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Review of the Planning System
GPO Box 1691
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By email: Planning.Review@justice.tas.gov.au

Dear Mr Stevens

Planning System Review

The Environmental Defenders Office (***EDO***) is a non-profit, community based legal service specialising in environmental and planning law. The planning system is the centrepiece of natural resource management in Tasmania, providing links between development proposals and social and environmental constraints. Therefore, a robust and transparent planning system is extremely important to the community and the environment.

We acknowledge the need for some improvements to the planning system to provide certainty to all parties. However, we would like to emphasise from the outset that any 'streamlining' must not be at the expense of genuine, rigorous assessment processes and community consultation.

We also have general reservations regarding several aspects of this review. This submission outlines these general reservations, before addressing the specific terms of reference for the review.

SUMMARY OF COMMENTS

- A further general review of the planning system is unwarranted, given the lack of implementation of recommendations from previous reviews
- The Land Use Planning Branch should commit significant resources to improving existing State Policies and increasing the suite of State Policies guiding resource management in Tasmania
- Timeframes for planning decisions and appeal proceedings are already tight and should not be reduced.
- Assisting local councils by standardising application forms and information requirements for development applications, and developing template permit conditions would significantly improve efficiency in the planning system.
- Mediation should be strongly encouraged, but not be compulsory. Mediation is not generally appropriate in RPDC matters.
- The EDO does not support any reduction in third party appeal rights
- There is no justification for amalgamation of the RPDC and RMPAT, given the different roles performed by each body.
- The EDO does not support Ministerial call-in powers.
- The EDO supports regional planning, but believes that regional projects should be assessed by regional authorities, not expert panels.

GENERAL COMMENTS ABOUT THE PLANNING SYSTEM REVIEW

The need for a further review of the planning system

As noted in the background paper, Tasmania's planning system has been subject to numerous reviews and inquiries, including the Edwards Review (1997), the Better Planning Outcomes Project (2005) and the Legislative Council Select Committee on Planning Schemes (2006). Significant public input was received in response to each of these reviews. However, to date, many of the recommendations of these reviews have not been implemented. The background paper for the current review does not provide any detailed explanation or empirical evidence for the need to further review the system.

The review purports to be aimed at streamlining decision-making and improving the approvals process for State Policies, Projects of State Significance and planning schemes. We presume that this is, in part, driven by the COAG reform agenda, but this is not explicit in the background paper.

Given the broad scope of previous reviews, we believe that sufficient guidance exists for the government to adopt a position on specific reforms to the planning system without the expense of a further general review. If specific reforms are being proposed, such as the amalgamation of the RPDC and the RMPAT, limiting public participation or shortening decision-making timeframes, a detailed issues paper should be released to identify problems with current arrangements, discuss alternatives considered to address the problems and justify the government's preferred position. Without this level of detail, it is difficult for the community to provide meaningful comment on proposed reforms.

Piecemeal rather than holistic systemic review

The principal strength of the Resource Management and Planning System (***RMPS***) is its recognition of the integrated nature of resource management decisions. Despite this, the terms of reference of the current review are relatively narrow, and it is clear that comments in relation to broader issues will not be considered. In addition to the three previous planning reviews outlined in the Background Paper, in the past few years comments have been separately sought in relation to assessment processes under the *Environmental Management and Pollution Control Act 1994*, the role of an Environmental Protection Agency, a review of cultural heritage management, review of the *Water Management Act 1999* and the NRM framework (amongst others). Recommendations arising from these reviews generally remain under-implemented, and do not seem to build into a holistic review of the RMPS generally. In our view, it is counterproductive to continue to review aspects of the resource management and planning system in isolation.

Previous reviews of the planning aspects of the system have provided sufficient guidance for improvements to the system. Rather than a further narrow review of the same elements of the system, we believe that a more valuable exercise would be to undertake a thorough investigation of the RMPS as a whole. Such a review could determine, for example, the benefits and disadvantages of integrated assessment, how effectively the integration is working in practice, the impacts of excluding land uses such as forestry from the RMPS and opportunities for reform of the numerous agencies involving in decision-making.

Steering Committee

The Steering Committee is limited to government representatives, and does not include input from other stakeholders who will be significantly affected by reforms to the planning system. We believe that a meaningful review of the planning system should involve input from affected community and industry groups.

STREAMLINING PLANNING SYSTEM DECISION MAKING

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.

