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using the law to protect the natural and built environment

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Jarrod Bryan
Department of Justice

By email: SingleTribunal@justice.tas.gov.au

Dear Mr Bryan,

Single Tribunal for Tasmania

EDO Tasmania is a non-profit, community legal service specialising in environmental and planning law. Among other roles, our organisation provides legal advice (and, in some cases, representation) to community members seeking to participate in matters before the Resource Management and Planning Appeal Tribunal, Forest Practices Tribunal, Tasmanian Planning Commission and the Mining Tribunal.

EDO Tasmania is of the view that the ideal body to adjudicate on environmental matters is a specialist environmental court, constituted as a court of record with responsibility for merits review, criminal and civil enforcement functions. Such courts operate very successfully in other jurisdictions in Australia and we recommend that consideration be given to establishing such a body in Tasmania.

However, we also acknowledge the costs involved in establishing a new body, and the efficiency and expense concerns raised in the Issues Paper. Therefore, while our preference remains for a specialist court to be established or, at least, for the Resource Management and Planning Appeal Tribunal (***RMPAT***) to be retained as a separate Tribunal, we consider that a well-designed Civil and Administrative Tribunal may be able to achieve some of the benefits of a specialist environmental court.

We therefore welcome the opportunity to comment on the Issues Paper. Our submission makes some general comments regarding environmental decision making before providing specific responses to recommendations in the Issues Paper. If the recommendations regarding further investigation are adopted, we would also welcome the opportunity to make further comments on the details of any future amalgamation proposals.

Specialist environment courts

The Vine Report recognised that some jurisdictions conducting administrative reviews involve specialist knowledge and understanding of the area they manage, and would not be suited to amalgamation into a more generalist review body.

As outlined above, EDO Tasmania maintains that specialist environmental courts, constituted as a superior court of record and convened by judges or commissioners with relevant expertise, are best placed to adjudicate on planning and environmental matters. The seminal report by the Access Initiative, *Greening Justice: Creating and Improving Environmental Courts and Tribunals*[1], illustrated

[1] Pring & Pring. *Greening Justice: Creating and Improving Environmental Courts and Tribunals*. 2009. The Access Initiative.

that specialist courts and tribunals improve environmental outcomes. In its Access to Justice Arrangements Inquiry report, the Productivity Commission also accepted that "specialisation in the area of environmental law can improve justice outcomes by promoting the expertise of decisions makers and the consistency of decision making."

The NSW Land and Environment Court, Queensland Planning and Environment Court and South Australian Environment, Resources and Development Court (**ERDC**) are good examples of specialist courts. We believe that the record of decisions made by these bodies demonstrates the value of specialist courts in improving the level of understanding about environmental issues, the rigour of assessment and consistency of decision making.

As outlined in the Issues Paper, each of these three jurisdictions currently has an amalgamated civil and administrative Tribunal, but has retained a separate environmental court. A recent review in South Australia considered amalgamating the ERDC's functions in the SA Civil and Administrative Tribunal, however we understand that this proposal is no longer being pursued. The maintenance of environment courts even in jurisdictions with "super Tribunals" recognises the specialised nature of the matters that these courts determine.

In a presentation to the Environmental Justice Seminar in 2013[2], Justice Brian Preston SC, Chief Judge of the Land and Environment Court of NSW, identified the characteristics of successful specialist environmental courts and tribunals. In summary, his Honour noted that such courts should be:

- **Quick** – swift resolution is particularly important in environmental matters, where delay in hearing a matter can result in the environment at risk being damaged before the case is finalised.
- **Supported by expertise** – environmental litigation frequently involves a complex mix of science, policy, law, economics and community values.

  It is critical that decision makers in these forums are "environmentally literate" – particularly where unrepresented or public interest litigants are not able to afford to engage technical experts, it is important that decision makers are able to critically analyse the evidence presented to them, and inquire of experts to satisfy themselves about whether a proposal meets relevant statutory criteria. As Justice Preston notes, this specialist expertise greatly contributes to the development of environmental law jurisprudence and ultimately improves the quality of environmental laws.

  Judges and commissioners in specialist environment courts generally have a greater appreciation of the significance of environmental laws, and are more willing to impose appropriate penalties in respect of breaches or to order adequate remediation responses. Such judicial expertise may be diluted if judges / members are required to sit on a range of matters in a generalist court and are not routinely presiding over environmental law matters.
- **Innovative and responsive** – specialist courts are experienced in environmental law and better placed to understand stakeholders and adopt practices and procedures that facilitate access to justice on environmental issues.
- **Consistent** – where a public interest litigant is weighing up the potentially significant cost risks associated with a proceeding, it is important that decisions are made consistently and allow for some level of predictability of the outcome (or, at least, the process).
- **Comprehensive and centralised** – Justice Preston notes that the most successful specialist environmental courts are those that have a comprehensive jurisdiction, dedicated staff and a high level of recognition and respect amongst stakeholders. Specialist courts with experienced, "environmentally literate" judges enhance community confidence in the appeal process and elevate the importance of environmental and planning law.

EDO Tasmania considers that these are important criteria against which to assess any proposed amalgamation to ensure that environmental and planning matters can be given the specialist attention they require.

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[2] Preston, B. 2013. "Characteristics of successful environmental courts and tribunals". Presentation to the Eco Forum Global Annual Conference, Guiyang. Available at http://www.lec.lawlink.nsw.gov.au/

Efficiency and effectiveness

As Justice Preston notes, the phrase "justice delayed is justice denied" is particularly applicable in relation to environmental enforcement matters, where hearing delays can put the environment or public health at significant risk.

