DRAFT MAJOR PROJECT BILL

TCT 'Fact Check' on the Planning Policy Unit's 'Fact Check' document, posted on the Department of Justice web site in early April 2020

Produced by Peter McGlone 5 May 2020

The State government's Planning Policy Units response to so called "incorrect advice".	**TCT response to the Planning Policy Unit**
1. Minister has too much power	This heading misrepresents the main point we have made. We have criticised the Major Projects Bill (MPB) for giving the minister too much power in that they have total power to declare virtually any project. The dot points do not negate this point and some are not relevant.
● Minister's powers are unchanged from current Project of Regional Significance (PORS) process:	The Minister's powers under the Major Projects Bill are different to those under the existing PORS process. But we are not concerned as to how similar the powers are, we are opposed to the Minister's powers in the MPB.
o Minister can only declare a project where it meets the eligibility criteria based on the guidelines issued by the Tasmanian Planning Commission	A project is eligible to be declared a major project if, *in the opinion of the Minister*, the project has two or more of the attributes listed as eligibility criteria in section 60K of the Bill. It remains our view that virtually any project could meet two or more of these criteria and the Minister's opinion is critical. The Planning Policy Unit (PPU) mistakenly links the statutory eligibility criteria with the guidelines. The statutory eligibility criteria are in section 60K and *are not* based on the guidelines issued by the Tasmanian Planning Commission (TPC). However, in determining whether to declare a project to be a major project, the Minister is to have regard to the determination guidelines, *if any*. To 'have regard to' means the Minister must carefully consider the guidelines. The Minister's decision does not have to comply or be consistent with the guidelines.

	Importantly, the TPC is not required to produce determination guidelines. The MPB states that the Commission *may* produce guidelines. Those guidelines must be consistent with the Act and there is no opportunity for public consultation in relation to the guidelines.
o This process is subject to appeal under the Judicial Review Act	It is possible that the Minister's declaration of a major project could be a reviewable decision under the *Judicial Review Act 2002* (Tas). However, judicial review is limited to consideration of errors of law. Errors of law are notoriously difficult to detect and prove. Judicial review proceedings are limited in that the usual remedy for a decision affected by legal error is for the decision to be quashed and sent back to the decision-maker for remaking. In practice, the remade decision may be very similar to the invalid one. There is no scope for the Supreme Court, under the Act, to consider the merits of the decision. That is, whether the project should be declared, or whether it meets the eligibility criteria. This is in contrast to normal planning decisions, which are generally subject to merits review by the Resource Management and Planning Appeals Tribunal. The Minister's declaration should be subject to a merits review process because of the broad discretion vested in him or her by the Act.
o Minister's decision making role finishes with project declaration, with the exception of revoking the 'major project' status at any time	Our main concern is regarding the Minister's power to declare major projects. The third, fourth and fifth dot points do not relate to the declaration process. However the minister has additional powers to give directions as to the composition of the Panel. There are incorrect statements in the fifth and sixth dot point of the Planning Policy Unit's Fact Check Document.
o After declaration of a project the Minister can only require the Panel to add a member with a specific skill set but not the individual; and grant extensions of time during the process to the Panel,	Under s 60O(3) the Minister may, in a major project declaration: (a) include a statement specifying the particular qualifications or experience that the Minister considers at least one member of the Panel ought to have; and

	(b) *require* the Commission to appoint to the Panel a member who has those qualifications or that experience. The scope of the Minister's power under s 60O(3) is ambiguous. It is not clear whether the Minister can or cannot direct the Commission to appoint a *particular person* to the Development Assessment Panel (DAP). The Minister may require the Commission to appoint one person with 'particular qualifications or experience' to the DAP which could in practice limit eligibility to one or a few persons.
o Panel members are appointed by the independent Tasmanian Planning Commission and not the Minister	See comment above. The Minister can require the Commission to appoint up to two members of the Panel.

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2. TPC is sidelined – lack of independence	
● Under the current PORS process, the Tasmanian Planning Commission (TPC) must establish a Development Assessment Panel to assess these types of projects.	The comparison with the PORS legislation is a distraction from our main complaint that under the MPB the TPC is sidelined. Under the MPB the TPC does not assess or approve a project and there is no guarantee that any TPC staff are on a DAP.
● Process for appointing panel has not changed from PoRS, it is not the Commission itself but an independent Panel appointed by it, and restricts the appointment to the Panel of a person who is on the Commission as one of the Government representatives.	The process for appointing a Development Assessment Panel (DAP) in relation to a major project is similar to the appointment of a DAP in relation to a PORS but there are some minor differences. Perhaps the most significant is that the Minister can require up to two persons be appointed to a DAP in relation to a major project: s 60O(3) and 60V(6). There is no corresponding power in the Minister in relation to a DAP established for assessing a PORS.

