



# PRACTICE DIRECTIONS OF THE RESOURCE MANAGEMENT AND PLANNING APPEAL TRIBUNAL

Amended: 6 August 2020

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**The Practice Directions contain important information about legal proceedings and as such you are expected to be familiar with them and should ensure you read them thoroughly and seek advice if necessary.**

## **Glossary of Terms**

|                     |   |
|---------------------|---|
| Adjournment         | An adjournment is the cancellation of a formal listing or hearing date. It can also be the interruption of a hearing in order for a break to occur for the parties or Tribunal to confer.   |
| ADR                 | ADR means a range of other dispute resolution processes other than the parties appearing before a Judge or Panel in an adversarial hearing. The options available in Alternative Dispute Resolution include mediation, conciliation or neutral expert evaluation. Please refer to <i>Practice Direction 5</i> for further details of those options. |
| Appeal Tribunal Act | <i>Resource Management and Planning Appeal Tribunal Act 1993.</i>   |
| Appellant           | An Appellant is a person who has commenced appeal proceedings in the Tribunal.  |
| Applicant           | An Applicant is a person who has made an application, whether it be an Application for Use or Development or an application for a direction or decision from the Tribunal.  |
| Direction           | A direction is a formal order of the Tribunal for a party to undertake a course of action.  |
| EMPCA               | <i>Environmental Management &amp; Pollution Control Act 1994</i>  |
| Land Use Act        | <i>Land Use Planning &amp; Approvals Act 1993</i>   |
| Planning Authority  | A Planning Authority is the decision-maker who is empowered to determine whether a planning permit should issue. Ordinarily, that is a local Council but there can be statutory bodies created which are granted planning authority powers.   |
| Respondent          | The Respondent is a person who has been made a party to the proceedings and who is responding to the appeal or the application. Normally, a Respondent is the body who made the decision (such as a Council) and/or the person who made the initial application which gave rise to the appeal (the Developer).                                      |

## Practice Direction 1: General – Please Read First

- 1.1** The Practice Directions of the Tribunal are made pursuant to Section 16 of the *Appeal Tribunal Act*.

They are to be complied with, unless a party has sought permission of the Tribunal to vary them (see *Practice Direction 3 - Procedures*).

- 1.2** The Tribunal's processes are legal proceedings which determine disputes having regard to the relevant law and the evidence presented by parties to those proceedings.
- 1.3** It is not a political process. Lobbying or weight of numbers is not a relevant factor in reaching a decision. You must not attempt to privately approach the Chairperson, Presiding Member or Members of the Tribunal Panel to discuss proceedings at any time.
- 1.4** The Tribunal is not an investigating body such as the Ombudsman or the Police, where a complaint is lodged and the matter is then investigated by that body of its own volition.
- 1.5** If you apply to become a party to proceedings before the Tribunal you are seeking to present a case to the Tribunal. You will be expected to comply with procedural requirements and actively present a case (preparing grounds of appeal, preparing evidence to present in the Tribunal and complying with all directions made by the Tribunal etc).
- 1.6** The Tribunal staff may not provide legal advice. They may only provide procedural assistance. If you have questions about the merits of your case, or seeking help in how to conduct your case, the Tribunal has a list of professional people who offer a free initial consultation of 15 minutes over the telephone to persons referred to them by the Tribunal.
- 1.7** At the end of legal proceedings the Tribunal must make an order regarding the costs that people incur as part of the appeal process. You should read *Practice Direction 15* regarding costs carefully and if necessary take advice. Apart from a filing fee the Tribunal does not charge the parties any costs or fees but orders may be made requiring one party to pay the costs of another party.
- 1.8** You must attend all appointments and hearings of the Tribunal which are listed during normal working hours. You may appoint representatives to appear on your behalf, however, you should read carefully the Practice Directions related to representation before the Tribunal (*Practice Direction 11: Representatives and Witnesses*) and comply with its requirements. A failure to attend any duly convened hearing may result in your proceedings being dismissed, your status as a party revoked and/or costs awarded against you.
- 1.9** Tribunal proceedings must be given priority. Holidays and work commitments are secondary to attending proceedings before the Tribunal and to complying

with Tribunal directions. Only exceptional circumstances may give rise to variations to the hearing of proceedings (see *Practice Direction 3 – Procedures*).

- I.10** All material submitted as part of your involvement in proceedings before the Tribunal are public documents and can be made available to the public for inspection.
- I.11** Please note the Tribunal has a 90 day timeframe within which to hear and determine any appeal. See Section 16 (1) (f) of the Appeal Tribunal Act. As such the Tribunal will set directions on very short timeframes. The parties are expected and required to comply with those timeframes. Please note that in circumstances where a party may be denied natural justice, they may seek to vary those timeframes in accordance with the Tribunal's *Practice Direction 3*. However, there must be sufficient reasons to demonstrate why a variation should occur.

## Practice Direction 2: Lodgement of Documents, Notices and Grounds of Appeal

- 2.1 Forms:** The forms to be used for Notices of Appeal/Applications and other documents are available on the Tribunal website: [www.rmpat.tas.gov.au](http://www.rmpat.tas.gov.au)
- 2.2 Valid Lodgement:**
- In order to validly lodge an appeal the following must occur:
- 2.2.1 A lodgement fee must be paid at the same time as lodging an appeal. The fee changes each financial year. Please check the Tribunal website for the current fee.
- 2.2.2 The appeal must be lodged in writing (and preferably on the relevant form provided by the Tribunal).
- 2.2.3 The appeal must be lodged within the required time frame (usually 14 days from the date of notification of the original decision.)
- 2.2.4 You must be a person who is given a legal right (standing) to bring an appeal under the relevant Act.
- 2.3 Lodgement Fee and Waiver of Fee, Reduction or Refund of Fee:** The lodgement fee can be waived or reduced pursuant to Regulation 6(3) of the *Resource Management and Planning Appeal Tribunal Regulations 2014*. An application to waive or reduce a lodgement fee **MUST**:
- 2.3.1 Be lodged at least 5 days before the expiry of the time for lodgement.
- 2.3.2 Include a full statement of assets and liabilities of the person seeking waiver or reduction of the fee.
- 2.3.3 Include a letter/submission to support the waiver or reduction (which explains why payment of the full fee would cause financial hardship.)
- 2.3.4 An application to refund a fee should be made with submissions in support of a refund. Note that if the Tribunal has engaged in work as a result of the application or appeal, a refund is less likely to be approved as part of cost recovery requirements.
- 2.4 Method of Payment:** The fee can be paid by cash, cheque or EFTPOS.
- 2.5 Electronic Communication and Lodgement:** The Tribunal consents to receiving any and all documents, notices and proceedings by electronic means
- 2.6 Strata Title Appeals:** Appeals under the *Strata Titles Act 1998* are to be lodged with the RECORDER OF TITLES, not the Tribunal Registry (Website for Recorder of Titles: <http://dpiuwe.tas.gov.au/land-tasmania/land-titles-office>)
- 2.7 Extension of Time For Lodgement:** A person may apply for an extension of time to lodge an appeal under Section 13 of the Act. Please note:
- 2.7.1 The application must be lodged at the same time as the notice of appeal and with the required fee.

2.7.2 The application must be in writing and contain submissions/evidence addressing the relevant tests under the legislation as to why an extension ought be granted to lodge an appeal.

2.7.3 An extension will not be automatically granted and a person should not delay lodgement of proceedings

(Please read *Practice Direction 3.10* for more details.)

**2.8 Grounds of Appeal AND Issues Overview:** All issues a party wishes to raise at any appeal must be relevant and clear. The issues that a party wishes to raise must be in writing. They must be sufficiently detailed to enable all other parties and the Tribunal to understand what the case is about and let the other parties prepare to meet that case.

**2.9 Disclose All Matters Early:** Ensure that you have raised all relevant matters early in the proceedings in your grounds of appeal or list of issues as you may be barred from raising additional matters later in the proceedings. The late addition of other matters can unfairly prevent a proper response by the other parties and may delay the hearing process.

**2.10 Failure to Comply:** A failure to comply with directions of the Tribunal in drafting relevant, clear and sufficiently detailed grounds of appeals or issues may result in your proceedings being dismissed or your status as a party revoked (Section 22A of the *Appeal Tribunal Act*).

**2.11 Form of Lodged Grounds of Appeal:** An appeal must include grounds drafted in accordance with the guidelines attached to this Practice Direction and those in *Annexure 2A – Examples*.

**2.12 Initial Direction:** A statement of issues or Grounds of Appeal not complying with *Practice Direction 2.14* will be required to be redrafted.

**2.13 Final Direction:** If you have not redrafted your grounds in accordance with that direction, the Tribunal will issue a final direction setting a timetable for that redrafting to occur at the preliminary conference. **A failure to comply with this final direction will result in the Tribunal considering the dismissal of proceedings unless there are exceptional circumstances as to why the direction has not been complied with** (See *Practice Direction 3.3 – Procedures* regarding variation to directions).

**2.14 Appeal Grounds Must Be Relevant, Clear and Sufficiently Detailed:** A ground of appeal or issue must disclose a matter which the Tribunal is empowered to hear and determine. Parties cannot raise any issue they wish. The Tribunal is restricted, as a matter of law, to consider only those matters which are made relevant by legislation. Most commonly, these will be contained in legislation which confers jurisdiction on the Tribunal including council Planning Schemes. If you are in doubt as to whether a matter is relevant, you should take your own private advice from a suitably qualified practitioner. A ground of appeal or issue must clearly state the dispute that has arisen, with reference to relevant provisions of legislation (or planning schemes) and the nature of that dispute. Refer to *Appendix 2A – Examples* for assistance.



- 2.15 Jurisdictional Grounds of Appeal or Issues:** A jurisdictional ground of appeal or issue is where a party seeks to argue that there exists a problem which affects the validity of the original decision or a limitation at law which results in the Tribunal not having jurisdiction to hear the proceedings. *Practice Direction 3.9 – Procedures*, sets out the procedure for case management of a jurisdictional issue. Please have regard to that Practice Direction when raising a jurisdictional matter.
- 2.16 Reasons for Refusal:** A local planning authority which refuses an Application for Use or Development will be required to either confirm that the original Reasons of Refusal will continue to be relied upon or must deliver amended reasons within a time frame directed by the Tribunal. The list of reasons for refusal, in the same way as grounds of appeal, must be drafted to be clear and concise in accordance with *Practice Direction 2.14*.
- 2.17 Applications to Enlarge the Issues:** In certain limited circumstances, parties who are joined to an appeal (see *Practice Direction 3.5 - Applications to be made a Party to the Proceedings*) may apply to enlarge the issues in dispute. This will arise where there has been an appeal by a proponent against a refusal of an Application for Use or Development. Parties joined to an appeal against a refusal will ordinarily be able to review the grounds of refusal relied upon by the planning authority and to apply to enlarge those grounds if there are additional relevant matters sought to be argued. Applications must comply with any timeframes set. The enlarged list of issues must have regard to the directions above and to *Appendix 2A – Examples*.
- 2.18 Revision of Statement of Issues or Reasons for Refusal:** In the event any party abandons anything contained in its Statement of Issues, or Reasons for Refusal or obtains permission to amend either document (see *Practice Directions 3.3 & 3.4 – Procedures* for making applications for permission to amend), it must submit to the Tribunal and serve upon each other party, the complete and amended document in its final approved form. This must be done within 3 days of any ruling or abandonment of issues.
- 2.19 Retaining a Ground of Appeal Abandoned by a Council:** In some circumstances, a joined party may have relied upon a Council's original list of grounds of refusal as listing all matters they sought to argue. If a Council abandons a ground of refusal, a joined party may still wish to argue that issue before the Tribunal. A joined party seeking to continue to rely upon an issue which has been abandoned by a Council must make an application to enlarge and send it to all parties and the Tribunal in writing within 48 hours of notification of Council's abandonment of an issue.
- 2.20 Copies of all Letters to be Shared with other Parties:** You must ensure ANY document sent to the Tribunal as part of the proceedings, is also sent to every other party to the proceedings. The Tribunal will provide you with the contact details of all parties to the proceedings early in the appeal process. You must also note at the bottom of any document sent to the Tribunal, the names of the persons you have sent a copy of the document to, to satisfy the Tribunal it has been done.
- 2.21 Multiple Copies not Necessary to be sent to Tribunal:** For ordinary letters and documents it is not necessary to email, fax and post the document.

One copy is sufficient. If you want to ensure the Tribunal has received the document, then simply request that receipt of the document be acknowledged by return email. Statements of evidence, however, must be sent in hard copy form in triplicate and in electronic format.

**2.22 Always quote correct Tribunal File Number on Correspondence:**

Once the Tribunal has allocated a file number to an appeal you must include the Tribunal's reference number on all documents (including emails) sent to the Tribunal. Please ensure the correct number is shown.

## Appendix 2A - Examples

| EXAMPLE OF AN ISSUE ARISING FROM A PLANNING SCHEME OR OTHER RELEVANT INSTRUMENT  | ADEQUATE GROUND OF APPEAL   | INADEQUATE GROUND OF APPEAL   |
|--|---|---|
| The proposed development does not have the setback required by the planning scheme.  | The proposed development having a setback of 1 metre from the eastern boundary does not satisfy the requirement of clause 12.1 of the planning scheme, which requires a minimum of 2 metres setback. The effect of the non-compliance is .....  | <p><b>The proposed development is contrary to clause 12.1 of the planning scheme.</b> <i>(This is inadequate because it does not say how it is contrary to the requirements.)</i></p> <p><b>The proposed development has an inadequate setback.</b> <i>(Because it does not refer to the relevant provision of the planning scheme.)</i></p>  |
| The proposed development is inconsistent with the desired future character for the zone, and contrary to the planning scheme requirements regarding a bulk and scale consistent and compatible with surrounding development. | The proposed development is inconsistent with the desired future character for the residential zone contrary to the requirement of clause 25.2 of the planning scheme in that its bulk and height are twice as great as, and completely out of scale with, the surrounding development. | <p><b>The proposed development does not comply with clause 25.2 of the planning scheme.</b> <i>(Because it does not say in what respect it does not comply.)</i></p> <p><b>The proposed development is out of scale with surrounding development.</b> <i>(Because it does not say in what respect, or identify what provision of the planning scheme is not complied with.)</i></p> |
| A condition limiting the use of a transport depot to three days a week is not justified by the provisions of the planning scheme which require residential amenity to be maintained.   | Condition 3 of the permit limiting use as a transport depot to three days a week is not justified by clause 26 of the planning scheme requiring residential amenity to be maintained, because the nearest residences are at least 500 metres away.                                      | <b>Condition 3 of the permit is too restrictive and is not justified by the planning scheme.</b> <i>(Because it does not say in what respect, or identify what provision of the planning scheme)</i>  |

| EXAMPLE OF A TYPE OF CONCERN ARISING FROM A PLANNING SCHEME OR OTHER RELEVANT INSTRUMENT      | ADEQUATE GROUND OF APPEAL   | INADEQUATE GROUND OF APPEAL   |
|---|---|---|
| Overshadowing of a residence by the proposed development.                                     | My house will be unacceptably overshadowed by the proposed development contrary to clause . . . of the planning scheme. | <b>“The councillors did not give proper weight to their planning officer’s advice”; or “The councillors were biased”</b> <i>(Irrelevant because the Tribunal is not concerned with the way in which Council reached its decision, in these respects.)</i> |
| The height of the development above ground level exceeds that allowed by the planning scheme. | The development is higher than allowed by clause . . . of the planning scheme.  | <b>“There are too many units in the area”.</b> <i>(Because the relevant provision in the scheme controls height rather than development density.)</i>   |

### Practice Direction 3: Procedures

- 3.1 Overview:** The Tribunal makes directions for the timely and efficient resolution of appeals. Those directions must be complied with or a costs order against the party may result. In extreme cases, a party's appeal may be dismissed or a person dismissed as a party to an appeal. This Practice Direction deals with the making and variation of directions, and the making of various applications in appeals.
- 3.2 Failure to Comply:** Failure to comply with a direction may lead to a party being removed from the proceedings, or the appeal dismissed. If you cannot comply with a direction for a good reason, you can apply to vary the direction in question.
- 3.3 Everything by Application:** Frequently parties communicate with the Tribunal to seek directions, variations to orders or extensions of time. Sometimes letters include submissions about the adequacy of grounds of appeal or requests are made to strike out appeals. This direction is intended to streamline procedures relating to all such matters.

