11 February 2021

Office of the Secretary
Department of Justice
GPO Box 825
HOBART TAS 7001

Via email: secretary@justice.tas.gov.au/haveyoursay@justice.tas.gov.au

Dear Ginna & Kerry,

RE: TASMANIAN CIVIL AND ADMINISTRATIVE TRIBUNAL AMENDMENT BILL 2020

Thank you for the opportunity to provide feedback in relation to the Amendment Bill. In your covering correspondence, you state that the Bill is the second of at least two Bills that will be tabled in Parliament as part of the establishment of TasCAT. This statement foreshadows that there may be a third Bill and these submissions should be read in the context that it is not known what is specifically intended to occur.

Jurisdiction

In the Tasmanian Bar's submission in respect of the Tasmanian Civil and Administrative Tribunal Bill 2020 which passed Parliament towards the end of last year ("the Act"), concerns were raised that the provisions in section 58 - Jurisdiction, did not adequately provide for the jurisdiction intended to be conferred by the policy for TasCAT.

Although Part 7 of the proposed Amendment Bill substitutes alternate provisions and establishes two types of jurisdiction, original and review, these provisions in our view remain problematic. The provisions mirror precisely those in "Part 3 – Jurisdiction" of the South Australian Civil and Administrative Tribunal Act 2013. While the provisions in the Amendment Bill are supposed to confer jurisdiction held by the individual Tribunals under the relevant Acts in Schedule 1 of the Act, in our view they do not achieve this and will not achieve this.

To achieve what is required, either of two things should occur. Either subsection 58(2) needs to be amended so that it reads –

*"Without limiting subsection (1), if a provision of **a relevant Act** enables an application, referral or appeal to be made to the **relevant Tribunal**, or a claim to be brought before the*

relevant Tribunal, this *Act will be taken to confer* ***that*** *jurisdiction on the Tribunal to deal with the matter concerned."*

Alternatively, each of the individual relevant Acts referred to in Schedule 1 of the Act will need to be the subject of consequential amendments. Is this what is intended?

In our view the solution suggested as the first alternative is preferrable because it does not require consequential amendments to ensure that the jurisdiction of the individual Schedule Acts and Tribunals are properly conferred on TasCAT.

Adopting identical wording to the South Australian provisions does not effectively confer jurisdiction as the meaning of "relevant Act" has a different meaning under the South Australian legislation to that given to this term in the Act. We assume consequential amendments to the individual Acts were made in South Australia to coincide with the commencement date of the 2013 legislation, although we have not reviewed this.

Sections 74 and 75 of the Amendment Bill seek to provide the means by which the original and review jurisdiction of TasCAT is to be distinguished. Once again the provisions are identical to those from the South Australian legislation. However because the nature of the jurisdiction of the Tribunals amalgamated in South Australia are somewhat different to those referred to in Schedule 1 of the 2020, the provisions will not be fit for purpose unless regulations are made contemporaneously which prescribe the types of relevant Tribunal decisions under each relevant Act.

In addition, subsection 75(2)(b) which provides that a reviewable decision is one made by the Crown or an agency or instrumentality of the Crown would create an anomaly in the workers compensation jurisdiction because State Service employees would be governed by the review jurisdiction but unless decisions to refuse compensation by private insurers who indemnify non State employees are prescribed as persons for the purposes of subsection 75(2)(b), the decisions refusing compensation by private insurers may come within the original jurisdiction based on the present drafting of the Amendment Bill. It should be noted that workers compensation claims are governed by a statutory corporation in South Australia and the motor vehicle compensation scheme is also different to that in Tasmania. These differences impact on what ought to be included in the review and original jurisdiction of TasCat and needs further consideration in our view.

The means provided to distinguish original and review jurisdiction is critical, because currently the Amendment Bill only provides for appeals from decisions of the Tribunal in its review jurisdiction. This is difficult to understand and we suspect this may be an oversight?

We would welcome the opportunity to meet and discuss these matters about jurisdiction. They are critically important.

Review jurisdiction

Section 77(2) of the Amendment Bill provides the ability to apply for a stay when a reviewable decision is subject to an application for review by TasCAT. However, only the Tribunal of its own motion or the decision maker can apply for a stay. There is no capacity for a person adversely affected by a reviewable decision to seek a stay. That is the person who has that greatest cause to apply for a stay. This is plainly unjust and contrary to existing rights under the relevant Acts. To illustrate this point, we refer to the Health Practitioner Tribunal jurisdiction. If the Medical Board of Australia makes a decision to suspend a doctor's registration following investigation of a notification against him or her, that decision is a reviewable decision. However, based on subsection 77(2) of the Amendment Bill, the doctor would not be able to seek a stay of the suspension pending an appeal. Currently doctors do have the capacity to do so, and we submit for obvious reasons.