	Irrespective of the similarity of the DAP appointment process the TPC is still sidelined in the MPB. Under the MPB the TPC does not assess or approve a project and there is no guarantee that any TPC staff are on a DAP.
● The new process requires the panel to act independently from Government:	The DAP is independent from the State Government, except to the extent that the Minister can direct up to two members be appointed to it. Even though the DAP may operate with some independence from government it is not the TPC.
o It requires the panel to abide by procedures stipulated by Tasmanian Planning Commission on how to conduct the assessment, as well as adhere to Part 3 of the Tasmanian Planning commission Act 1997 which sets out procedures and conduct of hearings.	When conducting hearings, a DAP must conduct its procedure in the same way as the Tasmanian Planning Commission would under pt 3 of the *Tasmanian Planning Commission Act 1997* (Tas). Even though the DAP may operate with some independence from government and follow TPC processes it is not the TPC. The critical difference is who may be appointed a DAP member and the involvement of the Minister in this process.
o All panel members are bound by the procedures.	A DAP must conduct its proceedings in accordance with the procedures approved by the Tasmanian Planning Commission.

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3. Why do we need a Panel? Why can't the TPC assess it?	
● A panel is used in the current PORS process, not the TPC	This point makes the claim that "A panel is used in the current PORS process" but this does not answer the question that is asked 'why use a Panel'. We argue a panel is unacceptable in the MPB. The Government has failed to make the case that any change to the PORS process is justified. When the government released the draft legislation the first two times it provided scant information on why the PORS process was

	inadequate and why the proposed changes were needed. This time it has dodged the issue entirely.
● The Panel composition has not changed from current process. It consists of: o A TPC Commissioner or a person nominated by the Commission (provides planning expertise similar to any Commission assessment where Commission staff sit on Panels) o A local Government representative (provides local expertise and adds local representation) o An expert in the project field (provides expert knowledge relating to the type of project) o Plus up to two additional experts if required	The point claims that the Panel composition is unchanged from the PORS process but even if this was correct the rest of the MPB is very different e.g. the Panels can assess and approve a much wider range of projects. The government is also reviewing the TPC and we fear that this may make it less independent and may make more political decisions in regard to DAP member nominations. There is a key difference between the appointment of members to a DAP under the MPB compared to the PORS process. That difference is described above but bears repeating here – in relation to a major projects DAP, the Minister can require up to two persons be appointed to a DAP: s 60O(3) and 60V(6). There is no corresponding power in the Minister in relation to a DAP established for assessing a PORS.
● The Commission has a broad membership but the practice is that only some of the Commissioners sit on Panels with senior staff of the Commission. The Commission is predominately comprised of planning experts. Panels are used for all current assessment processes outside of the local council process including the current Appeal Tribunal and Commission. The benefits of an assessment panel assessing the project is that: o The local government representative will provide local context and knowledge. o Bringing in a subject matter expert will increase the knowledge base of the assessment panel to ensure the	The claimed benefits of the Panel made in this point are not convincing as the TPC currently has Commissioners who are from local government. And if specific expertise is missing then why not amend the TPC legislation to allow it. Does the PPU Fact Check intend to assert that DAPs are used for all planning processes other than those considered by the local council under div 2 of pt 4A of LUPAA? That is not the case – the only Panels are through the PORS process which has never been used.

impacts are properly addressed. o An expert in the project field (provides expert knowledge relating to the type of project). o Plus up to two additional experts if required.	

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4. Avoiding normal required permits	
● All assessments required under the 'project associated Acts' are conducted by the normal regulators but their decisions are co-ordinated through the MP process just as the EPA and Heritage Council decisions are co-ordinated through the council DA process. ● The panel must follow the advice of the regulators. Consequently if a regulator recommends that the panel refuse the proposal, the Panel cannot override the recommendation. ● Independent regulators include: o Environmental Protection Authority o Heritage Tasmania o Aboriginal Heritage o Threatened Species o Tas Water o Gas Pipeline The first two are already integrated into the normal LUPAA council development assessment process. This introduces other approvals into a similar integrated framework.	This is an argument that the TCT have not made and we have not heard being made by others. The three dot points claim that all approvals required under the normal planning process are required under the MP process. But there is one major omission, under the MP process the local council are not involved in approving or refusing a development. The local council is not a "relevant regulator" under the Major Projects Bill. The upshot is that the local council cannot exercise the powers conferred on relevant regulators, being the power to: ● direct the DAP to refuse to grant a major project permit; and ● direct the DAP to impose specified conditions on a major project permit. It is also worth noting that the power of each relevant regulator to direct the DAP to refuse a major project or to impose a condition on a major project permit is significantly curtailed. Generally, a relevant regulator may only direct that the Panel refuse a major project permit if the relevant regulator is satisfied that, were the project not a major project, the relevant regulator would refuse the project a permit under the permit scheme for which it is responsible.

