



Environmental
Defenders Office

**Submission on the draft Tasmanian Civil &
Administrative Tribunal Amendment Bill 2020**

February 2021

About EDO

EDO is a community legal centre specialising in public interest environmental law. We help people who want to protect the environment through law. Our reputation is built on:

Successful environmental outcomes using the law. With over 30 years' experience in environmental law, EDO has a proven track record in achieving positive environmental outcomes for the community.

Broad environmental expertise. EDO is the acknowledged expert when it comes to the law and how it applies to the environment. We help the community to solve environmental issues by providing legal and scientific advice, community legal education and proposals for better laws.

Independent and accessible services. As a non-government and not-for-profit legal centre, our services are provided without fear or favour. Anyone can contact us to get free initial legal advice about an environmental problem, with many of our services targeted at rural and regional communities.

Environmental Defenders Office is a legal centre dedicated to protecting the environment.

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1. Introduction

- 1 EDO welcomes the opportunity to comment on the draft Tasmanian Civil & Administrative Tribunal Amendment Bill 2020 (the **Bill**). We thank the Department of Justice for providing a short extension of time to provide this submission.
- 2 We refer to EDO's previous submissions on the proposed Tasmanian Civil and Administrative Tribunal (**TasCAT**) and adopt their contents. Copies of those submissions are **attached**.
- 3 We understand that this is the second of a series of Bills that will ultimately confer TasCAT with the jurisdiction of many existing administrative bodies including the Resource Management and Planning Appeal Tribunal (**RMPAT**). EDO has practiced extensively within the RMPAT jurisdiction. We provide advice, representation and support to people appearing before RMPAT, and particularly, to those involved in planning appeals. For this reason, the following submission will focus on how existing rules, processes and procedures of the RMPAT are affected by the Bill.
- 4 Before we provide our detailed comments on the Bill, we make the following general remarks.
- 5 Given the increasing rate of development in Tasmania, and the challenges we are facing in terms of biodiversity loss and climate change, EDO considers that the provision of access to a fair, independent, and evidence-based adjudicator on environmental and planning matters is of critical importance to the future of the state.
- 6 Consistent with our previous submissions, EDO maintains that a specialist planning and environment court is the best practice model for hearing and deciding environmental and planning issues. However, as that option has not been adopted in the present reforms, we support the approach taken in the *Tasmanian Civil and Administrative Tribunal Act 2020* (the **Act**) to provide for the establishment of the Resource and Planning stream within the General Division of TasCAT.
- 7 We are encouraged by the intention, expressed by Department of Justice staff in our discussions about this Bill, that the composition and the practices and procedures of RMPAT will, in large part, be adopted within the Resource and Planning stream of TasCAT. However, we consider that this intention may be better reflected in the drafting of the Bill.
- 8 EDO is supportive of the objectives of TasCAT, as set out in the Act, to improve access to justice, expedite hearings and ensure cost efficiencies for both the Government and parties to the proceedings.
- 9 In EDO's experience, the costs of litigation are one of the primary barriers to accessing justice for our clients. In recent years, we have seen the costs of taking cases to RMPAT (such as the costs engaging experts and lawyers) sharply increase to the point that, even with the "usual rule" that each party is to bear their own costs, many potential litigants are deterred from exercising, or are simply unable to exercise, their legal rights in relation to proposed developments and other resource matters.
- 10 For this reason, EDO is very concerned that the Bill proposes to provide TasCAT with a range of powers to award costs against parties which are not presently found either with the *Resource Management and Planning Appeal Act 1993* (**RMPAT Act**) or within RMPAT's Practice Directions. No detailed analysis to justify these changes nor any assessment of

their likely impact on access to justice for those seeking to exercise their legal rights with respect to planning and resource management issues has been presented with this Bill. It is therefore our strong recommendation that the proposed new costs provisions should not apply within the Resource and Planning stream of TasCAT.

- 11 In our detailed submission below, we make recommendations as to how the draft Bill may be improved to address these and a number of other issues. A summary of our recommendations can be found below.
- 12 EDO would welcome the opportunity to discuss our recommendations with the Department.

Summary of recommendations

Recommendation 1: The Bill be amended to clarify that TasCAT's powers to award a party's costs reflect to those of existing tribunals, such as the RMPAT.

