Environmental Defenders Office

Submission re. Draft *Land Use Planning and Approvals Amendment (Major Projects) Bill 2020*

May 2020

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EDO is a community legal centre specialising in public interest environmental law. We help people who want to protect the environment through law. Our reputation is built on:

Successful environmental outcomes using the law. With over 30 years' experience in environmental law, EDO has a proven track record in achieving positive environmental outcomes for the community.

Broad environmental expertise. EDO is the acknowledged expert when it comes to the law and how it applies to the environment. We help the community to solve environmental issues by providing legal and scientific advice, community legal education and proposals for better laws.

Independent and accessible services. As a non-government and not-for-profit legal centre, our services are provided without fear or favour. Anyone can contact us to get free initial legal advice about an environmental problem, with many of our services targeted at rural and regional communities.

Environmental Defenders Office is a legal centre dedicated to protecting the environment.

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I. Introduction

1 Environmental Defender's Office Ltd (**EDO**) welcomes the opportunity to comment on the Draft *Land Use Planning and Approvals Amendment (Major Projects) Bill 2020* (**Draft Bill**).

2 The EDO raises the following concerns about the Draft Bill:

(a) there is no demonstrated need for the reforms that would be implemented by the Draft Bill;

(b) the eligibility criteria for a major project declaration are broad that many projects would be eligible;

(c) public participation rights are limited, particularly insofar as public comment is only invited *after* the Development Assessment Panel (**DAP**) has published its preliminary assessment report,[1] the timeframes for public hearings, and that a major project declaration displaces merits review rights;

(d) there are ambiguities around the way in which relevant regulators are required to contribute to the assessment of a major project;

(e) the Draft Bill would enable a project proponent to "forum-shop" as between available assessment processes.

3 We expand on each of these matters below.

4 There are elements of the Draft Bill that, insofar as there is a separate environmental impact assessment required, we would support. That includes the "no reasonable prospect" test, that public hearings are mandatory and that there has been no attempt to exclude judicial review, and the role of relevant regulators in particular the EPA.

5 However, the combined effect of each of our criticisms results in our conclusion that the Draft Bill should not be progressed in its current form.

6 We make recommendations for reform at paragraph [108] that address what we perceive as the intended purpose of this legal reform, insofar as that intention has been expressed, ambiguities about the assessment process and limits placed on public participation.

7 We are open to proactively working through these recommendations with the Department of Justice should that assist and answer any questions about the matters raised in this submission.

8 We are aware that the Draft Bill will repeal and replace the existing Projects of Regional Significance process in the *Land Use Planning and Approvals Act 1993* (**LUPA Act**). We acknowledge that some of the criticisms we make of the draft Bill – in terms of criteria for decision-making, the governance issues with a Development Assessment Panel and lack of merits review rights – are criticisms we might also make of the PORS assessment process.

9 However, if the intention is to improve the PORS process, then this is an opportunity to improve those aspects of the process, not simply to replicate them. To our knowledge, the PORS process has never been used and its elements are untested. In improving the PORS process, it will give greater social licence and trust in the PORS process, will be more likely

[1] Acknowledging public comment on assessment guidelines *may* be called for if approval under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) is likely to be required.

to be accepted, and thus more likely to be utilised. We ask that our comments be considered in that light.

10 Further, we do not consider that the direct comparison with the PORS process is apt, because the criteria for declaration of a project is broader and has the potential to displace other assessment processes – namely the Projects of State Significance process under the *State Policies and Projects Act 1993*. Again, there are criticisms we might make of that process – the lack of mandatory hearing, the restriction on merits review and the purported exclusion of judicial review – but there are also positive elements, eg, it is an integrated environmental impact assessment process carried out by the Commission with Parliamentary oversight on project declaration and approval, and in practice has included public hearings.

11 Our assessment of the Draft Bill is as introducing a new assessment process, because in any practical sense, it would be a new process.

II. Need for reform?

12 There are three existing planning processes that major projects are apt to be assessed under:

(a) the integrated assessment process for projects of state significance (**POSS**) under the *State Policies and Projects Act 1993* (Tas) (**SPP Act**);

(b) assessment of projects of regional significance (**PORS**) by a DAP under Div 2A of Pt 4 of the *Land Use Planning and Approvals Act 1993* (Tas) (**LUPA Act**); and

(c) assessment of linear infrastructure under the *Major Infrastructure Projects Assessment Act 1999* (**MIDA Act**).

13 These processes displace the usual assessment processes under Parts 3 and 4 of the LUPA Act:

(a) assessment by local government under Div 2 of Pt 4 of the LUPA Act, including by the EPA as a Level 2 assessment;

(b) assessment by a combined planning permit/ planning scheme amendment under the former Part 3 and the current Part 3B of the LUPA Act.[2]

14 The Draft Bill would replace the PORS assessment process[3] with a process that is, given the breadth of the eligibility criteria for the making of a major project declaration (see [11]-[27] below), conceivably applicable to PORS, POSS, MIDA, and therefore also Part 4 planning permits and combined planning permits/planning scheme amendments.

15 It is our observation that, to date, the policy considerations that purportedly underline this reform are unclear.

16 The Department of Justice Planning Reform website cites the following as justifying the Draft Bill:

> The Major Projects process is needed to deal with development proposals of impact, planning significance or complexity. It is particularly suited to large public infrastructure projects such as

[2] Under both the former Part 3 as at 15 December 2015 which remains in force for all municipalities, and Division 4 of Part 3B of the LUPA Act, for the amendment of Local Provisions Schedules.
[3] Draft Bill, cl 11.

> the proposed new Bridgewater Bridge, or large renewable energy projects including windfarms and pumped hydro networks.
>
> …
>
> The new process will provide the community with the confidence that proposals will undergo a rigorous assessment by independent experts, with opportunities for public input.
>
> It will also provide greater certainty for developers with a coordinated approach for multiple permit assessments, set timeframes and a 'no reasonable prospect test' early on to avoid unnecessary costs associated with assessing projects that are clearly not likely to be approved.
>
> The coordinated permit process ensures that all development-related approvals for a project are assessed concurrently, ensuring potential problems can be discovered early.[4]

17 The PORS, POSS and MIDA assessment processes are also intended to deal with projects of significant impact and complexity.[5] There is no indication as to why the POSS, PORS or MIDA assessment process (or even the usual local government assessment process) are inadequate or ill-equipped to deliver on that intention. In particular, the POSS process provides for a co-ordinated and concurrent approach to assessment where multiple permits would (but for the project being assessed under those processes) otherwise be required. There is no demonstrable systemic failure of the existing processes to deliver the outcomes to which the Draft Bill is directed.

