



Resource Management and Planning Appeal Tribunal

Report for 2008/2009

Pursuant to Section 37 of the Resource Management and Planning Appeal Tribunal Act 1993

1. Introduction

The Resource Management and Planning Appeal Tribunal (the ‘Tribunal’) is established by Section 5 of the Resource Management and Planning Appeal Tribunal Act 1993. In addition to establishing the Tribunal, that Act governs its jurisdiction and makes the Tribunal part of Tasmania’s resource management and planning system.

The Tribunal is an independent statutory Tribunal which deals with appeals relating to a wide range of administrative Acts and Decisions associated with resource management, environmental and planning issues.

Unlike a court the Tribunal possesses no original jurisdiction. It may only exercise such jurisdiction as is conferred upon it by Acts of Parliament. Specifically the Tribunal exercises jurisdiction under the following Acts:

- Land Use Planning and Approvals Act 1993
- Environmental Management and Pollution Control Act 1994
- Historic Cultural Heritage Act 1995
- Inland Fisheries Act 1995
- Living Marine Resources Management Act 1995
- Marine Farming Planning Act 1995
- Public Health Act 1997
- Strata Titles Act 1998
- Threatened Species Protection Act 1995
- Water Management Act 1999
- Local Government (Highways) Act 1982
- Local Government Act 1993

As has been noted in the last three annual reports, the Tribunal was established in 1993, a year which saw widespread change to the State's environmental laws. Of the many changes then brought about, one of the most significant was the introduction of objectives into the 'suite' of legislation. Those objectives are worth reproducing since they inform and guide the Tribunal in the performance of its various statutory roles. They are as follows:

- (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.

2. Role

Once again, in the year the subject of this report, the majority of the Tribunal's work was concerned with so-called 'permit' appeals. Such appeals typically relate to decisions of local councils acting as planning authorities. They may be concerned with either a refusal to grant a permit applied for or, alternatively, the grant of a permit. On occasions it may be that one or more of the conditions of a permit are the subject of appeal, rather than the grant or refusal of the permit itself. Whatever the nature of the permit appealed the Tribunal considers the matter afresh or, in legal terms, conducts a *de novo* hearing. It in effect assumes the position of the planning authority and makes the decision again but is not confined to the material that was before the planning authority.

In previous annual reports and numerous decisions the Tribunal has pointed out that it does not 'review' the local councils' decision. It does not determine whether the decision that gives rise to an appeal was 'right' or 'wrong'. Unless the conduct of the planning authority is such that its decision was a legal nullity then what may or may not have occurred in the course of a council or other authority dealing with an application for a permit is totally irrelevant. The Tribunal's job is, as has been noted already in this report, to make a fresh decision about the subject matter of the application. This may involve setting the original decision aside and replacing it with a decision in substitution therefore. It may involve confirming the decision or sending it back to the planning authority to be re-considered in accordance with any directions or recommendations made by the Tribunal. Hence, complaints about the decision-making process of the planning authority, even if justified, are rarely relevant, and then only in relation to questions associated with whether what is before the Tribunal is within its jurisdiction.

It is also important to remember that the Tribunal, created as it is by statute, may only exercise power conferred upon it by statute. This means, in the context of planning appeals, that it is constrained by the *Land Use Planning and Approvals Act 1993* (or any other applicable legislative provision), the applicable planning scheme, and relevant decisions of the Supreme Court of Tasmania. Unless an issue is made relevant by the applicable planning scheme then it simply does not fall for consideration by the Tribunal (or a planning authority for that matter) no matter how important parties or interested persons may consider it to be.

The way in which the Tribunal conducts its hearings is also governed by statute. Fundamental is the requirement to afford all parties - developer, planning authority and interested parties - procedural fairness. It is this requirement which guides the Tribunal in the exercise of its powers. It is this requirement which shapes the procedure adopted at every stage of every appeal. Procedural fairness (or natural justice: - the terms are interchangeable) means ensuring that all parties are given a fair hearing. This has many, many aspects. It includes ensuring timely warning is given of any hearing and making sure all parties are fully and fairly apprised of the case they must meet and the evidence that will be called by any other party at a hearing. It involves ensuring that the composition of the Tribunal is, in every case, such that no reasonable apprehension of bias can arise. Finally it means ensuring that all parties are heard objectively and fully.

