the Scottish Government through Judicial Review.

Although in Scotland there is no formal time limit within which Judicial Review proceedings must be started, there is a time limit of 6 weeks set for appealing a Ministerial decision with respect to Road Orders. Road Sense believes that this is insufficient time to mount an effective challenge against a Ministerial decision with respect to the environmental impact of a major road.

In effect, the ability of members of the public to put in train review procedures to challenge environmental decisions taken by the Scottish Government is so limited as to be almost non-existent. Road Sense contends that environmental justice cannot be obtained without the commitment of very significant expenditure, which may not be recovered. Moreover, there is likelihood in the event of defeat of extraordinarily high levels of expenses being incurred. There is a deficit of environmental justice under these circumstances. The lack of an effective and affordable review procedure is contrary to the provisions of the Aarhus Convention. **Article 9 (2) of the Aarhus Convention** provides that the public must have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission. With respect to members of the public, persons affected by the AWPR, and Road Sense, there is no such access. The Public Inquiry, as constituted, cannot be regarded as an independent and impartial body. The remedy of Judicial Review does not constitute a procedure established by law that is free of charge or inexpensive.

Indeed Judicial Review is so expensive that only exceptionally wealthy members of the public could ever contemplate resorting to that procedure.

Other international procedures invoked in connection with this issue

A Complaint has been sent to the Commission of the European Communities concerning failure to comply with Community law. The complaint contends that the procedures adopted by the promoters of the AWPR in deciding upon the Southern Leg and Fast Link fail to comply with the provisions of the Habitats Directive. A route is being promoted which will have significant adverse effects upon the Dee Special Area of Conservation, and which will cause disturbance to European Protected Species.

The Complaint argues that in considering the AWPR there has been:

- Failure to comply with Articles 6(3) and 6(4) of the Habitats Directive
- Failure to comply with Articles 12 and 16 of the Habitats Directive
- Failure to comply with the SEA Directive

Confidentiality

No request for confidentiality is submitted

Supporting documentation

There is a great quantity of documentation to support this Communication. However, rather than attach everything that is relevant Road Sense is willing to respond expeditiously to any request from the Committee for particular sources of information.

The Constitution of Road Sense is attached.

Signature of authorised person



William Walton
Chairman of Road Sense
7th May 2009

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Communication

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Constitution of 'Road Sense'

1. Name

1. Road Sense

2. Aims & Objectives

Road Sense aims to:

- Support the identification and selection of the most sustainable, environmentally acceptable, economically efficient and socially inclusive solutions to the transport problems of Aberdeen and its surrounding area.

The objectives of Road Sense are to:

- Support a comprehensive and thorough evaluation of all transport options available within the Aberdeen area
- Challenge the existing Netherley / Milltimber Brae route for an Aberdeen by-pass proposed by Transport Scotland

Those objectives will be achieved by:

- Coordinating the work of interest groups that are opposed to the announced route
- Arguing that the current choice of route was arrived at unfairly
- Pressing for a full evaluation of all options for solving Aberdeen's traffic problems, to be conducted in a responsible, equitable and objective manner
- Investigating and publicising more sustainable solutions to Aberdeen's transport problems

The activities of Road Sense will be open and transparent. Full and timely reports on all its meetings, activities and expenditure will be provided on the web-site.

3 Powers

In furtherance of its objectives Road Sense may:

1. Employ and pay any person to supervise, organize and carry out the objectives of Road Sense;
2. Establish itself as an Unincorporated Body;

3. Engage and pay fees to professional and technical advisors or consultants to assist in the objectives of Road Sense;
4. Promote and carry out or assist in promoting or carrying out surveys, studies and other investigations in support of the objectives of Road Sense;
5. Purchase, take on lease, hire, or otherwise acquire any equipment or apparatus considered appropriate for the work of Road Sense;
6. Inform people along the current route of the impact it will have upon their communities
7. Seek funds to pursue the objectives of Road Sense; and
8. Do all other such lawful things as are incidental or conducive to the attainment of the objectives of Road Sense.

