Environmental Defenders Office

Submission on the draft Land Use Planning and Approvals (Amendment) Bill 2022

12 May 2022

About EDO

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.

www.edo.org.au

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A Note on Language

EDO acknowledges that there is a legacy of writing about First Nations people without seeking guidance about terminology. In this submission, we have chosen to use the term "First Nations" to refer to Aboriginal and Torres Strait Islander peoples across Australia. We also acknowledge that where possible, specificity is more respectful. When referring to Tasmanian Aboriginal / palawa / pakana people in this submission we have used the term "Tasmanian Aboriginal". We acknowledge that not all Aboriginal people may identify with these terms and that they may instead identify using other terms.

Acknowledgement of Country

The EDO recognises First Nations peoples as the Custodians of the land, seas and rivers of Australia. We pay our respects to Aboriginal and Torres Strait Islander Elders past, present and emerging, and aspire to learn from traditional knowledge and customs so that, together, we can protect our environment and cultural heritage through law.

In providing these submissions, we pay our respects to First Nations across Australia and recognise that their Countries were never ceded and express our remorse for the deep suffering that has been endured by the First Nations of this country since colonisation.

Executive Summary

While Environmental Defenders Office (**EDO**) welcomes the opportunity to comment on the draft Land Use Planning and Approvals (Amendment) Bill 2022 (**Bill**), within the same period for consultation on the Bill, we note that the Government has also been consulting on a large number of issue and proposals relevant to Tasmania's environment, including but not limited to:

- The Consultation Paper on the new Aboriginal Cultural Heritage Act
- The draft Police Offences Amendment (Workplace Protection) Bill 2022
- Proposed amendments to *Environmental Management and Pollution Control Act 1994* (Tas)
- The 10 Year Salmon Growth Plan
- Proposed Aquaculture Standards
- The Future of Local Government

The Government also recently passed amendments to Tasmania's forestry laws, and while those amendments were not the subject of public consultation, EDO received numerous inquiries about the changes. Given the complex nature of the Bill, the Government should have taken account of these other consultation and legislative processes in deciding when to seek public comment upon the Bill.

In the last Solicitor General's annual report, Mr Michael O'Farrell SC noted:[1]

> A statute should communicate the law efficiently and effectively to those who have recourse to it. This does not just mean lawyers, it means citizens and institutions who must obey legal commands. While some laws convey difficult legal concepts that are not capable of expression in simple language, that is not true of all laws. The Parliament's endeavour should be to make laws that ordinary people can readily understand.

[1] Crown Law (Tasmania), Office of the Solicitor General, Solicitor-General Annual Report 2020-21, accessed at: https://www.crownlaw.tas.gov.au/solicitorgeneral/annualreport

> The complex and prescriptive nature of the provisions of some Tasmanian statutes do not lend themselves to this aspiration. For example, an ordinary person, unskilled in the law, would have great difficulty understanding Schedule 6 of the *Land Use Planning and Approvals Act 1993*. I have spent many many hours reading it and I still find some of its provisions very difficult to construe.

It is EDO's respectful view that the Bill adds a great deal of further complexity to the Act about which Mr O'Farrell SC rightly complained: the *Land Use Planning and Approvals Act 1993* (**LUPA Act**).

EDO supports the intent (if not necessarily the drafting) of a number of the amendments proposed in the Bill, such as the ability for documents to be disclosed electronically to relevant persons and extended timeframes for the major projects Assessment Panel (**Panel**) to respond to notices from regulators. However, we consider that, on the whole, **the changes proposed under this Bill do not improve the level of public participation in the major projects assessment process, nor do they increase the likelihood that ordinary people would understand it.**

The significant concerns raised in this submission also indicate that the Tasmanian major projects assessment process may be unlikely to meet national environmental standards for the purpose of any future accreditation of assessment and approval processes under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**).[2]

In the following submission, EDO responds to the Bill and the proposed:

1. Amendments relating to the non-publication of "sensitive" information
2. Amendments relating to the electronic disclosure of information
3. Amendments relating to granting permission for site investigations after a major project has been declared
4. Amendments to allow for additional land to be added to a major project declared area
5. Amendments clarifying that the process continues if a regulator does not provide a response when required to do so
6. Amendments to allow for the correcting of minor administrative errors before a final decision is made
7. Amendments introducing an additional assessment process option for amending a major project permit

A summary of EDO's recommendations with respect to the Bill can be found below.

