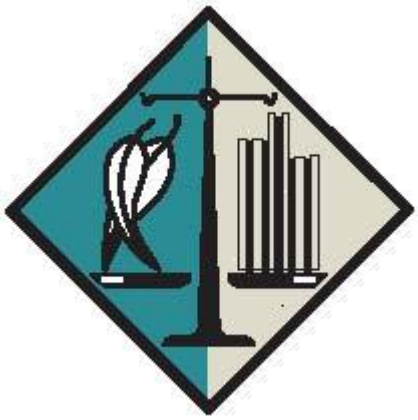

ANNUAL REPORT

OF

THE RESOURCE MANAGEMENT AND PLANNING APPEAL TRIBUNAL

2013-2014

Dear Minister,

I have pleasure in presenting my first Annual Report since my appointment as Chairman of the Tribunal in September 2013. I am privileged to have been appointed to this role and am committed to ensuring that the Tribunal discharges its statutory obligations diligently, striving for accuracy and correctness in its decision making whilst fulfilling the community's desire for efficient and expeditious decision making.

The Resource Management and Planning Appeal Tribunal (the 'Tribunal') is established by Section 5 of the *Resource Management and Planning Appeal Tribunal Act 1993*. That Act also governs the Tribunal's jurisdiction and regulates its practice and procedure. The Tribunal is an independent statutory tribunal which deals with appeals relating to a wide range of administrative actions and decisions associated with resource management, environmental and planning issues. Unlike a court, the Tribunal possesses no inherent jurisdiction. It may only exercise such jurisdiction as is conferred upon it by an Act of Parliament (including those powers necessary in order to make the exercise of an express power effective). The Tribunal exercises jurisdiction under the following Acts:

- *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;*

Tribunal Role

The role of the Tribunal is to conduct a *de novo* hearing which requires it to consider the subject matter of an appeal afresh. In other words, the Tribunal stands in the shoes of the original decision maker, and determines the matter as if it were the relevant authority.

In addition to the review of urban planning decisions the Tribunal conducts enforcement proceedings under Section 64 of the *Land Use Planning and Approvals Act 1993,* and Section 48 of the *Environmental*

Management and Pollution Control Act 1994. These proceedings are in the nature of injunctive proceedings and the Tribunal is vested with very wide powers to deal with breaches of relevant laws and regulations.

Somewhat curiously, the Tribunal is unable to deal with parties who ignore those orders. Breaches of Tribunal orders under Section 64 must be dealt with in the Magistrates' Court. That fragmentation of functions is not an ideal model for enforcement. The result is that to deal with breaches, Council's must commence a new and different process in another jurisdiction which is not part of the State's planning system. Experience confirms that this contributes to delays, and some, who have ignored Tribunal orders, may even take advantage of this arrangement to further delay obedience to orders. The Tribunal considers it desirable that it should have the power to deal with breaches of its orders, as an incident of the power conferred upon it to make those orders and as the most efficient and logical means of ensuring the State's planning system is upheld.

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 six 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. Recent months have seen an increase in the number of Appeals lodged, a fact consistent with improvements in economic activity in the State.

Table 2

Appeals By Legislations	**2006-07**	**2007-08**	**2008-09**	**2009-10**	**2010-11**	**2011-12**	**2012-13**	**2013-14**
LUPAA	403	425	300	270	266	195	150	117
Heritage	16	14	13	19	14	11	7	10
SOL	4		2			1	1	1
Marine		3	5	2	3		4	1
Water		4	1	5			4	0
Strata Titles	2	7	2	2	3	2	4	2
EMPCA	5	3	5		6	4		1
Threatened Species	1							
Local Govt. Highways Act		21						
Water & Sewerage Industry Act				1				
Building Act							6	3
Total	**431**	**477**	**328**	**299**	**292**	**213**	**176**	**135**

Applications By Legislations	**2006-07**	**2007-08**	**2008-09**	**2009-10**	**2010-11**	**2011-12**	**2012-13**	**2013-14**
S64 LUPAA	28	36	25	29	28	24	17	9
S48 EMPCA	1	3	1					
S96 Strata Titles	1	1	0				1	
S264 Water Management		1						
P12 S218A Building Act								1
Total	**30**	**41**	**26**	**29**	**28**	**24**	**18**	**10**

Decision Types	2004-05	2005-06	2006-07	2007-08	2008-09	2009-10	2010-11	2011-12	2012-13	2013-14	Total
Interim	15	17	39	25	46	41	30	10	31	24	316
Costs	3	65	34	26	43	31	22	27	29	33	388
Consent	189	133	164	217	161	123	114	126	80	62	1694
Amended	20	16	11	9	5	0	5	0	0	4	94
Hearing	76	81	56	65	46	52	44	39	17	23	682
Total	**303**	**312**	**304**	**342**	**301**	**247**	**215**	**202**	**157**	**146**	**2867**
Substantive decisions	**265**	**214**	**220**	**282**	**207**	**175**	**158**	**165**	**97**	**85**	**2140**