The following procedure is to be observed:

- Every request to the Tribunal is to be made by an application to the Tribunal.
- An application must be made in accordance with Appendix 3A and must include the following:-
  - 3.3.1 The application which is made, including references to any relevant sections of legislation;
  - 3.3.2 The basis for the application (e.g., that a witness is not available, the stated grounds do not invoke a relevant consideration etc.);
  - 3.3.3 Submissions in support of the application;
  - 3.3.4 The orders which are sought; and
  - 3.3.5 Whether or not the application is made with the consent of the other party/ies to the proceedings;

A party not consenting to the orders sought shall have 48 hours to respond to the application, and must include submissions in support of their argument and, if applicable, alternative orders. The response must be filed and served upon the other parties.

There will not be a right of reply to a response submission, save to correct a factual error.

The application is to be served on all other parties. The Tribunal is not responsible for circulating applications. An application must disclose that the other parties have been served before it will be entertained. The Tribunal will not circulate applications.

Upon submissions being completed, filed and served, the Tribunal will make determination on the application.

For certain types of applications additional specific requirements are set out further below.

- 3.4 Application for a Matter to be Listed for a Directions Hearing:** If a party requests a directions hearing before the Tribunal it must be done so by application to the Tribunal.

The Tribunal will determine whether orders in those terms are appropriate or not. If so, it will make the orders. If not, the Tribunal may make alternative orders or convene a directions hearing.

- 3.5 Application to Vary a Direction or a Hearing Date:** A party to proceedings may apply to the Tribunal for an alteration to a direction or to a listed hearing or mediation date. The application should comply with Practice Direction 3.3. There must be a good reason for seeking a variation of a hearing date. Mere Inconvenience to a party is typically not a good reason. It should be noted that applications to change hearing dates may be refused if made too late, or can give rise to risks of a costs order in some circumstances (See *Practice Direction 15 – Costs*).

- 3.6 Application to be made a Party to the Proceedings:** The relevant section relating to an application to be made a party is Section 14 of the *Resource Management & Planning Appeal Tribunal Act 1993*. A person wishing to make an application to join proceedings should use the form contained on the Tribunal's website. The application must contain information addressing the requirements of Section 14. Please note that a fee is charged for the making of an application to join. The Tribunal's website contains details of the current fee. Tribunal will issue directions for timeframes for other parties to make any submissions regarding any application to join.

- 3.7 Application Under Section 22(3) of the *Appeal Tribunal Act*:** Any application under this section must comply with Practice Direction 3.3 and in addition to those requirements the application must contain:

- 3.7.1 Written detailed particulars of the changes; and
- 3.7.2 Plans conforming to Schedule A of the Tribunal's Practice Directions showing the amendments, unless the changes are so minor as to be unnecessary to show them in plan form.

- 3.8 An Application under Section 62(2) of the *Land Use Act*:** An application under this section is to be made where a person seeks permission from the Tribunal to lodge a new Application for Use or Development within two years of a determination of the Tribunal, and where the development or use is substantially the same as has already been decided by the Tribunal. Such an application must:

- 3.8.1 Be in writing clearly stating the application is pursuant to Section 62(2) of the *Land Use Act*.
- 3.8.2 Include a copy of the original decision of the Tribunal related to the Application for Use or Development, or cite the judgment number of the decision.
- 3.8.3 Enclose a copy of the Application for Use or Development that the proponent seeks to lodge.

- 3.8.4 Contain reasons why the Tribunal should grant the application under Section 62(2) of the *Land Use Act*.

An approval under this section is ONLY to lodge a fresh Application for Use or Development to be lodged with the planning authority. It is NOT approval for the development itself.

Parties to the original appeal will be notified of the application pursuant to Section 62(2) of the LUPA Act 1993 and afforded an opportunity to be heard, in accordance with the Tribunal's obligations to accord Natural Justice pursuant to Section 16(1)(d) of the *Appeal Tribunal Act*. The applicant will be allowed a final right of reply to any submissions."

- 3.9 Applications to Raise Jurisdictional Issues:** A party may lodge an application to raise a jurisdictional issue. Such an application must be in accordance with PD3.3 and:

- 3.9.1 Be in writing.
- 3.9.2 Include a brief statement with full particulars of the jurisdictional issue in a similar format to drafting a statement of issues (see *Practice Direction 2.13*).
- 3.9.3 Contain detailed submissions in support of the jurisdictional issue.
- 3.9.4 Provide a list of all facts relied upon – with:
- a) a statement at the bottom of the document that identifies agreed facts; and
  - b) a list of disputed facts; and
  - c) the signatures of all parties confirming the statement.
- 3.9.5 Where a party seeks to have a jurisdictional issue resolved prior to a full merits based hearing, contain submissions detailing reasons why.

Where a dispute as to facts has arisen, unless the dispute is minor and capable of swift hearing and determination, the preliminary hearing of the jurisdictional issue may be declined. This would result in both merits of the proposal and any jurisdictional issue being heard and determined together at the final hearing.

A failure to adhere to these requirements will result in any jurisdictional issue being deferred until the full hearing and heard and determined along with the merits of the appeal.

The Tribunal cannot disregard a jurisdictional issue once it has been raised. The Tribunal must be satisfied it has power to issue any subsequent orders or directions and will need to determine any jurisdictional issue once raised.

- 3.10 Applications to Extend Time to lodge an Appeal:** Section 13(2) and (2A) of the *Appeal Tribunal Act* sets out the Tribunal's powers in relation to extending the time within which to lodge an appeal. In making any application to extend time for lodging an appeal, the following must be adhered to:

- 3.10.1 Carefully read Section 13 of the *Appeal Tribunal Act* to ensure you understand the requirements set out in that Section, in particular that

you need to act quickly in relation to planning appeals (Section 13(2A)(b)).

- 3.10.2 Any application must be made in writing.
- 3.10.3 The application to extend time must accompany the actual appeal which you are lodging, along with the required fee. You cannot make an 'anticipatory' application to extend time.
- 3.10.4 It must contain submissions addressing the requirements set out in Section 13 of the *Appeal Tribunal Act*.

**3.11 Application to amend a decision of the Tribunal:** Section 23(6) of the *Appeal Tribunal Act* relevantly provides:

(6) *The Appeal Tribunal may amend its decision on an appeal if it is satisfied that the amendment –*

*(a) does not change the effect of any condition required by the Appeal Tribunal; and*

*(b) will not cause an increase in detriment to any person.*

A person who wishes to amend a decision needs to make an application in writing to the Tribunal which provides the following information:

- 3.11.1 Detailed submissions which identifies the changes sought (which includes plans as required below), and addresses the two requirements set out in 23(6)(a) and 23(6)(b).
- 3.11.2 A copy of the original decision and plans or documents which the applicant wishes to alter.
- 3.11.3 A copy of any new plans, materials or documents which are proposed to be included in any changes. These plans must demonstrate the extent of any change if they relate to changes to the built form of an approval.
- 3.11.4 A list of persons whose interests may be affected, including original parties to the proceedings before the Tribunal, and the addresses of adjoining land holders to the subject site.

Upon receiving an application under Section 23(6) of the *Appeal Tribunal Act*, the Tribunal will notify all original parties to the proceedings including the planning authority and any adjoining land holders. Each person notified will be afforded an opportunity to respond to the application. The Tribunal will determine whether a hearing is required to determine the application having regard to any submissions received.

If an application is contested, then the application will be heard and determined in the same manner as any appeal or application before the Tribunal as set out in these Practice Directions.

**3.12 Notification of Withdrawal of an Appeal:** The withdrawal of an appeal must be made as soon as possible. The notification must be in writing, clearly stating that you withdraw the appeal. Any decision to withdraw should be made and acted upon quickly as late withdrawal of proceedings may risk a costs order being made against you (See *Practice Direction 15 – Costs*).

**3.13 Electronic Communication:** If you provide an email address the Tribunal will use that address as its primary method of contact and provision of information **and will not forward hard copy documentation unless specifically requested.** It is vital that you ensure you provide the Tribunal with your correct email that you check your email account on a daily basis on the event of important communications from the Tribunal. When commencing proceedings with the Tribunal, if you receive the initial correspondence electronically you are required to confirm receipt of that material so the Tribunal can confirm it has your correct email address.



## **Appendix 3a**

### **Application to the Tribunal**

#### **In the Resource Management & Planning Appeals Tribunal**

Matter no.

[Heading to the matter]

#### **Application:**

[Detail the application which is made and the reasons for the application. Attach written submissions supporting the application where necessary]

#### **Orders Sought:**

- 1.
- 2.

This application has been served on (set out names of parties served).

**Filed by:** [insert party filing name and contact details].

## Practice Direction 4: Preliminary Conferences

- 4.1 Overview:** The preliminary conference is the first hearing before the Tribunal. It is listed 10-14 days after the lodgement of an appeal and is generally advertised in the public notices section of a newspaper circulating in the municipality of the appeal. The Tribunal lists a directions hearing for at least 45 minutes but some matters may take a longer or shorter period of time depending on complexity.
- 4.2 Attendance:** As with all listings before the Tribunal, all parties are to attend at the appointed time and date. If you are unable to attend you may make application to vary the hearing date (see *Practice Direction 3.4*). However, if the listing has been advertised your application is very likely to be declined. You may send a representative in your stead (see *Practice Direction 11: Representatives & Witnesses*). A failure to attend a duly convened hearing of the Tribunal may result in your status as a party being revoked or your appeal dismissed (Section 21 of the *Appeal Tribunal Act*).
- 4.3 Statement of Issues or Grounds of Appeal:** In the Tribunal's standard correspondence, you will have been directed to revise your Statement of Issues if they do not comply with the guidelines set out in *Practice Direction 2.14*. You must ensure that you have redrafted your Statement of Issues or Grounds of Appeal to submit them at the preliminary conference.
- 4.4 Matters the Subject of Directions:** The following matters will be dealt with at a preliminary conference.
- 4.4.1 Applications to Join:** Applications to join proceedings should be made before the preliminary conference is held (See *Practice Direction 3.5* for information on making an application to join). Applications to join can be made at any time; however, lateness in making an application may be a relevant factor in refusing the application. Directions allowing parties an opportunity to comment on any application to join are set. Short timeframes apply to resolving applications to join.
- 4.4.2 Grounds of Appeal or Statement of Issues:** (see *Practice Direction 2.14*).
- 4.4.3 Jurisdictional Issues:** (See *Practice Direction 3.8*)
- 4.4.4 Alternate Dispute Resolution** (see *Practice Direction 5: Alternate Dispute Resolution*)
- 4.4.5 Dates for Full Hearing:** The hearing date is ordinarily set between 6-8 weeks of the preliminary conference to meet the Tribunal's statutory requirement of a 90 day decision time frame. (see *Practice Direction 7 – Hearing Process*)
- 4.4.6 Preparation and Filing of Evidence:** Directions will be issued setting dates for parties to exchange and file all material that is to be

used by parties in proving their respective cases at the full hearing (See *Practice Direction 8 – Material & Evidence*)

- 4.4.7 **Provision of Information and Papers:** The primary decision maker (usually the planning authority) is required to provide to the Tribunal and to all parties a complete set of documents which constitute the original decision making process material. In the event other persons are joined to proceedings, directions will be issued for that same paperwork to be provided to them. The preliminary conference is also an opportunity for parties to request information from other parties. If one party refuses to provide certain information, other parties may apply for a summons for provision of documents (See *Practice Direction 13 – Summonses*).
- 4.4.8 **Draft Conditions of Approval:** The primary decision maker (usually the planning authority) will be required to prepare and submit draft conditions of approval of any planning appeal by the date of the first exchange of evidence between the parties. Alternatively, if a planning authority asserts that it is unable to draft and file conditions of approval, then submissions detailing the basis of the inability to file draft conditions of approval must be submitted on that same date. Those draft conditions or submissions are to be supplied to each other party to the proceedings. Each of the parties may then respond to any of the proposed draft conditions in their response evidence (see Appendix 8C – *Draft Conditions of Approval*).

## Practice Direction 5: Alternative Dispute Resolution (ADR)

- 5.1 Overview:** The Tribunal offers a range of dispute resolution procedures ranging from mediation and conciliation to neutral expert evaluation. At the preliminary conference, the suitability and choice of ADR will be assessed.
- 5.2 ADR is Required:** Virtually all disputes before the Tribunal will be referred to mediation or other appropriate dispute resolution processes before proceeding to a full hearing. The case officer will determine whether exceptional circumstances arise which make ADR inappropriate.
- 5.3 DO NOT DELAY PREPARING YOUR CASE FOR FULL HEARING:** Parties should not delay or defer preparing their case just because a matter has been referred to ADR. In the event the dispute is not settled by ADR, parties must comply with the tribunal's directions for exchange of evidence and be ready to proceed to hearing on the appointed hearing date.
- 5.4 Notification of Representation and Attendance at ADR:** If you intend to be legally represented during ADR procedures or wish to bring a person to assist you, please notify the Tribunal and other parties at least 48 hours prior to the appointment. Where ADR has been listed, you must ensure you attend that listing. A failure to do so may result in an order that you be dismissed as a party or the appeal itself be dismissed (Section 21 of the Act).
- 5.5 Authority to Settle:** The parties who attend mediation or other ADR process must ensure that they have authority to negotiate and settle the dispute. If you are acting on behalf of another person, please ensure that you have read *Practice Direction 11 – Representatives & Witnesses*. When attending ADR you will be expected to be in a position to make decisions as to whether the results of the ADR are acceptable. It is neither acceptable nor satisfactory to have to discuss the results of ADR with a person not present at the ADR process. You should advise the mediator at the directions hearing whether you will have authority to settle at the ADR conference. There are some exceptions to this requirement for authority to settle which apply in the instances of Council officers representing a Council.
- 5.6 Pre-Mediation and Preparation:** The ADR assessment may identify information needed to prepare for a mediation conference. Parties may be encouraged to take advice from suitably qualified professionals to assist them in making informed decisions during the ADR processes. The venue for the ADR process will also be determined. Please note that many ADR processes are conducted on-site at the location of the proposed development or at the Local Planning Authority's Offices.
- 5.7 Mediation:** Mediation is the most common form of ADR procedures applied in the Tribunal. It involves a case officer who impartially assists the parties in identifying issues in dispute, exploring those issues, and generating possible options for resolving the dispute. The mediator has limited involvement in generating resolutions for the parties or offering opinions on the outcome of the dispute.

