

# FUTURE DIRECTIONS FOR ENVIRONMENTAL REGULATION

**Environment Institute of Australia Conference, 31 May 2002-**

*“THE ROLE OF THE COMMUNITY IN ENVIRONMENTAL REGULATION”*

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## **Introduction**

All systems of regulation restrict human behaviour in one way or another. In liberal democracies, regulatory systems must reconcile the conflict between individual liberty and the freedom to do what you like and the necessity to restrict that freedom to ensure your actions do not cause harm to others. Environmental regulation has an added dimension; it places limitations on the rights and privileges of private property ownership in order to protect not just the wider community but also future generations and to preserve ecological elements for their own sake (i.e. to achieve ‘ecologically sustainable development’<sup>[1]</sup>). Environmental regulation is therefore one of our most contentious and politically divisive spheres of regulation, and it generates a great deal of conflict within the community. Enabling broad community participation in the formal processes of regulation ensures that its outcomes are transparent, understood and responsive to community expectations. It is therefore the best way of managing conflicts over environmental issues. This paper will focus on public participation in environmental decision-making in Tasmania. It will also examine how expanding the scope for community participation will perhaps achieve resolution of currently Tasmania’s most polarised environmental conflict: the debate surrounding the forest management.

## **Public Participation in Tasmania’s Resource Management and Planning System (RMPS)**

The right of everyone to have a say in public decision making is the hallmark of democracy and community participation in the regulation of human activity is not a new or revolutionary concept in common law countries like Australia. On the contrary, it is the basis for some of our oldest legal institutions. The courts and government must be accessible to the public and anyone can vote, run for parliament, become a justice of the peace, attend council meetings, make a citizens arrest or privately prosecute someone for a criminal offence, as has been the case for centuries. In some situations, public participation is not just a right but also a civic duty. Consider, for example, the jury summons whereby any person in the community over the age of 18 (who is not a lawyer) may find themselves compelled by threat of fine to attend court and sit in judgement of a person’s guilt (in criminal trials) or the extent of a person’s liability (in civil trials).

The establishment of Tasmania’s Resource Management and Planning System (‘RMPS’) in 1994 gave ordinary citizens the ability to enforce planning, pollution, and resource management laws through the Resource Management and Planning Appeals Tribunal (‘RMPAT’) and extensive third party appeal provisions<sup>[2]</sup>. Encouragement of public involvement in resource management and planning is one of the statutory objectives underpinning all RMPS legislation. To start with, anyone can now instigate and participate in the process for changing planning schemes (through local government and the Resource Planning and Development Commission), which set controls on land use in their municipality. However, it is the basic planning process established under the *Land Use Planning and Approvals Act 1993* (‘LUPAA’) for discretionary development (outlined below) that exemplifies the scope for public participation:

1. a development requires a planning permit from the local municipal council before it can lawfully proceed; and
2. on receipt of a development application, the council must publicly advertise the development proposal and within 14 days, *any* member of the public can lodge a formal objection; and
3. the council then makes a decision whether or not to grant the permit and if so on what conditions, based on the objectives of LUPAA the RMPS, relevant planning scheme and state policies; and
4. the applicant or the objectors then have 14 days to appeal the decision (on merit or procedural

grounds) to the Resource Management and Planning Appeals Tribunal, which determines the issue via public hearing.

From the perspective of public participation, the key element of this process is the fact that a person does not need to demonstrate any proprietary or material interest in a particular development in order to be able to appeal against it. LUPAA thus provides the whole community with open standing to formally challenge developments, not just on legal technicalities, but on merit according to broad ecologically sustainable development criteria. It allows people who do not have wealth and property to have a say in how others (who have it) can use their land and natural resources. It is democracy in action but it turns the notion of private land ownership on its head and the RMPS has not gone without its share of criticism, particularly from the business sector<sup>[3]</sup>.

Despite such criticism, it is fair to say that the RMPS has become recognised as a 'world-best practice' system of integrated environmental planning and regulation. The increased scope for public participation is arguably its defining feature. The pro-development lobby will have a difficult task to convince the majority of the Tasmanians that the RMPS must be made less democratic by limiting rights of public appeal. As a Hobart newspaper editorial concluded in 1997 (in relation to the planning approval process):

*'It may be the case that there is some room for refinement in the approval process; however, no procedure for passing normal developments should be approved which ignores the fact that members of the general public must retain a right to have their opinions considered on projects which have the potential to affect the amenity of their lives.'*<sup>[4]</sup>

## **Forestry**

Over the last 12 months Tasmania has seen the largest street demonstrations in decades opposing forestry; in excess of \$4 000 000 worth of vandalism of forestry equipment in a single night on a coupe in the Southern Forests; uncomplimentary national and international media attention on Tasmania's forest practices; and differences of opinion over old growth logging threatening to ruin two of the Bacon Government's 'flagship' projects - the *Tasmania Together* forum and the *Ten Days on the Island* cultural festival. Surely, if the assertions made earlier in this paper about the value of public participation in environmental regulation were correct, the RMPS would have enabled us to achieve at least some resolution of the seemingly perennial forestry debate. If Tasmania has had since 1994 (in the RMPS) a world-class system of integrated environmental planning and regulation, characterised by ample scope for public participation, how has conflict over the management of Tasmania's forests intensified to become the single most controversial state issue of our day? The answer is breathtakingly simple and you would think plainly apparent to all except (it seems) the forestry industry and its supporters in Parliament.

