

Environment & Planning Update



The fallout from Henry Design; how are developments to be assessed against Planning Schemes?

Henry Design & Consulting v Clarence City Council & Ors [2017] TASRMPAT 11 (**Henry Designs**) was handed down by the Resource Management and Planning Appeal Tribunal (**Tribunal**) on 7 July 2017. The Tribunal held that an acceptable solution is not relevant in considering whether a proposal meets a corresponding performance criteria. The decision has given rise to considerable debate. A series of later decisions¹ have crystallised the Tribunal's position in that respect, establishing what is commonly referred to as the *Henry Designs* principle.²

The *Henry Designs* principle seeks to preclude arguments relating to the degree of non-compliance with the acceptable solution as being a consideration or 'starting point' for performing an assessment against performance criteria. For example, "the proposal is double the permitted height limit"³, or conversely, the proposal is only a minor departure from the permitted building envelope.

In the assessment process established by the Interim Schemes, the building blocks are 'acceptable solutions' and 'performance criteria'. As a general rule, a planning issue (height, setbacks etc.) will have an acceptable solution and corresponding performance criteria, as below:

14.4 Development Standards for Buildings and Works

14.4.1 Building Height

Objective:	
To ensure that <u>building height</u> contributes positively to the landscape character and does not result in unreasonable impact on <u>residential amenity</u> of adjoining land.	
Acceptable Solutions	Performance Criteria
A1	P1
<u>Building height</u> must not be more than: 7.5 m.	Building height must satisfy all of the following: (a) be consistent with any Desired Future Character Statements provided for the area or, if no such statements are provided, have regard to the landscape of the area; (b) be sufficient to prevent unreasonable adverse impacts on residential amenity on adjoining lots by: (i) overlooking and loss of privacy; (ii) visual impact when viewed from adjoining lots, due to bulk and height; (c) be reasonably necessary due to the slope of the site; (d) be no more than 8.5 m.

For a proposal to meet the requirements of the planning scheme in Tasmania, it must satisfy all applicable acceptable solutions or corresponding performance criteria.

¹ The most recent of which was handed down on 26 April 2018.

² *N Mamic v Hobart City Council* [2018] TASRMPAT 5 at [49].

³ *9 Sandy Bay Road Pty Ltd v Hobart City Council & Ors* [2017] TASRMPAT 19 – assertion made by the Appellant's opposing the development.

Henry Designs

Henry Designs represents a departure from what had been the generally accepted practice up until that point.

Prior to *Henry Designs*, *A Rowell v Clarence City Council*⁴ (**Rowell**) was the leading Tribunal decision which established that the acceptable solution was a reasonable benchmark for considering whether the proposal met the performance criteria.

Henry Designs involved a refusal of a permit for the demolition of a single dwelling and construction of four new dwellings on a single lot in Howrah. Clarence City Council refused the development on the basis that the new dwellings were not compatible with the density of the surrounding area.

The acceptable solution required multiple dwellings to have a minimum site area of no less than 325m² per dwelling. The Tribunal held that the degree of variation from 325m² was irrelevant in considering the performance criteria, although this was in the context that the acceptable solution did not reflect the actual density in that area. In doing so, it established that the performance criteria is a “free-standing” test that has no relationship to the acceptable solution.

Subsequent Tribunal Decisions

Since *Henry Designs* was handed down, there have been four decisions that reaffirm the Tribunal’s position in respect of the relationship between acceptable solutions and performance criteria, including:

- [C Boland v Clarence City Council and Anor \[2018\] TASRMPAT 4](#)
- [N Mamic v Hobart City Council \[2018\] TASRMPAT 5](#)
- [The House Family Office Pty Ltd v Hobart City Council \[2018\] TASRMPAT 6](#)
- [R Kasem v Hobart City Council & Ors \[2018\] TASRMPAT 8](#)

In all four decisions, the Tribunal applied *Henry Designs* in preference to *Rowell* and in doing so held that the principle applied to all controls, not just density or where the acceptable solution is quantitative in nature.

What are the implications of these decisions?

The Tribunal decisions equate the acceptable solution to an irrelevant consideration. This concept is drawn from administrative law and it is generally accepted that an irrelevant matter is one which the decision maker is forbidden from considering (s.17 (2)(e) and 20(a) of the *Judicial Review Act 2000*). If the decision maker does have regard to an irrelevant consideration, the decision may be invalid.

By way of example, a registered covenant that restricts building height is an irrelevant matter when assessing an application against performance criteria that regulates height. The covenant is not made relevant by the planning regime in Tasmania. However, can the same be said for acceptable solutions and performance criteria, which read together, form a single planning control?

Had the Tribunal restricted its conclusion to preventing the acceptable solution from being used as a ‘benchmark’ or starting point for assessment against performance criteria, in our view that would have been maintainable. However, for a court to determine that an acceptable solution is a wholly irrelevant consideration is, in our view, setting a high bar.

What should I do as a result of this decision?

The Tribunal’s application of the *Henry Designs* principle is currently subject to one (possibly two) challenges to the Supreme Court.

⁴ [2012] TASRMPAT 94

As the decisions of the Tribunal stand, project managers, consultants, proponents and planning authorities that are called upon to assess proposals against performance criteria should:

1. avoid referencing / referring to the corresponding acceptable solution in that assessment; and
2. approach performance criteria as 'standalone' control.⁵

It has been suggested that this principle places a heavy burden on planning authorities to undertake a more detailed assessment and will require more supporting material from proponents. Alternatively, it may favour developers where there are considerable discrepancies between the quantitative acceptable solution and the proposed development as it precludes assertions such as "the proposal is double the permitted height" – which have proved persuasive in the past.

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⁵ Subject to having regard to the relevant objective in an applicable standard which can be used to assist in determining whether or not a proposal complies with a performance criteria.