

THE TRANSITION TO THE TASMANIAN CIVIL AND ADMINISTRATIVE TRIBUNAL (TASCAT): AN OVERVIEW

PURPOSE OF THIS PAPER AND DISCLAIMER:

- 1 This purpose of this paper is to provide a detailed guide to the Tasmanian Civil and Administrative Tribunal for the public and practitioners who will appear before the Tribunal. The contents of this paper should not be construed as legal advice or in any way an indication of approaches to statutory interpretation or rulings of the Tribunal.

What is TASCAT?

- 2 The Tasmanian Civil and Administrative Tribunal (TASCAT) will be formed through the amalgamation of nine (9) existing Tribunals and Boards into one statutory Tribunal. It will join the existing seven (7) other “CATs” or “Super Tribunals” that already are in existence in each Australian jurisdiction¹. The nine bodies to be amalgamated are² the:

- Anti-Discrimination Tribunal (ADT);
- Asbestos Compensation Tribunal (ACT);
- Forest Practices Tribunal (FPT);
- Guardianship and Administration Board (GAB);
- Health Practitioners Tribunal (HPT);

¹ Australian Capital Territory Civil and Administrative Tribunal (ACAT); NSW Civil and Administrative Tribunal (NCAT); Northern Territory Civil and Administrative Tribunal (NTCAT); South Australian Civil and Administrative Tribunal (SACAT); State Administrative Tribunal (SAT – WA); Queensland Civil and Administrative Tribunal (QCAT); and Victorian Civil and Administrative Tribunal (VCAT)

² See definition of “relevant Board or Tribunal” in s 3 of the Tasmanian Civil and Administrative Tribunal Act 2020 (Tas) (“TASCAT Act”)

- Mental Health Tribunal (MHT);
 - Motor Accidents Compensation Tribunal (MACT); and
 - Resource Management and Planning Appeal Tribunal (RMPAT)
 - Workers Rehabilitation and Compensation Tribunal (WRCT)
- 3 Essentially, the work of the existing Tribunals and Boards will continue largely unchanged once TASCAT commences, the primary difference being that each of the jurisdictions will come under the umbrella of one organisation with a leadership structure headed up by a President, supported by Deputy Presidents and a Principal Registrar, supported by Deputy Registrars.
- 4 Unlike most Tribunal amalgamations that have occurred where various components of the Tribunal continue to physically exist in different locations and it takes planning over many years to co-locate, TASCAT is in a much more fortunate position as all existing Tribunals / Boards are already housed together in purpose built and accessible premises located at 38 Barrack Street in Hobart. As with the existing bodies, TASCAT will continue to sit across Tasmania. During the initial stages of operations TASCAT will be reviewing the suitability of the premises used on a regular basis outside of Hobart.
- 5 Once the amalgamation is complete (or at least as at the time of writing this paper), TASCAT will commence operations with a total of 106 Tribunal Members (represented by 9 full time members and 97 sessional members). Some overall member statistics include: gender: 55% are female and 45% male; location: 78 (South); 14 (North); 11 (NW); and 3 (interstate); qualifications: Legally qualified member (40); Psychiatrist (10); Other expertise (56); and in terms of the split of members between Divisions and Streams upon commencement: Protective Division (84) : Guardianship Stream (39); Mental

Health Stream (45); and General Division (70): Anti-Discrimination Stream (10); Forestry Stream (13); Health Practitioner Stream (6); Personal Compensation Stream (6); and Resource & Planning Stream (35).

- 6 TASCAT will commence with 38 registry staff. Given the current workload statistics of the Tribunals and Boards being amalgamated into TASCAT, it is estimated that in the first full year of operations TASCAT will deal with upwards of 5300 matters and hold in excess of 5100 hearings.

How did TASCAT come about, where is the legislation at, when will it commence, and will it be conferred further jurisdictions?

Brief History

- 7 The amalgamation of Tribunals and other administrative decision making bodies has been actively considered since 2003. The Vines Report in 2003³ recommended the formation of a TASCAT equivalent. In 2015 the then Attorney General, the Hon Vanessa Goodwin, directed that the reform be re-investigated and a Discussion Paper⁴ was published that year. The paper found that the reform should be implemented subject to a range of recommendations. The recommendations were largely adopted as government policy and the work to implement the reform commenced.
- 8 The implementation has included the preparation of legislation, as well as the co-location of the nine Tribunals to purpose built premises in July 2020. The inaugural President of TASCAT, Mr Malcolm Schyvens, was appointed in May 2021 and the final stages of the reform are now underway.

Where is the legislation at?

³ *Report of the Review of Administrative Appeal Processes*, G Vines, State Services Commissioner, 2003

⁴ *A Single Tribunal for Tasmania - Discussion Paper*, September 2015, Department of Justice

- 9 The TASCAT legislative program followed a similar model to that used for the establishment of the NSW Civil and Administrative Tribunal (NCAT) which was a two stage legislative process. The first piece of legislation, the Tasmanian Civil and Administrative Tribunal Act 2020 (Tas) (“TASCAT Act”), which came into force on 4 November 2020, legislated for the creation of TASCAT but deferred its establishment until 1 July 2021. The establishment date was subsequently deferred by proclamation to be 1 November 2021. The passing of the TASCAT Act allowed for the appointment of key personnel, created the legislative structure of the Tribunal, and allowed work to be done on the reform with the certainty of legislative imprimatur.
- 10 The second tranche of legislation incorporates four key instruments:
- The TASCAT Amendment Bill 2021 which will amend the first TASCAT Act of 2020 to incorporate the full suite of powers to allow the Tribunal to function;
 - The TASCAT (Consequential Amendments Bill) 2021 which will make all necessary alterations to any legislation which falls within the jurisdiction of the TASCAT. This includes, for example changing reference to the previous Tribunals / Boards to the new TASCAT;
 - The TASCAT Regulations 2021 are necessary for some sections of the TASCAT Act 2021 to operate. They also regulate important subordinate processes of the Tribunal such as requirements to pay fees and power to waive or reduce fees; and
 - The TASCAT Rules 2021 which have been drafted by the President and cover other important operational matters such as, for example representation of parties, reckoning of time, and service of documents..

- 11 The Amendment Bill and the Consequential Amendment Bill were both passed by both Houses of Parliament and Royal Assent was given on 5 November 2021.

When will TASCAT commence?

- 12 The Tribunal was established on 1 November 2021 in accordance with the existing TASCAT Act and the subsequent proclamation deferring the establishment date. The actual commencement date of TASCAT however, was the date upon which Royal Assent was given to the Amendment legislation which occurred on 5 November 2021.
- 13 In the short transition period between the two dates, that is, the establishment date and the commencement date, the existing Tribunals and Boards continued to operate in the usual way. Upon the commencement date, the new TASCAT formally opened with the full amalgamation taking effect. The existing Tribunals and Boards were abolished on the commencement date of TASCAT.

Possible Future Jurisdictions?

- 14 The Discussion Paper of 2015⁵ identified several jurisdictions that may be suitable for future inclusion in TASCAT.
- 15 The Attorney General during Budget Estimates in 2021 identified the following jurisdictions as being under active consideration for inclusion in the TASCAT in the future, some of which were recommended in the Discussion Paper:
- residential tenancy matters;

⁵ See [7] above

- certain appeals relating to licensing matters within the consumer affairs portfolio;
- building matters, including certain building disputes;
- certain appeals to the Administrative Appeals Division of the Magistrates Court;
- certain appeals that lie to a judge of the Supreme Court; and
- review of certain decisions by the Ombudsman, such as decisions under the *Right to Information Act 2009*.

