

Discussion Paper – Planning Proposals
Under the EPAA 1979 - *A review of
current provisions, roles and
responsibilities*

54 Relevant planning authority (Act)

- (1) For the purposes of this Part, the **relevant planning authority** in respect of a proposed instrument is as follows:
 - (a) **the council** for the local government area to which the proposed instrument is to apply, subject to paragraph (b),
 - (b) the Director-General or any other person or body prescribed by the regulations if the Minister so directs under subsection (2).
- (2) The Minister may direct that the Director-General (or any other person or body prescribed by the regulations) is the relevant planning authority for a proposed instrument in the following cases:
 - (a) the proposed instrument relates to a matter that, in the opinion of the Minister, is of State or regional environmental planning significance,
 - (b) the proposed instrument makes provision that, in the opinion of the Minister, is consequential on the approval of the concept plan for a project under Part 3A, is consequential on the making of another environmental planning or other instrument or is consequential on changes made to a standard instrument under section 33A,
 - (c) the Planning Assessment Commission or a joint regional planning panel has recommended to the Minister that the proposed instrument should be made,
 - (d) the council for the local government area concerned has, in the opinion of the Minister, failed to comply with its obligations with respect to the making of the proposed instrument or has not carried out those obligations in a satisfactory manner,
 - (e) the proposed instrument is to apply to an area that is not within a local government area (subject to subsection (6)).
- (3) A **relevant planning authority** that is requested by the owner of any land to exercise its functions under this Division in relation to the land **may**, as a condition of doing so, **require the owner to carry out studies** or provide other information concerning the proposal **or to pay the costs of the authority in accordance with the regulations**.
- (4) The Minister may, in a direction under this section, require a council to provide studies or other information in its possession relating to the proposed instrument to be provided to the person or body specified in the direction as the relevant planning authority for the proposed instrument.
- (5) Two or more relevant local authorities may together exercise the functions under this Division of a relevant planning authority in connection with the making of a single principal or amending instrument in relation to the whole of their combined areas.
- (6) A reference in this section to a local government area includes a reference to an adjoining area that is not within a local government area and that is designated as part of that local government area for the purposes of this Division by the Minister by order published in the Gazette.

For present purposes it is relevant to identify the key elements of the Environmental Planning and Assessment Act 1979 and the relevant legislative instrument (Regulations) applying to 'Planning Proposals' for the purpose of identifying the role and function of the parties to a planning proposal.

Tweed Shire Council is the *Relevant Planning Authority* for the purposes of cl 51(1)(a) of Part 3, except where otherwise *directed* by the Minister under cl 51(2).

As a general rule the Council will be the RPA in most cases.

This is an important section of the Act because not only does it distinguish between those who are responsible for a planning proposal and those who are not but, affirms through the terms of cl 54(3) the role of a party, not being an RPA, requesting an RPA to exercise **its** functions. That is to say, the only party to a planning proposal with power to exercise a delegation or authorised function in respect of planning making under the Act is the RPA and relevant Minister.

Another important feature of the terms of the Act is that unlike other exercisable functions which require a development application or an application of another kind there is no similar provision with respect to a planning proposal.

(Regulation 2000)

11 Recovery of costs of studies etc by relevant planning authority

The relevant planning authority may enter into an agreement with a person who requests the authority to prepare a planning proposal under Part 3 of the Act for the payment of the costs and expenses incurred by the authority in undertaking studies and other matters required in relation to the planning proposal.

Correspondingly, there is no applicant for the purposes of Part 3, Division 4 and consequently no third party rights of appeal.

In essence, the proponent of a submission requesting the exercise of an RPA's functions has no statutorily defined rights, as is the case under Division 8, cl 97 relating to development consents. This does not however affect or alter general administrative law or the right of any party claiming a jurisdictional error of law under s 123.

In summary, this section of the Act establishes that the preparation and corresponding responsibility of preparing and defining a planning proposal rests with the RPA.

RPA determines what studies are required for a planning proposal and who prepares them

RPA prepares justification

Section 55 of the Act further reaffirms the role of the RPA in preparing a planning proposal and establishes the requirement on the RPA to prepare a *document* to be known as a 'planning proposal,' which explains the intended effect and justification of the proposed instrument, cl 55(1), as well as, other important elements such as community consultation, cl 55 (2)(e).