18 In the absence of any explanation of the policy underpinning of this reform, it is both difficult to judge whether the Draft Bill achieves its purpose (that purpose not having clearly been articulated) or whether the Draft Bill is a proportionate and pragmatic method to achieve that purpose.

III. Breadth of eligibility criteria

19 For a project to be eligible to be declared a major project under the Draft Bill, the Minister must be satisfied that that the project has 2 or more of the following attributes (**Eligibility Criteria**):

(a) the project will make a significant financial or social contribution to a region or the State;

(b) the project is of strategic planning significance to a region or the State;

(c) the project will significantly affect the provision of public infrastructure, including, but not limited to, by requiring significant augmentation or alteration of public infrastructure;

(d) the project has, or is likely to have, significant, or potentially significant, environmental, economic or social effects;

(e) the approval or implementation of the project will require assessments of the project, or of a use, development or activity that is to be carried out as part of the project, to be made under 2 or more project-associated Acts or by more than one planning authority;

(f) the characteristics of the project make it unsuitable for a planning authority to determine.

20 These eligibility criteria are very similar to the current eligibility criteria for a PORS declaration under s 60C of the LUPA Act (**PORS Eligibility Criteria**). That is to be expected,

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[4] Planning Policy Unit, 'Major Project Assessment Reform', *Tasmanian Planning Reform* (Web Page, 7 May 2020) < https://planningreform.tas.gov.au/major-projects-assessment>

[5] See, e.g. the eligibility criteria for a POSS under the SPP Act, s 16(1) and the eligibility criteria for a PORS under s 60C(1)-(3) of the LUPA Act

given the Draft Bill would substitute the major projects process for the existing PORS process.

21 However, the Major Project Eligibility Criteria are broader than the PORS Eligibility Criteria so far as they encompass projects of *State* significance, as well as regional. It follows that while the Draft Bill does not purport to repeal or replace the existing POSS assessment process under the SPP Act, the displacement of that process is the likely (or at least possible) practical outcome.

22 The breadth of the Major Project Eligibility Criteria is such that many large or controversial developments could be eligible for a major project declaration. On our analysis, they would include major infrastructure projects, any Level 2 activity usually assessed by the EPA (except salmon farms), but also potentially include high rise buildings, prisons, large suburban/rural development or subdivision, and development in national parks and reserves. This is because many of these projects would (or may) require 2 or more project-associated permits, and satisfy the criteria of making a "significant financial or social contribution to a region or the State": cl.60K(1)(a) and (c).

23 We are aware that other jurisdictions (e.g. NSW and Victoria) have major project legislation with eligibility criteria referring to State *or regional* significance. However, a criterion of "regional significance" in NSW is a very different type of project to "regional significance" or "financial contribution to a region" in a Tasmanian context. In a jurisdiction of the size of Tasmania, a test of "significant financial contribution to a region" is potentially able to be met on an economic basis for any relatively large development, such as a large tourism development or even subdivision, and "social" significance for projects such as the Westbury prison.

24 If the intention of the Draft Bill is to address infrastructure projects such as the Bowen Bridge, pumped hydro power or wind farms, **we recommend that this intention should be clearly articulated and the eligibility criteria should be targeted to such projects**.

25 The broad scope of declaration power has the potential to lead to additional conflict in the community, as it invites speculation as to whether a project currently being assessed will be "called in" for major projects declaration. Likewise, it encourages proponents to forum shop between local and State government. It gives an impression of an "inside track" for developers, and has the potential to instill a level of distrust in planning. The creation of distrust and disruption to the planning process is likely and probable, in our experience in other jurisdictions in which our lawyers have practiced.

26 We note that the Commission *may* produce "determination guidelines" to which the Minister is to "have regard" in making his decision. However, as drafted, the Commission is not *required* to prepare the guidelines. **We recommend that, at a minimum, the guidelines under cl.60J must be prepared before any project can be declared.**

27 In NSW, the criteria for State and regional significance are objective. A State Environment Protection Policy declares what categories of projects are State significant development. The Minister only has a discretion to declare a project to be State significant development where it is on land identified in a SEPP, and the Minister has "obtained and made publicly available advice from the Independent Planning Commission about the State or regional planning significance of the development".

28 Whether development is of State significance for the purposes of the *Environmental Planning and Assessment Act 1979* (NSW) is determined by reference to the *State Environmental Planning Policy (State and Regional Development) 2011.* An example of the eligibility criteria for "cultural, recreation and tourism facilities" is as follows:[6]

> …
>
> Development for other tourist related purposes (but not including any commercial premises, residential accommodation and serviced apartments whether separate or ancillary to the tourist related component) that—
>
> (a) has a capital investment value of more than $100 million, or
> (b) has a capital investment value of more than $10 million and is located in an environmentally sensitive area of State significance or a sensitive coastal location

29 Or, for "electricity generating works and heat or co-generation", the criterion is:[7]

> Development for the purpose of electricity generating works or heat or their co-generation (using any energy source, including gas, coal, biofuel, distillate, waste, hydro, wave, solar or wind power) that—
>
> (a) has a capital investment value of more than $30 million, or
> (b) has a capital investment value of more than $10 million and is located in an environmentally sensitive area of State significance.

30 The capital investment value provides an objective description of development that falls within the major projects assessment process. The scheme does not rely on Ministerial discretion, and instead provides both industry and the community with clarity about what projects are eligible. This system has been in place for some years, the NSW State Liberal Government reverting to SSD in 2011 after repealing the former Labor Government's controversial "Part 3A" major projects assessment process.

