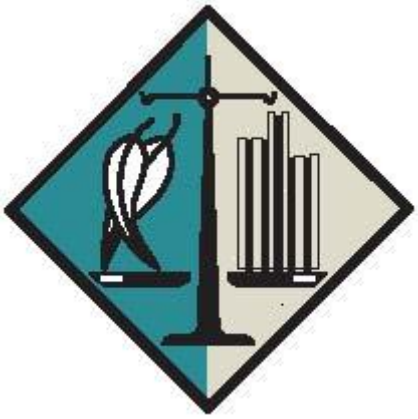

ANNUAL REPORT

OF

THE RESOURCE MANAGEMENT AND PLANNING APPEAL TRIBUNAL

2014-2015

Dear Minister,

I have pleasure in submitting the annual report for the Resource Management and Planning Appeal Tribunal for 2014/15.

The Tribunal provides appellate review of the decisions of councils, the Environmental Protection Authority, the Director of Building Control, and in some cases from the Minister. I have listed the Acts of parliament in respect of which jurisdiction is conferred upon the Tribunal elsewhere in this report.

In many appeals the Tribunal hears matters *de novo*, requiring it to; in essence, stand in the shoes of the original decision maker from whom the appeal has been taken. It does so free from political or other influence and subject to strict obligations to observe the principles of natural justice, an obligation enshrined in the legislation establishing the Tribunal.

The Tribunal's work is subject to the supervision of the Supreme Court.

The majority of the Tribunal's work in this reporting year involved review of council planning decisions, and thus an interpretation of planning schemes. This involves the application of established principles of statutory interpretation, since planning schemes are subordinate legislation attracting the same approach to interpretation as legislation. The task is a technical one.

The number of different schemes, the convoluted structures and language employed in some of them, remains a concern as it creates uncertainty and scope for dispute. Typically, the problem is that the language which has been employed is imprecise, and too many schemes attempt to achieve too many objectives with the result that the planning document contains internal inconsistencies, and becomes difficult to use. It is to be hoped that those responsible for drafting new schemes pay close regard to the objective of providing a document which can be easily understood thereby limiting the range of disputes which can arise, the resolution of which can become time consuming and costly for parties.

The Tribunal continues to achieve high rates of resolution of appeals at mediation. In that respect, I record my appreciation for the work of my Registrar, Jarrod Bryan, and specialist mediators Sally Bridge and Nick Mackey. The expeditious resolution of matters without all of the costs associated with a formal hearing is a worth-while objective. The result of the Tribunal's efforts in this respect has been that matters proceeding to full merits hearing tend to be those associated with major public works, or significant private developments.

The major case occupying the Tribunal in this reporting year was associated with the Hobart City Council's plans to develop a walk way from Marieville Esplanade to the slipyards in Napoleon Street, Battery Point. This involved nine hearing days, thousands of pages of evidence, in excess of 200 appeal points and a very substantial written decision from the Tribunal. It represented a very good example of public participation in the planning process, a principle encouraged by the suite of legislation which regulates planning approvals in this State, and which was identified as an objective by the Minister for Planning, Mr Cleary MHA, at the time of the introduction of the legislation in 1993.

In addition to conducting merits hearings, the Tribunal has provided numerous interlocutory rulings and pre-hearing jurisdictional decisions which have assisted in narrowing issues and reducing costs to parties.

Amendments to the *Land Use Planning & Approvals Act 1993* this year removed from the councils of this State, the power to make application to the Tribunal for enforcement orders against those acting in breach of the planning scheme. It is not clear whether this was intended but the result is, in my opinion, an unfortunate one. It is imperative that councils are provided with access to a specialist tribunal in circumstances where serious breaches of planning schemes occur. Infringement notices may be suitable in some instances, but not all. I would urge restoration of those rights for local planning authorities.

The Tribunal has continued the revision of its procedural guidelines. These are the rules which govern the way matters are conducted in the Tribunal. To that end, I convened for the first time a conference

with users of the Tribunal to investigate ways in which procedures can be improved for the benefit of those using the Tribunal's services. The process has resulted in a number of suggestions which the Tribunal has implemented. I expect that the review of the practice directions will be completed shortly and a revised guide will follow. The objective is a set of procedures which encourage engagement between parties, the early identification of issues in dispute, and points of agreement (to avoid the need for costly evidence to prove those matters). This narrows the issues which fall for mediation or determination on hearing.

