# Review of the State Policy on the Protection of Agricultural Land

## Summary Issues Discussion Paper

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## Introduction

The Review of the State PAL Policy commenced in August 2006 with submissions from the public called for by 4 November.

90 submissions were received from private individuals, related industries, community organisations, State Government agencies and Government Business Enterprises and Local Councils.

Of the 56 private submissions most were from the North West of the State, with 34 from the Waratah – Wynyard Municipal Area. Of the 29 Tasmanian Councils, 11 made submissions to the review with 10 of those from the North of the State. The LGAT also made a submission.

The issues raised in these submissions, while broad and representative of a range of views, did not necessarily cover all aspects requiring consideration in the policy review. The analysis of these submissions informed the review process in conjunction with other considerations.

The private individual submissions were mostly about the prevention of residential development on small properties and the lack of publicity and understanding about the Policy and concern at Councils' varying interpretations of it.

Local Council submissions focused on issues of interpretation and definitions, guidelines, governance of land use, the distinction between prime and non-prime land. Councils that had amended their planning schemes to reflect the Policy, expressed the opinion that others should have done the same and that the State should be enforcing this.

15 Industry / Community Organisations submissions covered a spectrum of issues and opinions although 10 were from forest industry groups or companies strongly advocating the continued inclusion of tree plantations as an agricultural use.

Submissions from State Government departments, agencies, business enterprises and the University of Tasmania totalled 7. Issues included consistency of policy application, ensuring planning schemes are updated state wide to reflect the Policy, the need for guidance, issues of 'fettering', the importance of non-prime land, protection from subdivision, and infrastructure development on agricultural land for community benefit.

Steering Committee identified seven key issues in December 2006, and determined that these required further more detailed consideration. This involved seeking detailed information from Government officers with expertise in these areas.

## 1.0 Appropriate assessment of land capability

### 1.1 Issues raised

A significant number of submissions covered the relevance and effectiveness of the 'land capability' classification system as set out in the Land Capability Handbook by KE Noble published by the Department of Primary Industry in 1992.

Opinions varied from affirming, consistent with the current Policy, that "all agricultural land is a valuable resource" to calls for unrestricted development of non-

prime land and a clearer distinction between prime and non-prime land to facilitate this.

A variety of other suggestions about assessing the value of land were made including use of a broader ‘farming capability’ assessment that would include consideration of the land in relation to existing neighbouring land uses and whether it is is significant locally or at a regional or state level.

Concerns about the cost implications of broad mapping of land capability were raised by local councils and individuals.

### 1.2 Current situation

The current PAL Policy is closely linked to the Land Capability classification process. The Policy directly uses the classification system as a means of identifying ‘prime’ agricultural land, the protection of which is one of the primary objectives of the Policy. The Policy makes reference in its definitions to the 1992 Land Capability Handbook, not the more recent revision of 1999 which has some differences in methodology.

The definition of ‘Prime agricultural land” in the Policy is land ‘classified <u>or capable</u> of being classified as Class 1, 2 or 3 land using the definitions and methodologies set out in Noble’s 1992 publication’.

The current land capability mapping does not cover all of the State and what is mapped is generally at 1:100,000 scale. Some areas have higher resolution mapping at 1:25,000 but these are few.

The revised edition (1999) of the Land Capability Handbook indicates that the criteria for mapping, although similar, are not consistent with that historically used in mapping.

Land capability assessment currently takes into account the physical nature of the land (geology, soils, slope) and other issues such as climate, erosion hazard, land management practices, and some limitations that might effect agricultural use. In short it is based on the permanent biophysical features and does not take into account the economics of agricultural production, distance from markets, social or political factors.

The land capability classification system divides land into a number of classes which are reflected in the current 1:100,000 mapping. More detailed classification is possible into sub classes which reflect dominant limitations and units being areas requiring the same kind of management and treatment. More recent maps in Tasmania provide sub class information. This is stored on the DPIW GIS database and available to the public on request. Maps at 1:25,000 scale are considered necessary for detailed local planning.

## 1.3 Commentary

### 1.3.1 Classified or capable of being classified.

The current definition of 'Prime land in the Policy includes land '<u>capable</u> of being classified as Class 1, 2 or 3. This capability or potential of classification is most likely the result of recognising that some areas were not mapped at the time the Policy was first drafted and therefore not classified. However, it might also be seen in the light of the detailed classification system which recognises that "many areas of land have the potential to attain an improved land capability ranking through the application of irrigation", while the land classifications are based on irrigation being unavailable.

Consequently it is unclear if Class 4 or 5 land which might be irrigated and which would be ranked higher if that were the case, falls within the current definition of 'prime' land.

If this is the case, the intent of the Policy in protecting 'prime' land goes beyond those areas simply mapped as Class 1, 2 or 3 or deemed to be within those classes by future survey or analysis. This interpretation of the definition would require a finer grained approach to assessment of land including whether it might potentially be classified higher should water be made available. This has substantial repercussions for protecting land not necessarily deemed to be Class 1, 2 or 3 at the moment.

### 1.3.2 Impact of irrigation

The issue of definition of 'prime' land relates substantially to the possibility of irrigation. The current Policy deals with this in Principle 7 but only in relation to specified irrigation schemes. The schemes included are listed in the definition itself and should be reviewed to ensure they are comprehensive.

Information was sought from DPIW in relation to the desirability to add the Meander Dam district to this definition. The response was that there were a number of newly proclaimed districts which should also be added. Additionally the advice indicated that land which is 'potentially' capable of irrigation should also be considered, not just those areas specified which constitute only a "small part of the irrigable land in the State".

The Policy in Principle 7 requires local councils to make provision for appropriate protection of 'non-prime' land in these identified irrigation areas. This new advice from DPIW suggests some protection of all land which is potentially irrigable should be considered. This begs the question about identifying these areas. Given the limitations of the current land capability assessment the more detailed land suitability assessment might be more appropriate or some other way of identifying land which could be irrigated.

This tends to reinforce suggestions that the current method of land capability mapping does not provide useful information in line with the requirements of the Policy to consider land that is potentially 'prime' if it were irrigated.

### 1.3.3 Mapping scale

The current land capability mapping does not cover all of the State and what is mapped is generally at 1:100,000 scale. Some areas have higher resolution mapping at 1:25,000 but these are few. According to the second edition of the Land Capability Handbook, the 'map units' used in 1:100,000 maps are predominantly larger than 64ha. and at this scale the information "is not intended to be used to make planning decisions at the farm level. "

Although such a comment is probably a reference to the planning decisions of farm management as opposed to broader land use planning decisions on that land, the pressure for non agricultural development on rural land means land capability mapping is increasingly used for determining whether the proposed development would be on 'prime' land.

Interestingly most individual development applications dealt with by local councils which invoke the PAL Policy do not rely on the 1:100,000 mapping carried out by the State Government and available on the LIST. However, it is possible that these maps formed the information basis for Councils requesting more information on the exact land capability. That is, the maps may have acted as a trigger but have not been relied upon as indicating accurate boundaries of land classes. Invariably agricultural or soil consultants are called upon to carry out a detailed land capability map of the specific title to accompany an application for development approval. This mapping is often at a scale nearer 1:5,000 or even 1:1,000.

This raises the issue of the purpose and value of mapping land capability. The revised edition of the Land Capability Handbook indicates that 'unit' level mapping is usually appropriate to 1:25,000 scale mapping or larger. Even so the mapping of sub-class characteristics is apparently not consistent as unit level map codes are specific to particular survey areas. The Handbook states that "Class 4e1 in one survey area is unlikely to be the same as 4e1 within another survey."

Consequently the usefulness of both mapping at small scale (1:100,000) and larger scale (1:25,000) for detailed land use decisions, particularly at a property level, is questioned. This is consistent with the advice in the Handbook that the 1:100,000 mapping provides an overview of land capability of a region to assist with regional strategic planning. Specifically this might identify areas for new developments, or urban expansion and provide a standardised framework on which to base more detailed assessments.

Mapping at 1:25,000 is recommended for considering "hobby farm expansion, urban growth options".

What is evident is that even this large scale mapping is designed as an input into strategic planning or at best local area planning but not site by site definition of classes of soil. The following diagram (Figure 12) published in the Handbook illustrates the relationship of different scale and type of land capability assessment for a variety of purposes.

Where residential development is concerned a scale of between 1:10,000 and 1:25,000 is recommended and the land capability criteria are broadened to cover a range of other constraints. This is in line with the distinction drawn between 'land capability assessment' and 'land suitability assessment'. The latter includes economic, social and political factors in evaluating the best use of a particular area of land.