31 While there are elements of the NSW system that would not automatically translate to Tasmania, there are benefits in providing certainty over what is State significant development, in the same way that Level 2 projects are prescribed. The policy position as to whether the declaration is automatic or whether there ought to be discretion is one that requires further consideration. We would be open to that discussion once the criteria have been produced.

32 **EDO recommends that criteria be designed to capture the types of projects to which the process applies and for those criteria to be in the legislation.** If it is not the intention to capture subdivision, residential apartments, tourist development in parks and reserves, or others, these can be ruled out by properly designed assessment criteria – designed to achieve the purpose of the legislation. Specifying criteria in this fashion will provide certainty to the development industry and investors, and to the community and assist in both preventing conflict and providing legitimacy to the process.

33 We note the current major projects declaration criteria would allow any Level 2 activity to be declared a major project. If it is the intention to take projects out of the EPA assessment process, this intention needs to be explicitly stated and reason given. There is no public policy basis articulated in the documents before us for removing EPA Level 2 assessments

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[6] *State Environmental Planning Policy (State and Regional Development) 2011* (NSW), sch 1 cl 13.
[7] *State Environmental Planning Policy (State and Regional Development) 2011* (NSW), sch 1 cl 20.

from the usual process through local councils and merits review in the Resource Management and Planning Appeal Tribunal (**RMPAT**).

IV. Public consultation and displacement of merits review

34 Certain features of the Draft Bill are likely to restrict public participation and consultation in relation to projects the subject of a major project declaration. The relevant features of the Draft Bill are:

(a) public consultation on draft assessment guidelines is only mandatory where the project is reasonably likely to require Commonwealth approval under the *Environment Protection and Biodiversity Conservation Act 1999 (Cth)* (**EPBC Act**) and the proponent is likely to seek to have a bilateral agreement apply to the project;

(b) public notice takes place *after* a DAP has prepared its draft assessment report;[8]

(c) public hearings must take place within constrained time frames unless an extension is approved by the Minister; and

(d) there is no provision for merits review of a DAP's decision to grant a major project permit; and

(e) the scope of project declaration power has the potential to displace merits review rights for a large number of projects.

Draft Assessment Report

35 The matter at [25(b)] is a standalone issue. Consultation with the public (i.e. by the making of representations under s 60ZZD and the holding of hearings under s 60ZZE) takes place after the preparation of the DAP's draft assessment report.[9][10] In our submission, there are issues of prejudgment inherent in a process that requires a decision-maker to essentially come to a decision prior to inviting public comment. The inevitable result of that process is that public submissions must, to have a meaningful impact, dissuade the DAP from adopting a position that it has already determined is the correct one. And, given that the DAP must rely on the relevant regulator's advice as to whether a permit should be issued and, if so, on what conditions, the public must also dissuade those regulators from their previously expressed positions. The process strays perilously close to a legislative endorsement of the decision maker adopting a process that at common law could be characterised as being affected by apprehended bias.[11] **We recommend this be reviewed with a view to resolving that issue.**

Hearing timeframe

36 The matters at [25(c)], [25(d)] and [25(e)] are interrelated. The timeframes in relation to public consultation under the Draft Bill (see [68] above) are longer than, for example, the time frames relating to consultation in relation to planning permits under Div 2 of Pt 4 of LUPAA. But to consider this a sufficient guarantee of public participation ignores the matter

[8] We acknowledge this is the process provided for in the POSS process.
[9] Draft Bill, s 60ZZA.
[10] The Panel's draft assessment report is in essence its preliminary conclusion as to whether or not a major project permit should be granted in respect of the project. It incorporates all relevant regulator's preliminary advices.
[11] See, e.g. *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507 at [95].

at [25(d)] – that the Draft Bill does not provide a right to seek merits review of a decision to grant a major project permit. This is in stark contrast to the right to seek merits review (a planning appeal to RMPAT) in relation to the grant of a discretionary planning permit under Div 3 of Pt 4 of LUPAA.

37 The result is that *all* evidence going to the *merits* of the Panel's decision must be prepared and provided within the representation period - 28 days (although conceivably further evidence could be provided by experts etc. during the hearings where an extension is given by the Minister). In contrast, in relation to a discretionary planning permit under Div 2 of Pt 4 of LUPAA, a person wishing to contest the grant of a permit on the merits could provide evidence during the 14-28 day[12] public exhibition period *in addition* afforded an opportunity to lead and cross-examine evidence through the fair hearing processes of the RMPAT planning appeal procedure.

38 Further, and critically, the Draft Bill requires public hearings to be held within 28 days of the end of the public notice period, unless the Minister approves an extension of time. While an extension may be granted, one would reasonably expect that the intention of such a timeframe is to constrain hearing times and that there is a legitimate expectation arising that both the DAP and the Minister would exercise that power cautiously. This analysis is necessarily hypothetical, but there is clear intended restraint. What this would mean in practice is that, if hearings were held within 28 days of the end of the notice period, the DAP will need to call a hearing within 2-3 weeks of the end of a notice period, to allow for a hearing of 1-5 days. It would need to send letters/emails out within 7 days, with a hearing held within 14 days of receipt of notice.

39 This is an insufficient time in which to prepare and provide all relevant evidence and submissions going to the merits of the Panel's decision, particularly for a large and complex project. It is likely that there will be no (or at least, very limited) opportunity for the exchange of evidence between representors and proponent. The time frame will also limit the ability of representors to engage and brief experts and/or legal representatives. To the extent further information in relation to a representation is required by the DAP to properly assess a representation, there will be limited time for the DAP to request, and the representor to prepare, additional information. Indeed, there is limited time for the DAP to have even read submissions before the hearing, and one must reasonably assume there would be constraints on cross-examination or other procedural rights, in order to ensure the hearing is completed within the 28 day period. In our view, there is little to no prospect of a fair hearing being held within that timeframe.

40 **We recommend that the restriction on hearing timeframes be removed from the Draft Bill**. If the DAP is to run a fair hearing process, the DAP must be allowed to run that process in a fair way consistent with procedural fairness obligations.

