STANDING COMMITTEE ON LEGISLATION

INQUIRY INTO THE JURISDICTION AND OPERATION OF THE STATE ADMINISTRATIVE TRIBUNAL

TRANSCRIPT OF EVIDENCE TAKEN
AT PERTH
FRIDAY, 15 FEBRUARY 2008

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 10.07 am

BARKER, HON JUSTICE MICHAEL
President, State Administrative Tribunal,
affirmed and examined:

WATT, MR ALEXANDER
Executive Officer, State Administrative Tribunal,
sworn and examined:

CHANEY, HIS HONOUR JUDGE JOHN
Deputy President, State Administrative Tribunal,
sworn and examined:

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

[Hon Justice Barker took the affirmation.]

[Mr Watt took the oath.]

CHAIR: Thank you. I now ask you to state the capacity in which you appear before the committee.

Justice Barker: I am a judge of the Supreme Court of Western Australia and President of the State Administrative Tribunal, in which particular capacity I appear today.

Mr Watt: I appear as the Executive Officer of the State Administrative Tribunal.

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

Justice Barker: Yes, I have.

Mr Watt: Yes, I have.

CHAIR: Thank you. These proceedings are being recorded by Hansard. A transcript of your evidence will be provided to you. To assist the committee and Hansard, please quote the full title of any document you refer to during the course of this hearing for the record. Please be aware of the microphones and try to talk into them, and 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 private 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 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.

What we propose to do today - and thank you very much for the documents that you have provided to the committee - firstly, in terms of timing we are envisaging that if we are still going at 11.30 am we will take a short break then and continue on and see how we go beyond that time. In terms of the procedure for today's hearing we will invite you to speak to the document that you have presented to us and to take the committee through that. As questions arise, members of the

committee may well ask you to further expand on issues that are raised. So I will hand it over to you and invite you to address the committee on that document.

Justice Barker: Thanks very much, Mr Chairman. I should also say that, as on the last occasion, we had hoped today that my Deputy President, Judge John Chaney, would be in attendance. He, however, at 9.30 am got called away to an urgent directions hearing and he is still hoping to get here; so he may arrive a little later, if that is acceptable.

CHAIR: Yes.

Justice Barker: At the table here this morning, as we have noted, I as president of the tribunal and the tribunal's Executive Officer, Alex Watt, appear to deal with any questions. Alex, I think, as on the last occasion, is particularly able to touch on anything that has a particularly administrative aspect to it, and there might be some issues of that nature that he can add to or assist with during the course of this presentation. The tribunal, as previously, is very pleased to be able to meet with the members of the committee and deal with any of the questions that you might have of me or us. We, of course, have provided you, for the purposes of this morning, with a document which is described as the tribunal's answers to the further questions. We have taken each of the questions as they were asked and gone through them from one to the end. The number of the last one was 78; so there is a little but not much repetition in there. I think it is probably easier, as you suggest Mr Chairman, to go through and perhaps I can mention the matter, not read fully all of the questions, and perhaps speak to some of the answers.

CHAIR: Sure.

Justice Barker: And you can tell me if you want me to linger or there are any questions, because some answers are longer than others. The very first question draws attention to the tribunal's 2007 - last year's - annual report, which indicated that the average time for lodgement to completion of an application in the development and resources stream, the vocational regulation stream and the commercial and civil stream had increased slightly over the figures provided in the previous year, as explained in the 2006 annual report. There is some sort of question the president of course is always asking himself and of others as far as the operation of the tribunal is concerned: why is that happening? I think the reasons are relatively simple. The 2007 report was for sort of the third reporting period in the tribunal, so we were not even three years old at that point, and the tribunal in that sense is still finding its statistical feet. I do not think the increases in times are of any real significance; they simply demonstrate the ebbs and flows, I think, that we will see from year to year in the flow of work. For example, we have pointed out in relation to the development and resources stream that there is a significant increase in the workload. Indeed in similar sorts of tribunal work around the country it is a common feature that workflow can go up and down depending on the state of the economy. If building and development work, for example, slows down because of economic contraction, tribunals see fewer review applications. In Western Australia, as we all know, at the moment we are in a boom period, and we are in this new year as well - and it will come out in the next annual report - seeing more applications come into the D & R section, as we call it. So there are other more particular issues. We had a few long, complex applications that took a little more time and we have also made a point of saying here, and there are other questions about it, that some of the matters we have in that area are affected by our inability to finalise matters which are the subject of environmental impact assessment and of the Environmental Protection Act. We, like any other decision maker, cannot move on anything, cannot make a decision, while something is the subject of environmental impact assessment. So all of those matters in relation to development and resources decision making conspired to push the average time up. But, as I said earlier, I do not think it is a matter of any particular significance.

In the vocational regulation stream it is simply a matter of an increased number of more complex and longer matters. As the tribunal was established in early '05 and we have progressed, the matters keep coming in. Certainly we are seeing in vocational matters some quite big and complex

matters coming, particularly in relation to medical regulation. There are a number of matters, which I usually manage in the tribunal, which involve medical practitioners who are the subject of applications which involve numerous allegations, numerous parties and there is a broad public interest in relation to the matters; and they are not quickly or easily resolved and often involve a number of expert witnesses. So, in that area in particular you usually do not get quick resolution. Additionally, in many areas of vocational regulation when parties are the subject of an application to the tribunal, they very often are in a sense protected by professional indemnity insurance, which means their rights are subrogated to the insurers. They are legally represented and usually their legal representatives seek to take great care not to let anything happen in the course of disciplinary proceedings that might affect the outcome of criminal or civil proceedings that are related.

There is also in general terms a range of matters that come before the tribunal in VR matters, for example in relation to nursing matters - not only in relation to nursing matters - where people have actually been charged with criminal offences.

[10.20 am]

The tribunal cannot move in fairness to the rights of those persons in those other proceedings. Until those other proceedings are out of the way, people cannot be obliged, in any sense, to incriminate themselves when they have a pending criminal proceeding against them. That often slows us down. Over the past two and a half years, to the end of that reporting period, more of these matters have come into the system and we are starting to get a good sense of how quickly, on average, matters can be completed in the tribunal.

In the commercial and civil stream there was an explanation provided in the 2007 annual report about why there have been some changes, and the explanation is set out in the answer. One interesting area that the tribunal handles is what I call building control matters in relation to local government decisions. These are matters in which people have not complied with building plans or they have departed from the building plans and local government has issued notices. In the pre-SAT days, those matters went to the Minister for Local Government, who was advised by an official in the department, and they were then given to the tribunal and we looked for some quick ways of dealing with them because there was a very large backlog in the department. Many of those matters were quite old. Our initial approach was to really push people to conclusion quickly. In the previous 12 months of the last reporting period we discovered that, in effect, local governments and parties wanted to adopt a procedure that gave them greater opportunity to talk, cooperate and then come back to us to try to resolve the matter. We often encourage parties to come to their own resolution of the matter. The result of amending our approach was to cause the determination period to go out a little bit. In effect, it happened with the consent of the usual stakeholders in those areas. The tribunal really does encourage parties to try to resolve their own matters. There are a range of matters, and I will come to an example later, in which we sometimes invite the primary decision maker to reconsider a decision because we think it is often appropriate for the primary decision maker to take full responsibility for a decision.

The commercial and civil area also involves commercial tenancy matters, and from time to time in any year we will get a big, complex commercial tenancy matter and such matters take more time. The other area is the Building Disputes Tribunal. You will have noted in a later question that the tribunal has experienced difficulties with the Building Disputes Tribunal post decision-making processes. We are dependent on having from the tribunal a set of reasons for its decision so we can decide whether it is a matter in respect of which we should give leave for further argument in the tribunal. I am not sure that I have explicitly said it in anything I have said to the committee previously or in this particular set of submissions, but I am personally coming to the view that the functions of the Building Disputes Tribunal would be usefully integrated with those of the State Administrative Tribunal. We have other examples of that. You could replicate the system of having primary decision making with a further review, as we currently have by the State

Administrative Tribunal, wholly within the tribunal. You could have State Administrative Tribunal members, with all of the appropriate expertise, deciding these matters in the tribunal. If somebody wanted to have a further second-tier review, you could have that, for example, before a judicial member and other relevant members of the State Administrative Tribunal. That is what happens in relation to a lot of planning and development decision making, for example, where a non-legally trained member, if they make a decision and there is a question of law involved, can seek review by the president. I deal with a number of such matters.

In the guardianship and administration area, if an initial decision is made by a member, you can seek review within the tribunal by a full tribunal of three people. This is the notion of first-tier and second-tier review. I think it would be seriously worth considering that in respect of the Building Disputes Tribunal. The reason I am coming to that view and expressing it now is that there was uncertainty, I suppose is one way of putting it, at the time of the SAT task force, which I chaired back in 2002, as to what the right answer was at that point. Do you leave the BDT on its own with the appeal through to the tribunal or do you bring it in? The reality is the BDT is comprised largely of part-time people. One of the important reasons for establishing the State Administrative Tribunal was that you were able to have full-time people who were able to act expeditiously. The BDT, once it makes a decision and then has to prepare reasons, is dependent on, very often, the part-time member getting the job done. It can take some time. In a very recent example, following a discussion I had the other day about this with the senior member Mr Raymond in the tribunal, who often hears a lot of the review applications that come through, we received a letter from the BDT explaining that it was terribly sorry that the reasons for its decision could not come through because the part-time member, who is a barrister, I think, was engaged on other important professional matters, which meant that the reasons could not be generated quickly enough. That just slows us down, and I do not think that, in the end, having a part-time tribunal in relation to building matters actually serves the people of the state who get caught up in that sort of disputation.

That is a very long way of saying I might answer shortly some of the questions, Mr Chairman, but that is question one. Is there anything you would like me to deal with about that?

Hon GEORGE CASH: Mr Chairman, through you - this is really a question firstly, Justice Barker, to the committee - would it be convenient for us to ask Justice Barker to formally write in respect of this matter or do we rely on what has just been said? I am concerned that we must get what he believes appropriate in the proper terms. I am wondering whether sufficient has been said for us to get that in proper terms or whether it is convenient to ask Justice Barker to put his suggestion in writing.

Justice Barker: Mr Chairman, I am more than happy to put it in writing, and I could in that sense slightly formalise the proposal.

CHAIR: We would invite you to do that, if you feel the need. We have just heard evidence, so I think we have enough to at least raise that, but it might be appropriate for you to formalise that.

Justice Barker: Just to document the proposal.

CHAIR: Yes, to formalise that, and you might look to add any further arguments in support.

Justice Barker: Yes. I would not really say much more, but I would just spell it out in a few simple paragraphs because it is a simple proposition.

I will move to the second question. Again, the tribunal's annual report - and I am pleased to see that our annual report is at least read by some people in the community, and read seriously - states that in every case the directions hearing or hearings is used to determine whether it is appropriate for the matter to be referred to a mediation or a compulsory conference. The question that follows then is: what process in a directions hearing is used to determine whether mediation or compulsory conference is appropriate to the matter?

I notice, Mr Chairman, that the Deputy President, Judge John Chaney, has just arrived. Do you want to swear him in?

CHAIR: We might invite Judge Chaney, firstly, to take either an oath or affirmation.

[Witness took the oath.]

CHAIR: Can you please state your full name and the capacity in which you appear before the committee?

Judge Chaney: John Anthony Chaney, and I appear as the Deputy President of the State Administrative Tribunal.

CHAIR: You have signed a document entitled "Information for witnesses"?

Judge Chaney: I have.

CHAIR: Have you read and understood that document?

Judge Chaney: I have.

CHAIR: These proceedings are being recorded by Hansard. A transcript of your evidence will be provided to you. To assist the committee and Hansard, please quote the full title of any document you refer to during the course of this hearing for the record. Please be aware of the microphones and try to talk into them, and 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 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.

Judge Chaney, we are going through the document that has been provided to the committee by you. Justice Barker is taking us through that document and we are actually on the second page and the second question; we have just commenced that.

[10.30 am]

Judge Chaney: Can I just apologise -

CHAIR You have not missed too much.

Judge Chaney: I am pleased to hear it. I apologise for my lateness. I was tied up in a hearing that went a little longer than I anticipated.