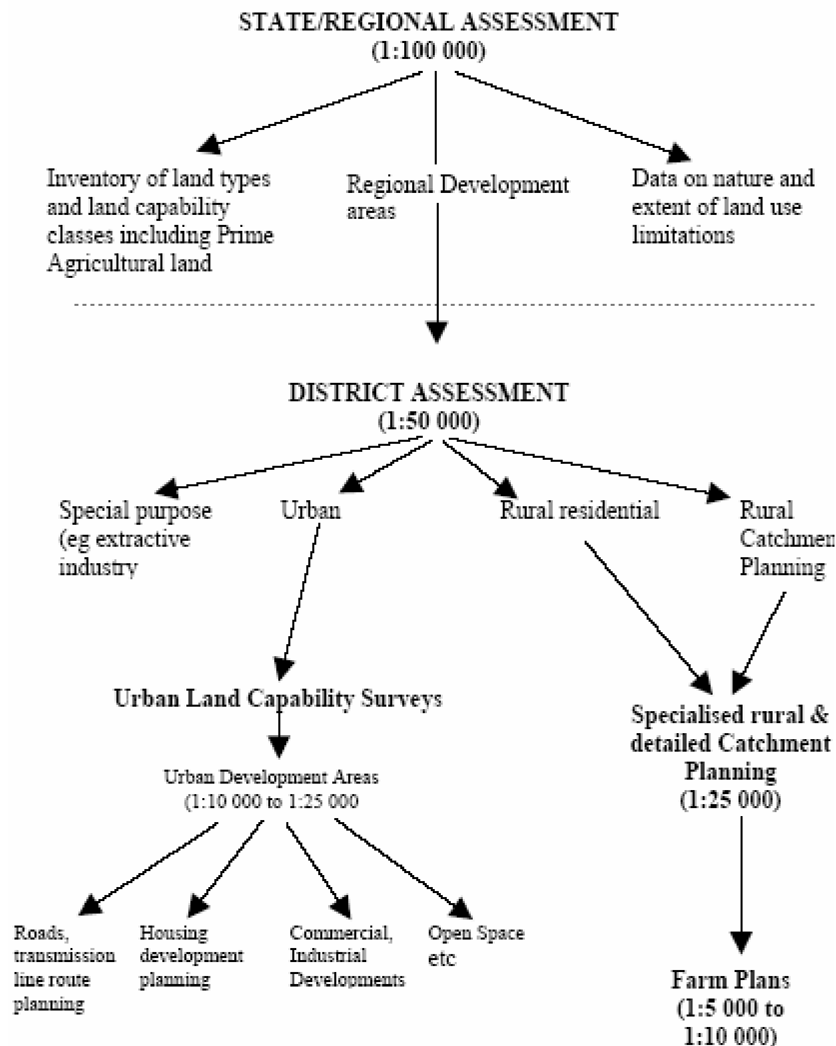

**Figure 12.** A possible framework for the application of land capability assessments. (Adapted from Dept. of Agriculture, South Australia)

### 1.3.4 Land Suitability Assessment

The issue of the relevance and value of land capability assessment for land use planning decisions needs further consideration. The schematic representation set out in Figure 12 indicates that land capability assessment consistent with the Handbook is only one of three components for State/ Regional Assessment, the others being Regional Development areas and land use limitations.

This combination then provides the base for larger scale District and local assessment including Urban Land Capability Surveys, specialised rural and detailed catchment planning, and Farm Plans.

It is increasingly obvious that land capability has been used for purposes beyond its limitations and in many instances at a local council planning level as the primary or sole criteria for determining land use and development approvals. This is despite the clear statements of limitation in the Handbook as follows:-

*"Land capability on its own cannot and does not purport to dictate land use planning decisions or policies and should not be regarded as standing alone in any planning decision, without being supported by other relevant land resource, economic, social or conservation considerations that may be pertinent to the decision making process. Only with recognition of all these factors can responsible decisions on land use be made." P.49*

In the absence of clear guidelines on the purpose and best use of the Land Capability mapping, the State Policy has been used predominantly as a 'self executing' prohibition on land use in rural areas. This is not unlike the situation with the original State Coastal Policy where the lack of strategic integration of the Policy into planning schemes resulted in tests of individual developments against clauses of the State Coastal Policy which were poorly constructed, and ultimately deemed to be inoperable by judgements of the Supreme Court, for such purposes.

The implications of this discussion are not that the assessment of land capability within the current Policy necessarily requires altering or broadening, but what might be required, is a clearer articulation that such capability should be used as one component of a more complex land suitability process which is integral to regional strategic planning and local neighbourhood or area development plans.

It should be said that the PAL Policy attempts to set out such processes through references in Principles 2, 4, 5 and 7 to 'planning schemes' as the implementation mechanism. Notwithstanding this there are still many examples of decisions of local councils and the RMPAT which draw directly on the State Policy as a 'self executing' set of requirements.

This problem is somewhat exacerbated by the statement of objective for the PAL Policy which seems to directly imply the Policy should be brought to bear in individual land use decisions rather than informing the planning schemes under which decisions are made.

> ***2. OBJECTIVES***
> *2.1 To provide a consistent framework for planning decisions involving agricultural land by ensuring that the productive capacity of agricultural land is considered in all planning decisions.*

As with the State Coastal Policy, the need is for planning schemes to be consistent with the State Policy so that tests of individual developments against the Policy are unnecessary.

Guidance on the use of land capability as a component in the broader strategic planning exercise is also found in the Handbook at p. 50 (see Figure.11).

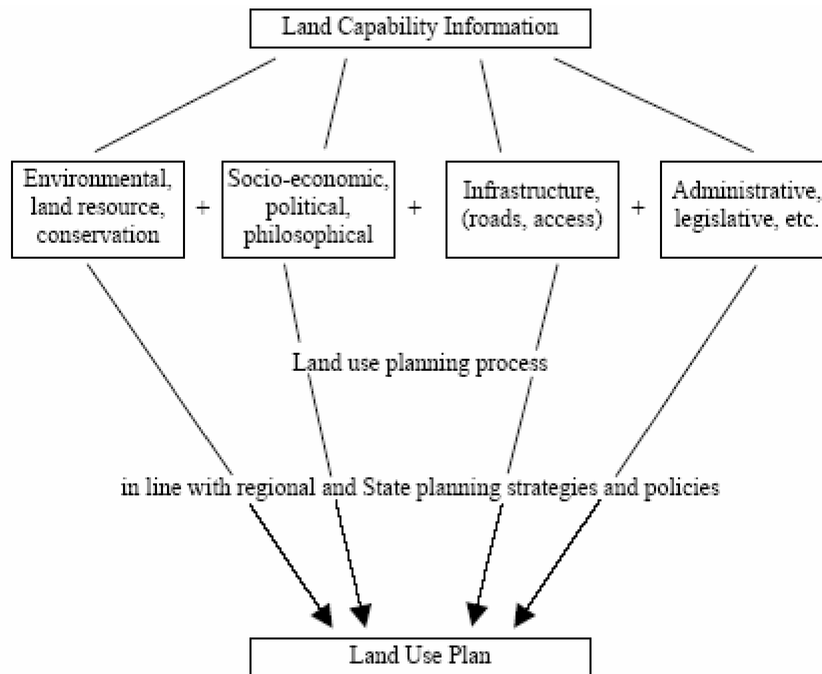


**Figure 11.** Framework for Land Use Planning

The use of land capability assessment in this process would provide the mechanism for dealing with a issues of land with 'potential' to be Class 1, 2 or 3, the identification of locally 'significant land' for specific crops, and whether land is irrigable regardless of its classification.

## 1.4 Possible ways forward

The purpose of the PAL Policy as expressed in Objective 2.1 is problematic in encouraging implementation of the Policy through planning schemes and suggests a self-executing intent. The Objective could be reworded to bring it into line with the more focussed statements in Principles 2, 4, 5 and 7.

Clarification should be considered in respect of whether prime land is limited to areas of Class 1, 2, and 3 land or includes areas of Class 4 or 5 land which have potential of irrigation which would reclassify those areas as 1, 2 or 3.

Areas of potential irrigation should be limited to those that could be served by a proper irrigation scheme as opposed to small on farm irrigation. These areas should be identified to assist with mapping of land capability or broader land suitability. Areas subject to new irrigation schemes should be added to those listed as 'specified' in the definitions. Where the DPIW also identifies areas with significant irrigation potential, planning authorities should be required to provide appropriate protection through their planning schemes. This will require a close liaison between DPIW and local councils.

The current methodology for determining land capability in respect of irrigation potential seems confused with some recognition being given if irrigation is a normal practice in a specific area. If areas of potential irrigation are to be considered outside

of mapping of 'prime' land in accordance with an expanded Principle 7, then the definition of 'prime land' could be modified to a less ambiguous statement by removing the reference to that land that " could be classified as Class 1, 2 or 3".

Advice from DPIW is that land capability mapping covers 70% of Tasmania and more than 90% of prime land has been identified. Funding for further or more detailed mapping is limited. Mapping land suitability as opposed to land capability is also considered to require a detailed site by site analysis to determine the substantial range of 'suitability' issues. It is consequently well beyond current resource capacity and is not supported.

What is clear is that land capability mapping, particularly at the 1:100,000 scale should be used as a component in broader strategic planning at a regional and local level. A guideline on best practice strategic planning in rural areas, including the use and role of land capability mapping, should be produced to assist with better implementation of the Policy in planning schemes.

## 2.0 Fettering and Land Use Conflicts

### 2.1 Issues raised

The submissions made in relation to the issue of 'fettering' indicate a variety of understandings of the concept and its causes. A few submissions specifically cited the protection offered to farmers under the *Primary Industries Activities Protection Act 1995* or what is termed 'right to farm' legislation.

However, the State PAL Policy is seen by some as a potential means to apply stronger controls on the ability of non-agricultural landholders to fetter bone fide agricultural activities.

A definition of fettering is not provided by the PAL Policy, nor are guidelines given on dealing with this type of land use conflict in the course of the protection of agricultural land. A number of submissions specifically raised the use and size of appropriate buffers to limit land use conflicts and thereby reduce fettering.

Variable buffers are suggested depending on topography, existing vegetation and land use. One submission indicated that the Central Coast Council has buffers ranging from 5 – 10 metres while the NSW Department of Primary Industries publication "Planning for Sustainable Agriculture", stipulates 50 – 500 metres.