The Objectives of TASCAT

- 16 The main objectives of TASCAT, in dealing with matters over which it has jurisdiction, should, and must, pervade all aspects of the Tribunal's operations. To state the obvious, the objects play an integral role in guiding Tribunal members in their decision making roles. However, the objectives also guide Registry operations in matters such as the accessibility of the Tribunal's website; and ensuring that the means by which the community can engage with the Registry are flexible to suit the needs of the breadth of our community who will engage with TASCAT's services.
- 17 The objectives are contained in s 10 of the TASCAT Act and are self-explanatory:

10. Main objectives of Tribunal

- (1) The main objectives of the Tribunal in dealing with matters within its jurisdiction are –

(a) in the exercise of its jurisdiction, to promote the best principles of public administration, including –

- (i) independence in decision-making; and
- (ii) natural justice and procedural fairness; and
- (iii) high-quality, consistent decision-making; and
- (iv) transparency and accountability in the performance and exercise of statutory functions, powers and duties; and

(b) to be accessible by being easy to find and easy to access, and to be responsive to parties, especially people with greater needs for assistance than others; and

(c) to ensure that applications, referrals, reviews and appeals are processed and resolved as quickly as possible while achieving a just outcome, including by resolving disputes through high-quality processes and the use of mediation, conciliation and alternative dispute resolution procedures alternative dispute resolution processes, or compulsory conferences, wherever appropriate; and

(d) to keep costs to parties involved in proceedings before the Tribunal to a minimum insofar as is just and appropriate; and

(e) to use straightforward language and procedures (including, insofar as is reasonably practicable and appropriate, by using simple and standardised forms); and

(f) to act with as little formality and technicality as possible, including by informing itself in the manner that the Tribunal considers fit; and

(g) to be flexible in the way in which the Tribunal conducts its business and to adjust its procedures to best fit the circumstances of a particular case or a particular jurisdiction.

(2) In furtherance of the Tribunal's main objectives, the Tribunal should, in relation to the conferral and exercise of the Tribunal's jurisdiction, consult from time to time with the agencies, organisations or bodies that it considers appropriate.

- 18 In relation to the positive obligation in s 10 (2) to consult from time to time with external stakeholders, a TASCAT Consultative Forum has been established. Close to 30 peak bodies and agencies representing stakeholders have been invited to be part of the forum. These includes organisations such as: Legal Aid; The Law Society of Tasmania; the Mental Health Council of Tasmania; the Bar Association of Tasmania; Advocacy Tasmania; and the WorkCover Board, to name but a few.

19 It envisaged that the Forum will meet at least twice each year and it is planned that the first meeting will occur within 2 months of the commencement of TASCAT. As outlined in the terms of reference, the primary issues that can be dealt with by the Forum are:

- Accessibility and user needs;
- Conduct of proceedings;
- Changes to standard TASCAT forms, guidelines or rules;
- Service delivery issues;
- Proposed service initiatives or procedural changes; and
- Fees and charges.

20 The Forum is not intended as a forum to discuss individual complaints unless the complaints raise a broader or systemic issue. Individual complaints or feedback will be dealt with in accordance with a Tribunal wide policy⁶ (see [53] to [66] below).

21 The Forum, together with the annual reporting mechanism, will also provide an avenue for the Tribunal to comply with the obligation to be transparent and accountable by providing statistics on key performance indicators (KPIs).

TASCAT's Structure

22 Akin to the existing CATS around Australia, TASCAT's jurisdictions will be allocated through a structure of Divisions and Streams (sometimes referred to

⁶ Tasmanian Civil and Administrative Tribunal, Complaints and Feedback Policy 2021

as Lists in other CATs). There will be two (2) Divisions of TASCAT, the Protective Division and the General Division, from which will stem seven (7) Streams.

- 23 The Protective Division will consist of two (2) Streams: the Guardianship stream (vested with the jurisdiction previously exercised by the Guardianship and Administration Board (GAB)), and the Mental Health Stream (vested with the jurisdiction previously exercised by the Mental Health Tribunal (MHT)).
- 24 The General Division will consist of the remaining five (5) Streams: the Anti-Discrimination Stream (vested with the jurisdiction previously exercised by the Anti-Discrimination Tribunal (ADT)); the Forestry Practices Stream (vested with the jurisdiction previously exercised by the Forestry Practices Tribunal (FPT)); the Health Practitioners Stream (vested with the jurisdiction previously exercised by the Health Practitioner Tribunal (HPT)); the Personal Compensation Stream (vested with the jurisdictions previously exercised by the Asbestos Compensation Tribunal (ACT), the Motor Accidents Compensation Tribunal (MACT), and the Workers Rehabilitation and Compensation Tribunal (WRCT)); and the Resource and Planning Stream (vested with the jurisdiction previously exercised by the Resource Management and Planning Tribunal (RMPAT)).
- 25 The legislation provides for the business of each Division of the Tribunal to be managed by a Division Head. To be appointed as a Division Head, a person must either be the President, or a Deputy President of the Tribunal.
- 26 It is the intention that upon the commencement of TASCAT, operations will largely mirror the existing leadership structure in place within the Tribunals and Boards to be amalgamated. That is, no Division Heads will be appointed for the time being. The President will hold the position and powers attributed to the

Division Head of both the Protective and General Divisions⁷. Apart from the Forestry Practices Stream, the day to day operations of each Stream will continue to be managed by each of the current Heads of jurisdiction whose jurisdictions will be transferred to TASCAT. Each of those Heads of jurisdiction will become Deputy Presidents in the new structure and will manage the day to day operations of their Stream(s) through instruments of delegation issued by the President⁸. The Forestry Practices Stream will be directly managed by the President with the assistance of the current Chief Chairperson of the Forest Practices Tribunal who will become a Senior Member within TASCAT.

- 27 This structure of management of TASCAT will continue through the initial period of TASCAT's operations. A final long term structure will be determined once there is greater clarity on what (if any) additional jurisdictions are to be transferred to TASCAT, and the resultant budget for operations is finalised.

TASCAT Members

Transition to TASCAT

- 28 As previously noted, TASCAT will be commencing operations with 106 members. This will mean the Tribunal will benefit from having members with significant depth of experience and wide ranging expertise and backgrounds, including lawyers, psychiatrists, pharmacists, medical practitioners, planning experts, and advocates for people with disabilities, to name but a few.
- 29 Anyone who is an appointed member of one of the Tribunals and Board to be amalgamated automatically, on the day that TASCAT commences, becomes a member of TASCAT⁹ and contemporaneously ceases to be a member of any and all of the amalgamated bodies¹⁰. A member's term of appointment with

⁷ S 159(2) TASCAT Act

⁸ s 14A TASCAT Act

⁹ s 150(1) TASCAT Act

¹⁰ s 149(1) TASCAT Act

TASCAT through the transition provisions will be the term of their appointment with the abolished Tribunal / Board¹¹.

- 30 Through these automatic transition provisions members simply become a member of TASCAT. Members are then required to be allocated to the Divisions and Streams of TASCAT before they can be allocated to sit in proceedings. The details of this is outlined below.

Member categories

- 31 The categories of member permitted by the legislation within TASCAT include: President; Deputy President; Senior Member; and Ordinary Member¹². Apart from the President, all other member categories may be appointed on a full-time, part-time, or sessional basis.
- 32 A person may only be appointed as a President of the Tribunal if they are a Magistrate or eligible for appointment as a Magistrate¹³. A person may only be appointed as a Deputy President if they have been an Australian legal practitioner for at least five (5) years¹⁴.
- 33 To be appointed as a Senior or Ordinary Member of TASCAT a person must either have been an Australian legal practitioner for at least five (5) years or alternatively, have extensive knowledge, expertise or experience relating to a type of matter dealt with by the Tribunal¹⁵.

¹¹ s 150(4) TASCAT Act

¹² s 11 TASCAT Act

¹³ s 12(2) TASCAT Act

¹⁴ s 26(3) TASCAT Act

¹⁵ s 44(2) TASCAT Act

- 34 An existing member’s category of membership within TASCAT is determined by the position they hold within their current Tribunal or Board on the day TASCAT commences¹⁶ as outlined in the table below.