Our specific comments about improvements to the planning system are largely consistent with the findings of the Edwards Review:

> *It became quite evident early in the review that several major issues needed addressing. None of these concerned the structure of the system, but highlighted a lack of understanding, lack of leadership and lack of state policies. In the Committee's view, whilst it is the system that appears to be under fire, the performance of those either administering or using it, the lack of underpinning policy direction and lack of desire to effect change is the root cause of complaint.*
>
> *In the interests of all Tasmanians there must be strong leadership to ensure that this Resource Management and Planning System is used to its best advantage. There is no doubt that the system has the capacity to provide certainty to everyone and to improve the quality of development. It can assist both levels of government in economic management, provide clear direction to developers and industry and at the same time protect individual interests; but to do these things it (the system) must be fully implemented and this has not happened to date.*

The EDO believes that the RMPS is a strong system which, if effectively implemented, can deliver sustainable development outcomes for Tasmania. Our specific comments on how to improve its implementation are set out below.

Roles and functions of State agencies, RPDC and RMPAT

Rigorous state policies will allow for consistent and efficient development assessment processes which deliver sustainable outcomes. Therefore, one of the most significant activities to streamline the planning system is to significantly increase the number of state policies implemented in Tasmania. The Land Use Planning Branch must take responsibility for overseeing the development and implementation of State Policies on matters of strategic importance. It is critical that the State 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.

The EPA will be responsible for assessing Level 2 activities. We believe that the EPA should be provided with sufficient resources to employ independent scientific staff to support this role. These staff should also be available to provide independent advice to the RPDC regarding resource management issues.

The RPDC and the RMPAT play significantly different roles in the planning system. At its most simple, the distinction is that the RPDC is principally responsible for strategic planning while RMPAT is responsible for appeals (and civil enforcement applications) in relation to use and development. That is, the RPDC is responsible for translating policy into planning documents, while RMPAT is responsible for assessing development applications against these documents.

The EDO believes that the roles of developing and implementing or enforcing planning documents should be kept separate. The following table sets out the roles that we consider appropriate for each of the relevant bodies in the planning system:

Agency	Roles and Functions
Land Use Planning Branch	Development of State Policies Advice to councils, community etc regarding planning system
RPDC	Reviewing Planning schemes, water management plans, reserve management plans, marine farm development plans etc Reviewing rezoning applications Assessment of Projects of State Significance Extension service providing guidance to councils on development of planning schemes
RMPAT	Determining appeals and civil enforcement applications
EPA	Assessment of Level 2 activities Provision of expert advice to RPDC regarding PoSS

Section 43A applications

The one area in which there is some cross-over in the roles of the RPDC and RMPAT is in relation to s.43A applications, combining rezoning and subsequent development. Currently, Councils give preliminary approval for proposed development, subject to the RPDC approval of the rezoning proposal. The RPDC then assesses the merits of the rezoning and the subsequent development and makes a decision in relation to both issues. This decision is not subject to review (other than on a question of law).

There are clearly efficiency benefits in having the two issues assessed concurrently, and the assessment of the merit of rezoning may turn on the merits of the intended development. However, subjecting development of rezoned land to a different process to development on other land can create confusion. Therefore, we would support amendments to transfer responsibility for assessing subsequent development on rezoned land. For example, on approval of the rezoning by the RPDC, the Council's preliminary approval of the proposed development could take effect and be subject to the same right of appeal to the Tribunal as any other development approval (that is, interested parties would have 14 days to appeal against the decision to approve the development).

Increasing efficiency through timelines, case management or other means

<u>Timelines</u>

We acknowledge the need for statutory timeframes at various stages of planning decisions. However, in our view it is important to retain some flexibility to ensure that proper assessment of the social and environmental impacts of a proposal is not compromised in order to meet rigid timeframes. Also, as discussed below, it is important to recognise that many delays in the planning system result from the failure of proponents to provide information in a timely manner.

As discussed in our submission to the Better Planning Outcomes project, we also have concerns that failing to comply with statutory timeframes results in a 'deemed

approval' of a development (s.59, *Land Use Planning and Approvals Act 1993*). In our view, it is more consistent with a precautionary approach for failure to determine an application within a statutory timeframe to be a deemed refusal.

Currently, discretionary applications are available for public comment for 14 days. Representors also have 14 days to appeal against the planning authorities decision in relation to the application. In our experience, it is incredibly difficult for community members to review a development proposal or application within this time. In the interests of encouraging effective public participation in land use planning decisions, we would support extending the timeframe for representations and appeals to 28 days.

In our view, the existing statutory timeframes for determining appeals are already quite tight. Any further reduction in these timeframes would compromise the parties' capacity to properly prepare their case. The ability for the Tribunal's 90-day timeframe for completion of appeals to be extended with the consent of all parties, or with the consent of the Minister, recognises that some complex matters will necessarily take longer to complete.

