STANDING COMMITTEE ON LEGISLATION

INQUIRY INTO THE JURISDICTION AND OPERATION OF THE STATE ADMINISTRATIVE TRIBUNAL

TRANSCRIPT OF EVIDENCE TAKEN
AT PERTH
WEDNESDAY, 30 APRIL 2008

SESSION THREE

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 11.25 am

POUSTIE, MR CAMERON
Principal Solicitor, Environmental Defender's Office of Western Australia (Inc),
sworn and examined:

The CHAIR: On behalf of the committee I would like to welcome you to the meeting. Before we begin, I will ask you to take either the oath or the affirmation.
[Witness took the affirmation.]
The CHAIR: Can you please state your full name, your contact address and the capacity in which you appear before the committee?
Mr Poustie: Cameron Poustie from the Environmental Defender's Office. I represent both the EDO and the Conservation Council.
The CHAIR: You will have signed a document entitled "Information for Witnesses". Have you read and understood that document?
Mr Poustie: Yes.
The 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, and please be aware of the microphones and try to talk into them. Ensure you do not cover them with papers or make noise into 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 a 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 material published or disclosed is not subject to parliamentary privilege. I will invite you in a moment to make any general comments that you feel are appropriate. I notice you have handed a two-sided document to the committee and we invite you to make any relevant comments to that. You have been provided with a list of four questions in advance of today's hearing. I will not recite each one; I will just invite you to talk through them, and then we will see what arises from that.
Mr Poustie: Thank you, Mr Chairman. I understand that we cannot quote from the transcript of today until it has been finalised, or until the committee reports.
The CHAIR: Yes, the transcript will, in a relatively short space of time, be a public record. Until such time as it becomes finalised, your evidence to this committee is not protected by parliamentary privilege, so you should not be out there attributing what you say. You can have opinions on things that you give evidence on, but you should not be out there attributing your evidence until such time as it becomes a public record. In that sense, it is six of one, half a dozen of the other; you can still have the same opinion, but you cannot say, "My evidence to the committee is . . . ". That is probably what you should steer away from. It does not gag you from having views on these things.
Mr Poustie: Is the submission we made in September last year public yet?
The CHAIR: Yes, that is a public document, so you are at liberty today and at any other time to discuss that.
Mr Poustie: We consulted a number of our constituent groups before we produced that, because I wanted to send them the final version of the submission.
The CHAIR: Yes, it is public.
Mr Poustie: By way of introduction, the Environmental Defender's Office is not a particularly well-known organisation among the conservation sector, so I will introduce us. We are a community legal centre comprising three staff. We focus exclusively on public interest environmental legal matters, which largely take in advice work, but to some extent law reform

issues as well. That is our brief; it extends to making suggestions in this context. I have to say that the submission we wrote last September was done within a fairly short time frame, among various other urgent sorts of things we were dealing with at the time, so I very much appreciate the opportunity to expand on our comments. As I will go on to outline, because of the way the WA system is currently set up, there are not many opportunities at all for community involvement at the State Administrative Tribunal, so I am not coming here having appeared at SAT, but there is the theoretical possibility that the EDO could represent clients at SAT, although it has a fairly narrow scope of operations. We obviously have a great deal of experience with the current process of EP act appeals to the minister. The Conservation Council and the EDO sought feedback from a number of constituent groups and came up with the position that we put forward on 7 September last year, which essentially was that recommended by the Barker task force in 2002. In our submission of September last year, we made the comment that we would be prepared to make further submissions and be involved in further consultation, and this is one of the few times that I have made a comment like that in a government submission and the opportunity has been taken up, so I thank the committee for that.

The CHAIR: Groundbreakers!

Mr Poustie: In terms of question 1, I will start by saying, with great respect to whoever was the author of the SAT annual report, that there are at least two sentences that are not that clear to me. We understand the thrust of the question and that the point is that SAT might be permitted to make a final decision that perhaps the proponent cannot implement prior to the EP act process being finalised. I thought that would be interesting to raise. On the second page, the second sentence of the second paragraph begins —

Even if the parties were in agreement . . .