4. Members

1. Members of Road Sense shall consist of individuals and organisations which share the objectives of Road Sense and have completed a membership application form.
2. In the event of any doubt whether an individual or organisation is or should be a member the final decision on membership shall be taken by the Committee. The Committee may terminate the membership of any individual or organisation which in their opinion does not support the objectives of Road Sense as set out in this constitution. Any individual or organisation being considered for termination of membership shall have the right to make representations to the Committee.

5. The Committee

1. The Committee of Road Sense shall decide upon general policy, direct the affairs of Road Sense and be responsible for taking action in support of the objectives of Road Sense. The Committee shall meet at least three times each year.
2. The Committee shall be nominated and elected annually by members at an Annual General Meeting (AGM) and shall consist of not less than 6 and not more than 12 Members.
3. The Committee shall consist of:
 - At least one representative of Maryculter
 - At least one representative of Milltimber

- At least one representative of Silverburn
 - At least one representative of Peterculter
 - At least one representative of Netherley
 - At least one representative of Charleston
4. Members of the Committee shall behave in the best interests of Road Sense to further the objectives laid down in this constitution and shall be accountable to the membership at the AGM.
 5. The Members of the Committee shall, where possible, undertake their work through consensus. If no consensus can be reached, dissenting opinions expressed by members shall be recorded in the report of a meeting. If a vote is taken at Committee Meetings only Members of the Committee (excluding the Chairperson) shall be entitled to vote.
 6. At any meeting of the Committee more than two thirds of the members shall be present to form a quorum.
 7. Meetings of the Committee shall be attended by the elected Members of the Committee. Other members of Road Sense and invited individuals may attend the meetings of the Committee at the discretion of the Chairperson
 8. The Committee of Road Sense may establish advisory groups, to assist the Committee for a specific purpose for a limited duration.
 9. Any vacancy on the Committee including the office bearers may be filled by the Committee and any person appointed to fill such a vacancy may remain until the next AGM.

6. Annual General Meeting

1. An AGM shall be organized by the Committee on behalf of the members of Road Sense
2. Members of Road Sense shall have the right to attend the AGM, nominate and elect a Chairperson for the Committee from amongst their members, participate in the appointment of the Committee from amongst their members and present their views on relevant issues to the Committee.
3. The Committee shall prepare reports and strategic plans for Road Sense which shall be presented and approved at the AGM
4. Attendance at the AGM shall be open to all members and others who support the objectives of Road Sense.
5. At the AGM the Treasurer shall present the annual accounts on behalf of the Committee.

6. Decisions taken at the AGM shall be decided by consensus or by a simple majority vote.

7. Office Bearers

1. The Office Bearers of Road Sense shall be elected annually by the AGM from the elected Members of the Committee and shall consist of:

The Chairperson

To be nominated and elected at the AGM for a term of one year by members of Road Sense. The Chairperson shall play an impartial and independent role. The Chairperson shall have a casting vote in the event of any tied vote by the Committee.

The Secretary

To be nominated and elected at the AGM for a term of one year by members of Road Sense from the elected Members of Committee. The Secretary shall have a vote.

The Treasurer

To be nominated and elected at the AGM for a term of one year by members of Road Sense from the elected Members of Committee. The Treasurer shall have a vote

2. The Treasurer shall keep the accounts of Road Sense and prepare the accounts for the AGM. The Secretariat shall arrange for certified auditing of the accounts and for satisfying any reporting conditions laid down by funders.
3. The Secretary shall maintain a register of members.

8. Amendments to the Constitution

1. This Constitution shall be agreed by the members of Road Sense. Any amendments must be presented to members for comment at the AGM and agreed by a two-thirds majority of members present.

9. Dissolution

1. Dissolution of Road Sense shall require a two-thirds majority of the members attending the AGM.

2. After all debts and liabilities have been met and funding conditions satisfied any remaining assets shall be passed to an organisation within Aberdeen or Aberdeenshire having objectives concerned with environmental conservation or protection of the built environment.