- 5.8 Conciliation:** Conciliation follows a similar process to mediation; however, the conciliator may offer suggestions or feedback to the parties concerning the merits of the dispute. Any opinion or comment by a conciliator does not constitute a ruling of the Tribunal, and parties are at liberty to disregard any opinion or comment and proceed to hearing if they choose. However, the conciliator may encourage parties to take their own private advice before deciding to proceed to hearing to assist them in making a fully informed decision as to the likely outcome of a hearing process.
- 5.9 Neutral Expert Evaluation:** Whilst parties may request neutral expert evaluation, the ultimate decision as to whether it is appropriate to engage an expert lies with the Tribunal case officer. The Tribunal appointed expert will have read the appeal file, including the original papers from the first decision maker and any notices of appeal or statements of issues filed with the Tribunal. Neutral expert evaluation occurs at the subject site and follows the same structure as mediation (see below). The parties are afforded an opportunity to explain their concerns and issues in the presence of the expert. The expert will be afforded an opportunity to ask any questions. At the conclusion of all these submissions from the parties, the expert will briefly meet with the mediator and then provide an opinion concerning the merits of the proposal to the parties.

The opinion of the expert is based on the file and the information supplied through the mediation process, but is not a formal ruling of the Tribunal. Because this is an informal procedure and does not constitute a full and tested case before the Tribunal, a party may disregard the opinion given and decide to proceed to hearing. In that instance, the neutral expert's opinion may not be referred to in any way at the hearing and the expert will have no further involvement in the proceedings.

It is possible that a neutral expert may identify new issues which have not been raised by any party. If the parties disregard the opinion of the expert and proceed to hearing, the Tribunal cannot disregard any relevant new issue identified by the neutral expert. In those circumstances, the Tribunal will formally notify the parties that it will require the provision of evidence and submissions in relation to the issue identified by the expert. That notification will not disclose either that the new issue(s) arose from a mediation conference, nor any opinion expressed by that expert. It will follow the format for a ground of appeal and will be supplied to the expert members of the Tribunal panel and all parties. The inclusion of a new ground of appeal does not mean that the Tribunal necessarily agrees with the opinion of the neutral expert. Rather it ensures that the panel hearing the appeal is alerted to an issue which another expert considered important enough to raise. At the final hearing, the panel will form its own opinion about a new issue once all evidence has been considered.

## **5.10 Structure of ADR:**

### **5.10.1 *Mediator introduction***

The mediator will briefly explain the structure of the mediation conference, confidentiality requirements and any relevant statutory provisions.

### **5.10.2 *Opening statements by parties***

Each party will be invited to give a brief statement of their prospective issues in the dispute and any topics of discussion that they wish to raise. These opening statements are to be a brief summary of what the parties understand the dispute is about and should not exceed five minutes.

### **5.10.3 *Agenda setting***

The mediator will attempt to identify, from the statements made by the parties, the key issues that need to be discussed. Those will be listed and the parties invited to agree upon an order in which to discuss them. The parties may raise further matters during the course of mediation if they forgot to raise them during these early stages.

### **5.10.4 *Discussion of agenda items***

The mediator will facilitate discussions between the parties about each of the issues identified on the agenda. These issues should be explored as fully as possible to ensure that all parties understand each other's concerns. Although the parties may be tempted to begin discussing options at this stage, it is preferable to defer this until later in the mediation.

### **5.10.5 *Private Sessions***

The mediator will then hold a brief private session with each of the parties. These are separate private discussions between the mediator and each party, the contents of which are confidential between the mediator and the party. The mediator will attempt to give equal time to each party in private sessions and should advise the parties if a private session with one party may take longer than anticipated. Private sessions are an opportunity for the mediator to assess how the parties believe the mediation is progressing and to begin the process of consideration of possible resolution.

A private session does not necessarily have to be called at the conclusion of 5.10.4. The mediator may wish to speak to the parties in private sessions at any time during the mediation process.

### **5.10.6 *Identifying options***

At the conclusion of the private sessions, the parties will be brought back together to discuss options which may exist to resolve the dispute. The parties will be invited to suggest options and to test those options to see if they are acceptable to the other parties. This process will entail the refinement of options and testing the details of resolution.

5.10.7 *Confirming an agreement*

Any agreements reached between the parties will be documented at the conclusion of the mediation. Ordinarily, the original decision maker will be charged with the responsibility of drafting the terms of that agreement.

5.10.8 *Cool down period*

The Tribunal must ensure that the parties settling a dispute have been given the opportunity to consider the outcome of mediation and to have taken advice, if necessary. Accordingly, the Tribunal will ordinarily allow seven days for the parties to consider the results achieved through mediation, to take advice and to confirm whether they still wish to settle the matter in the terms agreed to.

During the seven day cool down period, the original decision maker will have drafted the terms of the agreement between the parties and forwarded it to all parties. Parties satisfied with the terms of the settlement are to sign the consent and forward it to the Tribunal registry. A party reconsidering its position or disagreeing with the wording of the settlement should make contact with the mediator to arrange further mediation or the resolution of the wording of the settlement.

5.10.9 A final settlement submitted to the Tribunal is inspected by the Chairperson or any other expert of the Tribunal to determine whether it should be endorsed. Although the endorsement of a settlement is the final part of ADR, it is a separate procedure and is covered in *Practice Direction 6 – Agreement between the parties & Final Decisions*.

**5.11 Confidentiality:** Section 17(3) of the *Appeal Tribunal Act* provides as follows:-

“(3) At the hearing of an appeal before the Appeal Tribunal, evidence about anything that happens at a conference held under subsection (1) in relation to the appeal is inadmissible.”

There are exceptions in relation to this requirement as set out below. As Section 17(3) only relates to the giving of evidence at a full hearing of the Tribunal, the Tribunal cannot enforce total confidentiality in relation to discussions which arise during ADR procedures.

However, the Tribunal ordinarily requests that the parties agree to confidentiality of discussions. That is, the parties agree that anything which is discussed in ADR is not discussed with persons external to the proceedings without the express permission of the other parties involved.

If you are in any doubt as to whether to disclose something in the course of ADR, you should take your own private advice from a suitably qualified person.

**5.12 Exceptions to Confidentiality:** The confidential nature of the process of ADR may not prevent a court in other proceedings from ordering disclosure of information that may relate to Acts which are contrary to other pieces of legislation.

The final exception which should be noted is that a party may wish to produce revised plans in ADR for consideration of the parties as a possible settlement. Merely because that document was produced in ADR for consideration would not preclude the person from submitting that revised plan in a formal hearing of the Tribunal. What can not occur in most circumstances is any comment as to the discussions which arose in ADR concerning the revised plans. This commonly occurs where a Proponent revises a development to satisfy some of the parties to proceedings and then seeks to apply to amend the Application for Use or Development pursuant to Section 22 of the *Appeal Tribunal Act* such that the revised proposal proceeds to be the subject of the hearing (see *Practice Direction 3.7* for information regarding applications under Section 22(3) of the *Appeal Tribunal Act*).



## **Practice Direction 6: Agreement between the parties and Final Decision**

- 6.1 Overview:** The Tribunal has power under Section 17 of the Act, to issue a final decision where parties have conducted a Section 17 conference (or ADR as set out above), agreed to a settlement which the Tribunal is satisfied is appropriate and lawful. This Practice Direction provides information regarding preparation and consideration of agreement between the parties.
- 6.2 Format of Agreements between Parties:** An agreement must:
- 6.2.1 Be in writing and clearly identify the proceedings (i.e. the full citation appearing in Tribunal correspondence and file number);
  - 6.2.2 Confirm that the parties have reached an agreement to resolve the appeal;
  - 6.2.3 Fully detail the terms of the agreement reached. The entire permit in its final amended form must be contained in the agreement;
  - 6.2.4 Must include submissions which address Section 17(2)(c)(i) and (ii) with specific reference to the decision sought being within the powers of the Tribunal to approve and the decision would be appropriate to make.
  - 6.2.5 Be signed by each party to the proceedings (including the agreement and all documents forming part of the settlement);
  - 6.2.5 Where relevant, comply with Practice Direction 11 – Representatives & Witnesses; and
  - 6.2.6 Where necessary append any document.
- Appendix 6A is a template for an agreement.
- 6.3 Terms and Conditions of Agreements:** If the parties are overturning a decision of an original decision maker, they should provide the full details of the agreed replacement decision. For example, if the parties have agreed to overturn a refusal to issue a planning permit by a local planning authority, they must provide the entire permit they seek the Tribunal to endorse. The parties should consider the need for legal advice in the preparation of consent orders, and consider an agreement regarding any costs orders to be made (see Practice Direction 15 - Costs).
- 6.4 Tribunal's Powers to Decline a Proposed Agreement:** Section 17(2)(c)(ii) requires the Tribunal to be satisfied that a proposed agreement is appropriate to make. Merely because the parties have reached agreement as to the terms of a settlement does not bind the Tribunal to accept that outcome. The Chairperson may direct that the agreement be scrutinised by a suitably qualified expert of the Tribunal to confirm whether the outcome is appropriate. The Tribunal may decline to make orders in the terms of the Agreement if it is not satisfied either that the proposed settlement is within the Tribunal's legal power to issue, or is not

appropriate. In those circumstances, the parties will be notified of any decision to decline an agreement between the parties and the reasons for so doing. The parties will ordinarily be afforded an opportunity to proceed to hearing to produce evidence and make submissions in relation to the matters that were unacceptable to the Tribunal. Alternatively, parties may revise the proposed agreement to resolve any offending aspects.

- 6.5 Tribunal Endorsement of Agreement:** If the Tribunal is satisfied that the terms of the agreement are within the powers of the Tribunal and that the decision is appropriate, it will issue a final decision which will be sent to each party to the proceedings and published.

## Appendix 6a: Template for Consent Agreements

### Consent Agreement

#### IN THE RESOURCE MANAGEMENT AND PLANNING APPEAL TRIBUNAL

Tribunal reference number \* .....

**Appellant** .....

**1<sup>st</sup> Respondent** .....

**Other Respondents (if any)** .....

**Party Joined (if any)** .....

**Address of Site:** .....

**Description of proposal** .....

- I. The Parties to this appeal agree that the appeal be resolved in the following terms (list details of the orders sought):

**Signed (Appellant):** .....

**Date:** .....

**Signed 1<sup>st</sup> Respondent:** .....

**Date:** .....

**Signed 2<sup>nd</sup> Respondent:** .....

**Date:** .....

**Signed (Joined Party):** .....

**Date:** .....

\* (found on upper left hand corner of Tribunal correspondence)

## Practice Direction 7: Hearing Process

- 7.1 Hearing Overview:** A full hearing of the Tribunal is the opportunity for all parties to present evidence to an expert panel where that evidence is tested by each party to the proceedings. The parties may also make submissions to the Tribunal panel as to the outcome they say should take place - having regard to the evidence and submissions. In preparation for a hearing, the parties must ensure they have complied with all directions of the Tribunal in the preparation and exchange of evidence. A failure to comply with those directions may result in evidence being disallowed at the hearing.
- 7.2 The Tribunal:** The Tribunal is constituted by three members. However, the Tribunal has power to increase or reduce this number. Ordinarily the Presiding Member will be either the Chairperson of the Tribunal or a person appointed for their legal knowledge and expertise. Parties must comply with any directions issued by the Presiding Member. The other members of the Tribunal are selected for their knowledge and expertise in relevant areas to the appeal proceedings. All parties to the proceedings will be notified in advance of the hearing of the composition of the Tribunal panel. A party may object to the composition of the Tribunal - in writing, and in accordance with the timetable set out in the notification of the Tribunal panel composition.
- 7.3 Venue:** Full hearings are convened in Hobart. The Tribunal issued a Circular to this effect on 10 February 2009, and the reasons are set out in the Appendix 7A. Parties may apply to change the venue, and must detail the undue hardship or injustice in holding the hearing in Hobart. If the Tribunal is satisfied that a Hobart listing would result in undue hardship or injustice, it may change the hearing venue.
- 7.4 Orders of Proceedings:** The parties, in the order set out below, present their evidence, whether that be in the form of documents and/or documentary evidence or witnesses. The evidence is tested by each other party and once that process is concluded, each party is afforded an opportunity to make final submissions or arguments to the Tribunal panel. The order of making submissions is the reverse order to that which was adopted for giving evidence.

The order for giving evidence is as follows:-

- The first party to present their evidence will be the party who initiated the original decision making proceedings which gave rise to the appeal. In planning appeals it will be the developer who applied for a development permit to the Council or authority. In other appeals, it is the Applicant who applied for a decision from the relevant decision making body.
- The second party to present their case will be the original decision maker. In planning appeals, it will be the Council or authority that made the original decision on an Application for Use or Development or permit. In all other appeals, it is the body or person charged with the decision making responsibility.

- Any third party Appellants or joined parties.

The order of making submissions is the reverse of the above.

- 7.5 Evidence and Submissions:** The giving of evidence and the making of submissions can be confusing to persons unfamiliar with legal proceedings. Please ensure that you have regard to the Tribunal's *Practice Direction 8 – Material & Evidence*.
- 7.6 Giving Evidence:** Each party determines the order of its witnesses. The witness should move to the designated place in the hearing room. They should state their full name, address and occupation and confirm that they have prepared their statement of evidence (and, if necessary, correct it). Witnesses may not elaborate/expand on their statement without permission of the Tribunal as they should have already disclosed all relevant information in the statement. Seeking to expand on a statement of evidence during the hearing risks an adjournment and a costs order against that party.
- 7.7 Cross-Examination OF Witnesses:** After the witness has confirmed their statement of evidence, the representatives of opposing parties may question that witness. Cross-examination must be undertaken by a nominated representative of the party in question. Some questions may not be allowable and you should follow any direction given by the Tribunal panel in that regard. Cross-examination is the asking of questions; it is not an opportunity make comments or statements.
- 7.8 Notice of Cross-Examination Required:** A party requiring any expert for cross-examination must give written notice at least three days before the hearing.
- 7.9 Re-Examination:** When all cross-examination is concluded by all parties and the Tribunal, the representative who called the witness is entitled to re-examine that witness. Re-examination is only to clarify issues that were raised during cross-examination and not an opportunity to raise new matters.
- 7.10 Final Submissions:** At the conclusion of evidence in an appeal, and prior to presenting closing submissions, parties are to hand up a written summary of their closing submissions. An electronic copy is to be forwarded to the Tribunal at the conclusion of the hearing.
- It is not necessary for a party to read that material back to the Tribunal, but it will be assisted by the presentation of oral submissions going to the content of the written materials.
- The party who presents oral submissions first will have a right of reply to submissions made against it.
- 7.11 Notification and Use of Legal Authorities:** If a party seeks to rely upon a decision of a court or tribunal in making submissions, a list of the authorities to be referred to is to be filed with the Tribunal and served upon the other parties to the hearing no less than 48 hours prior to the hearing. The list is to be provided electronically and include full citations and an html link to the cited reports. Hard copies of authorities are no longer required to be filed or served.

- 7.12 Site Inspections:** The Tribunal ordinarily conducts a site inspection of the subject property as part of the hearing process. This is ordinarily done without parties or their representatives present. However, if the parties wish to specifically ensure that the Tribunal members have regard to certain matters on the subject site, the parties can arrange for a view with the Tribunal members and the representatives of the parties. The Tribunal and all parties should be notified of this at least 7 days before the hearing.
- 7.13 Decision:** The Tribunal is required by Section 24 of the *Appeal Tribunal Act* to deliver its ruling in writing. The Tribunal endeavours to have a decision delivered to all parties within 28 days from the conclusion of the hearing - depending upon the complexity of the matter and the amount of evidence adduced. The final decision will also include a standard order as to costs (see *Practice Direction 15 - Costs*).
- 7.14 Appeals from the Tribunal Decision:** A right of appeal from the Tribunal decision to the Supreme Court is available only on a question of law under Section 25 of the *Appeal Tribunal Act*. The time for making an appeal to the Supreme Court is 28 days from the date of the final decision. The Tribunal is not a party to an appeal under Section 25 of the *Appeal Tribunal Act* and would not seek to be heard in relation to those proceedings.

