Environmental Defenders Office

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Draft Land Use Planning and Approvals Amendment (Development Assessment Panels) Bill 2024

Environmental Defenders Office is a community legal centre specialising in public interest environmental law. We welcome the opportunity to provide feedback on the Draft Land Use Planning and Approvals Amendment (Development Assessment Panels) Bill 2024 (**Draft Bill**). EDO has a long history of providing legal advice on environment, planning and development matters in Tasmania, including the planning framework established by the *Land Use Planning and Approvals Act 1993* (**LUPA Act**).

EDO's overarching concern is that the Draft Bill establishes new assessment and approval pathways and decision-making panels, without appropriate environmental and public interest safeguards and transparency and accountability measures. We are concerned that the policy intent of the proposed framework, as explained in the *Report on Consultation - Development Assessment Panel (DAP) Framework Position Paper* (**Report on Consultation**)[1] is not clearly given effect by the Draft Bill.

Specific key concerns are outlined below, and relate to:

- New assessment and determination pathways under new Part 4, Division 2AA;
- Establishment of Development Assessment Panels (DAPs);
- Criteria for applications to be considered by Development Assessment Panels;
- Public exhibition and hearing timeframes; and
- Transparency and accountability.

As drafted, we do not support the Draft Bill.

[1] https://www.stateplanning.tas.gov.au/__data/assets/pdf_file/0030/382935/Report-on-Consultation-DAP-Framework-Position-Paper-October-2024.pdf

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New assessment and determination pathways under new Part 4, Division 2AA - Development Assessment Panels

The Draft Bill proposes a new framework (set out in proposed new Part 4, Division 2AA of the LUPA Act) under which certain applications can be referred to the Tasmanian Planning Commission (**the Commission**) for assessment and determination by a Development Assessment Panel/Assessment Panel.

The proposed new provisions allow for:

- *Proposed section 60AB(1):* **A person to apply to the Commission** for an application for a discretionary permit[2] to be determined by an Assessment Panel if it:
    - relates to social or affordable housing, or
    - exceeds certain development values, or
    - falls within a class of applications prescribed for the purpose of this section.
- *Proposed section 60AC(1):* A party to an application for a discretionary permit to **request that the Minister direct the Commission** to establish an Assessment Panel in respect of the application if:
    - the application relates to a development that may be considered significant, or important, to – (i) the area in which the development is to be located; or (ii) the State; or
    - either party to the application believes that the planning authority does not have the technical expertise to assess the application; or
    - the application relates to a development that is, or is likely to be, controversial; or
    - the relevant planning authority may have, in respect of the proponent or development – (i) a conflict of interest or a perceived conflict of interest; or (ii) a real or perceived bias, whether for or against the proponent or development; or
    - the application falls within a class of applications prescribed for the purpose of this section.
- *Proposed section 60AC(4):* **The Minister may refer an application** for a discretionary permit to the Commission for consideration and determination by an Assessment Panel if, in the opinion of the Minister – (a) the application meets one or more of the requirements specified in subsection (1); and (b) the application is not an application to which section 25 of the *Environmental Management and Pollution Control Act 1994* applies.

EDO is concerned that:

- The introduction of the new framework proposed in Part 4, Division 2AA essentially allows an applicant to 'elect' they pathway it believes to be of 'least resistance'. If an applicant

[2] To be defined as:
discretionary permit means a permit to which – (a) section 57 applies or to which, but for section 40Y(5), section 57 would apply; or (b) Division 2AA of Part 4 applies;

believes the planning authority will provide an unfavourable decision, they can apply to the Commission or the Minister to have the application determined by a Development Assessment Panel. While the types of development that can be referred is limited by the proposed provisions, the criteria are broad and key terms are undefined. This concern is exacerbated by the ability of parties to elect to transfer an application to the Commission mid-way through an assessment process (rather than it being clear and transparent upfront who the decision-maker will be for the application).

- As flagged, key terms in the abovementioned provisions are undefined. For example, what is meant by 'controversial' or 'likely to be controversial' and is this to be determined based on objective criteria and at the discretion of the Minister? Is it appropriate for an applicant to determine that a planning authority does not have suitable technical expertise?
- It is unclear whether proposed section 60AC(4) limits the Minister's referral of applications to the Commission to circumstances where requested by a party under section 60AC(1), or whether the Minister is able to exercise this power on his/her own initiative. The drafting of this section should be clarified to reflect the policy intent. The latter interpretation raises concerns regarding the Minister's broad discretion to intervene. As drafted, these provisions are open to abuse by applicants and are unlikely to lead to 'unpoliticised' decisions as intended. We note in other jurisdictions where development decisions are made by independent, expert decision-makers (such as NSW), there are often mandatory, objective criteria for determining when those decision-making bodies will be responsible for determining applications; and any Ministerial intervention is limited.

Establishment of Development Assessment Panels (DAPs)

As noted above, the Draft Bill proposes a new framework by which certain applications can be referred to the Commission for assessment and determination by a Development Assessment Panel/Assessment Panel.

Notably, the term 'Development Assessment Panel' is used generally when referring to the proposed new framework, but the term 'Assessment Panel' is adopted in the draft legislative provisions.