% of Total Decisions											
Interim	4.95%	5.45%	12.83%	7.31%	15.28%	16.60%	13.95%	4.95%	19.75%	16.44%	9.96%
Costs	0.99%	20.83%	11.18%	7.60%	14.29%	12.55%	10.23%	13.37%	18.47%	22.60%	12.22%
Consent	62.38%	42.63%	53.95%	63.45%	53.49%	49.80%	53.02%	62.38%	50.96%	42.47%	53.37%
Amended	6.60%	5.13%	3.62%	2.63%	1.66%	0.00%	2.33%	0.00%	0.00%	2.74%	2.96%
Hearing	25.08%	25.96%	18.42%	19.01%	15.28%	21.05%	20.47%	19.31%	10.83%	15.75%	21.49%

% Consent / Hearings to substantive decisions											
Consent	71.32%	62.15%	74.55%	76.95%	77.78%	70.29%	72.15%	76.36%	82.47%	72.94%	71.30%
Hearings	28.68%	37.85%	25.45%	23.05%	22.22%	29.71%	27.85%	23.64%	17.53%	27.06%	28.70%

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 as I have set out elsewhere in the Report. The Tribunal has maintained a very high level of compliance with this standard. The 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 additional material. Sometimes it is the result of a failure to comply with case management directions. Sometimes the time limit is extended to facilitate alternative dispute resolution, or the modification of proposals to accommodate objections. The actions of parties accounts for 92% of cases in which the 90 day period has been exceeded.

The complexity of some matters has militated 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 relation to new schemes not the subject of earlier consideration by the Tribunal or the Supreme Court. I have introduced some changes to the Practice Directions this year, to assist in relation to evidentiary issues, and introduce efficiencies in the conduct of hearings. I have detailed this elsewhere in my report.

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	2009 - 10 Actual	2010 - 11 Actual	2011 – 12 Actual	2012 – 13 Actual	2013 – 14 Actual
Percentage of appeals resolved within 90 days without extension.	%	77.08%	66.50%	78.00%	76.47%	72.41%
Percentage of appeals which did require extensions due to parties	%	97.11%	97.03%	95.00%	90.00%	92.50%

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.

Of course, alternative dispute resolution remains a matter which is in the discretion of the parties. 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 to 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 and the advantages of their involvement tangible. The Tribunal acknowledges the significant contribution of the Registrar, Mr Jarrod Bryan, and mediation officers, Ms Sally Bridge and Mr Nick Mackey 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.

Procedural Changes

The Tribunal publishes Practice Directions which set the rules which govern the conduct of matters in the Tribunal. I have implemented a number of rule changes this year as part of an ongoing review process, the changes intended to improve the conduct of hearings, and to reduce costs to parties. In all matters parties are now required to confer and agree as many facts as possible. This means time is not spent proving those matters through evidence. I have introduced a rule requiring expert witnesses to confer and to submit statements of agreed matters prior to hearing, intended to narrow issues by exposing the issues on which there is not a difference of expert opinion. The requirement has curtailed the need for much cross examination, narrowed the compass of contentious issues, and reduced hearing time. I have introduced procedures to streamline the application process to facilitate efficient dealing with the numerous interlocutory issues which arise before final hearing. This saves time in the resolution of pre-hearing skirmishes. These refinements to our practice directions were overdue.

Planning Scheme Amendments

Planning scheme reform remains an important and worthwhile objective. One need only be reminded of the comments of Justice Blow (as he then was) in the 2011 case of AAD Nominees Pty Ltd v Resource Management and Planning Appeal Tribunal [2011] TASFC 5[1]. The introduction of new schemes and interim schemes creates its own issues as was highlighted recently in a Supreme Court Decision[2]. Attempts to simplify planning schemes have not always resulted in that objective being achieved. Problems arise due to the employment of imprecise language, the absence of definitions, the use of broad statements of "purpose" to which limited reference may be had in interpreting the Scheme, and the arbitrary exclusion of parts of schemes in the interpretation of that scheme[3]. Some of these were the subject of comment by the Tribunal in the course of the year[4]Simplification of planning schemes is a worthy objective but it appears to the Tribunal that greater attention to the practical application of scheme provisions is necessary before revisions are accepted.

The Time taken for Appeals

The time taken to determine planning matters in this state remains the subject of regular commentary. In respect of the Tribunal's role in that process, which is limited to those matters which are appealed, it is useful to compare the situation in Tasmania to the other states and territories. That enquiry, if it is made, will demonstrate that this state has the fastest *appeal process* of any state, typically reaching a published decision within 90 days of the Appeal *being lodged*. This represents the period permitted under the Land Use Planning and Approvals Act. It is the shortest such period in Australia. Given the propensity for delay in the preparation of matters by parties, and issues around the availability of expert witness, all of which is beyond the Tribunal's control, this achievement reflects the efforts of the Tribunal (its members and staff) to efficiently carry out its business, conduct hearings, evaluate evidence and publish written reasons for its decisions (which of course the planning authorities appealed from, do not).

