



Environmental  
Defenders Office

**Submission in response to the Draft Validation (State Coastal Policy) Bill 2024 (lutruwita/Tasmania)**

**1 August 2024**

## **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.

**[www.edo.org.au](http://www.edo.org.au)**

### **Submitted to:**

State Planning Office  
Department of Premier and Cabinet  
By email: [stateplanning@dpac.tas.gov.au](mailto:stateplanning@dpac.tas.gov.au)

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## **Acknowledgement of Country**

The EDO recognises and pays respect to the First Nations peoples of the lands, seas and rivers of Australia. We pay our respects to the First Nations Elders past, present and emerging, and aspire to learn from traditional knowledges and customs that exist from and within First Laws so that together, we can protect our environment and First Nations cultural heritage through both First and Western laws. We recognise that First Nations Countries were never ceded and express our remorse for the injustices and inequities that have been and continue to be endured by the First Nations of Australia and the Torres Strait Islands since the beginning of colonisation.

EDO recognises self-determination as a person's right to freely determine their own political status and freely pursue their economic, social and cultural development. EDO respects all First Nations' right to be self-determined, which extends to recognising the many different First Nations within Australia and the Torres Strait Islands, as well as the multitude of languages, cultures, protocols and First Laws.

First Laws are the laws that existed prior to colonisation and continue to exist today within all First Nations. It refers to the learning and transmission of customs, traditions, kinship and heritage. First Laws are a way of living and interacting with Country that balances human needs and environmental needs to ensure the environment and ecosystems that nurture, support, and sustain human life are also nurtured, supported, and sustained. Country is sacred and spiritual, with culture, First Laws, spirituality, social obligations and kinship all stemming from relationships to and with the land.

## Executive Summary

Environmental Defenders Office (**EDO**) welcomes the opportunity to provide the following brief submission in response to the Draft Validation (State Coastal Policy) Bill 2024 (the **Bill**). In preparing this submission, EDO has had regard to the Department of Premier and Cabinet (**DPAC**) webpage which provides a short overview of the Bill (extracted in **Appendix 1** of this submission), however, we note that no other detailed explanatory materials concerning the Bill have been published.

In providing policy principles and outcomes for the management of State waters and all land to a distance of one kilometre inland from the high-water mark, the State Coastal Policy 1996 (**SCP**) is an important component of lutruwita/Tasmania's Resource Management and Planning System. Relevantly to the Bill and this submission, the SCP provides for the following outcomes to be achieved concerning Coastal Hazards:

### 1.4. COASTAL HAZARDS

1.4.1. Areas subject to significant risk from natural coastal processes and hazards such as flooding, storms, erosion, landslip, littoral drift, dune mobility and sea-level rise will be identified and managed to minimise the need for engineering or remediation works to protect land, property and human life.

1.4.2. Development on actively mobile landforms such as frontal dunes will not be permitted except for works consistent with Outcome 1.4.1.

...

EDO recognises that the practical implementation of the SCP has not been without issue. For example, previous judicial criticism of the drafting of the SCP resulted in the need for the *State Coastal Policy Validation Act 2003*.<sup>1</sup> In EDO's submission responding to a draft replacement coastal policy (which was not ultimately implemented), EDO highlighted the need for greater clarity and direction in such policies to prevent these problems from recurring.<sup>2</sup>

Notwithstanding this history, on its webpage concerning the Bill, DPAC suggests that previous amendments to the SCP during its 30-year life were introduced to "improve its operation". However, EDO understands that amendments to Outcome 1.4.2 of the SCP in 2009 which overturned a previous complete ban on development on actively mobile landforms are now the subject of apparent contention and are the focus of the Bill. In our view, this highlights the problems with a piecemeal approach to amending such important policies.

In addition to providing a brief and, as EDO argues in our submission below, inadequate justification for the Bill, the DPAC webpage states:

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<sup>1</sup> See *Richard G. Bejah Insurance & Financial Services Pty Ltd v Manning & Ors* [2002] TASSC 35, *Cameron & Anor v Resource Planning and Development Commission* [2006] TASSC 66. See also Blow CJ's comments in *St. Helen's Landcare and Coastcare Group Inc v Break O'Day Council & Anor* [2007] TASSC 15.