The issue of water use and contamination from both agricultural activity and residential development was mentioned as a type of fettering.

Submissions relating to the adequacy of the land capability assessment system also raised the issue of fettering and suggested that it should form a component in a broader assessment of 'farming capability', as discussed in the previous section of this report. For example if a lot including prime agricultural land is adjoined to land with a pre-existing use that could fetter the neighbouring agricultural activities, this will effect its potential productivity and thereby its classification for farming capability.

### 2.2 Current situation

The concept of fettering is mentioned specifically in Principle 6 of the PAL Policy as:

> *6. Adjoining non-agricultural use and development should not unreasonably fetter agricultural uses.*

It is also referred to indirectly in the Objectives of the Policy where the phrase "constrained by conflicts with non-agricultural land users" is used:

> *2.2 To foster the sustainable development of agriculture in Tasmania by:*
> *(a) Enabling farmers to undertake agricultural activities without being unreasonably constrained by conflicts with adjoining non agricultural land users; and*
> *(b) Providing greater direction and certainty for landowners, developers, land*

*managers and the community in planning decisions involving agricultural land*

Consequently there is no clear definition of fettering although the phrase in the Objective 2.2 (a) serves that purpose to some extent. The term remains a vague concept and there is no guidance as to what particular activities might constrain agriculture and what mitigation measures are available to manage that constraint.

No guidelines on 'fettering' have been issued.

## 2.3 Commentary

### 2.3.1 The meaning of 'fettering'

The word 'fetter' is generally defined as 'to shackle or constrain". In terms of land use, 'fettering' occurs where an activity is constrained or reduced by the nearby presence of a land use which is sensitive to such activity.

The Policy specifically refers to "conflicts with adjoining non agricultural land users" although some submissions suggest fettering can occur between types of agriculture. Although there may well be some incompatibility between certain forms of agriculture it would be an unusual situation where one form of agriculture restricted all other forms of agriculture on neighbouring land. For management reasons the options may be limited but rarely completely constrained.

Furthermore such an interpretation would not be consistent with the thrust of the Policy to facilitate agriculture generally. The intent of the Policy is to achieve this in two ways: by protecting the soil resource upon which agriculture is dependent through restricting conversion, and through limiting the land use conflicts which might restrict agricultural activity.

The potential for land use conflicts in semi-rural or rural areas is a well documented planning issue. The conflicts are almost universally between residents (often new) and existing farming activity. The range of conflicts is large. The NSW Dept. of Primary Industries sets them out as follows:-

**Table 1. Typical conflicts between agriculture and adjoining residential areas[1]**

| | |
|---|---|
| **Noise** | • Dogs, livestock.<br>• Farming equipment, pumps, spray machines, transport.<br>• Ancillary equipment associated with on-farm processing. |
| **Odour** | • Agricultural fertilisers and chemicals.<br>• Intensive animal industries.<br>• Application of effluent to pasture. |
| **Health concerns** | • Chemicals.<br>• Spray drift.<br>• Smoke. |

| | |
|---|---|
| **Water** | • Access.<br>• Pumping.<br>• Quantity. |
| **Smoke and ash** | • Burning of pasture, stubble or 'rubbish'.<br>• Cane fires. |
| **Visual intrusion** | • Hail netting.<br>• Polyhouses. |
| **Nuisance** | • Stray dogs.<br>• Vandalism.<br>• Trespass.<br>• Noxious and environmental weeds. |

It can be seen that although the majority of issues that cause the conflicts emanate from the farm, some originate from the residential activity such as those in the last two rows (Visual intrusion and Nuisance). In either case the impact is generally on the agricultural activity either through actions by neighbours to limit nuisance caused by that, or through direct incursions of plants or animals that interfere with farming. The consequences are invariably a limitation or reduction in the efficiency of the agricultural operation.

### 2.3.2 Buffers

A number of submissions raised the prospect of introducing buffers to mitigate the conflicts. NSW guidelines were particularly cited as examples of distances required to ensure minimal conflict. The NSW Guidelines suggest that buffers can assist in separating conflicting land uses and can involve specific solutions to minimise the impact of activities (eg. installing a sediment trap, constructing a noise barrier), or can consist of open space, vegetation screens, grassed areas or natural barriers such as hills. The appropriate sort of buffer would be determined by considering a variety of issues such as the issue the buffer needs to deal with, the level of impact involved, existing features which mitigate off-site impacts, and existing constraints or opportunities which provide the required buffer and separation.

The table below, taken from the NSW Dept. of Primary Industries Web Site, sets out some standard separation distances.

**Table 2. Examples of buffers between agricultural land use and residential development[2]**

| Purpose of buffer | Buffer width |
|---|---|
| For spray drift where there is no vegetative buffer. | 300 m + |
| For spray drift where an adequate and effective vegetative buffer is available. | 40 m + |
| Between dwellings and sources of noise such as a working tractor, fans and pumps. | 500 m + |
| Between dwellings and a cropping enterprise that involves soil cultivation (this would include a vegetated buffer). | 50 m + |

| An adjoining drinking water supply. | 100 m + |
| --- | --- |
| Where aerial application of chemicals is involved. | 150 m + |

Two issues concerned with buffers require further consideration. Firstly, the adequacy of them to deal with changing agricultural practices, and secondly the changing expectations and tolerances of new residents. If buffers can be negotiated they are specific in time and place and may not be considered acceptable over time where circumstances and people change.

The second issue is where the onus of cost lies. The NSW Guidelines suggest that the cost should be borne by the encroaching activity ie. the activity that is introduced. This could be a new residential development next to rural land in which case the buffer should be built into the residential subdivision, or it could be new agricultural developments on rural land next to existing housing. If that were the case the buffer would include agricultural land that could not be used for that new activity.

The NSW Guidelines therefore suggest that in the latter case the buffer should be provided by the farmer, or the farming activity modified. In this circumstance the cost is directly borne by the farmer and indirectly the community as it takes farming land out of production or modifies its potential output. This situation is at odds with the intent of the PAL Policy to protect agricultural land from conversion.

In the light of this discussion, the use of buffers is considered to be ineffective in avoiding and managing land use conflicts in rural areas in the long term but may have some merits for specific cases where other broader approaches or strategic management options have not been or cannot be applied.

### 2.3.3 Fettering and the 'Right to Farm'

The 'right to farm' is the perceived ability of a farmer to carry out routine agricultural activities without undue objection, harassment or complaint from neighbours or others. On this basis it is a direct counter to the 'fettering' impact of neighbouring incompatible land use.

However, as the NSW Dept. of Primary Industries argues, this sets up a situation of 'us and them' and does not address landholders' obligations according to environmental legislation. The 'right to farm' can be mistaken as some form of exemption from the normal obligations of any landowner and should not be seen as a licence to misuse farm chemicals or pollute the environment.

'Right to farm' legislation also fails to consider the cause of the conflicts and only deals with the symptoms. This can result in complex and lengthy litigation and intractable political problems stemming from ongoing land use conflicts.

The Tasmanian 'right to farm' legislation illustrates these points. The *Primary Industries Protection Act 1995* has as its objective "an Act to protect persons engaged in primary industry by limiting the operation of the common law of nuisance in respect of certain activities that are incidental to efficient and commercially viable primary production"[3]. This would appear to limit actions that could be taken against a farmer that might lead to a fettering of that activity.

However, the Act limits protection in two ways. In s.(4) the farming activity must be historically present and not substantially different to those previously carried out. New or substantially different farming activity appears not to be covered. Secondly the Act is generally limited by s.(6) which clearly does not provide immunity from action taken under other legislation. Notwithstanding this the Act is supported by amendments to the *Environmental Management and Pollution Control Act 1984* which excludes the ability to consider noise from farming activity as an environmental nuisance.

The *Primary Industries Protection Act 1995* does provide some security for farmers but probably serves more to warn new residents that levels of amenity that might be expected in urban areas are not guaranteed in the country.

## 2.4 Conclusions

In conclusion it appears that seeking to protect farming operations from unreasonable fettering through the use of 'right to farm' legislation avoids tackling the root causes of the conflict which are land use planning decisions that do not adequately avoid the potential for conflict in the first place. Such decisions are often made too late if they deal with development of individual titles adjacent to farms or agricultural land and rely on legislation to restrict complaints against pre-existing farming activity.

The concept of 'fettering' is useful in considering the adjacency of zones and the variety of uses that can occur on them. That is a process that is relevant to the drafting of a planning scheme or the review of it to ensure compliance with a State Policy. In this context the buffer distances in Table 2 (above) are helpful in assessing the appropriateness of adjoining zones under certain topographic situations and in determining lot sizes where potentially conflicting land uses might occur, thereby enabling adequate separation of houses from agriculture.

The problem with providing guidance on concepts like 'fettering' is that it can be used as a definitive explanation and in a mandatory way rather than being indicative of some issues and advisory in purpose. This practice is not such an issue where the guidelines are used to assist at a higher strategic level rather than at a development approval stage.

