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Planning Review
Tasmanian Planning Commission
GPO Box 1691
Hobart TAS 7001

By email: planningreview@justice.tas.gov.au

Dear Mr Fischer

Planning System Review

The Environmental Defenders Office (***EDO***) is a non-profit, community based legal service specialising in environmental and planning law. We welcome the opportunity to comment on the following draft legislation:

- *Land Use Planning and Approvals (Miscellaneous Amendments) Bill 2009*;
- *State Policies and Projects Amendment Bill 2009*.

LUPAA Amendments

Effective enforcement is critical to maintaining public confidence in the planning system in Tasmania. We therefore strongly support the introduction of additional tools to allow planning officers to enforce permits and planning schemes requirements.

As a general comment, we acknowledge that investigation and enforcement actions are resource-intensive, even where costs can ultimately be recovered from an offender. We recommend that appropriate technical and financial assistance be given to local governments to facilitate their enforcement activities.

We also support previous recommendations made as part of the Better Planning Outcomes review that planning authorities be required to conduct a periodic audit of compliance with planning permits. The results of this audit, and any enforcement activities, should be publicly available.

Our detailed comments in relation to the draft legislation are set out below.

Civil enforcement

In our experience, the civil enforcement provisions of LUPAA provide a useful option for third parties to take action to ensure compliance where the planning authority has failed to act, or where the planning authority is the alleged offender.

We recommend an additional amendment to s.64 to ensure that the civil enforcement provisions further the objective of facilitating public participation in resource management decisions. Presently, s.64(12) provides that costs will generally 'follow the event' in civil enforcement actions under LUPAA. This exposes third parties to the risk that they will bear considerable costs in the event that their action is unsuccessful. Several recent cases before the Tribunal have made it clear that costs in relation to enforcement matters under LUPAA are determined on the basis that costs should follow the event unless some disentitling conduct is identified (see, for example, *Hobart City Council v Buckland* [2009] TASRMPAT 14; *Drewitt v EPOH Investments Pty Ltd* [2009] TASRMPAT 40).

This is in contrast to the position in most other matters before the Tribunal. Section 28 of the *Resource Management and Planning Appeal Tribunal Act 1993* was amended in 2004 to make it clear that the presumption for planning appeals is that each party will bear its own costs. As noted in the Better Planning Outcomes discussion paper,

> *without this clarification, potential appellants may have been deterred from making an appeal by the threat of costs being awarded against them should they lose the appeal* (paragraph 6.7).

In our view, the situation with civil enforcement proceedings is no different.

We note that the presumption in s.28 does not prevent the Tribunal from determining that an unsuccessful applicant should pay costs if, after considering all the relevant factors, the Tribunal decides that such an order would be fair and reasonable. It will depend on the circumstances of the case.

In order to facilitate public involvement in enforcement, costs decisions in relation to s.64 proceedings should be subject to the considerations under s.28 of the RMPAT Act. This can be achieved by deleting s.64(12), and simply treating s.64 actions as appeals under the RMPAT Act. This is the approach adopted in relation to civil enforcement proceedings under the *Water Management Act 1999*.

Quantum of penalties

Penalties for offences under the planning system should be consistent. Therefore, the maximum penalties imposed for offences under s.63 should be equivalent to those imposed for offences under s.65E.

Environment Protection Notices (***EPNs***) issued under the *Environmental Management and Pollution Control Act 1994* can have the effect of amending permit conditions. The maximum penalties currently imposed for failing to comply with an EPN are significantly higher than those proposed for failing to comply with an enforcement notice. We believe that those

penalties are more appropriate as a deterrent to non-compliance with the planning system requirements.

We recommend that the maximum penalties for offences under ss.63 and 65E of LUPAA be:

- For a body corporate, 1,000 penalty units
- For an individual, 500 penalty units

The interrelationship between EPNs and enforcement options under LUPAA is discussed further below.

Enforcement notices

Section 65D(6) describes what an enforcement notice can require the person upon whom it is issued to do. We make the following comments in relation to those powers:

- S.65D(6)(a) allows the notice to require the person to cease the offence, but not to refrain from committing the offence. To ensure that prospective breaches can be prevented, (a) should be amended to allow the notice to require the owner or occupier to discontinue or not commence a specified action that would constitute an offence.

  We note that the provisions of s.65D(7)(e) may be broad enough to have the same effect. However, we believe that it is appropriate to amend the provisions in s.65D(6) to make this clear.

- S.65D(6)(c) refers to taking reasonable steps to ensure a permit is granted. We recommend that this be replaced with complied with.

It is not clear how the enforcement notices are intended to interact with any EPNs issued in respect of the land. Pursuant to ss.44(1)(d) and 44(2)(d), an EPN may have the effect of amending relevant permit conditions. Further consideration should be given to these issues:

- Where permit conditions amended by way of an EPN are not complied with, should the enforcement process under LUPAA or EMPCA be followed?
- Can an enforcement notice impose requirements which are contrary to the requirements of an EPN?
- If an enforcement notice is issued in respect of land to which an EPN is in force, is the Director of Environment required to be notified?

