Environmental Defenders Office

Submission in response to the Draft Tasmanian Civil and Administrative Tribunal (Additional Jurisdictions) Bill 2024

21 August 2024

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.

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Acknowledgement of Country

The EDO recognises and pays respect to the First Nations peoples of the lands, seas and rivers of Australia. We pay our respects to the First Nations Elders past, present and emerging, and aspire to learn from traditional knowledges and customs that exist from and within First Laws so that together, we can protect our environment and First Nations cultural heritage through both First and Western laws. We recognise that First Nations Countries were never ceded and express our remorse for the injustices and inequities that have been and continue to be endured by the First Nations of Australia and the Torres Strait Islands since the beginning of colonisation.

EDO recognises self-determination as a person's right to freely determine their own political status and freely pursue their economic, social and cultural development. EDO respects all First Nations' right to be self-determined, which extends to recognising the many different First Nations within Australia and the Torres Strait Islands, as well as the multitude of languages, cultures, protocols and First Laws.

First Laws are the laws that existed prior to colonisation and continue to exist today within all First Nations. It refers to the learning and transmission of customs, traditions, kinship and heritage. First Laws are a way of living and interacting with Country that balances human needs and environmental needs to ensure the environment and ecosystems that nurture, support, and sustain human life are also nurtured, supported, and sustained. Country is sacred and spiritual, with culture, First Laws, spirituality, social obligations and kinship all stemming from relationships to and with the land.

Executive Summary

Environmental Defenders Office (**EDO**) welcomes the opportunity to provide the following brief submission in response to the Draft Tasmanian Civil and Administrative Tribunal (Additional Jurisdictions) Bill 2024 (**Bill**).

In preparing this submission, EDO has had regard to the Department of Justice webpage which provides a short overview of the Bill and conversations we have had with Department of Justice staff.

While we appreciate the engagement by Department of Justice staff with EDO concerning the Bill, we do wish to express our disappointment that no detailed explanatory materials concerning the Bill were published by the Department. Given the length of the Bill and its complexity, EDO is concerned that interested members of the public have not been afforded a real opportunity to be informed and participate in the consultation on the Bill. While we understand when Bills are tabled in Parliament, clause notes and fact sheets are generally provided for Parliamentarians' benefit, by that stage, public comment has already been received by the Department, and substantive redrafting of the Bill is likely to be out of the question. For these reasons, in future, we request that the Department provide more fulsome explanatory materials when it invites public comment on such Bills.

Turning now to the substance of the Bill, we understand that the Bill's main purpose is to transfer jurisdiction for the review of certain administrative decisions from the Administrative Division of the Magistrates Court to the Tasmanian Civil and Administrative Tribunal (**TASCAT**). The Bill also makes a series of more substantive amendments to the Tasmanian Civil and Administrative Tribunal Act 2020 (**TASCAT Act**), to align the TASCAT's powers and jurisdiction with the Administrative Division of the Magistrates Court.

While EDO generally has no objection to the proposed transfer of jurisdiction to TASCAT, and is supportive of a number of the more substantive changes to the TASCAT Act, in our submission we raise several concerns about the Bill, including:

1. **The proposed requirement for TASCAT to 'give effect' to Tasmanian Government policy**
2. **Standing and the definition of 'interested person'**
3. **Rights and powers concerning statements of reasons**
4. **Changes to time limits for the resolution of appeals and applications in the Resources and Planning stream of TASCAT**

We provide a summary of our recommendations concerning the Bill below.

Summary of Recommendations

Recommendation 1: The Bill be amended to remove clause 225 and the requirement for the Tribunal to give effect to Tasmanian Government policy in reviewable decisions.

Recommendation 2: If notwithstanding recommendation 1 above, clause 225 of the Bill is retained, proposed section 75A should be amended to narrow its scope and improve its operation as outlined in EDO's submission.

Recommendation 3: Amend the Bill to provide a broad definition of "interested person" that applies to both section 74A and the proposed Division 1A of Part 8 of the TASCAT Act.

Recommendation 4: Proposed section 79F of the TASCAT Act in clause 227 of the Bill be amended to provide:

(a) the right for interested persons to seek orders from the TASCAT requiring a decision-maker to provide a statement of reasons where the reasons have not been provided to the person by the decision-maker within the "prescribed period" under proposed section 79D;

(b) the power under proposed section 79F for the TASCAT to declare a person is an "interested person" for the purposes of the Act; and,

(c) the power under proposed section 79F for the TASCAT to determine whether a request for reasons was made within a "reasonable time" for purposes of the TASCAT Act.