Current status	TASCAT status
President (MHT/GAB) Chairperson (ADT/HPT/MACT) Chief Commissioner (ACT/WRCT) Chairperson (RMPAT)	Deputy President
Deputy President (MHT/GAB) Deputy Chairperson (ADT/HPT/MACT) Chief Chairperson (FPT) Commissioner (ACT/WRCT)	Senior Member
All other Members	Ordinary Member

- 35 If a person is a member of more than one Tribunal or Board the subject of amalgamation, upon the commencement of TASCAT they will hold the member category that represents their most senior position¹⁷. For example, if a person is a Deputy President of one Tribunal / Board and a member of another Tribunal / Board, they will commence with TASCAT as a Senior Member.
- 36 It is also notable that some provisions of the legislation, particularly the Division Schedules (Sch 2 and Sch 3 of the TASCAT Act) relating to the composition of the Tribunal to hear matters in the various Streams, make reference to a “legally qualified member”¹⁸. This term means: the President; a Magistrate who is a member of the Tribunal; and a member who is an Australian lawyer of at least five (5) years standing as an Australian legal practitioner. An Australian lawyer

¹⁶ s 150(1) TASCAT Act

¹⁷ s 150(2) TASCAT Act

¹⁸ s 3 of the TASCAT Act

is a person who is admitted to legal practice¹⁹ and an Australian legal practitioner is an Australian lawyer who holds a practising certificate²⁰.

Assignment of Members

- 37 Members of TASCAT, as a matter separate to their appointment as a Tribunal Member, are required to be assigned to Divisions and Streams of the Tribunal in order to be listed on matters in a particular Stream²¹.
- 38 Accordingly, immediately upon the commencement of TASCAT, an instrument of assignment will be issued for every member and a copy provided to the member.
- 39 The ability for members to be assigned across additional Streams will allow greater flexibility for the allocation of members to Streams as workloads fluctuate and if new jurisdictions are allocated to TASCAT.

Member Code of Conduct and Disclosure Obligations

- 40 The legislation contemplates that the members of TASCAT will be subject to a Code of Conduct²². A Code of Conduct has been issued and applies to all members of the Tribunal.
- 41 A publicly available Code of Conduct can assist in promoting the main objectives of the Tribunal as outlined in the Act particularly in relation to the objectives of promoting independence of decision making, transparency and accountability.

¹⁹ s 5 Legal Profession Act 2007 (Tas)

²⁰ s 6 Legal Profession Act 2007 (Tas)

²¹ s 62, s 63, TASCAT Act

²² s 94 TASCAT Act

- 42 If a member fails to comply with the Code, the President may direct the member to take specified action to rectify his or her conduct, or determine that further work not be allocated to the member until the non-compliance is rectified. In cases of serious breach the President may refer a matter to the Attorney General or recommend that the member not be reappointed at the expiration of their term.

Professional Development and Performance appraisal

- 43 To assist members to perform their role in accordance with the main objectives of the TASCAT Act it is essential that members are provided with appropriate professional development opportunities. This includes comprehensive induction training for newly appointed members, ongoing professional development for all members, and a robust and transparent performance appraisal process.
- 44 A TASCAT-wide Member Professional Development Plan will be developed in the early stages of the amalgamation. There will be three (3) key aspects of member professional development that will be covered in the Professional Development Plan: Induction training that members receive on initial appointment; Professional development activities provided for members regularly by the Tribunal, such as seminars, conferences and online training; and appraisal of members' performance.

TASCAT Registry Staff

- 45 The staffing profile of TASCAT remains the same in terms of substantive positions. Each of the Tribunal's and Board's staff have been incorporated into the TASCAT structure and allocated to the Stream(s) which holds their previous jurisdictions. This is both to maintain existing operations due to the expertise of those staff, but also to minimise disruption.

- 46 The approach to amalgamation was to reduce, as much as possible, disruption to existing arrangements to allow time for an investigation of existing systems; consideration of what upcoming reforms are likely and then have a transition to new structures and systems in consultation with staff, unions and other key stakeholders.
- 47 The staff profile of the TASCAT Registry currently sits at 38 positions. This includes both permanent and fixed term positions.
- 48 One of the advantages of the reform was to have a collective pool of staff who can learn to work across different Streams of the Tribunal. This allows the Tribunal to be adaptive and address staffing shortfalls when needed. It also gives staff a chance to learn new skills and work in different areas of the Tribunal. Staff of the different Tribunals have already been working together in this way since co-location. With formal amalgamation a new range of options arise for TASCAT as an organisation with shared training opportunities and ability to easily transition staff between Streams.
- 49 The Principal Registrar will be working with the President, Deputy Presidents and Deputy Registrars to co-ordinate any reforms which are needed as part of the TASCAT day-to-day operations, and look for opportunities for staff, based on their feedback, for training and work in areas that interest them.

TASCAT's Website, email, and telephone systems

- 50 TASCAT will have an interim website when it commences on 5 November 2021. Scoping was undertaken to determine the time required to develop a modern, fit for purpose, website. Given the proposed implementation timeframe of TASCAT, it was determined that a new website was not going to be achievable within that timeframe. Instead, the existing websites of each of the Tribunals have been rebranded and updated and linked through a new home page

created for TASCAT. In essence, the old websites have become the webpages for each of the individual Streams of the Tribunal, with the TASCAT homepage acting as a hub for the webpages.

- 51 At present, work is being undertaken to develop a new website that is expected to be operational by August/September 2022.
- 52 The new phone system for TASCAT will have a single point of entry for new clients with an 1800 number which is provided on the Tribunal website

TASCAT's Service Charter, Strategic Vision and Values Statement and Feedback / Complaints policy

- 53 As part of ensuring TASCAT meets its statutory obligations, and to accord with best practice for Tribunal administration, TASCAT has developed three key documents. The first is a Service Charter, the second a Strategic Vision and Values Statement and the third a Complaints and Feedback Policy.
- 54 The Service Charter sets out the values of TASCAT in delivery of services and also specifies the extent to which staff can provide assistance. The values integrate the values adopted by the Department of Justice with TASCAT's values derived from the Council of Australasian Tribunals. It is a key document, along with the Code of Conduct, as it publically states the expectations the Tribunal has of its service delivery and provides a measure by which the public can gauge performance.
- 55 The Strategic Vision and Values Statement sets out TASCAT's goals over the next two years over a series of headings. It also is a statement of the values of TASCAT. Much of this content came from the initial consultations conducted about what TASCAT should be as an organisation, for the branding of TASCAT (February 2021) and designing the website (June 2021). It also draws upon

the values of the Department of Justice and the values that a Tribunal that strives to meet best practice should have.

- 56 TASCAT's values are those of the Department of Justice: that we will act with Integrity, Respect and Accountability and that our workplaces are Inclusive and Collaborative. The Value statement repeats what each value means under the Service Charter, but adds additional detail about how we will work together:
- 57 The Complaints and Feedback Policy is an essential process to ensure TASCAT is accountable. The policy encourages feedback of any kind, but also sets a process for how complaints are to be made and managed. This gives clarity and certainty to clients of the Tribunal and to the staff and members of the Tribunal as to the management of complaints.
- 58 Feedback will cover both good and bad feedback which can be done anonymously. It will not however give rise to a formal complaint investigation process.
- 59 The Complaint Policy explains what can and cannot be the subject of a complaint, and the process that needs to be followed for making a complaint and how it will be dealt with.
- 60 A complaint needs to be made in writing. TASCAT will provide a recorded phone service to allow people to ring in and have a staff member complete a form for them if they need help.
- 61 A complaint can only be about the conduct of a staff member or Tribunal members; any of TASCAT's processes or procedures or the quality of services or facilities. A complaint cannot be about the outcome of any proceedings or a decision, or about the laws that under which TASCAT exercises jurisdiction.

62 The complaint needs to provide: contact details of the complainant, the file reference number of the matter it relates to, what the nature of the complaint is under the 3 headings of conduct, quality or process, a description of the complaint and how the complainant would like to have the complaint resolved.

63 When a complaint is lodged TASCAT will confirm receipt of the complaint and that it will be reviewed in the next 14 days. The complainant will be advised if additional time is required, or the outcome of the complaint.

64 Depending on who the complaint is about the following people will deal with the complaint:

Type of Complaint	Referred to
Registry staff, mediators and conciliators	Principal Registrar
TASCAT Registry, processes, procedures, services and facilities	Principal Registrar
Conduct of a TASCAT member, mediator or conciliator	Deputy President or Division Head
Conduct of a Deputy President/Division Head	President
Conduct of the President	Attorney General

65 The policy sets out some of the outcomes that may result from a complaint:

- Explaining any action taken;
- Giving information about procedures and processes;
- Where appropriate, suggesting a solution;
- Provide an explanation, where appropriate;
- Providing an apology, where appropriate;

- Providing information for external organisations who may assist; or
- Review and if appropriate, modify TASCAT processes or procedures.