## Appendix 7A



RESOURCE MANAGEMENT AND PLANNING APPEAL TRIBUNAL

10 February 2009

### TRIBUNAL CIRCULAR

#### **Notification of Variation To Listing Procedures**

Given the impact of the global economic crisis upon the operating budgets of Government agencies, it is necessary for the Tribunal to modify its listing procedures.

The modifications below will continue until further notice.

- 1) All full hearings of appeals will ordinarily be convened in Hobart, subject to the following conditions:-
  - a) Where a hearing is proposed to take two or more days, the Tribunal may, at its own discretion, convene the first day of the hearing in the local municipality where the development is proposed, with the remaining days of hearing to be heard in Hobart;
  - b) If a site inspection is unnecessary, the hearing will ordinarily be convened entirely in Hobart.
- 2) The Tribunal acknowledges that in certain circumstances, such a listing may visit unreasonable or unjust outcomes upon parties. As such, there is general liberty to apply for a variation to the listing in Hobart. It would be necessary for any person who wishes to have a hearing convened within the municipal area to provide submissions detailing the basis upon which that listing should occur.
- 3) All stakeholders should note that the Tribunal has full video conferencing facilities available to allow witnesses to give evidence via video linkup. All stakeholders are on notice that the cost of using that facility will lie with the party seeking to have witnesses give evidence by video linkup. The costs of that facility may be obtained from the Registry of the Tribunal.
- 4) Notwithstanding that hearings regarding locations around the State will be heard in Hobart, the Tribunal will undertake its own regime to ensure that site inspections occur. Those inspections, however, may be undertaken in a cumulative single trip to reduce the cost to this agency.

I acknowledge that these arrangements will cause inconvenience and difficulty to a great many of the stakeholders who utilise the Tribunal's processes, but regrettably, given the financial strictures which have arisen, these arrangements are unavoidable.

I thank you in anticipation of your cooperation and assistance in these difficult times.

Yours faithfully



Jarrod Bryan  
BA/LLB, Grad Cert in Legal Practice, MEnvPlg, AIAMA  
**Registrar**  
**Resource Management and Planning Appeal Tribunal**

## Practice Direction 8: Material and Evidence

- 8.1 Overview:** The Tribunal in making a decision regarding an appeal is required to make findings of fact and to state the evidence upon which those findings were made. A party needs to carefully consider what factual material needs to be presented to the Tribunal in order to be successful. Factual material provided to the Tribunal must be in writing in the form of a statement of evidence. This must be a complete written statement of all facts or expert opinion to be given by a witness; it is not a summary or a list, and should read as one would state the facts as if speaking. This practice direction is to assist the parties in understanding the mode and format of presenting evidence before the Tribunal.
- 8.2 Authoring Statements of Evidence:** A statement of evidence must be individually prepared by each witness so that the author is identified and can be questioned during the hearing. The author of any document presented as evidence to the Tribunal must attend the hearing to be questioned about the document. A statement of evidence may include annexures such as letters, reports or studies. A party seeking to rely on the work of any other person must ensure that the other person attends the hearing in order to be questioned about the content of that document. A failure to do so may result in the evidence being excluded from consideration or, alternatively, be given diminished weight.
- 8.3 Exceptions:** The only exception to an author attending a hearing relates to documents which are generally accepted and used as authoritative such as dictionaries or medical and scientific texts. Reports by special groups or articles by experts not forming part of such accepted texts will not normally be accepted.
- 8.4 Timetable for Exchange of Evidence:** All evidence that the parties seek to rely upon must be forwarded to each other party and filed with the Tribunal at least 21 days before the hearing. The parties then have a period of 14 days to prepare statements of evidence in response. Response statements of evidence must only respond to material that was supplied in initial statements of evidence; they are not an opportunity to adduce new evidence.
- 8.5 Service of Documents:** Each party must serve upon each other party their statements of evidence and response statements; this is not the responsibility of the Tribunal. One copy of all documents to be relied upon at the hearing must be filed with the Tribunal at the same time they are served on each other party. The Tribunal also requires an electronic copy of all evidence filed.
- 8.6 Format of Evidence and Material:** All statements of evidence are to:
- 8.6.1. Include a coversheet in accordance with Appendix 8A. Cover sheets are not to include illustrations or material other than set out in the Annexure.



- 8.6.2. Where an original contains coloured material, copies for all parties and all Tribunal members must also be in colour.
- 8.6.3. Be on A4 size paper, portrait layout, paginated and with paragraph numbers.
- 8.6.4 For all documents lodged in PDF, bookmarks must be inserted into the document. Bookmarks facilitate the location of contents within the document. This link explains the process:  
<https://helpx.adobe.com/acrobat/using/page-thumbnails-bookmarks-pdfs.html>

Parties are to file a complete list of the witnesses to be called at the hearing.

A failure to file material in accordance with this Practice Directions may result in the material being returned to be corrected.

- 8.7 Evidence Vs Submissions:** Persons who are not familiar with legal proceedings often make the error of confusing evidence with submissions or arguments. Appendix 8B is intended to show the difference between evidence and submissions. Statements of evidence should recognise the distinction between evidence and submissions as valuable hearing time can be wasted in dealing with objections correcting statements of evidence.
- 8.8 Draft Proposed Conditions:** The planning authority is to make, file with the Tribunal and serve upon each other party a set of draft conditions of approval seven days prior to the hearing. These conditions are provided in the event the Tribunal is minded to grant a permit for the use/development the subject of the appeal. The draft conditions are to be responsive to the issues in the proceedings and are to be provided regardless of whether the planning authority refused or approved the use/development at first instance. A planning authority is at liberty to submit that it is not possible to frame practicable conditions of approval which are responsive to the issues in dispute, but they are to place all parties on notice of that submission seven days prior to the hearing. That submission will need to be substantiated by reference to the evidence led at the hearing which demonstrates the argument.
- 8.9 Agreed Facts:** The Tribunal encourages parties to agree as many facts as possible prior to hearing. The Tribunal directs that parties to proceedings are to confer prior to the full hearing to attempt to identify facts which can be agreed. The parties are to confirm in writing to the Tribunal, seven days before the hearing, that they have conferred to agree facts and submit a statement of agreed facts. If there are no facts which can be agreed, then the Tribunal is to be advised of that result.
- 8.10 TENDERING OF COUNCIL'S FILE OR BUNDLES OF DOCUMENTS, REPRESENTATIONS:** When a party seeks to tender a bundle of documents to the Tribunal, they will be required to take the Tribunal to the particular documents in the bundle relied upon. It is those documents that will be taken into evidence. Any documents to which the Tribunal is not taken are excluded.

The Tribunal at a full hearing will ordinarily not have regard to original development assessment materials unless they are tendered as evidence in the

hearing. Please note the requirements for the authors of materials being required to appear as witnesses if documents are being relied upon in proceedings (see PD 13.2.2).

The Tribunal is obliged to have regard to any representations that were filed at first instance (see Section 51(2)(c) and Section 62(4) of the *Land Use Planning and Approvals Act 1993*). At the full hearing of any appeal, the parties will be afforded an opportunity to be heard as to the extent to which any representations may be considered.

**Appendix 8A**  
**Cover Sheets for Statements of Evidence**

**STATEMENT OF EVIDENCE**

**IN THE RESOURCE MANAGEMENT AND PLANNING APPEAL  
TRIBUNAL**

**Tribunal reference number \*** .....

**Appellant:** .....

**1<sup>st</sup> Respondent:** .....

**Other Respondents (if any):** .....

**Party Joined (if any):** .....

**Author:** .....

**Field of Expertise (if any)**.....

.....

.....

.....

**Filed on behalf of:** .....  
(Appellant, Respondent or Third Party)

**Date:** .....

**APPENDIX 8B:**  
**GUIDELINES - EVIDENCE AND SUBMISSIONS BEFORE THE**  
**RESOURCE MANAGEMENT AND PLANNING APPEAL TRIBUNAL**  
**Witnesses Statements of Evidence and Advocates Submissions - Basic**  
**Distinctions**

| <b>Evidence</b>   | <b>Submissions</b>   |
|---|--|
| A statement given by a witness  | Argument or persuasion - by an advocate  |
| Of fact or opinion so as to prove that fact or opinion<br><br>e.g. facts - details of a development<br>e.g. opinion - access for traffic will be unsafe   | Argument as to which facts or opinions should be accepted by the Tribunal and as to the effects of those facts and opinions and the law upon the issues before the Tribunal.<br><br>Submissions refer to the evidence given or assessed. Submissions do not contain new facts and are not capable of proving anything. |
| Normally evidence is given first  | Normally submissions are made after the evidence has been concluded  |
| Normally not given as to construction of an Act, State Policy, Planning Ordinance or other legal instrument   | Characteristically as to proper construction (meaning) of an Act, State Policy, Ordinance or other legal instrument, as well as about the effects of facts or opinion  |
| May be non-expert or expert   |  |
| Expert - as to fact or opinion requiring special skill or knowledge<br><br>Facts outside the expertise of the Tribunal<br><br>e.g. accepted scientific fact behaviour of sound - behaviour of fume and odour plumes - accepted chemical reactions - accepted physical facts<br><br>Opinion - e.g. inferences or conclusions drawn from facts proved by the expert or by other witnesses in the proceedings<br><br>e.g. probable overshadowing resulting from a structure - likely behaviour of an odour plume - effect of a development upon heritage significance of a building - likely extent of overshadowing caused by a structure |  |
| While expert opinions must be formed upon stated or proven facts, there are some facts that do not require proof, e.g. dictionaries, generally accepted scientific texts and writings and journals, generally accepted bodies of expert knowledge   |  |
| The Tribunal or a court is not obliged to accept expert evidence, even though it remains uncontradicted.  |  |

|  |   |
|--|---|
| <p>Experts should not express an opinion upon the ultimate question the Tribunal is to decide.</p> <p>e.g. In an appeal against the refusal of a permit, an opinion that the permit should be granted. An opinion that there is no apparent planning reason why a permit could not be granted would be acceptable.</p>   | <p>Submissions may be made as to what conclusions the Tribunal should reach and the proper form of any order.</p> |
| <p>The limits of evidence - evidence is not receivable if it is not relevant to issues in the proceedings before the Tribunal.</p> <p>For example, in an appeal against the grant of a permit, residential amenity may be relevant, but the way in which Council reached its decision is not. Matters such as bias of Councillors, or a failure to follow the Council Planning Officer's advice, are not relevant. It is the decision (i.e. permit or the conditions imposed upon it, the refusal to grant a permit,) which are relevant and not the manner in which Council reached that decision.</p> <p>The only exception to the above is in the case of issues of jurisdiction, for example, where a requirement of LUPAA has not been complied with.</p> |   |
| <p>Expert witnesses; expert witnesses as advocates; and the form of expert evidence:</p> <p>Please read the contents of PD15 and PD8.4 of these Practice Directions closely.</p>   |   |
| <p><b>'Issues'</b></p> <p>The issues in the proceeding are those which have been established by the grounds of appeal as elaborated by the lists of issues presented by the parties to the Tribunal at the first directions hearing, or as otherwise directed by the Tribunal.</p>   |   |

## Appendix 8C – Draft Conditions of Approval

1. **Overview:** The Tribunal must ensure that in handing down its final determination, all relevant matters relating to the appeal are determined. As such, the Tribunal must ensure that it has all relevant information before it in the event it is minded to grant a permit. The Tribunal's Practice Directions have been modified to require the provision of draft conditions of approval by the planning authority in the event that the Tribunal is minded to grant a permit. Each other party will be required to identify which conditions are in dispute and / or any alternative sought to be imposed by that party. The provision of these draft conditions of approval are done so on a without prejudice basis. Their provision does not indicate a propensity for approval. It is provided to ensure that all matters that need to be disposed of can be done so in a single determination rather than multiple stages.
2. **Council's Provision of Draft Conditions of Approval:** A planning authority is required to file with the Tribunal at the same time as all evidence a set of conditions of approval. Alternatively, the Council will need to file submissions detailing the basis upon which it says it cannot provide that set of conditions of approval. Notwithstanding a Council may have refused the proposal, they are required to turn their minds to a proposed set of conditions of approval in the event the Tribunal ultimately overturns that decision. Councils are granted the opportunity to file submissions detailing the basis upon which they say the provision of grounds of approval are not possible.
3. **Response by Other Parties:** Each of the other parties to the proceedings are afforded the normal period of seven days to file any response evidence to the conditions of approval as proposed.
4. **Evidence:** The parties to the proceedings should ensure that in the filing of response evidence for a hearing they have addressed the conditions of approval and any dispute identified in the evidence submitted by witnesses.

## **Practice Direction 9: Information and Plans Requirements**

- 9.1 Overview:** This Practice Direction sets out requirements for the presentation of material and, in particular, plans and drawings to be used in proceedings. These requirements are mandatory and a failure to comply with them will result in the material being returned or disregarded. A delay or adjournment of proceedings resulting from a failure to comply with these requirements may give rise to an order for costs.
- 9.2 Requirements for Plans and Photographs:** The three copies of plans, drawings and illustrations submitted as evidence should conform to the relevant requirements in Appendix 9A.

## **Appendix 9A**

### **Schedule of Plans, Drawings and Illustrations**

#### **A. Information required under Clause 8.0 of the “Planning Scheme Template for Tasmania” – Schedule to Planning Directive No. 1 – “The Format and Structure of Planning Schemes”, May 2011:**

8.1.2 Sufficient information must be provided with an application to demonstrate compliance with all applicable standards and purpose statements in applicable zones, codes and specific area plans, and must include the following documentation:

- a) a copy of the current certificate of title for the site to which the permit sought is to relate, including the title plan and schedule of easements;
- b) a full description of the proposed use or development;
- c) a full description of the manner in which the use or development will operate.

8.1.3 The following information and plans must be provided as part of an application unless the planning authority is satisfied that the information or plan is not relevant to the assessment of the application:

- a) a site analysis and site plan at an acceptable scale showing:
  - i) the existing and proposed use(s) on the site;
  - ii) the boundaries and dimensions of the site;
  - iii) topography including contours showing AHD levels and major site features;
  - iv) natural drainage lines, watercourses and wetlands on or adjacent to the site;
  - v) soil type;
  - vi) vegetation types and distribution, and trees and vegetation to be removed;
  - vii) the location and capacity of any existing services or easements on the site or connected to the site;
  - viii) existing pedestrian and vehicle access to the site;
  - ix) the location of existing and proposed buildings on the site;
  - x) the location of existing adjoining properties, adjacent buildings and their uses;
  - xi) any natural hazards that may affect use or development on the site;
  - xii) proposed roads, driveways, car parking areas and footpaths within the site;
  - xiii) any proposed open space, communal space, or facilities on the site;
  - xiv) main utility service connection points and easements;



- xv) proposed subdivision lot boundaries, where applicable.
- (b) where it is proposed to erect buildings, a detailed layout plan of the proposed buildings with dimensions at a scale of 1:100 or 1:200 showing:
  - i) the internal layout of each building on the site;
  - ii) the private open space for each dwelling;
  - iii) external storage spaces;
  - iv) car parking space location and layout;
  - v) major elevations of every building to be erected;
  - vi) the relationship of the elevations to natural ground level, showing any proposed cut or fill;
  - vii) shadow diagrams of the proposed buildings and adjacent structures demonstrating the extent of shading of adjacent private open spaces and external windows of buildings on adjacent sites;
  - viii) a plan of the proposed landscaping of the site showing:
    - A) planting concept;
    - B) paving materials and drainage treatments and lighting for vehicle areas and footpaths;
    - C) plantings proposed for screening from adjacent sites or public places; and
    - D) materials and colours to be used on roofs and external walls.

**B. Information Required In Addition To Part A Above:**

The following requirements are additional to and/or complementary to those contained in Part A above, or any other planning authority requirements.