Recommendation 5: Instead of entirely removing the 90-day time limit for appeals and applications in the Resources and Planning stream of the TASCAT in clause 223(n) of the Bill, the Tasmanian Government should explore other amendments to clause 9, Part 8, Schedule 2 of the TASCAT Act to ensure those proceedings are time-constrained.

1. The proposed requirement for TASCAT to 'give effect' to Tasmanian Government policy

EDO has serious concerns about clause 225 of the Bill, which proposes to insert a new section 75A into the TASCAT Act. As drafted, the Bill proposes that the TASCAT "must give effect to any Tasmanian Government policy" in any discretionary decision that comes before it for review.[1]

EDO understands this provision has been modelled on section 27 of the *Magistrates Court (Administrative Appeals Division) Act 2001* (Tas). The Department of Justice has advised EDO that it was intended that this provision would only apply to decisions currently subject to that Act that,

[1] The proposed provision include the following definition, "***Government policy***, in relation to a decision, means a policy that –
(a) is adopted by the Cabinet, the Premier or any other Minister; and
(b) is to be applied in the exercise of discretionary powers by the relevant decision-makers for that decision."

through the passage of the Bill, are proposed to fall within TASCAT's review jurisdiction. While EDO is encouraged by that advice, for the following reasons, it is EDO's strong view that the proposed section 75A should be removed from the Bill before it is tabled.

We understand that the proposed new section 75A of the TASCAT Act and the current section 27 of the *Magistrates Court (Administrative Appeals Division) Act 2001*, seek to codify the common law established by such authorities as *Drake v Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634. While it is established law that administrative tribunals should consider and apply relevant government policies in the merits review of discretionary decisions, the proposed provision is not a precise replication of the common law authorities. Notably, we have not been able to locate similar provisions to the proposed section 75A in equivalent legislation in other Australian jurisdictions.[2] Furthermore, the recently introduced *Administrative Review Tribunal Act 2024* (Cth) has not introduced a similar provision following a detailed review of that jurisdiction.

We are concerned that in seeking to codify the common law principles concerning the consideration and application of government policy, the proposed provision raises more questions and legal uncertainties. For these reasons, we consider the proposed provision unnecessary and potentially oppressive.

We provide the following example to illustrate our concerns.

Currently, the Resource and Planning stream of TASCAT hears appeals against the decisions of planning authorities to grant or not grant planning permits for certain developments and uses under the *Land Use Planning and Appeals Act 1994* (Tas). These appeals fall within the "review jurisdiction" of TASCAT.[3] In these appeals, the TASCAT might consider and apply such policies as the State policies under the *State Policies and Projects Act 1993*, planning directives issued by the Minister for Planning under the *Land Use Planning and Appeals Act 1993* (**LUPA Act**), or policies incorporated into a relevant planning scheme.

Under the proposed section 75A, where the Tasmanian Government purports to create a policy that "is to"[4] be applied by planning authorities in the making of the planning decisions TASCAT is required to give effect to Tasmanian Government policy.[5]

As currently drafted, the section might require TASCAT to "give effect to" a broad suite of potential policies. Concerningly, these policies might have been made by the Cabinet but never communicated publicly, meaning that the planning applicant never had the benefit of making submissions to the original decision-maker about them. Indeed, even the original decision-maker,

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[2] Section 57 of the *Victorian Civil and Administrative Tribunal Act 1998* is not as broadly defined or drafted as the proposed new s75A of the TASCAT Act.

[3] *Ryan v Circular Head Council and Smith v Circular Head Council and Birdlife Tasmania v Circular Head Council and ACEN Robbins Island Pty Ltd v Circular Head Council and Bob Brown Foundation v Circular Head Council and Circular Head Coastal Awareness Network Inc v Circular Head Council (No 4)* [2023] TASCAT 217 (27 November 2023) at [35].

[4] Section 10A (1)(b) of the *Acts Interpretation Act 1931* (Tas) provides that the words "is to" are to be construed as being directory. The way proposed s 75A(1) is drafted in the Bill, means that Tasmanian Government

[5] Even where the planning authority may not be so strictly bound to apply the policy.

the planning authority, may be unaware of the policy in question, yet TASCAT would be obliged to give it effect. In another scenario, a Tasmanian Government Minister may make a policy statement at a press conference (for example, by hypothetically announcing, "The Tasmanian Government's policy is that all planning decisions should facilitate private development as far as possible"). Again, such a statement would arguably have to be given effect by the TASCATTASCAT in deciding a planning appeal, even where under the current planning framework established under the LUPA Act, the planning authority is not obliged to take policy into account in the making of its decision. In both these cases, and unlike most current planning policy documents, the relevant planning authority and the public have no opportunity to comment or contribute to the framing of the policy.