As the Policy stands, the Objective set out in 2.2 is consistent with encouraging a broad strategic approach to reducing the potential for fettering, however the wording of Principle 6 can be interpreted as more directly applicable to proposals for 'new' use and development. The consequence of this has been a translation of these words into planning scheme provisions resulting in somewhat vague and contentious requirements or tests for proposed development. An example of this is in the Waratah Wynyard Planning Scheme 2000[4], which includes the term in at least 3 performance criteria. An example is:-

> *6.2 Where a lot has been approved for residential purposes in other zones under the Wynyard s.46, Wynyard 1966 and Somerset 1966 Planning Schemes, it can be demonstrated that:*

*(a) it will not **fetter** existing or potential resource development uses or developments*

Other provisions of this planning scheme use the term in more general objectives and then explain the concept a little differently in the provisions. An example of this is in the Primary Industries Zone, performance criteria under Clause 9.4.1 (Subdivision):-

*(b) It must be demonstrated that the proposed use or development of the lot(s) will:*
*(i) **not impair the continuing operation** of use or development of surrounding land;*

The notion of fettering is further complicated by the PAL Policy referring to fettering or constraining in conjunction with the term 'unreasonably'. This results in an ambiguous qualification of an undefined term.

*6. Adjoining non-agricultural use and development should not unreasonably fetter agricultural uses.*

## 2.5 Possible ways forward

Four recommendations flow from this discussion:-

1. The term 'fettering' should be defined within the Policy to reduce room for contention and to assist with explaining the intent of the current Objectives and Principle 6.

   A possible definition follows:
   Fettering
   "Fettering" means the restriction of an agricultural use or potential agricultural use caused by a conflicting land use in the vicinity. "Fettering" may include, but is not restricted to, limitations on of agricultural practices resulting from negative impacts on residential activity from emissions of noise, light, odour, dust and the like from, establishment, maintenance and harvesting of crops and animal husbandry, and from nuisance caused to farming activity from the escape of domestic animals and plants onto agricultural land from adjacent non-agricultural uses.

2. The avoidance of 'fettering' should be predominantly delivered through strategic planning and land use zoning decisions not individual development applications.

3. Guidelines should be issued setting out in some detail the sort of land use conflicts that can occur and the 'fettering' of agriculture that can result, including examples of 'best practice' land use planning for rural areas. A discussion on separation distances and buffers will inform this process.

4. Where planning schemes include performance criteria for use and development which requires that they do not 'fetter' adjacent agricultural activity or the like, the performance criteria should either be based on the definition in 1. or the term

should be defined within the planning scheme consistent with that in the PAL Policy, as opposed to simply using the term ‘fetter’ without explanation.

## 3.0 Land value, rating, investment and superannuation

### 3.1 Issues raised

A significant number of submissions indicated that although the general thrust of the Policy in protecting good agricultural land was supported, its application has and continues to produce substantial economic hardship. Many of those making submissions specifically referred to their land in terms of 'superannuation'.

This hardship is generally related to a perception that the introduction of the Policy has limited the ability to develop the land for residential purposes, even if associated with agricultural operations of some sort, and consequently devalued the land. The purported repercussions of this are that the land loses value and /or is not saleable at the expected price. Claims are that the system of setting the value through the Valuer General's Office has resulted in the rates and land tax being disproportionate to the real 'developable' value.

Submissions indicated that the Policy has resulted in an inability to sell non-viable farmland for residential uses, yet a requirement to still pay taxes based on a development potential that cannot be realised.

A further consequence claimed is that the high capital value of the land (as opposed to the much lower market value) restricts access to the pension. The veracity of these claims cannot be easily checked but the wide spread perception remains that the PAL State Policy is responsible and as such, compensation is due to offset the loss of development potential.

The issue of loss of property value, inequitable rating and compensation 'because of the impact of the PAL Policy' needs further discussion.

### 3.2 Current situation

The PAL Policy clearly limits the development of houses on 'prime' agricultural land in the first instance through Principle 2. The prohibition is specific where a planning scheme has not been reviewed in the light of the Policy.

The Policy also provides some restriction on the development of houses through Principles 1 and 5 which refer to controlling the conversion of all agricultural land to non-agricultural uses. Principle 6 could imply a limitation if the development of a house was determined to 'unreasonably fetter' adjacent agriculture.

Clearly the introduction of the Policy imposed new limitations on the development of houses in rural areas, which was why transitional arrangements were included to provide a limited opportunity for approval of houses on lots in existence at the time of the commencement of the Draft Policy.

Although the PAL Policy in Principle 5 requires consideration of the conversion of all agricultural land, it does not directly prohibit development of houses on non-prime

land. It also requires a determination of what constitutes appropriate development on non-prime land to be determined through planning schemes.

The issue of land value is undoubtedly impacted by its development potential. Planning schemes play a significant role in influencing market value through changing zoning and the associated development allowed. Land owners' rights to develop are regularly modified by the introduction of new planning schemes or through amendments, some of which are responses to State Policies.

The State Government's valuation process is carried out by the office of the Valuer General. The Valuer-General is the statutory government officer responsible for establishing and maintaining municipal valuation rolls used for local government rating and tax purposes under the *Valuation of Land Act 2001*.

Under the provisions of the *Valuation of Land Act 2001* the Valuer-General is required revalue land within each valuation district within a seven-year period. A six year municipal cycle has been agreed with local government with one-third of Councils having revaluations every two years.

Contracts are let for the supply of statutory valuations to the Valuer-General in respect of all 29 valuation districts in Tasmania.

The legislation also enables a landowner to object to a valuation made by the Valuer-General and provides that in the event of an ongoing dispute, the final determination is made by either the Land Valuation Court or the Supreme Court.

The Act came into force on 28 June 2002 and although essentially the same as its predecessor, the *Land Valuation Act 1971,* has a few new provisions including:

- The Assessed Annual Value, which was previously assessed on a gross basis, is now assessed on a partial net basis, being clear of goods and services tax, council rates and land tax charges;
- Definition of land value has been amended to have regard to heritage issues and improvements which must be retained by law;
- Expanding the time in which a landowner may object to a valuation from 30 days to 60 days;
- Authority given to the Land Valuation Court to make Rules of Court. This can give direction to the parties as to the requirements of the Court.

Part of the valuation process in line with s.23 of the Act, may be a request for detailed information from landowners about the predominant use of the property and development thereon, and the particulars of farming activity. Standard prescribed forms are sent out to landowners for this purpose.

This process of seeking information about the land is not compulsory so the opportunity for input from every landowner is not necessarily provided.

An owner of land who is dissatisfied with a valuation of the land made under section 11, 20, 21 or 44 of the *Valuation of Land Act 2001* may, within 60 days of receipt of a notice under s.27, post or lodge with the Valuer-General an objection, in the prescribed form, against the valuation stating, fully and in detail, the grounds on

which he or she relies and stating any changes to the values specified in that valuation which he or she considers should be made.

Some of the grounds of objection that can be raised are:-
*(a) That the land value, capital value or assessed annual value assigned to any land is too high or too low;*
*(g) That the area, dimensions, or particulars of any land are not correctly described.*

The process of valuation is set out in various provisions of the *Valuation of Land Act 2001* including in 11(3) (b) and 11(4) (b) the land is taken to include any structure that the Valuer-General determines is occupied or is capable of being occupied.

s.11(5) states that for the purposes of this Act, the land value of land is to be assessed in accordance with the following rules:

> ***(a)*** *the land value of land is the capital sum which the fee simple of the land might be expected to realise if offered for sale on such reasonable terms and conditions as a bona fide seller would require, assuming that the improvements, if any, on the land or appertaining to the land, other than land improvements made or acquired by the owner or the owner's predecessor in title, had not been made;*
>
> ***(b)*** *notwithstanding paragraph (a), in determining the land value of any land it is to be assumed that –*
>
> > ***(i)*** *the land may be used, or may continue to be used, for any purpose for which it was being used or for which it could be used, at the date to which the valuation relates; and*
> >
> > ***(ii)*** *any improvements which are required by law to be used for any purpose or to be retained in their present form continue to exist or be made, as so required;*

A summary of the Land Tax situation is set out in the Tasmanian Budget Papers 2006-7 as follows:-

> *Land tax is imposed under the Land Tax Act 2000. It is levied on the basis of three land categories: general; primary production; and principal residence land. However, since 1 July 1996, the rate of tax on principal residence and primary production land has been set at zero, thereby effectively exempting such land from land tax. The land tax scales are currently fixed by the Land Tax Rating Act 2000.*
>
> *The principal residence category applies to land on which there is a dwelling or stratum unit that is occupied as the principal residence of the owner, or a related person as defined by the Act. This category also includes retirement village units occupied as principal residences.*
>
> *The primary production land category applies to land which is used substantially for the business of primary production. It includes land that has been declared a private timber reserve under the Forest Practices Act 1985.*

*General land relates to any land that is not classified as principal residence or primary production land. It includes commercial and industrial land, land used for the rental of residential housing and vacant land. Land tax is calculated on the assessed land value and is payable by the owner of the land as at 1 July each year. The assessed land value is the land value adjusted by a valuation adjustment factor, as determined by the Valuer-General as at 31 March each year, to bring all properties in the State to a common valuation date each year. The valuation adjustment factor for a given municipality is determined for each land category within that municipality and represents an estimate of the general movement in land values since the last full revaluation was undertaken for that municipality.*[51]

## 3.3 Commentary

Clearly changes to planning regimes through local council planning schemes and State Policies effect what can be done on land and that in turn influences the market value of the land.

The *Land Valuation Act 1971* identifies the Assessed Annual Value method (or the annual rental value of a property) as a basis of calculating rates on rural properties. Rate relief can be provided for urban farm land that is the principle means of livelihood for the landowner, used for substantial agriculture or horticulture and is increasing in value because of urban encroachment.

If land is declared to be urban farm land, it is revalued by the Valuer General on the basis that it is not used for any other purpose and this has the effect of reducing the value of land for rating and taxation purposes.

The primary criteria for Government valuation is enshrined in s.11(5)(b)(i) of the Act that states "the land may be used, or may continue to be used, for any purpose for which it was being used or for which it could be used, at the date to which the valuation relates".

