



# edotasmania

using the law to protect the natural and built environment

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Review of the Tasmanian Building Regulatory Framework  
Building Standards and Occupational Licensing  
PO Box 56  
Rosny Park TAS 7018

**By email:** [wstinfo@justice.tas.gov.au](mailto:wstinfo@justice.tas.gov.au)

Dear Director,

## **Building Regulatory Framework Review**

EDO Tasmania is a non-profit, community based legal service specialising in environmental and planning law. EDO Tasmania is a member of the Australian Network of Environmental Defenders Offices (ANEDO) and the National Association of Community Legal Centres.

EDO Tasmania welcomes the opportunity to provide a submission on the Building Regulatory Framework Review. EDO Tasmania was pleased to be a member of the Consumer Advisory Group formed as part of this review and has therefore limited our response to the Discussion Paper to key points of interest. Our submission draws on EDO Tasmania's experience working with community members engaging with the complex regulatory framework, Tasmania's Resource Management and Planning System.

### **General Observations**

EDO Tasmania applauds the approach taken in this review. In particular, we commend the government for involving all core stakeholder groups - government, industry and the community (including consumers).

During the Consumer Advisory Group, meeting the high cost of regulatory compliance was raised by some participants. While there is no easy answer, serious consideration needs to be given to this issue. A building regulatory framework which makes it impractical for people of modest means to comply will inevitably lead to non-compliance. The system must be flexible enough to accommodate large construction firms who can pass on compliance costs, owner-builders seeking to provide a house for their family at a low cost and community housing projects constructing a high volume of similar buildings.

In this context, the current discourse around red and green tape is profoundly unhelpful. As the Issues Paper notes, the need for standards and regulation is undisputed. The real question is how to ensure that any regulatory cost has a proportionate benefit, whether that benefit is to human health and safety or environmental sustainability.

In our view, it is critical to consider cost-effective implementation and how to create a culture of compliance so that regulatory benefits can be realised. Inevitably, this will involve allocating resources for training, monitoring and enforcement, as well as regular review in light of stakeholder experience.

The manner in which the building regulatory framework is applied should be consistent across the state and should not depend on which Council is applying it. In some instances, greater consistency can be achieved not through regulatory reform, but capacity building through clearer guidance (including training, guidelines and templates).

The Issues Paper notes the review is an opportunity to consider “environmental concerns and climate change impacts”. EDO Tasmania believes the building regulatory framework is one way to improve building performance with respect to sustainable construction, energy use and the amenity of occupants. Whilst in some cases such regulation will add to construction costs, it is likely to have a positive economic impact over the life of a building.

EDO Tasmania receives numerous inquiries about nuisance caused by wood smoke. In our experience, the regulatory regime currently fails to provide practical, timely solutions to this issue. The review should consider how wood smoke emissions can be managed to minimise the risk of nuisance, such as regulating the design and positioning of flues.

## **Responses to Specific Questions**

### **Questions – Certification**

*4.10 How might all the different elements of certification – for example, planning, building, bushfire, heritage and TasWater- be included in one package rather than separately and sequentially?*

Planning permits often include conditions which require a proponent to obtain building and plumbing permits. This practice in our view is unhelpful. Whilst it is appropriate for Council to inform permit holders of these requirements, including them as conditions in planning permits is both legally problematic, adds to an inaccurate perception of over-regulation and can be confusing.

*4.12 Are certification techniques and practices designed to unreasonably reduce the risk of litigation of an agency at the expense of certification efficiency?*

Justifying the imposition of a regulatory burden by reference to the risk of litigation is inappropriate. This should be the subject of capacity development in the regulators. Often the risk of litigation is misunderstood or overblown. Ultimately regulators should act according to law purely for the reasons that it is the law as set down by Parliament. The fact that a breach of the law may result in litigation is an unnecessary further justification which fuels the perception that regulation is not a legitimate cost to impose.

### **Questions – Role of Building Surveyors**

*4.25 Should Building Surveyors have a greater role and responsibility regarding planning schemes?*

It is not entirely clear what this question refers to. We do not support Building Surveyors having a statutory decision-making role with respect to Planning Schemes. However, people with building expertise should be consulted in the development of planning schemes (particularly development standards) to ensure that the terms of the scheme are workable.

### **Questions – Permit Authorities**

*4.32 Should the Permit Authority be a state government function?*

There is good reason to transfer the function to State Government in terms of consistency of approach. However, there is a risk that the overall pool of expertise will diminish and increase pressure to push work to the private sector.