Diversity jurisdiction

Section 84 of the Amendment Bill has doubtful legal efficacy and there also appears to be a clerical/typographical error in subsection 84(2). On its face, section 84 purports to empower the Magistrates Court to instruct or direct the Tribunal to undertake the compulsory conference under subsection 84(1). However the Tribunal, not being a court of record has no powers or jurisdiction in respect of matters that constitute "federal diversity proceedings", including procedural aspects of those. It seems doubtful that the Magistrates Court can bestow procedural powers on the Tribunal. The purpose of this provision is not clear.

Section 87 of the Amendment Bill refers to purported orders being orders made by a relevant Tribunal or the Tribunal which would otherwise be invalid due to the diversity jurisdiction issues. The provisions seek to validate the orders and make failures to comply with purported orders offences capable of being made subject to a fine. The style of legislative drafting in our view is not ideal and the provisions in the South Australian legislation are preferrable.[1] There is also in our view considerable doubt about the legal validity of these provisions as drafted.

We note that the above provisions of the Amendment Bill are identical to the South Australian legislation and it would be interesting to know if they have been challenged.

Dismissal of proceedings

Sections 96, 97 and 98 of the Amendment Bill empower TasCAT to dismiss parts or all of a proceeding. In the case of the power in section 96, the power is expressed to be one exercisable only by a legally qualified member of the Tribunal or a Registrar who has been authorised in writing by the President. However, the power to dismiss in other circumstances

[1] See section 89(2)

described in section 97 and 98 is not limited to being a power exercisable only by a legally qualified member. In our view it should be.

There also seems to be inconsistency in that a dismissal under sections 97 and 98 do not preclude reinstatement of proceedings if authorised by leave given by the President or Deputy President, whereas no such capacity exists in section 96. Is there a specific reason for this? We appreciate that the inconsistency referred to exists in the South Australian legislation,[2] however there does not appear to be good reason for the inconsistency.

Conferences, mediations and settlement

There appears to be an anomaly in the operation and interaction between subsection 100(4)(a) and subsection 100(5). It appears that reference to "member" in subsection 100(5) should be **President or Deputy President**. Comparison to the South Australian provision (section 50) bears this observation out.

Section 101 provides for the President to provide a list of specified mediators for the conduct or mediations by the Tribunal. While there is value in this to ensure appropriately qualified and suitable persons act as mediators, in our view there needs to be a transparent merits process for compilation of the relevant list. This should be something addressed in the Rules of the Tribunal.

Section 102(2) appears to contain clerical or typographical error in that the concluding words. In our view it should read *"referred the matter or aspect of the matter under section 101 for mediation"*.

Representation before the Tribunal

Subsection 107(3) in our view is too narrow as it would not prevent legal practitioners who have been suspended or struck off in other jurisdictions from appearing in the Tribunal. We note that the South Australian equivalent, section 56(4) is wider and in our view preferrable. It would be undesirable for persons who are not able to hold a practising certificate in other jurisdictions to be able to establish a business representing persons in TasCAT. We would submit that subsection (3) should be amended to reflect that being removed from the roll of practitioners in any State or Territory prevents a person from appearing in TasCAT as a representative of a party.

Costs

We anticipate that operation and construction of sections 108 and 109 will likely cause litigation, at least in the early stages of the establishment of TasCAT. The provisions are not clear and that the "costs of proceedings" may well be a component of the costs of a party contemplated in section 108.

[2] See sections 47 and 48

Appeals

Part 10 of the Amendment Bill deals with appeals but there is only provision for appeals in the review jurisdiction. There does not appear to be any justification for this. Further, it will likely create conflict between appeal provisions in the relevant Acts, leading to dispute about whether there is an avenue of appeal and if so, the nature of the appeal.

We submit that careful review of the appeal provisions in the relevant Acts is necessary and amendments made to ensure existing rights of appeal are not fettered.

We note that the South Australian legislation does permit appeals from the original jurisdiction.

Section 122 provides for the procedures on appeal and specifies a time limit of 30 days. This period is in conflict with the period of appeal allowed for in a number of the relevant Acts and also under the Supreme Court Rules, which is generally 21 days. This should be further considered and amendment made to the Bill to avoid confusion, and unnecessary disputes in the future.

There appears to be a clerical error in section 124(4). This provision deals with the Supreme Court's stay powers and therefore subsection (4) is unnecessary and in our submission, should be removed.

Rules

There is typographical error at section 142(4). The internal reference should be to section 141.

Yours faithfully

SANDRA TAGLIERI SC

PRESIDENT