

CLAUSE NOTES

Tasmanian Civil and Administrative Tribunal Amendment Bill 2021

Clause 1: Short title

This clause provides that, once passed, the Act will be cited as the *Tasmanian Civil and Administrative Tribunal Amendment Act 2021* (the Act).

Clause 2: Commencement

This clause provides for the amendments to commence on the day on which the Bill receives the Royal Assent.

Clause 3: Principal Act

This clause provides that the Principal Act to which the amendments apply is the *Tasmanian Civil and Administrative Tribunal Act 2020* (the Act).

Clause 4: Long title amended

This clause amends the long title of the Act to reflect the nature of the new provisions that will be inserted by the Bill.

Clause 5: Section 3 amended (Interpretation)

This clause inserts new definitions into the Act to assist in interpreting the sections that are inserted or amended by the Bill.

The new definitions include a definition of 'commencement day', which is the day on which the amendments in the Bill commence.

Clause 6: Section 7A inserted

This clause clarifies that the provisions of a relevant Act prevail over any inconsistent provisions within the Act or within the regulations or Tribunal rules that are made under the Act.

This is to ensure that where relevant Acts retain particular provisions relating to how matters are dealt with by the Tasmanian Civil and Administrative Tribunal (TASCAT), those provisions will continue to apply.

Clause 7: Section 10 amended (Main objectives of Tribunal)

This clause makes minor amendments to the objectives of TASCAT, as set out in section 10 of the Act, to ensure consistency with the operative provisions that are inserted by the Bill.

Clause 8: Section 14 amended (President's functions generally)

This clause amends section 14 of the Act to change the reference to timing to refer to the 'commencement day' for the Act (as defined by the new term inserted by clause 5) rather than the 'establishment day'.

Clause 9: Section 14A inserted

This clause inserts provisions to specifically provide for the President of TASCAT to delegate their functions or powers.

Clause 10: Section 44 amended (Appointment of senior members and ordinary members)

This clause amends section 44 of the Act to provide that it is the President of TASCAT who may request the Minister to alter the basis of appointment for a senior or ordinary member, rather than that person making the request of the Minister.

Clause 11: Section 48 amended (Supplementary members)

This clause amends section 48 of the Act to permit the Minister to appoint a person as a supplementary member of TASCAT if the person is to be designated as a professional or community member for purposes of the *Health Practitioners Tribunal Act 2010*.

Clause 12: Section 50 amended (When supplementary member ceases to hold office)

This clause amends section 50 of the Act to provide for a person to cease to be supplementary member of TASCAT where the person was appointed on the basis that they were to be designated as a professional or community member for purposes of the *Health Practitioners Tribunal Act 2010*, and they cease to be a professional or community member respectively.

Clause 13: Section 54 amended (Functions of registrars)

This clause amends section 54 of the Act to clarify the functions of a registrar and make a minor technical amendment.

Clause 14: Section 55 amended (Delegation)

This clause amends section 55 of the Act to clarify that a registrar may not delegate their power of delegation.

Clause 15: Part 4 repealed

This clause repeals Part 4 of the Act, which will become redundant upon commencement of the new Part 7 of the Act, dealing with TASCAT's original and review jurisdiction.

Clause 16: Section 59 amended (Divisions of Tribunal)

This clause amends section 59 of the Act to change the reference to timing to refer to the 'commencement day' for the Act (as defined by the new term inserted by clause 5) rather than the 'establishment day'.

Clause 17: Section 61 amended (Functions and powers of Division Heads and delegation)

This clause makes minor technical amendments to section 61 of the Act.

Clause 18: Part 6 substituted

This clause substitutes Part 6 of the Act with new Parts 6, 7, 8, 9, 10, 11, 12 and 13. Clause Notes relating to these new Parts are set out below.

PART 6 – CONSTITUTION OF TRIBUNAL

Sections 64-70:

This Part inserts sections into the Act that provide for the constitution of TASCAT.

These sections deal with: the persons who may constitute TASCAT; alteration of constitution of TASCAT, and dealing with different aspects of the same matter and with separate matters; hearing proceedings in respect of the same matter together; who presides when TASCAT is constituted by 2 or more members; how questions are resolved where the opinions of Tribunal members are divided; vacancies and defects in appointments; and disclosure of interests by Tribunal members.

The general provisions in this part will be modified for particular streams by the specific provisions found within Schedules 2 and 3 of the Act, as amended by clause 20 and 21 of the Bill.

PART 7 – JURISDICTION OF TRIBUNAL

Division 1 – Jurisdiction

Section 71: Jurisdiction of Tribunal

This section sets out the jurisdiction of TASCAT.