*4.33 Should the Permit Authority be a skilled accredited role?*

Yes. As set out previously, a critical aspect to improve regulatory efficiency is officer capacity. Having a system with flexibility requires regulators with good judgment and training to apply it.

*4.34 Should there be consistency between permit authorities in regards to performance of legislative duties?*

Yes. As outlined above and below, such consistency can be achieved through centralising the role and / or providing consistent training and technical support to assist with consistent interpretation and implementation of regulations.

*4.35 What opportunities might there be to achieve greater uniformity in building control across all jurisdictions, with uniformity/standardisation resulting in higher levels of efficiency and effectiveness in the building sector?*

While legislation itself is consistent across all municipalities, implementation varies both at a structural level (Council procedures and resources) and due to the differing approach of individual officers. There are opportunities for the State Government to roll out uniform procedures and documentation and to engage in training and capacity building to deliver more consistent regulation across the state.

*4.37 What are the key factors which determine whether there is effective performance of legislative duties by permit authorities? Effective performance includes timeliness, technical accuracy and cost. What performance measures should be applied to processing of the permit function?*

The primary key to effective implementation of legislation is clear drafting. Another significant factor is the regulatory “culture” within the decision making organisations (permit authorities, and accrediting bodies). A culture which values effective performance has the following characteristics:

- Responsible officers understand the law they are applying, including the objectives it seeks to achieve
- Regulators act within power at all times and apply the law as written
- Regulators act on behalf of the community, rather than being captured by industry or personal interests
- The relationship between regulator and regulated is cordial and professional – regulators understand that their task is not to facilitate or obstruct development, but to apply the law
- Regulators are open and transparent in relation to their decision-making, including making information available and documenting decisions
- Regulators regularly review performance, seek feedback and improve the regulatory regime in response to identified deficiencies.

*4.40 To what extent do permit authorities require specialist reports prior to processing applications?*

*4.41 Are those requests generally reasonable or do permit authorities require specialist reports when they should be applying their own expertise?*

*4.46 Does the legislative regime provide sufficient clarity on the specialist information that consumers should be expected to provide? Is this possible or is significant flexibility a necessary aspect of the regime?*

*4.47 Is the requirement to provide specialist reports consistent both within and between permit authorities?*

There is an inbuilt incentive for applicants to comply with requests for information from the permit authority, namely to maximise the potential for a permit to be granted. However, to avoid criticism in relation to unnecessary imposition of costs, it is important that regulators clearly articulate what further information is requested, and why they consider the information important to the relevant assessment.

Our planning experience indicates that where Councils provide guidance and advice and require further information on development applications, there is a risk that the proponent can perceive they are entitled to an approval if they follow the Council staff’s guidance. Clearly at law this is not the case and should be made clear to proponents at the outset.

Better communication and discretion in relation to information requests relates to the skill, capacity and resources of the regulator, and is unlikely to be satisfactorily resolved through legislative reform.

## Questions – Energy Efficiency

4.62 *Can the way energy efficiency codes are applied/implemented be improved?*

We support the introduction of 6 star efficiency rating requirements under the National Construction Code, and encourage the government to continue to increase efficiency requirements. Implementation through Certificates of Likely Compliance is appropriate, provided sufficient training and resources are available to equip responsible designers and energy assessors to assess compliance with the Code. TAFE and other training bodies must be supported to provide such training as part of building and design courses, as well as specialist training for energy assessors.

EDO Tasmania would also support mandatory disclosure of energy efficiency ratings for residential properties as part of the sale / lease process to ensure buyers / renters are able to make informed decisions. The government's *Climate Smart Tasmania* report noted:

A national consultation regulation impact statement showed that such a scheme would offer Tasmania benefits equivalent to a net present value of \$29.6 million higher sales prices.<sup>1</sup> Depending on the scale of implementation, a home energy rating scheme could reduce emissions by approximately 1 200 t CO<sub>2</sub>-e annually by 2020.

4.63 *Should energy efficient hot water systems be mandatory?*

EDO Tasmania supports both mandatory regulations regarding energy efficient hot water systems for new premises, and a mandatory phase-out of existing electric hot water heaters (as proposed in the Low Carbon Tasmania issues paper). Mandating efficient systems reduces electricity use and subsequent power bills.

4.64 *Should we regulate to reduce the cost of housing by encouraging owner-builders, cooperative housing ventures, use of recycled materials, higher density developments close to transport hubs?*

EDO Tasmania is a strong advocate for developing a Settlement Strategy for Tasmania, to be implemented through planning schemes. Such a strategy would guide decisions in relation to infrastructure, transport planning and location of essential services. The planning system is the appropriate mechanism by which to facilitate more efficient housing, higher density development, strategic urban design and public transport investments, which will ultimately drive down housing prices.

