edotasmania
using the law to protect the natural and built environment

131 Macquarie Street
Hobart TAS 7000

tel: (03) 6223 2770
email: edotas@edotas.org.au

2 October 2017

Planning Policy Unit
Department of Justice
PO Box 825
Hobart TAS 7001

By email: Planning.Unit@justice.tas.gov.au

Dear Brian,

Major Projects Reforms

Thank you for the opportunity to comment on the *draft Land Use Planning and Approvals Amendment (Major Projects) Bill 2017* (the ***Bill***). Our principal comments include:

- The scope of the eligibility criteria will allow most large projects to be considered "major projects", and should be narrowed by requiring a threshold of "regional or State significance"
- We strongly support the introduction of a "no reasonable prospects" decision, but recommend that decision be made prior to declaration of a major project. We also recommend that a broader range of government agencies be consulted in reaching that decision
- Panel members should not have to be approved by the Minister, and 6 weeks should be allowed for Council nominations to ensure representatives can be endorsed in the normal course of Council business
- More flexibility is needed regarding timeframes for agency responses – where projects are complex, additional time should be able to be requested to allow a robust assessment of the risks and opportunities presented by a major project
- We strongly support allowing public comments on the assessment guidelines and draft assessment report, and allowing a minimum of 42 days for public comments
- In-principle approvals should be confined to information that is not likely to alter the impacts of a major project. Any information that is required to assess and regulate the impact of a proposal must be submitted as part of the initial impact statement
- Hearings should be conducted with all interested parties, including participating regulators, rather than addressing only representations. A more integrated hearing, including discussion of proposed conditions, will greatly benefit the Panel. Practice directions to guide the process at hearing should also be published to ensure the process is fair, transparent and robust.
- Adjoining landowners should receive written notification of major project decisions
- We strongly support the requirement for significant amendments to a major project to be re-assessed under the major project process.
- We recommend that the Bill include provisions making it an offence to provide false or misleading information, and to allow a major project declaration to be revoked where it has been made on the basis of false information.

These comments are set out in more detail below.

Major Projects declaration – eligibility criteria

Broad scope

Section 60H(1) provides that a project is eligible for declaration as a major project if the Minister is satisfied that any of the attributes set out in that subsection are met. The attributes are very broad, such that most large projects could satisfy at least one of the criteria.

For example, a project may be eligible under 60H(1)(e) if it requires assessment under 2 project-related Acts. Many moderate coastal subdivision projects could require assessment under the *Nature Conservation Act 2002* and the *Threatened Species Protection Act 1995* if the proposal involves clearing in a coastal reserve.

In order to ensure that only projects that are genuinely "major" projects are removed from the standard assessment process, we recommend that either:

- There be a threshold eligibility requirement that the proposal is of regional or State significance, and meets one of the criteria in s.60H; or
- A project be required to meet at least two of the eligibility criteria (this is consistent with the approach taken for Projects of State Significance under s.16(1) of the *State Policies and Projects Act 1993*).

We also recommend that the Commission be able to publish decision guidelines under s.60I(2) without requiring the approval of the Minister. Similar guidelines for Projects of State Significance are made by the Minister, however, unlike major projects, declarations of Projects of State Significance are subject to parliamentary approval.

Council delay

Section 60H(2) provides that a project may "warrant declaration as a major project if, in the opinion of the Minister:

> *(a) the project is of such a scale or complexity, or has such characteristics, that a planning authority that, were the project not a major project, would be required to assess under this Act an application for a permit in relation to the project, is unlikely to have the capacity or capability to adequately carry out the assessment or **to do so in a timely manner**; or*
>
> *(b) the determination by a planning authority of an application for a permit in relation to the project has been **unreasonably delayed**. (**emphasis added**)*

There is no guidance provided as to what "timely manner" and "unreasonably delayed" might mean in practice. The average development assessment time in Tasmania is shorter than in many other states, so it is unclear why particular provisions are required to deal with delay.

The *Land Use Planning and Approvals Act 1993* (***LUPAA***) already sets out timeframes for assessment of development applications, and s.59 of LUPAA allows a proponent to refer an application to the Tribunal where it has not been determined within the statutory timeframe.

