STANDING COMMITTEE ON LEGISLATION

INQUIRY INTO THE JURISDICTION AND OPERATION OF THE STATE ADMINISTRATIVE TRIBUNAL

TRANSCRIPT OF EVIDENCE TAKEN
AT PERTH
WEDNESDAY, 30 APRIL 2008

SESSION TWO

Members

Hon Graham Giffard (Chair)
Hon Giz Watson (Deputy Chair)
Hon Ken Baston
Hon Sally Talbot

Hon George Cash (Substitute member for Hon Peter Collier)

Hearing commenced at 10.08 am

MIDDLE, MR GARRY
Appeals Convenor, Office of Appeals Convenor,
affirmed and examined:

The CHAIR: On behalf of the committee, I welcome you to the meeting. Before we begin, I will ask you to take either the oath or the affirmation.

[Witness took the affirmation.]

The CHAIR: You will have signed a document entitled "Information for Witnesses". Have you read and understood that document?

Mr Middle: I have.

The CHAIR: These proceedings are being recorded by Hansard, and a transcript of your evidence will be provided to you. To assist the committee and Hansard, please quote the title of any document that you refer to during the course of this hearing, for the record, and please be aware of the microphones and try to talk into them. Ensure that you do not cover them with papers or make noise near them. I remind you that your transcript will become a matter for the public record. If for some reason you wish to make a confidential statement during today's proceedings, you should request that the evidence be taken in closed session. If the committee grants your request, any public and media in attendance will be excluded from the hearing. Please note that until such time as the transcript of your public evidence is finalised, it should not be made public. I advise you that the premature publication or disclosure of public evidence may constitute a contempt of Parliament and may mean that the material published or disclosed is not subject to parliamentary privilege.

I see that you have prepared for us a document, which we all have a copy of, and thank you for that. You have received in advance the questions that we have prepared for you. As you observed in a previous session, it is our preference for you to simply address that and take us through that document. In the first instance, you are invited to make more general comments if you wish and, certainly at the conclusion, any additional comments that you wish to make. So I will hand over to you and invite you to take us through this, if you like.

Mr Middle: Thank you, Chairman. Just to clarify, I can, as I am going through my document, add supplementary information as it comes to me?

The CHAIR: Yes, absolutely.

Mr Middle: Thank you. It reads —

> Firstly, thankyou for the opportunity to address the Committee on this important issue.
>
> As an overall comment, I note that the questions refer to 'proposals' as defined under the *Environmental Protection Act 1986* (the EP Act) and not 'schemes'. My comments will, therefore, be restricted to proposals only.
>
> The Committee's first question relates to a suggestion that section 41 of the EP Act be amended to allow the Tribunal to finally determine a proceeding the subject of an EPA assessment but to not implement that decision.

[10.10 am]

> I offer the following advice.

> The Office of the Appeals Convenor manages for the Minister for the Environment the section 45 (of the EP Act) process for deciding on implementation of proposals. This process only commences after the Minister has determined any appeals against an EPA assessment report.

It is important to make that point. We do not start that process until the appeals are determined. The document continues —

> Section 45(1) requires that the Minister for the Environment consults with decision-making authorities (DMAs) and if possible agree on whether or not a proposal the subject of an EPA assessment should proceed or not and if so what conditions or procedures should apply. Where at least one DMA is a Minister, then the Minister for Environment only needs to get the agreement of that/those Minister(s), and there is no need to get agreement with non-Ministerial DMAs. It should be noted, based on the Supreme Court decision on the BGC case (referring to the then Town Planning Appeals Tribunal), that whilst SAT is a DMA for the purposes of section 41 and is thus constrained, it is not a DMA for the purposes of section 45.

By that I mean that the minister does not need to reach agreement with SAT if he is the only DMA. I will get to the reason that I am making that point. The document continues —

> Proposals the subject of EPA assessments are those where the EPA (or the Minister on appeal) determines that the proposal is environmentally significant (see *Environmental Impact Assessment (Part IV Division 1) Administrative Procedures 2002, section 4*). Most proposals, therefore, are not subject to EPA assessment and the constraints of section 41.