This requires a judgement about the potential use of the land and that directly relates to land use planning controls in place. There is however, no explicit requirement for the valuers to consult planning professionals or the local council as to the uses the land could be put to. The basis for their determination of potential uses is unclear.

Even where reference to a planning scheme to determine potential uses has been made this may fail to pick up further restrictions which are the consequence of a State Policy which is in force but not yet implemented through amendments to that planning scheme.

A secondary consideration is in s.11(3) and (4) where value is based on the land including "any structure that the Valuer-General determines is occupied or is capable

1

of being occupied". Again there is no direct requirement to assess the use of any structure for residential purposes under a planning scheme or the Building Code. There is no requirement to determine if the structure is legally approved and can be used for particular purposes.

The consideration of 'potential use' is not easy to determine even if the planning scheme and implications of a State Policy are looked at. For example if a dwelling is discretionary under a planning scheme it cannot be considered as equivalent to the 'may be used' criteria in s.11 of the *Valuation of Land Act 2001*.

The phrase 'may be used' or 'could be used' imply an unfettered potential to develop the land for that purpose. Whether that use comes to fruition is largely at the discretion of the landowner. However, a discretionary process under a planning scheme is just as likely to result in a refusal as an approval. The particular circumstances will vary with each piece of land. The concept of 'may be used' is not the same as 'Council may grant a permit'.

Anecdotally, valuers consider the surrounding land use when make a determination of potential use. This is on the basis that a development pattern is likely to continue. It does not take into account the particular constraints on the individual piece of land, where a planning scheme zone might change, and perhaps more relevantly what the land capability is for a specific title.

### 3.4 Possible ways forward

There is no modification to the Policy that could be made to address the issue of rates and land tax reflecting a value for land determined outside of considerations of the PAL Policy. However, the apparent anomaly does add to the confusion of issues and the negative reaction to the Policy's restrictions.

A more prompt implementation of State Policies through planning scheme amendments would provide a single point of information for consideration in the valuation process.

Additionally, the PAL Policy has been misrepresented as being responsible for all refusals by local councils of applications for development of houses in rural areas, when in fact the Policy only explicitly prohibits houses on prime land and then only when a planning scheme has not been reviewed in accordance with the Policy. Obviously the Policy's principles seek to limit the conversion of agricultural land of any classification to non-agricultural uses, but the exact expression of this is a matter for individual councils and the RPDC where changes to planning schemes are made.

Quite clearly the Policy does not prohibit the development of houses on non-prime land, but does seek to limit fettering and interference with agriculture. It is recommended that Guidelines are published which clearly indicate the role of the Policy as one element in rural land development control, and provide guidance on what impacts residential development in rural areas may have on farming activity.

## 4.0 Plantations

### 4.1 Issues raised

Submissions varied in their approach to the relationship of plantations and the State PAL Policy. The inclusion of plantations within the definition of agricultural uses in the Policy was specifically raised, with some submissions seeking to clearly exclude it on the basis of it being a form of forestry, which traditionally has been treated as a different land use in planning schemes. Others supported its retention within the definition or called for a statement of 'emphatic and unambiguous support for plantations'.

A distinction was made by some between small scale 'farm forestry' as part of a broader whole farm plan, and broad scale plantations.

Several submissions stressed that neither local governments nor the Policy itself should determine what crops are grown on agricultural land. Submissions also presented a range of statistics and claims relating to plantations, the class of land they are established on, and their impacts or not on rural society and areas of reputed visual and cultural value.

The issue of Managed Investment Schemes (MIS) was also raised including the statistic that plantations represent less than 1% of the MISs across Australia. MISs have also been used to establish a variety of new agricultural enterprises including orchards (fruit and nuts) and vineyards.

Plantations were also raised in terms of possibly fettering other agricultural uses. Some submissions claimed the nature of plantations impacted negatively on neighbouring agricultural use in a variety of ways including overshadowing, reduction in runoff and water supply, chemical spray drift, and harbouring weeds and wildlife pests.

Submissions also asked whether plantations alienate prime agricultural land through long term impacts on the soil quality and water.

### 4.2 Current situation

The PAL Policy explicitly includes 'intensive tree farming and plantation forestry' in its definition of 'agricultural uses'. This is set against the phrase 'non-agricultural use' which is not defined in the document.

The Policy's purpose is to 'foster sustainable agriculture' which, in this context, can be taken to mean 'foster sustainable agricultural uses'. On the basis of the preceding definition, this is taken as fostering all agricultural uses including intensive tree farming and plantation forestry.

The Policy also indicates in Principle 2 that non-agricultural use and development and some intensive agricultural industries alienate prime agricultural land. 'Agricultural industries' is not defined in the Policy, but the Australian Tax Office refers to it as an

organised commercial business whose purpose is one or more of the activities defined as "agriculture". Agriculture is defined as "viticulture, horticulture, pasturage, apiculture, poultry farming, dairy farming, and other operations connected with the cultivation of the soil, the gathering in of crops and the rearing of livestock."[6]

More significantly the Policy does not define what the adjective 'intensive' means and to which specific activities the term 'some' refers to.

### 4.3 Commentary

The primary way the Policy fosters agriculture is through protecting the soil from alienation by development for non-agricultural uses. This may also be achieved in part by restricting land use conflicts between agricultural and non-agricultural uses.

Consequently the Policy seeks to deliver two specific outcomes, those being the protection of prime agricultural land from conversion to non-agricultural use and the limitation of uses that fetter agricultural uses on all agricultural land. It does not directly seek to support or promote any one agricultural use over another, but its emphasis is on making the agricultural growing medium available into the future and limiting restrictive impacts of neighbouring land uses.

Principle 2 discourages 'intensive' agricultural activity that alienates the soil rather than uses it. In this context if Principle 2 is read in conjunction with the objective of fostering agricultural uses which includes intensive tree farming, it would seem inconsistent to suggest that this specific use could be amongst those 'intensive agricultural industries' that alienate prime agricultural land. It may be 'intensive' in nature but it is using rather than alienating the soil.

Notwithstanding this rationale, the Policy as currently drafted does not provide an explanation of the sorts of 'intensive agricultural industries' that could alienate prime land. Such examples would be useful. This is a matter that should be contained in Guidelines as opposed to the Policy itself, thereby providing clarification as to what types of uses are considered to alienate prime land and consequently how tree farming and plantations are viewed in the light of that.

Tree farming directly uses the soil medium in exactly the same way as most other crops, however it is distinguished from the majority of other crops by the fact that it does not produce an annual harvest. In fact the period for maturing the crop is generally between 15 and 30 years.

Indeed many submissions raised the nature of the crop and its frequency of harvest, implying that prime land should be available only for the production of vegetables for human consumption. This ignores the fact that considerable areas of prime agricultural land in Tasmania are used to grow opium poppies (18,000ha), pyrethrum crops, and flowers.

The shift in the type of crops grown can be quite dynamic as reported by Davey and Maynard in 2003[7]. Trends since 1985 include an increase in wheat at the expense of barley, a relatively constant area for vegetables but potato area up and peas down; a

significant increase in poppy area; and an increase in perennial horticulture – particularly grapes, cherries, apricots and walnuts. The area of poppies increased from around 5,000 hectares in 1985 to over 16,000 hectares in 2002.

However, all of these crops have an annual or short term output which provides more flexibility in viably managing the mix of agricultural uses in response to changes in the commodity markets.

The Policy's objective is to ensure prime land is available for appropriate types of agriculture which require the best soils for successful cropping not intensive agricultural activity which by its nature alienates the soil or removes it from productive use. Tree farming is unique in its cropping characteristics and evidence also indicates that prime agricultural land is not necessarily required for successful plantations.

Submissions indicated the level of increase in areas of farmland now under plantations, including some areas of prime land. Specific submissions from some local councils sought to prohibit plantations on prime agricultural land.

Although the exact figures may be disputed by various parties, it is clear that there has been some expansion and a small amount of prime land has been used for establishing plantations. However, the raw figures of land used for plantations do not reflect that some of the areas may have been in plantation for some time or may have previously been native forests rather than farm land. They do not necessarily reflect take up of cropping or grazing land.

Further to this, the evidence indicates that some of the areas growing plantation forest are part of a mixed or whole farm plan and do not represent broadscale monoculture.

Related to this discussion is the consequence of the recent amendment to the King Island Planning Scheme 1995 which prohibits the establishment of plantations in its Rural Zone. The Resource Planning and Development Commission has accepted legal submission on behalf of the Council that this amendment is not contrary to the State Policy but serves as a qualification to it and is consistent with the overall objective of 'fostering sustainable agriculture' on the basis of the importance of dairying to the economy and the limited amount of land available.

Advice from the Solicitor General obtained by the Department of Justice contradicts this by suggesting that the prohibition of one form of agriculture which is specifically defined in the Policy as an 'agricultural use' acts in contravention of that objective by plainly not fostering that form of agriculture.

It should be noted that although not mapped for land capability, King Island is unlikely to contain any prime agricultural land. Additionally, some planning schemes have developed the concept of 'locally significant agricultural land' which reflects the qualities of land and local climate for growing specific crops.

The issue is whether the Policy needs amendment to clarify that all agricultural uses should be allowed on both prime and non-prime land, with intensive tree farming remaining specifically included in the definition of 'agricultural uses'.