41 These limits on public rights are likely to disproportionately affect the most vulnerable in our community. We are concerned that people not educated in or afforded access to legal and expert services will be prevented from meaningful participation in these processes. Vulnerable people do not have the resources or connections to experts, and are not experienced in public hearing processes to be fairly heard in those timeframes.

[12] Noting that a planning authority may extend the public notice period, and in practice councils have used this power to extend the period up to 28 days for complex projects.

42 In particular, the notice and hearing process is the only way in which Tasmanian Aboriginal people have any voice in a major projects approval process, the Draft Bill displacing, in relation to a major project, any obligation to consult the Aboriginal Heritage Council in relation to permits under the *Aboriginal Heritage Act 1993* (Tas).[13] The constraint on hearings is likely in our experience to disproportionately impact Aboriginal people who may be affected by a project. This is of consequence in circumstances where the consequence of a major projects permit is that a right to damage or destroy cultural heritage is granted.

43 In view of the complexity of projects likely to attract the major project approvals process under the Draft Bill, our view is that the hearing timeframe should be removed. A requirement that hearings be held within 28 days of the close of public notice will substantially constrain public participation and will not allow for a full hearing.

Purpose of merits review

44 The scope of the project declaration power means that the Draft Bill has the potential to displace merits review rights for a wide range of projects. Merits review is a crucial element of our system of law, and such rights should not be removed lightly.

45 At a very basic level, the purpose of merits review is to restore and promote trust and integrity in the planning and environment system and reduce conflict. The benefits of merits review are widely recognized as improving consistency, quality and accountability in decision-making. The benefits have been described as:[14]

- enhancing the quality of the reasons for decisions;
- providing a forum for full and open consideration of issues of major importance;
- increasing the accountability of decision makers;
- clarifying the meaning of legislation;
- ensuring adherence to legislative principles and objects by administrative decision makers;
- focusing attention on the accuracy and quality of policy documents, guidelines and planning instruments; and
- highlighting problems that should be addressed by law reform.

46 The Law Council of Australia recently made submissions supporting an increase in merits review rights under the Federal environmental law, the EPBC Act, saying:

> Merits review is an essential tool to improve the rigour and transparency of upfront administrative decision-making and drives overall system efficiency.

47 The Commonwealth Government's Administrative Review Council sets out principles for how to decide whether a decision should be capable of merits review. The Council states:

> The Council prefers a broad approach to the identification of merits reviewable decisions. If an administrative decision is likely to have an effect on the interests of any person, in the absence of good reason, that decision should ordinarily be open to be reviewed on the merits.

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[13] See para [61] below.

[14] Preston B and Smith J, "Legislation needed for an effective Court" in Promises, Perception, Problems and Remedies, The Land and Environment Court and Environmental Law 1979-1999, Conference Proceedings, Nature Conservation Council of NSW, 1999, at 107.

> If a more restrictive approach is adopted, there is a risk of denying an opportunity for review to someone whose interests have been adversely affected by a decision. Further, there is a risk of losing the broader and beneficial effects that merits review is intended to have on the overall quality of government decision-making.
>
> The Council's approach is intended to be sufficiently broad to include decisions that affect intellectual and spiritual interests, and not merely property, financial or physical interests.

48 The Council identifies:

(a) two types of decisions that are unsuitable for merits review – legislation like decisions, which are subject to their own accountability measures, and decisions that automatically follow from the happening of a set of circumstances.

(b) Factors that *may* justify excluding merits review.

(c) Factors that *will not* justify excluding merits review.

49 None of these is applicable to the major projects permit decision under the Draft Bill.

50 Of note, both the Law Council of Australia and the Administrative Review Council say that a decision is not inappropriate for merits review merely because that decision may also be the subject of judicial review. Indeed, the Law Council advocates for certain decisions to be available to both forms of review in its EPBC Act Review submission, noting that the availability of merits review may render judicial review unnecessary – for instance, on a procedural fairness ground.

51 The information released with the Draft Bill under the heading "Accountability" states that "providing an appeal to RMPAT against the Independent Panel's determination would be like having one expert panel testing the decision of another expert panel". The implication being that the primary decision-maker – the DAP – needs no independent oversight or scrutiny. This statement misunderstands the purpose of merits review.

Role of the DAP

52 Let us consider the constitution and role of the DAP in more detail:

(a) A DAP is the primary decision-maker, once a major project is declared, the DAP makes all primary decisions in the assessment process.[15]

(b) A DAP is appointed on a case by case basis – it is not like the Tribunal's appointment of members (who are permanent and sessional, and listed on the website and in annual reports) or the Commission's appointment of delegates (who are either Commissioners or State Service Employees).

(c) Any person can be appointed to a DAP so long as they have the desired experience or qualifications, but there is no guarantee that they will have expertise in environmental impact assessment, in attributing weight to competing considerations, training in fair hearing obligations, or be subject to a code of conduct.

(d) Because of the time constraint on hearings, there is no guarantee that a DAP's processes allow for testing of expert evidence and representation by lawyers as the fair hearing rule dictates, and as would be expected in the Tribunal. It also does not allow for alternative dispute resolution through appropriately qualified and experienced legally trained staff, as does the Tribunal. For the reasons set out above, the

[15] Excepting the role of the relevant regulators to input into the DAPs decision.

timeframes are such that the full hearing process cannot be expected to occur and would require Ministerial approval to be allowed to occur.

53 A DAP is therefore not like the RMPAT or even the Commission, where functions are delegated. Because they are appointed on a case by case basis, it is perhaps more necessary that there be an accountability mechanism for their decisions. The limitations on a DAP under the Draft Bill provide the imperative that merits review lies from a DAPs decision.

54 We recommend that merits review lie from a decision of a DAP.

55 **We also recommend that the Commission be the decision-maker rather than a DAP.** Members of any "panel" that assesses complex projects, runs public hearings and notice requirements, and will ultimately make a decision, should be people trained and experienced in all of those things. The Commission is a ready-made trusted institution. There is no apparent need for a new body, appointed on a case by case basis. The removal of the DAP as decision-maker, and replacement with the Commission, will go a long way to restoring trust in this process.