Justice Barker: Thank you very much. The second question, which I just read out, asked about the process that is used in a directions hearing to determine whether something should go to mediation or to a compulsory conference. You made just a small point, but it is probably an important point, in reminding members of the committee about that. That particular comment was drawn from discussion about what happens in the commercial and civil stream. Nonetheless, it is generally relevant throughout the tribunal, because in many, many areas we go to a first directions hearing quite quickly. That is where we start to sort out what sort of treatment and what sort of decision-making approach we should take in relation to a matter that is before us. One of the first questions that comes up is whether a matter should be referred to mediation. I think I may have touched on this on the last occasion, but you will appreciate that compulsory conferences do not happen a lot in the tribunal. We, ourselves, used to wonder what the difference should be between a mediation and a compulsory conference and we have described it in various ways. We sometimes use a compulsory conference if we think that a party ought to sit down and talk with the other with the assistance of a tribunal member and is unwilling to do so, or there is a particular task that needs to be undertaken and we want in that conference to be much more direct in relation to a matter than

you might be when conducting a traditional mediation in which you are trying to facilitate discussion between the parties. Practice in the tribunal, though, has developed to a point where we expect that if a matter goes to something like mediation or a compulsory conference - some non-final hearing method of trying to resolve a matter - it will be mediation. Also in that process, we are fortified by our own experience that an enormous number of matters do resolve at mediation. We have tried to develop, and I think successfully, a culture within the tribunal in many areas that mediation is an important part of the process. Parties and their professional advisers often arrive at the tribunal having had some experience of the tribunal and with an understanding that a matter might go to mediation. A question will often be: why should it not go? There are occasions when matters do not go to mediation - when the parties say that it is a strictly legal question, that the matter needs to be resolved or that it is something of a test case - and the quickest way home in resolving the matter is to list it for a final hearing and to decide it. That is fine. In many other cases, the quickest way home is to get the parties to talk. We look at the nature of the matter. Of course, at the first directions hearing for most review matters, for example, we already have the decision that has been made by the primary decision maker. We can take a planning matter as an example, which many of us would be familiar with. The local government has already issued a statement of its reasons for a decision, so you can see the primary issues; for example, the building is too high and it will make too much noise. You know the primary issues. At the directions hearing we have not put the applicant to the trouble and expense of having to respond to all of that - the party has just filed an application primarily saying that he does not agree with that decision - so we will put the matter into mediation. Not all matters go to mediation. I will just ask Judge Chaney to comment in a moment about what are called class 2 planning matters, which are the more complex ones that involve bigger and more expensive development, if you like, and the number that go to mediation. The question is explicitly addressed in directions hearings. In other streams, for example the vocational stream, mediation is very often asked for. The parties are often legally represented along the lines I suggested earlier. There might be a Medical Board matter or a nursing matter or the like and the parties ask to go to mediation. Experience again shows that if they get to mediation, they can have a frank discussion, which often will be, "Look, we accept that something has happened here. What really is the appropriate outcome?" They can then have that discussion there. A lot of matters are referred to mediation. In the directions hearing, someone will sometimes ask, "What is it about?" This happens particularly if it is a self-represented party who has never been in the tribunal before. We take time to explain it to them. When we order mediation, we send them a brochure that tells them what to expect at mediation. As I say, the outcomes from our point of view are very good. I will invite Judge Chaney to comment particularly on the class 2, more complex planning and development matters.

Judge Chaney: In terms of numbers - I do not think that we keep an accurate statistic - in the range of 80 per cent of matters that come in would be referred to mediation very quickly. Those that are not referred to mediation are usually because the parties tell us that they have already been through a lengthy process of discussion, that the issues that are left after those discussions are really irreconcilable between them and are narrowly defined, and that there is nothing more to be gained by talking. It is more efficient to just get those matters resolved. Frequently, parties will say that they have been talking and that they do not want to talk any more. That is not enough, because we find that the process of having a tribunal member there managing their discussions adds a great deal. Many things that have been discussed at length are not resolved on the spot. Sometimes you can tell that the issue is just of a nature where you are just going to be wasting time by putting people through more talking, so you go an alternative route. I would be surprised if it is more than 20 per cent of cases for which we do not give it a try.

Justice Barker: Thank you. There are some areas in which we do not usually raise mediation because it is going to prevent getting home in the quickest way. For example, most decision making under the Guardianship and Administration Act is done at a final hearing, which is listed soon after the application comes in, such that we are able to finalise a very high number of the

numerous applications in guardianship and administration within eight weeks. Our target is to deal with about 80 per cent of those applications within eight weeks. I think we often run at 85 to 90 per cent of all applications being decided within that time. Occasionally you get a matter that just calls out for some management and mediation - you know that it is not a matter that can be decided in one hearing in that short period. It might involve complex family arrangements, disputation or a large estate in an administration context, or expert evidence might be required about a person's capacity. You sometimes need to sit down and mediate. We are always at great pains to point out that mediation is not just negotiation; it is not just talking. It is different, as Judge Chaney has intimated, from whatever discussions people might have had across a counter at the local government about why they have not got what they wanted or whatever. It is a structured process that seeks really to identify issues and to get some rational discussion about them. It often removes a number of the clogs and enables a matter to be better managed thereafter. We do use it in other areas like guardianship and administration, but much more sparingly. The quickest way home is usually to develop systems within the final hearing that use the facilitator, decision-making techniques that are used in mediation so that people are treated with respect and are able to explore the issues in a non-adversarial setting, and that is the way we proceed. For a range of other matters, particularly the more administrative applications that come up in commercial tenancy, we simply decide the matter on the papers in a couple of days. Mediation has been identified as appropriate for a whole range of matters in the tribunal. Experience is now showing that it works. We keep monitoring it and refining it.

Unless there are any more questions on number 2, I will move to number 3. I should say for the benefit of Judge Chaney, who may not have heard what I just said to the committee about the Building Disputes Tribunal, that I have already said in relation to question 1 that I have lately come to the view that it would be sensible public policy if the functions of the Building Disputes Tribunal were in fact conferred on the State Administrative Tribunal.

[10.40am]

I think the first and second-tier decision-making processes that currently operate could be incorporated within the tribunal's functions, and steps along these lines would remove the inefficient operations, as I perceive them, of many aspects of the Building Disputes Tribunal. Having said that, the answer that we have already given as to the problems we have had and the delays we have had were anticipated by that particular observation I make to you.

We have taken real steps over the last three years to improve the position so far as the provision of information that has to come to us in a BDT matter is concerned. The observations I make about conferring that jurisdiction on the tribunal are not so much born of any sense of frustration, but a practical realisation, as I said to you earlier, that when you try to run tribunals on a part-time basis, you have these built-in inefficiencies. I do not think that you can easily overcome them, and that is, as I said earlier, one of the big reasons for the establishing of the State Administrative Tribunal. You are able to be very professional, you are able to be very timely, you get consistency, you have resources to get things done, and you actually have everything within the one jurisdiction, the one ministerial portfolio, the one reporting process to Parliament - BDT is actually within consumer affairs - and so on and so forth. I really would not say anything more about the answer we have given to question 3. We have explained what we have tried to do to rectify the delay, but we continue to experience difficulties.

The fourth question also usefully draws on our last annual report, where we noted that the development and resources stream had been constrained by its ability to achieve the objective stated in section 9A to act speedily in relation to proposals that are the subject of environmental assessment or review under the Environment Protection Act. It is noted that SAT has recommended the amendment of section 41 of the EP act, but the government had not taken up that suggestion, and SAT proposes that consideration should be given to it to enable the tribunal to adhere to its

statutory objectives. The question then was: have any recommendations or steps been taken or proposed since?

We set out in our answer what we have said about it in the past, including the suggestion by reference to New South Wales that you could perhaps come up with a system whereby the legislation says, "Well, the State Administrative Tribunal can proceed to make a decision, but it won't have any effect until the concurring other authorities make a decision as well". At least that way, SAT's view of things would be known and we would have made our decision. It would certainly be nice from a statistical point of view to be able to say, "We've cleaned that matter up from our point of view and got it out of the road." However, I think it underlies a further question that is asked on more than one occasion through these other questions as to the relationship between the environmental impact assessment process under the EP act and planning and development decision making under the Planning and Development Act, and indeed other legislation that comes through to the tribunal on review. That is a difficult matter and there are other questions raised later, which I think are worth touching on at this point so it is dealt with a little more holistically, about whether certain decision-making or review functions under the EP act should not be given to the State Administrative Tribunal. I would remind members, I think, of what I said on the previous occasion - we repeat in here elsewhere - that in the task force report back in 2002, this question was addressed. It was recommended there that so far as the, if you like, pollution licensing functions under the EP act are concerned, and appeals that can go through to the minister in relation to licensing, that review function could be given to the State Administrative Tribunal. The task force report did not recommend that environmental impact assessment decisions, however, should be reviewed by the tribunal. There is still policy discussion, as we can see from some of the submissions you have received, about that, and not necessarily partisan. You do not necessarily find green interests, if I can put it that way, arguing for or against it and industry interests fighting for or against it; sometimes, everyone is wanting to see a different system and arguing for it to come to the tribunal.

What I always say about this, and remind people about, is that the system of environmental impact assessment in Western Australia is different, I think, from all - certainly most - other jurisdictions in Australia. When the act came into play, I think in 1987, the terms of it enabled any development that is likely to have an impact on the environment to be referred to the EPA. Then, different levels of assessment can be required. There can be appeals against EPA decisions about whether something should be assessed and at what level of assessment it should be assessed. Then, if the matter goes on and a report is then produced and recommendations made, there are further opportunities for citizens to seek review of recommendations in a report or conditions proposed - very broad rights of review, and they have always been handled through, eventually, the environment appeals coordinator, going through to the Minister for the Environment. In other words, in Western Australia we have a huge range of matters in the environmental impact assessment process which can be the subject of review. If you simply said, "Well, that can all now be the subject of review in the State Administrative Tribunal", it would be a very, very, very - and I think a fourth "very" would be justified - large area of review in the tribunal. You see, in other states it works differently. In New South Wales, under the Environmental Planning and Assessment Act, there is an obligation, I think under part 4 of that act, for decision makers across the board who make decisions concerning resource matters to consider the environmental impact assessment. It is really a matter of judicial review there. If someone has not complied with their obligation to conduct an environmental impact assessment, you can go to the Land and Environment Court, as many people did in the early days in relation to forestry commissioners and so on, to say, "You can't take out that entire section of state forest without doing an environmental impact assessment." The Land and Environment Court said, "Well, where is it?" and I would say, "We haven't done one", and they would say, "Well, go away and do it." However, that is judicial review making sure a system works; they are not actually involved in the Land and Environment Court in conducting that assessment.

So, I have always thought that, at a very practical level, it is difficult to say the whole of the environmental impact assessment review procedures can just be put in the tribunal. However, I have thought - and we said so in the task force report - that the licensing processes that are often involved and related to industrial processes and the like are much more technical in nature, and I think the time has arrived when an expert body, like the tribunal, could conduct review of those matters. It gives that degree of impartiality and expertise to a much more scientific area in relation to industrial and resource processes. I sense that there is a degree of support from both sides of these sorts of debates in relation to that. At the time, the attitude of the Minister for the Environment to the task force was that there is still a lot of linkage between licensing of industrial and resource processes and environmental assessment, and I think there is certainly a lot of weight in that. You often have the environmental impact assessment looking at a particular proposal, including what they are actually going to be doing on the ground to carry something out, and that can lead to and dictate the licensing requirements. So the argument against giving licensing review to the State Administrative Tribunal is that licensing can be inextricably involved in environmental impact assessments, so let us leave it all in government. It is a difficult matter. I am never too nervous about expressing my view bluntly when I have a very clear view about it. This is a difficult public policy issue, and I do not have a concluded view about what the right answer is. However, it has not changed, for me, from what was said by the task force in its report in 2002. I am not sure, Mr Chairman, whether there are any questions coming out of that general proposition.

[10.50 am]

CHAIR: No.

Justice Barker: Thank you.

The fifth question is still with the SAT annual report. We proposed that section 37 be amended -

> *to permit the Minister for the Environment to intervene in proceedings which concern a proposal which has been referred to the EPA for environmental assessment. This would enable all environmental planning issues to be determined in a single proceeding.*

Reference is also made to the answer that we previously provided. There are questions about what action has been taken to pursue this amendment. That question is tied up in the same proposition as I was just talking about, really. We have looked to deal with this issue about harmonising our responsibilities in making planning decisions with the decision making that goes on under the EP Act in relation to environmental assessment. A way of looking at this is not just to say, "Let us make a decision, and then it does not have effect until the other bodies make their decisions." The other way we thought about it was to say, "Well, perhaps the Minister for Environment can become, in effect, party to these proceedings, and we can be told things." That would assist everybody, we thought. There is no doubt that some proposals get caught up under the EP Act, and do seem to take an awfully long time to be resolved. There might be good reasons for that if one looks very closely, but our experience is that we have matters coming on, being called on, or we put them off for six months, they come back on and we are still waiting to find out what is going to happen under the EP Act. We just see that as an inefficient process. That was another way of trying to skin that cat: to say that perhaps the Minister for Environment can come down here and argue their case. It is probably a pious hope, but it was just a thought we had.