The process for approving planning schemes and scheme amendments can be protracted. However, as discussed below, much of the responsibility for this lies with the Council in the early stages rather than in the planning system itself. The RPDC must be satisfied that a certified amendment is 'in order' before proceeding to a hearing – the process of liaising with Council to ensure that a proposed amendment has been prepared in accordance with State policies and the objectives of the RMPS can often take many months. However, once the proposed amendment is in order, the RPDC is bound to assess the proposal within appropriate statutory timeframes. We believe that the existing timeframes are appropriate to allow for proper consideration of all relevant issues. Tighter timeframes may reduce the flexibility necessary to ensure that hearings can be arranged to suit the significant number of parties involved.

Therefore, we would not support significantly tighter timeframes for development assessment and appeals. The overriding consideration of the planning system should be proper assessment of the environmental impacts of a proposal and achievement of the objectives of the RMPS.

Case Management

In the EDO's experience, case management by the Tribunal is carried out efficiently and effectively, with appropriate notice to all parties. We have had less experience with the RPDC, but have generally found their case management procedures to be appropriate.

The best mechanism to improve case management within these bodies would be to provide additional resources to support staff, panel members and Commissioners.

Other issues

In the EDO's 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.

Similarly, where Councils fail to provide adequate information to support a proposed planning scheme or amendment, the RPDC can spend a considerable amount of time reviewing, and possibly rejecting, the certification documents.

Therefore, 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.
- Continuing the extension service provided by the RPDC to assist Councils to prepare planning schemes and amendments.

Mechanisms to give greater weight to State policy priorities

The EDO believes that current mechanisms within the RMPS suite of legislation, including LUPAA and the *State Policies and Projects Act 1993*, give appropriate weight to State Policies. The problem is the lack of these policies.

As identified in the Edwards Review, and by a number of submissions to the Legislative Council Select Committee review, one of the biggest hurdles to implementation of the RMPS is the lack of policy direction. State Policies are intended to provide this strategic underpinning to planning decisions and to ensure a consistent, State-wide approach to resource management and planning issues. The policy vacuum created by the limited number of State Policies that have been implemented to date continues to impede the effectiveness Tasmania's planning system.

Even the policies that have been developed to date are fraught with problems. Since its commencement in 1996, the *State Coastal Policy* has been the subject of numerous appeals arguing about the appropriateness of land use activities in the Coastal Zone. Despite over ten years of operation, considerable time continues to be expended in planning appeals, in both the Tribunal and the Supreme Court, discussing the relevance and enforceability of the Policy. The Policy has been subject to review for over two years now, but a revised policy is yet to be released. As this Policy is intended to form the basis for a clear and consistent approach to coastal management in Tasmania, a state with over 4,800 kilometres of coast-line, this delay is inexcusable.

It is critical that the Land Use Planning Branch act quickly to broaden the suite of State Policies guiding planning direction in Tasmania. Suggestions for future State Policies include:

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

Making and reviewing State Policies

State Policies should be high-level policy statements, implemented through planning schemes and other appropriate tools, such as management plans. Converting these policies into clear assessment criteria (e.g. within planning schemes) will ensure more consistent decisions and provide certainty to developers, councils and the community.

To achieve this aim, it is vital that State Policies explicitly identify:

- clear policy objectives
- implementation responsibilities of councils and government agencies; and
- instruments that will be used to implement policy objectives.

Given their role in providing State-wide policy direction, State Policies must be subject to consultation with the community, industry, social and environmental groups and relevant experts. The EDO believes that State Policies should be developed by the Land Use Planning Branch, following public consultation, and reviewed by the RPDC.

Where State Policies are to be implemented through planning schemes, planning authorities should be required to amend their scheme to implement the State Policy within a certain timeframe (for example, by directing the authority to initiate an amendment pursuant to section 34(2) of LUPAA).

Approving Projects of State Significance

We believe that the RPDC provides rigorous, independent assessment of projects of state significance. In our view, assessment of such projects should be independent of political influence. Therefore, it is inappropriate for the Minister to have power to act contrary to the findings of the independent body charged with assessing all the relevant issues arising from the project.

Given how rigorous the RPDC assessment process is, we strongly support removing Ministerial approval and making the RPDC's determination final, subject to rights of appeal to the Supreme Court.

Use of mediation

The EDO strongly supports increased use of pre-permit mediation, pursuant to section 57A of LUPAA. Identifying and resolving issues before a permit is issued has the potential to improve permit conditions and significantly reduce appeals. Local governments and the Land Use Planning Branch should actively encourage the use of this process, and provide resources to support pre-permit mediation.

We strongly support the use of mediation in the Tribunal and note that it is rare for a matter to proceed to hearing without an attempt at mediation. However, we believe that mediation should remain as a voluntary (though strongly encouraged) option – compulsory mediation is unlikely to be successful where the parties do not believe a compromise position exists.

