



Resource Management & Planning Appeal Tribunal

Annual Report 2016 - 2017

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I Chairman's Report

There has been an increase in the number of appeals this year, reflecting, I suspect, an increased level of economic activity: it requires development proposals to generate appeals.

Otherwise the reporting year has been very much a case of “business as usual”, with the majority of work undertaken by the Tribunal relating to a review of council planning decisions. This work constitutes the major review function undertaken by the Tribunal.

The Tribunal is responsible for appeals under a number of acts, including the following:

- *Agricultural and Veterinary Chemicals (Control of Use) Act 1995;*
- *Building Act 2016;*
- *Building Regulations 2016;*
- *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 2014;*
- *Public Health Act 1997;*
- *Strata Titles Act 1998;*

- *Threatened Species Protection Act 1995*;
- *Water and Sewerage Industry Act 2008*; and
- *Water Management Act 1999*.

During the reporting year, legislation passed both Houses of Parliament conferring jurisdiction upon the Tribunal in relation to neighbourhood disputes involving vegetation. The *Neighbourhood Disputes (Vegetation) Act 2017* is the result of the adoption of recommendations made by the Tasmanian Law Reform Institute in its final report (Problem Trees and Hedges – Access to Sunlight and Views). As well as embracing the recommendations in that report relating to sunlight and views, the scope of the Act was extended to other disputes between neighbours involving vegetation. This is a welcome reform which provides a forum within which disputes can be resolved. The creation of the jurisdiction will provide a welcome “circuit breaker” for disputes which have previously had no outlet for resolution. Or at least no proper outlet. The legislation proposes a mechanism for informal resolution where possible, and such approach sits well with the Tribunal’s entrenched practice of alternative dispute resolution, a process which continues to achieve high rates of resolution in appeals. The Tribunal has finalised practice directions for the purpose of these appeals to enable the jurisdiction to become “active” as soon as the Act takes effect.

As in previous years, most of the appeals which have come before the Tribunal involve council determinations which are contrary to the terms of the internal advice of council’s own planners. Last year I suggested that this may reflect the fact that councillors see themselves as performing a political function which permits a response that takes account of community views, and gives those views precedence over the terms of the planning scheme. When exercising its planning jurisdiction, a council sits as a planning authority and has an important statutory obligation under the *Land Use Planning & Approvals Act 1993*. It is incumbent upon councils to divorce themselves from external and political or populist views when approaching their assessment of planning applications. Every applicant for development approval is entitled to a consistent application of the planning scheme on its terms, divorced from other agendas. The Tribunal will, inevitably reverse decisions which depart from the terms of the planning scheme, its statutory duty to apply the law according to its terms, and regardless of public opinion. Those views find their expression through other channels.

Utilisation of alternative dispute resolution (ADR) methodologies provides a cost-effective way of resolving disputes and the Tribunal actively supports the process by providing three dedicated specialist mediators who are able to assist parties to identify issues in dispute and provide a forum within which issues can be explored and resolved. Resolution through ADR is achieved at significantly lower cost than is the case if a matter proceeds to hearing. Accordingly the Tribunal places significant

emphasis upon it, devoting resources to the continuing professional development of its mediators.

I record my considerable appreciation for the work of Jarrod Bryan, Sally Bridge and Nick Mackey in this respect. In the reporting year, they have achieved resolution in over 70% of cases. This statistic represents significant costs savings to parties who have been spared the costs associated with a hearing, and the advantage of a prompt resolution of the dispute. This is consistent with the Tribunal's ADR performance in previous years and reflects the very high skill set each mediator brings to the task. Their skills will be called upon in the vegetation disputes jurisdiction perhaps more than anticipated, as pent-up demand for resolution of such disputes emerges when the Act comes into effect in December 2017.

It is worth emphasising that even when parties achieve a resolution of matters by agreement the *Resource Management & Planning Appeal Tribunal Act 1993* requires the Tribunal to make a "decision". This is not what is known as a consent jurisdiction, which means that parties cannot resolve their disputes by consent and advise the Tribunal to that effect. Rather, the Act requires that in every such case, the consent, which is recorded in a memorandum and signed by the parties, is submitted to the Tribunal for its consideration. The Tribunal reviews closely the terms of such agreement. If the Tribunal is satisfied that the resolution which has been achieved is one which it could make because it accords with the provisions of the applicable law or planning scheme, then it will make a decision which gives effect to that agreement. Otherwise it will not do so and parties will be advised of the Tribunal's reasons for not sanctioning the proposal. Whilst this may seem an unnecessary additional step, it is one which ensures that the resolution of planning, building and other disputes within the Tribunal's jurisdiction, are subject to scrutiny. It was no doubt intended by the Parliament that such course would ensure that the public interest was protected, for it is very much in the public interest that decisions relating to planning and development are consistent with the applicable statutory regime (and indeed that it is consistently applied). These provisions ensure that there is a transparent process of supervision over development in this State and that it is not susceptible to private deals which ignore the public interest, as it is reflected in the applicable legislation or planning instruments. I am pleased to report that the resolutions achieved through Tribunal assisted ADR have satisfied the requirement for compliance in that respect.