Private Forests Tasmania strongly argues that the intent of the Policy is to enable agricultural uses to be undertaken on agricultural land and that it be amended to make it clear that no local council has the power, within any planning scheme or in issuing a permit, to determine what agricultural uses should be permitted on agricultural land.

Such a modification might appear to shift the emphasis of the Policy from one of ensuring agricultural land is protected from non-agricultural uses and fettering, and thereby facilitating agriculture, to one of ensuring any sort of agriculture can be pursued on agricultural land. This would constitute a Policy proactively promoting a land use (albeit agricultural use) as opposed to protecting a resource (agricultural land).

Currently, the Policy makes it clear that not all agricultural uses are always acceptable on prime land, preferring those that make use of the soil over those that, despite being agriculture, alienate prime land from production. The Policy contemplates exceptions to this, but as a base position, the proposition is generally sound although the issue of tree plantations appears to warrant specific attention. It may be that the Policy could be more explicit in expanding this.

Some submissions referred to the depletion or negative impacts on soils caused by long term tree farming on an intensive basis. Whether or not there is some substance to these claims it needs to be noted that other types of crops and a variety of agricultural regimes may deplete the soil and these may be subject to other policies or management prescriptions outside of this Policy.

Many submissions made reference to the perceived impacts of plantation development on a range of environmental, social and financial issues. These included the changes to the landscape from conversion of open grazing or dairying farmland to an intensive monoculture of trees; changing demographics and social structures of rural settlements; and the role of Managed Investment Schemes in encouraging conversion of farms to plantations. All of these issues are unrelated to the objective of the Policy to ensure agricultural land is generally available for a variety of agricultural activity and farming (including tree plantations) and such activity is largely unfettered.

The range of consequences ‘sheeted home’ to plantation development could equally be the result of any number of changes to the types of crops grown or agricultural management techniques pursued. They are not relevant considerations for this Policy review.

## 4.4 Possible ways forward

The ambit of the Policy is not to deal with a whole range of sustainable agricultural practices or the sustainability of rural communities. The Policy has a role in ensuring sustainable agriculture is possible through protecting the soil, particularly if classified as prime, from alienation to non-agricultural uses.

The Policy should not be modified to become a ‘Policy on Sustainable Farming’ through attempting to deal with detailed agricultural practices even to the point of

making provisions which refer to protecting or improving the soil structure subject to agriculture.

The Policy should remain one that primarily seeks to protect the soil resource for appropriate types of agricultural use rather than promotes any particular agricultural methodology.

Suggestions that the Policy should be amended to specify no planning scheme can restrict any form of agriculture in any location seems to ignore the fact that the Policy already places some restrictions on certain forms of agriculture on prime land. Indeed recommendations in relation to 'controlled environment agriculture' made in section 6.4 of this paper seek to introduce discretionary powers for local councils to approve these uses despite their alienation of prime land. So the Policy clearly makes distinctions about some forms of agricultural uses, but only in relation to their appropriate use of prime land soils.

Nevertheless there is merit in reinforcing the general intent of the Policy to make viable areas of prime agricultural land available for agricultural uses that rely on the soil for growth

To this end an additional Principle could be introduced as follows:
*A planning scheme must not prohibit an agricultural use on land zoned for rural purposes where the use depends on the soil as the growth medium.*

The issue of plantation forestry on prime agricultural land remains problematic. On the one hand the area of prime land being used for the establishment of plantations is small, while on the other hand there is merit in the arguments that despite being a form of agriculture that depends on the soil as the growth medium, the cropping cycle for trees is such that plantations do restrict the best use of the relatively rare soils.

The land capability classification system is based largely on the productive capacity of the land, with prime agricultural land being that which can support cropping. By exception food crops are largely not viable on non-prime land. Plantation forestry in contrast is very successful on non-prime land with the clear majority being established on Class 4 and 5 land.

In conclusion there is some evidence to support consideration of limiting further establishment of plantations on the rare prime agricultural land even though this appears to contradict the general position of the Policy not acting to differentiate between types of crops. The case is based on the combination of the fact that the prime agricultural land is neither required nor preferred for new plantations, the cropping cycle limits the flexibility of farmers to move to other crops annually, and tree plantations are different to food source crops that actually require prime land as they cannot be grown on non prime land.

Any restrictions on plantations should however acknowledge that prime and non prime lands do not neatly follow property boundaries and some flexibility and pragmatic controls need to be provided to allow small areas of prime land to still be used.

To this end an additional Principle could be introduced as follows:
*New plantation forestry should not be established on prime agricultural land except where it can be demonstrated that it is required for pragmatic farm management and will not unreasonably remove that land from use for other crops.*

## 5.0 Integral Use

### 5.1 Issues raised

The concept of integral use is set out in Principle 3 of the State Policy, which states that any building integral to an agricultural use on prime land is considered to be consistent with the Policy.

The issue of whether a use is integral was raised in submissions detailing deliberations by Councils and the Planning Appeal Tribunal on applications to establish houses on prime land. Some specific planning scheme provisions require a house to be related to agricultural use even on non-prime land. Submissions indicated that the term 'integral' needs clarification and that there should be a more liberal interpretation of its strict application.

Some submissions suggested that it is easier to prove a house is integral to a farming operation on prime agricultural land as its intensity is more likely to be a full time farming operation, than on lower class land, where the agriculture pursuit may be part-time. This has the consequence of allowing more development of houses on prime land, which was seen by some as unwittingly converting prime land to non-agricultural use.

Other submissions indicated that limitations of the development of dwellings on small lots and non-prime land restricts the opportunities for establishing new agricultural enterprises and that this is therefore contrary to the objective of the Policy in 'fostering sustainable development of agriculture'. A further concern was that planning officers in local councils were making a determination on whether a proposed enterprise was integral on the basis of its viability, without being qualified to do so.

### 5.2 Current situation

The PAL Policy makes reference to integral use in Principal 3 which states:

> *Use or development of any building that is an integral part of an agricultural use on prime agricultural land will be determined to be consistent with this Policy.*

Neither the term 'integral' nor 'integral use' is defined within the Policy.

### 5.3 Commentary

Although neither the term 'integral' nor 'integral use' is defined within the Policy, the concept, along with similar terms such as 'ancillary' and 'subservient' feature in many decisions by the Courts and Tribunals dealing with planning matters.

A number of references in Tasmanian legal cases dealing with 'integral' use or development relate specifically to the State PAL Policy. In an Agenda Paper to the Burnie City Council on an application for a planning permit in a rural area, the issue

of whether a use was integral related to determining if it had a separate purpose or intent aside from the agricultural use of the land. In essence, to be considered 'integral', it was considered necessary for the proposed activity to be indistinguishable from the primary agricultural use and necessary for carrying out the agricultural activity.

In Judgment J261/98 the Tasmanian Resource Management and Planning Appeal Tribunal accepted argument that a house might be ancillary or incidental (integral) where it is occupied in order to allow development of agriculture on the property as opposed to the agriculture being carried out simply to justify the existence of the house. That distinction appears to relate to the seriousness of the agricultural pursuit. The interesting aspect of this is that it doesn't require the house to be integral to a specific aspect of the agriculture, unlike a barn or storage shed, but simply required to enable the agricultural enterprise as a whole to be better enhanced.

Similarly the issue was aired in another Tribunal judgement in 2005. Here it was held that "it was common ground between the parties, and the Tribunal accepts, that the appropriate dictionary definition of 'integral' is that in the Macquarie Dictionary: 'of or necessary to a whole'. Further, that the definition of 'subservient' is (means) 'subordinate'. (RMPAT J233/2005)

What is clear is that for an activity to be integral, it must be a necessary part of the primary operation, which if not present, would inhibit the operation of that primary activity. It is not the same concept as a secondary or minor use, which is a different use playing a subservient role.

The consequences of accepting a use as integral is that it has no separate status as another use. It is not just dependent in a legal sense on the primary use it is the same use and cannot exist alone. If the use ceases then the integral part must also cease as there are no other parts of the use for it to be integral too.

This concept is relatively straightforward in some circumstances. A cafeteria may well be integral to a factory to provide hospitality facilities for the workers, but if the factory closes down the cafeteria cannot continue to operate in its own right. A car park may form part of an office development but if the office is vacant then the car park cannot continue to operate (legally) by providing parking for people who work in other offices. If it did so it would effectively become a commercial car parking business unrelated to the office development that it was integral too initially. This is not to say that either example may not be acceptable in planning terms but it would require a separate planning permit for the particular use to operate in that way.

In respect of the PAL State Policy it is apparent that the issue of integral development almost universally arises in applications for houses in rural areas and particularly on prime agricultural land. This is no doubt a direct consequence of the wording of Principle 3, which states:

> *3. Use or development of any building that is an integral part of an agricultural use on prime agricultural land will be determined to be consistent with this Policy.*

Some clarification for its intent may be derived from the immediately preceding Principle - Principle 2. which address how some development alienates land and how houses cannot be permitted on prime land unless the planning scheme has been reviewed. In this context Principle 3 might be seen to add clarification about development on prime land which is not making use of the soil, or alienates it by building on it, but is an integral part of the agriculture. In brief the intent of Principle 3 seems to be in ensuring that Principle 2 is not taken as prohibiting sheds or other agricultural support buildings required for the agriculture but not using the soil itself.

The application of this Principle to houses seems more problematic. It raises the whole question of whether houses can be considered as a necessary part of an agricultural endeavour under any circumstances particularly where much contemporary farming is mechanised and accessibility from nearby towns by car is relatively easy.