Though there are no specific provisions for mediation in the RPDC, it is open for the RPDC to determine its own procedures, which may include mediation. However, we do not believe that there is much scope for mediation in RPDC matters – reviews of planning schemes, management plans, marine farm development plans etc are not appropriately resolved by agreement by the parties. These documents must be subject to a full review to determine if they are consistent with the objectives of the RMPS, not left to the parties to reach a compromise that may or may not achieve sustainable outcomes.

Third party appeals

The background paper states that the review is not intended to substantially alter "*involvement of the public in making representations and lodging appeals where they have a legitimate interest*". However, we are concerned that, given sweeping reforms to planning legislation in NSW to streamline development assessment, the Tasmanian government intends to limit third party appeals. The Leading Practice Model developed by the Development Assessment Forum, and promoted in the COAG reform agenda, advocates for reduction of third party notification and appeal rights as a mechanism to streamline assessment processes.

The EDO refutes 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. For this reason, one of the key objectives of the RMPS is to encourage public participation in resource management decisions. This is also consistent with the Bartlett Government's commitment to remain "clever, kind and connected".

To maintain faith in the planning system, the public need to know that resource management decisions are based on sound information, that all the relevant issues have been considered and that these issues have been subject to a systematic and transparent assessment. Where this has not occurred, the public should be granted the right to appeal against planning decisions. As a recent NSW Independent Commission Against Corruption position paper found, third party appeal rights provide "*a safeguard against corrupt decision-making by consent authorities as well as enhancing their accountability*"[1].

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

Furthermore, we believe that third party rights of appeal should be extended to allow appeal on a matter of law from a decision in relation to a Project of State Significance.

AMALGAMATING THE RPDC AND RMPAT

As discussed above, the RPDC and RMPAT play significantly different roles in the planning system. Therefore, we cannot see much scope for amalgamation of these bodies. Furthermore, the government has not provided any justification for this proposal.

One of the principal differences is in the assessment approach taken by the two bodies. Both bodies are required to further the objectives of the RMPS and can determine their own processes. In practice, the RPDC has adopted a much more inquisitorial approach than the Tribunal. This largely reflects the different matters assessed by the two bodies.

The development of land use policy is inherently value laden, and must be subject to a broad inquiry. The RPDC hears evidence from all interested parties, but also employs its own planners to provide advice about the most appropriate planning outcome. In general, RPDC hearings are reasonably informal and facilitate public participation. We believe that the broader, informal and inquisitorial approach adopted by the RPDC is appropriate for the assessment of strategic and policy documents such as planning schemes and management plans.

In contrast, the Tribunal is generally more adversarial. While Tribunal members often have relevant expertise in planning, engineering, resource management etc, and may ask for additional information, they do not prepare independent assessments of the issues.

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1 Independent Commission Against Corruption. 2007. *Corruption risks in NSW development approval processes – Position Paper*. p44.

The EDO has concerns about the increasingly legalistic nature of RMPAT proceedings, and the difficulty community litigants have in presenting their case. However, we acknowledge that an adversarial approach may be more appropriate when assessing a proposal against existing planning documents.

We would strongly oppose amalgamation of the two bodies if it resulted in a more formal, less inquisitorial approach to the assessment of strategic documents such as planning schemes, or of projects of state significance.

We acknowledge that the Tribunal is principally involved in the implementation of planning schemes through assessing development applications against the approved scheme. In this role, the Tribunal will become aware of deficiencies or unintended consequences of planning scheme provisions. We would therefore support mechanisms for improving dialogue between the RPDC and RMPAT to ensure that the RPDC is made aware of any consistent problems identified in the practical application of planning schemes it has approved.

MINISTERIAL CALL-IN POWERS

We do not support the use of ministerial call-in powers. Public confidence in the planning system relies on the assessment of all developments pursuant to the same processes. Ministerial call-in is inherently subject to political influence and will erode public confidence that an assessment is objective.

In our view, a more effective safeguard against inappropriate assessment of planning applications is to improve the opportunity for third party appeals and enforcement.

ASSESSMENT OF PROJECTS OF REGIONAL SIGNIFICANCE

The EDO supports increased planning and assessment at a regional scale. However, we believe that the appropriate mechanism for this is allowing for the creation of regional planning authorities, including representatives of each affected local government and other stakeholders (such as NRM representatives), to develop regional plans and assess projects with regional impacts. This approach recognises the importance of local and regional expertise and knowledge, and accountability to constituents, in developing planning policy.

We do not believe that an additional assessment process should be adopted for regionally significant projects. Regionally significant developments should be assessed by regional planning authorities, rather than expert panels, pursuant to the normal LUPAA procedure and appeal rights. Depending on the significance of the proposed development, it may be appropriate to treat the development as a Project of State Significance.

It is important for any proposed reforms to provide clear, objective criteria for identifying projects of ‘regional significance’.

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
Principal Lawyer