Needless to say, while we make a lot of decisions, we have not, in any sense, tried to supplant the responsibilities you have as legislators. We are dependent upon the government to initiate things and for you to decide whether a law should be changed.

Question 6, still with the last annual report: attention is drawn to section 150 of the SAT Act. We are asked, there, to keep an eye on the extent to which primary decision makers comply with their obligations to notify people, when they make decisions, that they have the right of review in the tribunal, and to give written reasons for their decisions. This was an important public

accountability measure introduced through the SAT Act. Until that was done, in Western Australia you did not have a general right to get reasons from decision makers. In fact, the common law-general law position was that you were not entitled to them. Only if the statute said, could you get them. Everybody who is affected by SAT in our review jurisdiction has to meet those obligations, and we had to deal with our response to that obligation to report on compliance in our very first annual report for the first six months, back at 30 June 2005. We simply considered then, and we still consider now, in the course of looking at review applications when they come before us in the tribunal, whether decision makers met that responsibility. In most cases they do. If there is ever any citizen or affected person who has not been given the reasons for decision and has not been told about their rights, you can expect that they will let us know that it is not happening. We, I think, can say fairly confidently - I know it is something Judge Chaney and I have talked about each year when the annual report comes up - that it has worked well. Decision makers have been well advised across the public sector, and they let people know what their rights and responsibilities are. We think that is working well. No reason to think that it is not.

The seventh question is to do with a point touched on in the answers we provided on the last occasion, where we stated -

> *Normally, hearings of the Tribunal are conducted in public. The Tribunal may, however decide that all or part of a hearing is conducted in private and that only certain persons may be present. Such an order can only be made by a legally qualified member or by the presiding member.*

We are asked to explain, when a hearing is made private, what processes are used to inform the parties about the reasons for that, and are we satisfied with the effectiveness of the process. The answers are all there, and I would just make this point; very rarely does the tribunal sit in private. Section 61 of the SAT Act actually governs the circumstances in which we can take evidence privately or suppress people's names and such things. They are, in the end, all good reasons of public interest. We do, from time to time, make orders for non-publication of the parties' names. To give an example: there is a matter that I have been dealing with in the vocational regulation stream, where the Medical Board of Western Australia has made application to discipline a medical practitioner. It is one of these big matters that I have referred to. I have made orders that the practitioner's name not be published. That was done on the basis, and indeed there is an express provision in section 61, where there is a concern for the physical or mental condition of the persons concerned. There was psychiatric evidence from both sides that the practitioner would be at risk of self-harm if his name were to be published. I have maintained an order of that kind in that case. It seems to me entirely appropriate, and a proper exercise of the power Parliament has given us, to do that. In fact, the Attorney General has intervened to seek to have that restriction lifted because the relevant public health authorities wanted to be able to give publicity to the nature of the complaint they had made in respect of the practitioner, but I have maintained the non-publication order in view of the evidence before the tribunal.

There are other areas where we do not publish people's names. Under the Guardianship and Administration Act and the Mental Health Act, the parliamentary requirements in the statute are that we maintain confidentiality, in any event. There are other areas where it would be inimical to the proper administration of justice for a person's name to be published. In respect of closed hearings, it rarely happens. There might be some evidence that is taken occasionally, but I will ask Judge Chaney whether, as he is sitting there thinking about this, whether he can offer any example where he has done it. I am struggling to think, in my case, where I have done it.

There is an example provided, in a sense, in one of the questions asked because there was an administration hearing in Exmouth that the tribunal conducted, partly by video conference and partly in person. There were some interested persons, people who knew and had been, in the past, friendly with the represented person, who was the beneficiary of a large estate but who was also in

need of an administrator to manage their affairs. There were some tensions between that represented person and these old friends. The tribunal decided to request the interested persons to remain outside the hearing room. To that extent, it was a private hearing so far as those interested persons were concerned. That was the subject of complaints by those persons, or at least one of them, to the President about the way that tribunal hearing was conducted. I investigated it and I responded and I held the view then, and I hold it now, that it was an appropriate exercise of discretion to advance the proper interests of the hearing and everyone involved, to have made that order. That is still rare.

In some areas of decision making, in guardianship and the mental health ones, where to make proper decisions and to fully respect the rights of all of the people involved, you sometimes might need to ask people not to be in a hearing room and to have a private hearing at least for part of the matter. It is often a difficult matter and it has to be exercised carefully and with caution. I will ask Judge Chaney whether he can think of any other examples, or whether he thinks it happens terribly often in his case.

[11.00 am]

Judge Chaney: I am searching my memory, and one hesitates to speak categorically, but I am confident that I have not made any orders for private hearings. Nor am I aware, in the areas that I have direct responsibility for - the development and resources area and the commercial and civil area as well - of it having been done at all. I think it is extremely rare in my experience.

Justice Barker: Our answer goes on to point out of course that if this issue comes up, ordinarily all the parties concerned are there and people can make submissions about it, and then we make a decision and we give our reasons for making a decision. Often, our reasons will be a little bit like the sort of exchange one has here this morning; it is all on transcript and we can order the transcript and give it to the parties if they require it all. Indeed, that is what happened in relation to the Attorney General's intervention in the case I mentioned. The transcript is sent off and all the parties know in writing the reasons why I maintain that order. Mr Chairman, can I go on to number 8?

CHAIR: Please.

Justice Barker: That also refers to that earlier submission where we stated that the president considers the staffing profile requires review so that there are additional higher level managers, additional staff and greater opportunities for promotion within the tribunal. You asked what the status of the issue is. I am pleased to report - although nothing happens fast in the public sector, I keep discovering - that things are happening. The department has accepted that it is important to look closely at this issue, and I understand that we are soon to pursue a review with an externally engaged consultant to look at the way we work in respect of those very issues. There is some action and, from my perspective, some light through some tunnel a lot longer than the Graham Farmer tunnel.

Hon GEORGE CASH: If I might ask a question through you, Mr Chairman, to Justice Barker: Justice Barker, have you got adequate resources? In respect of that, I have heard what you have just said that there might be light at the end of the tunnel. I have heard that before, as you have heard it before, in life and the expected light never really comes through. In the report that was produced by Ross Elliott, a review of the tribunal support processes, in February 2007, the executive summary states that the implementation of the technology to support the tribunal operation has not met the expectations set when the tribunal was established, largely due to limited funding and resources; and, secondly, the human rights stream staff are under pressure, and particular focus to alleviate the pressure is required. You did mention or make reference to this general area when we last met, but the bottom line is: are you being properly resourced?

Justice Barker: When you are managing an organisation, Mr Cash, as you will appreciate, you can always do with more resources. I do not want to adopt any what might be considered a cheap

position about these matters, because I recognise how complex funding of the public sector is right across the board. From a purely institutional viewpoint of the State Administrative Tribunal, I believe the sort of staffing profile that we require requires additional funding. We do not have enough people at higher levels with the range of positions that I think are needed to be established to support our hardworking executive officer. As a result of our current structure, my view is, and I have made this very clear to the department, the executive officer is advised to take on more responsibility than ought to be the case in a properly organised institution at the staffing level. The institutional review that I understand will soon be underway will look at that, and if it is marked out, one would hope that the appropriate submissions will be made to Treasury. I am sure that any person who has been involved in government, whether as a minister or equivalent or as a hardworking member of Parliament or as a member of the public sector, knows the processes that have to be gone through to get Treasury to make eye contact and eventually put a signature on a cheque. I do not quibble with that; it is the way the system rightly works. When you are a new organisation like we were three years ago and a new kid on the block, the government has a more active interest in what you are doing, and as you become older and there are newer kids on the block, you know you are still loved but you see fewer signs of affection. We are perhaps in that position. The work we do right across the board is important. No citizen should have to wait or be prejudiced in any area of what the tribunal does, but there are obviously some areas - for example, persons who have decision-making difficulties in mental health or particularly guardianship and administration - where we want to do the quickest and best job we possibly can. We did, in fact, at about the time or perhaps just before these issues came up last time, divert resources to better support the guardianship and administration staff needs, and I will ask Mr Watt in a moment to add anything that he might to this. Over the three years of the tribunal, our staff numbers have increased. I think we started with around about 69 -

Mr Watt: Fifty-five and 69.

Justice Barker: There has been an increase and we are doing a good job. We would never want to argue that any deficiency in a performance at any time is just due to that, but the reality is that we, I am sure like many other organisations, could do better if we had more people. There are other issues associated with all of this, I hasten to add, because it is not an easy matter; it is complex. However, attracting appropriate staff and retaining appropriate staff are all difficult matters, I would understand, right through the public sector and perhaps right through the economy.

Hon GEORGE CASH: Justice Barker, thank you for the comment in respect of that particular area. Could you now move towards the e-technology area? When we had a briefing on your premises some time ago, you expressed a very keen personal interest in this area.

Justice Barker: Yes. The Elliott report touches on that.

Hon GEORGE CASH: Yes, it does.

Justice Barker: The position has not actually advanced in terms of our capabilities at this moment. When the tribunal was established, you may recall me, perhaps during that visit to the tribunal, saying that I had hoped and believed that within a relatively short period of time we should be able to have electronic lodgement of process right onto the computer of the tribunal. Currently, you can go onto the tribunal's website, you can hit the SAT wizard, you can bring up the Dog Act, you can prepare your review application, and you then have to print it off and you can post it in, bring it in to the tribunal, fax it in, email it in - we let people in special circumstances do that. However, if it is emailed in, it does not actually go onto a computer system; it just arrives in an email, an application has to be printed out and we then have to do the documentation and handle it. What I had always wanted, and what I still want, is a capacity for all citizens to prepare that application on the SAT wizard and then hit the button that says "submit", like you can do in so many other areas of the business economy today, and it would go straight onto our computer. Some preliminary work has been done in relation to e-lodgements of process in the District Court. Things are happening, but

the Department of the Attorney General submitted an e-justice plan to Treasury in the previous period. I was reasonably closely involved in that because I have sat on the joint courts and tribunals technology committee for some years now, at least for the past three, until I recently handed over to Judge Chaney.

[11.10 am]

Justice Barker: We pressed hard to get a department-wide e-justice plan in place, because there is no doubt that if one is not careful, this state will fall behind the electronic - it is not so much a revolution - daily way of doing business, and my concern is that we are falling behind and that there is a lack of appreciation within government of how important it is that courts and tribunals like ours have the capacity to complement the capacities of many of the organisations with whom we are dealing. In many cases they have got it, and yet they cannot directly communicate with us electronically in the way we ought to be able to do it. To answer the member's question, things have not happened. The department is pushing hard and consultants are looking at how we match up against other parts of Australia in this regard. My own personal view is that it is pretty clear what ought to be done. Sure, it costs money. We ought to be proceeding more quickly.

Hon GEORGE CASH: Justice Barker, you indicated in your comments that you were aware of the Ross Elliott report of February 2007. It has also been indicated to me that that report was provided to the members of this committee as a reference document, so it would be wrong for me to go any further into the particular words in the report, but we recognise what you said at our earlier meeting about the benefits of the e-tribunal.

Justice Barker: Yes, I am pleased. I think it really is almost a self-evident proposition. As I say, it costs money, but the concern is that a state like Western Australia, which has the capability to be the leading light in so many areas, really should not fall behind. However, against that I recognise the interests of the State Administrative Tribunal and perhaps courts more generally as but one part of the public sector that has to be funded.

Judge Chaney: Might I make comment on that, as I have now moved into the position on the joint courts and tribunals technology committee? I think a major issue in terms of SAT moving forward electronically is its dependence upon the electronic situation of the whole of the justice system, particularly in relation to the case management system, which stretches across all the courts and tribunals. It is not just the system we have, but it is all part of a single system, so that we have to step in line with the other courts in terms of what elements of the case management system get worked on at a particular time and developed. The limitation in that respect is the rejection last year of the department's e-plan. I understand that that is to be put up again in the next round of funding requests, but so long as that is held back, we are held back because we really go along with the rest of the system.