Recommendation 1: In the Bill, make it clear that a "sensitive matters notice" may only relate to information relating to a threatened species where that information has been declared under s 59 of the *Threatened Species Protection Act 1995* (Tas).

Recommendation 2: To allow for informed public comment on a major project proposal, in the Bill clarify that any "sensitive matters statement" must provide a broad indication of the subject matter of the "sensitive matters notice" where it deals with threatened species, and an indication of the potential impacts of the major project on those species.

[2] Previous analysis of Tasmanian laws by EDO has found many laws do not meet national standards for the purposes of accreditation. See also: Devolving Extinction: The risks of handing environmental responsibilities to state & territories - Environmental Defenders Office (edo.org.au)

Recommendation 3: In the Bill, clarify that a "sensitive matters notice" only applies to information disclosed by the major project proponent, the Minister, or a relevant regulator, and not to information already within the public domain (i.e. information known or held by a member of the public), and delete proposed s 60CA(8)(d).

Recommendation 4: In the Bill, provide a meaningful opportunity for representatives, chosen by the Tasmanian Aboriginal community to: (a) be consulted at a very early stage of the process about any cultural heritage in or on the land or waters the subject of a major project proposal; and (b) provide their free, prior and informed consent to the major project proposal, including about the release of any culturally sensitive information (as determined by the representatives).

Recommendation 5: In the Bill, proposed s 60ZZZH (2) be changed to allow for a relevant person to elect to be provided with hardcopies of relevant documents.

Recommendation 6: Do not proceed with amendments in clauses 8, 10, 19, and 20 of the Bill.

Recommendation 7: Do not proceed with amendments in clauses 9, 11, 12, 13, 18 and 25 of the Bill.

Recommendation 8: In the Bill, the amendments proposed in clause 15 should include an opportunity for the relevant regulator to seek an extension of time to provide their notice, and if granted, a corresponding extension of time should be given to the Panel to complete the steps under s 60ZK of the LUPA Act.

Recommendation 9: Do not proceed with amendments in clause 25 of the Bill.

Recommendation 10: Do not proceed with amendments in clauses 28, 29 or 30 of the Bill.

1. Amendments relating to the non-publication of "sensitive" information

The Information Package on the Bill (**Information Package**) states that, currently, the major projects process provided under the LUPA Act requires the publication of information relevant to a major project even if that information reveals "sensitive" information, such as information about the location or significance of Aboriginal cultural heritage or threatened species.

Amendments to introduce a new s 60CA to the LUPA Act are proposed to respond to this issue. In particular, it is proposed that under this new section:

- proponents of a major project must first lodge a "sensitive matters request" with "relevant regulators";
- the relevant regulators are empowered to provide the proponent with a notice outlining whether the regulator considers that information provided either by the proponent or the regulator under the major projects assessments process is likely to contain a "sensitive matter";
- a "sensitive matter" is defined in proposed subsection (5) as follows:

> (5) For the purposes of this section, a category of information is likely to contain sensitive matter (sic) if –
>
> > (a) information within the category of information (sic) is culturally sensitive; or
> >
> > (b) were (sic) information within the category of information (sic) available to members of the public, there may be a risk of harm to members of a cultural group, an object or an organism.

- if information concerning a major project is the subject of a notice given by a relevant regulator, then that information cannot be made publicly available through the publication of proposal documents; discussions between a member of the public and the proponent, regulator, Minister or Assessment Panel; or in any public meetings or hearings; or in proceedings before TasCAT or a Court that is open to the public;
- a major project that is subject to a "sensitive matters" notice from a regulator will be required to publish a "sensitive matters statement" when the Project is declared and with any document about the Project required to be published under the LUPA Act. The statement will indicate that the major project documents include information concerning a sensitive matter that cannot be viewed by the public or discussed at meetings or hearings relating to the Project.