Notification requirements

Planning permits run with the land and continue in force even if the permit holder disposes of the land. Compliance with the permit is therefore an ongoing responsibility for the current owner or occupant of the land.

We recommend that enforcement notices be subject to similar provisions to EPNs in the following respects:

- If a person who has been issued with an enforcement notice disposes of the land or ceases to be responsible for the activities to which the enforcement notice relates, the person must notify the planning authority and provide details of the new person responsible for the land or activity.

- Enforcement notices may be registered on the title of the property and remain in force as a charge on the land in the event that the notice is not complied with. The notice can be removed from the title following confirmation from the planning authority that the notice has been revoked, complied with or the work has been undertaken by the planning authority.

We also recommend that Schedule 7 of the *Local Government (General) Regulations 2005* be amended to require the local government to include details of any show cause or enforcement notice issued in respect of land in a certificate issued under s.337 of the *Local Government Act 1993*.

Cancellation of permits

Section 65G is confusing. Section 65G(3) provides that a permit may only be cancelled if an enforcement notice has been issued and not complied with in respect of the land. However, ss.65G(5)-(7) provide other grounds for cancelling a permit, for which an enforcement notice need not be issued.

It is unclear whether these provisions are intended to be grounds for cancellation in addition to those for which an enforcement notice may be issued, or requirements in addition to non-compliance with an enforcement notice. We would support ss.65G(5)-(7) being regarding as grounds for cancelling a permit in addition to the ground of non-compliance with an enforcement notice. If this is the case, s.65G(3) will need to be amended.

If a permit may only be cancelled following non-compliance with an enforcement notice, we do not believe that a show cause notice should have to be issued under s.65F prior to cancellation of the permit. In order for an enforcement notice to have been issued, the offender will already have been given an opportunity to show cause. In order for their permit to be cancelled, they will have subsequently failed to comply with the enforcement notice.

In our view, requiring a further show cause notice to be provided allows unnecessary latitude to a party who has failed to comply with the planning legislation. The permit holder has a right of appeal to the Tribunal if they feel aggrieved by the decision to cancel the permit.

State Policies and Projects Amendment Bill 2009

As noted in previous planning system review consultations, lack of policy direction inhibits the effective implementation of the Resource Management and Planning System in Tasmania. State Policies are necessary to provide a strategic foundation for planning decisions and to ensure a consistent, State-wide approach to resource management and planning issues.

Despite well over ten years since the introduction of the Act, Tasmania currently has only two operative State Policies (other than NEPMs). The State Coastal Policy has proven to be unwieldy, impractical and largely ineffectual in achieving sustainable coastal management. The volume of litigation attempting to interpret the Policy, without any real conservation gains, is testament to its inadequacy.

We endorse efforts to simplify the process for developing and adopting State Policies. However, it is critical that these measures be supported by a commitment from the State government to develop workable policies and to provide adequate resources to the Planning Commission and relevant planning authorities to facilitate their implementation.

Change of name – ss.4 and 6

We do not support the re-naming of State Policies from 'Tasmanian Sustainable Development Policies' to 'State Planning Policies'. The objective of sustainable development is central to the Resource Management and Planning System. The fundamental significance of sustainability as a guiding principle to the holistic management of resources cannot be overstated.

As noted on the Commission's website, State Policies "*represent the government's overarching position on certain policy matters*", and therefore form the back-bone of the RMPS. Section 5A of the Act makes clear the range of matters that may be addressed by State Policies, notably including sustainable development of resources.

The issues specified in s.5A, and the provision for further issues to be included, confirm the scope of Policies is far broader than 'planning issues'. State Policies are intended to provide overarching policy guidance on a broad range of resource management issues, which can inform and be translated into appropriate planning policy. These policy positions can then be implemented through planning schemes or other management tools.

For example, if a State Policy is to be developed on Climate Change (as recommended by the Planning System Review Steering Committee), the Policy should provide strategic guidance on matters including:

- Planning responses, such as appropriate zoning for planned retreat from coastal areas;
- More integrated transport planning to discourage reliance on cars;
- Innovation for industries, including adoption of best practice technologies to reduce emissions;
- Encouraging energy efficiency at a household and business level;
- Encouraging effective offsetting projects and avoided deforestation responses;
- Reducing air travel by encouraging state-based tourism and improving the availability and efficacy of video-conferencing facilities.

Clearly, some of these matters are directly related to planning, many are not. To limit the scope of a State Policy to planning issues would detrimentally hinder sustainable responses to Climate Change.

It is critical that State Policies continue to be viewed as key policy statements on resource management issues. We believe that the proposed name change is not simply semantic – it suggests a shift away from a holistic and sustainable approach to resource management in Tasmania.

We recommend that the long title for State Policies remain as Tasmanian Sustainable Development Policies.

Commission's role in modifying draft Policies – ss.10 and 10A

Currently, s.10(3)(c) and (d) limit the Commission to making statements on those aspects of a draft Policy which have been subject to a representation.

