



## Resource Management and Planning Appeal Tribunal

### Report for 2011/2012

#### ***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* (the '*Appeal Tribunal Act*'). 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 original jurisdiction. It may only exercise such jurisdiction as is conferred upon it by Act of Parliament and then in accordance with that Act.

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;*
- *Water and Sewerage Industry Act 2008;*
- *Agricultural and Veterinary Chemicals (Control of Use) Act 1995;*
- *National Parks and Reserves Management Act 2002;*
- *Gas Act 2000; and*
- *Gas Pipelines Act 2000.*

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 contained 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 managing:

“...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.”

These objectives, central to the stewardship of the State’s natural and built environment, are also central to the day-to-day operations of the Tribunal. They inform decision making about the management of the Tribunal’s business and guide the exercise of the Tribunal’s wide and varied areas of jurisdiction.

## 2. Role

The majority of the Tribunal's work this year was, as it ordinarily is, concerned with appeals in respect of decisions of planning authorities.

So called planning appeals are concerned with decisions to either grant or refuse town planning permits or relate to one or more of the conditions attached to such a permit. Whatever the nature of the appeal relating to a permit the Tribunal considers the matter afresh or, in legal terms, conducts a *de novo* hearing (see Section 23(1) of the *Appeal Tribunal Act*). In conducting such a merits review the Tribunal in effect makes the decision again and is not confined to the material that was before the original decision maker. It may have regard to new material or material that, whilst in existence earlier, was not before the decision maker. Neither is the Tribunal constrained to the issues raised by either the decision maker in its reasons for refusal or the parties in their grounds of appeal. It looks at the matter completely afresh.

Although the Tribunal's main function (at least in terms of numbers of matters filed) is to conduct an independent merits review of town planning decisions by local councils it does many other things. For example, it has the power to review several administrative decisions by Ministers in relation to fisheries regulation and threatened species. It also has other functions which do not fit easily, or at all, within the 'independent merits review' description, most notably civil enforcement proceedings under Section 64 of the *Land Use Planning and Approvals Act 1993* (the '*Land Use Act*') and Section 48 of the *Environmental Management and Pollution Control Act 1994*. During the year, the subject of this report, it dealt with all of these things and more.

## 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 *Appeal Tribunal Act*. 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.

One new member, Mr Robert Giblin, was appointed during the year the subject of this report. Ms Ann Cunningham, Mr Gregory Geason and Ms Fran Healy were each reappointed for a further period of 5 years by His Excellency the Governor.

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 thanks each member for her or his contribution and acknowledges the wisdom, experience, hard work and counsel of, in particular, Mr Barry McNeill, Dr Laurie Cosgrove, Ms Catherine Nicholson, Ms Marietta Wong, Mr Robert Giblin, Mr Neville Lester, Mr Michael Ball, Professor John Webster, Mr John Caulfield, Mr Clarrie Pryor, Mr Peter Spratt, Ms Fran Healy, Mr Roger Howlett and Mr Greg McNamara.

Table 1 sets out details, as at 30<sup>th</sup> June 2012 of the members of the Tribunal, including the length of their appointment and area of expertise.

**Table 1**

<b>Person</b>	<b>Appointed until</b>	<b>Area of Expertise</b>
<b>Ball, Mr M E</b>	27/10/13	Planning
<b>Bensz, Ms E A</b>	02/11/14	Planning
<b>Bryant, Ms N</b>	27/10/13	Legal
<b>Cannell, Mr REJ</b>	02/11/14	Planning
<b>Caulfield, Mr JJ</b>	02/11/14	Planning
<b>Cosgrove, Dr SL</b>	02/03/14	Environmental Management
<b>Cunningham, Mrs AF</b>	09/07/12	Legal
<b>Geason, Mr GP</b>	12/01/12	Legal
<b>Giblin, Mr R</b>	26/7/16	Planning
<b>Healy, Ms F</b>	25/06/12	Science/Environmental Management
<b>Hogue, Mrs S</b>	02/11/14	Planning
<b>Howlett, Mr DR</b>	02/11/14	Planning
<b>Lester, Mr ND</b>	02/11/14	Surveying
<b>Mucha, Dr C</b>	16/06/13	Water management/major infrastructure
<b>McMullen, (Tony) A Mr</b>	16/06/13	Planning
<b>McNamara, Mr GC</b>	02/11/14	Valuation
<b>McNeill, Mr B</b>	02/11/14	Planning/architect/Heritage
<b>Neale, Dr A</b>	02/03/14	Heritage
<b>Nicholson, Ms C</b>	07/12/16	Planning/ Environmental management
<b>Nolan, Mr RJ</b>	02/11/14	Planning
<b>Pryor, Mr CG</b>	02/11/14	Planning/architect
<b>Richardson, Dr AM.</b>	02/11/14	Zoology
<b>Spratt, Mr P</b>	07/04/14	Civil & structural engineering Heritage & building conservation
<b>Stratford, Dr E</b>	02/03/14	Geography/Environmental studies
<b>Temple-Smith, Mr MG</b>	07/04/14	Water management
<b>Webster, Professor JD</b>	25/08/13	Architect/heritage/planning
<b>Wong, Ms M</b>	02/11/14	Planning

