Environmental Defenders Office

1 June 2020

Department of Justice
Office of the Secretary

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

Dear Madam/Sir,

**Draft Tasmanian Civil and Administrative Tribunal Bill 2020**

I refer to the draft Tasmanian Civil and Administrative Tribunal Bill 2020, the consultation period for which closed on 29 May 2020.

I seek an extension of time to make a submission of behalf of the Environmental Defenders Office, on the basis that we are a key stakeholder in the reform. The reason for our delay in making a submission is primarily the limited capacity of our Hobart office.

The EDO is as an accredited community legal centre specialising in public interest planning and environmental 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.

The draft Bill will affect the operation of the Resource Management and Planning Appeal Tribunal (**RMPAT**), which is the central jurisdiction with which our services interact. We provide advice, representation and support to people engaged with the RMPAT, in particular, in its planning appeal and mediation functions, but also in its other jurisdictions.

We start by making the observation that we are pleased the government has turned its attention to positive reform to our justice system, noting that the purpose of the TasCAT model is to improve access to justice, expedite hearings and ensure cost efficiencies for both the Government and parties to the proceedings.

We refer to the submission made by EDO Tasmania to the Discussion Paper on 30 October 2015 and adopt its contents. A copy is **enclosed**.

In general terms, our view remains that a specialist court, or at least a specialist planning and environment jurisdiction, is the best practice model. To the extent that the draft Bill does not

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propose an specialist court of this nature, we say that the model needs to ensure that the specialist expertise, procedures, rights, powers and functions of the RMPAT are maintained.

In our enquiries to the Department of Justice, we are informed that the draft Bill is "stage 1" of the implementation of a TasCAT, intended to establish its structure and procedures. We are informed that a second Bill will confer jurisdiction on the TasCAT and that, until that time, the existing jurisdictions identified in the draft Bill will continue to function as usual. We understand that this is why the draft Bill does not deal with matters such as costs, mediation, appeal rights, expert witnesses, or membership of the Tribunal. We are informed that, in relation to those issues, the second Bill will retain the legislative provisions of the existing jurisdictions.

Given the substance of the Tribunal's constitution, powers and functions will largely be determined through that second Bill, we do not have detailed comments to make on the draft Bill.

We would expect that any second Bill does not alter the rights, duties and obligations of the RMPAT as set out in the *Resource Management and Planning Appeal Tribunal Act 1993*. In terms of procedure, in particular but not exclusively, the mediation and confidentiality protections in ss16A and 17, the position with respect to costs in s28, the determination of the appeal in s23, and rights of appeal in s25. In terms of composition, that the Tribunal maintain a broad expert base of permanent members as set out in s6 of the RMPAT Act. Any properly designed TasCAT needs to have the same reliance on permanent members with appropriately relevant expertise to inform the exercise of the Tribunal's functions.

The draft Bill provides for separate Divisions within the TasCAT. We support this approach. We would reasonably expect that the existing RMPAT jurisdictions be within its own division, and have the discretion to set its own practices and procedures. This is consistent with our experience working within the Victorian equivalent, the Victorian Civil and Administrative Tribunal. While this may be beyond the scope of the Draft Bill – in that it appears such matters will be at the discretion of the new Chair of the Tribunal – we support the draft Bill's provision for Divisions to enable appropriate specialisation and autonomy of jurisdictions.

The RMPAT has developed detailed procedures and processes in response to practical experience and necessity over many years. These procedures and the RMPAT Act provide for certainty of process, procedural fairness and evidence-based decision-making. The benefits of certainty to the administration of justice and delivery of fair and trusted decision-making, cannot be undervalued. Any changes to th existing procedures, functions, powers and duties of the RMPAT has the potential to create considerable uncertainty, for all participants – councils, statutory authorities, developers and affected parties alike.

On the substance of the draft Bill, there is one suggested change to the draft Bill that we ask that you consider.

We recommend that the draft Bill be amended to include a declarations power. Section 124 of the *Victorian Civil and Administrative Tribunal Act 1998 (Vic)* provides:

> (1) The Tribunal may make a declaration concerning any matter in a proceeding instead of any orders it could make, or in addition to any orders it makes, in the proceeding.

(2) The Tribunal's power to make a declaration under subsection (1) is exercisable by a presidential member or a member who is an Australian lawyer.

(3) The Tribunal's power under this section is in addition to, and does not limit, any power of the Tribunal under an enabling enactment to make a declaration.

The s124 power allows for the resolution of disputes about jurisdiction, without the argument that occurs in the RMPAT jurisdiction. In that jurisdiction, where there is uncertainty about a matter of interpretation – for instance, whether a planning permit is required at all, or whether a permit application was properly made – the question has to be plead as one of jurisdiction. A declaration power simply enables such matters to be clearly plead up front, clarifying the powers of the Tribunal, and promoting fairness and efficiency in the Tribunal process. Our experience is that this power is a positive one for the administration of justice, again, benefiting all parties.

Thank you for this opportunity to make a submission on this important reform.

Yours sincerely,
**Environmental Defenders Office**

**Nicole Sommer**
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