Matters which were not resolved through ADR have tended to be complex appeals. That complexity flows from the nature of the development or a combination of the nature of the development and the terms of the planning scheme.

The Registrar, Jarrod Bryan, continues his important role in reporting to Government on the implementation of a single tribunal. In my report last year, I described this as the single most important administrative law project in the State for some time. Tasmania is the only State without a single administrative tribunal, retaining the

fragmented arrangement which requires each tribunal to have its own associated administrative support, and premises. The consolidation of individual tribunals is a project which has been investigated, considered, debated and acted upon in every other state and territory for the obvious benefits it brings. The proposal was championed by the former Attorney-General, Dr Vanessa Goodwin, and it is to be hoped that the important work she undertook in committing resources to that vision can bear fruit, and be recognised for the important reform it is.

The Tribunal has continued its program of refining its practice and procedures. This is an important task which reflects the Tribunal's intention that those participating in the planning system, and who engage with the Tribunal should enjoy as efficient a process as is possible. This review process commenced at the beginning of my tenure with the introduction of a requirement for the identification of agreed facts, compulsory conferences of experts, and a requirement for councils to provide a "Statement of Facts & Contentions" in all planning appeals. This document assists the parties to identify the facts upon which councils rely to make the case it puts in relation to a development proposal. Its early preparation facilitates mediation, as well as enabling neutral expert evaluation to occur. This in turn provides the best chance of early resolution. But even if resolution is not achieved, it helps to frame the issues at hearing, thus reducing the cost of preparing for hearing by narrowing the scope of issues required to be addressed by evidence. Procedural reform remains an active task in the Tribunal.

The Tribunal's annual statistics follow this report. In addition to the high rates of resolution through mediation, upon which I have already commented, the Tribunal has continued to achieve a high degree of compliance with the requirement imposed by s16(1)(F) of the governing legislation. This provision, unique in Australia, requires the Tribunal to hear, determine and deliver written reasons for decisions within 90 days of an appeal being instituted. This is an unrealistic expectation in many instances (but not all). Also unique to this State is the requirement for the Tribunal to obtain the consent of parties in circumstances where the 90 day time limit cannot be achieved. If that consent is not forthcoming, for any reason, the Tribunal must refer the matter to the Minister. The Tribunal has no objection to the imposition of reasonable timeframes, but the reality of the 90-day time limit is that often complex decisions are required to be produced in a very short period: in a matter of days, the Tribunal is required to consider and arbitrate upon complex competing expert evidence, consider the legal issues arising, and draft and settle its reasons.

Interestingly, no appeals have been made against decisions of the Tasmanian Heritage Council this reporting year. Under the current regime, if the Tasmanian Heritage Council opposes a development on the basis of a provision within the *Historic Cultural Heritage Act 1995* then the council considering that application, is obliged to accept that determination and must refuse it. If, however, the Tasmanian Heritage Council is content to approve a development, or approve it on condition, then council retains a

discretion. Where its planning scheme imposes standards upon development in areas the subject of heritage overlays, it may reach a different conclusion from the Heritage Council. There have been a number of appeals this year which have related to council decisions which have applied the heritage provisions of planning schemes. In at least two instances, decisions of the Tasmanian Heritage Council have been favourable to development applications, but councils' heritage officers have identified concerns which have resulted in a refusal, which has been upheld on appeal.

Another area of "growth" has been in the number of appeals from the Recorder of Titles. Indeed, the reporting year has seen an increase in excess of 100% in this category of appeals. The vast majority of these appeals relate to disputes within bodies corporate, operating strata title schemes. The reason for the increase is not readily apparent, and the nature of the disputes does not expose a plausible thesis for the increased activity in this jurisdiction.

I acknowledge the contribution of Tribunal staff. Mrs Susan Vernon assists the Tribunal at reception and in hearings. She is assisted by Ms Danielle Cingel and Mrs Carmen Dittmann. Mr Stephen Main is responsible for the Tribunal's financial records and reporting. Mrs Hilary Harris provides executive support to the Registrar. Mr Mackey and Ms Bridge, manage appeals, directions hearings and ADR, and also provide support to me. Ms Bridge has acted as Registrar during the reporting year to enable Mr Bryan to continue his participation in the single tribunal project. Each year I have acknowledged the considerable efforts of my executive assistant, Ms Angela Korotki, and I do so again this year. She undertakes the considerable task of typing decisions, managing my work and undertaking file management and does so efficiently. It would be impossible for me to fulfil my duties without her assistance.