<sup>2</sup> See [https://www.edo.org.au/wp-content/uploads/2019/12/100621\\_Draft\\_State\\_Coastal\\_Policy2008.pdf](https://www.edo.org.au/wp-content/uploads/2019/12/100621_Draft_State_Coastal_Policy2008.pdf)

...the SCP should be changed to include more contemporary planning controls for actively mobile land on our coasts. A separate position paper will be released in coming weeks outlining the proposed changes.

Given the real and looming impacts of sea-level rise, coastal inundation and flooding arising from climate change,<sup>3</sup> EDO rejects any suggestion that the SCP needs further amendment to potentially weaken the level of protection of lutruwita/Tasmania's vulnerable coastlines and communities. Rather, what lutruwita/Tasmania actually requires is a much stronger State Coastal Policy that identifies objectives to protect and conserve our coasts and clear, enforceable strategies to achieve these objectives.

Unfortunately, the Bill in no way seeks to clarify or strengthen the SCP, and for this reason, **EDO does not support it**. In this submission, EDO raises the following concerns about the Bill:

- 1. The need for the Bill has not been established**
- 2. The Bill may have unintended negative consequences for lutruwita/Tasmania's coasts and communities**
- 3. The drafting of the Bill creates uncertainty**

We understand that, notwithstanding the widespread community opposition to the Bill, the Government is likely to seek to proceed with the Bill. To ensure any debate about the Bill and its likely impacts is fully informed, we provide a summary of our recommendations concerning the Bill below.

#### **Summary of Recommendations**

**Recommendation 1:** The Bill should be delayed so that it can be tabled and considered in light of relevant information, including the Tasmanian Government's legal advice, any relevant Supreme Court decision(s), the proposed related changes to the SCP, the Statewide Climate Change Risk Assessment and State of the Environment Report.

**Recommendation 2:** Further information concerning the legal liability for harms arising from developments on actively mobile landforms should be released before the Bill is tabled in Parliament.

**Recommendation 3:** The drafting of the validations in clause 4 of the Bill should be tightened to ensure that the scope of the Bill is limited to validating only the target developments.

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<sup>3</sup> IPCC, 2023: Summary for Policymakers. In: Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change [Core Writing Team, H. Lee and J. Romero (eds.)]. IPCC, Geneva, Switzerland, pp. 1-34, doi: 10.59327/IPCC/AR6-9789291691647.001

## 1. The need for the Bill has not been established.

The need for the Bill has not been clearly articulated or established in materials published by the Tasmanian Government.

The DPAC webpage asserts that the recent Tasmanian Civil and Administrative Tribunal (**TasCAT**) decision concerning the proposed Robbins Island wind farm “raised questions around the manner in which the SCP has been previously applied in relation to Outcome 1.4.2 of the SCP.”

In a media release dated 6 June 2024, the Hon Nick Duigan, Minister for Parks and Environment, said:

“...the Government received advice in March regarding the application of the Tasmanian State Coastal Policy. This advice is different to the way that the Policy had been applied to developments in coastal areas since being introduced. This could potentially impact on the use of all coastal infrastructure, including community infrastructure such as jetties and boat ramps.”

The same media release went on to state that the advice received by the Government “...also led to the Environmental Protection Authority joining an appeal against Robbins Island windfarm in March 2024, which has been approved by the Council, with the decision upheld by the [TasCAT].”

Neither the DPAC webpage nor the Minister has specifically outlined the questions raised by the Robbins Island windfarm appeal or provided the legal advice the Tasmanian Government received about the application of the SCP to coastal developments which gives rise to the need for the Bill.

While the DPAC webpage suggests that “there are numerous developments” on actively mobile landforms, such as jetties, boat ramps, bridges and golf courses, there is no information about how many of these developments are subject to any legal uncertainty and might require the “validation” proposed under the Bill. In the absence of such information, it is difficult to understand whether, and if so why, the Bill is necessary.

Previous amendments to the SCP appear to have caused the issues that the Government now proposes to address through the Bill. EDO considers that before the Bill can be properly understood and interrogated by the community and Parliament, at a minimum the legal advice concerning the interpretation of Outcomes 1.4.1 and 1.4.2 of the SCP and a list of the developments likely to be “validated” by the Bill should be publicly released.

EDO is further concerned that in the rush to pass the Bill, the full scope of the Government’s intentions concerning changes to the SCP has not been made clear. We understand the Tasmanian Government seeks to pass this Bill quickly to proactively address some of the grounds raised in appeals to the Supreme Court relating to the permit granted to the Robbins Island wind farm. Given the amendments in the Bill are unlikely to fully resolve the appeals, EDO questions the need for this legislation to be rushed through without the full picture of reforms to the SCP being presented both to the community and the Parliament.