56 The Commission is experienced in undertaking these functions. It hears public representations on a day-to-day basis. It is sufficiently independent of government, and is not subject to direction. Commissioners must comply with a Code of Conduct, and State service employees likewise. Noting that the governance and advice role of the Commission are under review, one would hope that this leads to a strengthening of the Commission's role.

57 If the DAP is to be maintained, **we recommend that there be legislated criteria as to its skills and experience**. For instance, it is important that where Aboriginal cultural heritage forms part of the assessment, that the DAP be appointed with a member of the Tasmanian Aboriginal community or a person with substantial experience and standing within that community in respect of Aboriginal cultural heritage. This criteria should be developed and consulted on.

Judicial review

58 Turning to judicial review, the government's information states that an "appeal under judicial review" is "available" from the DAP or Regulators, and the Minister's project declaration. We support the fact that there is no attempt to exclude judicial review, unlike the POSS process.

59 However, it is necessary to be clear that a judicial review is not appeal. It is either a proceeding under the *Judicial Review Act 2000* (Tas) or at common law by which a Court supervises the exercise of administrative powers. There are significant technical restrictions to the standing of a person to make a judicial review application, both under the Act and at common law.

60 Judicial review is limited in scope – review is only permitted on the basis of jurisdictional error or error of law on the face of the record. There is no scope to mount a judicial review on the basis of an argument about the merits of the case.[16] Where a decision-maker's discretion to make a particular decision is broad – as is the case in the draft Bill – the potential for judicial review to be successfully invoked is further reduced.

[16] For a statutory judicial review, only those matters identified in ss17 and 18 of the *Judicial Review Act 2000* (Tas).

61 Supervision of administrative decision-making by judicial review in superior courts is a constitutional minimum standard. In that regard, in *Kirk v Industrial Relations Commission of NSW* (2010) 239 CLR 531 at [100] that "[l]egislation which would take from a State Supreme Court power to grant relief on account of jurisdictional error is beyond State legislative power. "

62 The judicial review jurisdiction of the Supreme Court is a costs jurisdiction (c.f. proceedings in RMPAT).[17] That is, there is presumption that costs follow the event. As such, the risk of adverse costs order is often prohibitive the judicial review is commonly cost prohibitive because costs follow the event, unlike in a merits review jurisdiction such as the RMPAT.

63 Finally, Tasmania has a good system for merits review and we should support the oversight, accountability and independent review it provides, rather than attempting to limit its jurisdiction. RMPAT is an efficient forum for the resolution of disputes and provides clear and transparent oversight of administrative decision-making in the planning context. Its decisions provide certainty to the operation of the planning system, as its ruling on interpretation and jurisdictional questions have provided guidance to the profession and community over many years.

64 RMPAT procedure involves a highly effective mediation process. In the 2018-2019 financial year, of 144 matters filed with RMPAT, only 19 went to full hearing. Sixty-nine cases resolved by consent, and there were 45 withdrawals. That means 80% of cases are effectively resolved without a hearing. It is a credit to the Tribunal that its focus on alternative dispute resolution resolves so many disputes without a formal hearing. Through mediation, often mutually acceptable alternatives can be found. Its benefit cannot be overlooked. There is no equivalent mediation process under a DAP-run hearing and consultation process. Mediation needs qualified and experienced leadership and is not the same as an open hearing process.

65 For the reasons set out above, it is our submission that there is no justification not to provide merits review rights, or for the displacing merits review across a potential broad range of developments.

66 Legal reform should be proportionate to its aims. Where, as here, the policy aim said to be an assessment process for complex proposals, it is difficult to see how the exclusion of a central form of oversight – merits review – is justified particularly given the scope of projects potentially eligible for declaration. The Draft Bill cannot be considered a proportionate legislative response.

V. The Role of Relevant Regulators

67 The Draft Bill purports to ensure that the regulatory regimes put in place by "project-associated Acts"[18] are considered in the grant of a major projects permit. Persons

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[17] *Resource Management and Planning Appeal Tribunal Act 1993*; and where there is no legislated capacity for the Tasmanian Supreme Court to issue protective costs orders, unlike other jurisdictions eg, s.65C(2)(d) of the *Civil Procedure Act 2010* (Vic).

[18] Defined by s 60B of the Draft Bill to be the following Acts: the *Aboriginal Heritage Act 1975* (Tas), *Environmental Management and Pollution Control Act 1994* (Tas), *Historic Cultural Heritage Act 1995* (Tas), *Nature Conservation Act 2002* (Tas) and the *Threatened Species Protection Act 1995* (Tas).

responsible for issuing permits/approvals under project-associated Acts are "relevant regulators" in relation to a major project.[19]

68 Relevant regulators have certain functions in the assessment of a major project:

(a) specifying matters to be included in the assessment guidelines for a major project;[20]

(b) issuing a preliminary advice to the DAP,[21] which shapes the DAP's draft assessment report and consequently has a significant bearing on how public consultation takes place; and

(c) issuing a final advice to the DAP,[22] by which the relevant regulator can direct the Panel to refuse the major project permit or require the Panel to impose conditions on the grant of a major project permit.

69 Importantly, the Draft Bill appears to intend that the relevant regulator's functions in relation to major project assessment be guided by the regulator's function under its project-associated Act. For example, under s 60ZZK(1), a relevant regulator may only direct the Panel to refuse to grant a major project permit in relation to the project if the regulator is:

> … satisfied that the regulator would, if the project were not a major project, refuse to grant, under the project-associated Act, a project related permit in relation to the project.

70 Similarly, under s 60ZZK(2), a relevant regulator may only specify conditions or restrictions to be imposed on a major project permit if the regulator would, if the project were not a major project:

> (a) grant, under the project-associated Act… a project-related permit in relation to the project; and
>
> (b) impose, on a project-related permit granted under a project-associated Act in relation to the project, the condition or restriction.