What this means is that the RPA (council), having been requested to exercise its functions under the Act, needs to determine whether it is prepared to exercise those functions. In determining that question it will need to consider many different and often competing issues. These may include:

- Whether the subject land is identified in an adopted council or regional strategy for rezoning?
- Is the timing of the submission consistent with an adopted works program and can the proposal be resourced at that time?
- Is there a demonstrated nexus between the proposal and the demand for it?
- Is there a net community benefit or otherwise?
- Are there other competing projects of greater community benefit or that will better service the identified demand or need?

The starting point for a council arises when a submission is made by a landowner or someone acting with their authority (see cl 54(3)) to make a planning proposal however, there is no requirement for a council to act on a request to exercise its functions. Where it does resolve to act, the RPA is responsible for determining the scope of works and studies required to be prepared to underpin the planning proposal.

This is an important element of the Act's provisions because in order to determine the appropriateness of the request by the landowner, the RPA must satisfy itself as to the suitability of the proposal. The RPA in most cases will need to undertake a range of detailed studies up-front, as part of preparing the planning proposal.

There is a misconception that detailed studies should be deferred until after the Gateway determination however, this view may not be consistent with either the Act's or the Regulation's provisions. There is a strong indication in the terms of the provisions that a planning proposal must be prepared with sufficient information to provide certainty about whether the proposal *could* proceed at a level which permits the Minister or their Delegate to *determine* whether the matter *should* proceed cl 56(2)(a); where studies are required to be prepared the RPA may enter into agreement with the person making the request to pay the associated cost, refer cl 54(3) of the Act, and cl 11 of the Regulations.

Studies are prepared up-front

55 Relevant planning authority to prepare explanation of and justification for proposed instrument—the planning proposal

- (1) Before an environmental planning instrument is made under this Division, *the relevant planning authority is required to prepare* a document that explains the intended effect of the proposed instrument and sets out the justification for making the proposed instrument (the *planning proposal*).
- (2) The planning proposal is to include the following:
 - (a) a statement of the objectives or intended outcomes of the proposed instrument,
 - (b) an explanation of the provisions that are to be included in the proposed instrument,
 - (c) the justification for those objectives, outcomes and provisions and the process for their implementation (including whether the proposed instrument will comply with relevant directions under section 117),
 - (d) if maps are to be adopted by the proposed instrument, such as maps for proposed land use zones; heritage areas; flood prone land—a version of the maps containing sufficient detail to indicate the substantive effect of the proposed instrument,
 - (e) details of the community consultation that is to be undertaken before consideration is given to the making of the proposed instrument.
- (3) The Director-General may issue requirements with respect to the preparation of a planning proposal

56 Gateway determination

- (1) After preparing a planning proposal, the relevant planning authority may forward it to the Minister.
- (2) After a review of the planning proposal, the Minister is to determine the following:
 - (a) whether the matter should proceed (with or without variation),
 - (b) whether the matter should be resubmitted for any reason (including for further studies or other information, or for the revision of the planning proposal),
 - (c) community consultation required before consideration is given to the making of the proposed instrument (**the community consultation requirements**),
 - (d) any consultation required with State or Commonwealth public authorities that will or may be adversely affected by the proposed instrument,
 - (e) whether a public hearing is to be held into the matter by the Planning Assessment Commission or other specified person or body,
 - (f) the times within which the various stages of the procedure for the making of the proposed instrument are to be completed.
- (3) A determination of the community consultation requirements includes a determination under section 73A (or other provision of this Act) that the matter does not require community consultation.
- (4) The regulations may provide for the categorisation of planning proposals for the purposes of this section, and may prescribe standard community consultation requirements for each such category.
- (5) The Minister may arrange for the review of a planning proposal (or part of a planning proposal) under this section to be conducted by, or with the assistance of, the Planning Assessment Commission or a joint regional planning panel:
 - (a) if there has been any delay in the matter being finalised, or
 - (b) if for any other reason the Minister considers it appropriate to do so.
- (6) The relevant planning authority may, at any time, forward a revised planning proposal to the Minister.
- (7) The Minister may, at any time, alter a determination made under this section.
- (8) A failure to comply with a requirement of a determination under this section in relation to a proposed instrument does not prevent the instrument from being made or invalidate the instrument once it is made. However, if community consultation is required under section 57, the instrument is not to be made unless the community has been given an opportunity to make submissions and the submissions have been considered under that section.

Once the RPA has carried out the necessary investigations and studies and has satisfied itself through the preparation of a planning proposal that the Local Environmental Plan should be amended it refers the planning proposal to the Minister under cl 56(1).