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5. Limiting rights of the public – feedback and appeal	
● The level of public consultation in the process has not decreased from the current PORS process	This point states that the level of public consultation remains the same as with PORS but even if this was true it does not make it acceptable and the MPB is very different in many ways e.g. it relates to a much wider range of projects. There is no provision for public consultation in relation to the formulation of "assessment guidelines" for PORS or major projects (subject to a minor exception for a major project that is "reasonably likely" to require approval under the EPBC Act). Both major projects and PORSs must be exhibited for a period of 28 days during which members of the public may make representations in relation to the project. Following the period of exhibition, in relation to both major projects and PORS, the DAP must hold hearings. The period of time within which hearings must be held differs as between major projects and PORS: ● hearings in relation to PORS must be held "as soon as is practicable after the public exhibition of the project ends"; ● hearings in relation to major projects must be held within 28 days of the public exhibition concluding.
● As with all current discretionary assessment processes, the public make submissions on the proposal before the Panel carries out its assessment and before the normal regulators carry out their assessments and advise the Panel. Additionally, the public have an opportunity to attend and	This point fails to mention that with the normal council process the community can attend council meetings and make deputations and directly lobby councillors The public may only make representations after: ● the assessment guidelines have been produced; ● each relevant regulator has provided its preliminary advice (i.e. the regulator's

participate in public hearings before the panel finalises their assessment.	view as to whether the major project complies with the assessment guidelines); and ● the DAP has produced a draft assessment report (which is essentially the DAP's preliminary conclusion as to whether a major project permit should be granted). The exhibition period (during which representations may be made) is 28 days or a longer period if a longer period is determined by the Panel to be appropriate.
● The Panel's hearing process will provide for the public to test issues and evidence, similar to an appeal process, as is currently the case in the PORS process and all other Commission hearings into planning scheme amendments.	The Tasmanian Planning Commission is to approve procedures for the conduct of proceedings of DAPs. When conducting hearings, a DAP must conduct its procedure in the same way as the Tasmanian Planning Commission would under pt 3 of the *Tasmanian Planning Commission Act 1997* (Tas). But a good deal of discretion relating to procedure is afforded to the DAP under that part. The PPU Fact Check appears to compare the hearing process (before a DAP) with the appeals process (i.e. to the Resource Management and Planning Appeals Tribunal) available in relation to normal development applications. That is not a legitimate comparison. There is no provision for merits review in relation to decisions about major projects.

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6. It's a way to fast track development	
● Fast track implies cutting corners and shortening key opportunities for involvement. ● The proposed process has longer and more measured timeframe than the current PORS process (293 days compared to 171 days) and far longer than a normal	The key concern is not the time within which a decision can be made. It is whether this new process gives a reasonable opportunity for *meaningful* community engagement/consultation. Features of the MPB that suggest there is an inadequate opportunity for community engagement include:

development application undertaken by local council (42 days) ● The 293 days includes a 90 day period for the Panel to conduct public hearings and test issues and evidence, which is a similar timeframe to an appeal process with RMPAT or an amendment process with the TPC.	● community consultation does not occur in relation to the assessment guidelines, which are the key standards against which the project is measured; ● the project is not publicly exhibited (and representations called for/hearings conducted) until *after* a DAP has made what is in essence a draft decision; ● hearings are held within 28 days of the end of the notice period; ● the relevant local government authority has almost no role to play in the decision-making process;
● The new process includes a 28 day public exhibition of the proposal as opposed to 14 days for a normal development application	In relation to applications for discretionary permits under div 2 of Pt 4 of LUPAA, the application must be exhibited for 14 days but it can be extended. The public may make representations during that period. In relation to major projects, the exhibition period (during which representations can be made by the public) is 28 days.
● It is a comprehensive assessment conducted by an independent Panel with rights for Judicial review	This point raises the right of review to the Supreme Court but as explained above this does not replace the much more accessible merits review process before the Resource Management and Planning Appeals Tribunal.