The Tribunal has, over a number of years, developed and published a series of practice directions. The making of practice directions is authorised by Section 22(1) of the *Resource Management and Planning Appeal Tribunal Act 1993*. Their purpose is to ensure that procedural fairness is afforded to all who come before the Tribunal and that hearings are conducted as efficiently as possible. They are not pointless and technical rules that may be ignored by parties if they so wish, for to do so works an unfairness to others and wastes the Tribunal's valuable, and limited, resources. The Practice Directions are regularly up-dated and available on the Tribunal's website www.rmpat.tas.gov.au. Every person who is a party to an appeal should be familiar with them.

3. Members

The Tribunal is composed of a Chairman, two (2) presiding legal members and a number of other members possessing experience and expertise in planning, resource economics, science, engineering, medicine, environmental management, and industry process operations.

Members are appointed for a five (5) year term pursuant to Section 6 of the *Resource Management and Planning Appeals Tribunal Act 1993*. That section allows for the appointment to the Tribunal of persons with expertise in planning, resource economics, science, engineering, medicine, environmental management, industry process operations and such other areas of expertise that are considered necessary from time to time. The *Water Management Act 1999* also makes provision for the appointment of members with expertise in water resource issues.

As has been the case in the past the Tribunal relies, very heavily, upon a limited number of expert members without whom it would be literally impossible for the Tribunal to function. The author of this report acknowledges the wisdom, experience, hard work and counsel of, in particular, Mr John Caulfield, Mr Clarry Pryor, Mr Ean Cannell, Mr Neville Lester, Mr Barry McNeill, Dr Laurie Cosgrove and Mr Roger Howlett.

It is, however, necessary to broaden the pool of expert members. To that end it is extremely pleasing to report that during the year His Excellency the Governor appointed Mr Michael Ball, Dr Anne Neale, Mr Peter Spratt, Mr Michael Temple-Smith and Professor John Webster. Each brings to the Tribunal a great wealth of experience in a variety of fields including planning, architecture, engineering and water management. The Tribunal looks forward to their contribution in the future.

During the year the subject of this report the resignation of Mr John Pretty was received. The Tribunal acknowledges the contribution of this gentleman in the past and thanks him for his service.

Finally the contributions of Mrs Ann Cunningham and Mr Gregory Geason, the part-time presiding members, must be acknowledged. The Tribunal would be unable to function without them.

The Tribunal is always mindful of the need to complete matters in a timely manner and strives so to do. It relies very heavily upon the co-operation of **parties** to achieve this aim and in most cases receives that co-operation, particularly from members of the legal profession. But as was noted last year a combination of a constantly increasing case load, more and more complex matters, limited resources and above all the needs of **parties** means that some delays are unavoidable.

Table 1 sets out details of the members of the Tribunal during the year the subject of this report, including the length of their appointment and area of expertise.

Table 1

PERSON	APPOINTED TILL	AREA OF EXPERTISE
Ball (Michael) E Mr	27/10/13	PLANNING
Bensz (Elizabeth) A Ms	15/11/09	PLANNING
Bryant (Naomi) Ms	27/10/13	LEGAL
Burbury (Timothy) TV Mr	06/08/12	ENGINEERING
Cannell (Ean) REJ Mr	15/11/09	PLANNING
Caulfield (John) JJ Mr	15/11/09	PLANNING
Claxton (Robin) AC Mr	05/05/08	FISHERIES
Cosgrove (Laurie) SL Dr	17/11/08	ENVIRONMENTAL MANAGEMENT
Cunningham (Ann) AF Mrs	09/07/12	LEGAL
Derrick (David) D Mr	05/05/08	PLANNING
Domeney (Tim) T Mr	05/05/08	ARCHITECT/HERITAGE
Fitzpatrick (Michael) MD Mr		ENGINEER/ DAMS
Gourlay (David) DK Mr	21/12/10	VALUATION
Geason (Greg) GP Mr	12/01/12	LEGAL
Healy (Frances) F Ms	25/06/12	SCIENCE/ENVIRONMENTAL MANAGEMENT
Hogue (Sandra) S Mrs	15/11/09	PLANNING
Howlett (Roger) DR Mr	15/11/09	PLANNING
Imlach (Mary) MA Ms	12/3/09	LEGAL
James (Elizabeth) EA Ms	21/12/10	SCIENCE
Lester (Neville) ND Mr	15/11/09	SURVEYING
Mucha (Christine) C Dr	16/06/13	WATER/MAJOR INFRASTRUCTURE
McMullen (Tony) A Mr	16/6/13	PLANNING
McNamara (Gregory) GC Mr	15/11/09	VALUATION
McNeill (Barry) B Mr	15/11/09	PLANNING/ARCHITECT/ HERITAGE
Neale (Anne) I Dr	2/3/14	ARCHITECTURE/HERITAGE
Nicholson (Catherine) C Ms	21/12/10	PLANNING ENVIRONMENTAL MANAGEMENT
Nolan (Robin) RJ Mr	15/11/09	PLANNING
Pryor (Clarence) CG Mr	15/11/09	PLANNING/ARCHITECT
Richardson (Alastair) AM Dr.	15/11/09	ZOOLOGY
Sandford (Rosemary) RA. Dr	15/11/09	HERITAGE/ ENVIRONMENTAL MANAGEMENT
Spratt (Peter) Mr	7/4/14	CIVIL AND STRUCTURAL ENGINEERING AND HERITAGE AND BUILDING CONSERVATION
Stratford PhD MPIA (Elaine) E Dr	17/11/08	GEOGRAPHY/ ENVIRONMENTAL STUDIES
Temple-Smith (Michael) Geoffrey (Mike) Mr	7/7/14	WATER MANAGEMENT
Webster (John) C Professor	25/8/13	ARCHITECTURE/HERITAGE AND PLANNING
Wong (Marietta) M Mrs	5/11/09	PLANNING