Environmental and planning law is complex, involving a vast array of interacting legislative provisions and regularly requiring the interpretation of complicated scientific material or balancing of competing social, economic and environmental considerations.

Maintaining a specialist Tribunal with access to suitable expertise not only facilitates better understanding of the issues arising in environmental and planning matters, it reduces the time and expense involved in the assessment, leading to both faster decisions and to orders and conditions that are better tailored to address the relevant issues.

The Resource Management and Planning Appeal Tribunal handles a significant volume of matters each year, and has a very successful track record in resolving disputes through mediation. It is important that any amalgamated Tribunal structure retains the expertise and procedural flexibility that has allowed this to be achieved.

Response to recommendations

Recommendations 1.1 - 1.6: We support the recommendations regarding further investigation and the development of a detailed discussion paper.

Recommendation 2.1: As outlined above, our preference is for the RMPAT to remain a stand-alone Tribunal. Like the Mental Health Tribunal, RMPAT involves specialist issues and detailed and effective procedures that may not be appropriately transferred to an amalgamated body. We do not oppose RMPAT being included in the review / investigation recommended in the Issues Paper, but urge the Steering Committee to give detailed consideration to the benefits of retaining a separate, specialist environmental review body.

We also recommend that, whatever structure is adopted following the review, the functions of the Mining Tribunal and Forest Practices Tribunal be undertaken by the same body performing the current functions of the RMPAT.

Recommendation 3.2: For all the reasons outlined above, we believe that environmental and planning law is sufficiently specialist to warrant a separate Tribunal or, at least, a dedicated list within any future Civil and Administrative Tribunal.

Environmental lawyers practising in Victoria and Western Australia have reported that a dedicated environmental registry is critical to successful case management within a "super Tribunal". In the absence of a dedicated registry for the environmental list, procedures lack consistency and, particularly for unrepresented litigants, this can be overwhelming. Environmental matters are often not prioritised over other civil matters, even where environmental harm is imminent or continuing.

There is a risk that, if the recommendation to leave decisions regarding internal structure to the discretion of President is adopted, a President with limited environmental law experience will fail to appreciate the need for a specialist environmental list and a dedicated, properly-resourced registry.

We strongly recommend that, if the functions of the RMPAT are to be amalgamated into a Civil and Administrative Tribunal, the relevant legislation explicitly provide for a specialist environment list.

Recommendation 4.3: One of the key objectives of the Resource Management and Planning System is encouraging public participation in resource management decisions. We therefore strongly support the comments in the Issues Paper regarding access to justice, particularly in regional areas. Since the RMPAT adopted a position that all hearings would be held at the Hobart registry, the costs of participating in hearings have increased for most parties. Allowing flexibility for hearing venues, including increased use of videolink, will facilitate broader participation.

The RMPAT has developed a range of excellent practice directions and guidance for parties. While some flexibility in Tribunal processes is appropriate, we consider it is critical that any amalgamated structure retains the following features of the RMPAT that help to achieve access to justice and the RMPS objectives:

- Minimising the cost risks associated with legal actions, including affordable filing fees and a presumption that parties bear their own costs (s. 28 of the *Resource Management and Planning Appeal Tribunal Act 1993*)
- Broad tests for standing to commence or join proceedings (for example, ss.57 and 64, *Land Use Planning and Approvals Act 1993*, s.48, *Environmental Management and Pollution Control Act 1994*, s.14, *Resource Management and Planning Appeal Tribunal Act 1993*)
- Structured mediation processes and facilitation of negotiated resolutions (s. 17 of the *Resource Management and Planning Appeal Tribunal 1993*)
- Less formal, inquisitorial nature of proceedings (ss. 9, 16 and 22, *Resource Management and Planning Appeal Tribunal Act 1993*)
- Options for expert conferencing (RMPAT Practice Direction 12)
- Broad range of orders able to be made by the Tribunal (for example, s.48, *Environmental Management and Pollution Control Act 1994*, s.64, *Land Use Planning and Approvals Act 1993*)

Recommendation 4.4: As outlined above, one of the principal strengths of environmental courts and tribunals, including RMPAT, is access to appropriate expertise to address the range of issues arising in a matter. In his paper "Four Problems for Specialist Courts in Dealing with Nonhuman Environmental Victims**"** (in publication), Rob White[3] points out:

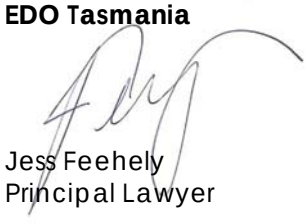
> Among the building blocks for an effective environmental court or tribunal is the mobilisation of scientific and technical expertise and the competence of judges and decision-makers. A defined environment court provides an established forum for the development of specialist expertise aided by the availability of technical experts within the court itself...Moreover, such courts and tribunals provide a ready platform for the further extension of environmental jurisprudence and coherent sanctioning processes.

We strongly recommend that any Tribunal adjudicating environmental and planning matters include compulsory expert membership, including a range of experts to draw from depending on the nature of a particular matter.

Thank you for the opportunity to make these comments. Please do not hesitate to contact me if you would like to discuss any issues raised in this submission.

Kind regards,

EDO Tasmania



Jess Feehely
Principal Lawyer

[3] Professor White is a Professor of Criminology and currently works within the School of Social Sciences at UTAS. His work focusses on environmental crime and the benefits of specialist courts for achieving environmental justice. We strongly recommend that Professor White be consulted in the development of any Discussion Paper.