71 These restrictions on the relevant regulator's final advice function feed into the relevant regulator's other functions under the Draft Bill. The relevant regulator may only specify matters to be included in the assessment guidelines if those matters would be "relevant to the decision of the relevant regulator as to the contents of the…final advice".[23] Similarly, the content of the relevant regulator's preliminary advice is dependent on what the relevant regulator considers would, at the time the preliminary advice is given, form the content of the *final advice*.[24] The result is that all of the relevant regulator's functions require it to consider how it would give its final advice. That, as [23] and [24] above demonstrate, requires the regulator to as itself the hypothetical question: if the project were not a major project and the relevant regulator were assessing the project under its project-associated Act, what conclusion(s) would the relevant regulator reach in relation to the granting of a permit/approval under that Act

72 Unfortunately, the Draft Bill does not specify *how the relevant regulator is to undertake that hypothetical exercise*. Is the regulator to conduct itself in according to whatever process is

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[19] Draft Bill, s 60Z.
[20] Draft Bill, s 60ZA(1).
[21] Draft Bill, s 60ZY.
[22] Draft Bill, s 60ZZF.
[23] Draft Bill, s 60ZA(7), (9).
[24] Draft Bill, s 60ZZ(4), (5).

prescribed by its project-associated Act? Further, are the criteria in the project-associated Act relevant or some other criteria?

73 For instance, under the Victorian *Major Transport Projects Facilitation Act 2009* (Vic), which is a similar piece of legislation where the regulator is involved in formulating project impact statement guidelines and providing advice, the "applicable law criteria" are relevant both to the project impact statement guidelines and to the advice of relevant regulators.[25] This provides substantial clarity about the scope of exercise of powers.

74 It is the EDO's submission that there is a substantial ambiguity in the Draft Bill that should be resolved. We recommend that the Draft Bill be amended to clarify the interaction with project-associated Acts and to make clear that criteria for decisions are relevant to project impact statement guidelines and .

75 The problems posed by this ambiguity are well illustrated by considering the role of the relevant regulator associated with the *Aboriginal Heritage Act 1975* (Tas) (**Aboriginal Heritage Act**). Under that Act, the Director of National Parks and Wildlife (**Director**) and the Minister for Aboriginal Affairs (**Minister**) are the issuers of permits and hence would be deemed by the Draft Bill to be the relevant regulators associated with that Act.[26] The Aboriginal Heritage Council (**AHC**) is given an advisory role in relation to decisions under the Aboriginal Heritage Act.[27] This is important because the AHC is an Aboriginal voice in relation to decisions affecting Aboriginal cultural heritage.[28]

76 Under the Draft Bill, it is not clear whether the AHC would retain its advisory role in the course of the Director and/or Minister conducting the functions of a relevant regulator. That is, in considering the matters at [23] and [24] above, would the Director and/or Minister be required to consult the AHC as usual? If the answer is no, this would be a regressive step in terms of Aboriginal heritage protection. It removes an Aboriginal voice from decision-making that is otherwise present, limited though it might be, and is contrary to rights guaranteed by the United Nations Declaration on the Rights of Indigenous Peoples to free, prior and informed consent in decisions that affect cultural heritage or land.

77 Another area of ambiguity is what level of assessment is required of the EPA. Section 11, cll 60ZA and 60ZC of Draft Bill provides that:

(a) The EPA Board is a relevant regulator for all declared major projects;

(b) A relevant regulator may decide whether or not to input to the project impact statement guidelines by issuing a "notice of assessment requirements" or a "notice of a no assessment requirements", or whether it would recommend a revocation of the project declaration;

(c) The EPA Board cannot issue a notice of no assessment requirements if the project is a "bilateral agreement project", meaning that an approval is required under the EPBC Act;

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[25] See sections 27(h), 39(h), 65(1)(a) of the *Major Transport Projects Facilitation Act 2009 (Vic).*
[26] Aboriginal Heritage Act, ss 9, 14.
[27] Aboriginal Heritage Act, s 3(2); *Aboriginal Heritage Standards and Procedures,* published by DPIPWE on the website of Aboriginal Heritage Tasmania, June 2018, pp 8, 14, 16, 23 and 28, <https://www.aboriginalheritage.tas.gov.au/Documents/Aboriginal%20Heritage%20Standards%20and%20Procedures.pdf>
[28] See, e.g. Aboriginal Heritage Act, ss 3(6), 4(2).

(d) If the EPA issues an assessment requirements notice or notice recommending revocation, it must "carry out an environmental impact assessment of the major project in accordance with Part 5 of the EMPC Act".

78 Therefore, unless the project requires Commonwealth approval – of which there are relatively few in a Tasmanian context – the EPA can choose whether it has any assessment requirements. There are many examples of projects that are not Level 2 activities, or would not otherwise be assessed by the EPA, would not require Commonwealth approval and do not therefore need an environmental impact assessment. If that is the case, how are the integrated environmental, social, and economic impacts of the project to be assessed? It is clear that the intention is that the Draft Bill does not contemplate an integrated assessment.

79 We recommend that the EPA always be a relevant regulator where there are environmental impacts associated with the project.

80 Further, the environmental impact assessment principles apply to an assessment, but do not specify any clear criteria for how the EIA is to be undertaken. While we welcome the requirement for an environmental impact assessment, where relevant regulators each have different roles, we query how cl 70ZC would operate in practice. The interrelationship between the Draft Bill and Part 5 of the EMPC Act is unclear.

81 We note that planning authorities are not relevant regulators and have limited input to the decision-making process. Indeed, a planning authority needs to make a submission like any other member of the public in order to be heard about the issue of a permit. It seems to us that a planning authority plays a particularly important part of the assessment, in particular, given an amendment to its planning scheme may be made as a consequence of the process, and that it responsible for part of the enforcement of the major projects permit. We recommend that the relevant planning authority(s) be relevant regulators, or at least, have a higher level of input in relation to conditions and the terms of a planning scheme amendment applying to its municipal area.

82 It is the EDO's strong recommendation that these ambiguities be clarified.

83 Finally, we welcome the "no reasonable prospects" process with a test to be met. It is an important element in reducing unnecessary time and investment in such a project. However, the role of the relevant regulators is such that a notice by a relevant regulator to the Commission ought to have a higher order of consequence, and the Panel should not have a discretion as to whether to trigger the notice in cl.60ZE. **We recommend this change be made to the no reasonable prospects process.**

VI. Duplication of assessments

84 There is potential for the Draft Bill to provide an avenue for approval to be granted to a major project notwithstanding that the project has been refused under another assessment process.