4. Personnel

Once again the role of the Registrar, Mr Jarrod Bryan, must be acknowledged. Mr Bryan continued to be responsible for the efficient administration of the Tribunal as well as the delivery of its Alternative Dispute Resolution services.

5. Overview of matters

During the year the subject of this report the Tribunal continued to exercise its statutory obligations in relation to the hearing and determination of appeals. In addition mediation was undertaken in virtually every case lodged with the Tribunal.

Set out in the Tables below are details of the numbers and types of appeals and applications dealt with by the Tribunal in the year the subject of this report as well as the decisions delivered.

Table 2

Appeals By Legislations 2005-2006		2006-7	2007-8	2008-9
Land Use Act	346	403	425	300
Heritage	10	16	14	13
Sale of Public Land	2	4		5
Marine	1		3	
Water	7		4	1
Strata Titles	2	2	7	2
Environmental Management and Pollution Control	9	5	3	5
Threatened Species		1		
Local Govt. Highways Act			21	
Total	377	431	477	328

Applications By Legislations 2005-2006		2006-7	2007-8	2008-9
Section 64 Land Use Act	31	28	36	25
Section 48 Environmental Management and Pollution Control Act	3	1	3	1
Section 96 Strata Titles Act	1	1	1	
Section 264 Water Management Act			1	
Total	35	30	41	26

Table 3

Decisions Financial Yrs 2002-03 2003-04 2004-5 2005-6 2006-7 2007-8 2008-9								
Decision Types	2002-03	2003-04	2004-5	2005-6	2006-7	2007-8	2008-9	Total
Interim	8	18	15	17	39	25	36	158
Costs	20	34	3	65	34	28	37	221
Consent	94	164	189	133	164	229	152	1125
Amended	7	14	20	16	11	9	12	89
Hearing	37	108	76	81	56	66	44	468
Total	166	338	303	312	304	357	281	2061
Substantive	131	272	265	214	220	295	196	1593
% of Total Decisions								
Interim	4.82%	5.33%	4.44%	5.03%	11.54%	7.40%	10.65%	7.67%
Costs	12.05%	10.06%	0.89%	19.23%	10.06%	8.28%	10.95%	10.72%
Consent	56.63%	48.52%	55.92%	39.35%	48.52%	67.75%	44.97%	54.59%
Amended	4.22%	4.14%	5.92%	4.73%	3.25%	2.66%	3.55%	4.32%
Hearing	22.29%	31.95%	22.49%	23.96%	16.57%	19.53%	13.02%	22.71%
% Consent / Hearings to substantive decisions								
Consent	71.76%	60.29%	71.32%	62.15%	74.55%	77.63%	77.55%	70.62%
Hearings	28.24%	39.71%	28.68%	37.85%	25.45%	22.37%	22.45%	29.38%

6. Alternative Dispute Resolution

The Tribunal remains committed to the proactive use of alternative dispute resolution. There are many reasons for this. Assisting parties to achieve a resolution of matters in dispute is preferable to imposing a result upon them. Matters resolved without the need for a hearing are cheaper and quicker. Significant savings are able to be achieved for all parties if needless hearings can be avoided. Such an approach leads to greater efficiencies and serves the objectives of the Resource Management and Planning System of Tasmania, particularly in regard to encouraging “public involvement in resource management and planning”. Our settlement rate as the result of mediation remains very high and continues to compare more than favourably with similar jurisdictions.