Forestry operations on State Forest (public land managed by Forestry Tasmania) are exempt from RMPS planning processes. Private landowners can apply to the Forest Practices Board to have their land declared a "Private Timber Reserve" in order to exempt the forestry operation from their local planning scheme and thus avoid the requirement for council approval and any threat of public appeal.

Forestry has its own system of regulation, the '*Forest Practices System*,' established by the *Forest Practices Act 1985* and administered by the Forest Practices Board. The Board regulates the industry through the development and enforcement of the Forest Practices Code and a planning process whereby it is illegal to carry out forest practices unless authorised under a forest practices plan approved by the Board. The Forest Practices System is not part of the RMPS and therefore not subject to the RMPS integrated planning and sustainable development objectives. In practice, the Forest Practices System can be distinguished from the RMPS in two important respects:

1. It is self-regulatory. Employees and executives of commercial forestry companies (including Forestry

Tasmania – Tasmania’s incorporated government forestry enterprise) make up the bulk of Forest Practice Board executive members and forest practices officers – who have the delegated responsibility of monitoring forestry operations and enforcing compliance with the Code. Under this system, policy and regulations governing forest practices are set primarily by the industry, for the industry and enforced by the industry.

2. The absence of public participation. The Forest Practices System has virtually no formal mechanisms for public involvement in forest management. **Members of the public, no matter what their grounds or how they might be affected cannot object to, or appeal any aspect of a forest practices plan.** The public, even neighbours directly adjoining a forestry operation, do not have any formal legal right to see a forest practices plan. In contrast, a forestry company or proponent who has had an application for approval of a forest practices plan refused by the Board can appeal that refusal to an ‘independent’ tribunal (the Forest Practices Tribunal) or appeal against any operational restrictions inserted into the plan by the Board. Landowners who have had their application for Private Timber Reserve status refused (an extremely rare occurrence) are entitled to statutory compensation. It is beyond the scope of this paper to examine the history of how Tasmania’s forestry industry managed to secure its virtually unique exclusion from RMPS public planning processes.<sup>[5]</sup> We can however address some of the arguments to support denying the community the same rights of appeal against forestry operations as they would have for other land use developments.

### **Keeping the mob at bay**

Graeme Wilkinson has stated in relation to systems of forestry regulation in Australia,

*‘As with issues of non-compliance, a forest practices system needs to provide an appropriate mechanism for the resolution of conflicts. In some sectors there is support for the rights of citizens groups to take action against forestry activities (Briody & Penzler 1998). However, there is also a strong view by many that such rights lead to an unacceptable proportion of disruptive, vexatious and unreasonable actions. (Garland 1996) [6]*

This echoes the not unfamiliar ‘floodgates argument’, which runs along the lines that the masses must be prevented for their own sake from having access to the courts to enforce environmental laws lest the ensuing torrent of vexatious litigation overloads the legal system and brings progress to a grinding halt. Such arguments are based on the premise that publicly motivated legal action should be the province only of those agencies entrusted with the authority of the state (and the taxpayers funds) to carry out that purpose. However, what happens when those with authority fail to take appropriate action, either because of inadequate resources, short-term political or practical expediency, corruption, self-interest or just plain apathy? In an ideal world, (or a utopian benevolent dictatorship) this would never happen, but we do not live in an ideal world and it does happen.

The increased scope for public participation in the RMPS reflects moves over recent decades throughout common law countries to relax standing restrictions that have hitherto prevented ordinary people accessing public interest legal remedies. The reason for this is, *inter alia*, that arguments against broadening community standing (such as the floodgates argument) have been discredited by historical experience. For example, in the United States it has been noted by one commentator that:

*‘the single most frequently heard argument in opposition to a broadened law of standing that would allow citizens to bring suit to enforce environmental laws is that such a provision would unleash a flood of litigation...But these contentions must finally give way to twenty years of experience. Rhetoric aside, there simply has not been a flood of citizen initiated litigation anywhere in the US, and if one objectively examines the hypothetical possibility that such might have been the case, there are any number of reasons to explain why there has been no flood of litigation. To begin with, complex enforcement litigation is economically costly and emotionally draining; few citizens and/or environmental organizations have the monetary resources, the organisational structure, or the staying power necessary for meritorious efforts,*