The Tribunal is currently preparing sessions to assist expert witnesses appearing in this jurisdiction, in the preparation and presentation of evidence and in participating in expert conferences and giving concurrent evidence. The expert's role is a neutral one intended to assist the Tribunal to reach the correct of preferable decision in a matter. This year I directed a conference of experts in a major planning application to occur before hearing, a practice the Tribunal will repeat when it is appropriate. Chaired by the Registrar, Mr Bryan, the conference identified points of expert consensus, and those aspects which were in contest. The conference resulted in the production of a joint statement of 14 witnesses which was available to the parties and the Tribunal at the hearing. It is also intended to introduce concurrent evidence at hearings, a practice which involves experts in a particular discipline, giving their evidence together. It is sometimes called "hot tubbing" and the experience in other jurisdictions has been that it contributes to a better level of presentation, and better communication (and thus understanding) of ideas. This will benefit everyone who is engaged with the Tribunal, and assist the Tribunal in the fulfilment of its statutory functions.

Acts for which the Tribunal is responsible

- *Agricultural and Veterinary Chemicals (Control of Use) Act 1995;*
- *Building Act 2000;*
- *Building Regulations 2004;*
- *Drains Act 1954;*
- *Environmental Management and Pollution Control Act 1994;*
- *Fire Service Act 1979*
- *Gas Act 2000;*
- *Gas Pipelines Act 2000;*
- *General Fire Regulations 2010;*
- *Historic Cultural Heritage Act 1995;*
- *Inland Fisheries Act 1995;*
- *Land Use Planning and Approvals Act 1993;*
- *Living Marine Resources Management Act 1995;*
- *Local Government (Highways) Act 1982;*
- *Local Government Act 1993;*
- *Marine Farming Planning Act 1995;*
- *National Parks and Reserves Management Act 2002;*
- *Plumbing Regulations 2004;*
- *Public Health Act 1997;*
- *Strata Titles Act 1998;*
- *Threatened Species Protection Act 1995;*
- *Water and Sewerage Industry Act 2008;*
- *Water Management Act 1999;*

Activity

Appeals from planning authorities constituted the majority of the Tribunal's work this year. Set out in Table 2 is the number and types of appeal and applications dealt with by the Tribunal in the year the subject of this report. It will be noted that the Tribunal has assumed responsibility for appeals under the *Building Act 2000* and 9 matters came before the Tribunal in that category. Whilst there was an overall decline in the number of matters dealt with by the Tribunal in the year the subject of this report, there has been an increase in the number of longer and more complex appeals.

Table 2

Appeals By Legislations	2007-08	2008-09	2009-10	2010-11	2011-12	2012-13	2013-14	2014-15
LUPAA	425	300	270	266	195	150	117	101
Heritage	14	13	19	14	11	7	10	
SOL		2			1	1	1	
Marine	3	5	2	3		4	1	1
Water	4	1	5			4		
Strata Titles	7	2	2	3	2	4	2	5
EMPCA	3	5		6	4		1	2
Threatened Species								
Local Govt. Highways Act	21							
Water & Sewerage Industry Act			1					
Building Act						6	3	9
Total	**477**	**328**	**299**	**292**	**213**	**176**	**135**	**118**

Applications By Legislations	2007-08	2008-09	2009-10	2010-11	2011-12	2012-13	2013-14	2014-15
S64 LUPAA	36	25	29	28	24	17	9	12
S48 EMPCA	3	1						1
S96 Strata Titles	1					1		
S264 Water Management	1							
P12 S218A Building Act							1	
Total	**41**	**26**	**29**	**28**	**24**	**18**	**10**	**13**

Decision Types	2007-8	2008-9	2009-10	2010-11	2011-12	2012-13	2013-14	2014-15
Interim	25	46	41	30	10	31	24	37
Costs	26	43	31	22	27	29	33	12
Consent	217	161	123	114	126	80	62	57
Amended	9	5	0	5	0	0	4	1
Hearing	65	46	52	44	39	17	23	15
Total	**342**	**301**	**247**	**215**	**202**	**157**	**146**	**122**

Substantive Decisions

% of Total Decisions	2007-8	2008-9	2009-10	2010-11	2011-12	2012-13	2013-14	2014-15
Total For Year	282	207	175	158	165	97	85	72
Interim	7.31%	15.28%	16.60%	13.95%	4.95%	19.75%	16.44%	30.33%
Costs	7.60%	14.29%	12.55%	10.23%	13.37%	18.47%	22.60%	9.84%
Consent	63.45%	53.49%	49.80%	53.02%	62.38%	50.96%	42.47%	46.72%
Amended	2.63%	1.66%	0.00%	2.33%	0.00%	0.00%	2.74%	0.82%
Hearing	19.01%	15.28%	21.05%	20.47%	19.31%	10.83%	15.75%	12.30%
% Consent / Hearings to substantive decisions								
Consent	77.78%	70.29%	72.15%	76.36%	82.47%	72.94%	79.17%	71.53%
Hearings	22.22%	29.71%	27.85%	23.64%	17.53%	27.06%	20.83%	28.47%

