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using the law to protect the natural and built environment

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Performance Benchmarking Australian Business Regulation
Productivity Commission
PO Box 1428
Canberra ACT 2601

By email: planning@pc.gov.au

Dear Mr Coghlan

Planning, Zoning and Development Assessments

The Environmental Defenders Office (Tas) Inc (***EDO***) is a non-profit, community based legal service specialising in environmental and planning law. We strongly support the comments made in the Australian Network of Environmental Defenders Offices submission on this issue, and seek only to add a few comments in relation to the Tasmanian experience.

Government coordination and cooperation

Need for State level policies on significant planning issues

Many recent reviews of the planning system in Tasmania (including the Edwards Review and the Legislative Council Select Committee review) identify lack of Statewide policy direction as an impediment to consistent land use planning decisions. Without clear policy guidance on strategic issues, planning, zoning and development assessment decisions vary significantly between local government areas.

In Tasmania, State Policies (developed under the *State Policies and Projects Act 1993*) are intended to provide a strategic backdrop for planning decisions and to ensure a consistent, State-wide approach to resource management and planning issues. However, to date only three policies have been developed:

- *State Coastal Policy 1996*
- *State Policy on Water Quality Management 1997*
- *State Policy on the Protection of Agricultural Land 2009*

Even these policies have been fraught with implementation difficulties[1].

In our view, a broader suite of State Policies will ensure more consistent and sustainable planning decisions and provide certainty to developers, councils and the community. It is critical that the Tasmanian government commit to developing State policies and to facilitating their adoption at a local government level, through implementation guidelines, education programs and ongoing resource assistance.

Examples of issues which would benefit from strategic policy guidance include:

- Vegetation Management
- Natural Hazards (including bushfires and floods)
- Managing Climate Change Impacts (including policies for planned retreat)
- Tourism
- Affordable Housing
- State Settlement Strategy
- Public Transport

Coordination of Available Information

In our experience, there is poor coordination between relevant State and local government agencies in relation to information. While considerable information has been collated across the state in relation to issues such as water quality and flow data, threatened species habitat and vegetation clearance, this information is often not readily available to Council officers assessing development applications.

Councils are often basing decisions on outdated or broad GIS and TASVeg mapping to determine whether threatened species will be impacted. Responsibility for assessment of vegetation clearance associated with development has recently been shifted from the Forest Practices Authority back to planning authorities, despite many councils not having any capacity to map, monitor, assess or report on native vegetation clearance.

We would support greater efforts to improve information sharing between government agencies and councils to ensure that planning authorities have access to up-to-date spatial and mapping information when assessing developments, or requiring councils to seek the advice of relevant government agencies. Better information will improve decisions and reduce legal challenges.

Competition

Without Statewide guidance on various policy issues to set minimum planning standards, there is a danger that Councils will be reluctant to make bold restrictions for fear of losing development investment to other, more lenient municipalities.

Equally, some flexibility is required to allow individual councils to regulate land use having regard to the assets of the region. Recently, the *State Policy on the Protection of Agricultural Land 2009* was adopted which prevents councils from designating plantation forestry as either a discretionary or prohibited use. King Island Council took a firm stand on this issue, claiming that expansion of plantation forestry

[1] For more information, see EDO Tas submissions in relation to the draft State Coastal Policy 2008 (http://www.edo.org.au/edotas/pdf/100621_Draft_State_Coastal_Policy2008.pdf) and the Review of the State Policy on Water Quality Management (http://www.edo.org.au/edotas/pdf/water_quality_management0901.pdf).

would potentially compromise existing agricultural enterprises in the municipality. The final State Policy provides a qualification to the initial exemption, allowing a prohibition on plantation forestry where it was considered necessary to protect existing industries.

Another obvious competitive difficulty with the resource management and planning system in Tasmania is the different assessment processes for specific industries, including forestry and marine farming. These different systems arguably advantage these industries over other land uses.

Removal of all exemptions and protections for the marine farming and forestry industries would ensure that decisions relating to these uses are subject to sustainable development objectives and accountable through the RMPS public participation processes, along with all other land uses.

Third party access to information

To ensure effective public involvement in land use planning, it is essential to allow easy and equitable access to planning information. At present, the approach to providing public access to development application material differs widely between councils throughout Tasmania.

In our experience many people are advised by council officers that they cannot see a development application, or supporting documents such as traffic reports, because the information is confidential. Clearly, it is necessary to ensure that all council officers are aware that the public are entitled to see the application and supporting documents.

Currently, the *Land Use Planning and Approvals Act 1993* only requires that the development application by available for inspection during office hours. It is frequently incredibly difficult for interested parties to attend the council office during business hours and take sufficient notes to enable them to understand the impacts of a proposed development. This can lead to frustration and poor quality representations. It would be preferable for information to be readily available to all interested parties to enable constructive representations to be made in response to the proposal.

