

## National Competition Policy Review of Land Use Planning & Approvals Act 1993

Response to Issues Paper - Environmental Defenders Office  
October 1999

Generally

The Land Use Planning & Approvals Act 1993 is the primary planning legislation in Tasmania, and a central part of the Resource Management and Planning System. The basis of the RMPS is ecologically sustainable development. Planning schemes are also subject to State Policies, and they should be working to protect and enhance Tasmania's resources for the benefit of future generations.

The restrictions on competition or business outlined in the paper are justified because the benefits of the restrictions to the community at large in terms of maintenance of resources for future generations. The only way to achieve the objectives of the legislation is by restricting competition, but keeping it to minimum, which is what the Act does.

Our submission is based upon two major and increasingly dominant international and national trends in decision-making. The first is the trend toward greater community participation in decision-making, including in the policy, planning and management stages. The importance of community involvement is recognised in myriad of international, national and state environmental agreements and policies, including, for example, Agenda 21 of the Rio Earth Summit and the National Strategy for the Conservation of Australia's Biodiversity and as an identified principle of resource use and development underpinning Tasmania's RMPS (DPIWE 1999).

The second is the growing importance and recognition of the precautionary principle in decision-making. This principle states that uncertainty regarding the effects of a particular action or activity should act as a constraint against the action or activity in order to avoid potential environmental harm. The precautionary principle is widely recognised internationally and nationally as a key factor in achieving ecologically sustainable development and as a key component of successful environmental management and planning.

The precautionary principle and land-use planning

The precautionary principle applies when a lack of information or poor understanding of a process, leads to uncertainty as to the consequences of a particular action. This principle has gained international and national recognition in, for example, the National Strategy for Ecologically Sustainable Development. It is part of Tasmania's State Policies, eg. the State Policy on Water Quality Management. The Precautionary Principle should be similarly applied within Tasmania's land use planning system.

The precautionary principle should be applied to land-use planning and development at both a macro and micro scale. That is, to the full range of land use and development from the assessment of individual developments by local councils to a policy and strategic planning stage. In particular, the precautionary principle should be applied in the planning and management of the resource industries currently exempt from the provisions of the RMPS - the marine farming, mining and forestry sectors. Conflicting evidence regarding the effects of these industries upon the natural, cultural and, increasingly, social environments supports the application of this principle within these industries.

A strategic approach

This submission recognises that the sustainable use and development of all land is best achieved via a strategic

approach. A strategic approach relies upon the integration of all stakeholders at all levels - the policy, planning and management stages. It is argued that a strategic approach cannot be achieved in a system that includes a number of separate and self-regulating planning systems, applying to specific resources only and with distinct administrative and legislative frameworks. We submit that all resource industries currently outside the provisions of the RMPS be included within this system.

## 2.2 Objectives of the Act, Schedule 1

These objectives must be retained in order to meet the requirements of the RMPS. We propose as an addition that "the precautionary principle be adopted when assessing environmental considerations to ensure that all aspects of environmental quality, including ecosystem sustainability and integrity and beneficial uses of the environment, are considered in assessing and making decisions in relation to the environment." This would bring the Act into line with the Environmental Management & Pollution Control Act 1994 and with the requirements of State Policies.

### 3.1 What a Planning Scheme can Address (s.20(2)(c), (d).

Reservation of land for public purposes is important for providing community amenity, whether it be for a sewage works, or for a park. The benefit to the community (and the environment), of eg retention of native bushland, outweighs the restrictions on competition or business.

### 3.3 Requirement to obtain a permit

Both the permit itself and the development approvals process perform a number of important functions. These include:

- \* Providing a check on the activities of the developer, by ensuring that all relevant matters (for example, environmental, social, economic, cultural) are considered before the development or activity proceeds.
- \* The development approvals process offers an opportunity for community representations on certain developments and for third-party appeals against the decisions of the council.
- \* The opportunity to assess individual developments provides a planning link between these developments and the wider geographical area. This allows for a strategic approach to development, in particular in terms of the future use and appearance of an area.

However, there is an argument to support permits based upon performance standards as opposed to the current system of classifying developments according to zones. This would remove current development restrictions in terms of location.