Recommendation 2: The Bill be amended so that clause 6, proposed section 108(2) mirrors the costs considerations found in equivalent provisions in Queensland and Victoria.

Recommendation 3: The Bill be amended to either remove proposed sections 109, 110, 111 and 114(6)(a) from clause 6, or at a minimum, clarify that these provisions do not operate within the Resource and Planning stream of the TasCAT.

Recommendation 4: The Bill be amended so that the areas of expertise for members sitting within the Resource and Planning stream of TasCAT are listed as currently set out in section 6 of the RMPAT Act.

Recommendation 5: The Bill be amended to provide that the RMPAT Practice Directions will apply in the Resource and Planning stream of the General Division of TasCAT in the interim period until the Rules Committee establishes a set of rules.

Recommendation 6: The Bill be amended so that the heads of relevant streams of TasCAT are consulted by the Rules Committee in relation to rules with respect to their streams.

Recommendation 7: The Bill be amended to limit the power of the Rules Committee to ensure it cannot make rules that would be inconsistent with relevant Acts, such as the RMPAT Act.

Recommendation 8: The Bill be amended to provide that no leave is required to withdraw a proceeding before the Resource and Planning stream of TasCAT.

Recommendation 9: The Bill be amended to provide that no fees are payable for mediation relating to a proceeding before the Resource and Planning stream of TasCAT.

Recommendation 10: The Bill be amended so that reference to "or involves a trivial matter or amount", and "is being used for an improper purpose" is removed from clause 6, proposed section 97(1).

Recommendation 11: The Bill is amended to make it clear that representors in relation to a planning or resource proposal automatically have standing to join an appeal relating to that proposal.

Recommendation 12: The Bill is amended to make it clear that in allowing the Attorney General to intervene in a proceeding, the TasCAT may order the Attorney General pay the costs of the other parties relating to the intervention.

2. Costs

- 13 The Bill proposes to continue the “usual rule” before RMPAT that each party bears their own costs (see clause 6, proposed section 108(1) of the Bill). The Bill proposes that the usual rule will be displaced if the Tribunal considers it appropriate in certain circumstances listed in section 108(2) or “unless otherwise specified in a relevant act”. A “relevant Act” for the purposes of the Bill and the Act, is the RMPAT Act.
- 14 Following our discussions with the Department of Justice about the Bill, we understand that the intention of proposed section 108(2) and many of the other provisions in the Bill that deal with costs, is that the usual considerations for costs orders, such as those set out in section 28 of the RMPAT Act, will continue to apply to TasCAT. If that is correct, EDO is supportive of this intent, however, we recommend that this intention be made plain in the text of the Bill. For example, this intent could be given effect by including a provision in clause 6, proposed Division 7, Part 9 of the Bill that states “If provisions of a relevant Act deal with the manner in which the Tribunal is to award costs under a relevant Act, the provisions of the relevant Act apply to the extent of any inconsistency with the provisions of this Act”.

Recommendation 1: The Bill be amended to clarify that TasCAT’s powers to award a party’s costs reflect to those of existing tribunals, such as the RMPAT.

- 15 In addition to ensuring the provisions of “relevant Acts” continue to apply, the proposed section 108(2) should also be redrafted so that it mirrors the costs considerations as provided in section 109(3) of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) (**VCAT Act**), and 102(3) of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) (**QCAT Act**), which provide a for a much more standardised list of costs considerations than found in the equivalent provision in the *South Australian Civil and Administrative Tribunal Act 2013* (**SACAT Act**).

Recommendation 2: The Bill be amended so that clause 6, proposed section 108(2) mirrors the costs considerations found in equivalent provisions in Queensland and Victoria.

- 16 In our discussion with the Department of Justice about the Bill, we queried the intent behind:
- (a) clause 6, proposed section 109 of the Bill which provides the TasCAT the power to award “costs of proceedings” to a party in a matter, where the “costs of proceedings” are defined as “costs of, or incidental to, any proceedings of the Tribunal, other than the costs of a party”; and
 - (b) clause 6, proposed section 110(1) of the Bill which provides TasCAT with the power to “make an order for the payment of an amount to compensate the other party for any expenses or loss resulting from any proceedings or matter.”