In Victoria, 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

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[1] I have read the reasons for judgment of Tennent J in draft form, and agree that this appeal should be dismissed, for the reasons stated by her. I would like to add some comments, mainly concerning the Kingborough Planning Scheme 2000. The full text of each of the relevant mind-numbing clauses is set out in her Honour's reasons for judgment, and I am very grateful for that. The planning scheme is very complex, and exceedingly and unnecessarily difficult to comprehend or interpret. Most ordinary people would not have a chance. Most sensible people, or people with a life, would not attempt the task unless they had absolutely no choice. In order to determine how the scheme operates in relation to the appellant's proposed development, it is practically essential to have a law degree, decades of experience in interpreting legal documents, a talent for understanding gobbledygook and misused words, a lot of time, and a very strong capacity for perseverance.

[2] Northern Midlands Council v Telstra Corporation Ltd [2014] TASSC 54 . At [20] the Chief Justice noted: In summary, it can be said that the LUPA Act does not contain a coherent scheme in relation to the status of permits, applications and appeals when a planning scheme is superseded by an interim planning scheme. There are situations in which issued permits do and do not cease to have effect. There are situations in which a new permit can take effect pursuant to a superseded scheme. But there can be situations in which rights are extinguished as a result of an interim planning scheme coming into operation.

[3] R Brown and T Shaw v Launceston City Council and Bullock Consulting [2014] TASRMPAT 15: "The meaning to be attributed to the term "Northern Region" became a significant focus. It is a consideration relevant in the context of Grounds 1, 2 and 3 of the appeal. The Developer's witness has regarded the term as including the municipal areas of Launceston, the Northern Midlands, the Meander Valley, West Tamar, George Town, Dorset, Break O'Day and Flinders. Clause 2 of the Scheme includes a reference to "Northern Region" and describes the municipalities said to comprise the region ….. Whilst it may be thought that this resolves the question of what is meant by the term, Clause 8.10.3 of the Scheme provides that "*in determining an application for any permit the Planning Authority must <u>not</u> take into consideration matters referred to in Clauses 2 and 3 of the Planning Scheme."*

[4] R Brown and T Shaw v Launceston City Council and Bullock Consulting supra; R and J Shaw v Northern Midlands Council and Mity Pty Ltd [2014] TASRMPAT 25;

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.

ACPECT Conference 2014

During this year, the Tribunal hosted the 2014 conference of the Australian Conference of Planning Courts & Tribunals. Governor Peter Underwood hosted a reception at Government House and opened the Conference with an insightful address to delegates. We note with considerable regret his untimely passing. Judges and Tribunal members from every state and from New Zealand attended and contributed to formal sessions and out of session activities. The theme of this year's conference was heritage and the environment. It was a privilege to address the Conference on behalf of the Tribunal, and Registrar Jarrod Bryan presented a detailed outline of the Tribunal's functions, the legislative regime, current and prospective, as well as referencing some recent interesting cases. I record my appreciation to Chief Justice Blow and to Justice Estcourt, both of whom delivered addresses to the conference. Conference dinners were held at Woodbridge (Peppermint Bay) and at MONA. Each of those events was extremely well received. The conference was hugely successful and I would like to record my appreciation to Jarrod Bryan, for his assistance in ensuring its success. It showcased Tasmania well, and the Tribunal can be proud of its achievements in presenting such a well-received conference.

Members 2014

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, due for example, to a conflict of interest. The position of Deputy Chair, provided for under the Act has not been filled. 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 obligation.

Ean Cannell passed away this year. His contribution to the Tribunal over many years was invaluable, and his disposition was always cheerful. I acknowledge his contribution. He will be missed.

I record my considerable appreciation to the staff of the Tribunal. Their diligence and dedication is worthy of praise and I am grateful for their support over the last year.

Gregory Geason
Chairman,
October 29th 2014

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 2014.

Person	Appointed until	Area of Expertise
Arnold, Mr P	24/09/17	Building
Ball, Mr M E	27/10/18	Planning
Bensz, Ms E A	02/11/14	Planning
Bryant, Ms N	27/10/18	Legal
Caulfield, Mr JJ	02/11/14	Planning
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	02/11/14	Planning
Howlett, Mr DR	02/11/14	Planning
Hurst, Mr A	24/09/17	Building
Keating, Mr GF	24/09/17	Building
Lester, Mr ND	02/11/14	Surveying
Locke, Mr R	24/09/17	Building
McMullen, (*Tony*) A Mr	25/08/18	Planning
McNamara, Mr GC	02/11/14	Valuation
McNeill, Mr B	02/11/14	Planning/architect/Heritage
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	02/11/14	Planning
Pryor, Mr CG	02/11/14	Planning/architect
Richardson, Dr AM.	02/11/14	Zoology
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	02/11/14	Planning