**I. GENERAL REQUIREMENTS**

- ☐ scaled plans - to include bar scale/graphic scale to ensure accuracy of copies;
- ☐ preferred drawing sheet size is A1 unless project is small enough for A3;
- ☐ A3 sheets containing only one floor plan, elevation or section are discouraged as resulting in excessive bundles;
- ☐ A4 sheets should not be used except in unusual circumstances;
- ☐ where sheets are reduced, at least one copy should be provided at the original sheet size in addition to the 4 mandatory copies;
- ☐ reduced copies must be to a true scale e.g. 1:100 at A1 = 1:200 at A3;
- ☐ originals at A3 must not be reduced to A4 because of resulting legibility problems;
- ☐ where originals are in colour, all copies must be in colour;

- ☐ any amendments must be noted and dated and sets of drawings must be consistent in relation to each other;
- ☐ the preferred location for the title blocks, including details of amendments, is to the right hand edge so that individual sheets are easy to identify when bound, folded or in bundles.

**2. SITE PLANS** should include:

- ☐ all dimensions and site boundaries in metric;
- ☐ all critical distances from front, side and rear boundaries;
- ☐ relevant features of adjacent properties including windows, private open spaces, paved areas, landscaped areas, driveways, decks and terraces;
- ☐ relevant features of immediately adjoining streets including poles, footpaths, kerbs, crossings, pits and street vegetation;
- ☐ relevant auxiliary elements such as garbage storage, clothes drying and water and retention tanks;
- ☐ calculation of site area and site coverage and method of calculation.

**3. BUILDING DRAWINGS** should include:

- ☐ room/space names and/or uses;
- ☐ location of all doors and windows;
- ☐ levels at AHD of floors, decks, courtyards, terraces, ceilings and roofs on all elevations and sections;
- ☐ sections, as appropriate;
- ☐ materials and finishes;
- ☐ roof levels relative to natural ground levels immediately below and relative to any planning scheme height limits and/or envelope requirements;
- ☐ setbacks relative to planning scheme distances and/or envelope requirements;
- ☐ clear distinction between existing and new work with separate plans, elevations and sections of the existing if critical;
- ☐ overall dimensions and the dimensions of significant projections and re-entrant features and sufficient internal dimensions to confirm overall figures and area calculations;
- ☐ calculation of site coverage and/or plot ratio and method of calculation.

**4. MONTAGES** are optional but can be very useful; where required (see Character and Streetscape and Heritage entries below) they should:

- ☐ explain the method employed;
- ☐ include representation of the existing situation including any relevant vegetation;

- ☐ include any relevant proposed or altered vegetation on the representation of the proposal;
- ☐ use unrendered frame or block forms only where scale, mass and height are the issues;
- ☐ employ rendered materials, textures, colours and shadows where Character and/or Streetscape or Cultural Heritage Significance are in issue.

**5. PHOTOGRAPHS** if included should include:

- ☐ an indication of the lens type used and the height of the vantage point;
- ☐ the date and time taken;
- ☐ author's name;
- ☐ confirmation of any stitching, modification or enhancement of originals.

**6. SUBDIVISION AND ESTATE PLANS** - should include:

- ☐ full contours to AHD at intervals relevant to slopes, access, parking, road and drainage grades;
- ☐ details of any proposed natural drainage pattern modifications;
- ☐ adjacent development patterns and structures;
- ☐ dimensions and lot areas in metric;
- ☐ location and dimensions of any proposed development envelopes;
- ☐ any planning scheme required inscribed circles, dimensional limitations and slope parameters;
- ☐ major service easements and planned or proposed infrastructure details;
- ☐ relevant zone and precinct boundaries;
- ☐ relevant geological constraints such as landslip prone areas;
- ☐ relevant any contaminated areas;
- ☐ relevant flood and projected climate change water level contours;
- ☐ relevant bushfire hazard management zones on the same base as the main plans;
- ☐ any relevant noise and/or odour buffers or contours;
- ☐ any threatened native vegetation and threatened native ecological communities;
- ☐ any threatened /or endangered fauna habitats;
- ☐ any relevant cultural heritage and/or archaeological details;
- ☐ proposed soft and hard landscaping (see below for details).

**7. SPECIFIC REQUIREMENTS RELEVANT TO GROUNDS AND ISSUES IN THE APPEAL**

**Where Overshadowing is at issue** - drawings should include:

- ☐ true north;
- ☐ explanation of the method employed and confirmation of the altitude and azimuth of the sun for each shadow plan;
- ☐ comparison between existing and proposed shadowing at least at 9.00am, 12noon and 3.00pm at the solstices and equinoxes;
- ☐ shadowing from existing buildings, vegetation, fences and any other significant structures such as outbuildings;
- ☐ shadowing from proposed works and landscaping;
- ☐ where critical shadows fall on vertical surfaces - include sections, elevations and/or 3D diagrams.

**Where Privacy is at issue** - drawings should include:

- ☐ all relevant/involved elements;
- ☐ comparative levels at AHD supplemented with relative sections;
- ☐ distances and off-sets between sensitive viewing points and impacted features;
- ☐ the effect of any proposed screens and/or vegetation.

**Where Character and/or Streetscape are at issue** - illustrations and drawings should include:

- ☐ photographs/detail photographs descriptive of the existing situation (see 5 PHOTOGRAPHS above for requirements);
- ☐ a figure-ground diagram of the proposal and the surrounding area (Google or other aerial photographs are an acceptable base);
- ☐ a ground-figure diagram version where spaces rather than building impacts are the main issue;
- ☐ street elevations and/or perspectives and/or montages illustrating the relationship of the proposal to the existing setting.

**Where Cultural Heritage Significance is at issue** - documents and drawings should include:

- ☐ authentication/attribution of all historical material;
- ☐ plans and drawings of the existing situation where major changes are proposed;
- ☐ clear distinction between existing and new work where changes are minor;
- ☐ illustrations and drawings as for Character and/or Streetscape (see above) where impacts on any adjacent place(s) of cultural heritage significance are at issue.

**Where Parking and Access is at issue** - diagrams and drawings should include:

- ☐ clear dimensions of access, pedestrian facilities, turning paths and parking spaces;
- ☐ contour or gradient plans where relevant;
- ☐ comparison with planning scheme requirements and/or Australian Standards e.g. AS/NZS 2890.1:2004 as relevant.

**Where Traffic is at issue** - diagrams and drawings should include:

- ☐ clear dimensions of footpaths, crossings, pavements, shoulders and lanes;
- ☐ relevant sight distances;
- ☐ relevant features such as street parking, traffic controls, bus stops, pedestrian crossings, street vegetation and power poles;
- ☐ comparison with planning scheme requirements and Australian or other relevant standards.

**Where Landscaping is at issue** - drawings should include:

- ☐ plans using the same base , orientation, scale, levels, contours, etc as for the main site and building drawings except for details;
- ☐ existing vegetation including species, height and spread of canopy;
- ☐ hard and soft landscaping details;
- ☐ alterations and new proposals, a schedule of plantings and the proposed maintenance regime.

## Practice Direction 10: Statements of Facts and Contentions

**10.1 Overview:** The Tribunal will determine in individual cases whether Statements of Facts and Contentions will be required. These are intended to assist the Tribunal and parties in identifying those matters which are agreed, those matters which are disputed and the basis and nature of each disputed item. The Tribunal will normally require these statements in more complex hearings.

**10.2 Direction to Prepare Statement and Content:** The Tribunal may direct any or all parties to prepare a Statement of Facts and Contentions in accordance with paragraph 10.3 or any part of it. A party seeking to raise an issue of fact or law that precludes the approval of an application is to identify it in the Statement of Facts and Contentions where that Statement has been directed to be prepared.

### 10.3 Annexure A: Statement of Facts and Contentions Requirements

#### Requirements of Statement of Facts and Contentions by Planning Authority

- 10.3.1 The statement is to be as brief as reasonably possible.
- 10.3.2 The statement is to be divided into two parts – Part A Facts and Part B Contentions.
- 10.3.3 An authorised officer of the planning authority is to sign and date the statement.
- 10.3.4 In Part A - Facts, the planning authority is to identify:
  - (a) **The proposal:** a brief description of the proposed development or modification of a development including any building, subdivision and/or land use and, where relevant, matters such as density, floor space ratio, setbacks and heights.
  - (b) **The site:** a description of the site including its dimensions, topography, vegetation and existing buildings.
  - (c) **The locality:** a description of the locality including the type and scale of existing surrounding development.
  - (d) **The statutory controls:** details of the applicable planning instruments and the relevant provisions, including the applicable zone.
  - (e) **Actions of the respondent consent authority (Council or planning authority):** date of application, application number, details of any advertising process and its results, details of any consultation and results, the decision of the respondent and the reasons for refusal.

Part A Facts is not to include matters of opinion.

- 10.3.5 In Part B – Contentions, the planning authority is to identify each fact, matter and circumstance it contends requires or should cause the Tribunal, in exercising its powers under Section 23 (1) of the Act to either refuse the application or to grant a permit subject to certain conditions.
- 10.3.6 In Part B - Contentions, the planning authority is to:
- (a) focus on issues genuinely in dispute;
  - (b) have a reasonable basis for its contentions;
  - (c) present its contentions clearly, succinctly and without repetition;
  - (d) where it contends that the application must be refused, identify the factual and/or legal basis for that contention; any such contention is to be listed at the beginning of Part B - Contentions and is to be clearly identified as a contention that the application must be refused;
  - (e) where the planning authority contends there is insufficient information to assess the application, list the information it contends is required;
  - (f) where it contends that a proposal does not comply with provisions, of the applicable planning scheme or body of legislation, identify the standard or provision that is breached and quantify the extent of the non-compliance (if necessary, in a diagrammatic form), grouping together provisions or sections dealing with the same aspect (for example, height or density);
  - (g) identify the nature and extent of each environmental impact relied upon to support any contention and, if practicable, quantify that impact; and
  - (h) identify any contentions that may be resolved by conditions of consent.

**Requirements for Statement of Facts and Contentions by Applicant for Permit**

- 10.3.7 The statement is to be as brief as reasonably possible.
- 10.3.8 The statement is to be divided into two parts – Part A - Facts and Part B - Contentions.
- 10.3.9 The Applicant for the Permit or its authorised officer or agent is to sign and date the statement.
- 10.3.10 In Part A - Facts, the applicant for a permit is to identify:
- (a) the relevant Application for Use or Development, its number and the date of determination;
  - (b) if an Applicant for a Permit, the decision or conditions appealed against.

Part A - Facts is not to include matters of opinion.

10.3.11 In Part B - Contentions an Applicant for a Permit is to identify each fact, matter and circumstance that is contended require or should cause the Tribunal, in exercising its powers under Section 23 (1) of the Act, to grant a permit, or not to impose or to amend certain conditions

10.3.12 An Applicant for a Permit is to:

- (a) focus its contentions on issues genuinely in dispute;
- (b) have a reasonable basis for the contentions; and
- (c) present its contentions clearly and succinctly.

10.3.13 An applicant for a permit is to identify:

- (a) each condition that the applicant contends should be deleted; and
- (b) each condition that the applicant contends should be amended and, for each such condition, the amendment sought and the reason for seeking the amendment.



## Practice Direction 11: Representatives and Witnesses

- 11.1 Representatives:** A person does not need to be represented to appear before the Appeal Tribunal. If a party engages a professional person to act on their behalf, that professional should ensure they comply with the requirements set out in this Practice Direction.
- 11.2 Non-Professional Representatives:** If a party seeks to be represented by a friend, colleague or family member who is not acting in the professional capacity of an advocate, the person seeking to be represented must complete an Authorisation to Act form. That document must be filed with the Tribunal as early as possible in the proceedings and before the representative undertakes activities in representing the party. The Authority to Act form is on the Tribunal's website.
- 11.3 Notice of Appearance:** Any professional person (solicitor or other professional) who is engaged to appear as an advocate for a party must complete and file with the Tribunal a [Notice of Appearance](#) as soon as they receive instructions to act.
- 11.4 Acting as both Witness and Advocate:** Please read *Practice Direction 12 – Expert Witnesses* in relation to Expert Witnesses and their obligations. Given the inherent conflict between the role of an advocate and the impartial expectations of an expert witness, any person who takes on both roles of advocate and expert witness is on notice that greater critical scrutiny will be applied to the evidence of that person than would have been applied had they acted purely as an expert witness.
- 11.5 Duties and Roles of Representative/Advocate:** A representative acts for another person. That person must be fully aware that the decisions that a representative makes will be binding upon them and therefore must ensure that they have given that representative full and clear instructions as to the conduct of the proceedings. A representative and/or advocate must attend all listings of the Tribunal's hearings. A representative/advocate is responsible for co-ordinating and conducting the case of a party. As with any witness, the representative has a responsibility and duty to the Court and Tribunal and must not knowingly mislead the Tribunal in the conduct of any proceedings.
- 11.6 Witnesses:** In relation to expert witnesses, please see the separate *Practice Direction 12 – Expert Witnesses* for expert witnesses. In giving evidence at the Tribunal as a non-expert witness it is necessary to complete a Statement of Evidence. Please see *Practice Direction 8 – Material & Evidence*. All witnesses must be present at a hearing of the Tribunal to be questioned about the contents of their statement of evidence and may only be excused from attending proceedings with the consent of all parties and the Tribunal. An application for a witness not to attend a hearing must be made at least two weeks before the hearing date. Witnesses may also give evidence by telephone or video link up – but only on application at least two weeks before the hearing. Such application may be declined if the witness needs to be shown hard copy documents in the course of questioning.

- 11.7 Expert Witnesses and Non-Expert Witnesses:** Ordinarily a witness who wishes to express an opinion must be an expert in a relevant field to be qualified to give evidence of that nature. The Tribunal, since January 2006, in accordance with Section 16 (1) (c) has allowed evidence to be given by non-expert witnesses who are parties to the proceedings and wish to express their own personal opinions. Evidence will not be excluded on the basis that the party expressing the opinion has no expertise in the field in which the opinion is expressed. This does not allow parties to call non-expert witnesses other than themselves to give evidence. The weight given by the Tribunal to expressions of opinion by non-expert witnesses is a matter for the Tribunal, having regard to all relevant matters.
- 11.8 Duties and Roles of Witnesses:** A witness must prepare a Statement of Evidence in accordance with the Tribunal's Practice Directions - *Practice Direction 12 – Expert Witnesses*, and *Practice Direction 8 – Material & Evidence*. They must attend proceedings at the times directed by the Tribunal. They must follow directions given by the Tribunal in the course of proceedings. They must not knowingly give evidence that is false or misleading. Some of these matters are not merely duties, but are also requirements of the *Appeal Tribunal Act* and a failure to comply with them may constitute an offence (see Sections 30, 31, 32 & 33 of the *Appeal Tribunal Act*).
- 11.9 Summoned Witnesses and Costs:** The Tribunal, under Section 20 (2) of the Act may issue a summons for the production of material or witnesses. Please see *Practice Direction 13 - Summonses* for greater details. The Tribunal will not issue a summons for an expert to prepare opinion evidence in relation to an appeal. However, the Tribunal may consider the issuance of a summons to an expert to attend to give evidence in relation to a pre-existing opinion relevant to the proceedings. When summoning a person to attend to give evidence, the person who successfully applied for the summons is expected to pay the allowances and expenses of that witness. (see Section 36 of the Act). If a witness is being called to give evidence in relation to certain factual matters within their knowledge and as such no written statement of evidence exists regarding that knowledge, a deposition hearing may be required (see *Practice Direction 13 - Summonses*).
- 11.10 Conducting the Case and Interposing Witnesses:** The Tribunal follows a set order in its proceedings (see *Practice Direction 7 – Hearing Process*). However, on occasions, the parties may have witnesses who have a limited timeframe within which they may attend a hearing to give evidence. In those circumstances, a party may seek to “interpose” a witness outside the ordinary order of proceedings – that is, you may wish to call the witness earlier than you would ordinarily be entitled to do. Application to interpose a witness should be made as soon as you become aware that the witness has limited availability, and that should be known upon first engaging the witness to prepare evidence. The application must be made in writing and filed with the Tribunal and served upon each other party to the proceedings (see *Practice Direction 3.4*).
- 11.11 Giving Evidence (technology options):** As indicated under *Practice Direction 11.6* witnesses are able to give evidence by telephone and video link. In relation to video link you will be required to notify the Tribunal and make

the arrangements to be linked to the Tribunal's video conferencing facilities. You should contact the Tribunal Registry well before the hearing to make those arrangements. If the giving of evidence entails the use of information or technology or display equipment, you should contact the Tribunal Registry as to whether it has the facilities to display the material you wish to use. If it does not, you will be expected to provide the necessary technology and equipment for the presentation of your case.