Sensitive information concerning threatened species

EDO accepts that there may be rare occasions where it is appropriate to keep the exact location or nature of threatened species discrete in major project documentation that is publicly released to protect them from harm. However, the proposed amendments outlined in the Bill do not appear to cross-reference to or align with s 59 of the *Threatened Species Protection Act 1995* (Tas). Under that Act, "information about a listed taxon of flora or fauna or any plan, agreement, determination or interim protection order" can be declared confidential by the Secretary (with the Minister's approval), so that any person who receives information declared to be confidential can only use that information to "the extent necessary to perform his or her duties or for the purpose of legal proceedings". This is not in alignment with the Bill, as the Bill proposes to restrict references to certain threatened species information potentially even in TasCAT or other legal proceedings.

Under the Bill, no guidance is given about how a relevant regulator is to determine what is an acceptable risk of harm to an organism arising from the publication of the material may be, for example, through consultation with the Scientific Advisory Committee under the *Threatened Species Protection Act 1995* (Tas).

Based on the current drafting of the clause, it is unclear whether the public will generally be made aware that a sensitive matters notice relates to information concerning a threatened species. For example, through a statement that a threatened species may be impacted by the major project (without disclosing the precise location of the specimens within a major project area).

The broad discretion given to relevant regulators to determine what issues outlined in major project documentation should not be publicly disclosed leaves open the possibility that, while there may be a risk of harm to threatened species from the publication of documentation about that matter, a potentially greater risk of harm to species arising from a major project itself might not be disclosed to the public. This would be a perverse outcome, as these significant risks are the very issues that are likely to be the subject of strong public representations about the proposal.

Indeed, where a member of the public is independently aware of threatened species potentially impacted by the major project and which are the subject of a sensitive matters notice, those people should not be restrained from making representations, submissions or having discussions about those matters throughout the major projects assessment process or in related TasCAT or

Court hearings. However, as currently drafted, the proposed provisions appear to operate to do just that.

For these reasons, **EDO does not support clause 6 in its present form** and makes the following recommendations to improve its clarity and operation.

Recommendation 1: In the Bill, make it clear that a "sensitive matters notice" may only relate to information relating to a threatened species where that information has been declared under s 59 of the *Threatened Species Protection Act 1995* (Tas).

Recommendation 2: To allow for informed public comment on a major project proposal, in the Bill clarify that any "sensitive matters statement" must provide a broad indication of the subject matter of the "sensitive matters notice" where it deals with threatened species, and an indication of the potential impacts of the major project on those species.

Recommendation 3: In the Bill, clarify that a "sensitive matters notice" only applies to information disclosed by the major project proponent, the Minister, or a relevant regulator, and not to information already within the public domain (i.e. information known or held by a member of the public), and delete proposed s 60CA(8)(d).

Sensitive information concerning Aboriginal cultural heritage

In making the following submissions about clause 6 of the Bill, EDO acknowledges that it cannot and does not speak on behalf of Tasmanian Aboriginal people. We make the following comments as experts in planning and environmental law with experience in seeking to protect Tasmanian Aboriginal cultural heritage through the law.

EDO supports "culturally sensitive" information not being publicly disclosed in major project documents. However, under the proposed amendments in the Bill, no definition of "culturally sensitive" is provided nor does it provide any information about how information is determined to be "culturally sensitive", or indeed whether the Tasmanian Aboriginal community will have any say in that decision. The Information Package refers to Aboriginal Heritage Tasmania (**AHT**) as if it is a "relevant regulator" for the purposes of the LUPA Act.[3] Currently, AHT is not a representative body for the Tasmanian Aboriginal community, rather it is a non-statutory body that reports to the Minister administering the *Aboriginal Heritage Act 1975* (Tas). The proposal for AHT (or the Minister administering the *Aboriginal Heritage Act 1975* as the case may be), and not the Tasmanian Aboriginal community, to have a role in deciding whether and when major project information contains culturally sensitive information does not appear to be in accordance with the United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**) principles of free, prior and informed consent and of self-determination.[4]

[3] Despite the content of the Information Package, it is unclear if AHT is a "relevant regulator" for the purposes of the LUPA Act as it has no statutory role in the making of decisions under the *Aboriginal Heritage Act 1975* (Tas), rather the issue of permits under that Act is by the Minister on the advice of the Director of National Parks and Wildlife.