Most planning proposals therefore do not come before the EPA. The document continues —

> Section 41 prevents DMAs from making any decision that "could have the effect of causing or allowing the proposal to be implemented" until the Minister gives a final authorisation under section 45(7) of the EP Act. It could be argued that a DMA could proceed to investigate a proposal under its own jurisdiction but must stop short of actually making a final decision. It could be further argued that in order for a DMA to properly consider the proposal as part of the section 45 consultation, it must have a proper understanding of the proposal so it can be informed about whether the proposal should proceed or not and if so what conditions or procedures should apply.

My point is that because the minister needs to consult with and get agreement with them, one would think that the DMA should go a long way down the track of understanding the proposal before it. The document continues —

> To gain this level of understanding the DMA would need to give considerable consideration to the proposal through its own processes. Consequently, a DMA could then quickly make its own decision once a section 45(7) authorisation has been issued. In short, the other decision-making processes (including SAT) do not need to be 'back-to-back' with the environmental assessment process but can be concurrent but stopping short of making the final decision.
>
> In the end, however, whether the constraints on DMAs that section 41 imposes remains or not is a government policy question.

I make those observations. The document continues —

> The Committee's second question refers to a suggestion in SAT's 2006 Annual Report that the Minister for the Environment could intervene in proceedings which concern a proposal the subject of an EPA assessment. I offer the following advice.
>
> This suggestion is a follow-on from the suggestion referred to in question 1, and my comments made in question 1 apply here. I also offer the following additional advice.

> This suggested process would apply where the restrictions of section 41 are lifted. Given that section 45 of the EP Act would still apply even if section 41 was amended, it is not clear why the minister would need to intervene where a proposal is already the subject of an EPA assessment given that he has his own decision to make independent of the SAT process.
>
> The Committee's third question relates to appeals under Parts IV and V of the EP Act, and Question 4 related specifically to appeals under Part V of the EP Act. I offer the following advice.
>
> At the start —

This is not surprising —

> as the Appeals Convenor, my interest in this issue needs to be noted.

I guess my point is that I have an interest - I guess I can be keeping appeals in my possession. To continue -

> As background, I present the following information on appeals received by this office.

I provide this information to give you some indication of the nature of the appeals we get and their number in both parts IV and V. The first is proposals appeals. It can be a single appeal or multiple appeals, but an individual proposal. You can see that by and large, up until the clearing regulations came in, by the far the most number of proposals appealed were through part IV of the act. There were not many appeals under part V of the act. That changed when the vegetation regulations came in. You can see that by far the most significant decision appealed was a decision by the EPA to not assess. When you turn to the actual number of appeals rather than the number of proposals appealed, you can see, in terms of the number of appeals received, that reports, recommendations and the decision not to assess dominate again in the part V appeals. The last spike in 2002-03 was the Coral Coast proposal. That pushed our number through the roof, as you can see. The part IV appeals attracted the most public interest. The document continues —

> In terms of the number of appeals received, the Part IV process attracts more public interest than Part V, with the EPA assessment reports attracting the most interest. In terms of number of proposals appealed, Parts IV and V are about the same since the introduction of the Clearing Regulations and appeal provisions.
>
> The Part IV appeals include:
>
> - The decision of the EPA to not assess a proposal,
> - The level of assessment set by the EPA when it decides to assess a proposal,
> - The EPA report and recommendations — including draft conditions, and
> - The final Ministerial Statement.
>
> The first three appeals are subject to third party appeals, whereas the last appeal type can only be appealed by the proponent.

Of course, that is an appeal against a ministerial decision.

[10.20 am]

I should add at the end of that, which I did not say in my written statement, that an appeals committee is a requirement whereby someone appeals a ministerial statement. It is a requirement of the act that a committee be set up specifically to deal with that because it is against the minister's decision. To continue —

> The most common appeal type — against the EPA report and recommendations — is, arguably, not a 'true' appeal at all but a submission to the Minister on the EPA assessment. The appeals process, therefore, is really one of providing further information to the Minister

> as part of his section 45 considerations. For this reason alone, SAT is, in my view, not the most suitable body to deal with these matters as it does not typically have an advisory role to Ministers.

Am I making clear what that appeal is?

The CHAIR: Yes.