66 The policy makes it clear that the Tribunal will not deal with unreasonable complaints and sets out what an unreasonable complaint could be. The Tribunal will report on complaints and feedback in annual reports in a general and de-identified way.

The Legislative landscape

67 The legislative landscape for TASCAT is akin to other CATs. There is the TASCAT Act, the TASCAT Regulations, the TASCAT Rules and all of the “relevant Acts”²³ and their subordinate legislation which provides the Tribunal’s jurisdictions. The key is being aware how each of these pieces of legislation interplay with each other. There is also the TASCAT (Consequential Amendments Act) which amends certain legislation consequential upon the enactment of the TASCAT Act, for example, amendments to the Guardianship and Administration Act, the repeal of the RMPAT Act.

68 It is worth noting that the TASCAT Act (not so much the Regulations and Rules) draws heavily upon the *South Australian Civil and Administrative Tribunal Act 2013 (SA)* which establishes SACAT, but with some significant alterations.

69 In many domains there has been intentional retention of provisions peculiar to an amalgamated Tribunal / Board. This intentional retention occurs through both extensive Stream specific Schedules to the TASCAT Act (See Sch 2 for the Streams within the General Division and Sch 3 for Streams within the Protective Division) and through retained provisions in relevant Acts.

²³ See Sch 1 to the TASCAT Act

- 70 An example of this would be the issue of a party's ability to be represented in proceedings before TASCAT (see [115] below). Whilst the TASCAT Act allows for a party to be represented as a matter of right²⁴, this right is subject to a different position as outlined in the schedules to the Act relating to each Stream²⁵ or in a relevant Act.
- 71 This approach is due to the desire not to alter positions of policy in existence within the amalgamated Tribunal / Board without appropriate community consultation having occurred. Many of these matters that may well benefit from harmonisation in future and may be attended to through tranche 3 legislation allowing for such consultation to take place.

“Relevant Acts” and Division Schedules prevail

- 72 It is important to be aware of s 7A of the TASCAT Act:

7A. Inconsistency with relevant Act

If there is an inconsistency between a provision of a relevant Act and a provision of this Act, the regulations or the Tribunal rules, the provision of the relevant Act prevails to the extent of the inconsistency

- 73 Similarly, s 59(7) of the TASCAT Act provides:

(7) The provisions of a Division Schedule for a Division of the Tribunal prevail to the extent of any inconsistency between those provisions and any other provision of this Act.

- 74 Accordingly, it is prudent to take a multiple step approach to ensuring the correct legislative position on jurisdictional matters. First, it may assist to look at the TASCAT Act to see if there is a position on the matter at hand. Then check the relevant part of the Division Schedule applicable to the Stream in question. In some cases, it may be necessary to then examine the Regulations

²⁴ s 98 TASCAT Act

²⁵ eg. See cl 7 of Pt 4 of Sch 3 relating to representation in matters in the Guardianship Stream

or the Rules to the TASCAT Act. Finally, a review of the relevant Act and any subordinate legislation of the relevant Act may be necessary to ascertain finally whether anything is overruled.

- 75 This principle is common amongst the CATs as whilst it allows for an overarching position to be taken on an issue which applies to the whole of the Tribunal by default, it recognises the breadth of jurisdiction exercised by such Tribunals and the need for differentiation to be permitted to best suit the needs of proceedings in a certain Stream or List – “not one size fits all”.
- 76 The TASCAT Regulations are relatively minimal, primarily because the existing regulations to “relevant Acts” have been largely maintained. Any fees payable upon application have been retained in existing regulations apart from those applicable to the Resource and Planning Scheme to be moved to the TASCAT Regulations²⁶.
- 77 The initial TASCAT Rules will be issued by the President and then subsequently reissued as required by the TASCAT Rules Committee²⁷. The rules will provide for, amongst other things : guidance as to when proceedings are commenced²⁸; identification of the parties to proceedings in the Guardianship Stream²⁹ (replacing the former Practice Direction on the topic); guidance as to the granting or revocation of leave for representation where applicable³⁰; guidance as to the reckoning, extension and abridgement of time³¹; requirements as to an address for service³²; the approved forms for documents and the registry’s ability to accept or reject certain documents³³; rules as to costs orders and a

²⁶ Reg 9 TASCAT Regulations

²⁷ s 92 TASCAT Act

²⁸ r 5 TASCAT Rules

²⁹ r 7 TASCAT Rules

³⁰ r 8 and r 9 TASCAT Rules

³¹ r 10 and r 11 TASCAT Rules

³² r 12 TASCAT Rules

³³ r 14, 15, 16 and 17 TASCAT Rules

default assessment rate for costs at 75% of the Supreme Court scale³⁴; procedure as to the issue of a summons³⁵; and the circumstances in which a Registrar may constitute the Tribunal³⁶

Major components of the Act

The Main Objectives of the Tribunal (s 10)

78 Whilst already outlined earlier in this paper (see [16]), parties must always be mindful of the relevance of the main objectives to proceedings before the Tribunal.

Part 8 – Principles, Powers and Procedures (Part 8)

79 The principles governing proceedings are provided in s 79 of the TASCAT Act. The principles apply to all proceedings before the Tribunal unless modified by a relevant Act. Whilst a clear codification of applicable principles, it is unlikely, in practice, that these principles result in any significant derivation from principles currently being applied in proceedings before the Tribunals / Boards to be amalgamated.

79. Principles governing proceedings

In any proceedings, but subject to the provisions of a relevant Act –

(a) the procedure of the Tribunal is, subject to this Act, to be conducted with the **minimum of formality**; and

(b) the Tribunal –

(i) is not **bound by the rules of evidence**; and

(ii) may **adopt, as in its discretion it considers appropriate, any findings**, decision or judgment of a court or other tribunal, insofar as may be relevant to the proceedings; and

(iii) may otherwise **inform itself as it considers fit**; and

(c) the Tribunal must act according to **equity, good conscience and the substantial merits of the case and without regard to legal technicalities and forms**.

³⁴ r 18 TASCAT Rules

³⁵ r 20 TASCAT Rules

³⁶ r 22 TASCAT Rules

- 80 The general practice and procedure applicable to all Tribunal matters is provided for in s 83 of the TASCAT Act:

83. Practice and procedure generally

(1) The provisions of a Division Schedule in relation to a stream of a Division apply in relation to proceedings in respect of the stream of that Division.

(2) The Tribunal is to take measures that are **reasonably practicable** –

- (a) to ensure that the parties to any proceedings **have a reasonable opportunity to understand** the nature of the matter under consideration; and
- (b) to ensure that the parties to any proceedings **understand the nature of any assertions made in the proceedings and the implications** of those assertions; and
- (c) to **explain to the parties** to any proceedings, if requested to do so, any aspect of the procedure of the Tribunal or any decision or ruling made by the Tribunal; and
- (d) to ensure that the parties to any proceedings have the **opportunity in the proceedings to be heard** or otherwise have their **submissions received**.

(3) The Tribunal –

- (a) is to take all **practicable steps** to ensure that **all relevant material is disclosed** to the Tribunal so as to enable it to determine all the relevant facts in issue in any proceedings; and
- (b) may decide the matters on which it will hear oral evidence or argument; and
- (c) may permit or require evidence or argument to be presented in writing and may require such evidence to be verified by an oath or affirmation; and
- (d) may limit the time available for presenting the respective cases of parties to proceedings that are before the Tribunal at a hearing to an extent that it considers would not impede the fair and adequate presentation of the cases; and
- (e) may require a document to be served outside the State; and
- (f) may adjourn any proceedings at any time and to any place, including for the purpose of enabling the parties to the proceedings to negotiate a settlement or for the purpose of reconsideration of a decision by the decision-maker; and
- (g) may proceed to hear and determine proceedings in the absence of a party to the proceedings.