The statutory obligation imposed upon the Tribunal by Section 16(1)(f) of the *Appeal Tribunal Act* is to hear, determine and deliver written reasons for decision within 90 days after an appeal *is instituted*. This is unique in Australia[1] and is often unrealistic. As noted last year the complexity of some matters militates against the achievement of that standard in some cases. Those complexities relate to technical subject matter, the need for further evidence to be filed to address issues exposed in the course deliberations and statutory interpretation questions particularly in new schemes not the subject of earlier decisions.

The following table sets out the percentage of case heard within 90 days and the percentage of cases falling outside that period.

Performance Indicator	Unit of Measure	2010 - 11 Actual	2011 – 12 Actual	2012 – 13 Actual	2013 – 14 Actual	2014 – 15 Actual
Percentage of appeals resolved within 90 days without extension.	%	66.50%	78.00%	76.47%	72.41%	61.48%
Percentage of appeals which did require extensions due to parties	%	97.03%	95.00%	90.00%	92.50%	92.31%

The Tribunal has maintained a very high level of compliance with this standard. It remains the case that the vast majority of appeals which require extensions of time are the result of parties seeking hearing dates outside the 90-day timeframe or seeking adjournments due to the need to file new or additional material. Sometimes it is the result of a failure to comply with case management directions. The actions of parties accounts for 92% of cases in which the 90 day period has been exceeded. (Sometimes the time limit is extended to facilitate alternative dispute resolution, or the modification of proposals to accommodate objections).

[1] I noted last year as follows: In Victoria, for example, decisions are generally handed down within 6 weeks of the end of the hearing. This is an objective for the Victorian Tribunal (VCAT), and not a requirement. It is preserved as an objective in recognition of the fact that many variables can influence the time taken to reach a properly considered decision, (variables which affect this Tribunal but are not accommodated in the local statutory scheme). VCAT, states as its aim "*The Tribunal tries to ensure that decisions are handed down and reasons given as expeditiously as possible. The Tribunal aims to hand down 90% of decisions within 6 weeks of the final hearing day or submissions. Sometimes decisions take longer due to the length of the hearing, complexity of the issues or the volume of material to be taken into account*".

In New South Wales, the Land & Environment Court imposes no statutory time limit for the finalisation of its decisions, and the published procedural guidelines indicate that a commissioner or judge may deliver a written decision within 2 to 12 weeks of the end of the hearing, depending on the work load of the commissioner or judge. The Court's standard period for reserved judgments is 3 months.

In South Australia the Environment Resources and Development Court states as its objective that *"Judges and commissioners try to provide a judgment within 8 weeks of the last day of the hearing*". Again, the time limit runs from the conclusion of the hearing. In Western Australia there is no statutory time limit for the finalisation of decisions and nor is a time limit imposed in Queensland. Neither the ACT nor the Northern Territory impose statutory time limits for the delivery of decisions. Despite this, the Northern Territory in its publications indicates that decisions are typically given within 2 months after the hearing of proceedings.

Alternative Dispute Resolution

The Tribunal is committed to alternative dispute resolution (ADR). It offers an opportunity for the early resolution of matters with significant cost savings to parties. It expedites process from development application to development commencement and offers a practical means of addressing concerns about the time and cost associated with planning approvals. Unlike some jurisdictions where mediation is a compulsory step in the path to an arbitrated resolution, in this jurisdiction the view has been that the process has prospects of success if, and only if the parties are willing to engage. Having regard to the significant cost borne by parties to proceedings when a matter is not resolved early, consideration ought be given to requiring mediation as a preliminary step in the preparation of matters for hearing. Even if resolution of matters is not achieved, experience confirms that many issues are resolved, narrowing the matters which require an arbitrated resolution. This reduces the cost burden to parties and produces a faster result.

The Tribunal provides its own alternative dispute resolution service. The training, qualifications and experience each of those members of staff brings to the process is significant. Sally Bridge and Mr Nick Mackey have recently undertaken training in Melbourne to reinforce and develop their skills in this regard.

Expert neutral evaluation also represents an important part of the Tribunal's ADR procedures. It affords an opportunity for a preliminary assessment of a matter by an expert and the provision of information to parties about the merits of their argument and likely prospects on appeal. It is intended to assist parties make appropriate judgments about whether to proceed to a hearing or not.