The exercise of these powers by TasCAT is not constrained by any rules or “relevant Acts” which might otherwise govern TasCAT’s jurisdiction in a particular case.

- 17 The Department of Justice was not able to provide EDO with context as to the need for proposed section 109 and 110 or any clarity on whether “relevant Acts” or the rules might govern the exercise of powers under these provisions. However, we were advised that there was authority in South Australia concerning the equivalent of section 109 which showed that it was usually exercised with respect to the tribunal’s own costs for a particular case, for

example where it has sought the opinion of an independent expert on a case and determined a party or parties should bear those costs.

- 18 In our experience, RMPAT will ordinarily bear its own costs with respect consulting with experts and undertaking site visits etc. RMPAT also does not have the power to award “compensation” except for a very limited number of circumstances that are already explicitly provided under legislation (for example, in civil enforcement proceedings under the *Land Use Planning and Approvals Act 1993 (LUPA Act)* or the *Environmental Management and Pollution Control Act 1994*).
- 19 In the absence of detailed information about the need for the provisions, and an analysis of the likely impact of the exercise of these significant costs powers might have on those people seeking access to justice through TasCAT, EDO opposes the inclusion of section 109 and 110 in the Bill to the extent to which they might apply to the Resource and Planning stream within TasCAT.
- 20 Furthermore, EDO is strongly opposed to the inclusion of:
- (a) clause 6, proposed section 111 in the Bill which provides TasCAT with the power:
 - (i) to order a party to pay security for costs, or provide an undertaking as to the payment of “monetary amounts” and
 - (ii) to dismiss a proceeding with costs where the security or undertaking is not provided.
 - (b) clause 6, proposed section 114(6)(a) which empowers TasCAT to make an order requiring a party to make an undertaking as to costs or damages when it makes orders of an interlocutory nature to preserve the subject matter of the proceeding or protect the interests of a party.
- 21 We note that RMPAT currently does not have the power to order a party to pay security for costs or provide any undertakings as damages. The proposed introduction of such powers in this jurisdiction would present a radical departure from the ordinary practice and be inconsistent with RMPAT’s duty, outlined in section 19 of the RMPAT Act, to give every party a reasonable opportunity to present the party’s case.¹ Requiring a party to pay a sum of money, or make a promise to do so, before they are even heard is also inconsistent with the objectives of the RMPS.
- 22 In EDO’s experience, it is not uncommon for legally represented parties in RMPAT to threaten an unrepresented party with a costs order (often without justification) to induce them to withdraw or settle proceedings. Providing a mechanism for such parties to seek security for costs or undertakings as to damages, or threaten to do so, is likely to exacerbate this existing problem to a substantial degree.
- 23 Even with the current RMPAT costs rules, there are substantial hurdles to in the involvement of the public in proceedings with the jurisdiction.

¹ In the case of *Craig B Rogerson obo MF Cas Pty Ltd v Clarence City Council* [1998] TASRMPAT 102, the Tribunal dismissed an application for security for costs on the basis that it did not have jurisdiction to make such an order, relevantly finding that such an order would infringe on the RMPAT’s duty under section 19 of the RMPAT Act to give every party a reasonable opportunity to present the party’s case.

- 24 The costs of engaging experts and lawyers to assist in the successful presentation of a planning case to RMPAT can run to tens of thousands of dollars. This is out of reach to the majority of the people to whom EDO provides advice. EDO has extremely limited resources and currently does not receive any funding from the Tasmanian Government to provide our services. Only in all but the most limited of cases, can we provide representation to parties appearing before RMPAT. Apart from EDO, there are no low cost or pro bono legal resources which prospective RMPAT parties can draw upon.
- 25 The spectre of the award of costs under provisions such as the proposed sections 109, 110, 111 and 114(6)(a), is likely to impose a further significant barrier to access to justice for those seeking to be involved in the Resource Management and Planning System (**RMPS**) of which RMPAT is an integral component.² The proposed changes to the costs powers would be contrary to one of the primary objectives of the RMPS – “to encourage public involvement in resource management and planning” – and should not be implemented within TasCAT.