(4) To the extent that the practice or procedure of the Tribunal is not prescribed by or under this Act, Tribunal rules, practice directions or a relevant Act, the practice or procedure **is to be as the Tribunal determines**.

81 Part 7 of the TASCAT Act delineates the various jurisdictions conferred on TASCAT as either being “original” or “review” in nature. The primary “work” of this Part is to direct the Tribunal as to how it is to conduct proceedings that fall within the review jurisdiction, which is of relevance to several Streams in the General Division.

82 If a matter does not involve a reviewable decision then the matter falls within the Tribunals’ original jurisdiction³⁷. Understandably, when exercising original jurisdiction, the Tribunal is to proceed to act as the original decision-maker and apply those principles which are to be applied when performing such a role³⁸.

83 If a matter does involve, either expressly or necessarily, the review of a decision by another decision-maker, then that amounts to a reviewable decision and the matter falls within the Tribunal’s review jurisdiction³⁹.

84 The Act provides guidance in stating in s 75(1):

The purpose of a review of a reviewable decision is to produce the correct or preferable decision.

85 Further, the following hierarchy then applies:

- (1) If a relevant Act prescribes how a review should be conducted, then the Tribunal is to follow that prescription⁴⁰;
- (2) If a matter falls within the jurisdiction allocated to the Resource and Planning Stream, the review is to be conducted by way of a hearing *de novo*⁴¹; and

³⁷ s 72 TASCAT Act

³⁸ s 73 TASCAT Act

³⁹ s 74 TASCAT Act

⁴⁰ s 7A, s 75(3), s 75(6) TASCAT Act

⁴¹ s 75(2) TASCAT Act

- (3) If neither (1) or (2) apply, then the review is to be conducted by way of a rehearing⁴².

86 The remainder of Part 7 outlines what the Tribunal may take account when the proceedings fall within the Tribunals' review jurisdiction, certain obligations upon the relevant decision-maker to assist the Tribunal, and outlines the orders that can be made on a review.

Transitional Provisions

87 In the initial stages of TASCAT's existence, consideration needs to be given as to how proceedings "caught" in the transition from the previous Tribunals and Board into TASCAT might need to be conducted, given the provisions in Division 2 (s 152 to s 160) of Part 13 to the TASCAT Act.

88 Given the intention of the legislative drafting in Tranche 2 was not to alter "policy settings" on operational matters, in practical terms, the transitional provisions most likely will not have significant ramifications for impacted proceedings. However, regard should be had to them to ensure the proceedings are conducted as required under the transitional provisions.

89 There are 3 types of proceedings which are relevant to consider:

(a) proceedings instituted or commenced in an abolished Tribunal/Board but part heard at commencement date – **part heard proceedings**;

(b) proceedings instituted or commenced in an abolished Tribunal/Board but unheard at commencement date– **unheard proceedings**;

⁴² s 75(3) TASCAT Act

- (c) proceedings commenced in TASCAT after the commencement day but which could have been commenced in an abolished Tribunal/Board immediately before that date – **unexercised application right proceedings**;

Part Heard Proceedings

- 90 The continued hearings of part heard proceedings is dealt with in s 152(3)(a) and (b) which provides:

(3) If a relevant Board or Tribunal had, before the commencement day, begun to hear, but had not determined, proceedings, before the relevant Board or Tribunal, to which this section applies –

(a) the person or persons constituting the Board or Tribunal for those proceedings are to continue, on and from the commencement day, to hear and determine the matter to which the proceedings relate, sitting as the Tribunal established under this Act; and

(b) the Tribunal may have regard to any record of the proceedings before the relevant Board or Tribunal, including a record of any evidence taken in the proceedings before the relevant Board or Tribunal.

- 91 For the purposes of the continued hearing of a part heard proceeding s 152(4) provides that:

(4) For the purposes of subsections (2) and (3), in relation to proceedings to which those subsections relate –

(a) the Tribunal established by this Act has and may perform and exercise all the functions and powers that the relevant Board or Tribunal, to which the proceedings related before the commencement day, had immediately before that day; and

(b) the provisions of any Act or instrument of a legislative character that would have applied to or in respect of the proceedings, had this Act not commenced on the commencement day, continue to apply.

92 Whilst each decision maker or panel must obviously engage in their own statutory interpretation of the transitional provisions in terms of the proceeding being dealt with, in summary, for part heard proceedings, it appears that:

- the original members of the abolished Tribunal/Board continue to hear and determine the part heard proceedings as members of TASCAT; and
- the substantive and procedural law to be applied (including for example in relation to costs, representation and time limits) is that which would have been applicable in the abolished Tribunal/Board.

Unheard Proceedings

93 Unheard proceedings are dealt with in s 152(2) which provides:

(2) If proceedings, before a relevant Board or Tribunal, to which this section applies, had not been heard before the commencement day by the relevant Board or Tribunal, the proceedings are to be taken, on and from the commencement day, to have been instituted or commenced before the Tribunal established under this Act and may be heard and determined instead by that Tribunal.

94 Again, as with part heard proceedings, s 152(4) applies.

95 In summary, for unheard proceedings it appears that:

- TASCAT hears and determines the proceedings; and
- the substantive and procedural law to be applied (including for example in relation to costs, representation and time limits) is that which would have been applicable in the abolished Tribunal/Board

Unexercised Application/Appeal Right Proceedings

96 Unexercised application/appeal right proceedings which would have been dealt with in an abolished Tribunal/Board are covered in s 154 which provides:

(1) If a person had, immediately before the commencement day, a right (including a right exercisable only with leave) –

(a) to apply to a relevant Board or Tribunal to make a decision at first instance concerning a matter; or

(b) to apply to a relevant Board or Tribunal for a review of a decision of another person or body; or

(c) to appeal to a relevant Board or Tribunal against a decision of another person or body –

but had not, before that day, exercised that right, the person may apply or appeal to the Tribunal established under this Act for the performance and exercise of the same functions and powers that could have been performed or exercised by the relevant Board or Tribunal if that Board or Tribunal had not been abolished.

(2) For the purposes of subsection (1) –

(a) the Tribunal established by this Act has and may perform and exercise all the functions and powers that the relevant Board or Tribunal would have had in relation to the application or appeal if the application or appeal had been made before the commencement day, including any functions or powers relating to the granting of leave to apply or appeal; and

(b) the provisions of any Act or instrument of a legislative character, including provisions concerning the time within which to apply or appeal, that would have applied to or in respect of the proceedings, had this Act not commenced on the commencement day, continue to apply.

97 It appears that unexercised application/appeal right proceedings are in effect those where the cause of action or other relevant right to make an application/appeal accrued prior to the commencement day. In other words, if the application in question could **in its entirety** have been made to an abolished Tribunal/Board prior to the commencement day, the proceedings will

be unexercised application right proceedings and transitional proceedings in TASCAT.

98 For these unexercised application right proceedings, it would seem that the time within which the proceedings were required to be commenced that were applicable prior to the TASCAT legislation coming into effect will continue to apply by express operation of s 157 which provides:

If, for any purpose, time had commenced to run under a provision of a relevant Act in relation to a relevant Board or Tribunal before the commencement day, the time expires for the corresponding purpose under that Act (as amended by this Act), or this Act, as the case may be, at the time at which it would have expired if the Board or Tribunal had not been abolished under section 148.

99 In summary for unexercised application right proceedings it appears that:

- TASCAT hears and determines the proceedings; and
- the substantive and procedural law to be applied (including for example in relation to costs, representation and time limits) is that which would have been applicable in the abolished tribunal.

Panels of the Tribunal

100 The legislation prepared for the formation of TASCAT intentionally preserves the panel requirements that currently exist in each of the Tribunals / Boards to be amalgamated.

101 The TASCAT Act prescribes that a panel of the Tribunal cannot be constituted by more than five (5) Members⁴³. The President is to determine which member

⁴³ s 64(2) TASCAT Act.

(s) are to be listed on a matter or a class of matters⁴⁴. In most cases, this power will be exercised by Deputy Presidents of the Tribunal by delegated authority, in consultation with the President.