Members

The Tribunal is composed of a Chairman and two part-time legal members, engaged to hear matters on occasions when the Chairman is unable to sit. In that respect I gratefully acknowledge the work of Anne Cunningham in the reporting year. The other members of the Tribunal are chosen for their experience in planning, engineering, architecture, science, and environmental management. Members are appointed for a five-year term pursuant to Section 6 of the *Appeal Tribunal Act*. I have provided a list of members in Appendix B to my report. The contribution of members to the Tribunal's work, for very modest reward, is commendable, acknowledged, and appreciated. Without them the Tribunal could not fulfil its statutory obligations.

The Tribunal records the passing of John Caulfield and Barry McNeill this year. It notes the retirement of Neville Lester and Greg McNamara, and records its considerable appreciation for their involvement.

Other business

In 2015, the Tribunal moved to new premises in Hobart which offered better and more sophisticated facilities for the public and, importantly, for staff. I would like to record my appreciation to the Department of Justice for its considerable assistance in facilitating this change, and to my colleagues at the Tribunal for their unfailing efforts in dealing with all of the issues a move of office creates.

This year the Tribunal has made its Registrar, Jarrod Bryan, available to the Department of Justice to assist in the preparation of a report into the possibility of Tribunal amalgamation. He has undertaken that task with aplomb. I am very pleased to have been able to make Mr Bryan available to assist this very worthwhile project. That has been possible because Sally Bridge agreed to act as Registrar, a task she has undertaken with diligence and executed very well. She is supported by Nick Mackey, Susan Vernon, Carmen Dittmann, Stephen Main and Hilary Harris. I am supported by my personal assistant, Angela Korotki, who has provided invaluable help to me in the performance of my duties. Thank you all.

Gregory Geason
Chairman,
20 October 2015

Appendix A- the Tribunal's legislative context

The Tribunal is part of the Resource Management and Planning System of Tasmania (see Section 5 (3) of the *Appeal Tribunal Act*). The objectives of that System are in Schedule 1 of the *Appeal Tribunal Act*. They are:

> "(a) to promote the sustainable development of natural and physical resources and the maintenance of ecological processes and genetic diversity; and
>
> (b) to provide for the fair, orderly and sustainable use and development of air, land and water; and
>
> (c) to encourage public involvement in resource management and planning; and
>
> (d) to facilitate economic development in accordance with the objectives set out in paragraphs (a), (b) and (c); and
>
> (e) to promote the sharing of responsibility for resource management and planning between the different spheres of Government, the community and industry in the State."

"Sustainable development" is defined as meaning, to manage "…the use, development and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic and cultural well-being and for their health and safety while –

> **(a)** sustaining the potential of natural and physical resources to meet the reasonably foreseeable needs of future generations; and
>
> **(b)** safeguarding the life-supporting capacity of air, water, soil and ecosystems; and
>
> **(c)** avoiding, remedying or mitigating any adverse effects of activities on the environment."

Appendix B - Members of the Tribunal as at 30 June 2015.

Person	Appointed until	Area of Expertise
Arnold, Mr P	24/09/17	Building
Baird, Ms M L	02/09/18	Planning
Ball, Mr M E	27/10/18	Planning
Bensz, Ms E A	06/05/20	Planning
Bryant, Ms N	27/10/18	Legal
Cooper, Mr M	24/09/17	Building
Cripps, Mr P	24/09/17	Building
Cunningham, Mrs AF	19/07/17	Legal
Flint, Ms D	24/09/17	Building
Giblin, Mr R	26/07/16	Planning
Gliddon, Ms A	24/09/17	Building
Healy, Ms F	25/06/17	Science/Environmental Management
Hogue, Mrs S	06/05/20	Planning
Howlett, Mr DR	06/05/20	Planning
Hurst, Mr A	24/09/17	Building
Keating, Mr GF	24/09/17	Building
Lester, Mr ND	06/05/20	Surveying
Locke, Mr R	24/09/17	Building
McMullen, (*Tony*) A Mr	25/08/18	Planning
McNamara, Mr GC	06/05/20	Valuation
Mucha, Dr C	05/08/18	Water management/major infrastructure
Murphy, Mr R	24/09/17	Building
Neale, Dr A	02/03/19	Heritage
Nicholson, Ms C	07/02/16	Planning/ Environmental management
Nolan, Mr RJ	06/05/20	Planning
Smith, Ms A	24/09/17	Legal
Spratt, Mr P	24/09/17	Civil & structural engineering Heritage & building conservation
Stratford, Dr E	02/03/19	Geography/Environmental studies
Thompson, Mr S	24/09/17	Building
Webster, Professor JC	02/03/19	Architect/heritage/planning
Wong, Ms M	06/05/20	Planning