This stage of the process is referred to as the 'Gateway determination.' The purpose of this stage is for the Minister or their Delegate to determine if a proposal should proceed, cl 56(2)(a). It is an important function for the Minister to determine whether they should support the proposal or not because pursuant to cl 59 they are the sole delegate with the power to make a local environmental plan.

This part of the process also provides the Minister's departmental staff to evaluate the proposal from a State perspective and where appropriate determine whether there should be any variation to the proposal as submitted by the RPA, and to identify consultation requirements that it considers appropriate for the making of a plan.

It is a misconception that the Minister's determination to an RPA is a representation of all the matters and terms that must be met. The Ministerial Direction should not and in practice does not direct the RPA on the range of matters that it should consider nor does it bind the extent of those considerations or external consultations to those expressed in the determination.

The determination is issued to the RPA and is representative of three elements. Firstly, it sets out the requirements the Ministers has determined as necessary prerequisites to satisfy itself about the proposal, secondly, it may require the RPA to consider a matter which it had not considered, and finally the determination disposes of those functions delegable only to the Minister or their delegate not an RPA, e.g. cl 56(2)(e).

As a general rule the RPA will consider a very wide range of issues and require a wide range of studies. The terms of clause 56 support the view that these studies form part of the process of preparing a planning proposal and not part of the requirements under a Gateway determination.

This proposition is supported further by the terms of cl 56(2)(b) which refers to the 'resubmission' of the proposal, including for further studies. The terms of that provision are at odds with the view that the legislative intent was for the identification of studies to inform the plan making process as it proceeds on the basis that the Minister would make a

determination about whether a proposal should proceed in the absence of that information, this must be held as incorrect.

Section 58 provides two very important elements. Firstly, cl 58(1) makes it very clear that the RPA may seek to amend its planning proposal at anytime and for any reason.

Secondly, it is at the discretion of the RPA to determine whether, at any time, it wishes to request the Minister to determine that the matter not proceed. Whilst a request may be made the Minister is not bound to accept it and may as a consequence determine to proceed with a proposal and appoint a different RPA.

In summary there are several aspects of the planning proposal process under Part 3 of the Act that are worth reiterating as they will form the basis of how planning proposal submissions will be managed by Tweed Shire Council, they include:

1. There is no applicant.
2. A submission must be made by a landowner or their agent or a person or entity acting on that persons behalf. This means that the authorisation of the landowner must accompany a submission to the Council requesting that it exercise its functions for the purposes of Part 3.
3. The RPA (council) is the responsible entity for preparing a planning proposal, as such it will:
 - a. Determine whether to prepare a planning proposal
 - b. Determine what studies will be required.
 - c. Formulate and direct the scope of any required studies.
 - d. Require a close working and collaborative relationship between the Council and any entity preparing a study or report that the Council will be relying on.
 - e. Decide who will prepare and/or pay the cost of any studies or other work.
 - f. Proceed with any necessary investigations required to satisfy itself as to the suitability of the proposal on its own terms and prepare the required justification.
 - g. Keep the landowner making the request informed and involved in the process, as appropriate.
4. A Gateway determination is a notice of requirements that must be satisfied by the RPA, it is not a direction as to the heads of considerations that an RPA is restricted to considering.
5. The Gateway determination is not the process or stage for determining what studies and investigations are required, but the Minister or their Delegate may prescribe a matter or consideration which the RPA had not.

Requests are made by a landowner

58 Relevant planning authority may vary proposals or not proceed

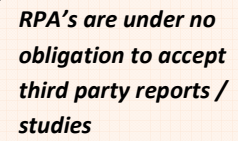
- (1) The relevant planning authority may, at any time, vary its proposals as a consequence of its consideration of any submission or report during community consultation or for any other reason.
- (2) If it does so, the relevant planning authority is to forward a revised planning proposal to the Minister.
- (3) Further community consultation under section 57 is not required unless the Minister so directs in a revised determination under section 56.
- (4) The relevant planning authority may also, at any time, request the Minister to determine that the matter not proceed.

Enquiries should be directed to the Coordinator Planning Reforms at first instance.

6. A Gateway determination is actionable by the RPA and not by a landowner making a request, except where directed by the RPA.

7. The RPA is not obliged to accept any studies prepared by the landowner.

8. The RPA will specify the terms of reference for any required studies where the landowner is requested to prepare the study or alternatively will be advised of and be liable for the cost of studies undertaken by or on behalf of the RPA.



RPA's are under no obligation to accept third party reports / studies

Refer to Flow Diagram below for a proposed work stream based on the issues / process discussed above.