#### 4. Professional Development

The Registrar, Mr J Bryan, received mediation training during the financial year as part of his continuing professional development. In addition, as is its practice, the Tribunal conducted its own Professional Development Programme for its members.

#### 5. Personnel

The Tribunal could not function without its staff. I am very grateful for the professionalism and support of all the staff whose invariable cheerfulness makes my job much easier than it should be.

#### 6. 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. While the number of planning appeals instituted has declined, the workload of the Tribunal so far as the determination of hearings and the production of written reasons has not in fact declined at all. Similarly, Civil Enforcement applications have remained at a constant level.

Set out below is Table 2 detailing the numbers and types of appeals and applications dealt with by the Tribunal in the year the subject of this report.

**Table 2**

Appeals By Legislations	2006-07	2007-08	2008-09	2009-10	2010-11	2011-12
LUPPA	403	425	300	270	266	195
Heritage	16	14	13	19	14	11
SOL	4		2			1
Marine		3	5	2	3	
Water		4	1	5		
Strata Titles	2	7	2	2	3	2
EMPCA	5	3	5		6	4
Threatened Species	1					
Local Govt. Highways Act		21				
Water & Sewerage Industry Act				1		
<b>Total</b>	<b>431</b>	<b>477</b>	<b>328</b>	<b>299</b>	<b>292</b>	<b>213</b>

Applications By Legislations	2006-07	2007-08	2008-09	2009-10	2010-11	2011-12
S64 LUPAA	28	36	25	29	28	24
S48 EMPCA	1	3	1			
S96 Strata Titles	1	1	0			
S264 Water Management		1				
<b>Total</b>	<b>30</b>	<b>41</b>	<b>26</b>	<b>29</b>	<b>28</b>	<b>24</b>

Table 3

## Decisions Financial Years 2001-02 to 2011-12

Decision Types	2001-02	2002-03	2003-04	2004-5	2005-6	2006-7	2007-8	2008-9	2009-10	2010-11	2011-12	Total
Interim	12	8	18	15	17	39	25	46	41	30	10	261
Costs	21	20	34	3	65	34	26	43	31	22	27	326
Consent	67	94	164	189	133	164	217	161	123	114	126	1552
Amended	3	7	14	20	16	11	9	5	0	5	0	90
Hearing	38	37	108	76	81	56	65	46	52	44	39	642
<b>Total</b>	<b>141</b>	<b>166</b>	<b>338</b>	<b>303</b>	<b>312</b>	<b>304</b>	<b>342</b>	<b>301</b>	<b>247</b>	<b>215</b>	<b>202</b>	<b>2871</b>
<b>Substantive decisions</b>	<b>105</b>	<b>131</b>	<b>272</b>	<b>265</b>	<b>214</b>	<b>220</b>	<b>282</b>	<b>207</b>	<b>175</b>	<b>158</b>	<b>165</b>	<b>2194</b>
<b>% of Total Decisions</b>												
Interim	8.51%	4.82%	5.33%	4.95%	5.45%	12.83%	7.31%	15.28%	16.60%	13.95%	4.95%	9.09%
Costs	14.89%	12.05%	10.06%	0.99%	20.83%	11.18%	7.60%	14.29%	12.55%	10.23%	13.37%	11.35%
Consent	47.52%	56.63%	48.52%	62.38%	42.63%	53.95%	63.45%	53.49%	49.80%	53.02%	62.38%	54.06%
Amended	2.13%	4.22%	4.14%	6.60%	5.13%	3.62%	2.63%	1.66%	0.00%	2.33%	0.00%	3.13%
Hearing	26.95%	22.29%	31.95%	25.08%	25.96%	18.42%	19.01%	15.28%	21.05%	20.47%	19.31%	22.36%
<b>% Consent / Hearings to substantive decisions</b>												
Consent	63.81%	71.76%	60.29%	71.32%	62.15%	74.55%	76.95%	77.78%	70.29%	72.15%	76.36%	70.74%
Hearings	36.19%	28.24%	39.71%	28.68%	37.85%	25.45%	23.05%	22.22%	29.71%	27.85%	23.64%	29.26%