Division 2 – Original jurisdiction

Sections 72-73:

The sections in this Division clarify which matters fall within the original jurisdiction of TASCAT and set out how TASCAT is to exercise its jurisdiction and powers for those matters.

Division 3 – Review jurisdiction

Section 74-78

The sections in this Division clarify which matters fall within the review jurisdiction of TASCAT and set out how TASCAT is to exercise its jurisdiction and powers for those matters.

These sections deal with: what is a reviewable decision and who is a decision-maker; how TASCAT's review of a reviewable decision is to be conducted; requirements that may be imposed on the decision-maker to assist TASCAT; the effect of review proceedings upon the decision being reviewed; and the range of decisions available to TASCAT upon completing its review.

PART 8 – PRINCIPLES, POWERS AND PROCEDURES

Division 1 – Principles governing proceedings

Section 79: Principles governing proceedings

This section sets out the general principles that must be followed by TASCAT when conducting proceedings.

Division 2 – Procedure Generally

Sections 80-86

The sections in this Division set out when and how proceedings are to be conducted Tribunal.

These sections deal with: when and where TASCAT may sit; when proceedings are to be held in public and the exceptions that may apply, including in relation to publication and disclosure of information; the use of electronic means to participate in proceedings, and proceedings held without hearings; the measures TASCAT is to take to promote accessibility and understanding of proceedings, and the quick and just resolution of matters; directions that may be given by TASCAT; consolidating and

splitting proceedings; and completion of part-heard matters where a member of TASCAT ceases to hold office.

Division 3 – Dismissal of proceedings or part of proceedings

Section 87-90

The sections in this Division set out the circumstances in which proceedings may be struck out or dismissed.

These sections deal with: circumstances where TASCAT considers that the matter, or any aspect of it, would be more appropriately dealt with by another tribunal, a court or any other person; withdrawal of proceedings by the applicant, or dismissal or striking out of proceedings for want of prosecution; the dismissal or striking out of proceedings that are frivolous, vexatious, misconceived, lacking in substance or otherwise an abuse of process; and dismissing, striking out or determining proceedings where TASCAT believes that a party to any proceedings is conducting the proceedings in a way that unnecessarily disadvantages another party to the proceedings.

Except where the applicant withdraws or agrees to the withdrawal of the proceedings, TASCAT's power to make an order under this Division may only be exercised by a legally qualified member of TASCAT or a registrar who is authorised in writing by the President to make such an order.

Division 4 – Tribunal rules, practice directions and codes of conduct

Sections 91-94

The sections in this Division provide for establishment of a Rules Committee and for the making of Tribunal rules, practice directions and a code of conduct.

Division 5 – Parties

Section 95-97

The sections in this Division specify who may be a party to proceedings, who may be joined as a party by order of TASCAT, and who may intervene and be heard in proceedings to which they are not already parties.

Division 6 – Representation

Section 98: Representation

This section provides that, subject to the provisions of a relevant Act, a party to proceedings may appear personally, be represented by an Australian legal practitioner or (with the leave of TASCAT and subject to TASCAT rules) be represented by another representative.

The section also: provides for a person appearing before TASCAT to be assisted by another person as a friend; specifies who may not act as a legal representative or other representative for a party; and provides for TASCAT to appoint a guardian ad litem or a person to represent a party, or to order that a party be separately represented.

Division 7 – Compulsory conferences, alternative dispute resolution processes and settlement

Sections 99-103

The sections in this Division provide for TASCAT to require parties to proceedings to participate in compulsory conferences or alternative dispute resolution processes, and for the settling of proceedings where the parties agree in writing.

The purpose of compulsory conferences is to identify and clarify the issues in proceedings and to promote the resolution of matters by settlement between the parties, and the purpose of alternative dispute resolution processes is to resolve or narrow the issues between parties.

Division 8 – Evidentiary powers

Section 104-110

The sections in this Division set out the powers of TASCAT to gather, prepare and hear evidence related to proceedings.

These sections deal with: the issuing of a summons requiring a person to appear before TASCAT to give evidence or to produce evidentiary material; claims of privilege and privileges unaffected by the Act; powers to enter and inspect property for the purposes of proceedings; the appointment of experts to assist TASCAT; the authorisation of persons to take evidence; and accessibility of evidence to the public.

Division 9 – Orders and powers

Sections 111-119

The sections in this Division provide for TASCAT to: make orders to preserve the subject matter of, or protect the interests of a party to, proceedings; make interlocutory orders; make conditional, alternative and ancillary orders and directions; grant relief to an applicant; extend or abridge time limits; review its decision where a party to proceedings did not appear and was not represented; reserve a question of law for the opinion of the Supreme Court; and to correct clerical mistakes, accidental errors, material miscalculations or defects of form.

Section 119 provides for TASCAT or the Supreme Court to cure an irregularity affecting proceedings or any matter to which the proceedings relate.