To achieve this end every Appeal or Application that is received is carefully examined and a decision made as to whether it should be the subject of Alternative Dispute Resolution. In fact virtually every matter that comes to the Tribunal is the subject of such a direction. Although the process in the *Appeal Tribunal Act* is described as 'mediation' it is much broader than traditional or pure mediation since the expression has the same meaning as that in the Alternative Dispute Resolution Act 2001 namely:

"**mediation**", which includes conciliation, means a structured negotiation process in which the mediator, as a neutral and independent party, assists the parties to a dispute to achieve their own resolution of the dispute."

The Tribunal uses a variety of procedures as part of its provision of Alternative Dispute Resolution services. Last year's report touched upon the process of Expert Neutral Evaluation. During the year the subject of this report many more Expert Neutral Evaluations have been conducted using the assistance of one of the Tribunal's experts along with one of the Tribunal's mediation officers. Such mediations are conducted on site with all parties and their representatives (if any) present. In most cases the matters in fact resolve. If they do not the Tribunal expert involved will not, of course, be part of the Tribunal appointed to hear the Appeal or Application.

The process of Alternative Dispute Resolution remains central to the function of the Tribunal. Simply put the Tribunal would be unable to carry out its statutory functions in a timely manner, or at all, if it were not actively implemented. The professionalism and commitment of the Registrar, Mr Bryan, and the mediation officers Ms Bridge and Mr Mackey, should be acknowledged. So too the invaluable assistance of the Tribunal experts who have been involved in the provision of Expert Neutral Evaluation: Mr Roger Howlett, Mr Barry McNeill, Mr Clarry Pryor, Mr John Caulfield and Ms Catherine Nicholson.

7. Other Developments

a. Video Conferencing

This year has seen the increased use of video conferencing facilities to enable parties or their representatives to appear at directions hearings, mediations or hearings without actually attending the Tribunal's hearing rooms in Hobart. The Tribunal continues to encourage parties to make use of this service.

b. Budgetary Issues

The Tribunal has not been immune to the tightened financial circumstances within which all arms of government have been required to operate. Along with every other Court or Tribunal in the State the Tribunal was required in the early part of 2009 to identify budget savings. Although the Tribunal's funding had not increased, at all, for the better part of a decade, and the practical reality of the Tribunal's budget is that had it conducted no hearings whatsoever in the year the subject of this report it still would have been under funded, the task of finding yet more savings was undertaken. The only area where savings were able to be made was in relation to travel and accommodation expenses. As a result in February 2009 a decision was made to hold, where possible, and for the time being, all hearings in Hobart. 'Stakeholders' were notified by the attached practice direction. The Tribunal is grateful for the professional manner in which the vast majority of parties accepted this decision. Only in one case was any formal dissent expressed and then only in circumstances where it became clear that such dissent was expressed on the basis of a basic misunderstanding of the content and tenor of the Tribunal's direction. Site inspections away from Hobart continued to occur. So too, mediations; and so too some hearings in the appropriate circumstances, particularly where real hardship to a party was able to be demonstrated. Parties also had available the option of the Tribunal's video conferencing facility.

The potential for impact upon parties was not ignored when the decision was undertaken. But the measures referred to above have meant that those impacts have been ameliorated. And the fact remains that the Tribunal has continued to carry out its myriad of functions at locations other than Hobart whilst at the same time achieving significant budgetary savings.

c. Professional Development

Continued professional development remains fundamental to the Tribunal's efficient discharge of its statutory functions. To that end the practice of 'in-house' professional development sessions for members was continued this year. The thanks of the Tribunal is extended to those members who took time out from busy schedules to participate in this programme.

Regrettably budgetary constraints meant that no formal professional development in the form of seminars, courses or conferences relevant to the Tribunal's jurisdiction was able to be made available to staff this year, although some was undertaken at personal expense.

8. Conclusion

The Tribunal continues to strive to meet the challenge of providing a fair and efficient appeal process which meets the objectives of Tasmania's resource management and planning system. Objectively it continues to achieve that aim and is certain that in the coming years it will continue so to do.

Dated this 19th day of October 2009

Simon J Cooper
Chairman