[4] Further discussion about the UNDRIP principles and how they should be applied in the case of Aboriginal cultural heritage can be found in EDO's recent Submission in response to a new Aboriginal Cultural Heritage Act dated 6 May 2022, which can be accessed here: https://www.edo.org.au/publication/edo-submission-on-a-new-aboriginal-cultural-heritage-protection-act-tasmania/.

The Tasmanian Government is presently undertaking consultation for a new Aboriginal Cultural Heritage Act. The proposed form of the new s 60CA appears to presuppose the outcome of that consultation will be that AHT will play a role as a regulator with respect to Aboriginal cultural heritage. The Bill also does not factor in any changes required to allow for early involvement of the Tasmanian Aboriginal community in proposals that are likely to have a significant impact on cultural heritage.

In the absence of the new Aboriginal Cultural Heritage Act, any reforms to the major projects process proposed to protect "culturally sensitive" information from public disclosure need to provide a meaningful opportunity for representatives, as chosen by the Tasmanian Aboriginal community, to be consulted at a very early stage of the process about any cultural heritage in or on the land or waters the subject of the proposal, and provide an opportunity for them to provide their free, prior and informed consent to the major project proposal and the release of any culturally sensitive information (as determined by the representatives) relating to it.

Recommendation 4: In the Bill, provide a meaningful opportunity for representatives, chosen by the Tasmanian Aboriginal community to: (a) be consulted at a very early stage of the process about any cultural heritage in or on the land or waters the subject of a major project proposal; and (b) provide their free, prior and informed consent to the major project proposal, including about the release of any culturally sensitive information (as determined by the representatives).

2. Amendments relating to the electronic disclosure of information

The Information Package notes that there are several provisions of the major projects process under the LUPA Act that require the delivery of hardcopy documents to certain people, which can result in very large bundles of documents being distributed to hundreds of people. The Information Package states:

> In the age where most people have the means to view documents in an electronic format, there should be provision to allow the sharing of electronic documents in this process, **noting that the process should always accommodate those persons without access to electronic documents**. (emphasis added)

The Bill proposes to amend ss 60ZL, 60ZZB and 60ZZZH to "allow electronic exchange of documents throughout the process".

Contrary to what is indicated in the Information Package, EDO considers that the proposed amendments to s 60ZZZH do not make it clear that a person might have a choice between being given an electronic copy of a document or a hard copy. Rather, the proposed new subsection (2) of s 60ZZH provides that a notice is deemed to have been given to a person if the person is told "a means by which the person may view, or download a copy of, the document or information at a website specified in the notice, using a means specified in the notice" and "the person may view, or download a copy of, the document or information at the website specified in the notice, using the means specified in the notice." In EDO's view, proposed subsection (2) is unclear and insufficient to allow for a person to elect to obtain hard copies of relevant documents. EDO considers that such an option must be provided for those people who may lack access to the

internet or a computer, or the ability to travel to a physical location to view the relevant documents.

Recommendation 5: In the Bill, proposed s 60ZZZH (2) be changed to allow for a relevant person to elect to be provided with hard copies of relevant documents.

3. Amendments relating to granting permission for site investigations after a major project has been declared

Amendments are proposed in the Bill to provide for the grant of early site investigation permissions by the Executive Officer of the Tasmanian Planning Commission or the relevant regulator before the finalisation of major project assessment criteria.