Recommendation 3: The Bill be amended to either remove proposed sections 109, 110, 111 and 114(6)(a) from clause 6, or at a minimum, clarify that these provisions do not operate within the Resource and Planning stream of the TasCAT.

3. Composition of Tribunal

- 26 The Bill proposes to make current sitting members of RMPAT ordinary members of TasCAT, with the Chairperson and Deputy Chairperson of RMPAT to be appointed as a Deputy President and Senior Member of TasCAT respectively.
- 27 EDO is supportive of the transfer of existing RMPAT members to TasCAT. This is one practical way of ensuring that the existing pool of expertise within RMPAT can be utilised within the Resource and Planning stream of TasCAT.
- 28 Currently section 6 of the RMPAT Act lists the various areas of expertise for members within RMPAT. While this may be an issue that is ultimately resolved in later Bills that complete the TasCAT reforms, EDO is concerned that there is presently no equivalent provision which sets out the expertise and qualifications of members sitting within the Resource and Planning stream of TasCAT either within the Act, or the Bill.
- 29 As expressed in our previous submissions, engaging and maintaining a pool of appropriately qualified experts to hear and determine planning and environment cases is essential to ensure that TasCAT can efficiently, effectively and consistently deal with the large variety of complex environmental and planning issues that presently are considered by RMPAT.

Recommendation 4: The Bill be amended so that the areas of expertise for members sitting within the Resource and Planning stream of TasCAT are listed as currently set out in section 6 of the RMPAT Act.

4. Rules

- 30 We understand that the Bill provides the President or Acting President with the discretion to set TasCAT’s interim rules in consultation with the heads of the various streams. These interim rules are to be in effect while the TasCAT Rules Committee is established. The Rules Committee is to be comprised of the President, the two Division Heads (or their nominees) and such members as the President nominates from time to time. There is presently no legal

² Refer to section 5(3) of the RMPAT Act.

requirement under the Bill for the Rules Committee to consult with any of the stream heads when developing new rules.

31 RMPAT currently has no formal rules, however it operates consistently with a set of publicly available Practice Directions issued pursuant to section 16 of the RMPAT Act. The Practice Directions provide useful and practical guidance to all parties appearing before RMPAT. It is unclear what elements of the existing RMPAT Practice Directions, if any, will be incorporated into interim rules made by the President or Acting President, or whether they will be implemented within a set of rules developed by the Rules Committee.

32 Given the unique issues that arise in the planning jurisdiction, and to minimise disruption of matters already on foot before RMPAT, it is our firm view that the RMPAT Practice Directions should be adopted, in full, for the Resource and Planning stream of the General Division of TasCAT. The RMPAT Practice Directions should be given effect until, at the very least, the Rules Committee has had an opportunity to develop an appropriate new set of rules.

Recommendation 5: The Bill be amended to provide that the RMPAT Practice Directions will apply in the Resource and Planning stream of the General Division of TasCAT in the interim period until the Rules Committee establishes a set of rules.

33 We further consider that stream heads should be consulted by the Rules Committee and have a say over rules developed that apply to or are specific to their particular stream.

Recommendation 6: The Bill be amended so that the heads of relevant streams of TasCAT are consulted by the Rules Committee in relation to rules with respect to their streams.

34 The RMPAT Act already prescribes the practices and procedures of RMPAT in some detail. To ensure there is consistency and continuity between the procedures of the RMPAT and TasCAT, the Bill should be amended to limit the scope of rules to be made by the Rules Committee to ensure they do not interfere or otherwise impose requirements inconsistent with practices and procedures that are already set out in other relevant Acts.

Recommendation 7: The Bill be amended to limit the power of the Rules Committee to ensure it cannot make rules that would be inconsistent with relevant Acts, such as the RMPAT Act.

5. Withdrawal of proceedings

35 The Bill proposes that a person must seek leave to withdraw from a proceeding unless the rules provide otherwise (clause 6, proposed section 96(2)). Under the RMPAT Act and the RMPAT Practice Directions, no leave is required from the Tribunal for a person wishing to withdraw their appeal. This is consistent with RMPAT's practice of encouraging parties to resolve proceedings by consent, and minimise the costs and formality of proceedings.