Building heights

In response to community concern that building projects could seek declaration as major projects to avoid height restrictions imposed under planning schemes, the Bill provides that the Minister is "*not to have regard to whether the height of any building that is to form part of the project is greater than the acceptable solution for building height that applies, in relation to such a building, under the planning scheme in respect of the land to which the project relates*" (s.60H(3)).

We note that this provision would not prevent a building proposal exceeding planning scheme height limits from being declared a major project where the Minister was otherwise satisfied that the project would have significant economic benefits (or another of the criteria in s.60H(1) was met).

We also note that buildings which exceed the height set out in an acceptable solution may still be assessed against performance criteria. For example, under the current *Sullivans Cove Planning Scheme 1997*, buildings exceeding the "deemed to comply" heights may be approved subject to assessment against a range of design criteria. If an assessment against those performance criteria

was considered to be "unreasonably delaying" the determination of an application, the Minister could potentially declare the project to be a major project, despite s.60H(3).

Inconsistent with planning scheme

Section 60H(7) allows a project to be declared a major project even where it would be prohibited under the applicable planning scheme, provided the project is "not inconsistent with the TPPS or a regional land use strategy that applies in relation to the land."

If the Bill is passed, it is likely that the State Planning Provisions and Local Provisions Schedules applying to any referred project will have been very recently subject to public review and determination by the Commission. Therefore, we would caution against allowing projects that are inconsistent with those provisions without strong justification.

Significantly, the reliance on Tasmanian Planning Policies to justify a development that is otherwise inconsistent with a planning scheme (s.60H(7) and s.60XU(4)) confirms our comments in earlier submissions that the TPPs are important documents that must be subject to the highest level of public scrutiny before being adopted.

Landowner consent

We support the requirement to obtain Crown, Council or Wellington Park Management Trust consent to any declaration of a major project over public land (s.60H(4)). It is important for public authorities to consent to any delegation of their management or decision-making responsibilities over land under their control.

We also support the requirement for a planning authority to be notified of any major project proposal in the municipality, and for the Minister to consider any advice received from the planning authority regarding whether to declare the project (s.60C(4)).

Major Project Proposal

We support the broad range of information that must be submitted as part of a Major Project Proposal (s.60D(4)), and the capacity for the Minister to request further information before deciding whether to declare a major project.

Section 60D(4)(b) requires the major project proposal to include "details of the proponent's experience and of the financial capacity of the proponent to implement the project." Currently, the definition of "proponent" is unclear in relation to situations where more than one person will be involved in delivering the project. For example, s.60G(2) provides for a major project declaration to include "any use or development that is necessary for the implementation of the project".

The definition of proponent refers to "the person proposing the project or major project as a whole." Lack of clarity as to who is the "main" proponent will have implications when assessing the track record, financial or technical capacity of those intending to implement the project.

Declaration of major project

We recommend that when the Minister publishes the declaration of the major project (s.60J(3)), the Minister also be required to publish a statement outlining the criteria under s.60H(1) that she or he is satisfied has been met and the reasons for that decision.

Any affected landowner should also be given written notice of the declaration (s.60J(1)).

Revocation of declaration

Under 60M(2)(c), the Minister may revoke a major project declaration if the proponent has failed to provide further information under s.60D(8). Rather than revoke a declaration at that point, we consider that the Minister should not make a declaration if that further information has not been provided.

Similarly, we strongly support the introduction of a "no reasonable prospects" decision, to prevent time and resources being expended assessing a project that is clearly unacceptable (s.60X).

However, we recommend that consideration be given to seeking input from relevant agencies on that question *prior* to the decision to declare a major project, rather than after the declaration has been made. The decision to issue a "no reasonable prospects" notice is made on the basis of the Major Project Proposal, so the decision could be made prior to the declaration without the need for any additional documentation.

Finally, we recommend that the Minister be able to revoke a major project declaration where it becomes clear that the major project proposal contained false or misleading information (see below).

Development Assessment Panel

Section 60N requires a Development Assessment Panel to be established within 28 days of the Commission receiving notice of the major project declaration.