Hon GEORGE CASH: There is a flow-through effect.

Judge Chaney: Yes.

Justice Barker: I do not argue against that. I think I have said before that I am a strong supporter of a new governance model for courts and tribunals whereby we would actually establish in this state a courts administration authority, and judges and tribunals like ours would in fact be managing their own affairs with staff that report directly to the authority. I hope that something might happen in that regard. That is the way to achieve the best outcomes across the board. No doubt if our tribunal operated on its own, we could act idiosyncratically perhaps; we might even have got further ahead in some areas, but I do not think that is necessarily the right public policy response.

Hon GIZ WATSON: While we are touching on these two questions, I am interested in the human rights stream. I wonder whether you can provide any more information. I understand that most of that workload comes under the guardianship and administration area. Is that because there are more

applications, or that they are more complicated? I wonder what you see as the primary cause of that additional stress.

Justice Barker: The additional stress in relation to -

Hon GIZ WATSON: The human rights stream being under more pressure, if that is correct.

Justice Barker: Yes, I thank the member for the question. The reason has to do with the nature of the decision-making at two levels which are quite related. We are very close, with the increasing number of applications in the tribunal, to having 6 000 applications in the next reporting period ending 30 June this year. Just less than half of those - a little under 3 000 - are going to be under the Guardianship and Administration Act. Most of the parties involved in those proceedings are self-represented. All of the matters involve complex questions about individuals' capacities to make decisions for themselves and to look after their own affairs. Some are about their day-to-day decisions, and guardianship is an issue. For others, in relation to the management of their financial affairs, administration is an issue. In many but not all of these cases there is, as I said earlier, disputation often between siblings about what is good for their parents, but a range of other people become involved as well, including neighbours who have lived down the street for many years and who are much more attentive to the needs of the old people than the children are. It is an area in which the tribunal, under the Guardianship and Administration Act, has to be satisfied about a number of principles that are spelt out in the act, and we cannot and should not make orders if there is any less restrictive alternative than making an order, because people's human rights need to be respected. It is an area, then, where the inquisitorial nature of the tribunal's functions is accentuated compared with, say, a planning and development case, where parties are separately represented and it is much more adversarial. In guardianship we have to have the information in front of us from medical practitioners, nurses and other health professionals to decide some of those questions. We also have to deal with a range of self-represented persons and interested parties who are always going to be self-represented and who want answers to questions. The nature of the process, then, is that we need staff members who go out and chase up information. We need staff members who can also respond to the reasonable questions of people who have never been caught up in such a system, and who treat us - perhaps not unfairly - as just another government department, and they want answers in areas where the subject matter of the decisions we have to make can be very difficult and very emotional. Stress comes in because there is a large volume of work in relation to sometimes very difficult matters where we have to take a very active case management role. We need many more staff members working in guardianship and administration than we do in VR, DR or CC. In fact, our staff in some of those other areas service more than one stream, whereas we need people who are experienced and capable, and more of them, to deal with guardianship in particular. The human rights stream picks up equal opportunity and mental health as well. In some ways they are not all that different either. Many of the people who finish up pressing equal opportunity matters in the tribunal are the ones who have not been supported by the Commissioner for Equal Opportunity following investigation at that earlier level. They can often be self-represented and have similar sorts of demands on the tribunal, but it is principally the guardianship and administration area. It is making sure that we have the requisite number of people there. My concern as the ultimate administrator of the tribunal is that we keep everything in kilter; we recognise that in every area, all citizens using the tribunal are entitled to an optimal service, and I do not want anything to get out of kilter. But I hope that explains, Ms Watson, why we want to give very close regard to what happens in that area.

Hon GIZ WATSON: For the sake of clarification, is that workload and stress greater than what was anticipated?

[11.20 am]

Justice Barker: No, I do not think so. I think if one were to sit down and run the ruler over the whole process, the tribunal probably was given too few people across the board in the beginning.

What happened was, more or less, the people who worked for various existing bodies such as the Guardianship Administration Board, the Town Planning Appeals Tribunal, the Strata Titles Referee, the Commercial Tribunal were given like jobs in the tribunal and it was probably generally thought that if you brought in all those people servicing those old decision makers they would adequately service the new tribunal. In some ways the tribunal in that area is a victim of its own success. You are doing a good job, there is an expectation, you are trying to move quicker and faster than people did in the old days, but you suddenly discover in fact the early supply of staffing resources was not sufficient and then you discover difficulties; so we moved people from other areas to back up the human rights staffing needs. That, of course, then has effects elsewhere in the organisation. We are better off than we were. We have gone from the number Alex Watt mentioned to 69. We obviously could do better with more.

Hon GIZ WATSON: Does it affect things like the timeliness of decisions and that sort of thing?

Justice Barker: I do not think it does. This is an interesting management issue. The old Guardianship Administration Board at the time I became president of it, before SAT was set up in April 2004, operated on the basis that it did not list anything before what were then part-time members until staff said "We've done all of our jobs and we are ready". As a result of that listing process, dependent on staff saying that, the objective of trying to decide 75 per cent of all applications within eight weeks had not been met for some years. When I became president of the old board and was confronted with this statistical lack of performance, I said, "Well, why don't we just say we'll tell people that their applications will be listed and finalised within the eight-week period, save for the complex ones that we can see on the face of it are complex." That is what started to happen. We listed and suddenly, particularly under the new tribunal following the same procedure, we have been running at the 85 to 90 per cent within eight weeks. The result is though, that staff certainly have had to respond in a manner different from the manner in which they had previously. It is a question of both staff expectation, training, adequate numbers and the nature of the work that can reduce stress. Certainly every workplace is a place in which people have to worry about the effect of the work on the people who work there, who want the workplace to be a happy place where people are not being asked to do more than what is reasonably appropriate. We undoubtedly could do with more resources. As I said to Mr Cash earlier, I personally do not want to sound as though I am bleating about these matters, but I think it is a responsible approach in this tribunal in areas like that, because the decision-making function is quite different from what happens in courts and the like. We need adequate, well-trained staff. Thank you.

The next question, Mr Chairman, is No 9. The committee received a particular submission that raised issues about being given advice about what happens on the hearing day and so on. We have given a response about the variety of information that is available. My concern is when I see a question like that attributed to a particular person that it suggests that all parties in the tribunal are blissfully ignorant of actually what goes on when, from the very outset, we have worked very hard to try to make everyone fully aware of how it works. Our website is full of information. We have got these sorts of pamphlets. We have shown the ones in development and resources because that is where that particular submitter was involved, to show just what we do give people. What is incredibly important to understand is that a lot of people do not understand the visual processes and what will happen. That underpins the approach we have taken from the outset; that is, we want to get everyone to an initial directions hearing as quickly as we can so that we can start talking about exactly what this case is all about, and work out the best way to handle it. There is a lot of information about it, and I think we have provided that information to you with the material we have been given.

Judge Chaney: I might just add that what is not built within the written answer is a very common practice where a matter is going in those class 1 planning matters or minor planning matters. They have the initial directions hearing and it does not resolve and it is going to a hearing. I know that the member will very often take the applicant - the respondent is usually a council that does it all

the time - into the hearing room, show them the room, explain where everyone will be sitting and go through the process orally as well as provide the written material, which I think is very useful.

Justice Barker: We hope increasingly - it is another matter to do with resources, I suppose - to keep developing all sorts of tools that we put on the web site - videos as to what happens - and so on and so forth. The Commissioner of State Revenue's office not long ago wanted to improve the training of its officers so that they could better participate in tribunal proceedings in the work they do before matters get to the tribunal, and prepared a video. I think I must have been away ill because Judge Chaney takes on a Robert Redford role in this video; he is in virtually every frame! I am hoping that if I can put myself into a couple of the frames after the event, we can adapt the video and put it on the website. It is actually quite useful and made me realise that a visual presentation of what goes on in a room can help people a lot. That presentation to the public is sort of second phase, but an important phase to get to.

Hon GEORGE CASH: Justice Barker, you obviously did not realise Judge Chaney waited for you to be sick before he commissioned it!

Justice Barker: I cannot imagine that would be the case, Mr Cash!

Judge Chaney: It would be unfair to say there is an ongoing bitterness about it!

Justice Barker: It is not resolved yet; we will deal with it!

The tenth question is about the comments of the Disability Services Commission, which thinks the tribunal has more difficulty dealing with more complex matters involving such issues as domestic violence, significant family conflict and issues of abuse, and submits that examples of difficulties not appropriately handled by SAT include addressing the power dynamics between victims and perpetrators, and lack of access to support or advocacy by people with disabilities, particularly in some country areas, among other difficulties.

The tribunal has said in answer to the question about whether we think these are valid and what problems there are and how we support people, particularly in country areas, that we think we are doing a pretty good job. I am surprised to see this comment. There are some other comments about which we have been a little surprised. It has made me realise that I have to keep encouraging a range of primary decision makers and people who deal with the tribunal to come in more regularly than they currently do to see us and tell us about things. This is not a matter that DSC has ever raised with us, and we would hope that people would, but that is not the point. If there were difficulties along these lines, we would be needing to deal with them. I do not think it is the case. One does not want to be unnecessarily defensive about this, but the sort of concerns that the Disability Services Commission has will be in our HR area, typically in our guardianship and administration area, and some other related areas. The members who work in those areas are particularly well suited by both background and training in their decision making to deal with just these sorts of things. It is the sort of comment that makes you want to sit down and discover more about it - just what is the example or circumstance that has led to a comment like this being made. We really take very seriously our job in responding to people with disability problems, any power imbalance problems or anything that makes them vulnerable in the decision-making process.
[11.30 am]

We try to create - to use jargon - level playing fields. We try to take out of play anything that suggests that someone will not be able to properly participate in the proceedings. We consciously adopt a therapeutic jurisprudence approach to decision making here, so that people benefit from the process and will speak well of it. The party survey I have given you that was conducted earlier, comforts me in that, in most respects, as far as I can see, there are good responses. By the way, we are just about to have an on-line constant party survey in place, so that when the parties finish an action we write to them and say "Go onto the website or fill out this form and tell us your answers to all these questions." It is the sort of comment that inspires me and the tribunal to examine its

performance and to ask what the issue is, but I think we need to talk to the Disability Services Commission to understand it better, because it must have been something in the country that perhaps happened, and it might be that if we found out more we would be better informed. Let me make this point. The tribunal goes to country areas to do business wherever it seems appropriate. We do it quite often in respect of, say, guardianship and administration matters, going to major regional centres. But we do not want to sit in the Kalgoorlie courthouse to deal with a matter like this, or any other courthouse. They are intimidating places; totally inappropriate for what our decision making involves, and so we will sit in other places. In guardianship, you will finish up perhaps at the hospital, and they will say "There is a room down the end of the corridor available for you." This produces all sorts of problems, and indeed it happened in Kalgoorlie on one occasion. There is no way out apart from the way in, and if people become upset, and you do not have security available, and even if you do, it is not a good place to be. If you choose that place and someone is disabled, and they have to attend there, we are just using someone else's premises. They are not always well designed from a number of perspectives. I suspect that there are some difficulties in holding hearings in regional places, because there are not adequate facilities. Judge Chaney is now sitting on two steering committees in relation to the development of new justice complexes in Kalgoorlie and Carnarvon. Our hope is that as they develop these new court and tribunal facilities, they will actually bear the State Administrative Tribunal in mind, and create rooms, settings and mediation facilities and features that are like our tribunal is in Perth, and not like a courthouse as they currently are in those places. I think it can be improved in the longer run.

Hon SALLY TALBOT: Can I ask you to clarify a matter for the committee? In your written response at 10(a), you say that the Disability Services Commission has not raised these matters, notwithstanding opportunities to do so. Can you just outline what those opportunities would have been?

Justice Barker: I have not met with them directly, but the human rights stream, through the senior member Ms Jill Toohey, in particular, meets with a range of people and has meetings from time to time. I cannot tell you this morning in detail of what meetings she may have had with them, but there is certainly a range of public information sessions we hold for people in all streams, where we try to explain tribunal processes. We invite people in, and we invite questions. I think it is really a reference to that. The tribunal runs a public/community relations program - we have a general manager of that - and we seek to have everyone involved come to the tribunal. We invite them to tell us what they think. The point I am making is that, despite these various things we have done, no-one has been brave enough to tell us what they really thought.

