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Submission to the Validation (State Coastal Policy) Bill 2024

Thank you for the opportunity to make a submission on the *Validation (State Coastal Policy) Bill 2024* ('Bill') and for granting us a short extension.

Background

This Bill seeks to retrospectively suspend parts of the *Tasmanian State Coastal Policy 1996* ('State Coastal Policy') in relation to an application to build 100 wind turbines on Robbins Island, in Bass Strait, off the north-west coast of Tasmania ('Robbins Island proposal').

The Robbins Island proposal includes an application to build a 509-metre wharf at the Back Banks dunes on the north-east coast of the Island. A 100-metre-long concrete ramp would connect the wharf to an internal road network. Back Banks is a 'barrier dune system ... backing the exposed beaches of Ransonnet Bay', which is an area of recognised geo-heritage significance.¹

On 16 February 2023 the Circular Head Council (the 'Council') granted a permit for the wind farm and associated developments. On 27 November 2023 the Tasmanian Civil and Administrative Tribunal (TasCAT) affirmed the Council's decision. TasCAT's decision is currently subject to proceedings in the Supreme Court of Tasmania. Based on legal advice from the Solicitor-General's office, the Environment Protection Authority (EPA) has intervened in those proceedings because it now realises that, in providing its advice on the wharf proposal, it failed to properly consider the application of Outcome 1.4 of the State Coastal Policy. The attached extract (Appendix 1) from a statement by the relevant EPA officer sets out the facts.

¹ *Ryan v Circular Head Council and Smith v Circular Head Council and Birdlife Tasmania v Circular Head Council and ACEN Robbins Island Pty Ltd v Circular Head Council and Bob Brown Foundation v Circular Head Council and Circular Head Coastal Awareness Network Inc v Circular Head Council (No 4)* [2023] TASCAT 217 at [7].

Relevant law

The State Coastal Policy is a legally binding statutory document adopted in accordance with the requirements of the *State Policies and Projects Act 1993* (Tas). The State Coastal Policy relevantly provides that:

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.
- 1.4.3. Policies will be developed to respond to the potential effects of climate change (including sea-level rise) on use and development in the coastal zone.

State Coastal Policy an essential planning instrument

The implementation of strong coastal protection planning controls is more important now than ever. Climate change will have profound impacts Tasmania's coastal zone: sea level rise will inundate coastal areas and accelerate coastal erosion. Many parts of Tasmania already have significant exposure to coastal climate hazards due to legacy development in vulnerable coastal areas. These areas will require costly interventions in future, either to retreat from or adapt to erosion and inundation. In light of these unavoidable hazards, it is essential that we minimise the creation of *new* risks is an essential adaptation strategy. This means avoiding new development in exposed areas. Far from exempting development from the application of the State Coastal Policy, the Government should be strengthening both the detail and application of the Policy, especially section 1.4.

No justification for the retrospective suspension of State Coastal Policy.

Regardless of how the Policy might be applied and strengthened in future, it is inappropriate to pre-empt the Supreme Court's determination of the legality of the approval by retrospectively suspending part of the Coastal Policy. The fact that the EPA may have made a mistake in failing to fully consider the application of the State Coastal Policy to the proposal to build a wharf in Back Banks dunes is not a reason to retrospectively suspend parts of the Policy.

As part of the system of 'checks and balances' inherent in Tasmania's separation of powers, it is the role of the Supreme Court of Tasmania to determine whether the decision of TasCAT should stand and, if required, make appropriate orders to correct errors in the application of the law. The oversight provided by the Supreme Court, after considering the submissions of all parties, means that the system of checks and balances is working as it is designed to, to ensure that there is independent expert oversight of administrative decision-making.

The Tasmanian Government's explanation of this Bill is that Parliament should pre-empt the Supreme Court's decision and retrospectively remove the operation of Outcome 1.4 of the State Coastal Policy because of uncertainty as to the scope of its application. The Government points to two things as evidence of that 'uncertainty': first, that Outcome 1.4 in the State Coastal Policy does not include a 'definitive description' of 'actively mobile land forms;' and second, that there is no accepted map of those land forms.