In the United Kingdom there are strict national controls on building houses on farms including the requirement for comprehensive assessments that consider the scale, viability and details of the farming operations; the labour requirements of the farm, including the need for specialist workers and the level of attention needed outside normal hours; the existing residential accommodation on the farm; and the existing development opportunities on the farm.

Interestingly many of the applications for houses in rural areas in Tasmania are in the form of new applications, often restricted to a house only, on land already being farmed. Theoretically, if any development is an integral part of an agricultural use, it is classified as that use and it cannot be granted a permit as another sort of use. The applicant would need to demonstrate a considerable change in the agricultural activity to warrant development of a new house. This is consistent with the Tribunal's ruling in J261/98.

Accordingly, if it can be agreed that the nature of the activities on the land warrant a permanent residential occupation, then any approval for a dwelling on the land must be given as if the dwelling were agriculture not residential.

The dilemma with including the concept of 'integral' in the Policy is that as a clearly understood concept it shouldn't even require separate explanation. In planning law an integral use or development is one and the same as the main use or development and it might be considered unnecessary to even mention it. However, in the context of the Principle 2, it seems that some clarification would be desirable as to what is acceptable development on prime agricultural land where the development itself alienates the soil through building on it.

This suggests that Principle 3 requires detailed explanation and guidance on its application. Publication of such a guideline would reduce the prevalence of isolated determinations as to the meaning and compliance with this Principle. This would be similar to the issue of the Guideline by the RPDC on the community benefit test required in relation to Principle 4. The head of power to introduce guidelines to inform the application of the Policy is provided in Part 4. of the Policy.

## 5.4 Possible ways forward

Principle 3 of the Policy should remain but consideration should be given to amending it to include references to the sorts of ‘integral development’ that are more consistent with normal agricultural operations, and/ or to defining the term ‘integral’ within the Policy.

A possible definition is as follows:

**Integral use or development**
“Integral use or development” means a use or development that is a necessary part of an agricultural use. It will vary on a case by case basis but generally may include farm sheds, storage areas, barns and the like, water storage areas, and dairies. Houses and workers accommodation are generally not considered to be integral except in situations of intensive agricultural operations requiring significant on-site supervision.

A Guideline should be drafted that explains the reasoning for detailing ‘integral use or development’. This should include explanation of the term and a set of criteria for determining if a proposal can be construed as ‘integral’, similar to that used in the United Kingdom.

Additionally the issue of residential use in rural areas may require separate consideration rather than being dealt with under Principle 3.

## 6.0 New agricultural practices

### 6.1 Issues raised

A few submissions raised the issue of the Policy recognising the changing nature and range of agricultural practices. The Department of Economic Development and Tourism urges consideration be given to the effect the Protection of Agricultural Land State Policy may have on modern and contemporary agricultural and farming practices, including Controlled Environment Agriculture (CEA) and intensive animal husbandry.

'Controlled environment agriculture' refers to growing crops within glass houses or similar structures. One submission indicated that a broader consideration of the suitability of land for this use was required which took into account the shared use of existing farming infrastructure, which might not be allowed under a strict interpretation of the current Policy.

### 6.2 Current situation

The PAL Policy makes no specific reference to 'controlled environment agriculture'. Principle 2 raises the issue of some 'intensive agricultural industries' alienating prime agricultural land. This concept is not defined so it is unclear if 'controlled environment agriculture' would be considered as such an example of 'intensive agricultural industries'.

### 6.3 Commentary

'Controlled environment agriculture' (CEA) refers to any production system which reduces the impact of climatic and environmental variability on the production process. Examples of this include growing crops within greenhouses or similar structures. In the draft PAL Policy prepared in 1998, the definition of 'agricultural uses' specifically excluded "intensive animal feedlots, piggeries and poultry farms and plant nurseries based on either hydroponics or imported growth media".

This definition was modified in the October 2000 Policy to include all forms of animal and crop production. The Principles then make distinctions about particular forms of agriculture such as 'some intensive agricultural industries'. This provides for a less definitive exclusion.

In other states of Australia CEA agricultural products generally compete with soil based products because the climate allows them to grow in open fields however in Tasmania they tend to expand the range of crops beyond those already grown to include those normally limited by climatic restrictions. In the majority of cases these products are grown specifically for export (including interstate) markets.

Reports on the advantages of hydroponics and other controlled environment agriculture indicate that good quality soil is not (generally) a requirement and

therefore lower cost land can be utilised for production[8]. Hydroponics also have a smaller land area requirement than conventional soil based systems and use less water, have lower labour requirements and generally lower costs for production and harvesting[9].

Opinion suggests that because it uses less chemicals, and because runoff, smell and noise can be appropriately managed, CEA has the potential to be accommodated in urban or urban fringe areas where traditional agriculture has been displaced.

Further advice suggests that there may be synergies and economic efficiencies to be gained from locating CEA on existing farms where it may or may not involve prime land. The issue then is whether these CEA developments alienate land from productive use and therefore might be seen as contravening the objectives of the PAL Policy.

There is now a trend in large scale CEA developments internationally and within Australia, driven by market demand for premium fresh produce. High capital costs in establishing new agricultural ventures result in the establishment of large scale developments, between 5 and 20 hectares (usually as staged developments), being the most cost effective and efficient to operate.

These enterprises are generally located on large, flat acreages with a temperate climate. The most suitable area in Tasmania is a relatively narrow band along the State's north-west coast which according to the Department of Economic Development and Tourism is comparable with other prime international locations for CEA production. As these enterprises are also generally focussed on export markets, proximity to a commercial port is also an important consideration.

This strip includes some areas of prime agricultural land. However the requirement for large areas of flat land (5 to 20 Hectares) effectively limits the potentially viable locations and sites within this region.

The Department indicates that it is important for Tasmania to take advantage of the economic development opportunity this represents, both in terms of the local economy and export opportunities and urges that the PAL State Policy does not place further, undue limitations on the establishment of these enterprises.

It appears that some or probably the majority of these CEA operations do not actually make use of the soil and in some way build over it. However, unlike conversion to non-agricultural use such as residential, the structures might be seen as less permanent and the use more justified through relation to the broad farming land use. In short the alienation of land could be both qualified and conceivably reversible.

The Department of Economic Development and Tourism also suggests that PAL Policy should provide for exceptional consideration of 'intensive animal husbandry' on prime land opining that such enterprises (such as piggeries and feedlots) need to be sited in non-urban settings at a considerable distance from residences and involve the establishment of structures such as concrete pads and covered pens, or open air pens, on flat agricultural land.

The Department submits that the PAL Policy should recognise the economic importance of these enterprises, from both an export and local economic development point of view. In particular that it should provide an opportunity for these enterprises to be considered for development on non-prime agricultural land, and in some instances on prime agricultural land.

It points out that while these enterprises are not necessarily reliant on the productive capacity of the soils on the land in question, other factors such as the availability of suitable flat land and its separation from residences may necessitate consideration of these enterprises on prime agricultural land.

Notwithstanding these submissions there is a fundamental inconsistency between the characteristics of many of these proposals which alienate prime land and the central notion of protecting the best land to foster agriculture, as expressed in Principles 1 and 2. There may well be overriding or persuasive arguments for allowing these to be developed on prime land in exceptional circumstances, but to seek to directly provide for these generally in the Policy, as though they were equivalent to other forms of agriculture, might present an internal inconsistency that would undermine the Policy's integrity.

There does seem to be a more compelling argument to allow CEA to locate on prime land. These enterprises are not always disconnected from the productive capacity of the soil unlike intensive animal husbandry. The nature of the physical structures is less permanent and the types of produce are directly comparable to normal cropping on the prime land (eg. vegetable production) and thereby fit better with existing operations and cropping regimes. The specific band of microclimate is also limited to an area of Tasmania rich in prime land, whereas climatic circumstances are far less of an issue with intensive animal husbandry.

This distinction suggests that CEA enterprises be treated differently in the Policy.

In regard to the development of either form of agriculture on non-prime agricultural land, the current Policy is flexible in relation to local councils determining what uses might be allowable on non-prime land, and as such these forms of development can be assessed against a range of appropriate local conditions. Where they might be proposed on prime land, the Policy may need to put in place a process through which exceptional circumstances can be demonstrated to allow for the alienation of the soil resource.

The current Policy has specific provisions for considering public utility and infrastructure developments that might alienate prime land based around a community benefit test. Where a CEA development is proposed on prime land its appropriateness may be a function of its planned longevity, its locational requirements particularly in respect of microclimate, links to existing infrastructure, proximity to markets, labour, and for management and other functional synergies.

If an overriding argument based on these considerations can be made to support the alienation of the soil for the development of CEA, then provision should be made to put this case and planning authorities given discretion to approve such proposals.

Notwithstanding this, there may be scope for allowing very small CEA developments to establish on prime land as permitted developments where they are closely linked to existing agricultural activity on the land. A suitable size limit should apply to ensure only a small amount of land is taken up.

Where a proposal is for intensive animal husbandry on prime land, the justification requires a far more rigorous test combining consideration of a range of planning matters. The Policy can flag that notwithstanding these developments alienate prime land, there may be exceptional circumstances that warrant permitting that alienation but that approval is required by means of referral beyond the local planning authority.

### 6.4 Possible ways forward

The Policy should be amended to define ‘controlled environment agriculture’ and an additional clause be introduced that allows this use to be allowed on prime agricultural land where a proposal can demonstrate performance against a predetermined set of criteria or guidelines. CEA might be permitted where it takes up no more land than 200m$^2$.