Finally, if the Government policy provided some discretion to the relevant planning authority about whether to give effect to the policy, as currently drafted, proposed section 75A arguably removes that discretion for the TASCAT in the review of the planning authority's decision.

If, notwithstanding our submissions, the Tasmanian Government decides the proposed section 75A should remain in the Bill, EDO makes the following recommendations:

1. The provision should only apply to the decisions currently subject to the *Magistrates Court (Administrative Appeals Division) Act 2001* which are being transferred to TASCAT under the Bill;

2. The definition of "Government policy" in subsection (1) of section 75A should be refined to require that a policy needs to be written and certified by the relevant Minister;

3. So that the applicant for review has notice of the relevant policy, the provision should replicate section 57(2)(a) of the *Victorian Civil and Administrative Tribunal Act 1998* (**VCAT Act**); and

4. The provision should require the original decision-maker to provide a statement that they relied on the policy, similar to what is required under section 57(2)(b) of the VCAT Act.

Recommendation 1: The Bill be amended to remove clause 225 and the requirement for the Tribunal to give effect to Tasmanian Government policy in reviewable decisions.

Recommendation 2: If notwithstanding recommendation 1 above, clause 225 of the Bill is retained, proposed section 75A should be amended to narrow its scope and improve its operation as outlined in EDO's submission.

2. Standing and the definition of 'interested person'

Clause 223 of the Bill inserts a new section 74A into the TASCAT Act:

> **74A. Applications for review**
>
> (1) Unless otherwise specified in this Act or a relevant Act, or regulations made under a relevant Act, an application for a review of a reviewable decision may only be made –

(a) by an interested person in respect of the reviewable decision; and … (emphasis added)

We understand that it is not intended that the new section 74A of the TASCAT Act would affect or vary the standing for parties seeking to appeal or join an appeal in the Resource and Planning stream as provided in clauses 6 and 7 of Part 8, Schedule 2 of the TASCAT Act and the various Resource and Planning stream Acts. The following comments are provided on this basis.

We note that no general definition of "interested person" is provided in the TASCAT Act or the Bill. While clause 227 of the Bill defines "interested person", that definition only applies to the proposed new Division 1A of Part 8 and not all the TASCAT Act.

In our view, introducing an undefined phrase "interested person" into the proposed section 74A of the TASCAT Act reduces the clarity and certainty of the operation of the TASCAT Act. EDO recommends that the Bill be amended to provide a clear and sufficiently broad definition for the phrase – one that applies to both section 74A and the proposed Division 1A of Part 8 of the TASCAT Act. We recommend that the phrase be broadly defined and include not only persons who applied for or are subject to the relevant decision but also those persons whose interests are affected by the reviewable decision.

Recommendation 3: Amend the Bill to provide a broad definition of "interested person" that applies to both section 74A and the proposed Division 1A of Part 8 of the TASCAT Act.

3. Rights and powers concerning statements of reasons

Clause 227 of the Bill inserts a new Division 1A into Part 8 of the TASCAT Act providing a process for:

- the provision of notice of a reviewable decision and associated review rights;
- for interested persons to seek reasons for reviewable decisions from decision-makers;
- the grounds on which requests for statements of reasons may be refused by the decision-maker; and
- where reasons for a decision have been refused by a decision-maker, for the review and overturning of those decisions by the TASCAT.

EDO is generally supportive of the inclusion of these processes as they provide a mechanism for people affected by decisions to obtain relevant information about the basis for the decisions. This allows these people to seek advice on their legal rights and options for review, which are important steps in providing access to justice.

While EDO does not have specific information concerning the intent of the proposed new Division 1A to Part 8 of the TASCAT Act, we assume that it was included in the Bill to replicate Division 1, Part 4 of the *Magistrates Court (Administrative Appeals Division) Act 2001*. We note that in several significant ways, the proposed new division does not completely replicate the relevant provisions

of the *Magistrates Court (Administrative Appeals Division) Act 2001* and in failing to do so, the Bill imposes unnecessary limitations on both people seeking reasons and the TASCAT. In particular, we note that the Bill does not:

- Allow a person who has requested reasons under proposed section 79D, to apply to the TASCAT under proposed section 79F for an order for a decision-make to provide a statement of reasons where the reasons have not been provided to the person by the decision-maker within the "prescribed period".[6] This is important as there is no other recourse to compel the disclosure of reasons.

- Provide the power under proposed section 79F for the TASCAT to declare a person is an "interested person" for the purposes of the Act.[7] This is important as such a declaration will help the person to be clear on whether the TASCAT considers they will later have a right to apply for the review of the decision.

- Provide the power under proposed section 79F for the TASCAT to determine whether a request for reasons was made within a "reasonable time" for purposes of the Act.[8] This will allow future applicants for reasons and decision-makers an understanding of what factors will be taken into account by the TASCAT in determining what is a reasonable time in which to seek reasons.