4.67 *Sustainability and efficiency are tightly coupled with cost and productivity. How is the Building Act driving sustainable activities?*

The Building Act drives activities by specifying minimum requirements, avoiding the temptation for developers to prioritise minimisation of upfront costs over longer-term efficiency gains. As discussed above, the planning system also plays an important role in facilitating sustainable design, as does providing appropriate training to allow building designers to identify opportunities for efficiencies and to be able to explain the longer term benefits to clients.

## Questions – Bushfire Code

The protection of buildings from bushfire is complex. Unlike other aspects of building construction, bushfire risk is likely to be more apparent to future purchasers or occupants than risks associated with flooding, instability or sea level rise. Climate change continues to exacerbate the risk of catastrophic bushfire events, making it increasingly difficult to prevent fire risk through building design alone. Furthermore, permit conditions designed to improve fire safety, such as vegetation clearing and maintenance of water tanks, impose a burden on Council to monitor compliance.

Instead, insurance premiums and stricter planning regulations to restrict residential development in high risk areas are better able to influence building decisions. The role of the regulator should

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<sup>1</sup> The Allen Consulting Group 2011, *Mandatory disclosure of residential building energy, greenhouse and water performance: Consultation Regulation Impact Statement*

be to provide sufficient information regarding risk to allow consumers to make informed choices. Such information should include both risk mapping and details regarding access to fire services and government policy in relation to defending private property in the event of a fire.

*Planning Directive No.5 Bushfire-Prone Areas Code* also needs to be considered in this review. PD5 provides that vulnerable uses should only be permitted in bushfire prone areas in exceptional circumstances, and subject to a planning permit. An application for the use must demonstrate suitable bushfire protection measures.

It is appropriate for subdivision that an accredited person is required to certify the project under the Planning Directive. The comments above in relation to the knowledge of the occupant do not apply to subdivisions where a subsequent purchaser may not have the necessary information regarding risks prior to purchasing a lot.

*4.70 Should we continue to have separate Accredited Bushfire Hazard Assessors or should this skill set be part of the role of an existing practitioner (for example designers or surveyors)?*

Bushfire hazard assessment, and related assessment of necessary vegetation clearance, is an important expert task. However, it is appropriate that existing practitioners be provided with training to undertake such an assessment. This would have the benefit of reducing the cost of engaging additional experts, but would also better equip practitioners to design buildings and subdivisions having regard to bushfire risks. However, there should be provision for specialist assessors to be involved where the applicant is seeking to construct a building in a manner that is outside common practice and requires more detailed analysis. This will ensure that innovative design options are appropriately assessed, without compromising safety standards.

### **Questions – Benefits of Standards**

*5.3 Should standards define durability requirements?*

Building standards should encourage the construction of durable buildings to avoid replacement costs and associated waste.

*5.5 Have we become over-regulated and risk-averse?*

EDO Tasmania is not in a position to comment in detail on the regulatory burden imposed by the current legal framework. However, rather than thinking in terms of "over-regulation" and a volumetric assessment of the number of regulations, it is appropriate to consider whether we are well-regulated. Are the objectives of regulation agreed and appropriate? Is regulation achieving these objectives? Is it doing so efficiently?

As outlined above, it is also important to consider whether any alleged inefficiencies relate to the regulations themselves, or poor implementation resulting from lack of resources or technical knowledge. For example, where the cost of providing additional information is criticised, it is important to understand whether the information is, in fact, reasonably required in order to make an assessment, or whether the planning authority is seeking further information because of a fundamental misunderstanding regarding the assessment process.

### **Questions - Scope for appeals/ review/ modifications flexibility of application of standards**

*5.32 Should permit authorities or building surveyors be required to provide the legal advice they are relying on, when they cite that advice as the basis for a decision made under the legislative regime (or for requiring further material to be provided in order to make a decision)?*

In the interests of transparency and improving consistency in decision making, legal advice regarding the interpretation of regulations should be provided (provided no litigation is currently on foot). Providing the actual advice, rather than a paraphrasing of that advice, gives the consumer an opportunity to review and consider the advice and whether to challenge the regulator's decision. In many cases, providing that advice upfront will avoid unnecessary litigation.

5.35 *Should Council officers who provide advice in relation to building matters be required to be accredited by the Director of Building Control? If yes, what are the critical skills that an officer should possess in order to be accredited?*

Yes. Restricting advice to persons accredited as a building assessor would facilitate more consistent (and accurate) advice being given to consumers and minimise the risks of legal action where inexperienced Council officers give incorrect advice that is relied upon.