In EDO's view, before the Bill is tabled, it would be much better for the community and the Parliament to have the benefit of:

- the advice provided to the Government concerning the operation of Outcomes 1.4.1 and 1.4.2 of the SCP;
- the list of the developments likely to be "validated" by the Bill;
- the Supreme Court's decision on the Robbins Island wind farm appeals;
- an outline of any other proposed changes to the drafting of the SCP and the process by which those proposed changes will be considered and made;
- lutruwita/Tasmania's Statewide Climate Change Risk Assessment which we understand is due "mid-2024";<sup>4</sup> and
- lutruwita/Tasmania's State of Environment report which is due to be presented to the Minister on 30 August 2024.

EDO considers this information will help ensure that the debate about the Bill is fully informed.

**Recommendation 1:** The Bill should be delayed so that it can be tabled and considered in light of relevant information, including the Tasmanian Government's legal advice, any relevant Supreme Court decision(s), the proposed related changes to the SCP, the Statewide Climate Change Risk Assessment and State of the Environment Report Court decision(s), the proposed related changes to the SCP, the Statewide Climate Change Risk Assessment and State of the Environment Report.

## 2. The Bill may have unintended negative consequences for lutruwita/Tasmania's coasts and communities.

The Bill purports to validate planning permits granted for coastal developments on "actively mobile landforms" since 25 February 2009. As outlined above, it is unclear how many developments may be captured by this Bill. Given that the Government's legal advice has not been released, it is also unclear whether the "traditional" interpretation of the relevant provisions of the SCP has resulted in inadequate assessments of the impacts and likely consequences of these developments on coastal environments and communities.

EDO is concerned that the proposed validation of permits under the Bill may endorse permits for developments on actively mobile landforms that were never properly assessed by planning authorities or implemented by developers. This may have unintended negative consequences for lutruwita/Tasmania's coasts and communities, potentially exposing them to harm or impacts from developments that should never have been built. A correlated issue is that, where developments have been built on these actively mobile landforms and result in some harm or loss to life, property or the environment, it is unclear who will be held liable for the remediation or mitigation of those harms.<sup>5</sup> Will it be the councils that erroneously approved the permits for the

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<sup>4</sup> See [https://www.recfit.tas.gov.au/what\\_is\\_recfit/climate\\_change/adapting/risk\\_assessment](https://www.recfit.tas.gov.au/what_is_recfit/climate_change/adapting/risk_assessment), and *Climate Change (State Actions) Act 2008*, s 5B(1).

<sup>5</sup> For more on the legal risks associated with decision-making regarding coastal developments see: Bell-James, J., Baker-Jones, M., and Barton E., 2017: Legal risk. A guide to legal decision making in the face of

developments? The developers? Or will the Tasmanian Government ultimately pick up the tab for those losses given that, through the Bill, it proposes to “validate” the permits? These are not matters addressed by the Bill or the supporting materials but in our view warrant further exploration and explanation before the Bill comes before the Parliament.

**Recommendation 2:** Further information concerning the legal liability for harms arising from developments on actively mobile landforms should be released before the Bill is tabled in Parliament.

### 3. The drafting of the Bill creates uncertainty.

Finally, EDO considers the proposed validations in clause 4 of the Bill to be unclear, giving rise to further uncertainty.

Read as a whole, clause 4 of the Bill provides a seemingly contradictory list of provisions. For example, on one hand in subclause (1), we are told that all permitted developments on actively mobile landforms during the validation period are consistent with Outcome 1.4.1. But then, in subclause (2) we are told that Outcome 1.4.2 is taken to have never applied to these developments. This is curious, as it is only Outcome 1.4.2 that makes compliance with Outcome 1.4.1 a necessity under the SCP.

Clause 4 (4) of the Bill provides:

Any act or thing done or omitted or required to be done or omitted in pursuance of, in reliance on, or arising from, the issuing, or purported issuing, of a LUPA [Act] permit during the validation period is taken to have been validly done or omitted or required to have been done or omitted.

Taken alone, this subclause far exceeds the types of developments on actively mobile landforms that are supposedly the subject of this Bill, rather, it captures *all* LUPA Act permits issued since 25 February 2009. While subclause (5) does seek to limit the scope of subclause (4), as it is currently drafted, this subclause only applies “for the avoidance of doubt”, which may or may not mean subclause (4) is limited by subclause (5).