Turning to the first of these, it is important to note that uncertainty always exists within the law and that it is the role of the courts to construe terms in legislation. Furthermore, it is questionable whether Outcome 1.4 actually suffers from such uncertainty. The wording of Outcome 1.4 alone and/or together with relevant extrinsic material provides a sufficiently clear description of 'actively mobile land forms.' Indeed, for the purposes of the proposed wharf at Back Banks dune Outcome 1.4.2 expressly refers to 'frontal dunes' as an example of an actively mobile land form. In addition, both expert witnesses who TasCAT questioned about this issue confirmed that the site of the proposed wharf at Back Banks is without any doubt a frontal dune and actively mobile landform.²

The claim that uncertainty in Outcome 1.4.2 arises because there is no accepted map of 'actively mobile landforms' is also not persuasive. That is because extensive mapping of hazardous coastal areas in Tasmania already exists. According to the Government's Coastal Hazards Fact Sheet, the *Coastal Erosion Hazard Code* and the *Coastal Inundation Hazard Code* exist to ensure compliance with Outcome 1.4 of the State Coastal Policy.³ Both Codes 'contain provisions and mapping ('overlays') that control use and development within 'hazard bands.'⁴ According to the Fact Sheet '[t]he coastal hazard areas were mapped as part of the Mitigating Natural Hazards through Land Use Planning Project undertaken by the Department of Premier and Cabinet's Office of Security and Emergency management.'⁵ The Land Information System Tasmania (LIST) database also provides access to coastal inundation and coastal erosion hazards bands.

Retrospective suspension of the State Coastal Policy undermines the rule of law

The *Validation (State Coastal Policy) Bill 2024* would retrospectively remove the application of State Coastal Policy Outcome 1.4.2. This would mean that the building of the proposed wharf in the Back Banks dune system will be lawful even if that approval was unlawful at the time of the Council and TasCAT's decisions.

Suspension of (or dispensing with) the law has always been a favoured power of arbitrary rulers. As long ago as 1688 when the English *Bill of Rights* was enacted, the 'crown' has been prohibited from suspending the law. That is because suspending the operation of a law undermines public confidence in the rule of law, namely that the law applies equally to everyone, regardless of

² Ibid [270 - 271].

³ See State Planning Provisions – Coastal Hazards Fact Sheet at https://planningreform.tas.gov.au/_data/assets/pdf_file/0006/625299/Fact-Sheet-State-Planning-Provisions-Coastal-Hazards-August-2021.PDF at 4. It provides that the Coastal Erosion Hazard Code may be applied to 'any land that a planning authority reasonably believes is an actively mobile land form within the coastal zone'.

⁴ Ibid 1.

⁵ Ibid 2.

wealth, status or special relationships. There is a strong perception amongst the community that the Bill is brought forward at this time to assure an individual developer that - regardless of the outcome of the judicial review proceedings currently before the Court - the building of the proposed wharf at Back Banks dunes can proceed unimpeded by legal requirements.

Such perceptions about the Bill arise not only because no other relevant past developments have been identified as matters of concern, but also because the Bill is not intended to have any prospective application. The Bill provides that any proposals for building on sand dunes or other actively mobile land forms made at any time after the Bill commences will once again be subject to the State Coastal Policy's Outcome 1.4. In other words, it appears that the Government does believe that the rules in Outcome 1.4 are important and sufficiently clear and certain to regulate future proposals for building development in Tasmania's hazardous coastal areas. Intuitively, that makes sense: the rules in Outcome 1.4 of the State Coastal Policy and the two related Codes serve an important public purpose: without them, there is a risk that building will take place on shifting foundations, potentially creating risks to both life and property.

