

Tasmania in Transition

A response to the Consultation Draft Exposure Land Use Planning and Approvals (Tasmanian Planning Scheme) Amendment Bill 2015.

Property Council of Australia

10 August 2015

Thank you for the opportunity to comment on the **Consultation Draft Exposure Land Use Planning and Approvals (Tasmanian Planning Scheme) Amendment Bill 2015**.

By way of background, the property sector has a large footprint on the Tasmanian economy.

- It directly contributed \$2.0 billion to Gross State Product (GSP) in 2013-14 (7.8%), and is estimated to have contributed a further \$2.7 billion to Tasmania's GSP through flow-on demand for goods and services.
- It also directly employed 13,923 full time equivalent (FTE) employees in 2013-14 (7.0 % of Tasmania's total), and supported some 16,060 FTE jobs through flow-on activity.
- Approximately 16.6% of wages and salaries paid to Tasmanian workers are generated by the property sector.
- The majority of property sector activity is generated by the residential property sub-sector.
- The property sector contributed approximately \$927.8 million in combined Tasmanian Government tax revenues and Tasmanian local government rates, fees and charges revenue in 2013-14. This equates to 57.8% of total State taxes and local government rates, fees and charges revenues in 2013-14.
- Residential property ownership is not the only way every day Australians participate in the property sector; 389,874 Tasmanian residents have a financial stake in the property industry through their super funds.

Tasmania is at a unique point in its history with significant prospects to generate local economic activity through capitalising on the opportunities which have presented. It is now time for boldness and leadership which breathes oxygen back into a recovering state. The Property Council is adamant in its belief that Tasmanian must continue to run hard and fast in an effort to drive economic growth.

The south of the state continues to prosper off the back of government infrastructure development, tourism, and hospitality and service provision. The north and north west of the state must now be the central focus of decision makers in an effort to strengthen and drive a transitioning economy, with utility improvement and the University of Tasmania an ideal place to begin.

The Tasmanian Division of the Property Council is clear in its view regarding the need to continue reforms that strengthen the state's economy.

Tasmania is in transition.

The need to implement a raft of changes which will deliver a longer term internationally competitive economy is both obvious and necessary.

To achieve economic growth, urgent action is needed across the board, particularly in relation to:

1. **Planning;**
2. **Regulation reduction;**
3. **Population;**
4. **Utilities;**
5. **Local government; and**
6. **Taxation & Rates.**

The Property Council remains fully supportive of the move to a single state-wide planning scheme - *a suite of planning reforms to provide a fairer, faster, cheaper and simpler planning system for Tasmania.*

The Tasmanian Division focussed its advocacy efforts in the run-up to the 2014 State Election on micro-economic reforms with planning identified as a key initiative.

The Property Council remains appreciative of the opportunity to provide significant feedback via our response to the exposure draft, extensive briefings and through continuing as a member of the Industry Consultative Committee.

The Division looks forward to furthering our outstanding relationships with the Tasmanian Government and the Planning Reform Taskforce in order to deliver these much needed reforms.

Yours affably,



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Preliminary/general comments

The Tasmanian Division of the Property Council of Australia recognises the significant undertaking by the State Government led by the Planning Reform Taskforce to deliver the Tasmanian Planning Scheme through amendments to the **Land Use Planning and Approvals Act 1993**.

From the outset, it has been observed that the provisions and effect of the **Land Use Planning and Approvals (Tasmanian Planning Scheme) Amendment Bill 2015** would be easier to review and understand if the proposed amendments were 'merged' with the existing Act as a 'draft' of the amended Act. However, we appreciate the complexity with "tracking changes" via a system which is predominantly a database.

The Property Council recognises the challenges in drafting the amendments due to the technical nature of planning and we therefore suggest that all definitions should be found at the start of the Bill, thus voiding 'sub-definitions' throughout the remainder of the Act. The Bill is written in language which features extensive cross-referencing and this unfortunately appears to be a departure from the 'plain-English' of the original Act.

The Tasmanian Division maintains faith in the ability of the Justice Department to draft legislation which both achieves the aim of delivering - *a suite of planning reforms to provide a fairer, faster, cheaper and simpler planning system for Tasmania* while also maintaining technical accuracy and integrity when delivering such significant change.

However, the Property Council continues to express its concern that local government policies and interpretations which "hang" off the legislation may lead to confusion, further exacerbated by the "personal bent" of officers who attempt to manipulate particular circumstances. It will be essential that the Government has a level of "control" over the legislation which will deliver consistency across 29 local government areas and potentially 29 different interpretations.

This is evident in the Part 3A Local Provision Schedule which may not provide adequate control to ensure consistency between councils. The Tasmanian Division must express in the strongest possible terms that the interpretation and creation of policies by councils has the potential to derail the project, including a legacy of costly and time consuming appearances in the courts.

Further, the Property Council recommends that It should be made clearer that State Provisions take priority over Local Provisions, and ensure the local 'overlays' which put State Policies and Codes into effect are not misapplied to restrict development.

However, it is most welcome that the amendment to Part 3B Clause 47Q and R which allows the Tasmanian Planning Commission to instruct Councils to participate in a **Review of requirement for additional information** provides for, in our view, appropriate leadership.

The Property Council takes the opportunity via this response to suggest a broader point regarding the role of councils as planning authorities. The Tasmanian Division is of the view that planning should be removed from the remit of local government and placed in an independent statutory body, similar to the Western Australian Planning Commission. The Division continues to express concern that planning decisions remain open to political interference and should be made by professionals with expertise in interpretation, implementation and decision making under the relevant planning legislation.

