



## tasmanian conservation trust inc

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

#### **First and second stages of the TasCAT reforms**

In a letter from the Department of Justice dated 20 March 2020 Kristy Bourne states that the Tasmanian Civil and Administrative Tribunal Bill 2020 (the Draft Bill) "is the first of several Bills that will be necessary to establish TasCAT". The letter outlined the key elements of the Draft Bill and what future Bills would seek to achieve. It is clear that the current Draft Bill would not change how the effected tribunals would operate but that the future proposed bills would have this potential.

The TCT is greatly concerned regarding the possible changes to tribunals in particular the Resource Management and Planning Appeals Tribunal (RMPAT) and Forest Practices Tribunal. In this submission we wish to outline our interests in these tribunals and flag concerns regarding possible changes. The TCT will be making a more comprehensive submission in response to future bills and will be encouraging all of our supporters and other community and conservation organisations to make submissions.

We recommend that when the future bills are released that a very thorough public consultation process is undertaken. This process should involve at a minimum some targeted consultation prior to the drafting of the bills.

We will be much more engaged in responding to the future bills that affect RMPAT and Forest Practices Tribunal and we strongly encourage the state government to ensure the most comprehensive consultation process is applied.

I note that many organisations that we work with are very concerned about the potential changes to tribunals but are unlikely to make submissions this time as they have been occupied with preparing submissions on the Major Projects Legislation and the review of the Tasmanian Planning Commission. They are also very preoccupied with the current Coronavirus crisis. Some may have been

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directly affected by the disease and many more by the impacts of the government's response e.g. having to home school children, losing their job or closing their business and not being able to visit an aged relative or friend.

Please do not assume that if few people make submissions to the Draft Bill that they not interested and concerned, there is a lot of interest and concern.

### **Positive elements of a TasCAT**

In preparing to make comment on the Draft Bill I read the key parts of "A single tribunal for Tasmania – Discussion Paper" prepared in 2015 by Jarrad Bryan. It is a pity the Discussion Paper was not circulated with the Draft Bill as it provides important background information about the limitations of current tribunals. Most importantly the Discussion Paper provides convincing evidence of the potential for a single TasCAT to improve how tribunals operate which may deliver improved service delivery and justice outcomes, improved administrative support and cost savings.

The TCT gives in-principle support for a single tribunal but a TasCAT can take many possible forms and our full support for the final bill is dependent upon addressing a number of concerns raised below.

### **No options paper and consultation**

Jarrad Bryan recommended a stage two of the process, including the production of an Options Paper and broad community consultation (which was not undertaken in producing his discussion paper). It seems that the recommended second stage was skipped entirely which is a great pity because it would have provided a opportunity for the community to make input before the state government decided its preferred model. This omission highlights the importance of comprehensive consultation on future draft bills (as stated above).

### **Retain RMPAT's good elements:**

Throughout its history the TCT has been regularly involved with taking planning appeals and supporting others to take appeals in the RMPAT. In recent years I have become increasingly involved in supporting individuals and organisations in a range of ways including: ensuring they knew what an appeal involves; preparing applications; assisting with obtaining legal representation and experts; and being an advocate to assist with mediation. The TCT is a strong advocate for retaining the key elements of RMPAT and can suggest a number of improvements. We are a strong believer in the effectiveness of mediation and think that when the next round of bills is prepared it is an opportunity to improve the processes for seeking mediated outcomes.

Any form of amalgamated tribunal structure must retain the following features of the RMPAT that help to achieve access to justice and meet the objectives of the Resource Management and Planning System:

- TasCAT is to explicitly require a specialist and dedicated list of people for administering and hearing planning and environmental appeals. The list should provide for a relatively wide range of relevant expertises including: environmental law; local government planning and development assessment; environmental assessment and biodiversity

management; environmentally focused engineering and resource management.

- Minimising the cost risks associated with planning appeals. Maintain the relatively low cost to lodge an appeal application and to join to an appeal and to maintain the general practice that parties bear their own costs.
- Broad tests for standing to commence or join appeals. History has shown that having appeals open to a broad range of people and organisations has not flooded the RMPAT with frivolous appeals.
- Facilitated mediation processes (see additional comments below).
- Less formal inquisitorial nature of proceedings.

### **Improving RMPAT processes**

There could be areas of RMPAT practice that could be better utilised and legislative change needs to be considered to make full use of them.

#### RMPAT appointed experts

RMPAT has on rare occasions involved independent experts at its expense to inform it and all parties of a critical matter. While this is allowable under current legislation it is not widely applied and few in the community seem to be aware of it. It would be greatly beneficial to community groups and potentially all parties to enable an independent expert to inform mediation discussions and possibly play a role in full hearings. Members of the community often cannot afford experts and having the RMPAT engage and pay would have obvious benefits. Some forms of expertise can be very rare and/or hard to engage. This is especially important when a technical issue is central to the community's concerns. I have been involved in one mediation process where luckily both sides accepted the expert advice of the indisputable expert on a particular matter (whom I cannot name). If the proponent had have disputed the advice there may have been a disastrous environmental outcome. This is a very good example that supports the need for more active use of RMPAT appointed experts.

#### Improvements to mediation

Mediation is a common path followed by community members, often because they only seek an amendment to the project that was not addressed by their council; they are unlikely to succeed in a full appeal or they cannot afford a full appeal. Mediation can avoid unnecessary delays and costs of all parties. The TCT has been involved in a number of mediated outcomes that delivered a very satisfactory outcome for community members with fairly low cost. The RMPAT staff are dedicated to attempting mediation and making it work and do a very good job facilitating it.

There are improvements that can be progressed and these should be considered when the second stage of TasCAT legislation is drafted:

- While RMPAT staff are generally good at mediation some are better than others and better training should be considered.
- Ensuring mediation occurs onsite where the development is proposed or at least close to that site to make it easier for the community to particulate.

- As recommended in the Bryan Discussion Paper more active facilitation should be considered e.g. allowing and encouraging staff to more actively support community appellants to understand the RMPAT requirements while ensuring fairness to all parties is maintained. Also RMPAT staff are often involved at an initial meeting but do little facilitation after that, mainly advising of timelines and other formal requirements that must be met.
- Some mediation processes are largely left to the parties to organise and there are widely different approaches. It seems that some lawyers prefer a single face to face meeting followed by exchange of documents whereas some community people would prefer a series of meetings. Active engagement by the RMPAT staff may help parties to find the best approach for them.

### **Forest Practices Tribunal**

I don't have much experience of this tribunal but I understand from those who have been that retention of the requirement for relevant specialised expertise should be retained.

Yours sincerely



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