The proposed amendments to allow for such early site investigation permissions are **not supported** by EDO, as they presuppose what might be the information required to respond to the assessment criteria and further complicate what is a very complicated process. If a major project proponent is aware that certain likely site investigations can only be undertaken in certain seasons or conditions, they can and should plan for that within the project schedule. They also have the option of seeking the relevant permissions for those assessments separately to the major project process.

Recommendation 6: Do not proceed with amendments in clauses 8, 10, 19, and 20 of the Bill.

4. Amendments to allow for additional land to be added to a major project declared area

The Information Package contends that amendments to the LUPA Act are required to allow:

> … the assessment panel to consider **small (relative to the originally declared land area) amounts of extra land being used for the major project outside the area declared for a major project,** and if considered suitable to add the extra land to the declared major project area, make a recommendation to the Minister to amend the declared area of land for the major project.

As currently drafted, the Bill does not quantify what would amount to a relatively "small" amount of "additional area or land" proposed to be added to a major project declared area. Furthermore, the amendments proposed in the Bill to allow for this additional land to be added to a major project do not bind the Minister to follow the advice received from the Panel or the Commission, meaning that even if those bodies considered that the additional area was not relatively "small", "appropriate" and/or "necessary and desirable" to form part of the Project, the Minister could still decide to add that area to the major project declaration.

EDO has concerns that the proposed provisions could be subject to misuse as they potentially allow for the creep of major projects onto adjoining land, including after the major project assessment processes have concluded. On which point, EDO is extremely concerned that it is contemplated both in the Information Package and in the Bill, that the expansion of the area of a major project could potentially be treated as a "minor amendment" under s 60ZZX(3) of the LUPA Act.

EDO also holds concerns about whether the Minister can make a properly informed decision on whether the original assessment criteria are still suitable to assess the impacts of the proposed on the additional land, where all members of the public have not had an opportunity to comment on whether those criteria address all the issues relevant to that additional land.

Therefore, EDO does **not support** the amendments proposed in clauses 9, 11, 12, 13, 18 and 25 of the Bill.

Recommendation 7: Do not proceed with amendments in clauses 9, 11, 12, 13, 18 and 25 of the Bill.

5. Amendments clarifying that the process continues if a regulator does not provide a response when required to do so

The Information Package states that:

> The major projects assessment process has a rigid requirement that the regulators must give notice of their assessment requirements or a notice of no assessment requirements or a notice recommending revocation of the major project, as required by section 60ZA of the *Land Use Planning and Approvals Act 1993* (the Act).
>
> If a regulator does not provide any form of notice at all then the assessment panel is placed in an uncertain quandary as to whether they can continue with the process because an element of the process has not been satisfied (which is the giving of a notice from the regulator to the panel).
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> A regulator not responding would also create uncertainty as to whether they wish to become a participating regulator in the process or not.
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> There is also potential for the proponent to receive a major project permit that is open to legal challenge on this matter.

Amendments are proposed to s 60ZA of the LUPA Act so that where a regulator does not provide a notice of their assessment requirements to the Panel within the required 28 days, they are taken to have no assessment requirements and do not wish to be involved in the process. An exception is made to this general rule for the EPA Board, as it is generally required to be involved in assessments due to the Assessment Bilateral under the EPBC Act.

EDO considers the proposed amendments will provide an unsatisfactory outcome where a relevant regulator has been unable to meet the notice deadline, for example where they require further information to determine their assessment requirements. Given the complexity of major project proposals, the period of 28 days may not be a sufficient amount of time for certain regulators to make a decision as to their assessment requirements or involvement. In these circumstances, the regulators should be provided with an opportunity to seek an extension of time.

Recommendation 8: In the Bill, the amendments proposed in clause 15 should include an opportunity for the relevant regulator to seek an extension of time to provide their notice, and if granted, a corresponding extension of time should be given to the Panel to complete the steps under s 60ZK of the LUPA Act.