## **7. Alternative Dispute Resolution**

As has been emphasised in the past the Tribunal remains strongly committed to the use of alternative dispute resolution (ADR) in all its many forms. The fact is that the resolution of planning and environmental disputes by agreement prior to hearing, where possible, is in the interests of the parties and the broader community. It is also clearly consistent with the objectives of the Resource Management and Planning System of Tasmania. As such, every matter that comes before the Tribunal is assessed for its suitability for ADR as part of our case management process. ADR, in one form or another, is undertaken in virtually every case before the Tribunal, although of course not every dispute is amenable to such an approach and not every dispute which is amenable will necessarily resolve as a result.

Even if the matter does not resolve as the result of mediation or some other form of ADR, frequently the areas of dispute between the parties will be narrowed in advance of a hearing which in itself is a most desirable outcome. The rate of settlement achieved by mediation compares more than favourably to other comparable jurisdictions. There is also no doubt that mediated settlements are cost effective.

As in previous years the Tribunal continued to provide its own ADR service. The training, qualifications and experience of the Registrar, the Mediation Officer, Ms Sally Bridge and the Senior Executive Officer, Mr Nick Mackey has been dealt with in previous reports. And as in past years the Tribunal has continued to provide Expert Neutral Evaluation as part of its ADR procedures. In such cases a Tribunal mediation officer conducts mediation with the assistance and input of one of the Tribunal's experts. These mediations are almost always conducted on-site. The expert gives neutral expert feedback to parties involved in the appeal to assist in resolving the issues in dispute. Several members of the Tribunal, including Mr McNeill, Mr Spratt, Mr Caulfield, Mr Pryor and Mr Howlett all greatly assisted the Tribunal in this process during the year the subject of this report.

## **8. Practice Directions**

During the year the subject of this report the Tribunal completely reviewed, revised and re-published its Practice Directions. I acknowledge in particular the work of Messrs Gregory Geason, Barry McNeill and Michael Ball in this important (but not always interesting) task. Especially useful was the capacity to draw upon Mr Michael Ball's extensive experience of practice in the NSW Land and Environment Court.

## 9. Effectiveness Indicators

The Tribunal is obliged, by statute, to hear determine and deliver reasons within 90 days after an appeal is instituted (Section 16(1)(f) of the *Appeal Tribunal Act* – although a failure to do so does not deprive it of jurisdiction see *R v RMPAT ex parte Wilson* [2000] TASSC 101). The time may be extended either with the consent of the parties or, absent such consent, by the Minister if she or he is of the opinion ‘that the interests of justice so require’ (Section 16(6) & (7)).

Apart from being a statutory obligation the 90 day time limit is an extraordinarily tight key performance indicator (in contrast most comparable courts or tribunals aim for disposition within 9 months as an absolute minimum and much longer in most instances - see for example ‘Model Key Performance Indicators for NSW Courts’ L. Glanfield & E. Wright February 2000). It is also an accurate and useful measure of the Tribunal’s efficiency.

The Table below sets out the percentage of cases heard with 90 days and the percentage of cases falling outside that period. It will be seen that the Tribunal is, by any measure, extremely efficient.

Performance Indicator	Unit of Measure	2009 - 10 Actual	2010 - 11 Actual	2011 – 12 Actual
1. Percentage of appeals resolved within 90 days without extension.	%	77.08%	66.50%	66.67%
2. Percentage of Item 1 above, which were due to activities of parties.	%	97.11%	97.03%	95.00%

The Tribunal always provides hearing dates within the 90 day time frame. The majority of appeals which require extensions are as a result of parties either applying for hearing dates outside the 90 day time frame or seeking adjournments due to filing of new material or failing to comply with case management directions. Other matters such as extended negotiations for settlement or the redesign of proposals can, and do, impact upon the 90 day time frame.



## 10. 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 10<sup>TH</sup> day of October 2012



**S J Cooper**  
Chairman

## GLOSSARY

ACDC	Australian Commercial Dispute Centre
ADR	Alternative Dispute Resolution
EMPCA	Environmental Management and Pollution Control Act 1994
Heritage	Historic Cultural Heritage Act 1995
Local Govt. Highways Act	Local Government (Highways) Act 1982
LUPPA	Land Use Planning & Approvals Act 1993
Marine	Living Marine Resources Management Act 1995
SOL	Sale of Public Land - Local Government Act 1993
ST	Strata Titles Act 1998
Threatened Species	Threatened Species Protection Act 1995
Water	Water Management Act 1999
Water & Sewerage Industry Act	Water and Sewerage Industry Act 2008