## Practice Direction 12: Expert Witnesses

**12.1 Overview:** This Practice Direction governs the giving of evidence by expert witnesses. It sets out the guidelines for the content and format of expert testimony as well as the expectations, responsibilities and duties of expert witnesses in the Tribunal processes.

**12.2 Expert Evidence in Chief:** An expert witness's evidence must be contained in one or more statements of evidence, unless the Tribunal otherwise directs.

### 12.3 General Duties and Code of Conduct:

- a) An expert witness must comply with the Code of Conduct set out in Appendix 12A.
- b) As soon as practicable after an expert witness is engaged or appointed the engaging party must provide the expert witness with a copy of the code of conduct.
- c) An expert's statement of evidence may not be produced in evidence unless it contains an acknowledgment that the author has read the code of conduct and agrees to be bound by it, unless the Tribunal otherwise orders.
- d) Oral evidence may not be received from an expert witness unless the Tribunal is satisfied that the expert witness has acknowledged, whether in an expert report prepared in relation to the proceedings or otherwise in relation to the proceedings, that he or she has read the code of conduct and agrees to be bound by it, unless the Tribunal otherwise orders.
- e) An expert witness is not an advocate for a party. Where the same person represents a party at a hearing and gives evidence as an expert, there is a clear conflict between the overriding duty to the Tribunal and the duty to the party (client). The result may be that the evidence given by that witness is not accorded the same weight which would be given to an expert who does not appear as an advocate.

### 12.4 The Context and Format of Expert Evidence:

- a) Any statement of evidence must comply with formatting requirements set out in *Practice Direction 8.6*.
- b) A statement of evidence can refer to, but is not to repeat, any information contained in a Statement of Facts and Contentions (where prepared pursuant to *Practice Direction 10*) unless the expert contends that such information is incorrect or inaccurate.

### 12.5 Conferences between Expert Witnesses

The Tribunal directs expert witnesses to:

- a) confer, and
- b) endeavour to reach agreement on matters in issue,

- c) and to file within seven days of the hearing, a statement which identifies those matters which are agreed, or otherwise certifies that a conference has occurred and that no matters could be agreed between them.

## **12.6 Joint Reports of Experts**

The Tribunal may also direct expert witnesses to:

- a) prepare a joint report, specifying matters agreed and matters not agreed and reasons for any disagreement, and
- b) base any joint report on specified facts or assumptions of fact, and may do so at any time, whether before or after the expert witnesses have furnished any individual statements of evidence.

The Tribunal may direct that a conference be held:

- (a) with or without the attendance of the parties affected or their legal representatives, or
- (b) with or without the attendance of the parties affected or their legal representatives, at the option of the parties, or
- (c) with or without the attendance of a facilitator (that is, a person who is independent of the parties and who may or may not be an expert in relation to the matters in issue).

Expert witnesses so directed may apply to the Tribunal for further directions to assist in any aspect of the performance of their functions.

Any such application must be made by sending a written request for directions to the Tribunal, specifying the matter in relation to which directions are sought.

An expert witness who makes such an application must send a copy of the request to the other expert witnesses and to the parties to the proceedings.

## **12.7 Joint Statements of Evidence Arising from Conferences Between Expert Witnesses:**

- a) This rule applies if expert witnesses prepare a joint statement of evidence as above.
- b) The joint statement of evidence must specify matters agreed and matters not agreed and the reasons for any disagreement.
- c) The joint statement of evidence may be tendered at the hearing as evidence of any matters agreed.
- d) In relation to any matters not agreed, the joint statement of evidence may be used or tendered at the hearing only in accordance with the practices of the Tribunal.
- e) Except by permission of the Tribunal, a party to the proceedings may not adduce evidence from any other expert witness on the issues dealt with in the joint statement of evidence.

## **12.8 Experts Jointly called by Parties or Concurrent Testimony:** The Tribunal may direct that evidence from more than one expert in the same discipline is to be given concurrently at the hearing.

**12.9 Notice of Cross Examination Required:** If a party requires any expert for cross-examination, notice is to be given at least three days before the hearing.

## **Appendix 12A**

### **Expert Witness Code of Conduct**

#### **1. Application of code**

This code of conduct applies to any expert witness engaged or appointed:

- a) To provide an expert's statement of evidence for use as evidence in proceedings or proposed proceedings, or
- b) To give opinion evidence in proceedings or proposed proceedings.

#### **2. General duty to the Tribunal**

- a) An expert witness has an overriding duty to assist the Tribunal impartially on matters relevant to the expert witness's area of expertise.
- b) An expert witness's paramount duty is to the Tribunal and not to any party to the proceedings (including the person retaining the expert witness).
- c) An expert witness is not an advocate for a party.

#### **3. Duty to comply with Tribunal's directions**

An expert witness must abide by any direction of the Tribunal.

#### **4. Duty to work co-operatively with other expert witnesses**

An expert witness, when complying with any direction of the Tribunal to confer with another expert witness or to prepare a party's expert's statement of evidence with another expert witness in relation to any issue:

- a) Must exercise independent, professional judgment in relation to that issue, and
- b) Must endeavour to reach agreement with any other expert witness(es) on that issue, and
- c) Must not act on any instruction or request to withhold or avoid agreement with any other expert witness(es).

#### **5. Experts' reports**

- a) An expert's statement of evidence must (in the body of the statement or in an annexure to it) include the following:
  - i) the expert's qualifications as an expert on the issue the subject of the report,
  - ii) the facts, and assumptions of fact, on which the opinions in the report are based (a letter of instructions may be annexed),
  - iii) the expert's reasons for each opinion expressed,
  - iv) if applicable, confirmation that a particular issue falls outside the expert's field of expertise,

- v) a list of literature or other materials utilised in support of the opinions,
  - vi) any inspections, examinations, tests or other investigations, on which the expert has relied, including details of the qualifications of the person who carried them out,
  - vii) in the case of a statement of evidence that is lengthy or complex, a brief summary of the statement (to be located at the beginning of the statement).
- b) Where an expert believes that a statement of evidence may be incomplete or inaccurate without some qualification, that qualification must be stated in the statement.
  - c) If an expert witness considers that his or her opinion is not a concluded opinion because of insufficient research or insufficient data or for any other reason, this must be stated when the opinion is expressed.
  - d) If an expert witness changes an opinion on a material matter after providing an expert's statement to the engaging party (or that party's legal representative), the expert witness must forthwith provide the party (or legal representative) with a supplementary statement to that effect containing such of the information referred to in subclause 5(a) above as is appropriate.

## **6. Experts' conference**

- a) Without limiting subclause 3 above, an expert witness must abide by any direction of the Tribunal:
  - i) to confer with any other expert witness(es), or
  - ii) to endeavour to reach agreement on any matters in issue, or
  - iii) to prepare a joint report, specifying matters agreed and matters not agreed and reasons for any disagreement, or
  - iv) to base any joint report on specified facts or assumptions of fact.
- b) An expert witness must exercise independent, professional judgment in relation to such a conference and joint report, and must not act on any instruction or request to withhold or avoid agreement.

## **7. Joint reports arising from experts' conferences**

- a) This rule applies if expert witnesses prepare a joint report as referred to in subclause 6 above.
- b) The joint report must specify matters agreed and matters not agreed and the reasons for any disagreement.
- c) The joint report may be received at the hearing as evidence of any matters agreed.
- d) In relation to any matters not agreed, the joint report may be used or tendered at the hearing only in accordance with the rules of evidence and the practices of the Tribunal.
- e) Except by leave of the Tribunal, a party affected may not adduce evidence from any other expert witness on the issues dealt with in the joint report.



## Practice Direction 13: Summonses

**13.1 Overview:** The Tribunal may issue summonses under a variety of legislative provisions, the more common of which relate to the Tribunal's enforcement powers under Section 64 of the *Land Use Act* and Section 48 of *EMPCA*. For information regarding those summonses please refer to *Practice Direction 14*. This Practice Direction refers to the issuance of summonses for discovery of information and evidence in normal planning appeals pursuant to the power set out in Section 20 of the *Appeal Tribunal Act*.

**13.2 Aims of Summonses:** A summons may seek the production of documents, the attendance of a witness or both.

**13.2.1 Summons for the production of documents:** Any application for a summons for the production of documents must:

- (a) Be in writing,
- (b) Specify the documents applied for or, alternatively, the class of documents required - with clear submissions demonstrating that the documents are relevant to the proceedings before the Tribunal, and
- (c) Identify the person or organisation that possesses or has custody of the documents and the address of that person or organisation.

**13.2.2 Summons for the attendance of a witness:** Witnesses may be called for one of two reasons. Firstly, they may have authored a document which a party wishes to produce in evidence and, therefore, the author of the information must attend to be questioned about its contents. Secondly, a person may have witnessed events or have factual information which is not contained in documentary evidence.

Any application for a summons for witnesses to give evidence about a pre-existing document must:

- (a) Be in writing,
- (b) Give the full name and address of the person to be served with the summons,
- (c) Attach the document which the witness has produced, and
- (d) Include submissions demonstrating why the document is relevant to the proceedings.

Any application for a summons for witnesses to give evidence about information within their knowledge must:

- (a) Be in writing,
- (b) Give the full name and address of the person to be served with the summons,
- (c) Provide written submissions detailing the information that you say the witness possesses, and

- (d) Include submissions demonstrating why the information is relevant to the proceedings.

It is preferable that arrangements be made with the witness in question for them to prepare a written statement of the information within their knowledge. If, however, that is not possible, it may be necessary for a deposition hearing to occur – see *Practice Direction 13.5*. If a witness who is attending to give evidence agrees, once a summons has been issued, to prepare a written statement of their evidence, you must ensure that statement is provided to all other parties in accordance with the Tribunal's procedures and timetable for exchange of evidence.

The Tribunal will not issue a summons for an expert witness to prepare an opinion or statement of evidence about the subject of the proceedings. The Tribunal will only issue a summons in relation to pre-existing work that has been undertaken by an expert witness.

Any application for a summons should be made as early in the proceedings as possible. Disclosure of all evidence, including those witnesses who will be giving evidence at a hearing, must occur on the same timetable as the exchange of all evidence for the full hearing. As such, if a witness will require a deposition hearing, then an application for a summons should be made well before the exchange dates for evidence.

**13.3 Responsibilities for Service:** It is the responsibility of the party who made an application for the summons to serve that summons upon the witness in a timely manner. A person who is the subject of a summons must be given sufficient notice in relation to the return date of the summons. A person who has applied for and received a summons should serve it upon the Respondent to that summons as quickly as practicable.

In order to serve a summons, you may:

- (a) Give it directly to the person, or
- (b) Leave it at, or post it to, the person's residential or postal address – or address of business/employment, whichever is last known to the server of the summons.

**13.4 Expenses of Witnesses:** Under Section 36 of the *Appeal Tribunal Act*, a witness who is summonsed is entitled to be paid allowances and expenses for that attendance. The person who applied for and received the summons is liable for those expenses.

**13.5 Deposition Hearings:** Where application is made for persons to attend the Tribunal to be questioned about information within their knowledge, it may be necessary for a deposition hearing to take place if that person cannot or will not provide a written statement of the information within their knowledge. A deposition hearing must occur well in advance of the full hearing. In making an application for a summons to issue for a witness to attend to give evidence, you should advise the Tribunal whether a deposition hearing would be necessary. A deposition hearing permits the person who sought the summons being allowed to question the witness, and for that evidence to be recorded and transcribed. The cost of transcription of the evidence is to be paid by the

person who applied for and received the summons. The other parties to the proceedings will be afforded an opportunity to consider the information that was given in the deposition hearing and, if necessary, the witness may be recalled for cross-examination. The recalling of the witness for cross-examination would occur at the full hearing of the Tribunal into the merits of the matter. The person who applied for the witness to give evidence would be liable for all expenses of that witness attending the Tribunal.

## Practice Direction 14: Civil Enforcement Proceedings

**14.1 OVERVIEW:** Civil enforcement proceedings may be initiated with the Tribunal under various Acts including:

- (a) Section 64 of the *Land Use Planning & Approvals Act 1993*,
- (b) Section 48 of the *Environmental Management & Pollution Control Act 1994*,
- (c) Section 53 of the *Historic Cultural Heritage Act 1995*,
- (d) Section 264, 266 or 280 of the *Water Management Act 1999*,
- (e) Section 111 of the *Marine Farming Planning Act*, or
- (f) Section 96 of the *Strata Title Act*.

Any person commencing actions under these, or any other empowering legislation should be familiar with these Practice Directions. Persons not legally trained are strongly encouraged to take legal advice regarding commencing Civil Enforcement Proceedings.

**14.2 Who may commence Civil Enforcement Proceedings:** The relevant legislation will specify persons who have standing to commence proceedings under the relevant section. Ordinarily, a person with a proper interest may apply to the Tribunal for an order restraining another person from acting in a manner which is contrary to the *Land Use Act* or a planning scheme or a permit. Certain other agencies and persons may have automatic standing to bring proceedings.

PLEASE NOTE: With respect to s64 of the *Land Use Planning & Approvals Act 1993*, the Act has been modified as at 1 February 2015. There are now requirements which must be met before you may file an application under s64. Here is the link to the relevant provisions of the Act ([s64 of LUPAA](#)). The Tribunal's form has been altered to require that you confirm that you have met the prerequisites for filing a s64 application.

**14.3 Filing An Application:** The Tribunal has provided various forms for the making of applications under specific legislation. Please have regard to the Tribunal's website at [www.rmpat.tas.gov.au](http://www.rmpat.tas.gov.au) under the heading "Forms". The following must be provided:

- a) Evidence that the person named as the Respondent is the person who is allegedly breaching either the planning scheme or permit (or relevant legislation). In proceedings brought under Section 64 of the *Land Use Act* such evidence may include a copy of the Certificate of Title which shows the Respondent as the owner of the subject property. The Tribunal must be satisfied that the party named as being responsible for the breach is actually the person directly responsible for the alleged conduct and breach.

You should also identify any other person with a legal or equitable interest in the subject property.

- b) Specific and clear orders that are within the power of the Tribunal to grant, clearly articulating the nature of the relief or the orders that you are seeking from the Tribunal. The specific provisions of the legislation giving rise to the civil enforcement proceedings should be listed to ensure that the orders that you are seeking are within the power of the Tribunal to grant.
- c) Evidence of the breach – The Tribunal must be satisfied on a prima facie basis that a breach has occurred. It is necessary, therefore, to file sufficient evidence to demonstrate to the Tribunal that a summons should issue. As such, the Tribunal requires that evidence be filed in Affidavit or Statutory Declaration form.