Hon SALLY TALBOT: So the commission would have been included in those meetings?

Justice Barker: It certainly would have been invited. I am assuming they will have been. I have conducted some difficult guardianship hearings - one comes to mind in particular - where the Disability Services Commission was represented, and a number of other organisations. A hearing, I suppose, is not the best place for someone to raise some issues, but if there ever is an issue in relation to one of the parties, you expect it to be raised in a hearing. If there is a particular issue with someone with a disability, you say "Can you do something about this?" As I say, my approach to all of these thing is to say that if somebody thinks there is an issue, we want to know more about it, and we need to find out from them just what the real concern is. It sounds to me as though it might have been some problem in some country area, and it may well be out of our control, but it emphasises the need to have appropriate facilities wherever we go. I do not think there is much more I can say about that.

Hon SALLY TALBOT: Thank you for that.

CHAIR: I might call a short break now - just looking at the time, for maybe 10 minutes. Justice Barker, looking at the time programming for today, I am not sure what your constraints are, in terms

of needing to be away. We have members who will need to finish up here today at around 2.00 or 2.30 pm, if we are still going then, and I anticipate we probably will be.

Justice Barker: That is fine.

CHAIR: My view of the document is that it is very complete, and the answers, in the main, address the questions raised with you. I know members have questions that arise out of some of the answers, and the time we have available might be best used in focussing on those things that you particularly need to add to the answers you have here, and the questions that members have, based on the responses you have given. It would be nice to allocate more time to these things, because we can always get more information, but it is a matter of trying to fit it in.

Justice Barker: I am in a bit of a position here of counsel who appear before me and the tribunal. I tell them I have read their submissions, but sometimes they do not believe me, so I am happy to go through it in some detail. I suggest that, when we come back in, I will take up your offer, but particularly, from my point of view, there are a couple of things here that I think you might be particularly interested in. I will tell you what they are, and then you can fire your questions at us.

CHAIR: That is probably a good approach. We will break for 10 minutes.

Proceedings suspended from 11.38 to 11.49 am

CHAIR: Mr Justice Barker?

Justice Barker: Thanks very much. Can I just correct, in a very minor way, one thing I said in my evidence earlier about closed hearings? I was struggling to remember when I ever closed a hearing. As we had a coffee just now, my associate, Amanda Whiteley, reminded me that about two months ago I did in fact close a hearing. It was a vocational matter involving a person who, the evidence showed, was suffering from a number of difficulties, including psychiatric problems. In the circumstances I closed the hearing while we heard that matter. I later made orders and made an order for non-publication of that person's name when orders were made affecting her. That is an example of when it has happened.

Mr Chairman, if I can then go to your invitation to, in a sense, identify particular matters that, from my point of view, I think the tribunal would want to emphasise from a number of questions asked and that, from my point of view at least, are interesting and broader issues. I think on the last occasion I was here, again in these answers, I made the point that the tribunal's view, and certainly my view, is that vocational regulatory bodies, the various boards that oversee various professions and vocations in the community, should all have a minor disciplinary function. All of the health-related VRBs now have it - the Medical Board, the Nurses and Midwives Board, the Physiotherapists Board etc. I do not see any reason why architects, veterinary surgeons, land surveyors and all the ones who do not have it and feel left out should not have it; I think they should. From my point of view that is not an issue. It has been raised at various times. I support a recommendation, in effect, to the committee that that be supported.

The question of mediation has come up in many contexts. We discussed it again today. I just wanted to say something. I think it is in the answer that has been advanced by me. It is, this year, to undertake a project which will actually result in a major paper being presented to the national mediation conference in Perth later in the year about the SAT brand of mediation. There is a lot of interest amongst users of the tribunal as to how we mediate. There is a lot of theory and a lot of practice from bodies such as LEADR and IAMA and the Western Australian group that brings all of the people involved in mediation or, alternatively, dispute resolution together hearing what we do and how we do it, because we, of course, have a model which is a little of a variation on some other voluntary models of mediation in that we have our full-time members and some sessional members as mediators. They come to mediations with knowledge of the matter. They are trained mediators. We are developing our own process. We want to be able to look closely, statistically, at what we are doing, the methods, consistency, scale, and outcomes. We want to be able to produce for

ourselves, so that we can refine our own process, as much data as we can. That will happen during the course of this year and culminate in a major paper, I hope, in about August, I think. I wanted to mention that to the committee. That will be interesting.

There are some questions that are raised in different places about the process or the rules that govern review proceedings where, say, the Commissioner of State Revenue is involved. I should preface my comments by saying I greatly appreciated the periodic regular meetings that Judge Chaney and I have with the Commissioner of State Revenue and his officers who come along and representatives of the State Solicitor's Office. It has been a prime example of how it is important for the tribunal at our levels to meet with important decision-makers who become involved in tribunal proceedings. We are able to discuss a range of policy matters. It is very important in that area because until the State Administrative Tribunal was set up very few matters in relation to state revenue went on appeal, under the old system, to the Supreme Court. It was said, putting it colloquially, the commissioner could control the process and there were a lot of disincentives in that process for an applicant to go very far, because it might be an interesting issue but if they lost they would be visited with a big bill for costs awarded against them.

The proceedings in the tribunal, of course, are cost-free, and we have resisted, including the revenue area in a few matters, making cost orders. Only if someone acts badly, egregiously, will that ever happen. We have resisted doing that. The result has been that there have been a large number - an exponential increase, compared with the previous era - of review applications in revenue matters. The issue that then arose and has arisen for the commissioner is that he comes to the tribunal in the same situation as everybody else who is a decision-maker comes to the tribunal on a review matter. Application is made by a person to seek review of the decision. The tribunal's obligation is to consider the matter de novo. Despite the current Chief Justice's desire not to see Latin used in any context, the legislation actually uses here, so it is your collective fault and, I suppose, not his or mine on this occasion! That simply means that we stand in the shoes of the decision-maker. We start afresh, we consider the evidence as it is today and we make a decision as of today. We need to be persuaded that it is right and proper that that decision be reviewed. The commissioner wants a provision in his act, which we would then have to respect, that says the onus in state revenue reviews is on the taxpayer. That was raised with us in various ways and in discussions that we have with the commissioner. We have said to the commissioner consistently that we do not see how adding an onus provision actually changes the game. The commissioner has the view that it might assist in certain areas. It might mean that his office does not need to make such detailed investigations in some areas, because if the onus is on the taxpayer to prove something, then he will just sit back and see what the taxpayer produces.

I think, without wanting to be too short and misrepresent the commissioner's proposal - he may well have made, I think, more detailed submissions about that - I am not personally convinced that it makes any difference. We have to have information before us to say that the commissioner's decision was wrong. We have to decide what the correct and preferable decision is. I do not think it matters if there is an onus provision. There is an onus provision in some other states. The leader in this would have been the commonwealth, because they were the first to come up with an administrative appeals tribunal, and revenue no doubt was then, and still is everywhere, of great moment.

[12 noon]

It does not matter who is in government. People that are in government are looking after the community's interest and want to make sure that people who have to pay their taxes pay them. The commissioner has got a very weighty responsibility to respect the revenue, as the tribunal does I should add, when we stand in his shoes.

I do not see why an onus provision will make any difference. I might be wrong about that but it has not been demonstrated to me in any decision that I have made. Judge Chaney and I, I think, have

made nearly all of the revenue decisions, a number of which have gone on appeal to the Court of Appeal. We have found, earlier on, for the commissioner in some cases; we have found against the commissioner in others. The commissioner has lost on appeals when he has won before the tribunal. I do not know whether he has won on appeal when he has lost in the tribunal yet, Judge Chaney, but the system is working. I will ask Judge Chaney to say whether he disagrees with us or not, but I do not think he does. We have not seen how the existence of an onus provision will actually make any difference to our decision making.

Judge Chaney: I agree with that. I think in practical terms it makes no difference at all because the parties come to you, the taxpayer is there to persuade you the decision was wrong and, if they do not bring forward adequate material to demonstrate that, as a practical onus they fail. So the imposition of a legal onus, I suspect, will make no difference.

Justice Barker: A practical example, so you can understand us because we get quite technical, is that a range of revenue decisions come but a very favourite one at the moment is in respect of payroll tax. Who knows if payroll tax will survive revenue reforms in Australia? It would be nice if it went and we did not have to worry about it in the tribunal, but the issue usually is - always is - whether a person to whom a putative employer is making payments is in a relationship of employer and employee with the person, or whether the other person is truly an independent contractor. The commissioner says that they are on wages, they are really employees, they are not independent contractors. The applicant comes to us and says that is wrong, they are really independent contractors. Then what does an onus provision say about that? If the applicant is going to win, they are going to have to call a whole lot of evidence to make out their case. The commissioner in a sense does not have to do a lot at all. He certainly wants information, wants to be able to tackle them, and the tribunal can do all of that. The tribunal has full powers to say to an applicant, "You need to produce this, this and this. You should be answering these questions." So we can cause a full investigation to happen. An onus provision really is irrelevant in my view.

I did write a letter - I think I might have been late - to the tax review that has been referred to to express a view. My views were represented one way or another to the tax review because I spoke to the head of the tax review who makes submissions to the government about those matters, and I think what I have said today is consistent with what I have said throughout.

Hon GEORGE CASH: Justice Barker, you might be interested to know that some of the members of this committee have been involved in the consideration of taxation administration bills in the past when we have had considerable representations from the Commissioner for Revenue, and some of us took the view that the commissioner should not see taxpayers as second-class citizens; that they should have, where reasonably possible, equal rights; and it seems to me that what you have said would appear to support that general view.

Justice Barker: Yes. I think it is, with respect Mr Cash, not my role to make that more detailed policy analysis, but what I can say at a technical level is if I thought the state revenue was losing out because there was a deficiency in the act, I would say so and say so clearly, and we are not seeing it; that is the point.

The other issue that came up, which is also mentioned in the questions in these discussions we have had with the commissioner, has been in relation to whether documents that would be the subject of legal professional privilege that are in the commissioner's possession should be given to the tribunal as part of the obligation of the primary decision maker to give us all the documents they have got that are relevant to the matter in question. Let me take you back just a step to remind you about what the rules are that govern these sorts of review proceedings in the tribunal.

Because we are the substitute decision maker - the philosophical and practical idea behind the legislation is that when somebody makes an application for review, in effect, the primary decision maker calls in the delivery van and puts in it absolutely everything they have got that touches on the question and sends it down to the tribunal - we have formal rules in place that say they should give

us those documents within so many days. They are called the section 24 documents, because section 24 says that they should give us their documents. There has been a question lurking around the place about whether the documents they have to give us include those which, if they were in the Supreme Court in some proceedings, would be the subject of legal professional privilege. My view is - and I have said this to the State Solicitor's Office, which, on behalf of the commissioner, made representations to the Attorney on this point and I responded in the course of all of that - that I think, if you read the act, as a primary decision maker you have to give us everything you have got, and that includes the legally professionally privileged matters. What we do with them is another question, but if we are the substitute decision maker, we are obviously intended to have everything.

The commissioner considers that the legal advice that he has got should not have to come to us. It is not so much that there is a stand-off about the issue, because it has not actually become an issue, in a practical sense, in the tribunal. Every time the commissioner, through his solicitors, lodges documents, there is some notation somewhere on the section 24 bundle that says, "We're not giving you these", so they sort of maintain their position. Perhaps there would be a day when we say, "Well, we want to see them." There might be circumstances where one wants to, and the view that I have adopted, as a matter of philosophy, if you like, is that the Parliament has set up this administrative review process. We are the substitute decision maker. We are supposed to see all those documents. If a primary decision maker did have some document - for example, lawyer's advice - that did tell them something, and the way they had acted was in fact quite contrary to what they had been advised, as a matter of public accountability the tribunal should be able to read those documents and make some comment about public administration in relation to that decision maker. That would be a very, very rare occasion, but there is a proper logic behind the idea that everything should come to us. If the position is to be otherwise - again, the Office of State Revenue is the only body that I know of that has actively raised this issue, although the State Solicitor's Office perhaps, in voicing its view, purports to speak for a range of public sector bodies that it often appears for - then I think the legislation should be made explicit. What I have said very succinctly in the answers is that in the tribunal's view, legally professionally privileged documents do have to be given to us under section 24. If it is thought the position should be otherwise as a matter of policy, then this committee should make a recommendation to that effect. I do not support it.

I think at this point it would be best for me to be quiet, Mr Chairman, and invite your questions.