6. Amendments to allow for the correcting of minor administrative errors before a final decision is made

The Information Package states:

> The major projects process is highly prescriptive, lengthy and complex, with many administrative requirements to act within set timeframes or to consult with a potentially wide range of people. It is plausible that during such a long and complex process, an error or oversight could occur with a decision maker not responding within a set timeframe, or an individual not receiving an appropriate notification during a particular stage in the process.
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> If a mistake with administering the process occurs during the process, the proponent could be left with a permit that is open to legal challenge. Naturally, major mistakes should cause the process to be redone for any of those aspects which were not done properly. However, if a mistake is minor in nature then the intent of the process should be that the major project permit is not undermined as a result.
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> The current process does not enable the assessment panel the ability to correct any administrative error that may have occurred during the process.

To respond to these issues, amendments are proposed in the Bill to allow the Panel to give notice to people who should have been notified about a major project but were not and to provide those people so notified 7 days to make a representation to the Panel about "whether a major project permit ought to be granted in relation to the major project" and/or "any conditions or restrictions that the person considers ought to be imposed on such a permit if granted ". The proposed amendments also provide that the provision of a notice by the Panel outside of a prescribed timeframe does not invalidate the notice.

EDO agrees that the major project process is "highly prescriptive, lengthy and complex, with many administrative requirements to act within set timeframes or to consult with a potentially wide range of people." We further agree that there is a possibility that the failure to abide by some of the prescriptive requirements might leave project permits open to legal challenge. However, in our view, this is no reason to justify the provision of only 7 days to respond to a major project proposal to members of the public or regulators who should have previously been notified about or consulted about the proposal, but through no fault of their own, were not. The timeframes for representations provided under the proposed amendments are significantly less than other timeframes provided for the provision of representations through the ordinary course of a major project assessment. Furthermore, the provision of a notice under the proposed s 60ZZMB(4) after any Panel hearings, would deprive a person of an opportunity to play an active role in the hearings, which may have significant implications for the outcome of a Panel assessment.

For all these reasons, EDO **does not support** the amendments in proposed clause 25.

Recommendation 9: Do not proceed with amendments in clause 25 of the Bill.

7. Amendments introducing an additional assessment process option for amending a major project permit

Presently, the LUPA Act does not provide for a middle ground assessment pathway for proposed amendments to major project permits that do not fit within the meaning of a "minor amendment" or are not in nature of typographical errors. Rather, all such amendments must go through an

assessment using the largely the same processes and timeframes for any ordinary major project proposal. The Information Package notes that such assessments can take over 300 days to complete and that this may impact upon a project schedule. Amendments are proposed in the Bill to provide a process for amendments to major project permits that are not to correct errors, or "minor amendments", or within the proposed new category called "significant amendments". For want of a better descriptor in the Bill or the Information Package, this submission will refer to this new process as a "middle ground" assessment. The proposed middle ground assessment pathway will half the amount of time for the assessment of eligible amendments as compared to "significant amendments".

Under the proposed amendments, relevant regulators are invited to comment on "significant amendment" applications and provide the decision-maker (being the Commission or a reconstituted Panel) with advice on whether the original major project assessment criteria will allow the regulator to appropriately assess the amendment, and whether the amendment should be refused or modified. Based on the advice from relevant regulators, the relevant decision-maker then decides whether the proposal can proceed through the "significant amendment" process or the shortened middle ground assessment. Only those proposals that can be assessed under the original assessment criteria are eligible for the middle ground assessment. No public comment is proposed to be invited on what assessment pathway may be required for the proposed amendment. Notice of the decision about the assessment pathway for the proposed amendment is only given to the owner, occupier or lessee of the land to which the permit relates after a decision has been made as to what assessment process (if any) applies to the proposed permit amendment.

EDO **does not support** the amendments to provide for a middle ground assessment. This is because timeframes for public and regulator input and decision-making are significantly reduced and may not be adequate for the types of amendments capable of undergoing this process. Such compressed timeframes give rise to the risks that impacts from changes to major projects will not be properly understood by the public or assessed by relevant regulators or the decision-maker.

Recommendation 10: Do not proceed with amendments in clauses 28, 29 or 30 of the Bill.