Introducing assessment which takes into account the economic effects of development along with the social and environmental effects is of course consistent with the requirements for decision makers set out in the Objectives of the *Land Use Planning and Approvals Act 1993* (Schedule 1 Part 2 (c)).

A possible definition follows:
**Controlled environment agriculture**
“Controlled environment agriculture” means an agricultural use carried out within some form of built structure whether temporary or permanent which mitigates the effect of the natural environment and climate. These include production techniques that may or may not use imported growth medium.

It is also recommended that the current definition of agricultural use is expanded to include ‘controlled environment agriculture’ to ensure it is clearly accepted as a form of agriculture and not considered as a ‘non-agricultural use’.

**Agricultural uses**
"agricultural uses" means animal and crop production and includes controlled environment agriculture, intensive tree farming and plantation forestry.

It is also recommended that Principles 2 is amended to make specific reference to this form of agriculture.

> *Principle 2. Houses and other non agricultural use and development and some controlled environment and intensive agricultural industries alienate prime agricultural land.*

Principle 4 should be amended to separate the CEA from utilities (which are discussed in the next part of this paper) other significant economic proposals. A new

Principle should be drafted to allow for CAE development under certain circumstances. Suggested amendments are as follows:

> *Principle 4. (See amendments proposed in next part of this paper separating utilities from other proposals of significant economic benefit).*
>
> *New Principle. Planning Schemes may allow the development of controlled environment agriculture on prime agricultural land where the location is the most suitable option and required for efficient operation, and the scale of development and the impacts of operation on the surrounding environment are minimised.*

A new Principle which deals with the proposals of significant economic benefit is also suggested as the test and process is different to that recommended for either public utilities or CEAs. As follows:

> *New Principle. Other proposals of significant economic benefit to the region that may cause prime agricultural land to be converted to non-agricultural use, will require a specific amendment to a planning scheme based on consideration of the social, environmental and economic costs and benefits to the community.*

An additional Guideline should be drafted that sets out the mechanics for both the CEA suitability test and the social, environmental and economic costs and benefits test for other proposals, similar to that which has been issued by the RPDC in relation to the community benefit test for infrastructure.

## 7.0 Community benefit of public utilities and infrastructure

### 7.1 Issues raised

The DIER submission raised concern about the current Policy requirement, under Principle 4, for the provision of public utilities and other physical infrastructure to be referred to the RPDC for its confirmation that there "is an overriding need for a use or development for community benefit and a suitable alternative site is not available".

DIER submitted this is time consuming and unnecessary for projects which by their very nature are almost inevitably in the public interest.

DIER also raised concerns at the limited scope of the term 'public' in the phrase 'public utilities and other infrastructure' as it might preclude the increasing number of private companies that provide publicly accessible infrastructure.

The suggestion is to use the term 'open access infrastructure' which can be provided by either public or private organisations.

### 7.2 Current situation

The PAL Policy indicates in Principle 2 that non-agricultural uses alienate prime agricultural land. It does provide for exceptions to this in Principle 4 which sets up a process for the RPDC to confirm an overriding community benefit before allowing a planning authority to consider an application.

Principle 4 indicates three sorts of proposals that can be assessed. These are 'public utilities', 'other physical infrastructure', and proposals of 'significant economic benefit to the region'.

The conversion of prime agricultural land for any of these proposals must pass two tests. It must comply with the planning scheme or amendment, and it must have approval from the RPDC which confirms an overriding need for community benefit.

To assist with interpreting this Principle a Guideline was issued by the RPDC with the approval of the Minister for Environment and Planning under Paragraph 4 of the *State Policy on the Protection of Agricultural Land 2000* effective from 30 August 2005.

The Guideline indicates that there is a sequence for achieving these two requirements. It states "the first consideration that must be made is whether or not the application satisfies the requirements of Principle 4(ii)" (ie. the RPDC confirmation).

> "It is essential that this determination is made prior to lodgment with the planning authority of an application under Section 57 or 58 of the Land Use Planning and Approvals Act 1993 (the Act), so that the 42 day determination period provided for in Section 57(6)(b) or 58(2) of the Act does not commence until the Commission has made its determination."

The Guideline states that if the confirmation from the RPDC is not provided the planning authority must refuse the application. In the ‘Procedure’ section of the Guideline this is expressed as “the planning authority cannot consider the application”.

The Guideline provides explanation of the means for the RPDC testing significant economic benefit for the region, overriding need and community benefit, and alternative siting.

The ‘Procedure’ section also sets out the information requirements of the RPDC for assessment of a proposed development against these criteria.

### 7.3 Commentary

There are a number of issues concerning the internal consistency of Principle 4 and its operation under the Guideline.

Firstly, if a proposal needs to comply with a planning scheme, and the planning scheme is already amended to give effect to the PAL State Policy, then it is difficult to see why a further sign off by the RPDC is required, even if the alienation of prime agricultural land would occur.

Presumably the wording “comply with the planning scheme or amendment” predicts that there may be occasions where it doesn’t comply with a planning scheme and an amendment is required to allow it. Where an amendment is required then it would appear that if the application were to be considered under s.43A, the RPDC would test the merits of it (including community benefit) through the amendment process. In which case the referral process outlined in Principle 4 is either redundant or a duplication.

The application of Principle 2 provides a parallel. In Principle 2, houses (which are also indicated as alienating prime land) are only allowed where the planning scheme has been amended through due process. The Policy does not require referral to the RPDC outside of the amendment process. The requirement is consistent with the general application of a State Policy by implementation through planning schemes.

The second issue is that the RPDC referral process, despite the explanation in the Guideline, is an internal administrative process without any normal access, transparency or review rights. It is also a pre-lodgement requirement the equivalent of seeking land owner consent on applications dealing with Crown Land. There must be concerns with the procedural fairness of this process.

Notwithstanding these procedural issues, DIER submits that while it supports the notion that community benefit is an appropriate test for the conversion of agricultural land it considers it difficult to imagine circumstances where the development of public utilities and other major infrastructure would not be of public benefit.

DIER suggests that appropriate criteria could be included in the Policy (they are set out in the Guideline) to enable the local planning authority to determine compliance.

DIER does not make submission about other development proposals which are also covered by Principle 4.

This issue relates to the structure of State Policies more generally. If State Policies are viewed as being implemented through planning schemes and other statutory tools and the Principles are advisory to drafting those planning schemes, then it is questionable whether they should contain operational mechanisms for consideration of developments outside of the planning schemes. This seems to perpetuate a self executing nature in respect of individual developments.

In relation to the possible limitation of the utilities or infrastructure to those provided by ‘public’ organisations, it is accepted that there is an increasing number of private companies providing basic infrastructure. The terminology should be amended to capture any provider of publicly accessible infrastructure.

### 7.4 **Possible ways forward**

Principle 4 is probably best divided to separate out those public utilities and infrastructure developments for the broader projects of significant economic benefit.

The Principle might indicate that those utilities and infrastructure should be dealt with in planning schemes subject to strict performance assessment, and a process of amendment of a planning scheme is required for other significant BUT non-infrastructure proposals.

Where other proposals of significant economic benefit are proposed which are not already allowed under the planning scheme amended to be consistent with the Policy, an amendment to a planning scheme would be required and any such approval would depend on a demonstrated community benefit by assessing the social, environmental and economic costs and benefits.

Where possible there is a need to remove machinery clauses from the Policy, which rely on detailed processes outside of normal planning scheme provisions. Therefore it is suggested that for proposals outside of those allowed by a planning scheme (ie. not utilities or infrastructure), the community benefit test is carried out by the RPDC not as an administrative pre-lodgement process, but as part of a normal amendment to a planning scheme, albeit in most cases a site specific one.

Changes to the terminology should also be made to reflect the concept of ‘open access infrastructure’, which may also need an accompanying definition.

A suggested revision of Principle 4. is:

> Planning Schemes may allow the development of public utilities or other open access infrastructure on prime agricultural land where they minimise the amount of land converted to a non-agricultural use, they do not unreasonably fetter agricultural uses, and where the location is the most suitable option and required for efficient operation of the service.

This removes the current referral to the RPDC as set out in Principle 4. The replacement arrangement places the onus on the planning authority and RPDC to make a determination of proposals which have this ‘overriding community benefit’ in a more generic sense through allowing them as discretionary uses in planning schemes. Both the designation of uses and the criteria for testing them as exceptions to protecting prime agricultural land at all costs, would be tested through the planning scheme or amendment drafting processes set out in LUPAA.

The current Guideline issued by the RPDC in relation to the community benefit test for infrastructure, could be redrafted to set out the mechanics of such a test that should be provided in a planning scheme. Alternatively a model planning scheme provision consistent with PD1 could be provided for inclusion in planning schemes.

In essence this relaxes the process for assessing public utilities and infrastructure on prime land through allowing direct assessment under planning schemes subject to strict criteria, but tightens and formalises the exceptions for other significant economic projects through requiring a site specific amendment rather than a peculiar referral to the RPDC.

The proposed inclusion of a new definition for open access infrastructure is as follows:

> “open access infrastructure” means infrastructure providing services such as, but not limited to, water, sewerage, energy, transport, and communication, which are open to third party access whether provided by a public or private entity.

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[1] NSW Dept. of Primary Industries. ………..
[2] NSW Dept of Primary Industr
[3] Protection of Agricultural Activity Act, Tasmania.
[4] Waratah Wynyard Planning Scheme…………..
[5] Budget Overview. Budget Paper No.1 2006-7
[6] Australian Tax Office.
[7] Davey and Maynard. 2003
[8] (Carruthers, 2001)
[9] (Hassell and Assoc, 2001)