The term 'Assessment Panel' is to be defined (by section 60AA) as follows:

> ***Assessment Panel***, in relation to an application under this Division, means the Development Assessment Panel that is established, in respect of the application, by the Commission under section 60AD or 60AP;

Proposed sections 60AD and 60AP simply state that the Commission is to establish an Assessment Panel to undertake an assessment of applications made under the new Part 4, Division 2AA, but is otherwise silent as to process for establishing the panel, appointment and expertise of the panel and functions of the panel. On the face of the provisions, it appears the Commission is unrestrained in establishing an Assessment Panel for the purpose of new Part 4, Division 2AA.

This is concerning as it would put assessment and decision-making into the hands of unknown persons at the whim of the Commission, however we believe this is not the policy intent. The Report on Consultation, when considering aligned concerns by stakeholders, draws analogies to

processes for establishing the Commission under the *Tasmanian Planning Commission Act 1997* and the provisions on the LUPA Act for the establishment of Development Assessment Panels for major project applications (see Part 4, Division 2A, Subdivision 6 of the LUPA Act). Based on the Report on Consultation, we understand that the policy intent is for Assessment Panels established under new Part 4, Division 2AA to be established under a similar process. This must be clearly reflected by explicit provisions to this effect in the Draft Bill. It is important that decisions be made by independent experts, if such panels are to be created

Criteria for applications to be considered by Development Assessment Panels

It is unclear on the face of the Draft Bill what matters for consideration are to be applied by an Assessment Panel when determining applications under the new Part 4, Division 2AA. While the provisions set out a process for applications to be provided to or transferred to an Assessment Panel, additional information, and public hearings, it is unclear if the usual matters for consideration in the LUPA Act apply, including those set out in section 51. It is also unclear to what extent the Commission, in establishing the Assessment Panel, can specify how the application is to be determined (see, for example, proposed section 60OA). The Draft Bill must clarify what assessment criteria is to be applied by the Assessment Panels when determining the application. Our view is that the criteria must include matters to be considered by a planning authority when determining an application under the LUPA Act, otherwise the new framework would again be at risk of misuse by applicants seeking to overcome existing planning processes. This necessarily includes compliance with the planning scheme, public representations and the objectives of the resource management and planning system set out in Schedule 1 of the LUPA Act.

Public exhibition and hearing timeframes

We are concerned that the public exhibition process and hearing timeframes do not allow for genuine community engagement on proposed applications. In particular, we are concerned that:

- A draft permit will be exhibited as part of the public consultation process (see section 60AG(1)(d)(v)). This pre-empts the proper identification and consideration of key issues during the public consultation process and undermines the integrity of the process.
- The public exhibition process also occurs after a reviewing entity has considered an application, potentially preventing the reviewing entity an opportunity to consider and respond to any concerns raised by stakeholders. While it may be useful for public stakeholders to consider the views of reviewing entities during the public consultation period, the process must also provide those reviewing entities an opportunity to respond to any additional concerns raised during the public consultation period.
- A 14 day public consultation period is inadequate and will not allow for genuine public participation. There are occasions when the timeframe for public notice has been extended to 28 days, with 14 day for public consultation being very short. This process does not reflect genuine public consultation and hearing of objections. Consultation takes up time and resources and is often done without financial incentive or support. Short time periods do not allow for stakeholders to engage with the key issues, seek feedback from members (e.g. in the case of peak or community organisations), or seek expert advice.

Longer time periods should be implemented to allow for genuine engagement with stakeholders.

- Similarly, short timeframes for public hearings risk undermining identification of key issues, consideration of evidence and procedural fairness. A hearing undertaken by the primary decision maker, here the Assessment Panel), and as part of the assessment and determination process, only 10 days after public notice has closed, does not afford procedural fairness, and does not displace the very genuine need for a separate, independent avenue for review.

Transparency and accountability

As in the case for all environment and planning decisions, transparency and accountability are crucial for maintain integrity in decision-making. To that end, we make the following observations:

- The Draft Bill could be amended to require decision-makers to provide reasons for decisions under the new Part 4, Division 2AA, including, for example, reasons for referring applications to the Commission for assessment by an Assessment Panel.
- The Draft Bill explicitly excludes merit appeals for decisions made under the proposed new provisions (see proposed section 60AR(1)(d)). Merits appeals are an important accountability tool in planning frameworks as they provides scrutiny of decisions, can improve the consistency, quality and accountability of decision-making , enable better outcomes, including through conditions, and foster natural justice and fairness. The proposed hearing process to be undertaken by the Commission in accordance with the new provisions will not provide the same level of scrutiny and oversight as a merit appeal to the Tasmanian Civil & Administrative Tribunal. EDO's view is that **all decisions of an Assessment Panel should be subject to merits review**. In the absence of providing for merits review rights, critical reforms would be needed to strengthen the public hearing processes of the Commission and Assessment Panels, including clear, mandated process for hearing based on procedural fairness and that allow for the proper consideration and interrogation of expert evidence.

For further information, please contact Rachel Walmsley on rachel.walmsley@edo.org.au.

Yours sincerely,
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