36 EDO recommends that the Bill be amended to provide that no leave is required to withdraw a proceeding before the Resource and Planning stream of TasCAT. Alternatively, consistent with our previous recommendation 5, the existing RMPAT Practice Directions ought to be adopted as rules of the Resource and Planning stream of TasCAT until the Rules Committee decides the rules to apply.

Recommendation 8: The Bill be amended to provide that no leave is required to withdraw a proceeding before the Resource and Planning stream of TasCAT.

6. Mediation

37 The Bill provides that the rules may set out the fees associated with mediation processes (see clause 6, section 101(5)(c)). Under the RMPAT Act and the RMPAT Regulations, no fees are payable for the attendance of mediation. This is consistent with RMPAT's practice of encouraging parties to resolve proceedings by consent and minimise the costs and formality of proceedings.

Recommendation 9: The Bill be amended to provide that no fees are payable for mediation relating to a proceeding before the Resource and Planning stream of TasCAT.

7. Frivolous, vexatious and improper proceedings

38 The Bill proposes to give TasCAT a much broader scope to dismiss cases than what is currently afforded to RMPAT under the RMPAT Act.

39 Currently, RMPAT may only dismiss a proceeding under section 22A of the RMPAT Act where it is satisfied that the appeal is frivolous or vexatious or where the appellant fails to comply with directions. Clause 6, proposed section 97(1) of the Bill empowers the TasCAT Tribunal to dismiss or strike out a proceeding or make an ancillary order if it believes that a proceeding is:

- (a) frivolous, vexatious, misconceived or lacking in substance or involves a trivial matter or amount; or
- (b) being used for an improper purpose; or
- (c) otherwise an abuse of process.

40 We understand that the proposed section 97 has been modelled on section 48 of the SACAT Act. However, the proposed provision is significantly wider than the equivalent provisions in both the VCAT Act, and QCAT Act.

41 No explanation has been provided for the need for TasCAT to have wider powers to dismiss proceedings than those presently enjoyed by some existing tribunals in Tasmania, nor why the South Australian approach to this issue has been preferred over the approach taken in other states.

42 EDO considers that TasCAT's powers to dismiss proceedings should be strictly confined and should not introduce subjective considerations such as whether a matter is "trivial" or whether a proceeding is being used for an "improper purpose". This is particularly important given proposed section 108(4) of the Bill creates a general rule that TasCAT should make an order for costs against a party whose case is dismissed or struck out.

Recommendation 10: The Bill be amended so that reference to "or involves a trivial matter or amount", and "is being used for an improper purpose" is removed from clause 6, proposed section 97(1).

8. Parties to proceedings

43 EDO supports the drafting of TasCAT's power to join parties to proceedings (see clause 6, section 104). However, to provide further clarity, and to avoid unnecessary disputes about standing in planning and resource matters, the Bill should be amended to specifically provide that where a person has made a representation in relation to a proposal (for example, a representation in relation to a development under section 57(5) of the LUPA Act), they automatically have standing to apply to join an appeal relating to that proposal.

- 44 Such an amendment to the Bill would be consistent with the objectives of the Act – to improve access to justice, expedite hearings and ensure cost efficiencies – and would create consistency in the parties who are entitled to be heard in relation to resource and planning disputes. Providing such standing is also consistent with the objectives of the RMPS of which RMPAT is a central component.

Recommendation 11: The Bill is amended to make it clear that representors in relation to a planning or resource proposal automatically have standing to join an appeal relating to that proposal.

- 45 The Bill proposes to formally allow the Attorney General to intervene in proceedings (see clause 6, proposed section 106). While TasCAT may allow the intervention on any conditions it sees fit, it is unclear whether those conditions may extend to ordering the Attorney General pay the costs of the other parties relating to the intervention.
- 46 Given the substantial resources of the State, and the potential for an intervention to significantly add to the complexity and costs of a proceeding, providing a power to TasCAT to order that the Attorney General pay compensation to the other parties in relation to the intervention is necessary to level the playing field. We note that the VCAT Act and the QCAT Act both have provisions that give effect to this principle.

Recommendation 12: The Bill is amended to make it clear that in allowing the Attorney General to intervene in a proceeding, the TasCAT may order the Attorney General pay the costs of the other parties relating to the intervention.