Division 10 – Costs

Section 120: Costs of parties

This section provides that parties bear their own costs in proceedings unless TASCAT makes an order for a party to pay all or any of the costs of another party. TASCAT may only make such an order if it considers it appropriate to do so after taking into account the matters specified in subsection (2).

These provisions, including the power to make an order for costs, may be displaced if otherwise specified in the Act, a relevant Act or regulations under a relevant Act.

Subsection (3) operates to prevent an order being made in the Mental Health stream or Guardianship stream for a party to pay the costs of another party.

Clause 20 of the Bill amends Schedule 2 of the Act to provide special costs provisions that apply to matters in the Resource and Planning stream and to exclude the application of this section to that stream.

Section 121: Costs of parties – related matters

This section provides that an order to pay the costs of another party may include an order for the payment of an amount to compensate the other party for any expenses or loss resulting from any proceedings or matter.

The power to compensate a party may only be exercised by the President, a Deputy President or a legally qualified member of TASCAT, and such an order can only be made against a party where that party brought or conducted the proceedings frivolously or vexatiously, or circumstances exist as prescribed in the regulations.

An order to compensate may be made against the representative of a party, rather than the party represented, if the representative acted in, or delayed, the proceedings in a way that resulted in unnecessary costs.

Section 120(3) operates to prevent such an order being made in the Mental Health stream or Guardianship stream.

Clause 20 of the Bill amends Schedule 2 of the Act to provide special costs provisions that apply to matters in the Resource and

Planning stream and to exclude the application of this section to that stream.

Section 122: Costs incurred by Tribunal in relation to proceedings

This section provides for TASCAT to make an order requiring a party to pay all or any of the costs of proceedings, which are those costs incurred by TASCAT in relation to proceedings other than the costs of a party.

If the matter that is the subject of the proceeding comes within TASCAT's review jurisdiction, such an order can only be made against a party where that party brought or conducted the proceedings frivolously or vexatiously, or circumstances exist as prescribed in the regulations.

Subsection (3) operates to prevent such an order being made in the Mental Health stream or Guardianship stream.

Clause 20 of the Bill amends Schedule 2 of the Act to provide special costs provisions that apply to matters in the Resource and Planning stream and to exclude the application of this section to that stream.

Division 11 – Information

Sections 123-124

The sections in this Division deal with the publication and provision of information in relation to proceedings in the Guardianship stream.

Division 12 – Process and Enforcement

Section 125-128

The sections in this Division set out the powers and procedures of TASCAT in relation to process and enforcement.

These sections deal with: the ways in which documents and notices may be submitted and served on a person, TASCAT or another body; how orders of TASCAT may be enforced by a court; proof of decisions and orders of TASCAT; and penalties for disrupting Tribunal proceedings.

PART 9 – FEDERAL JURISDICTION PROCEEDINGS

Sections 129-135

This Part inserts sections into the Act that provide for proceedings on an application to be referred to the Magistrates Court in circumstances where TASCAT does not, or may not, have jurisdiction to determine the application because it involves

matters of the kind referred to in section 75 or 76 of the Constitution of the Commonwealth (federal jurisdiction).

PART 10 – APPEALS TO SUPREME COURT

Sections 136-139

This Part inserts sections into the Act that provide for appeals from TASCAT to the Supreme Court of Tasmania.

These section consolidate all such appeals that are currently provided for in relevant Acts, and replicates the current nature of those appeals in terms of who may appeal, and whether the appeal is permitted on a question of law only, on a question of law or fact, or on a question of law as of right and on a question of fact with the leave of the Court.

PART 11 – PROTECTION AND IMMUNITIES

Sections 140-142

This Part inserts sections into the Act that provide for protections and immunities in certain circumstances for members of TASCAT, Tribunal staff and persons acting under TASCAT's direction, as well as parties and their representatives, witnesses, experts, and persons presiding over alternative dispute resolution processes.

PART 12 – MISCELLANEOUS

Sections 143-146

This Part inserts sections into the Act that provide for miscellaneous matters.

These sections deal with: the requirements for an annual report on the operation and administration of TASCAT; use of TASCAT's seal; the making of regulations for the purposes of the Act; and administration of the Act.

PART 13 – SAVINGS AND TRANSITIONAL PROVISIONS

Division 1 – Abolition of Boards and Tribunals and Transition of Certain Members

Sections 147-151

The sections in this Division provide for the abolition of existing relevant Boards and Tribunals on the commencement day and for the current members of those Boards and Tribunals to cease to hold office. In accordance with section 150 and section 151, specified members of the abolished Boards and Tribunals will become members of TASCAT on the commencement day and receive remuneration.