*much less for frivolous or duplicative litigation efforts.'* [\[7\]](#)

In the 1980's, the Australian Law Reform Commission, after reviewing empirical evidence from around the country, concluded that nowhere in Australia where there were broad standing provisions for citizen initiated public interest litigation had there been a huge quantity of litigation. [\[8\]](#) In *Phelps v Western Mining Corp*(1978) 33 FLR 327 Deane J stated (in relation to the meaning of a legislative provision allowing 'any other person' to apply for certain injunctive relief) :

*'The argument that to give the words which the parliament has used their ordinary meaning would, to use a popular phrase, "open the flood-gates of litigation" strikes me as irrelevant and somewhat unreal. Irrelevant in that I can see neither warrant for concluding that the Parliament did not intend that flood-gates be opened on practices which contravene the provisions of the Act, nor reason for viewing that prospect, if it were a realistic one, with other than equanimity. Unreal in that the argument assumes...the existence of a shoal of officious busybodies agitatedly waiting behind the 'flood-gates', for the opportunity to institute costly litigation in which they have no legitimate interest.'* (333-4) [\[9\]](#)

Other established and emerging industries in Tasmania have seemingly been able to withstand the '*...unacceptable proportion of disruptive, vexatious and unreasonable actions,*' which, according to the 'flood-gates' reasoning, they would be exposed to under RMPS planning processes. Moreover, is it equitable that these industries must operate within the RMPS framework of ecologically sustainable development and open public planning while the forestry industry is shielded behind self-regulatory processes for the sake of resource security?

### **Leave forests to the foresters**

Another argument advanced in favour of forestry self-regulation is that the Tasmanian industry already employs world's best environmental practice, which reflects decades of scientific research and practical experience. Proponents of this view maintain that the industry is better placed than any other stakeholder to determine how the forests can be managed sustainably. Increasing the level of community scrutiny of forest management is an unjustified interference and likely to be counter-productive. 'The ability of (democratically elected) local governments to provide sufficient resources to adequately assess timber harvesting, including professional expertise, is also questioned.' [\[10\]](#)

Whether or not Tasmanian forests are being managed sustainably by the industry is open to interpretation and debate. One must consider whether it is realistic, or even fair to require representatives of an industry that has always relied on the availability of forests for commercial exploitation, to be able to objectively determine the parameters of sustainable forest management from a non-commercial perspective. There is a big difference between commercial sustainability and environmental sustainability. At the crudest level, the most commercially sustainable way of managing an old growth forest is to convert as much of it as possible into a high yield plantation. Plantations produce more timber per hectare and will never be suddenly made off limits because of, in the words of Evan Rolley, 'some sort of hypothetical view about what may or may not be happening to some aspect of biodiversity' [\[11\]](#)

Through the RMPS, forestry would be subject to independent, fair and open appeal processes that would measure the viability of individual (i.e. coupe by coupe) forestry proposals against sustainable development criteria that apply to all resource management rather than criteria set by the industry alone. It will be subject to greater public scrutiny and accountability but how can this be a bad thing? Within these processes, forestry proponents will be afforded the same natural justice and opportunity to present their case as every other participant. If the Tasmanian forest practices *are* world – class; if they do not jeopardise biodiversity, bush heritage, soil and water resources or cause harm to neighbouring land users; if the rate and manner of native forest harvesting is sustainable; and if conversion of agricultural land to broad scale plantations genuinely benefits rural communities; forestry will have nothing to fear from greater public accountability.

### **In Conclusion**

This paper has attempted to briefly explore the importance of community participation in environmental planning and regulation in Tasmania. There is perhaps no better way to conclude such an exploration than to look to the words of one member of the Huon community who took the opportunity (along with many others) to participate in the public assessment and approval process for the controversial Southwood wood processing development proposed for the Huon Valley. The following is an excerpt of the closing address of Dr John Young to the Resource Planning and Development Commission. Dr Young is not a lawyer or a politician, he holds a Phd in history and has been a research associate with the University of Tasmania since 1991 and of late been working on the subject of sustainable communities. His closing address expresses beautifully what we all gain through allowing the community to participate in environmental regulation:

*'When I gave my representation last week, I introduced myself as a teacher of wooden boatbuilding because the main point I wanted to make was about resource security for wooden boatbuilders. Most of what I have heard since confirms my pessimism, however I was glad to hear today from Hans Drieslma that the Special Timbers Management Units will not be clear felled. My written representation also dealt with the public consultation process, and since hearing representors with many points of view, I'd like to address the broader questions that have been raised about the Southwood proposal in the light of the objectives of LUPAA, which include community participation...In recent times, it has been the practice to anticipate public opposition (to large scale resource developments in the Huon region) by developing a local support group. Public debate is then based on group loyalty rather than rationality. This makes productive discussion and the discovery of common ground almost impossible, as proponents and opponents back themselves into intransigent positions. It is a pattern that inevitably involves forestry and which has characterised in the Huon Valley for the last 25 years. As Andy Skuja, former Chief Commissioner of Forests, said in 1986, "We never set out to be like this".*

*So far, the Southwood project has followed this pattern, but now, this last week, we have had the first genuine opportunity for analytic public evaluation of it, to gain accurate and detailed information about the research it is based on, its impacts and implications for the future. We are now at the point we should have been at about a year ago, a point at which a genuine public consultation should have begun. It could have tapped into the skills, experience and resources of this community, and I mean that inclusively, in order to develop a value-adding project or several of them, based on the most productive, least harmful solutions, to create the most employment for the least capital investment. It could have included the product diversity, which could underwrite sustainability, and it could have maintained all our present options for the future. As it is, we did not have the leadership, which could make this possible, but I would like to thank the Commission for enabling us to discover the energy, knowledge, resourcefulness and professionalism that form part of the social capital of this community. One of the achievements of my PhD supervisor was to provide several newly independent countries with their constitutions. I once asked him how he approached a task of such great responsibility, expecting some erudite formula, but he simply said, "I try to find out what the people want". I would like to suggest to the Commission that it is a good way to plan sustainable development as well.'*

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[1] In Tasmania's Resource Management and Planning System: "sustainable development" means managing the use, development and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic and cultural well-being and for their health and safety while -

(a) sustaining the potential of natural and physical resources to meet the reasonably foreseeable needs of future generations; and

(b) safeguarding the life-supporting capacity of air, water, soil and ecosystems; and

(c) avoiding, remedying or mitigating any adverse effects of activities on the environment.

[2] *The Environmental Management and Pollution Control Act 1994* (EMPCA) is the principal RMPS environmental protection legislation. It makes it an offence to cause environmental harm by **polluting** the environment. Section 48 of the Act provides for civil enforcement, which enables any person with a "proper interest" to remedy or prevent a party causing environmental harm by polluting the environment or breaching permits or environmental protection notices. Under the *Land Use Planning and Approvals Act 1993* ('LUPAA'), it is an offence to carry out a development without a permit or in breach of a condition in a permit. Section 64 of LUPAA enables a person with a 'proper interest' to commence civil enforcement proceedings in RMPAT to remedy a breach or non-compliance with the Act, a planning scheme, or permit. Most other legislation within the RMPS has similar civil enforcement provisions.

[3] See for example Tasmanian Business Reporter, 'Planning Lashed' September 2001

[4] Editorial, *The Mercury*, 29 November 1997

[5] Forestry operations conducted on land that is covered by a Commonwealth/State Regional Forest Agreement (which would account for practically all Tasmanian forestry operations) is also exempt from the civil enforcement provisions of the principal commonwealth environment protection legislation: the *Environmental Protection and Biodiversity Conservation Act 1999*.

[6] Wilkinson, G. 'Codes of Practice as Regulatory Tools for Sustainable Forest Management' [www.fpb.tas.gov.au/fpb/pdf\\_files/FPC'S\\_as\\_reg\\_tools\\_for\\_SFM.pdf](http://www.fpb.tas.gov.au/fpb/pdf_files/FPC'S_as_reg_tools_for_SFM.pdf) (P.7) accessed 27 May 2002.

[7] Orlando Delogu, 'Citizen Suits to Protect the Environment: the US Experience may Suggest a Canadian Model' Uni of New Brunswick LJ 41 (1992) 124-30, 128 cited in Ramsey, R. & Rowe G.C. *Environmental Law and Policy in Australia*, Butterworths 1995, p. 772.

[8] ALRC Report No 27 – *Standing in Public Interest Litigation (Canberra AGPS 1985)* cited in *ibid*.

[9] Cited in *ibid*

[10] Graeme Wilkinson, Chief forest Practices Officer, Forest Practices Board, personal communication, in Dianne Gee & Dr Elaine Stratford, *Public Participation and Integrated Planning in the Tasmanian Private Timber Reserve Process*, *Environmental and Planning Law Journal* Volume 18, No 1, February 2001, P. 60

[11] Evan Rolley, Managing Director of Forestry Tasmania in Earthbeat, *Debate Hotting Up Over Tasmania's Forests*, ABC Radio National Broadcast 24/03/01 - [www.abc.net.au/rn/science/earth/stories/s268243.htm](http://www.abc.net.au/rn/science/earth/stories/s268243.htm)

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