EDO recommends that clause 227 of the Bill be amended to ensure that the proposed new Division 1A to Part 8 of the TASCAT Act provides the above rights and powers.

Recommendation 4: Proposed section 79F of the TASCAT Act in clause 227 of the Bill be amended to provide:

(a) the right for interested persons to seek orders from the TASCAT requiring a decision-maker to provide a statement of reasons where the reasons have not been provided to the person by the decision-maker within the "prescribed period" under proposed section 79D;

(b) the power under proposed section 79F for the TASCAT to declare a person is an "interested person" for the purposes of the Act; and,

(c) the power under proposed section 79F for the TASCAT to determine whether a request for reasons was made within a "reasonable time" for purposes of the TASCAT Act.

[6] Such a right is provided to interested persons under section 16(1) of the *Magistrates Court (Administrative Appeals Division) Act 2001.*
[7] Such a power is provided to the Administrative Division of the Magistrates Court under section 15(1) of the *Magistrates Court (Administrative Appeals Division) Act 2001.*
[8] Such a power is provided to the Administrative Division of the Magistrates Court under section 15(2) of the *Magistrates Court (Administrative Appeals Division) Act 2001.*

4. Changes to time limits for the resolution of appeals and applications in the Resources and Planning stream of TASCAT

Clause 223(n) of the Bill proposes to remove the current 90-day time limit for planning appeals before the Resource and Planning stream of the TASCAT. EDO is informed by the Department of Justice that these changes have been made at the request of the TASCAT for the following reasons:

- The 90-day restriction has applied since 1993 and no longer realistically represents the time required to hear and determine matters in the Resource and Planning stream;
- The TASCAT achieves a high level of compliance with the 90-day timeframe, but that is only in relation to matters which are mediated or settled early. Anything that proceeds to hearing almost invariably exceeds the 90-day timeframe;
- The vast majority of extensions to the 90-day timeframe arise from requests from the parties because they are simply unable to prepare their cases within the timeframe imposed by the Tribunal, which has to allow at least 4 weeks to issue a decision;
- Rather than impose an unrealistic timeframe for all matters, it is more appropriate that the time limit should be determined by the TASCAT having regard to the submissions of the parties, which can address questions of prejudice arising from delay, the requirement to accord natural justice and any other relevant considerations; and,
- The high rate of requiring extensions due to the unrealistic 90-day deadline also means the Tribunal is continually having to seek extensions from parties, which is inappropriate from a statutory independence perspective.

While EDO accepts that it may no longer be realistic for a fully contested planning appeal or application to be heard and decided in 90 days, we consider that there are some real benefits to having clear constraints on the time taken for planning appeals. This is because, invariably, increasing the length of the proceedings generally increases their cost. Cost can be a significant disincentive to community-minded representors commencing or joining planning appeals, or for planning authorities seeking to defend their planning decisions. This is even more pertinent where these parties are facing off against large and well-funded developers.

Uncapped timeframes for appeals and applications also mean that self-represented litigants have no guide on how long they will need to allocate to the resolution of the proceedings. This is significant because they may need to take time off work or make alternative caring arrangements to prepare for and attend TASCAT hearings.

Finally, the current 90-day time limit has operated to focus the attention of the parties and the TASCAT in seeking to resolve appeals and applications as quickly as possible, including through mediation or alternative dispute resolution conferences. Without any guidance on the time for Resource and Planning stream appeals or applications in the law, even these preliminary steps in the proceedings may take longer to finalise.

For these reasons, EDO recommends that instead of entirely removing a time limit for appeals and applications in the Resources and Planning stream, the Tasmanian Government explore other options, such as amending clause 9, Part 8, Schedule 2 of the TASCAT Act to:

- provide a longer timeframe for resolution of matters, for example, 180 days;
- alternatively, provide that the timeframe of 90 days applies to preliminary steps, including preliminary conferences and alternative dispute resolution;
- transfer the Minister's current power to extend the timeframe for the resolution of a matter in lieu of agreement by the parties to the President of the TASCAT, and provide a list of considerations that the President must have regard to in granting the extension, such as the need to afford natural justice to the parties and prejudice of delays etc.

Recommendation 5: Instead of entirely removing the 90-day time limit for appeals and applications in the Resources and Planning stream of the TASCAT in clause 223(n) of the Bill, the Tasmanian Government should explore other amendments to clause 9, Part 8, Schedule 2 of the TASCAT Act to ensure those proceedings are time-constrained.

Thank you for the opportunity to make this submission.
Please do not hesitate to contact our office should you have further enquiries.