Division 2 – Proceedings of former relevant Board or Tribunal

Sections 152 – 160

The sections in this Division provide transitional arrangements for proceedings that were commenced under a former relevant Board or Tribunal and not completed by the commencement day.

These sections deal with: the constitution, functions and powers of TASCAT when hearing and determining such proceedings; the completion of any court proceedings relating to the determination of a relevant Board or Tribunal; unexercised rights to apply or appeal to a relevant Board or Tribunal; allocation of transitional proceedings to a Division of TASCAT; the saving of orders of a relevant Board or Tribunal; the expiration of time periods; the savings of TASCAT's code of conduct and Mental Health Guidelines made under the *Mental Health Act 2013*; appointments and other matters to facilitate establishment of TASCAT; and general savings provisions.

Clause 19: **Schedule 1 amended (Relevant Acts)**

This clause amends Schedule 1 of the Act to update the list of relevant Acts for purposes of the Act.

Clause 20: **Schedule 2 amended (General Division)**

This clause amends Schedule 2 of the Act to make minor technical amendments to Part 1 and Part 3, and substitutes Part 4 of Schedule 2 with new Parts 4, 5, 6, 7 and 8. Clause Notes relating to these new Parts are set out below.

PART 4 – ANTI-DISCRIMINATION STREAM

The clauses in this Part relate to the Anti-Discrimination stream of TASCAT.

These clauses: identify the relevant Act, regulations and instruments in relation to which TASCAT exercises its functions and powers in this stream; and specify how TASCAT is to be constituted for proceedings in this stream.

PART 5 – HEALTH PRACTITIONERS STREAM

The clauses in this Part relate to the Health Practitioners stream of TASCAT.

These clauses: identify the relevant Acts, regulations and instruments in relation to which TASCAT exercises its functions and powers in this stream; and specify how TASCAT is to be constituted for proceedings in this stream.

PART 6 – FORESTRY PRACTICES STREAM

The clauses in this Part relate to the Forestry Practices stream of TASCAT.

These clauses: identify the relevant Acts, regulations and instruments in relation to which TASCAT exercises its functions and powers in this stream; and specify how TASCAT is to be constituted for proceedings in this stream.

PART 7 – PERSONAL COMPENSATION STREAM

The clauses in this Part relate to the Personal Compensation stream of TASCAT.

These clauses: identify the relevant Acts, regulations and instruments in relation to which TASCAT exercises its functions and powers in this stream; specify how TASCAT is to be constituted for proceedings in this stream; and set out provisions relating to the withdrawal of proceedings in this stream that exclude the operation section 88(2) of the Act.

PART 8 – RESOURCE AND PLANNING STREAM

The clauses in this Part relate to the Resource and Planning stream of TASCAT.

These clauses: define terms that apply to this Part; identify the relevant Acts, regulations and instruments in relation to which TASCAT exercises its functions and powers in this stream; specify how TASCAT is to be constituted for proceedings in this stream; and clarify that TASCAT is part of the State's resource management and planning system in relation to proceedings in this stream.

These clauses also include special provisions that apply to matters in this stream relating to institution of proceedings, parties, representation, procedure, determination of appeals and applications, reasons for decisions, costs and refusal to answer questions or produce documents, which replicate provisions currently contained in the *Resource Management and Planning Appeal Tribunal Act 1993*. Where applicable, these provisions supplement or override general provisions in the Act that deal with these powers, procedures and processes.

Clause 21: **Schedule 3 amended (Protective Division)**

This clause amends Schedule 3 of the Act to make a minor technical amendments to Part 3, and substitutes Part 4 of Schedule 3 with new Parts 4 and 5. Clause Notes relating to these new Parts are set out below.

PART 4 – GUARDIANSHIP STREAM

The clauses in this Part relate to the Guardianship stream of TASCAT.

These clauses: define terms that apply to this Part; identify the relevant Acts, regulations and instruments in relation to which TASCAT exercises its functions and powers in this stream; and specify how TASCAT is to be constituted for proceedings in this stream.

These clauses also include special provisions that apply to matters in this stream relating to hearings, dismissal or striking out of applications, appearances, interim orders on adjournment, statements of reasons and publication of reports about proceedings in this stream, which replicate provisions currently contained in the *Guardianship and Administration Act 1995*. Where applicable, these provisions supplement or override general provisions in the Act that deal with these powers, procedures and processes.

PART 5 – MENTAL HEALTH STREAM

The clauses in this Part relate to the Mental Health stream of TASCAT.

These clauses: identify the relevant Acts, regulations and instruments in relation to which TASCAT exercises its functions and powers in this stream; and specify how TASCAT is to be constituted for proceedings in this stream.

Clause 22: **Repeal of Act**

This clause provides for repeal of the Act on the first anniversary of the day on which it commenced.