Due Process for Law Reform

In a system of representative and responsible Government, Parliament makes and amends laws in the public interest. Where review of a law is necessary, the Government must clearly identify shortcomings or problems with the operation of the law and engage in public consultation, including with legal and other experts, on the nature of those problems and the best manner in which to address them, including by appropriately balancing all relevant interests. Conducted in that manner, law reform processes enhance public confidence that Parliament acts in the interests of the community as a whole and that new laws are based on well considered justifications.

In contrast, this Bill is merely accompanied by a short announcement on the Department of Premier and Cabinet's website and a two-week period for public submissions. There is also no indication that public submissions will be made available on the Government website in a timely manner to inform public and parliamentary debate. This process is therefore an inadequate basis for sound and well considered law reform in the public interest. The fact that the statement of the Department's website indicates that a position paper on a comprehensive review of the State Coastal Policy will soon be released, further increases the perception that this Bill is rushed through to pre-empt the Supreme Court's judicial review of the Robbins Island wind farm proposal and to provide special dispensation from the law to an individual developer.

We recommend that:

- this proposed Bill be withdrawn, and
- that the Government commences a comprehensive, expert-led, review of the State Coastal Policy as a whole, including public consultation and consideration of Australian best practice coastal management, and amend the State Coastal Policy in accordance with the recommendations of that Review.

We would be happy to provide any further information or assist in any other way in relation to the Bill. Enquiries can be directed to Anja Hilkemeijer (anja.hilkemeijer@utas.edu.au).

Yours sincerely,

Ms Anja Hilkemeijer, Professor Jan McDonald, Dr Emille Boulot and Ms Cleo Hansen-Lohrey.

About the signatories

Ms Anja Hilkemeijer teaches and researches in constitutional law. Professor Jan McDonald has wide-ranging teaching and research expertise in environmental and climate law and policy. Dr Emille Boulot is researcher in national and international environmental law and governance and Ms Cleo Hansen-Lohrey teaches and researches in administrative law. The signatories are all staff members of the University of Tasmania Law School.

Appendix 1

Extract from affidavit by EPA officer.⁶

5. The DPEMP addressed aspects of the State Coastal Policy ('SCP'); however, it did not refer to cl 1.4.
6. The Board considered and assessed the development proposal in accordance with s 25 of EMPCA; however, it did not consider the application of the SCP except to the extent that it was addressed in the DPEMP. The Board did not consider the possible relevance of cl 1.4 of the SCP. As far as I am aware, no member of the Board was aware of that issue.
7. I did not consider the possible relevance of cl 1.4 of the SCP until that issue was raised by the Tribunal during the hearing of appeals relating to the permit issued by the Circular Head Council ('the Council') in or about February 2023. At that time, I did not consider the matter in detail, and did not seek any legal advice about it, as I was focussed on issues relating to the defence of the EPA conditions relating to the 5-month shut down of the wind turbines. Further, it appeared to me at the time that the evidence and submissions provided by the Council and the material provided by ACEN dealt with the matter appropriately.
8. On 6 March 2024 I was emailed by the Assistant Solicitor-General, Jenny Rudolf, and had a telephone conversation with her later that day. I cannot disclose the content of that email or conversation due to legal professional privilege. Following that, I began to have real concern that the Board may have erred in not properly appreciating the effect and significance of cl 1.4 of the SCP in the context of the development application and had not complied with the SCP in that regard.
9. On 13 March 2024 Ms Rudolf emailed me again, attaching a letter of advice to the Board. Again, I cannot disclose the content of that letter due to legal professional privilege. I provided that advice to the Board on 13 March 2024.
10. On 14 March 2024 I advised the Board that I had formed the view that the Board and the Council had failed to comply with the cl 1.4 of the SCP; and further that the Tribunal had erred in its decision in relation to the application and effect of cl 1.4 in respect of the proposal and in directing the Council to permit the development of the wharf on an actively mobile landform.

⁶ Found at: <https://x.com/AdamHolmes010/status/1818476690928185752/photo/1>.