The phrase “for the avoidance of doubt” is also used in subclause (3) of the Bill, and again does anything but eradicate doubt given the preceding subclauses.

The drafting of clause 4 requires substantial tightening to make clear the limited scope of the validations provided under the Bill. For example, this might include adding the phrase “subject to (5)” at the beginning of subclause (4) and removing the phrase “for the avoidance of any doubt”

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climate change for coastal decision makers. CoastAdapt Information Manual 6, 2nd edn, National Climate Change Adaptation Research Facility, Gold Coast; and Hughes, L., Dean, A., and Koegel, M., 2021. Neighbourhood Issue: Climate Costs and Risks to Councils. Climate Council of Australia Limited, accessed at [https://www.climatecouncil.org.au/wp-content/uploads/2021/09/Report-Councils-on-the-Frontline\\_V5-FA\\_Low\\_Res\\_Single\\_Pages.pdf](https://www.climatecouncil.org.au/wp-content/uploads/2021/09/Report-Councils-on-the-Frontline_V5-FA_Low_Res_Single_Pages.pdf)



from subclause (5), and removing the unnecessary contradiction and duplications between subclauses (1), (2) and (3).

**Recommendation 3:** Tighten the drafting of the validations in clause 4 to ensure that the scope of the Bill is limited to the target developments.

*Thank you for the opportunity to make this submission.  
Please do not hesitate to contact our office should you have further enquiries.*

## **Appendix 1 – Department of Premier and Cabinet webpage on the Bill<sup>6</sup>**

The *Validation (State Coastal Policy) Bill 2024* has been released for consultation and is [available here](#). Submissions on the draft Bill can be forwarded to [stateplanning@dpac.tas.gov.au](mailto:stateplanning@dpac.tas.gov.au) by **5pm on Thursday, 1 August 2024**.

The State Coastal Policy 1996 (SCP) is a critically important part of the State's Resource Management and Planning System (RMPS) and has served the State well in protecting the coast and providing for sustainable development. Introduced almost 30 years ago the SCP has been amended twice to improve its operation.

In recent months the way that the SCP has been applied with respect to development on actively mobile landforms has come under question. The recent approval of the Robbins Island windfarm (more specifically the wharf required for the construction of the windfarm) by the Tasmanian Civil and Administrative Tribunal (TasCAT) has raised questions around the manner in which the SCP has been previously applied in relation to Outcome 1.4.2 of the SCP. That Outcome prohibits all development on actively mobile land unless it is for a purpose provided for under Outcome 1.4.1 (which relates to the protection of land, property and human life).

The location of the wharf and wharf infrastructure on Robbins Island was considered and approved by the Circular Head Council and the Tasmanian Civil and Administrative Tribunal.

The ongoing concerns with the operation of the current SCP is compounded by there being no definitive description of an actively mobile landform or any accepted map of their location. Tasmania has numerous developments that might be on actively mobile landforms which provide access, recreation, and help conserve areas of fragile environment. These range from boardwalks through the dunes, fencing, lookouts, boat launching facilities, bridges, jetties, and even golf courses.

The SCP Outcome 1.4.2 also required identification of areas where there is significant risk from coastal processes and hazards such as flooding, storms, erosion, landslip, sea level rise and other changes. With the introduction of the Tasmanian Planning Scheme across the State, there are now statewide mapping of these hazards and detailed planning scheme provisions for assessment of development in these areas. Furthermore, the new Tasmanian Planning Policies provide a second more detailed set of policies to guide future land use in the coastal zone.

The draft Bill seeks to validate previous permits issued under the Land Use Planning and Approvals Act 1993 (LUPA) from 25 February 2009 until the date of the commencement of the proposed legislation. It also ensures that no action can be taken against individuals or organisations that have acted in line with permits issued under LUPA.

Now that management measures have been put in place through the Tasmanian Planning Scheme, the Government also considers that the SCP should be changed to include more contemporary

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<sup>6</sup> Accessed at [https://www.dpac.tas.gov.au/divisions/policy/state\\_policies/validation-state-coastal-policy-act-2024](https://www.dpac.tas.gov.au/divisions/policy/state_policies/validation-state-coastal-policy-act-2024) on 21 July 2024.

planning controls for actively mobile land on our coasts. A separate position paper will be released in coming weeks outlining the proposed changes.