### **Questions – Compliance and Enforcement**

6.1 *Should the duties of building practitioners be added to the Building Act?*

Yes.

6.3 *Should Building Surveyors be engaged by the Councils or the Director rather than by the owner to avoid potential conflict of interest when required to report defects when the owner is also the employer?*

Yes. The Director should engage surveyors, with application fees increased accordingly to meet these costs. To avoid unnecessary delays, the legislation may also need to be amended to build in an incentive for the survey work to be conducted in a timely fashion. A mechanism where the Director becomes liable for costs where inspection delays occur is one possibility.

Implementing a system similar to the Gas Model seems most appropriate to us, and would result in a more consistent approach across the state. It will also remove the profit incentive which the Issues Paper suggests is having a negative impact on the survey work done. It should also remove the perverse situation where surveyors believe they limit their liability by not conducting inspections.

6.6 *Are General Managers the appropriate person to undertake the compliance and enforcement role allocated to them?*

No, it should be the Director.

6.9 *Should the Director have enforcement powers to intervene in disputes involving councils?*

We consider that enforcement responsibility should rest solely with the Director. However, if some enforcement responsibility remains with the Council, the Director should have powers to intervene.

6.10 *Should the complaint process be widened to the performance of the building practitioners?*

Yes

6.11 *Should any of the key compliance officers (the Building Surveyor, Permit Authorities, General Managers or staff of the Director) be authorised to issue on the spot defect and rectification orders and/or infringement notices?*

Yes, the Director should have this power (and may delegate the power to appropriate persons).

6.12 *Should the Director have the power to require rectification or suspend or cancel a builder as is common in other states?*

Yes.

6.13 *Should we implement a hybrid mediation/arbitration mechanism for resolving owner/builder disputes, similar to the one used in Queensland?*

Yes.

6.15 *Should it be possible to contract out liability?*

No. This too greatly exposes consumers to unscrupulous operators, and imposes a significant burden on the consumer to understand the liability risks. The risks outweigh the potential benefits.

If this option was pursued, consumers who want to accept a contract which shifts liability should have to certify that they have sought legal advice (and have their lawyer sign the contract).

*6.16 Should we have a different model of compliance and enforcement, for example similar to the gas and electricity industry?*

Yes, the Gas Model should be adopted.

*6.17 Should the dispute process be more focused on reaching a resolution and less legalistic?*

Yes

*6.20 Should there be stronger penalties, and/or zero tolerance for builders doing the wrong thing?*

Yes

*6.25 Should previous rectification records be accessible to other authorities to issue stronger fines for further non-compliance issues?*

Yes – it is important that repeat offenders are punished more severely to actively deter ongoing breaches.

### **Questions - Protection**

*7.1 Should the Director or another relevant administrator have an active role in dispute resolution or should it be left to the Courts?*

No. The Director may be required to take enforcement action and should therefore remain independent of any dispute resolution.

*7.7 Where should the power to order rectification rest?*

With the Director. Rectification orders should also be subject to appeal.

*7.10 Should civil liability attach to a breach by a building practitioner of its duties under the Building Act 2000?*

Yes.

*7.12 What records should be kept at each stage of the process? Who should be responsible for keeping these records? Where should they be kept? Who should have access to them? Is there a benefit to including photographic evidence?*

It should be an offence not to keep records. Having the surveying work done by government improves the chance of a continuous record existing.

*7.13 What protection is there for the public if a building surveyor resigns or otherwise becomes unavailable? What should happen to the records?*

We recommend that the role of building surveyor should be performed by a State government office. This would address issues in relation to maintaining records, corporate knowledge and consistency of approach.

*7.24 How do we protect consumers from buying a defective/illegal property?*

This is very difficult; however it is probably best left to consumers to take responsibility.

*7.27 Should persons who perform pre-purchase building inspections be licensed and insured?*

Yes

*7.32 Should a consumer be liable for works that a certified practitioner has completed?*

No. The consumer pays the certified practitioner in recognition of their skills. There is no

reasonable basis to transfer responsibility to the consumer. Furthermore, the ability to transfer this responsibility does little to deter a certified practitioner from poor performance.

*7.34 Should there be compulsory contracts for private domestic construction?*

Yes.

*7.39 Should a detailed plain English specification form part of the contractual package?*

Yes.

Thank you for the opportunity to comment on the Building Regulatory Framework Review. If you wish to discuss any matter raised in our submission, please do not hesitate to contact the EDO Tasmania office.

Kind regards,

**Environmental Defenders Office (Tas) Inc**

Per:



Adam Beeson  
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