The Tasmanian Planning Commission has considerable expertise in relation to the application of the objectives of the RMPS and the implementation of planning policy in Tasmania. Given their experience and expertise, Commission officers may identify issues with a draft Policy that have not been picked up by representors.

Therefore, we believe that Commission comments in relation to a draft Policy, including proposed modifications, should not be limited to issues raised by representors. The Commission must be able to propose modifications on its own initiative.

Similarly, if the Minister proposes to modify the draft Policy under s.10A(2)(a) and requests advice from the Commission, that advice is currently limited to whether or not the proposed modification would significantly change the Policy. If the proposed modification would not significantly change the Policy, the Commission is not authorised to make any additional comment regarding the proposed modification.

Even if the proposal would not significantly change the Policy, the advice allowed from the Commission under s.10A(4) should extend to a statement regarding the proposed modification, and any recommendations that the Commission has in relation to further proposed modifications to improve the efficacy of the proposed modification.

Making State Policies – s.11

To be most effective in providing guidance on issues of sustainability, State Policies should be developed through mechanisms that are as independent and rigorous as possible. We consider that sustainable outcomes demand the development of State-wide policy at arms length from government. We therefore oppose efforts to move responsibility for determining the content of State Policies from the Commission to the Minister.

We have no objection to the Minister, rather than the Governor, ultimately declaring State Policies. However, the Minister should not be afforded the opportunity to amend a proposed State Policy other than in accordance with the recommendations of the Commission.

Interim State Policies – s.12

We appreciate that there will be situations in which an interim policy is appropriate to quickly introduce necessary direction on significant resource management issues. However, this is not a power that should be exercised lightly. As such, we support the legislation retaining the power to overturn an interim policy by resolution of one of the Houses of Parliament.

We also note with caution the experience with the *State Policy on the Protection of Agricultural Land*. The former policy was revoked in July 2008 and the interim Policy was given effect under s.12. The interim policy lapsed in July 2009, but has yet to be replaced by a formal State Policy. This leaves a notable gap in policy direction on the protection of agricultural land at a

time when the government is promoting Tasmania as a potential "food-bowl of the nation".

The State government must make efforts to ensure that there is continuity in policy direction on resource management of issues of State significance.

Contravention of State Policies – s.14

The proposed s.14(1A) currently provides that a person is not guilty of contravening a State Policy if the contravention relates to use or development that is "permitted, or not prohibited" under a relevant planning scheme (our emphasis).

Arguably, uses or developments designated as 'permitted' under a Scheme made after a State Policy commenced, or amended to reflect a State Policy, have been assessed as being consistent with the objectives of the State Policy. Provided the use or development meets the criteria in the scheme, the person carrying out the use or development should not be found guilty of contravening the State Policy. The appropriate response to determining that the permitted use was not consistent with the State Policy would be to issue an Environment Protection Notice to bring it into line with the State Policy (s.44(2)(c), EMPCA). Where appropriate, the planning scheme should also be amended to better reflect the State Policy in relation to subsequent applications for similar uses or developments.

However, as drafted, the proposed exemption in s.14(1A)(b) would also apply to contraventions committed in relation to a discretionary use for which no permit has been issued. Where a planning scheme designates a use or development as discretionary, it recognises that it is necessary to assess the details of a particular proposal to determine whether it meets the objectives of the RMPS, the scheme and relevant State Policies. Designation of a use or development as 'discretionary' does not, of itself, indicate that the use or development is consistent with the State Policy. Unless, following consideration of the State Policy, a council has issued a permit for the discretionary use or development, the activity should not be considered to be in accordance with the State Policy.

We generally agree that the principal mechanisms for enforcing compliance with State Policies that have been adopted into planning schemes should be those outlined in the *Land Use Planning and Approvals Act 1993*. However, where a development is carried out unlawfully, it may be in breach of both the planning scheme and the State Policy. Enforcement options should therefore be available under both legislative schemes.

We recommend that the exemption in s.14(1A) be limited to use or development that is consistent with a planning scheme made after the State Policy was made or subsequently amended to reflect the State Policy. This can be achieved by amending s.14(1A)(b) to read:

(b) the use or development of the land by the person was not contrary to the provisions of a planning scheme or a special planning order that applies to the land; and

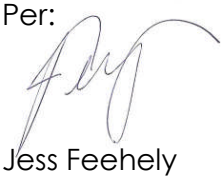
Revocation of State Policies – s.15B

State Policies provide important policy direction and should not be revoked lightly. On the other hand, some flexibility is required to allow for the revocation of interim policies or outdated policies in light of new information.

For this reason, we do not oppose the introduction of a power to revoke a State Policy. However, to provide a further check on a decision to revoke a State Policy, we recommend that an order revoking the Policy must be approved by both Houses of Parliament (under the same conditions as for approval of the State Policy).

The EDO appreciates the opportunity to make these comments. Please do not hesitate to contact us if you wish to discuss anything raised in this submission.

Kind regards,
Environmental Defenders Office (Tas) Inc
Per:



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