One member of the panel is to be nominated by affected councils (s.60O(1)(b)). If the councils have not nominated a person within 21 days of being requested to do so, the Commission may appoint someone to that position. Given the monthly meeting schedules of Councils, it may be unrealistic to expect a coordinated nomination to be made within 21 days.

Further, s.60O(7) allows the Commission to, at any time, revoke the appointment of a Panel member and appoint a replacement. There is no requirement for the Councils to agree to the person appointed in the role of Council representative under s.60O(1)(b).

Any appointment to the Panel must be approved by the Minister (s.60O(4)), giving the Minister an inappropriate level of control over the composition of the independent assessment body. Ministerial approval is not mandated in respect of Projects of State Significance or planning scheme amendments, and should not be required for major projects.

We strongly support the provision allowing the Commission to appoint additional members where a project is particularly complex or requires specialist expertise (s.60O(8)). It is not clear that additional Panel members can be appointed throughout the process, however we recommend that any decision to appoint additional members occurs after the receipt of preliminary advice from relevant agencies to ensure there is a comprehensive understanding of the issues likely to arise in relation to the project.

Where a project is likely to have an impact on a matter of national environmental significance under the *Environment Protection and Biodiversity Conservation Act 1999* (***EPBC Act***), we recommend that a Commonwealth representative be appointed to the Panel under s.60O(8).

Assessment process

Consultation

We support efforts to integrate the assessment of key impacts, particularly the inclusion of environment, threatened species, and both Aboriginal and historic heritage considerations through directions from "relevant regulators" (s.60S). We also support these regulators influencing the content of the assessment guidelines, as well as assessing the impact statement and commenting on the draft assessment report.

While s.60XB provides for planning authorities and other State service agencies to be consulted in relation to the assessment guidelines, there is no opportunity for these agencies to provide input into the "no reasonable prospects" decision. Agencies such as State Growth, TasWater, Crown Land Services and MAST are likely to have feedback regarding the infrastructure servicing requirements of proposed major projects and should have the opportunity to raise concerns regarding a project at the earliest possible stage. We support these agencies being consulted in relation to proposed conditions on a major projects permit (s.60XX).

As a general comment, the timelines for the provision of advice are tight, and the legislation does not provide flexibility for agencies to seek additional time. Where projects are complex, as major projects are likely to be, it would be appropriate to allow agencies to seek further time to complete the necessary review of project documentation.

"Participating regulators" are also required to take into account guidelines developed by the Commission (and approved by the Minister) in determining what assessment requirements to direct the Panel to include in the assessment guidelines (s.60V(4) and (5)). Participating regulators are already confined to including matters in the assessment requirements notice that relate to their decision making function (s.60V(6)), so it is unclear what further constraints are intended to be imposed by the guidelines.

False and misleading information

Given that the major project proposal and impact statement will be relied upon in the assessment process, we strongly recommend including an explicit provision making it an offence for a proponent to provide false or misleading information.

Such provisions are provided under s.43A of the *Environmental Management and Pollution Control Act 1994*, and s.17 of the *Tasmanian Planning Commission Act 1997*, and provide an important check on the veracity of the material provided.

As outlined above, we also recommend that the Minister be able to revoke a major project declaration under s.60M if the proponent has provided false and misleading information.

Public participation

We strongly support the broad release of material contemplated in the Bill, and the opportunities for public comment on the assessment guidelines and the draft assessment report. In particular, we welcome the exhibition of the assessment report along with the impact statement and all notices received by participating regulators (s.60XL and 60XM).

Notification

The requirement to publicly exhibit "as prescribed" should be expanded to replicate the exhibition requirements for development applications, including advertisements in the newspaper, written notices to the landowner and all adjoining landowners, and a notice displayed at Council / Commission offices and on the development site.

We note that s.60XM(6) makes it an offence to "obscure or remove a notice that is displayed on the land to which the notice relates". This indicates an intention to require notices to be displayed on site, and we would welcome confirmation that will occur.

We strongly support the explicit requirement to ensure that the assessment guidelines, impact statement and assessment report are available to download from the Commission website.