The Property Council also remains of the view that the implementation of the Tasmanian Planning Scheme would be far easier and less open to interpretation should the Government initiate council mergers/amalgamations prior to enactment.

Transitional provisions

The Property Council believes that strong transitional provisions are required to ensure that developers are not disadvantaged by advancing projects now only to have approvals that they acquire rendered pyrrhic by the introduction of the Tasmanian Planning Scheme. Transitional provisions must be clear and comprehensive.

Transitional provisions are a necessity because the experience of other jurisdictions has confirmed that a planning permit is not an accrued right, and unless use and development in reliance upon the permit has been substantially commenced prior to a change in legislation and/or scheme requirements, or transitional provisions provide otherwise, any existing approval is pyrrhic.

The transitional arrangements provided by the draft bill (see s.65) address amendments to planning schemes and applications for permits that remain undetermined at either the commencement of the amended Act or upon the introduction of the local planning provisions.

The Property Council supports the continuation of existing provisions that provide against the retrospective application of the Tasmanian Planning Scheme are also to be carried forward (see cl.12 in s.9 of the draft bill).

However, while, the draft transitional provisions for permit applications provide for the application to continue to have effect and for the *Land Use Planning and Approvals Act 1993* in its previous (i.e. current) form to apply to such applications, this does not address the following issues:

- (a) Under current arrangements, a permit is determined in accordance with the planning scheme that is in force at the time that the planning authority makes the decision. If the Tasmanian Planning Scheme comes into effect after an application has been made but before it is determined, the planning authority will be required to determine the application in accordance with the provisions of the Tasmanian Planning Scheme. That is the case notwithstanding that the applicant will have addressed their application to the terms of the previous scheme. There is nothing in the draft bill that addresses this issue notwithstanding the preservation of application and continued operation of the prior form of the Act that is provided for by s.65 of the draft bill.
- (b) No provision is made which would enable a landowner or operator to act in reliance upon a permit that was granted under a previous scheme (i.e. the scheme in existence prior to the commencement of the Tasmanian Planning Scheme) that has not been not substantially commenced.
- (c) No provision is made that would enable a landowner or operator to act in reliance upon an exemption that applied at the time that building approvals are obtained (or significant design work undertaken) in circumstances where the development has not commenced before the Tasmanian Planning Scheme comes into effect.

Under current arrangements the issues raised in (a) and (b) above are addressed under s.30FA which allows permits to be determined in accordance with the previous planning scheme and on that basis preserves the right for the permit holder to act in reliance on the permit. The Property Council seeks

that these arrangements, modified for application to the Tasmanian Planning Scheme, are carried forward under the proposed amendments.

A related issue is the preservation of permits issued under an older scheme concerning use and/or development that is rendered prohibited by the new scheme. In relation to the interim schemes, following a recent decision of the Supreme Court, the operative provisions of the schemes themselves have been modified to address this issue. This is unsatisfactory as it is unlikely that such a provision is a valid exercise of powers under what is effectively delegated legislation. The Property Council contends that such provisions should be included in the Act itself.

Drafting changes

The Property Council further urges against making alterations to the drafting of existing provisions in a manner that could be described as change for changes sake. Unless there is a clear need to amend existing provisions in order to effect to the new regime or reflect related policy changes, such alterations ought to be avoided.

While a detailed comparison between the current form of the *Land Use Planning and Approvals Act* 1993 and those proposed by the draft bill is beyond the scope of this submission, by way of example we draw attention to the proposed amendment to replace s.11(10) of the Act with s.11(7). We show these side by side below:

| Source | Act (existing) 11(10) | Bill (proposed) 11(7) |
|--------|---|---|
| Terms | A planning scheme is not to prohibit or require a discretionary permit for the use or development of a proclaimed wharf area for port and shipping purposes. | <i>The Tasmanian Planning Scheme must require a permit, other than a discretionary permit, to be obtained for the use or development of a proclaimed wharf area for port and shipping purposes.</i> |
| Effect | Scheme <u>may</u> require a permit for port and shipping purposes in the proclaimed wharf area; But can only do so in order to impose conditions because it cannot prohibit or make such use or development discretionary. | <i>Scheme <u>must</u> require a permit to be obtained for use or development that is for port and shipping purposes in the proclaimed wharf area; And the requirement must render such use and development permitted.</i> |

While the changes are subtle in nature, they have the effect of mandating that the Tasmanian Planning Scheme require a permit (that is permitted application under s.58 of the Act) for all use and development in a proclaimed wharf area where such use and development is for port or shipping purposes. Under the current Act, a scheme may impose such a requirement however is not required to do so. The reason for mandating such a requirement is unclear particularly when one considers the other types of use and development that may be carried out in such areas and may or may not require a permit before it carried out.

While this example is identified for illustrative purposes, the Property Council asks that a detailed comparison of the changes to the *Land Use Planning and Approvals Act* 1993 be undertaken to ensure that the amendment does not produce unintended consequences through drafting change.

In conclusion and to reiterate, the Property Council of Australia is the peak representative body for Australia's property industry. Our members include major investors, property owners and developers as well as the industry's professional services and trade providers.

The Tasmanian Division remains in full support of - *a suite of planning reforms to provide a fairer, faster, cheaper and simpler planning system for Tasmania.*

Yours sincerely,



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