- 102 The particular requirements of panel composition for each Stream of TASCAT, together with the requirement that a member must be assigned to the Division / Stream in question, are contained in Sch 2 (General Division) and Sch 3 (Protective Division) to the Act, and in summary, provides as follows:

*Anti-Discrimination Stream*⁴⁵

- 103 The Tribunal may be comprised of a single member so long as the member is the President, a Deputy President; or a legally qualified member. The Tribunal may also be constituted by a multi-member panel consisting of , at least, the President, one Deputy President, one Senior Member, or one legally qualified member, together with one of more other members (up to a maximum of 5 total members) who has relevant experience and expertise.

*Health Practitioners Stream*⁴⁶

- 104 Apart from matters relating to the *Pharmacy Control Act 2001 (Tas)*, the Tribunal when hearing matters within the Health Practitioners Stream must be constituted in accordance with the requirements of the *Health Practitioners Tribunal Act 2010 (Tas)*.
- 105 Those requirements⁴⁷ mean that if the President so decides, and unless a party requests that the proceedings not be heard by a single member, matters can be heard by a single member of the Tribunal so long as the member is the

⁴⁴ s 64(1) TASCAT Act

⁴⁵ cl 3 of Pt 4 to Sch 2 of the TASCAT Act

⁴⁶ cl 3 of Pt 5 to Sch 2 of the TASCAT Act

⁴⁷ s 18 Health Practitioners Tribunal Act 2010 (Tas)

President, a Deputy President, or a Senior Member (note a legally qualified member is not sufficient).

- 106 Otherwise, the panel must consist of three (3) members. One must be the President, a Deputy President, or a Senior Member. The remaining two (2) can either be two (2) “professional” members, or one (1) “professional” member and one (1) “community” member.
- 107 A professional member is a member of TASCAT designated by the President to be a professional member for particular proceedings. To be so designated the Member must be a registered health practitioner in respect of the health profession to which the proceedings relate and also be on a list of members approved by the National Health Practitioner Board for the relevant profession⁴⁸.
- 108 A community member is a member of TASCAT designated by the President to be a community member for proceedings. To be so designated the Member must not be, or have never been, a registered health practitioner, must not be a member of a National Health Practitioner Board, and must also be on a list of members approved by the Minister for Justice⁴⁹.

*Forestry Practices Stream*⁵⁰

- 109 The Tribunal must be constituted by three (3) members. One must be the President, a Deputy President, or a legally qualified member. The other two (2) members must have particular expertise or tertiary qualifications (depending on the proceeding) as outlined in Part 6 of Sch 2 of the TASCAT Act.

⁴⁸ s 11 Health Practitioners Tribunal Act 2010 (Tas)

⁴⁹ s 13 Health Practitioners Tribunal Act 2010 (Tas)

⁵⁰ cl 3 of Pt 6 to Sch 2 of the TASCAT Act

*Personal Compensation Stream*⁵¹

110 The Tribunal may be comprised of a single member so long as the member is the President, a Deputy President; or a legally qualified member. The Tribunal may also be constituted by a multi-member panel consisting of the at least the President, one Deputy President, one Senior Member, or one legally qualified member, together with one of more other members (up to a maximum of 5 total members) who are assigned to the Stream.

*Resource and Planning Stream*⁵²

111 The Tribunal may be comprised of a single member so long as the member is a legally qualified member. The Tribunal may also be constituted by a multi-member panel consisting of the at least one legally qualified member, together with one of more other members (up to a maximum of 5 total members) each of whom is either a legally qualified member or has expertise in the subject matter of the proceedings.

*Guardianship Stream*⁵³

112 The Tribunal may be comprised of a single member so long as the Member is the President, a Deputy President; or a legally qualified member. The Tribunal may also be constituted by a multi-member panel consisting of at least the President, one Deputy President, one Senior Member, or one legally qualified member, together with one of more other members (up to a maximum of 5 total members) who are assigned to the Stream.

*Mental Health Stream*⁵⁴

⁵¹ cl 3 of Pt 7 to Sch 2 of the TASCAT Act

⁵² cl 4 of Pt 8 to Sch 2 of the TASCAT Act

⁵³ cl 4 of Pt 4 to Sch of the TASCAT Act

⁵⁴ cl 3 of Pt 5 to Sch 3 of the TASCAT Act

- 113 The Tribunal may be comprised of a single member so long as the member is the President, a Deputy President, or a legally qualified member. The Tribunal may also be constituted by a multi-member panel consisting of at least the President, one Deputy President, one Senior Member, or one legally qualified member, together with one or more other members (up to a maximum of 5 total members) who are assigned to the Stream. There is no longer a requirement that a panel must consist of one (1) or three (3) or more members⁵⁵. A two (2) member panel is now possible. However, the requirements continue that a panel of three (3) or more members is required if a hearing is held in relation to certain reviews of Treatment Orders⁵⁶, or the review of the authorisation of treatment for a forensic patient⁵⁷.
- 114 If a panel is to be composed of three (3) or more members, at least one (1) of the members must be a psychiatrist. On a multi-member panel the legally qualified member must preside, and if there is more than one, the presider is the legally qualified member nominated by the President.

Representation

- 115 In terms of legal representation, the TASCAT Act starting point is that a party to proceedings has an automatic right to be legally represented⁵⁸. That is, there is no requirement for a party to seek and be granted leave to be legally represented. Leave is however required if a party wishes to be represented by a person other than a legal practitioner⁵⁹.
- 116 However, these starting positions, are modified in many cases as a result of either the Division Schedules or a relevant Act prevailing over these provisions.

⁵⁵ s 170 of the Mental Health Act 2013 (Tas) to be repealed

⁵⁶ s 181(f) of the Mental Health Act 2013 (Tas)

⁵⁷ s 192A(1)(e) of the Mental Health Act 2013 (Tas)

⁵⁸ s 98(1)(b) TASCAT Act

⁵⁹ s 98(1)(c) TASCAT Act

Again, regard should be had to the transitional provisions with respect to any provisions of repealed legislation which may still be applicable.

Anti-Discrimination Stream (ADS)

- 117 An amendment to s 79A of the *Anti-Discrimination Act 1998 (Tas)* will explicitly exclude the operation of the TASCAT Act provisions on representation in inquires in the Anti-Discrimination Stream⁶⁰.
- 118 Instead, the original principle will remain in force, that is, a party may only be represented or accompanied by another person with the permission of the Tribunal⁶¹, and such permission can be withdrawn at any time⁶². If one party is granted permission, any other party taking part may be represented or accompanied by another person⁶³.

Forestry Practices Stream (FPS)

- 119 The Forestry Practices Stream is one example where there has been a change in position. Prior to the commencement of TASCAT the relevant legislation prohibited legal representation⁶⁴. This prohibition will be repealed and the automatic right to be legally represented in the TASCAT Act will replace it.

Health Practitioners Stream

- 120 In the case of matters in the Health Practitioners Stream, a party is automatically entitled to be represented by a legal practitioner or any other

⁶⁰ s 79A(4) of the *Anti-Discrimination Act 1998 (Tas)*

⁶¹ s 79A(2) of the *Anti-Discrimination Act 1998 (Tas)*

⁶² s 79A(1) of the *Anti-Discrimination Act 1998 (Tas)*

⁶³ s 79A(3) of the *Anti-Discrimination Act 1998 (Tas)*

⁶⁴ s 37(8) of the *Forest Practices Act 1985 (Tas)*

person⁶⁵. This differs from the TASCAT Act in that leave is not required to be represented by someone other than a legal practitioner.

Personal Compensation Stream

- 121 Each of the “relevant Acts” retain their provisions as to representation in the Personal Compensation Stream and as such, prevail over the TASCAT Act.
- 122 Under both the *Workers Rehabilitation and Compensation Act 1988* , and the *Asbestos-Related Diseases (Occupational Exposure) Act 2011*, a party to a proceeding may be represented by a person of that party’s choice, but only with the approval of the Tribunal.
- 123 The Motor Accidents Compensation Tribunal is established by the *Motor Accidents (Liabilities and Compensation) Act 1973*. By that Act, Section 8 and Part 3 of the *Commissions of Inquiry Act 1995* apply to matters referred to the Tribunal as if the Tribunal was a Commission of Inquiry and the matter was the matter into which the Commission was directed to inquire. Because a person appearing before a Commission of Inquiry may, with its permission, be represented by counsel, the same applies to the Motor Accidents Compensation Tribunal⁶⁶.