Under s.60YB, written notice of the grant (or refusal to grant) a major project permit should be given to all representors and regulators, as well as notification in the Gazette and on the Commission website.

Timing for representations

We strongly support a minimum of 42 days being allowed for representations from the public in response to a draft assessment report (s60XO(4)). While s.60M(5) provides for the period to exclude days on which the Commission is closed during normal business hours, we recommend a further provision to exclude the Christmas period (consistent with s.27K of EMPCA).

Hearings

We support the requirement for the Panel to hold public hearings in relation to the major project (s.60XP). However, we have some concern at the apparent separation between the process for hearings into representations and the submission of advice and comments from participating regulators. For example, it appears that hearings are limited to representors, and that advice and further information requests from regulators are made without the benefit of any issues raised at such hearings (including any responses provided by the proponent).

Participating regulators are notified that hearings will be held (s.60XP(3)), however the timeframes for submission of requests and advice (e.g ss.60XQ(1) and 60XR(1)) do not appear to provide for any "pause" while regulators participate in a hearing. The requirement for a permit decision to be made within 60 days of the end of the public notification period also raises concern – it is unlikely that a meaningful hearing process could be completed within that time.

We consider that it would be more constructive for the Panel to hear from representors, participating regulators, other agencies and the proponent through an integrated hearing process. This would allow all interested parties to hear from other interested parties, to present or contest evidence, and to identify areas of shared concern and opportunities to resolve issues.

Further, where a participating regulator requires a condition to be imposed (s.60XS), the proponent is invited to comment on the proposed condition (s.60XX). A hearing would provide an efficient opportunity for all affected parties (including third party representors) to be made aware of the proposed condition, to discuss how effectively it addresses a particular issue, and to resolve any potential conflict with other conditions proposed.

All hearings should be subject to natural justice and clear practice directions to ensure proceedings are fair, transparent and robust.

Permit operation

Holder of the permit

Sections 60XY, 60YG, 60YJ and 60YK all refer to the "holder of a major project permit". It is not clear whether this would be the proponent (being the principal proponent), the landowner, or whether the permit can be transferred to another person.

In-principle conditions

Where an in-principle condition requires information to be provided to the satisfaction of a regulator, there is no public exhibition of that information.

While it is appropriate for some detailed information to be provided to a regulator as a condition of a permit, that information must be confined by relevant standards and must not be something that could significantly alter / increase the impact of a proposal.

We would welcome an opportunity to comment on any guidelines developed on the types of matters that can be addressed by in-principle approval and the drafting of in-principle conditions.

Amendments

We support the provision requiring all persons who made a representation to be notified of a proposed minor amendment to the permit (s.60YH(1)(iv)). We recommend that the landowner and adjoining landowners also be notified – neighbours potentially affected by the amendment may not have made representations if they did not own the adjoining land at the time the major project was advertised.

We support the provisions requiring significant amendments to be subject to the assessment and notification provisions in the Bill (s.60YK).

Other issues

Consent to undertake preliminary surveys

Section 60XE(1) provides that, where a permit is required to undertake surveys etc necessary to prepare the impact statement, a regulator must issue a permit as if the proponent had made a valid application under the relevant legislation. There may be situations where it is not appropriate to issue a permit (for example, where proposed disturbance of Aboriginal heritage is unwarranted or where landowner consent has not been given).

We recommend that the provision be amended to provide that the proponent is taken to have made a valid application under the legislation, but discretion still rests with the regulator as to whether a permit is granted.

Bilateral assessment

The Consultation Paper notes that the major projects process will be submitted for accreditation as a bilateral assessment process under the EPBC Act. We recommend that, where a matter of national environmental significance is likely to be impacted by a major project, Commonwealth assessment requirements be integrated by:

- Requiring the Panel to seek (and consider) advice from the Commonwealth regarding the assessment guidelines (s60XB), and whether the impact statement addresses the guidelines (s.60XH);
- Appointing a representative of the Commonwealth to the Panel (s.60O(8)).

If you would like to discuss any of these comments, please do not hesitate to contact me on (03) 6223 2770.

Yours sincerely,

Environmental Defenders Office (Tas) Inc.

Jess Feehely
Principal Lawyer