It is not clear to me quite what that means. I indicated that to the committee clerks and they directed me to some transcripts of earlier proceedings of this committee. I still was not quite sure what was intended by that particular sentence, but as I say, I am really just noting that I am comfortable with the thrust of what the proposals are.

[11.30 am]

Similarly, with the entire last paragraph on page 2, I think what has been done there is that it quotes essentially from that Burns case. When I look at the relevant paragraph of the Burns case, that paragraph is also unclear to me. It is not suggesting anything inappropriate is happening at the SAT level where they have sort of confused matters, but there is a question mark there over quite how the New South Wales system operates. Anyway, I think that is not relevant for our deliberations in terms of just whether or not the SAT might be empowered to make a decision that has effect and that therefore it has some sort of exception to what is currently section 41 of the Environmental Protection Act. Essentially, our position is that we do not support amendments being made to section 41 along these lines.

We are very conscious of the fact that the SAT has a keenness to make very quick decisions, and we very much support that in any decision maker, but in addition to the SAT act section 9 setting out that decisions should be made as speedily as practicable, obviously the other key SAT objective is to make or review decisions fairly and according to the substantial merits of the case. I note that His Honour Justice Barker, at page 14 of the 21 September 2007 transcript, says, “To give proper time you just cannot do those things too quickly.” Justice Barker, on the same day, at pages 13 to 23, outlines a series of matters that are too complex to decide quickly. I cannot recall whether it is his honour’s phrase or a phrase I am suggesting to you: if the SAT is bound to wait on the outcome of a parallel proceeding, then obviously there is only so much it can do about the speed of the actual SAT process itself. With great respect, his honour’s approach of effectively suggesting that SAT’s performance might be evaluated by reference to how fast it deals with 80 per cent of its matters is probably the way to deal with that. The alternative would be that when looking at the effectiveness of SAT as a jurisdiction, if it is waiting on a parallel process, then it sort of stops the clock, if you

like, and does not count any time that effluxes as a result of parallel proceedings. We note that Justice Barker, at page 13 of the 21 September transcript, says that on some occasions, apart from waiting for EP act procedures and sometimes waiting for the Magistrates Court or the District Court, obviously very serious matters need to be dealt with first. We would then say that if the SAT was evaluated through lenses that had due regard for those parallel proceedings blowing out time lines, if you like, there is no need to change the Environmental Protection Act primacy over the SAT legislation and, indeed, over all other Western Australian legislation.

Justice Barker, on 15 February 2008, at pages 8 and 9 also acknowledges that part IV matters—that is, matters that are subject to formal environmental assessment—would very much slow down the SAT. If those EPA processes are in train within either the DEP or the EPA—or the minister, as is currently the case—we acknowledge that to wait for those outcomes will slow down the SAT. We do agree with Senior Member Parry's interpretation in the Burns case that section 41 has this impact. We think that is beyond dispute, but we say there are very good reasons why other decision makers wait for the EPA process and that, essentially, the EP act is quite clear at section 5 that it overrides other legislation. That was acknowledged in the Burns case at paragraph 27. I might just take you to that. Notwithstanding that the Burns case is quoted in the SAT annual report as authority for recognising that there is this apparent problem with section 41, we say that at paragraph 27 Senior Member Parry acknowledges in the final sentence of the paragraph there —

> Reading the word "could" as referring to a potential event or situation and thus having broad effect is consistent with the express object of the EP Act "to protect the environment of the State" having regard to the principles of ecologically sustainable development . . . and the supremacy of the EP Act over inconsistent provisions of other written laws . . .

We would say that the clear legislative hierarchy, if you like, is that the Environmental Protection Act is the superior act. From a governance perspective, we urge that that situation be maintained. It is important that the larger public interest issues are dealt with and considered to be predominant as against the relatively minor issues. In this case, if something does go to the EPA and is considered significant enough for formal assessment, then it is appropriate that that larger-scale question gets resolved before the planning considerations, for example, are dealt with. That is usually the interaction that we are talking about in the context of environmental matters when it comes to the EPA on one hand and the SAT on the other. It is a question of planning matters waiting to be determined until such time as the environmental matters have been determined.