Several councils make development applications and supporting material available on their websites during the public comment period. This practice should be mandatory to facilitate greater access to information.

Compliance with information requirements

In our experience, significant delays in the planning system occur at the local government level. These delays are often related to inadequate information being provided by a proponent, or to council officers' lack of understanding of the information required prior to certification of a planning scheme or planning scheme amendment.

Even in council areas where planning schemes detail the information that must be provided before a development application can be assessed, the level of compliance with these provisions remains uneven. Council officers can spend considerable time seeking extra information and clarification. This can lead to significant delays.

There have recently been a number of appeals before the Tribunal where the Tribunal has held that it has no jurisdiction to hear the appeal because the development application was invalid for lack for failing to provide adequate information.[2] This also leads to lengthy delays and costs.

Similarly, the process for approving planning schemes and scheme amendments can be protracted. The Tasmanian Planning Commission must be satisfied that a certified amendment is 'in order' before proceeding to a hearing. Where Councils fail to provide adequate information to support a proposed planning scheme or amendment, the Tasmanian Planning Commission can spend a considerable amount of time reviewing, and possibly rejecting, the certification documents.

The EDO would support moves to improve efficiency at an administrative level within local governments. Measures could include:

- Standardising application forms and information requirements for DAs throughout all council areas. This should be supported by clear guidelines for proponents on how to satisfy these requirements;
- Clarifying Councils' powers to reject a DA if insufficient information is provided;
- Developing a set of standard permit conditions which can be adopted and amended as necessary by Councils. This would ensure that basic permit conditions were consistent, easily understood and legally enforceable.

Planning authority enforcement

Effective enforcement is critical to maintaining public confidence in any land use planning system. We agree with comments in the Issues Paper regarding the need for consistent enforcement activities across jurisdictions, but strongly endorse the ANEDO comments that enforcement action is not an 'unnecessary regulatory burden' but a critical aspect of a robust planning system.

Currently in Tasmania, planning officers do not have sufficient regulatory 'tools' to enforce planning schemes. We support recent recommendations to improve the suite of enforcements tools available to facilitate appropriate and timely control of planning activities (such as infringement and enforcement notices). We would also support amendments to allow planning authorities to recover the costs of investigation and enforcement activity. We acknowledge that, even with these amendments, prosecutions and enforcement action involve significant costs and expenses. We recommend that greater technical and financial assistance be given to local governments to pursue enforcement activities.

Pre-permit mediation

The opportunity to engage in mediation before a development permit is issued, pursuant to section 57A of LUPPA, is invaluable. Resolving issues before a permit is issued has the potential to improve permit conditions and significantly reduce appeals, or to narrow the issues on appeal. The fact that this option is currently underused is unfortunate.

One factor hindering greater use of pre-permit mediation is the lack of support from developers. The Act provides that "2 or all parties" must agree to the mediation.

[2] See, for example, *Woolcott Surveys obo Cooroolina Pty Ltd v Glamorgan Spring Bay Council* [2007] TASRMPAT 192; *P Krause v Derwent Valley Council* [2010] TASRMPAT 94; ***Burbury Consulting Pty Ltd v Brighton Council*** [2010] TASRMPAT 42

Theoretically, if a representor and council agree, mediation can proceed. However, councils remain subject to penalties for failing to determine a development application within the statutory time frame. Therefore, unless the applicant agrees to an extension of time, a council is unlikely to insist on mediation.

We would support efforts to educate council officers and the community (including developers) about the availability and advantages of this process. Training of mediators would also improve confidence in the merit of the mediation process.

Third party appeals

As a general comment, transparent decision-making and rigorous environmental assessment are the cornerstones of the planning system. Adopting good processes in which all relevant issues are considered leads to sustainable outcomes. It is critical to community support for the planning system that any effort to streamline the system does not erode rights of public participation or compromise the assessment of environmental impacts.

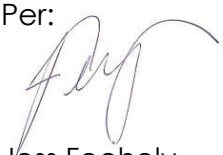
We refute any suggestion that community participation is an administrative and bureaucratic burden rather than a process that can add much value to resource management and decision-making. We believe that public participation helps to ensure fairness, justice and accountability, and can contribute issues to the debate that may otherwise be overlooked.

Therefore, the EDO opposes any reduction in existing third party appeal rights.

As discussed in the ANEDO submission, adequate legislative protections exist to discourage 'frivolous and vexatious' appeals. In Tasmania, s.22A of the *Resource Management and Planning Appeals Act 1993* requires the Tribunal to dismiss any appeal it is satisfied is frivolous or vexatious.

The EDO appreciates the opportunity to make these comments. Please do not hesitate to contact us if you wish to discuss anything raised in this submission.

Kind regards,
Environmental Defenders Office (Tas) Inc
Per:



Jess Feehely
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