Applicants are required to file with the Tribunal four (4) copies of the application and supporting documentation. In addition where there is more than one respondent to an application the applicant is to file two additional copies of each document for each additional respondent.

- 14.4 Assessment of the Application:** If the Tribunal is satisfied, on a prima facie basis, that a breach appears to have occurred, it will issue you with three copies of a summons. The first is titled “Original for Service” and it is the document that you will be required to serve upon the Respondent forthwith. You will also receive a copy titled “For Return to the Tribunal” and a copy titled “Your Copy”. You should complete the form on the reverse side of the copy titled “For Return to the Tribunal” which is a declaration that you have served the summons upon the Respondent. The Tribunal must be satisfied that the Respondent has been served with a copy of the summons. The final copy is for you to keep for your own records.

The summons will contain a return of service date which will require the attendance of both the Applicant for the summons and the Respondent to the summons.

- 14.5 Ex-Parte Hearing:** The Tribunal may not be satisfied on a prima facie basis that a summons should issue and may direct the Applicant to attend an ex parte hearing for the purposes of gaining further information as to whether a summons should issue. You will be notified by the Tribunal Registry of any requirement to attend an ex parte hearing and must attend.
- 14.6 Interlocutory Orders:** A party may seek to apply for an interim or interlocutory order to restrain a party from undertaking certain activities in order to preserve the party’s rights or interests. You should ensure that any such application clearly indicates that it is for an interim or interlocutory order. Supporting evidence and submissions are required to justify the making of such an order. An undertaking to the Tribunal may be required that, in the event the Respondent was restrained from an activity which they were lawfully entitled to undertake, that you, as the Applicant, will reimburse the Respondent for any financial loss suffered as a result of a temporary order being made.

- 14.7 Service of Summonses or Temporary Orders:** The Applicant for a summons must, as soon as possible, serve upon the Respondent any summonses or orders which are made as the Respondent must have sufficient time to consider the summonses or orders before attending any hearing before the Tribunal.
- 14.8 The Return of Service Listing:** This is the first appearance before the Tribunal. It is the opportunity for the Respondent to advise the Tribunal whether they seek to “show cause”. That is, whether they contest either the orders sought, whether a breach has in fact occurred or any other matter which has been included in the application which the Respondent will resist.
- Alternative dispute resolution procedures will be considered and, if appropriate, the matter may be listed for mediation or conciliation. The matter will also be listed for full hearing if the parties are in dispute as to either the orders sought or the allegations of a breach.
- 14.9 Resolution by Consent:** After ADR or if reaching an agreement outside the Tribunal process, the parties may lodge an agreement with the Tribunal. This should be done as soon as practicable after having reached an agreement. If the Chairperson is satisfied that a decision in the terms of the agreement is within the power of the Tribunal and is appropriate, a decision may be issued without the need for a hearing. Practice Direction 5 covers Alternative Dispute Resolution procedures.
- 14.10 Hearing:** Matters unresolved through ADR or agreement will proceed to hearing. The practice directions of the Tribunal with respect to the filing of evidence and the conduct of proceedings are applicable to any civil enforcement proceedings although a variation will occur in the filing of evidence. Ordinarily, the Applicant for a summons will be directed to file, at least four weeks before a hearing, any further and final material that it seeks to rely upon in support of the application. The Respondent to the proceedings will be afforded until two weeks prior to the hearing an opportunity to file any evidence and material in response. The Applicant will then be given a final right of response whereby any final evidence and material may be filed seven days prior to the hearing. On the day of the hearing the order of proceedings will be that the Applicant for the orders and summons will present its case first. The Respondent will then present its case. Final submissions will be presented in reverse order.
- 14.11 Persons Entitled to be Heard:** Under Section 64(4) of the *Land Use Act*, a person with a legal or equitable interest in land to which an application relates is entitled to be heard in proceedings. The Tribunal ordinarily advertises the commencement of proceedings. A person with a legal or equitable interest in the proceedings should write to the Tribunal as soon as practicable after being made aware of those proceedings. They will be required to comply with all directions set by the Tribunal in the resolution of the application.
- 14.12 Enforcement of Orders:** The Tribunal is not responsible for the enforcement of orders that are issued. Parties must take their own legal

advice in relation to seeking penalties against a person who fails to comply with an order of the Tribunal. Ordinarily, such proceedings would be commenced in a Court of competent jurisdiction, such as the Civil Division of the Magistrates Court.

## Practice Direction 15: Costs

**15.1 Overview:** At the end of any proceedings, the Tribunal must make an order in relation to the costs the parties incur having gone through the legal proceedings. In most proceedings, Section 28 of *Appeal Tribunal Act* will regulate the making of and determination of any application for costs. However, some proceedings have separate cost provisions with different considerations (such as Section 64(12) of the *Land Use Act* and Section 48(5A) of EMPCA). Parties are encouraged to take their own private legal advice in relation to the relevant provisions which govern an order for costs before initiating proceedings with the Tribunal. The Tribunal's staff cannot give advice in relation to the likelihood of a costs order being made against a party.

**15.2 What are Costs:** Costs refer to the financial outlay incurred by a party in defending or pursuing proceedings before the Tribunal. Costs may include the retaining of a solicitor/barrister to act for a party, retaining an expert witness to give evidence or retaining a planning consultant to assist a party in an appeal. It may also include disbursements such as photocopying and faxing. Before making an application for costs, a party may wish to take advice as to whether the costs claimed are ones which are capable of reimbursement by order of the Tribunal.

**15.3 Who Can Claim for Costs:** Any party to proceedings before the Tribunal may make an application for costs excluding witnesses or persons who were not formally joined as a party to proceedings. At the conclusion of the proceedings, the Tribunal will issue an order allowing persons to make any applications for costs within 21 days of a nominated date. If no applications are made within that timeframe, the Tribunal will issue a self-executing order that each party bear their own costs of the proceedings. Care and attention must be exercised to ensure that the application is made within the timeframe nominated by the Tribunal.

**15.4 Making an Application for Costs:** An application for costs must:

- (a) Be in writing,
- (b) Specify the parties against whom the application for costs is sought,
- (c) Include submissions in support of the application for costs.

Regard should be had to the relevant provisions under legislation which regulate applications for costs. Any tests or factors which are set out in that legislation should be addressed in the making of the written submissions. Section 28 of the *Appeal Tribunal Act* is provided to assist parties who may be making an application under that section.



Section 28 of the Act:

**“28. Costs**

- (1) Each party to an appeal is to pay its own costs.
- (2) However, the Appeal Tribunal may order a party to an appeal to pay all or part of the costs of another party to the appeal if the Appeal Tribunal is satisfied that it is fair and reasonable to do so.
- (3) For the purposes of subsection (2), the Appeal Tribunal may take into account any of the following matters:
  - (a) whether the appeal appears to the Appeal Tribunal to have been instituted merely to delay or obstruct;
  - (b) whether in the Appeal Tribunal's opinion a party has raised frivolous or vexatious issues;
  - (c) the relative merits of the claims made by each of the parties;
  - (d) whether in the Appeal Tribunal's opinion a party has unnecessarily or unreasonably prolonged the appeal or increased the costs of it;
  - (e) whether a party has failed to comply with a direction or order of the Appeal Tribunal without reasonable excuse;
  - (f) whether a party has failed to comply with any relevant law or planning scheme;
  - (g) the nature, complexity and outcome of the appeal;
  - (h) the capacity of the parties to meet an order for costs;
  - (i) any other matter the Appeal Tribunal considers relevant.
- (4) If the Appeal Tribunal makes an order for costs under subsection (2), it –
  - (a) is to specify the time within which those costs are to be paid; and
  - (b) may, by a further order, extend the time if it considers it reasonable in the circumstances.
- (5) If the Appeal Tribunal makes an order for costs before the end of any proceedings, it may require that the order be complied with before it continues with the proceedings.
- (6) An order for costs under this section may be registered in a court having jurisdiction for the recovery of debts of the amount ordered to be paid by or under the order.
- (7) Proceedings for the enforcement of an order for costs under this section may be taken as if the order were a judgment of the court in which the order is registered.”

**15.5 Determining a Costs Application:** A costs application is forwarded to the parties against whom an order is sought. Those parties are afforded a right of reply, which is ordinarily 10 days from receipt of the costs application. All parties may request a costs hearing. Ordinarily, a costs hearing will only occur where a factual dispute has arisen in the written material forwarded to the

Tribunal by the respective parties. If no such factual dispute arises, a costs application will ordinarily be dealt with by written submissions. The party who made an application for a costs order is given a final right of response to any submissions which are made by the Respondent to the costs application. That is ordinarily a period of seven days.

Please note, costs decisions are not subject to the 90 day timeframe pursuant to Section 16(1)(f) of the RMPAT Act 1993. The Tribunal must give priority to appeal decisions which fall under the 90 day timeframe. As such, cost decisions will be determined at the earliest convenience of the Tribunal and within date order of their filing.

**15.6 An Order For Costs:** If the Tribunal is satisfied that an order for costs should issue, it will issue the terms of that order in writing. The order will include a timeframe within which the order for costs is to be complied with. The order will also contain a dispute resolution clause whereby parties who may dispute the quantum charged by the Applicant for costs may come before an assessing officer of the Tribunal to hear and determine that dispute (see *Practice Direction 16 – Costs Assessment Hearings*). Once an assessing officer has heard and determined any dispute as to the quantum of costs, a Certificate of Costs Assessment will issue which may then be used in enforcement proceedings of the order of the Tribunal.

## Practice Direction 16: Costs Assessment Hearings

**16.1 OVERVIEW:** Where one party is ordered to pay the costs of another party to proceedings, those parties may end up in dispute over whether the costs claimed were reasonable or necessary for the conduct of the appeal. A party may apply to the Tribunal for a costs assessment hearing (taxation of the bill of costs).

**16.2 COSTS THAT CAN BE CLAIMED:** See Practice Direction 15.2

**16.3 ATTEMPTS TO SETTLE COSTS DISPUTES:** Before applying for a costs assessment hearing, the parties are expected to attempt to produce an agreement as to costs payable. A party who is the subject of a costs order is entitled to request details of the costs incurred by the other party or parties – including details of the professional costs and disbursements incurred in the proceedings. If the parties are unable to reach agreement as to the final quantum of costs that should be paid, either party may apply to the Tribunal for an assessment of the bills of costs.

**16.4 APPLICATION:** The parties should apply in writing to the Tribunal for a costs assessment hearing for any disputed costs – annexing a copy of the bills in their application. The application for a costs assessment hearing and the bills of costs are to be served upon the other party/parties to the costs order. The application needs to advise the party/parties served that they have 14 days to notify the Tribunal if they dispute the bills of costs and they are required to file submissions within that timeframe in accordance with Practice Direction 16.5. Evidence of service of the material needs to be filed with the Tribunal Registry.

**16.5 NOTIFICATION OF DISPUTE:** A party served with an application for a costs assessment hearing is to notify the Tribunal within 14 days if they seek to dispute the bills of costs annexed to an application for a costs assessment hearing. That notification must identify the items which are disputed with brief submissions addressing the basis of the objection.

**16.6 FAILURE TO NOTIFY THE TRIBUNAL OF DISPUTE:** If a party who has been served with an application for a costs assessment hearing fails to notify the Tribunal within 14 days of service that they dispute the bills of costs, the Tribunal may proceed to tax the bills without further notice to them. If a party requires additional time to respond to an application for a costs assessment hearing they must notify the Tribunal within the 14 day timeframe, making application for an extension of time.

**16.7 PRE-COSTS ASSESSMENT CONFERENCE:** If a party seeks to dispute a costs assessment hearing application, the Tribunal may determine that a pre-costs assessment conference be convened before a full costs assessment hearing. A pre-costs assessment conference may be required to ensure all necessary material and information has been supplied to allow the Assessing Officer to hear and determine the dispute.

**16.8 COSTS ASSESSMENT HEARING OR HEARING ON THE PAPERS:**

If no pre-costs assessment conference is required, the Tribunal will write to the parties either setting the matter down for a costs assessment hearing or directing the provision of submissions for a determination on the papers. The Assessing Officer may request the provision of specific information to address particular items on the bills of costs.

Whether a hearing is convened or the assessment is determined on the papers, each party will be afforded the opportunity to make submissions and a right of reply. The Assessing Officer may determine to reserve a determination on one or more items of a bill to issue a ruling in writing.

**16.9 CERTIFICATE OF COSTS ASSESSMENT:** Once all disputed items have been ruled upon, the Assessing Officer will issue a Certificate of Costs Assessment which confirms the final amount payable as a result of the Costs Assessment Hearing.

**16.10 FORMAL ORDER OF COSTS:** A party may apply to the Tribunal for the Tribunal to issue a formal order which consolidates a primary determination of the Tribunal for costs liability with the quantum determined by a Costs Assessment Officer.

## Practice Direction 17: Tribunal Etiquette

Attention to the following matters will assist you during your visit to the Resource Management & Planning Appeal Tribunal.

- 17.1 Instructions by Staff:** Visitors must obey the instructions of all Tribunal staff while on Tribunal premises.
- 17.2 Attendance during Hearings:** Representatives appearing for a party (whether lawyer, agent or litigant in person) must not leave the hearing room without permission from the Chairperson, Presiding Member or Tribunal Officer. Proceedings cannot continue in the absence of representatives.
- 17.3 Electronic Devices and Media Guidelines:** The Tribunal has issued media guidelines which includes requirements related to the use of electronic devices. These guidelines are available for viewing on the Tribunal's website. Please ensure anyone who wishes to attend any hearings of the Tribunal, whether parties, witnesses, media or members of the public are aware of the requirements set out in those guidelines. Please note, electronic devices of any kind are not to be used in the hearing rooms of the Tribunal except in accordance with the guidelines.
- 17.4 Turn off all Communication Equipment:** Radio receivers or transmitters (including mobile phones) and pagers must be switched off when in any Tribunal room, unless the Chairperson, Presiding Member or Registrar permits otherwise.
- 17.5 Food and Drink:** Food or drink (except water) is not to be taken into any Tribunal hearing room.
- 17.6 Avoid Disturbances to Proceedings in the Registry Area:** Whilst you are in the waiting/reception area, please be aware that there may be proceedings being conducted in the adjoining hearing rooms and that loud conversations may be distracting to the parties in those hearing rooms.
- 17.7 Avoid Disturbances to Proceedings in Hearing Rooms:** Visitors should enter and leave hearing rooms without undue delay while proceedings are in progress and should sit at the rear of the hearing room. Standing in doorways is not permitted. Conversation in hearing rooms must be restricted to that which is reasonably necessary and, in any event, it must not interfere with the proper conduct of the proceedings.
- 17.9 Limited Access to Mediations:** Some Tribunal proceedings, for example mediations, are closed to the public. Unless you are a party to these proceedings you must not enter these hearing rooms and must leave the hearing room immediately upon being requested by a Tribunal officer to do so.
- 17.10 Etiquette Rules apply to Remote Venues:** A room in another building ('a remote site') that is connected by means of an audio link or an audio-visual link is part of the Tribunal room while the link is in operation.

Accordingly, the same standards of behaviour apply to persons who are present at the remote site as if they were present at the Tribunal building.

**17.11 How to Address the Tribunal:**

You should address the Chairperson as either:

- “Mr Chairman” or “Madam Chairperson”; or
- “Sir” or “Madam”.

You should address the other Tribunal members as “Sir” or “Madam” or by their name (e.g. Mr Smith). You should address the Registrar as “Sir”, “Madam” or “Registrar”.

**17.12 Politeness and Professionalism:** You should always endeavour to be polite and professional in both correspondence and communications with the Tribunal. Rudeness and discourtesy are not acceptable and in some circumstances may constitute an offence (See Section 33 of the Act).