Mr Middle: Thank you. To continue —

> The other appeal types, including the Part V appeals are, arguably, 'true' appeals in that appellants are objecting to an actual decision; in this first case (to not assess, the level of assessment set, the final Ministerial Statements or decisions by the Department of Environment and Conservation on licences, works approval and clearing permits). In my view there are six reasons why the appeals should remain outside the jurisdiction of SAT:

That is, both part IV and part V. To continue —

- The EP Act gives the Minister the power to determine all appeals other than the final Ministerial Statement. A decision to change this is a matter of government policy;

That is getting to, I guess, the intellectual reasons, if you want to put it that way. To continue —

- If the EP Act remains as giving the Minister the power to determine most appeals, any involvement of SAT would be advisory only replacing the role of the Appeals Convenor. SAT does not typically have that advisory role.
- The early Part IV appeals —

That is, on decision to not assess and the level of assessment if assessed —

> influence the ability of the Minister to have a role in section 45 of the Act.

By that I mean, for example, if there is an appeal against the decision to not assess, and if the minister upholds that appeal, he is effectively saying, "I want to make a decision under section 45 of the act." To continue —

> (to assess or not) and may involve questions of public interest. Arguably, the political process is best equipped to make a call on public interest, and the Minister may also be best placed to make a call as to whether a proposal should be subject to section 45 of the Act *(and EPA assessment);

That star does not belong there — sorry about that. To continue —

- There are often strong links between Part V and Part IV, notably where a proposal is subject to an EPA assessment and then later requires works approval and licensing.

A number of the major industries are affected, such as Alcoa in Wagerup — part IV then part V. To continue —

> Having a single entity (in this case the Minister) determining appeals for both Parts of the EP Act would better ensure consistency of appeal determinations and a consistent policy approach being applied;

That is in relation to whether you drop part V into SAT or keep part IV for the minister. That is addressing that issue. To continue —

- There may be occasions where a Part IV not assess decision is carried out concurrently with a DEC decision. The decision of the EPA to 'not assess' a proposal may be based on the ability of Part V to manage the proposal (for example, if the only environmental issue involves the clearing of native vegetation, then Part V can deal with the proposal).

This is a common thing that happens with not assessed decisions, where the EPA in not assessing says that the only issue is clearing or it might be air emissions through works approval; therefore, it does not need to assess it; it duplicates the work of the department. Often the EPA will make that decision, and that is consistent with the administration procedures I quoted earlier. To continue —

> Appeals could be received on both decisions and the Minister can determine the appeal concurrently and consistently; and
>
> - In cases where no Part IV assessment is required but a Part V approval is, there will be cases where a certain policy matter is relevant and was set by the Minister through an unrelated appeal on a Part IV assessment — for example, matters including Bush Forever or an air quality standard. Having the same entity determining these directly unrelated Part V appeals means that it is more likely that a common policy position and related decision making is adopted.

I guess what I mean there is, for example, with Bush Forever, the EPA may assess something involving Bush Forever and, through appeals, the minister determines an appeal and sets a policy position about that. If the department then deals with a clearing proposal that has not been subject to an EPA assessment but is subject to appeal, the minister is conscious of the policy he has made in other Bush Forever issues, and applies that consistently to the part V decision as well. It allows for consistency of decision making. I need to make the following point —

> In the end, while I have argued a merits-based case to keep Parts IV and V appeals within jurisdiction of the Minister and the Appeals Convener, this is really a government policy matter.
>
> Question 5 relates to third party appeal rights under the EP Act, and I offer the following advice.
>
> By far the vast majority of EP Act appeals are from third parties. Any move to remove or reduce these rights will be strongly opposed by the community. Should SAT be given jurisdiction over any of the environmental appeals, it would need to adapt its processes and procedures to deal with these third party appeals. It has been my experience that one of the reasons why individuals and community groups use the provisions of Part IV of the EP Act is that the planning system does not allow third party appeal rights. Many appeals against EPA decisions to not assess proposals are because the community has more confidence in the environmental assessment process than the planning process.
>
> I have no other issues I would like to address.

That answers the last question.

> Once again, thank you for the opportunity to address the committee on this significant and important issue.

The CHAIR: That is quite complete and all very clear. Thank you very much for your evidence.

Mr Middle: A pleasure.

Hearing concluded at 10.26 am