Hon GEORGE CASH: I was interested in legal professional privilege, which has now been covered as far as the tribunal is concerned. The other area that I thought would be helpful to hear from Justice Barker on is the area of the Office of the Public Advocate. A number of questions have been taken from the submission of the Public Advocate. There are answers to those various questions. The question that I have is that it appeared that the Public Advocate did not have regular meetings with the tribunal, from the way in which the questions that were contained in the submission were framed. However, from our earlier discussions between the committee and Justice Barker, it seemed to me that there was a rather close relationship between the two bodies. Perhaps Justice Barker might wish to comment on the position of the Public Advocate and the tribunal.

[12.10 pm]

Justice Barker: Thank you very much. Let me say immediately that the relationship between the tribunal and the Public Advocate is critical to the proper working of the Guardianship and Administration Act. The Public Advocate performs very important roles in the community. In general terms, the Public Advocate comes to express what an appropriate outcome is in relation to guardianship and administration decisions in complex cases. The tribunal has the power to ask the Public Advocate to investigate matters. The Public Advocate has the power to look at every application that comes in and to decide whether the Public Advocate should be involved in those proceedings. We have, you might say, a symbiotic relationship. At times, we probably have the relationship that close siblings have; that is, they do not always agree with each other fully but love

each other dearly. The relationship between the Public Advocate and the tribunal, in my view, has been very close from the outset. Just to back that up so that you understand it, I hark back to the time when I was appointed president of the Guardianship and Administration Board in April 2004. The first thing that I did was to go to the Public Advocate's office to meet the Public Advocate - who was then and was until recently Ms Michelle Scott, who has done an outstanding job in that office - to understand just what the needs and requirements of that office are. The Public Advocate has jobs that go beyond turning up to the tribunal to advocate about matters. The Public Advocate must also disseminate matters more generally in the public sphere. There are resource issues for the Public Advocate. The Public Advocate could not work properly if the tribunal referred every application it got to the Public Advocate. There is a need for liaison and there is a need for discussion. That was always recognised. As soon as the tribunal was established, we followed an example that the Victorian Civil and Administrative Tribunal had been trialling for some time, which was to have a liaison officer between the Public Advocate and the tribunal. That was established in 2005 and continues to this day. There is a relationship with an officer of the Public Advocate's office who comes in, meets people and sees files and referrals that are made. It is practical liaison. On top of that, we have regular meetings between staff as well.

Mr Watt: Between managers of both offices.

Justice Barker: The managers at the staff level meet regularly. Then there are quarterly meetings between the senior member - Deputy President, Judge Eckert, is very often involved - and the Public Advocate or the people immediately below her in that office. There is quite a lot of dialogue. To take your point, Mr Cash, I think it is probably unfortunate that the issue about the importance of communication is raised in a way that suggests that we do not talk. To the contrary. What I think the question reveals is a reality that in this very difficult and challenging area of decision making, as I explained to Ms Watson earlier, where public agencies like the Public Advocate and the tribunal have distinct jobs to do, there needs to be a lot of discussion. Sometimes there is not complete agreement. Sometimes we put the Public Advocate under pressure about things. Sometimes the Public Advocate thinks that we should not have perhaps requested an investigation. Sometimes we might be considered to have asked for responses from the Public Advocate within time frames that are difficult for the Public Advocate to meet. We need to talk about and get proper responses to all of those practical administrative issues, because it is a resourcing issue on both sides. There are times when the tribunal falls down because we wanted to get an order made to the Public Advocate pronto and it has taken, through our administrative error, more time than it should have taken, and we can be properly criticised for that. We have mechanisms in place that are designed to keep us talking as closely as we need to, to make sure that everybody gets the best possible outcomes. There have been times over the past three years when I have specifically asked the executive officer to meet and discuss processes so that we harmonise them properly between our two offices. For example, we introduced email communications early on when there was reluctance by people to use email communications, but it is reliable and quick. It is all about making sure that we have reliable and quick communications. That, I think, led to the establishment of the managers' regular meeting. From my perspective, we have got good processes in place. That is not to say that it will remove difficulties, but it is there to facilitate the removal of difficulties.

Hon GEORGE CASH: Thank you.

CHAIR: What occasions prompted you to specifically ask the executive officer? Was that just because of changing procedures - a new way of doing things - or was it a breakdown of some sort?

Justice Barker: Yes, it was two things. I will ask Alex Watt to respond. Early on there were questions about just how the process worked. I said to Alex, "Look, rather than have someone more junior go, let's try and deal with this up-front." Perhaps Alex could comment.

Mr Watt: Yes, an example might be where reports are provided by the Office of the Public Advocate to the tribunal. Between the tribunal and the Public Advocate we established a protocol for the delivery of reports from the Public Advocate by email and the acceptance of those reports by email. Additionally, we have protocols for the delivery of information to the Office of the Public Advocate and the timeliness of that as well. We have some process mapping around that and some procedures that are attached to each process, and they have been shared with the Public Advocate.

Justice Barker: The other example early on that Alex would recall is that we were very keen to make sure that we met that historic benchmark of 75 per cent of matters determined within eight weeks. I pushed it up to 80 per cent and we are doing better than that. When we first started doing that, there were actually some complaints that we were moving too fast. The Public Advocate does have a job to do, an investigation, and if we listed all matters for the Public Advocate six or seven weeks out, they would be struggling to meet it. We devised a process whereby we consult with them appropriately and make sure that we list matters at the outside part of that period so that they get the maximum time to do their job but we still have a chance of meeting the citizens' requirements of getting an order as quickly as they can have it. So far as the Public Advocate and the tribunal are concerned, we will continue to talk about the exact same issues, with variations of them, in the years to come.

Hon GEORGE CASH: The next area that I wanted Justice Barker to consider was that of the Public Trustee. As you are aware, the Public Trustee has made a number of submissions and has raised a number of points within those submissions. In particular, I refer to question 31, which discusses confidential information and the Public Trustee's view on the release of certain information. I also direct you to question 26, which seems to be more of an irritation than a complaint. Question 26 is in respect of the cost of medical reports and question 31 relates to the release of what they say is confidential information, but also refers generally to your relationship with the Public Trustee. Some of the issues here appear to be irritations, which you would normally expect to be taken up with the tribunal. Others are policy issues, which they are certainly entitled to raise, and have.

Justice Barker: Mr Cash, thanks for raising that. My perception of the relationship with the Public Trustee is that it is very good. We are more cousins with the Public Trustee than close siblings.

Hon GIZ WATSON: First or second cousins?

Justice Barker: Probably distant first cousins. What happens in the tribunal is that the Public Trustee comes into the game when there is nobody else who can be appointed as administrator. The job of the Public Trustee is extremely challenging, therefore, because it is an administrator of last resort. Some of the most defenceless people in the community finish up having their affairs handled by the Public Trustee. The Public Trustee, like the rest of us in this sector, has a challenging job. There are staff attraction and retention issues. The Public Trustee has been responding in the last year or two to the need to approach administration in more modern ways than were perhaps available to the office in the past.

[12.20 pm]

The creation of the State Administrative Tribunal also marked off the responsibility of the Public Trustee in many areas, such that the tribunal no longer, as the Guardianship and Administration Board before it did, actually managed the estates once administration orders were made, and acted on its own initiative whether to chase up administrators and do this and do that. The Public Trustee supervises the review of administrators' activities and also acts as an administrator, and they are on their own.

We have regular meetings, in which the Public Advocate and the Public Trustee come to the tribunal. I usually attend those - not always, but if I am not there, in any event Judge Eckert,

Deputy President, will be there, and Ms Jill Toohey, senior member in the area, will be there. We have extremely cordial relations and we get on well. I agree, with respect, with Mr Cash's observation that these are the sort of things that should just be taken up. Indeed, I am surprised they have not been. Some have already been resolved, I think. They seem to me to reflect a particular issue that a particular officer had on a particular matter, and they are not, to my knowledge, systemic issues. The question that you first identified, I think, was 31, was it?

Hon GEORGE CASH: Thirty-one, in respect to confidential information.

Justice Barker: It is one of those questions which, when we read it, and if we had more time, we could go - well, it is not appropriate for us, but in the future if we had more time we could go back and talk to the Public Trustee about just what the issue really is. Our response is simply to say that, look, if there is something in the tribunal that involves parties, we are obliged, as a matter of natural justice/obvious good decision-making process, to refer relevant information to all relevant parties. That is what we do. I am not sure exactly what we did which caused the Public Trustee to fear that confidential information was being misused, but it is a little bit like the discussion earlier about the Disability Services Commission. I think, for me, it flags a need just to maintain our good discussions and encourage people, if they have difficulties, to tell us. We try to have our arms very open; we do not want to be in any big brother, big sister or big cousin role. We want people to come and tell us if we are annoying them or if we have done something that upsets them. I am not aware of it being an issue, Mr Cash, really.

Hon GEORGE CASH: Twenty-six I think you have generally covered, the relationship between the tribunal and the Public Trustee, and that there are regular meetings. I am sure some of the other issues -

Justice Barker: Yes. What we would love to do is the last sentence in the answer, because it is a big issue. Medical practitioners - I do not think Dr Talbot always liked getting a call from the tribunal saying, "Could you let us have a medical report, please, about" -

Hon SALLY TALBOT: No, I am a real doctor. Just for the record, I am a real doctor, not a medical one.

Justice Barker: I am sorry. You will appreciate the point that if you are sitting there and the tribunal rings and asks you to give a report, you are perhaps wondering, if you are not a part of the public sector, "Who is going to pay for this?" Medical practitioners, fortunately, are very professional in their dealings, but we think it would be great if you could get the commonwealth, through the Medicare system, just to pay a fee for the issuing of this report. That would mean, amongst others, that the Public Trustee, too, would not be complaining about having to shell out some dollars. The Public Trustee gets criticised from time to time, and over the years, because they get to manage an estate as an administrator, it has got a certain amount of money in it, and they have charged interest, or their usual fees, and it can take away the body of the estate they are managing. So they are trying to be prudent, and if they have to spend money, they would prefer somebody else to do it, but we do not have the money to spend on it either. So it would be good if we could get Medicare to pay.

Hon GEORGE CASH: Yes, yes.

Hon GIZ WATSON: I notice there are a number of questions with further elaboration around the issue of local government and planning and development applications.

Justice Barker: Yes

Hon GIZ WATSON: The further answers are useful. I just wanted to quiz you on a recent query which I had with a particular local authority, which made the comment that the trend they were finding is that the developers were using the fact that SAT was there and that almost automatically things were going to end up in the tribunal, to not genuinely negotiate with the local authority in the first instance. I am not sure whether you are able to comment on that. The particular council was

then saying that this also led to a lot of expense. Some of the comments from the WA Local Government Association seemed to reflect the same thing. The local authorities were ending up having to spend a lot of time and resources at the tribunal, dealing with those development applications in that forum, whereas they previously had, kind of, dealt with them, in their view, adequately at that first instance.

Justice Barker: Yes.

Hon GIZ WATSON: I guess it will all depend on which side of the fence you are looking at that from, whether you are a developer or a local council.

Justice Barker: Partly, yes. If I could make some comments - and Judge Chaney will need also to respond to this. There might be more than one legitimate impression about all of this because, as you have just said, it might depend where you are standing in relation to it. Just to hearken back to my comments about the former system of review relating to state revenue matters, which used to be controlled by the commissioner entirely, he could patrol the fence and carry a shotgun and virtually not let anyone over it. If you were a citizen, you could not do too much. The situation in relation to the planning and development review processes has been different from that for some time, before the ministerial appeals were removed a few years ago and everything then went to the refashioned Town Planning Appeals Tribunal. The process probably typically involved local government making a decision, they understood that if someone did not like it, they could appeal it, and the processes of appeal usually were that things just went to a final hearing. Things like mediation did not really exist. Certainly, in the earlier days of the old Town Planning Tribunal, that was the case. The system, though, has developed, evolved, over the years. I was appointed chairman of the old Town Planning Tribunal in 1989, and occupied that position for about four years - I think until the end of 1993. One of the first things I did was call a meeting of all the different industry and involved groups to say, "What do you think about engaging in mediation?" It was a new thing in 1989, but I was interested in it then and read a lot of the literature and investigated the practices. There was a lot of support, particularly from industry. The reason was, as I have always perceived it, that industry values the opportunity to sit down and talk about some proposals, and not just have them dealt with on papers or by, from their perspective, less than useful communications, and believed that if you could just sit down and talk sensibly about some conditions or whatever, that you might find some common ground. As you will know from everything I have previously written and said on this topic, I strongly believe in the mediation processes in relation to all sorts of different matters. There is no doubt, from a local government point of view, the growth of mediation and the reliance on it in the tribunal, as a significant alternative to just going to final hearings, has caused some difficulties. It is a change of culture, it requires a different engagement, and it requires people who come to the tribunal knowing what it is about. We expect people to engage with us and to engage with others to talk about real issues. The result is, as our statistics show that we have laid out for you, a significant number of matters, both in the class 1 processes, which engage people pretty much in mediation from the outset, and in class 2 matters - I mean, we do not go to final hearings all that often, by comparison, and certainly by comparison with the old days. My feeling about this is that we have actually moved through the transitionary period, and that there has been some unhappiness about mediation from local governments in particular because they feel a little disempowered in the procedure.