85 The Draft Bill does not appear to bar a proponent from seeking a major project declaration in relation to a project that has been refused consent by a planning authority (or the Tribunal) or that has not been approved under the POSS process. This is apt to lead to the major projects approval process being used as a de-facto appeals process for refused projects.

Such an outcome is contrary to the rule of law so far as it undermines the finality of planning decision-making.

86 We recommend that the interaction with Courts and Tribunals be clarified.

VII. Criteria for decision-making

87 The DAP is to decide whether to grant a major project permit on the basis set out in s 60ZZM of the Draft Bill. The DAP must:

(a) have regard to the matters specified in section 60ZM(6); and

(b) consider any representations made under section 60ZZD(1) in relation to the major project; and

(c) consider any matters raised in hearings in relation to the major project; and

(d) consider all participating regulator's final advices.

88 The matters in s 60ZM(6) are :

(a) any relevant planning scheme; and

(b) if the carrying out of the project is inconsistent with the provisions of a relevant planning scheme – the merit of any changes to a planning scheme (other than to the SPPs) that would be required to be made for the major project to be lawfully carried out; and

(c) the regional land use strategy, if any, for the regional area in which the land is situated

89 Notwithstanding that a major project is contrary to the provisions of a planning scheme, the DAP may grant a major project permit, but only if the DAP is satisfied that the grant of the permit:

(a) would be consistent with furthering the objectives specified in Schedule 1; and

(b) would not be in contravention of a State Policy; and

(c) would not be in contravention of the TPPs; and

(d) would not be inconsistent with a regional land use strategy that applies to the land on which the project is to be situated.

90 While these are the current criteria for PORS projects, they are not the same criteria as for planning scheme amendments under the former Part 3, which provide good guidance on when planning scheme amendments should be made. If the role of the DAP is to perform the planning assessment, and the outcome is that a planning scheme amendment can be made, that assessment should be made as though it is performing the Commissions role.

91 EDO recommends that criteria be consistent with those criteria for a planning scheme amendment under s40M (and s34) of the LUPA Act, and the former s.32 (and s30) of the LUPA Act.

92 We recommend that:

(a) The criterion in cl60ZZM(4)(c) and (5)(b) be amended to "is consistent with each State Policy";[29]

(b) The criterion in cl60ZZM(4)(d) and (5)(c) be amended to "be consistent with the TPPs";[30]

(c) The criterion in cl60ZZM(4)(e) and (5)(d) be amended to "consistent" with the regional land use strategy, not "inconsistent", replicating the existing requirement in s34(2)(e) of the LPS criteria and the former section 30O;

(d) Include a criterion in cl60ZZM(4) and (5) that the project avoid the potential for land use conflicts with use and development permissible under the planning scheme applying to the adjacent area.

(e) Include a criterion in cl60ZZM(4) and (5) that the DAP have regard to the impact of the project relating on the region in environmental, economic and social terms, replicating the existing requirement in s32(1)(f); and

(f) Include a criterion in cl60ZZM(4) and (5) that, where the development is located on reserved Crown land or in Wellington Park, the project is in accordance with the relevant management plan.

93 **We recommend a review of other usages of this criteria throughout the Draft Bill**, as it would appear the intention is for these criteria to be consistent. That is, the prohibition on project declaration in cl.60L and the "no reasonable prospects" test in cl.60ZI(4).

94 Of particular note is the use of the word "contravention" in respect of both State Policies and TPPs. There will be very rare circumstances for a project to "contravene" a State policy, following the reasoning of the Supreme Court in *St Helen's Area Landcare and Coastcare Group Inc v Break O'Day Council* [2007] TASSC 15 and *Richard G Bejah Insurance & Financial Services Pty Ltd v Maning & Ors* [2002] TASSC 36.

95 The Court observed in both cases that the State Coastal Policy is formulated as list of "outcomes" containing very few "requirements", and the extent to which requirements are imposed, they are imposed on local government and State authorities, not to members of the public. His Honour Justice Crawford concluded on the State Coastal Policy:[31]

> *By its name it purports to be a policy document. Notwithstanding the expression in the Act, s14(1), that it is an offence if "a person" contravenes or fails to comply with a provision of a State Policy or a requirement or obligation imposed under a State Policy, it is my opinion that the Coastal Policy only imposes duties and obligations on government bodies at State and local level, including local councils, for contravention or failure to comply with which the penal provisions of s14 will operate. The Policy does not impose duties and obligations on the general public. Further, requirements which, if contravened or not complied with, might result in an offence being committed by a State or local government body, are small in number, quite possibly only those of cls 1.4.2, 2.6.5, 2.7.2 and 2.7.3, and of them only cls 2.7.2 and 2.7.3 depend on the meaning of "coastal zone" for their effect.*

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[29] Consistent with s34(2)(d) of the LUPA Act for LPS amendments; the former s20(1)(b) of the LUPA Act, which requires a planning scheme amendment to be prepared "in accordance with" a State Policy; and s13(1) of the SPP Act.

[30] Compare with s34(2) which requires an LPS to satisfy the "relevant criteria", which includes that a planning instrument be "consistent" with the TPPs.

[31] *Richard G Bejah Insurance & Financial Services Pty Ltd v Manning & Ors* [2002] TASSC 36 at [23] per Crawford J.

96 The same analysis could readily be applied to the *State Policy on the Protection of Agricultural Land 2009* and the *State Policy on Water Quality Management 1997*. One would expect the TPPs likewise not to contain requirements, particularly given the stated purpose in s12B(1) of the LUPA Act that TPPs are to set out the aims, or principles" that are to be achieved or applied by the TPS or RLUSs.

97 The policy decision is therefore, whether it is intended to only require an assessment of "contravention" and thus with limited work to do, or whether the DAP as decision-maker should consider the policies as a whole and whether the project accords with them. We say the latter is preferable.

98 In relation to reserve management plans, it is the case that Crown or Wellington Park Trust consent is required under the Draft Bill. However, the giving of consent does not in itself indicate whether the development is in accordance with or consistent with a management plan[32]. It is appropriate to assess this through a formal public process, not least of which to ensure that all matters that must be assessed under the EPBC Act are assessed and the process can be properly accredited.