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7. Taking away power from Local Government and giving it to State Government	

● The process is the same as that already available through the PoRS process. All Government's across Australia have processes where significant projects are elevated to independent panels which assess them against criteria which set out the broader public interest as opposed to a local council interest	The MP process is not the same as the PORS process, though some features of the two processes are very similar. But the similarity of PORS and MP is not the relevant point. We do not support the MPB including for the reason that projects are removed from local government. A key difference is the breadth of the major project eligibility criteria. The effect is that many projects can be declared a major project, including those that would otherwise be POSS. The POSS process includes provision for parliamentary oversight, whereas the major projects process does not. Other states have a wide range of major projects laws that are presumably not directly comparable with the MPB. Without evidence they can't be used to justify the MPB.
● Local government accepts that some parts of the planning system (amendments) and some projects (Projects of State Significance) should be assessed by independent experts such as the Commission. The assessment panel is independent from State Government and includes at least one Local Government representative	Even if it was true that local government accepts the existing uses of panels this does not demonstrate that local government accept the use of panels for major projects. The argument that the panel is independent from government is irrelevant to our concern that local councillors are not involved in approving a major project.
● The Minister has no involvement with the Panel or the Regulators while they are making their decision, other than to grant an extension of time	We have never claimed that the Minister is involved with the Panel or regulators. The Minister has the power to require up to two people be appointed to a DAP.

● This process involves greater independent scrutiny and more public process than normal Local Government assessment	The normal local government process involves the potential for an appeal to the tribunal which is the critical element of independent scrutiny. . It is not to the point that the MPB might provide 'more' or 'less' public process that normal local government process. The central concern in the community is that: (a) the breadth of the eligibility criteria mean that many projects may be declared as major projects; and (b) in relation to those projects, the involvement of local government in the decision making process will be significantly diminished; and (c) the draft Bill will exclude merits review rights to the Tribunal – this is crucial. This is of concern because it is a commonly held community belief that local government, being necessary local, are best place to evaluate projects likely to impact on their region.

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8. Any project could be declared a Major Project at the Minister's discretion	
● Someone needs to declare a project is eligible and it should not be the same person or body that assesses it. The Minister does not assess it, he/she simply refers it to the Commission.	There is no foundation to the statement that the project declaration and assessment need to be performed by different people. The EPA Board decides if a project meets the Level 2 criteria and then assesses the projects. This provides certainty to the community and to industry. Even if it was accepted that a major project should not be declared by body that assesses it, it doesn't necessarily have to be the Minister.
● PORS eligibility criteria are retained and we have added two points:	The second dot point claims that the "PORS eligibility criteria are retained" but this is misleading. Critically the PORS criteria only relate to projects having regional significance and

o a new criterion where a number of permits are required o Inserted requirement for the Minister to consult with the Commission regarding the relevant Council's capacity to assess a given project We have also clarified other criteria	the MPB criteria refer to projects that are of regional or state significance. The addition of criteria relating to "state significance" is likely to sideline the existing POSS process. For example, the proposed new Basslink cable could be assessed and approved under the MPB but it could not be taken through the PORS process. The addition of eligibility criteria broadens the circumstances in which a major project declaration can be made significantly in comparison to those where a PORS declaration can be made. The breadth of these criteria are of concern because they have the potential to sideline regular council planning processes in a significant number of cases. The problem with the breadth of the relevant criteria is well illustrated by the example given in the PPU Fact Check – of the new criteria relating to multiple permits. Virtually all medium to large projects will require multiple permits. The addition of this criteria is one of the reasons that the MPB represents a significant encroachment on local governments' power to decide planning applications of significance to their local area. The requirement for the Minister to consult with the Commission about the council's capacity to assess a given project does not come with any requirement that he or she accept the Commission's recommendation.
● As a result, under MP process a proposal will need to meet two out of six criteria as opposed to one out of five for Project of Regional Significance	The number of criteria are not reliable indicator of the breadth of circumstances in which the major projects process could be enlivened. It is the breadth of the criteria that are crucial. As is outlined above, the major project eligibility criteria are extremely broad.
● The Minister can only make a decision on whether the project is deemed eligible based on the eligibility criteria and having regard to the guidelines prepared by the Commission.	This point repeats the reference to the assessment guidelines but there is no requirement that the TPC makes the guidelines and if they are made the minister only has to consider them.
● Unlike the PORS process the MP process provides criteria the	This point refers to the MPB ineligibility criteria but our legal advice is that the criteria are so hard

make a project ineligible rather than letting the Minister decide if the project is ineligible	to meet that virtually no project could be ineligible.
● Unlike the PORS and POSS process, the independent assessment panel in the MP process can declare the project to have 'no reasonable prospect' very early on in the process if advised by a regulator to do so or if the Panel considers that the project was ineligible to be declared as a major project	This point refers to the MPB providing the DAPs with the power to declare a project has 'no reasonable prospect' but this does not relate to our criticism of the minister's powers to declare virtually any project.