Resource and Planning Stream

- 124 The automatic right to legal representation under the TASCAT Act will apply in the Resource and Planning Stream. However, for matters within that Stream the Tribunal can refuse to allow representation if another party would be significantly disadvantaged⁶⁷.

⁶⁵ s 25 of the Health Practitioners Tribunal Act 2010 (Tas)

⁶⁶ s 138(1) of the Asbestos-Related Diseases (Occupational Exposure) Compensation Act 2011 (Tas)

⁶⁷ cl 8 of Pt of Pt 8 to Sch 2 TASCAT Act

Guardianship Stream

125 In the Guardianship Stream, existing rights prevail, that is, the proposed represented person, the applicant, and the Public Guardian do not require leave to be represented (by either a legal practitioner or another person), however anyone else does require leave⁶⁸.

Mental Health Stream

126 The Mental Health Stream mirrors the TASCAT Act in terms of parties having an automatic right to representation, however the automatic right also extends to representation by an advocate or another person⁶⁹.

Other matters re representation

127 It should be noted that in circumstances where the Tribunal may grant, refuse, or revoke leave to representation, there is guidance as to the circumstances to take account of in the TASCAT Rules⁷⁰.

128 If a party is entitled to automatic leave to be represented by a legal practitioner under the TASCAT Act, then the TASCAT Rules require the instructed legal practitioner must, as soon as practicable, notify the Tribunal and each party to the proceeding of their representation⁷¹.

129 The TASCAT Act provides an explicit power to appoint a separate representative or a Guardian ad litem for a party to proceedings⁷² or for a person under 18 years of age, even if not a party⁷³. Whilst this power is available in all proceedings in TASCAT, it is most probable that the power would

⁶⁸ cl 7 of Pt of Pt 4 to Sch 3 TASCAT Act

⁶⁹ cl 7 of Pt 2 to Sch 4 Mental Health Act 2013 (Tas)

⁷⁰ r 8, r 9 TASCAT Rules

⁷¹ r 8(1) TASCAT Rules

⁷² s 98(4) TASCAT Act

⁷³ s 98(5) TASCAT Act

normally only be exercised in the Guardianship and Mental Health Streams. This power to appoint is in addition to the power the Guardianship Stream will retain to “appoint a person to represent a person”⁷⁴ but will replace the ability of the current Mental Health Tribunal to “make arrangements” for a party to represented⁷⁵.

Provision of documents, legal process and service

- 130 Section 125 of the TASCAT Act is an important section that will affect how the Tribunal serves and receives notices and documents. There are a range of options for service which include personal service; posting to address or last known address; leaving a copy at the address for service or last known address; electronic (email or fax or mobile phone) if a party has consented to receiving documents that way; or in a manner that the Tribunal or a Registrar determines in a particular case.
- 131 An important new provision is under s125(3) which provides that if someone has provided the Tribunal a document that contains an email address or has been sent from an email address, they are taken as having given consent to service of notices orders or other documents by email.
- 132 The section also sets out how documents may be given to the Tribunal. including sending it in an electronic form approved by the President; sending it by email; sending it by fax; hand delivery to the registry; posting it; or sending it in a way approved by a Registrar.
- 133 Registrars have the power to refuse to receive a document in paper or physical form and direct that it needs to be lodged in an electronic form.

⁷⁴ cl 7(3) of Pt 4 to Sch 3 TASCAT Act

⁷⁵ cl 7(3) of Pt 2 to Sch 4 Mental Health Act 2013 (Tas)

Compulsory conferences, alternate dispute resolution and settlement

- 134 There are some new processes available under Part 8, Division 7 of the TASCAT Act. Compulsory Conferences are a form of hearing that allows a member of the Tribunal to make a range of decisions related to both case management and conduct conciliation, including the power to make final decisions in relation to the proceedings. It requires a legally qualified member to make the determination at the conference, whereas a non-legally qualified member needs to refer the outcome to the Tribunal for determination.
- 135 The procedure of a Compulsory Conference is within the discretion of the member and it is to be held in private unless directed otherwise. Anything said or done in the conference cannot be admitted in evidence in a hearing, unless by consent of the parties. A member who conducts a conference is unable to sit on a final hearing.
- 136 There are new provisions about settling proceedings by consent (through ADR or compulsory conferences) and they are set out below. If the parties cannot reach a resolution, the member (like a mediator) will need to notify the Tribunal that a settlement has not been reached.
- 137 The TASCAT Act has a provision under Section 102 that sets out the Tribunal's powers in relation to Alternative Dispute Resolution. The section is broad and allows discretion to the officer conducting the ADR as to how it will operate (section 102(7)) and parties can be directed to attend at any time. It is held in private unless directed otherwise, anything said or done is inadmissible in the hearing, and the officer conducting the ADR must notify the Tribunal if settlement is not reached.
- 138 Settlement under both Compulsory Conferences and ADR must meet three important standards before it will be endorsed by the Tribunal. The Tribunal

must be satisfied, first, that the settlement is not inconsistent with the TASCAT Act or a relevant Act; second, that the settlement does not materially prejudice a person who is not a party but has a direct or material interest in the matter; and third, that the terms of the settlement are not inappropriate.

Costs

- 139 The TASCAT Act⁷⁶ provides the default costs position, that each party must bear their own costs. The Act then gives the Tribunal power to depart from that position if it is satisfied it is appropriate to do so, with a series of matters the Tribunal is to have regard to before making an order for costs (see s.120(2)(a)-(d)). The Guardianship and Mental Health Streams are excluded from the operation of this section, that is, costs orders cannot be made in either of these Streams.
- 140 There are provisions that provide that if Tribunal strikes out or dismisses any proceedings in prescribed circumstances, the Tribunal should make an order for costs against the party who has had the proceedings struck out or dismissed, unless there is a good reason not to. S121 has powers to make orders for costs to compensate a person for expenses or loss resulting from proceedings, but there are very limited circumstances to do so (and it should be noted that Schedule 2, Part 8, Clause 12(8) of the Tasmanian Civil and Administrative Tribunal Act 2020 exclude the operation of this section within the Resource and Planning Stream). Frivolous or vexatious proceedings are the main category. S121 also makes relevant the conduct of parties as to whether they genuinely attempted to assist the Tribunal to make a decision on the merits, or, if the party to the appeal is the original decision maker, whether the decision maker attempted to make a decision on the merits. There is a power to make a personal order for costs against the representative of a party (a

⁷⁶ s 120 TASCAT Act

lawyer for example) if that representative acting in a way that delayed the proceedings or caused unnecessary costs.

- 141 Section 122 allows the Tribunal to make an order for its own costs incurred against parties. It has not yet become operative, as it requires prescribed circumstances to be set out in the Regulations for it to apply. None of been prescribed as yet.
- 142 It's important to note that Section 120 specifically states that the costs provisions under the TASCAT Act do not apply if another Act or Regulations provides otherwise. As such, the existing cost arrangements under other legislation and regulations such as *Workers Rehabilitation and Compensation Act 1988*, *Motor Accidents (Liabilities and Compensation) Act 1973*, *Asbestos-Related Diseases (Occupational Exposure) Act 2011* and any other Acts which retain their cost provisions, will prevail over the TASCAT Act.

Reasons for decision

- 143 None of the legislation to come into force as part of the establishment of TASCAT alters any of the existing obligations and timeframes relating to the provision of reasons for decisions in each jurisdiction.
- 144 In some Streams, such as the Resource and Planning Stream, reasons for decision remain mandatory as is the case in the current respective Tribunal⁷⁷. In other Streams, such as the Guardianship and Mental Health Streams, reasons for decision remain available upon request and must be provided within 21 days of request⁷⁸.