Recently I have been assisted by the engagement of a graduate associate. Ms Emma Livingston has joined the Tribunal in August and I have been greatly supported by her contribution in the undertaking of research and the review of draft materials. I am delighted the Tribunal has been able to fund this position and provide a graduate of our University with an opportunity to gain practical legal experience.

Finally, I acknowledge all the Tribunal members who have agreed to make themselves available to sit on appeals. The Resource Management & Planning Appeal Tribunal Act stipulates a requirement for particular skills to be available to the Tribunal. The organisation of panels for appeals is determined on the basis of the issues raised in the appeal: engineering, flora and fauna, landslip, heritage and so on. Members' contributions ensure the Tribunal system can work effectively to provide a procedure for the review of decisions and the value they bring cannot be overstated. I acknowledge it. I would also like to acknowledge the contribution of Ann Cunningham. Ms Cunningham is a legal member of the Tribunal and has chosen not to continue in that role beyond 2017. Ms Cunningham's contribution is appreciated and

the Tribunal could not have functioned as efficiently or effectively as it has without her. She will be missed. I thank her for her service.

2 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 I 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.”

3 Members of the Tribunal as at 30/06/17

Member	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
Blakesley, Mr A	06/03/18	Forestry
Brereton, Mr R	06/03/18	Forestry
Bryant, Ms N	27/10/18	Legal
Calvert, Mr N	06/03/18	Forestry
Code, Mr G	02/09/18	Legal
Cripps, Mr P	24/09/17	Building
Cunningham, Mrs AF	19/07/17	Legal
Davis, Ms J	24/08/20	Planning
Gilfedder, Ms L	06/03/18	Forestry
Gliddon, Ms A	24/09/17	Building
Gunson, Mr C	06/03/18	Forestry
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

Member	Appointed until	Area of Expertise
Kantvilas, Mr G	06/03/18	Forestry
Keating, Mr GF	24/09/17	Building
Kitchell, Mr M	24/08/20	Building
Locher, Dr H	24/08/20	Planning
Locke, Mr R	24/09/17	Building
McMullen, (Tony) A Mr	25/08/18	Planning
Masters, Mr D	24/08/20	Planning
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	09/05/21	Planning/ Environmental management
Nolan, Mr RJ	06/05/20	Planning
Pitt, Mr K	06/03/18	Legal
Pretty, Mr J	06/03/18	Forestry
Schaap, Mr A	24/08/20	Environmental management
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

Member	Appointed until	Area of Expertise
Thompson, Mr S	24/09/17	Building
Webster, Professor JC	02/03/19	Architect/heritage/planning
Wong, Ms M	06/05/20	Planning

4 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 both the *Building Act 2000* and the *Building Act 2016* and 10 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	2009-10	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17
LUPAA	270	266	195	150	117	101	119	131
Heritage	19	14	11	7	10			
SOL			1	1	1			
Marine	2	3		4	1	1		
Water	5			4			1	
Strata Titles	2	3	2	4	2	5	4	11
EMPCA		6	4		1	2	8	2
Threatened Species								
Local Govt. Highways Act								1
Water & Sewerage Industry Act	1							
Building Act				6	3	9	9	10
Total	299	292	213	176	135	118	141	155

Applications By Legislations	2009-10	2010-11	2011-12	2012-13	2013-14	2014-15	2014-15	2016-17
S64 LUPAA	29	28	24	17	9	12	1	
S48 EMPCA						1	1	
S96 Strata Titles				1				1
S264 Water Management								
P12 S218A Building Act					1			
Total	29	28	24	18	10	13	2	1

Decision Types	2009-10	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17
Interim	41	30	10	31	24	37	29	21
Costs	31	22	27	29	33	12	10	15
Consent	123	114	126	80	62	57	55	74
Amended		5			4	1		
Hearing	52	44	39	17	23	15	14	27
Total	247	215	202	157	146	122	108	137

% of Substantive Decisions	2009-10	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17
Total For Year	175	158	165	97	85	72	69	101
Interim	16.60%	13.95%	4.95%	19.75%	16.44%	30.33%	26.85%	15.33%
Costs	12.55%	10.23%	13.37%	18.47%	22.60%	9.84%	9.26%	10.95%
Consent	49.80%	53.02%	62.38%	50.96%	42.47%	46.72%	50.93%	54.01%

Amended	0.00%	2.33%	0.00%	0.00%	2.74%	0.82%	0.00%	0.00%
Hearing	21.05%	20.47%	19.31%	10.83%	15.75%	12.30%	12.96%	19.71%

% Consent / Hearings to substantive decisions	2009- 10	2010- 11	2011- 12	2012- 13	2013- 14	2014- 15	2015- 16	2016- 17
Consent	70.29%	72.15%	76.36%	82.47%	72.94%	79.17%	79.71%	73.27%
Hearings	29.71%	27.85%	23.64%	17.53%	27.06%	20.83%	20.29%	26.73%