**Practice Direction 18: Applications under the  
*Neighbourhood Disputes About Plants Act 2017***

**Overview/General:**

This Practice Direction is a guide to completing the application forms related to the *Neighbourhood Disputes About Plants Act 2017*. It provides information about the process of an application through the Appeal Tribunal.

There are 3 types of applications under the *Neighbourhood Disputes About Plants Act 2017*.

1. An Application under Section 23 seeking orders from the Tribunal related to Affected Land.
2. An Application under Section 36 to Vary or Revoke an order.
3. An Application under Section 37(4) to search the Tribunal's Database of Orders.

**PD 18.1. Making an application under Section 23 of the *Neighbourhood Disputes About Plants Act 2017*.**

You need to consider the following when making an application under the Act. The form which you need to complete in making an application sets out these issues to be addressed.

**18.1.1 Are you a person who can make an application?**

Section 23 states that only a "landholder of affected land" can apply to the Tribunal.

To be a landholder you must be the owner or an occupier of the affected land.

An owner is defined in Section 3(1).

An occupier is defined in Section 3(1). If you are an occupier, you must have written to the owner asking them to make an application under this Act. The owner must have refused or failed to reply within 42 days.

The Tribunal application form will require you to include evidence demonstrating this has been done.

**18.1.2 Is the Land and/or Vegetation, the subject of your application, excluded from the operation of the Act?**

Some types of land or vegetation cannot be the subject of an application under this Act.

Section 9 of the Act sets out the types of land which are excluded from the operation of the Act.

Section 5 of the Act sets out the plants which are excluded from the operation of the Act.

It is important you check these categories to ensure your application is valid.

**18.1.3 How is your land affected and do you have all the details of the properties involved?**

Section 7 of the Act sets out when land is affected by a plant.

You should first specify which part of Section 7 you are relying upon. This requires you to specifically identify which subsections of Section 7 you claim are relevant.

For example: If your concern is in relation to a loss of view from a dwelling, you would identify Section 7(1)(b)(iii) and provide information about the alleged loss of view and how the plant or plants are affecting the land in more detail.

It is important to note that some of the categories under Section 7 have limits or requirements.

For example, in relation to a loss of view, Section 7(3) sets out a series of requirements that have to be met, before a loss of view can be considered under the Act. Those requirements include: the plant must be at least 2.5 metres high; the plant must cause the view to be severely obstructed; and the person is an owner of the land and the view from the dwelling was not so obstructed when the person took possession of the affected land.

The Tribunal cannot give you legal advice as to whether your circumstances meet the requirements of the Act. You may need to take private advice from a suitably qualified person if you are unsure if your circumstances allow you to make an application.

You are also required to clearly identify the parcel of land (or parcels of land if the plant is located on several titles) where the plant is located. This will mean providing details of the street address and copies of the Certificate of Titles of all parcels of land involved in the application.

**18.1.4 What orders are you seeking from the Tribunal?**

The orders you need from the Tribunal need to be clearly explained and within the power of the Tribunal to make. Importantly, there are two issues to consider when deciding on the orders you are seeking from the Tribunal.

1. What kind of orders can the Tribunal make? That information is set out in Section 33 of the Act.
2. Whether the orders you are seeking require approval from another government body. Sometimes plants are protected under other legislation, such as planning scheme provisions for example. It may be that removing or modifying a plant might require approval from a Government Body such as a Planning Authority. You can contact TasWater directly to search whether land, the subject of an



application, contains any infrastructure. TasWater website [link](#). You will need to identify in your application whether an order would require approval from another government body. That will affect how the application is processed by the Tribunal.

18.1.5 Interim Order:

An interim order is an urgent form of order which is made without having completed a full hearing process. It is only made where there is an imminent risk of injury to persons or property.

If you are seeking an Interim Order under Section 33(4) of the Act, you will need to complete the relevant section of the Application Form.

You are also required to produce evidence which satisfies the Tribunal there is an immediate risk of injury to persons or property.

The Tribunal may require a person seeking an Interim Order to give an Undertaking as to compensating the other party for any loss or damages as a result of making an Interim Order, if after fully hearing the matter, the Interim Order ought not to have been made. You will be advised if an Undertaking is required.

18.1.6. Who must be notified of this application?

Section 24 of the Act says that you are to notify certain people or government bodies of your application. It includes the person who is the owner of the land on which the plant is situated which is the subject of the application; any interested government bodies under Section 27 and any other person whose interests would be affected if the orders you are seeking were granted.

You need to identify those persons on your application form and you will be required to give them written notice of it (with a copy of the application – See PD 18.2.6) once the Tribunal has initially assessed your application and set a date for a Preliminary Conference. Service of the application upon the Respondent/s should be completed seven (7) days before the Preliminary Conference date.

18.1.7 Have you attempted to resolve this problem with the owner of the land on which the plant or plants are located?

The Act requires that parties have made a reasonable attempt to resolve the dispute between themselves before making an application to the Tribunal.

The Tribunal's form will include a section which requires you to provide evidence that there has been a reasonable attempt made to resolve the dispute. The form will give you direction as to the type of evidence that can be used.

This will assist the Tribunal in determining whether further mediation is appropriate or required.

**18.1.8 Have you provided all the information that the application requires?**

The Tribunal will require sufficient evidence to demonstrate a prima facie case. The Tribunal will not initiate proceedings without sufficient evidence accompanying an application.

A checklist is provided on the form which sets out all the material you need to include with your application.

These are:

- Evidence which demonstrates the relevant allegations in the application:

For example:

- If it is alleged a plant overhangs affected land, evidence to demonstrate that allegation such as photographs, survey plans or other material.
- If it is alleged a plant has or is likely to cause serious injury or serious damage, evidence to demonstrate the injury caused, or risk assessment evidence by a suitably qualified person to demonstrate the risk of serious injury or serious damage.  
(PLEASE NOTE: if you intend to use risk assessment evidence in your application, the person who produces that risk assessment must include the full methodology used in making the risk assessment.)

- If it is alleged there is a substantial, ongoing and unreasonable interference with the use and enjoyment of the affected land, evidence which demonstrates the interference and meets the standards set out in the Act.

eg. if you are alleging a substantial, ongoing and unreasonable interference as a result of a view being obstructed, you must provide evidence of that obstruction and that you meet the requirements of Section 7(3) in order to commence the application.

eg. If you are alleging a substantial, ongoing and unreasonable interference as a result of overshadowing, you must provide evidence of the overshadowing such as shadow diagrams prepared by suitably qualified persons.

Please note the evidence which is filed in support of an application must be in affidavit or statutory declaration format. If it is evidence provided by an expert witness, they should be provided with Appendix 12A of the Tribunal's Practice Directions and prepare any evidence in accordance with those requirements (See Clause 5 in particular).

- Copies of Certificates of Title of the Affected Land and the Parcel or Parcels of Land where the plant or plants are located. This can be obtained online from The List or in person from Service Tasmania.

- If you are an Occupier, evidence that you have written to the Owner of the Affected Land seeking them to make an application and their refusal, or evidence they have not replied in 42 days.
- Information/Evidence which identifies the Affected Land as the Plants which are the subject of the application (such as type, scale and height of the plants).
- Information or Evidence demonstrating that reasonable attempts to resolve the dispute have been attempted by the parties before lodging the application.
- A list of persons or government bodies that must be notified of the Application and confirmation you have sent them a copy of the completed application. These details must include their names and addresses and method you have used to notify them of the Application.
- If you are seeking an INTERIM ORDER – you must also provide evidence to satisfy the Tribunal there is an immediate risk of injury to person or property.

## **PD 18.2 Filing The Application**

### **18.2.1. Where do I lodge the Application?**

The application needs to be lodged with the Registry of the Resource Management and Planning Appeal Tribunal. It can be:

- Lodged in person at the Tribunal – Level 6, 144 Macquarie Street, Hobart
- emailed to the Registry ([rmpat@justice.tas.gov.au](mailto:rmpat@justice.tas.gov.au)); or
- posted to GPO Box 2036, Hobart 7001.

### **18.2.2 How many copies do I need to file?**

When lodging your application at the Tribunal you must provide sufficient copies for each of the parties to the proceedings. You will be required to serve a copy of the application once the Tribunal has endorsed it.

The number of copies will be a minimum of 3 (1 for your records, 1 for the Tribunal's records, and 1 to serve on the other land owner). You will need an additional copy of each additional party you nominate in the application (for example, a Local Council or an additional land holder if the plant covers two titles).

**18.2.3 What are the fees?**

There is a filing fee that must be paid at the time of lodging the application, in order for the application to be valid. Please refer to the Tribunal's website to determine the appropriate filing fee.

**18.2.4 Application To Reduce Or Waive A Fee:**

You can make an application to reduce or waive that fee if the Tribunal is satisfied that paying all or part of the fee may cause financial hardship. You will need to provide information in support of that application (See PD 2.3)

**18.2.5 Review of Application:**

Once you have filed your application it is reviewed by the Tribunal. The Tribunal will determine if additional information is required, and if so we will write to you seeking that information.

**18.2.6 Notification of the application:**

After the Tribunal has reviewed your application, the Tribunal will register the application and allocate a preliminary conference date and then return the applications to you for you to service on the parties stated.

After you lodge this application with the Tribunal, you are required to give a copy of this form and all supporting documents to:

- The owner of the property (respondent)
- Any government body you have nominated in your application
- Any person you have identified whose interests are affected by the application

The requirements of serving a document will be explained in a letter from the Tribunal which will be sent to you with the documents for service. You will be required to complete a Notice of Service to confirm you have served the documents.

**PD 18.3 Tribunal Processes**

**18.3.1 Notification and Advertising:**

If the Tribunal is satisfied the application has met all the necessary requirements to start, it will set a Preliminary Conference date approximately 14 - 21 days from the date of lodging the application.

The Tribunal will also advertise the existence of the application in the Public Notices section of the regional newspaper circulating in the area in question at least 5 - 7 days before the Preliminary Conference. It will invite persons who believe their interests may be affected by an order related to the plan, to make an application to join and attend the Preliminary Conference.

**18.3.2 Preliminary Conference:**

The Preliminary Conference will be conducted following the same process as for a Preliminary Conference for planning applications or appeals (See PD 4)

**18.3.3 Alternative Dispute Resolution (ADR) and Mediation:**

At the Preliminary Conference the Tribunal will assess whether Alternate Dispute Resolution (ADR) or Mediation may be appropriate to assist the parties in resolving the dispute. If it is appropriate, a date for ADR will be listed. Mediation and ADR will be conducted in the same way as for Planning disputes (See PD 5)

**18.3.4 Consent Agreements:**

If the parties can resolve their dispute by ADR or Mediation, an agreement will be prepared with the Orders that have been agreed to and submitted to the Chairperson for consideration. If the Chairperson is satisfied the orders are appropriate and within the Tribunal's power, the Orders will be issued.

**18.3.5 Preparation for a Full Hearing:**

If the parties do not resolve the application by a consent agreement, the dispute will need to proceed to a hearing. The parties will have received directions at the Preliminary Conference about the preparation of evidence and material. They will need to make sure they comply with those directions. The directions will be very similar to those issued for planning appeals (see Practice Directions 8, 8A, 8B, 9 & 11).

The parties will be notified of the panel of members who will hear the application before the hearing.

**18.3.6 Hearing of the Application:**

The hearing of the application will follow the same process as hearing for planning applications or appeals (See Practice Direction 7). Please note PD7.4 is slightly different in that the person who filed the application will present their case first.

**18.3.7 Decision and Orders:**

The Tribunal will issue a decision in writing to the parties and any government bodies that need to be notified, which sets out the reasons for the determination and any orders made. The order or orders will be included in the material.

Orders may last for up to 10 years depending on the decision of the Tribunal. They will set out the terms of the order; when the order takes effect; when any action required by the order is to be carried out; and who is required to carry out action under the order.

Consistent with other jurisdictions around Australia, where the Tribunal orders works to be carried out, those orders will require that a fully qualified arborist undertake the works and that the arborist possess public indemnity insurance of no less than \$10,000,000.00.

Orders will be placed on the Tribunal's database within 14 days of being made.

The Tribunal's Database of Orders is for future searches which are permitted under Section 37 of the Act. To apply for a search of the Database, see PD 18.5.

**18.3.8 Costs:**

The costs of an application will be subject to the same Section that applies to planning appeals under Section 28 of the *Resource Management and Planning Appeal Tribunal Act 1993*. All parties will be given an opportunity to make an application for costs at the end of the proceedings and those applications will be dealt in the same way as other costs applications before the Tribunal. (See Practice Direction 15)

**18.3.9 Appeal Rights:**

As with any decision of the Tribunal, there is a right of appeal to the Supreme Court under Section 25 of the *Resource Management and Planning Appeal Tribunal Act 1993*. The appeal must be with respect to a question of law and must be commenced within 28 days of the Tribunal's decision.

**PD 18.4 Application to Vary or Revoke an Order:**

**18.4.1 Who can make an Application to Vary or Revoke?**

Only a landholder of affected land or an owner of land on which a plant is situated, to which an order of the Tribunal relates, can make these applications.

**18.4.2 Complete The Form:**

The Tribunal has provided a form that you will need to complete for making an application to vary or revoke an order.

**18.4.3 What is the Fee?**

There is a filing fee that must be paid at the time of lodging the application to Vary or Revoke, in order for the application to be valid. Please refer to the Tribunal's website to determine the appropriate filing fee.

**18.4.4 Application to Reduce or Waive a Fee:**

You can make an application to reduce or waive that fee if the Tribunal is satisfied that paying all or part of the fee may cause financial hardship. You will need to provide information in support of that application (See Practice Direction 2.3)

18.4.5 Notification:

The Tribunal will notify persons or government bodies of the application (in accordance with Section 36(4)). Those persons will be invited to advise the Tribunal if they wish to be heard in relation to the application.

18.4.6 Process if a Party wishes to be heard:

If another party wishes to be heard, the process set out above under PD 18.3 will be adopted to resolve the dispute.

18.4.7 If Variation or Revocation granted:

The Tribunal must update the Database of Orders within 14 days if a variation or revocation is granted.

**PD 18.5 Applications to Search the Database of Orders:**

18.5.1 Complete the Form:

The Tribunal has developed an online application form for making an application to search the Database of Orders. **The online application is the Tribunal's preferred method of lodgement.** The link for the search can be found under the Neighbourhood Disputes About Plants Act section on our website.

All details need to be provided on that form and searches will only be made by reference to a Certificate of Title Reference Number (or reference number for a parcel of land still registered under General Law). You must have that Certificate of Title Reference Number if you wish to search the Tribunal database.

If you wish to pay by means other than a credit card, a manual form is available in our Forms section for you to download and lodge at any Service Tasmania shop.

18.5.2 Search Fee

Please check the Tribunal's website for details of the current fee applicable for this service.

18.5.3 Application to reduce or waive a fee:

You can make an application to reduce or waive that fee if the Tribunal is satisfied that paying all or part of the fee may cause financial hardship. You will need to provide information in support of that application (See PD 2.3)

18.5.4 Filing the Search Application:

The Tribunal would prefer that Application to Search the Database be lodged via the Online Search function.

Alternatively a manually completed form together with your cheque can be filed as follows:

Alternatively a manually completed form together with your cheque can be lodged at any Service Tasmania shop.

Please do not email your search request and then send a hard copy. One or the other will suffice and reduce possible duplication or confusion.

**18.5.5 Search Results:**

The Tribunal will complete any searches within 14 days of their lodgement. If it is anticipated that the search will take longer than 14 days to complete, you will be notified in writing with an estimate of any additional time required.

Once the search is completed the Tribunal will forward to you a certified copy of the search result in accordance with Section 37(2) of the Act.