⁷⁷ eg. Resource and Planning Stream: see cl 11 of Pt 8 to Sch 2 TASCAT Act

⁷⁸ cl 9(2) of Pt 4 to Sch 3 TASCAT Act (GS), cl 1 of Pt 6 to Sch 4 Mental Health Act 2013 (MHS)

- 145 A common template is currently being developed so that all reasons issued by TASCAT, irrespective of the Stream, will have a similar look and style. Where possible and appropriate, reasons for decision will be published on Austlii (de-identified as required).

Other miscellaneous legislative features

Multi Member panels

- 146 When the Tribunal is sitting as a panel consisting of more than one member then: the most “senior” member is to preside⁷⁹; in terms of decision-making matters are decided by means of the majority view, and if equally divided, then the issue is to be resolved according to the opinion of the presiding member⁸⁰ (unless this principle is modified by a “relevant Act”); and if a question of law arises in a matter the presiding member may refer the matter to the Supreme Court if the President consents⁸¹.
- 147 In terms of who is the most senior member, the order of precedence is: President; Deputy President; Senior Member; and then Ordinary Member⁸². If the hierarchy does not resolve the issue of who is to preside, the matter is to be determined by the President⁸³.

Hearings open to the Public

- 148 The rule applicable to all TASCAT proceedings (subject to certain exceptions and not including ADR processes), is that proceedings must be heard in public, that is, any member of the public is permitted to attend a hearing⁸⁴.

⁷⁹ s 67(1) TASCAT Act

⁸⁰ s 68(1) TASCAT Act

⁸¹ s 117 TASCAT Act

⁸² s 67(3) TASCAT Act

⁸³ s 67(2) TASCAT Act

⁸⁴ s 81(1) TASCAT Act

- 149 The Tribunal can make a number of different directions, however, which derogate from this principle. For example, directions can be made to: hold all or part of a hearing in private; prohibit or restrict the publication of the identity of a person or certain evidence; prohibit or restrict evidence from some or all parties to a proceeding; exclude any person from all or part of any proceedings⁸⁵. Before making any such direction the Tribunal must be satisfied it is desirable to do so because it is in the interests of justice, by reason of the confidential nature of the evidence, it will expedite the proceedings, or for some other reason⁸⁶.
- 150 There are certain classes of proceedings to which the open hearing principle does not apply without a specific direction being made. This includes all proceedings dealt with in the Mental Health Stream (unless the Tribunal orders to the contrary⁸⁷ and any matters in the Personal Compensation Stream relating to the *Asbestos-Related Diseases (Occupational Exposure) Compensation Act 2011 (Tas)*⁸⁸, or the *Workers Rehabilitation and Compensation Act 1988*⁸⁹ (unless the parties agree to the contrary). Similarly, whilst hearings in the Guardianship Stream will remain open hearings as is currently the case with GAB, existing automatic restrictions on the disclosure of information relating to the person the subject of an application will also remain⁹⁰.

Practice Directions

- 151 The President may give directions relating to the practice and procedure to be followed in proceedings⁹¹ to be known as “Practice Directions”. All Practice Directions must be publicly available on the Tribunal’s website. Of significance,

⁸⁵ s 81(3) TASCAT Act

⁸⁶ s 81(2) TASCAT Act

⁸⁷ Cl 9 of Pt 2 to Sch 4 Mental Health Act 2013 (Tas)

⁸⁸ s 138(3) of the Asbestos-Related Diseases (Occupational Exposure) Compensation Act 2011 (Tas)

⁸⁹ s 48 of the Workers Rehabilitation and Compensation Act 1988 (Tas)

⁹⁰ s 86 of the Guardianship and Administration Act 1995 (Tas)

⁹¹ s 93(1) TASCAT Act

Practice Directions must be complied with by not only parties to proceedings and their legal representatives, but also each member of the Tribunal⁹².

- 152 All existing practice directions of the Tribunals / Boards to be amalgamated will cease to have effect upon the commencement of TASCAT. A number of existing practice directions are currently being readied to be issued as “Fact Sheets” or “Information Sheets” and any TASCAT Practice Directions to be issued will be made available upon commencement on the TASCAT website

Preservation orders

- 153 The Tribunal is provided with a general power to make orders to preserve the subject matter of proceedings or to otherwise protect the interests of a party to proceedings⁹³. This power may only be exercised by the President, a Deputy President, a legally qualified member, or a member so authorised by the President. Such an order can be made on application of a party or on the Tribunal’s own motion⁹⁴. The power is in addition to any existing power contained within a “relevant Act”.⁹⁵

Review of decision due to party absence

- 154 A party to a proceeding may apply for a review of a decision made in their absence⁹⁶. Unless the Tribunal grants an exemption, an application to review must be made within 7 days of the decision being made and is limited to one review application in respect of the same matter⁹⁷.
- 155 If the Tribunal on hearing the application for review is satisfied that the applicant had a reasonable excuse for not attending the relevant hearing, or for not being

⁹² s 93(4) TASCAT Act

⁹³ s 111(1) TASCAT Act

⁹⁴ s 111(3) TASCAT Act

⁹⁵ s 111(8) TASCAT Act

⁹⁶ s 116(1) TASCAT Act

⁹⁷ r 19 TASCAT Rules

represented in the hearing, then an order may be made to revoke or vary the decision made in the party's absence⁹⁸. If practicable, the same member(s) who heard the original matter are to determine the review application⁹⁹.

Correcting mistakes

156 The legislation allows for the Tribunal to correct a decision or a statement of reasons issued to correct a clerical mistake, an error arising from an accidental slip or omission, miscalculation of figures, or a material mistake in the description of a person or thing¹⁰⁰. This is essentially codification of the "slip rule".

157 A correction using this power can be made by the Tribunal's own motion or upon the application of a party to the proceedings¹⁰¹, such application to be made within 21 days of the applicant having received notice of the Tribunal's decision or statement of reasons¹⁰²

Federal Jurisdiction proceedings

158 In the event that the Tribunal receives an application and considers that it does not, or may not, have jurisdiction to determine the application because it may involve the exercise of "federal diversity jurisdiction", then the Tribunal may order that the proceedings be transferred to the Magistrates Court¹⁰³.

159 Part 9 of the TASCAT Act provides how matters can be transferred to the Magistrates Court, how they are then to be dealt with, and how the Court can remit matters back to the Tribunal.

⁹⁸ s 116(5) TASCAT Act

⁹⁹ s 116(6) TASCAT Act

¹⁰⁰ s 119(1) TASCAT Act

¹⁰¹ s 119(2) TASCAT Act

¹⁰² r 21 TASCAT Rules

¹⁰³ s 131(2) TASCAT Act

160 Chapter 1.3 of the Council of Australasian Tribunals' (COAT) Practice Manual¹⁰⁴ provides a useful overview of this jurisdictional issue.

Appeals

161 Part 10 of the TASCAT Act provides the avenues of appeal to the Supreme Court from TASCAT decisions. As outlined in that Part, the jurisdiction the subject of the appeal determines the nature of the right of appeal, whether that be on a question of law, a question of fact, or both. It is essentially a bringing together of rights of appeal previously located in "relevant Acts".

162 In addition to preclusions against appeals contained within "relevant Acts", there is no right of appeal against certain prescribed interlocutory decisions¹⁰⁵. These include¹⁰⁶: a decision to grant or refuse an adjournment; a direction to close a hearing or restrict publication of parties' identities or evidence; allowing a party, representative or witness to participate by video link or telephone; proceeding to conduct a hearing on the papers where permitted; a direction to consolidate or split proceedings; a decision not to grant leave for representation (to a person other than an Australian legal practitioner); a determination not to allow a person appearing before the Tribunal to be assisted by another person as a friend; a decision to appoint or to refuse to appoint a guardian ad litem or a separate representative; and certain other decisions particular to the Guardianship Stream.

163 The commencement of an appeal to the Supreme Court under the TASCAT Act does not affect the operation of the decision which is the subject of the appeal,

¹⁰⁴ COAT Practice Manual 2020 (5th Edition) – available at : www.coat.asn.au

¹⁰⁵ s 136(10) TASCAT Act

¹⁰⁶ Reg 7 of TASCAT Regulations

nor prevent the taking of any action to implement the decision unless the Supreme Court makes orders to the contrary¹⁰⁷

¹⁰⁷ s 139 TASCAT Act