### 3.5 Exemption of certain activities from LUPAA

In our view the exemptions of the marine farming, mining and forestry industries from the provisions of LUPAA clearly constitutes a restriction on competition. Both the actual creation of separate planning systems for these industries and the nature of these planning systems afford these industries an unfair advantage in terms of resource use and development.

Restrictions inherent within these planning systems include:

- \* Limited provision for community involvement and consultation in resource planning and management. In particular, the lack of legal rights afforded to third parties. Thus, whilst other land-users must have their activities scrutinised by the community via the local council development approvals process, and expose themselves to potential community objections and enforcement action in the Tribunal, the exempted industries are not.

\*The individual development activities of these industries are not independently assessed. However, under LUPAA, local councils perform an integrated and independent assessment of all use and development in a given municipality.

\*Codes of practice exist to regulate the activities of the exempted industries (the exception is the marine farming industry). However, these codes differ in terms of legal enforceability. The Quarry Code of Practice is generally recommendatory only. The Forest Practices Code, the strongest in terms of legal enforceability through the Forest Practices Act, contains differing levels of compliance such that only 'will' statements must be followed. This is in contrast for the situation facing all land-users outside of these exempted industries who must comply with the provisions of the local council Planning Scheme, any permits issued under the Planning Scheme, and all other relevant legislation. There is no opportunity to abide by some statements and ignore others, resulting in varied levels of compliance across land-users, as occurs under the management system of the exempted industries.

The argument that these exemptions are justified on the basis of a need for a strategic approach to resource management is flawed. A truly strategic approach to resource use can only come from a coordinated planning system based upon such principles as wide stakeholder involvement and shared responsibility for resource management and use.

The current situation of a number of separate planning systems does not represent such an approach. Any strategic approach is confined to individual resources only, raising the possibility of developing and using the resources in a way that promotes the individual resource to the exclusion of all else.

Thus, the current system represents a strategic approach to individual resources only – there is no overall strategic approach to land-use and resources generally. The current system also has the potential to conflict with overall approaches, eg, catchment management taken by several councils.

The exemptions also need to be seen in the context of the RMPS and the sustainable development objectives of this planning system. There is a strong argument supporting a positive relationship between an integrated and coordinated planning regime and the achievement of sustainable development.

It is also noted that both the creation of separate resource management and planning systems and the restrictiveness of these systems, particularly in terms of external involvement and community consultation, are contrary to the sustainable development goals of the RMPS. They undermine public confidence in the system.

To this end, it is recommended that:

Changes are made to LUPAA to disallow the current exemptions of the marine farming, mining, and forestry industries from the provisions of that Act.

That, as a result of these changes, all development activities occurring on land managed by the mining, marine farming and forestry industries are assessed by local councils via the development approvals process established under LUPAA.

#### 4.1 Conditions on s.57 Permits under s.51(3A)

The objective of allowing conditions on permits under s57 applications for other matters not specified in the planning scheme, is an important way for the Act to meet its Objectives and this section must be retained. Planning schemes are subject to LUPAA, to the RMPS Objectives and to State Policies Those making development applications need to be aware of this, most usefully prior to making their application.

Section 51(3A) of the Act directs a council and potential proponent to the Objectives of the RMPS etc. The Edwards Report identified lack of knowledge and understanding of the planning system as an important factor in its successful operation. Such lack of knowledge is not remedied by amending legislation, but by educating applicants when they first enquire about a development application.

Performance standards can also provide for a flexible, integrated site-specific approach. Councils should be able to have the flexibility to allow for useful innovations in building design, appearance and siting, which may not have been foreseen by the planning scheme.

#### Other Issues

The other issues identified in the paper are, in our view, important for the proper functioning of the legislation, to fulfil the Objectives of the RMPS, especially those that provide for public participation and comment in the RMPS. This is a crucial aspect that leads to public confidence in the system. Our office is reminded almost daily of the lack of public confidence in the other planning systems for forestry, mining and marine farming, which do not allow for public consultation and the opportunity for review.

Environmental Defenders Office

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