I am conscious of the fact that you have been addressed, I think, by the DEC and the Appeals Convenor's office today. I did not have a chance to come along and listen to their evidence. I hope I am not treading over well-trodden ground.

The CHAIR: No, we are interested in your evidence and what you have to say.

Mr Poustie: From the governance point of view, again we say that the biggest public interest decision is the most important one to resolve first. Essentially, the question could be asked: what would be the point of having the SAT express a definitive view of the planning aspects of a matter that might ultimately not even get environmental approval? I would be interested in the committee's feedback if there is a good answer to that question. I am not sure that there is.

[11.40 am]

Also from the governance point of view, we would ask why the SAT should be exempted from the operation of section 41 given that section 41 applies to all other decision-makers, including the DEC itself. So in the context of the DEC, for example, if there was a proposal to build a large factory and part of that factory involved the need for a pollution licence in respect of one of their stacks, the DEC cannot issue a pollution licence for one of those stacks until the whole proposal for the factory has been passed through. Similarly, we ask why the SAT should be given an exemption if the decision-maker whose decision they are reviewing actually does not benefit from the

exemption. I believe it is pretty clear that SAT is supposed to literally step into the shoes of the original decision-maker and have the capacity to remake a decision—that is the essence of merits review. It would be odd, we would suggest, for the potential to exist for the reviewer, the merits review body, to have a slightly different capacity to make a decision from the actual body in respect of which it is reviewing the decision. Again, we take you to the last sentence of paragraph 49 of the *Burns* case —

> Furthermore, in the absence of any additional power not available to the Commissioner . . .

In that case, the Commissioner of Soil and Land Conservation —

> . . . the Tribunal is subject to the same limitations as the Commissioner in making the reviewable decision.

It would obviously be a fairly significant government decision to look to upset that status quo. I wonder whether there would be the potential at least for perverse, unintended consequences, in that potentially if someone was very, very keen to have their proposal move through the process as quickly as possible, they might appeal to SAT anyway, knowing that SAT was not subject to the limitation of having to wait for the EP act processes. That might result in more matters going to SAT that essentially were not necessary to appeal the merits and they were really just being appealed on the basis of trying to speed up the decision-making process. I think that would be an unintended consequence of addressing the apparent issue here.

Assuming the EP act processes are more appropriate to be finalised first, we would ask why in fact the planning matter needs to be listed within SAT at all—while the EP act processes are in train. Perhaps the appeal just needs to be lodged and then the appeal can be properly dealt with once the EP act matter is dealt with. If it is appropriate that it should be listed, presumably it would be listed for fairly long adjournment periods with the capacity for any of the parties to apply to bring the matter on faster if the EP act process was finalised. We have, for example, a Warden's Court matter like that, that is adjourned on a yearly basis. Everyone is waiting on the proponent actually to produce some more environmental studies. Once they are done, then the Warden's Court matter will be resuscitated and will go forward to a full hearing.

I should finally note that if you were minded to accept our recommendation in respect of the part V trial—which I will talk more about in a minute—then there is obviously no need to change section 41 in respect of part V anyway. It is just a question of what you might do in relation to part IV. That is all I propose to say about the first question. Is that a point to take questions from the committee?

The CHAIR: Members will jump in as they feel the need. We are happy for you to walk us through the list of questions and they will take the opportunity if and when it presents.

Mr Poustie: I turn then to question 2 on page 3. Firstly, it is noted that there is a right for the Attorney General to intervene in proceedings. I will come back to talk about that more in a moment. Again, with great respect to the author of the SAT annual report, we feel it is necessary to understand a bit more about what is actually proposed in this context and we had a look at the transcripts and were not able to get that level of detail. I can talk you through some of the question marks I think that are there at the moment. Does the SAT consider, for example, that the minister may intervene after a proposal has been referred but before the EPA has expressed a view on whether or not to assess it? If that is the case, that would seem, with great respect, to be too early as the EPA may decide not to assess it. In any case, the minister is not involved at that stage.