99 In any event, this assessment should be undertaken through the major projects process by the Panel, or by making the managing authority a relevant regulator. We have recommended that, at a minimum, this form part of the criteria for decision-making.

100 We note that there is an ambiguity as to what occurs if a development is approved which is inconsistent with a management plan. For instance, in relation to the Wellington Park Management Plan, the issue of a major project permit that is inconsistent with the plan is not in keeping with the *Wellington Park Act 1993*. It is unclear what the issue of a permit that is inconsistent or not in accordance with a management plan means for the exercise of powers by a reserve management authority, and whether with respect to the Wellington Park, that is satisfactorily cured by section 60ZZZC(4). **We recommend that this ambiguity be clarified.**

VII Alternative policy solutions

101 On our analysis, the Draft Bill's aims are unclear, which makes it difficult to assess whether those aims are achieved. In the absence of a clear policy justification or clearly articulated purpose of this regulatory intervention, we consider that the Draft Bill should not proceed in its current form.

102 We note statements made in the media yesterday by the Minister for Planning that the Draft Bill is about "an appropriate, streamlined process for projects that are of a scale, strategic significance or complexity beyond the normal capacity and resources of local planning authorities to assess, especially those that cross municipal boundaries and involve multiple acts and regulators".[33]

103 In order to provide some constructive feedback, we wish to address briefly alternatives to the draft Bill. In doing so, we make certain assumptions about the purpose of the Draft Bill.

[32] The usual practice of DPIPWE Crown Land Services is to make clear that Crown consent is not an assessment of the project or approval of lease or licence.

[33] The Mercury, 'Talking Point: No fast-track, shortcuts, or easy routes in Major Projects process', 14 May 2020

104 If it is the intention to provide a more detailed assessment for complex projects that are not existing Level 2 activities or Level 2 activities that cross municipal boundaries, we recommend that:

(a) the category(s) of projects to be targeted should clearly expressed in declaration criteria;

(b) the reason for identifying that category(s) of projects is clearly expressed.

105 If the intention is to provide a coordinated assessment process for major infrastructure projects, such as named by the Minister, the scope of project declaration could readily be limited.

106 This would have the benefit of limiting the scope of declaration, that do not unduly displace the existing planning assessment process, or impacting on public participation rights in a way that is disproportionate to the policy aim.

107 If it is the intention to streamline permit processes, this could be done through the existing Part 4 permit approval process by creating a series of referrals. This is currently done with the EPA Level 2 assessments under the EMPC Act and Tasmanian Heritage Council under the Heritage Act. A referral system is in place in both the NSW and Victoria planning systems and operates effectively. This enables authority responses to be the subject of submissions and ultimately merits review by proponent and third party alike. This would enable co-ordination of approvals through the existing Part 4 system.

108 Should the Draft Bill proceed in its current form, **we make the following recommendations**:

Project declaration

(a) The criteria for project declaration be clearly defined and constrain the scope of project declaration by specifying categories of use and development that fall within the scope of the legislation.

(b) The Commission be required to prepare the determination guidelines under cl.60J before any project can be declared.

(c) The Bill state that the cl.60J determination guidelines contain criteria and categories of development.

(d) There be public notice and comment on the determination guidelines.

(e) Review the criteria in the prohibition on project declaration in cl.60L and the “no reasonable prospects” test in cl.60ZI(4) to align with our recommended criteria for decision under cl.60ZZM.

(f) Clarify the interaction between a project declaration where an existing permit application is before a Court or Tribunal by:

- ensuring a project cannot be declared when a related permit application is before the Tribunal or on appeal to the Tasmanian Supreme Court;
- replicating the 2 year time limit in s.62(2) for major projects declaration of a project that is substantially the same development as a development refused by Tribunal.

Development Assessment Panel

(g) The Commission be made the assessment body, instead of a DAP.

(h) If a DAP is proceeded with, the Bill prescribe the expertise required for a DAP for particular projects, for instance, for matters affected Aboriginal cultural heritage, the DAP must contain a representative of the Tasmanian Aboriginal community or person with expertise in Aboriginal cultural heritage assessment.

Relevant regulators

(i) Clarify how relevant regulators make decisions by ensuring that criteria under project-associated Acts are relevant to their assessment, and ensuring that the project impact statement guidelines contain sufficient information to make that assessment.

(j) Ensure that relevant regulators are required to have input where a permit under a project-associated Act will or may be required, rather than a discretion.

(k) Clarify how the Aboriginal Heritage Council and Tasmanian Aboriginal people have input into the assessment where the Aboriginal Heritage Act is a project-associated Act, or Aboriginal cultural heritage is in issue.

(l) The relevant planning authority(s) be a relevant regulator.

(m) The EPA always be a relevant regulator where there are environmental impacts associated with the project.

(n) A “no reasonable prospects” notice issued by a relevant regulator ought to trigger the notice process under cl.60ZE.

Public participation

(o) There be public comment sought on the project impact statement guidelines for every project.

(p) The requirement for the DAP to prepare a draft assessment report prior to public hearings be reviewed, having regard to the potential for pre-determination and procedural fairness obligations.

(q) The restriction on public hearing timeframe in cl.60ZZE(1) be removed and the DAP/Commission be entitled to regulate its own procedures.

(r) The advice of relevant regulators be made publicly available at all steps (project declaration, project impact assessment guidelines, preliminary advice and final advice).

(s) The Bill include an amendment to s61 of the LUPA Act to allow a right of appeal to RMPAT against the decision of the Commission.

Decision criteria

(t) The criteria for making a decision under cl.60ZZM(4) and (5) be amended as outlined at [81].

(u) The relevant regulators be required to comply with their own Act, so as to ensure that relevant matters under those Acts form the basis for their assessment.

Clarify ambiguities

(v) Clarify the consequences for a reserve managing authority if a major project permit is issued that is inconsistent/not in accordance with a reserve management plan or the Wellington Park Management Plan.[34]

[34] We note this would likely be resolved by adopting our recommendations (r) and (t)