[12.30 pm]

If you are a decision maker trying to resist the applicant interests, probably a much better position to try to get to is where the Commissioner of State Revenue used to be, standing on the fence with a gun and saying, "If you try and climb over that and get review, look out!" - it might have been more convenient for local governments to say, as I think some of them have said, "Why don't things just get listed for final hearing?" We just do not believe that is an optimal procedure. We believe that when you get people to sit down and talk about real issues, you can find common ground. We are

not forcing people to do it, but many matters genuinely resolve because the parties are happy with that outcome. It means, from a cost perspective, that council officers may need to be up to speed, or their consultants need to be up to speed, and they need to genuinely engage in the process. They might need to come in and talk on more than one occasion about a matter. Class 1 decision making will often involve - we still call them directions hearings, rather than mediations straight; I think they can be referred to as mediations proper as well - people coming in on one, two or perhaps three occasions to work through still some quite complex matters. However, the result is that you can come to a professional understanding that parking arrangements like this would be satisfactory; you know, height would not be a problem if you did these other things. It takes a bit more time, more involvement from a council's point of view and undoubtedly, in a number of cases, some more expense. The result, though, is that you do not then finish up going in so many cases to what might be a three or a four-day final planning hearing, where they might actually feel obliged at that point to go and call lawyers. The system has changed, and I think a lot of people have come to understand it. There is no doubt that the development industry, Ms Watson, appreciates that process. I think there are a number of planning authorities that have come to understand it and be engaged in it very well, including the WA Planning Commission. The culture is changing. Quite unapologetically, as president of the tribunal, I think it is a good thing, and it is consistent with what we do right across the tribunal. It can possibly then lead to a perception, the one that was conveyed to you by a local government official, that this means that industry can simply say, "Oh, we're not going to be terribly interested in you in the early days because we're going to finish up in SAT and we're going to do it all down there." I would like to think that that does not happen. I do not know that it does. Undoubtedly, though, if you are an applicant or a person representing an applicant's interests, and a local government, from their perspective, is being difficult about something, they might say, "Well, look, you know, we can talk about this in the tribunal eventually!" Maybe that happens; I do not know. However, if the tribunal is doing a good job - and, again, it might be that it is, in that sense, not so much a victim of our success in that regard, but that people sometimes choose forums where they think real issues are going to be properly dealt with and they are going to get administrative justice - it can go both ways.

Hon GIZ WATSON: So, is there a requirement that there has been a genuine attempt to come to a resolution ahead of time with the local authority?

Justice Barker: There is, yes. Section - it has just gone out of my head for the moment -

Judge Chaney: Section 87(3).

Justice Barker: Section 87(3) says that -

Judge Chaney: I think it is section 87(4).

Justice Barker: There are two provisions, actually, in section 87. One says that the decision maker has to have seriously dealt with something and the other one is that the parties affected have to have properly been involved. Our powers in that regard are that if we really think that someone has just abused the process and tried to bypass the primary decision maker, we can invite reconsideration by the primary decision maker. The philosophy of the tribunal is very clear about this. We take our role as a substitute decision maker seriously. We are not a primary decision maker. There are a range of matters, right through the tribunal, where we will send something back to a primary decision maker if we think they have been cut out of the game, because primary decision makers are the ones who make all these numerous decisions that enable the whole system to work. We are there as a backup to look at the difficult cases. We are not there to become primary decision makers. I will ask Judge Chaney whether he is aware of any particular examples to substantiate it.

Hon GIZ WATSON: And perhaps whether it is an issue that particularly arises in this area of planning and development applications.

Justice Barker: If it does, this will be the only area because there is so much money and contention and historic battle. It is the same around the country, I think.

Judge Chaney: I have heard that concern expressed, I think in the forums we have held with local governments. From time to time that has arisen as an issue and a concern, so I am alive to it in looking at applications that are coming through. I think that the prospect of taking a matter to the tribunal probably looms larger in the stage that an application is going through in council now than it did in the days of the former tribunal. So things such as deemed refusal provisions are being used a lot, where under a town planning scheme a local authority has to make a decision within, commonly, 90 days. They are being, I am sure, out in the marketplace, held over the heads of council by developers who are saying, "Well, you know, if you haven't done it by the due date, we're off!" The concern, as I understand it, is that the developer is really not making a bona fide attempt to present everything that needs to be presented at that first stage on the basis of, "We'll do it all later and see what the tribunal says", and do it in the light of the mediation, and so on. I do not observe that to be the case. I have not seen cases come through that are half baked and are developed in the course of the hearing. Sometimes they are amended and varied in the course of our processes, but they start from a position in which they are capable of approval, I think.

Two weeks ago, I dismissed an application by a developer on the basis that - it was a planning commission one rather than a local authority - the planning commission had not actually made a reviewable decision. That was a case, which is a bit of a sign of the times - there is clearly a great shortage of town planners in this state. Local authorities are having real difficulty attracting or retaining people, because as soon as they are any good, the private profession picks them up. The commission is under immense pressure within its planning department and the result is they take a long time. This was a case, and it was a good case, where there was - because it came out in the evidence that I heard before I dismissed the thing - a lot of talk of, "Well, make a decision or we are going to appeal. Make a decision", and the commission saying, "Well, we need to do a whole lot of things before we do", and it was alleged in that context that they actually did make a decision. I said, "No, you didn't and so back you go."

In a sense, I think there is an appreciation amongst developers that our processes work and get quick results. I think there is probably a consciousness that this might be a step people are going to take and they are quite happy to take. My perception is that the sort of notion that "We won't even bother to try and get approval first up from the local authorities" is not born out by experience. However, I think there is pressure on local authorities because of their shortages of staff, and I think it is a real danger that if that situation continues to worsen - I think it has worsened in the three years that I have been closely watching it - that is a risk; that what the councils fear could manifest itself as a reality. However, I do not think we are there yet. If we got to that point, we do have the sanction under section 87 in respect of costs. If people do take that course, they could be lumped with a costs order. In any event, if that is the position when it comes to us, and it is evident, then we would at least manage our processes to make sure that the local authority had proper opportunity to form its view, and, you know, whether you refer it back under section 31 or simply take it through the process where they get a proposal which they take back to council and it is considered at that stage, in the end council makes a decision through the mediation process.

There are ways in which the decision ultimately remains with the primary decision-maker, even if there is an attempt to abuse the process in the manner suggested.

[12.40 pm]

Justice Barker: We take the point, Ms Watson, in relation to planning matters, and not infrequently seek to get the matter back to the local government so they can make a decision. Sometimes, perhaps, they do not like that, but it is part of respecting the fact that the local government in so many situations ought to be making that decision, so if at an appropriate juncture in the proceedings at the tribunal we think that there is either new information that has come up or

proposals that have come out of mediations or other things, we will try to get that back to the primary decision-maker so they can have a proper consideration of that. We are not, in that sense, supplanting their primary responsibilities. It may not be the best example of all of this, but it is not a bad one: when the Steve's Hotel redevelopment was at its height, it came before me and I eventually invited the local government concerned to reconsider that decision. It did not have to, but it did, and it made a decision. It seemed to me to be important from the basis of local autonomy that they should have that opportunity in a case like that.

Hon GIZ WATSON: If I could add another piece of information, it was not so much that there was a criticism of the mediation of that process; it was that that particular local authority had a set of conditions on a particular development and on appeal to SAT - I think there were 50 conditions and only 30 were upheld - they felt that had weakened their attempt to have a sustainable development.

Justice Barker: One becomes topic-specific at that point -

Hon GIZ WATSON: Yes. I do not have any further detail, but I assume that that would have been because the other criteria were considered to have been met, even though in the council's view they had not been met.

Justice Barker: I think we are bound to say that our decision-making would have been entirely rational!

Hon GIZ WATSON: Yes!

Justice Barker: I do not want to sound glib about it, but that is why we believe in constant communication with all sorts of interest groups, particularly local governments. We met with representatives of the WA Local Government Association. An interesting thing, for example, came out of that. There had been some misunderstanding about mediation. We invited, on occasions, members of local governments to come to mediations to try to improve the communication flows, and there was some misunderstanding about what we were doing and the like. In fact, we addressed some of those points in these answers. As a result of that meeting we immediately fashioned a standard order which is to invite the president of a shire or the mayor of a municipality to nominate a person, if they wish, to participate in the mediation. That properly expressed what we always wanted to express. It was an invitation. It is the local government, through its usual processes, that decides who comes; it is not some rump in the council that can decide to come down and misrepresent the council's position or whatever their fears might have been. It was not a personal invitation to a particular councillor to do that, but it is through those discussions with appropriate bodies that we get the feedback, we keep listening, and we continue to hold those meetings regularly. In fact, I think next month we start a number of major local government consultations, both in regional areas and in the city, with local governments.

Hon GEORGE CASH: When the original bill was introduced into Parliament, in the Legislative Council in particular there were very substantial amendments made to the bill which later became the SAT act.

Justice Barker: Yes.

Hon GEORGE CASH: Can you tell the committee, Justice Barker, as the President of SAT, whether those amendments have enabled the act to work better, and if there is any need for any other adjustments to the amendments that were made? In particular, I refer you to your answer to question 78. At 78 (b) you were asked -

> Are there any amendments to the SAT Act, SAT Regulations or the SAT Rules which you consider are warranted?

The answer to question 78 (b) states -

> Apart from the matters in train referred to in (a), no other amendments are required.

That would seem to lead me to believe that the SAT act is working pretty well. Perhaps you would like to make some general comments in that regard, but I recognise that in a number of the answers contained in this document - for instance 71, 73 and 74 - SAT agrees with the need to amend some other acts. That is just an example of some of them. Right through the report there are examples of where you generally agree with the need to amend some other acts, in some cases simply to have greater clarification of various issues that have been raised in other areas. I have to say that I am led to believe in general terms that SAT appears to believe that the SAT act is working reasonably well, but that is for me to believe and for you to tell the committee whether that is reasonable.

Justice Barker: Yes, there are a number of components to the member's question. The very first one invites an analysis of the amendments that were introduced during the earlier legislative process and the contribution they have made or might be thought to have made to the working of the act, as well as an invitation to say how the SAT act is going. In answering the question as you have put it out, Mr Cash, there are two aspects to the SAT act, in a sense. There is the SAT act proper, with its regulations and rules, and it enables the tribunal to do its job. Then there are all of the enabling acts of which we are now up to about 150, and if there is an inconsistency between the enabling act and the SAT act, the enabling act prevails. So, for example, there are special tribunal constitution rules as to who sits in a legal practice matter. I have to sit in certain cases and so on, and my usual discretion as to who should sit on the matter is controlled by the Legal Practice Act. One needs to look, in some situations, at how that primary act works and the sort of regulatory scheme it sets out. We have not brought too much into that, but I can tell the committee that we have, through the CTAC - I am not sure what it stands for, but it is to do with strata titles; it might be STAC -

Mr Watt: If I may correct that?

Justice Barker: Please.

Mr Watt: It is the Community Titles Advisory Committee.

Justice Barker: Thank you. Mr Watt is right up on that!

We have - particularly through our senior member, Clive Raymond, who is on that committee - made contributions to the committee as to the working of the Strata Titles Act, but we have also, through me, made express tribunal recommendations as to how the Strata Titles Act might be improved. We have not, in these submissions, brought in that substantive issue in many cases. There is for example, as I mentioned last time, a working group of the Public Advocate's Office, the tribunal and the State Solicitor's Office to look at the Guardianship and Administration Act, which requires a review, and that is a real job on its own. From time to time we see something in an act that we think could be improved and we will put that into our annual report. What we said in answer to question 78 is that by and large, with the recent proposals in the Acts Amendment (Justice) Bill 2007, we are happy that the bits and pieces we think can be tidied up are being tidied up.

[12.50 pm]

A point was raised last time by the Chairman, and I agreed that the act could be amended in that regard.

Looking at some of the amendments now in the act proposed and adopted in the earlier legislative process, it was not my job at the time to be an advocate in relation to all of that. Thankfully, I was tucked away deciding civil and occasional criminal matters down in the Supreme Court and mercifully spared having to debate any of the issues with the then members of the committee that looked at it. I have to say that I was not sure that I thought all of them were desperately needed. However, by and large, with one exception I will mention, I think it has worked. For example, it was useful I think to have an amendment that enabled us at the tribunal to deputise a magistrate to deal with a SAT matter - a good sensible suggestion. As it turns out, we have used it only once in a guardianship matter, as Mr Watt says. I thought we were going to use it in relation to a firearms

matter at Carnarvon on one occasion, but I think, for whatever reason, the listing was cancelled or a magistrate was not available. The reality has been in that area that, whilst the Chief Magistrate and I earlier on had established an understanding as the act required, and it was put in place, it has not often been used. It is a good idea but in practice, the tribunal believes in its own product and in the processes it has developed. It believes that where it can it ought to decide matters itself, use video conferencing and go to that place. We want citizens everywhere to get the benefit of what we are doing. Magistrates are not trained in what we are doing. We can use it; it is a good back-up to have. There are times when I think about it but there are usually a whole lot of practical reasons it will not work. The Chief Magistrate will say, "Well, we can't deal with that matter in Meekatharra until magistrate X is there on circuit in August." We say, "Well, hang on, we need to deal with it immediately." So it does not happen. That was an interesting addition, worth having, but, in practice, it has not been of great assistance or of great use.

One thing that was put in was the minor matters procedure, under section 93(2), concerning matters that have a value of less than $7 500 -

> At or before an initial directions hearing in a minor proceeding the applicant may make one or more of the following elections in relation to the proceeding -
>
> (a) a no legal representation election;
>
> (b) a no hearings election;
>
> (c) a no appeals election.

If I had been invited and been able to come to the earlier committee discussions about that provision, I would have strongly opposed it. If you are inviting me now to think of something I would prefer not to be in the act, it would be that provision. My view about the legislation in a number of areas - not all areas - is that you facilitate a tribunal like ours to operate fairly but you are best to avoid being overly prescriptive. It usually causes problems down the track as much as it might satisfy some strongly held view of a legislator or the legislature at a particular time. At a very practical level, to enable a person to say, "I don't want a hearing here" and to be able to call a veto on a proceeding might actually be inimical to the interests of justice for that party themselves. There is a belief in some quarters that getting ridding of hearings and dealing with things only on documents is a much better way - quicker, cheaper and better - but experience shows us that it is not. By way of example, I had a matter in a state revenue review from what seemed to be a citizen with a very small claim and concern. This person was Islamic and did not speak very good English and was assisted by her son. After the matter was presented to me at some directions hearings, they said, "Deal with it on the documents." Everyone agreed I should deal with it on the documents. When I started to write the decision and get into it properly, I suddenly discovered it was not quite so simple. I brought the matter back on and held a hearing. She came and gave some proper evidence; we had interpreters in and suddenly discovered it was quite different. I made a decision that actually supported the taxpayer's position. By the end of that hearing the commissioner's position fully accepted, without any begrudging attitude, the rightness of that decision. It taught me - I think many of us have had this experience - that just doing something on the documents without a hearing is not necessarily always the best way to go. Therefore, my view is informed by that and I do not think it is a good idea to let a party say that there is not going to be a hearing; that parties cannot be represented; or that there cannot be an appeal. The ideas behind all of that are that you get quicker decision making. Do you get quicker administrative justice? I do not think so. I would always say that you can leave it in and include a comma and say "subject to the decision of the President".

CHAIR: Were the documents themselves suggestive that you might want to have a hearing; is that what led you to that belief?

Justice Barker: When I sat down to write the decision, suddenly real questions, lack of evidence and an inability to decide the case on the materials became clear. The same problem evidenced itself very quickly under the old strata titles process. It was thought by the old Strata Titles Referee, I imagine correctly, that the act as it used to be effectively required him to decide matters on documents. However, when you have to deal with factual disputes and people are obliged to give you just documents, they are not all trained advocates or trained writers; they do not always know what you want to know to make the decision. They do not always appreciate what the critical issue is under the act. We like to be able to fashion the decision-making process to suit the circumstances. What is better is to be able to say that this case is obviously ready for decision on documents, and if everyone agrees, let us go away and do it. On a whole lot of issues, we do that, but not have it prescribed by the legislation and certainly not have it prescribed by the legislation that a party can oblige a particular process.

Hon GEORGE CASH: Are you aware of how many occasions 93(2) has been used?

Justice Barker: Very, very few.

Hon GEORGE CASH: That is helpful. Are you suggesting that perhaps if the words "with the consent of the president" were inserted prior to or in the appropriate place in 93(2) - I do not have the act before me - would perhaps overcome the issue?

Justice Barker: If there was discretion to cancel the veto, that would be a way forward short of removing it.

Hon GEORGE CASH: It will depend on the Parliament. If the Parliament does not agree to the removal of 93(2), perhaps the opportunity for discretion will improve the situation?

Justice Barker: There are different ways of expressing it. One could say a party in such a case may request, subject to the approval of the president. The same thing. Thank you.

Apart from that - I had not really sat down to study the benefits of the committee review process on the earlier occasion - I can say that it worked pretty well with respect to all of those who were involved.

CHAIR: My perception was that we raised this the first time you gave evidence to us, but it has been triggered again with your reference to the Building Disputes Tribunal being brought under SAT. Are there any other bodies that would be better run under the SAT umbrella?

Justice Barker: The task force report identified a number of possibilities, some we excluded immediately for a range of philosophical and practical reasons; for example, we did not think that WorkCover should be included.

[1.00 pm]

I have actually realised that, in theory, lots of organisations of an administrative nature could be in the tribunal, but we said no. A body like WorkCover would not be included, the main reason being that it has a huge responsibility, and if you put it into a body like the tribunal, there would probably be a move within six months to rename the State Administrative Tribunal "WorkCover", because that would seem to be the main thing it does. We did not imagine that would come in. Industrial relations was left out, but I have to say that with the demise, effectively, of state-based industrial relations processes and their movement to the federal sphere, I read in the paper that one well-known industrial relations lawyer in Perth thought that what was left should be given to the State Administrative Tribunal. I took that as a compliment about us, but we were not particularly seeking to have that come to us.

CHAIR: It might trigger more use of your compulsory mediation power.

Justice Barker: It would, and I think that is where that expression came from, and there it is; there might be occasions. So I do not think that. There was a question about teachers at one point, and I see that in the new teaching legislation there is a right of re-hearing in the District Court.

CHAIR: Is it the College of Teaching you are talking about?

Justice Barker: Yes, the college of teaching act. We said in our answers explicitly about that, that there was no reason in principle that we should not have it. I cannot see why the District Court should have it; it does not fit with the general theory. We just want to make sure that, if it comes to us, it comes with a cheque, so that we can continue to do our jobs.

CHAIR: That was one of those bills that I think went through before you were established.

Justice Barker: Yes. There is no reason in principle -

CHAIR: I always thought that the tribunal might be a place where it would better fit.

Justice Barker: Yes. Synergy raised a question about licensing matters. Again, I think that should be in the tribunal. That is after, probably, the task force report. There was a discussion about a number of areas that the Local Court and the Magistrates Court exercise, and the Small Claims Tribunal. We said to leave that for a couple of years. Our thinking was always the same in respect of residential tenancies and other matters that could be in the tribunal. Liquor licensing was then in a separate body, and my thought back in 2002 was that it required either deregulation or new forms of regulation. That has happened, so there is nothing to transfer to us. In regard to the Racing Penalties Appeal Tribunal, metaphorically, a couple of country race meetings worth of horses were sent to gallop around the task force and made such a noise that we decided we did not want to have them in the tribunal, so we allowed them to go. I think there is probably a philosophical case for them to be in the tribunal but I cannot get too excited about it. We recommended at the time, and it was part of the original bill, that the Mental Health Review Board's functions be in the tribunal. You know that the president of that board and I agree that the functions should be in the tribunal, supported, I think, by the community law service. I understand that the Attorney General, who is also the Minister for Health, has accepted that recommendation in principle. I think that will be an important and very sensible step forward. I have made my comments about the Building Disputes Tribunal. It was umm-ing and ahh-ing about the best way to go there. History has shown, I think, that it would be good to have them in from a citizen's point of view.

There have been proposals around this Parliament in relation to freedom of information. I think I made a comment somewhere that we believe that if we were given jurisdiction, the tribunal would exercise it very efficiently. Under the proposals as they were put up, as I understand, the FOI commissioner would be maintained and have an important mediation role, to filter out all but the most intractable matters that would come through to the tribunal. I certainly see that as a very practical and feasible way forward. Queensland is conducting a review through a special task force chaired by Mr David Solomon into the Queensland Freedom of Information Act 1992. I received a copy of the discussion paper it has just issued the other day. It draws attention to the prospective Western Australian position as being realistic, and it is noted that VCAT and the commonwealth AAT are currently engaged in FOI decision making. I do not have a strong view about that. That is a policy matter.

There are probably no other matters or organisations that immediately come to mind. We are not in the business, and I am certainly not in the business, in any sense, of empire building. It is a question of what is sensible public policy at the end of the day, and anything that comes to the tribunal must come with appropriate resources to do it. There are some jurisdictions that, if we were given them, would accentuate our current need to be in new premises suitable for us to operate in for the next 15 or 20 years. We do need to resolve that issue.

Hon GEORGE CASH: Just a general question about the Prisoners Review Board -

Justice Barker: No thanks!

Hon GEORGE CASH: The "no thanks" related to the fact that it is a criminal matter, and it is better handled elsewhere. Could you just advise us on your reluctance?

Justice Barker: I expressed it too quickly - I gave my position away! I cannot remember now, but I think we may have been invited to comment about this, and I probably did represent my position to government in a formal way at one stage. I very much see the parole process as still being inextricably linked to the criminal processes of the courts, whilst they can be seen as administrative processes afterwards. I think that is one area that has such discrete issues as to whether in a theoretical sense they are exercising an administrative function. I see it as so tied to the whole process of sentencing and the administration of sentencing that it ought to remain separate. It might be a little like the WorkCover example I gave. If the tribunal were simply to be known in the public eye as the organisation that deals with parole or release decisions involved in sentencing, I think it would be most unfortunate. It is one of the few bodies that I think in practice and in theory does not have a natural alignment with the functions of the tribunal as it is.

Judge Chaney: If I may make a comment, I know that there is a provision in the legislation affecting that body that provides that it is not required to extend natural justice in its deliberations. They, in fact, invited me to come and talk to them about what that means. I think it actually indicates something of the fundamental difference in character between the two functions, and it is this role within the criminal justice system that requires special and different considerations from the type of administrative decision making that we are generally involved in, which I think does set it apart in theory.

Hon GEORGE CASH: Thank you. Just on some other boards and tribunals that exist, it may be convenient later for the committee to approach the State Administrative Tribunal to seek an expression in respect of a number of tribunals that we may be considering so that you might give us a brief answer as to whether you believe they would fit within the organisation or not. That is something that may come up in due course. There are some other areas that we still have to pursue.

CHAIR: We may also come back to you with some concerns about the areas you have already identified as being desirable. That might be a process of ongoing dialogue with you.

We do not have any further questions for you today. It might be that we do not see you again as part of this process of the review of the act. Thank you very much for the evidence you have given us today. We appreciate the evidence you have given on previous occasions, and all the support and assistance you have provided to enable us to move forward with our review.

Justice Barker: Thank you very much, again, for the opportunity to explain the jurisdiction and the operation of the tribunal. I think this process has been very important and useful. It has certainly helped us to keep focusing closely on what we do. In the course of it all, I came to realise that we are probably the most publicly accountable justice-related organisation in the entire country. We have enjoyed, when all is said an done - enjoyed is probably not the right word, but we have appreciated the value of engaging in this process, so thank you for giving us the opportunity.

CHAIR: Thank you very much. That concludes the hearing today.

Hearing concluded at 1.11 pm