Possibly what is contemplated instead is that the minister could intervene after a decision not to assess has been made and before the period for appeal against that decision has expired, or after an appeal against a refusal to assess has been lodged but before it has been determined. In both cases again, though, the minister has not been involved at that stage yet. The point I am getting to here, which I think is fairly self-evident, is that if it is contemplated that the minister might intervene, it would make sense, we would say, that the minister would intervene only once the minister actually

was dealing with the matter at some level, and there are a number of stages in the process when the minister is not involved at all, or at least not involved unless there is an appeal against the level of assessment, which the minister does determine. If that is the case, then it is really the EPA that is dealing with the assessment process at that point. Perhaps then what is contemplated, instead of the right of the Minister for the Environment to intervene, would be the right of intervention by either the EPA or the Appeals Convenor or the minister, depending on where the process is up to. I imagine that would be complex to contemplate and complex to draft, but that possibly is really the intention of the SAT proposal. That said, if the minister has made a decision, then section 41 will generally not apply at all. If the minister is involved, other than in respect of an appeal against a level of assessment, section 41 often does not apply unless we are in that gap period between the minister making a decision on appeals and then the subsequent issuing of conditions in relation to the proposal.

With the Wagerup expansion, for example, sometimes the decision is made on the appeals and then implementation conditions—as they are called under the EP act—are issued pretty much at the same time. On the other hand, sometimes there is a significant delay. In the Gorgon proposal, there was a decision made in December 2006 about the appeals and then there was a delay of some nine months before the implementation conditions were issued. If that circumstance applies, then potentially the minister could intervene in that nine-month period to update SAT on how quickly the matter is proceeding or whatever else, so that SAT has an idea of how long further adjournments would need to take.

We should note, however, that such intervention is not currently contemplated under the Warden's Court jurisdiction or in relation to any local government. It is not considered appropriate that the minister can jump in at a local government level in the context of assisting local government with making a decision that might be considered to have a statewide consequence. Perhaps what instead is contemplated is a limited right of intervention when important legal questions are being dealt with that have sufficiently large public interest.

When this committee looked at what was then the SAT bill, I understand it looked at this issue and it was noted that section 37(1) was really about overriding public interest matters, and that was a very limited opportunity for the Attorney General to intervene. We would say it is perhaps not the original intention of section 37 anyway that there would be intervention just for the sake of speeding matters along; it is really just limited to the prospect of the issues being dealt with at SAT being of statewide significance or at least broad public interest.

With great respect to His Honour Justice Barker, at page 9 of the 15 February 2008 submissions he gives the appearance, we would say, of being unfairly critical of the EPA in terms of the time to deal with some of these matters. That may not be what His Honour intended, and I speak very carefully in relation to justices of the Supreme Court. Often delays occur under the EP act purely and simply as a result of scientific uncertainty in areas that are very unusual and technically complex. Lots of proposals in the Pilbara at the moment involve stygofauna and troglofauna and all sorts of things that are at the cutting edge of science. If delays are to do with that, then it is fair to say that the EPA will take some time and proponents will take some time.

I mentioned earlier that the delays regarding the Warden's Court matter that we are dealing with at the moment are exclusively as a result of waiting for further work to be done by the proponents. Sometimes the impression you get with these issues of delay is that it is really about the decision-maker not responding quickly enough to the issue.

[11.50 am]

He might have a question mark about whether he is sufficiently well funded or whether he has enough staff. Often the delay is a result of the proponent taking a long time to get his head around

fairly complex engineering challenges or environmental constraints. In short, our submission is that we cannot at this stage see how SAT would be able to deal with these matters faster than the EPA and the Appeals Convenor currently deal with them, assuming that both parties have the same resources to make those assessments. Again, on a similar note to the first question, there is no need to provide for such ministerial intervention about part V appeals if a suggested trial is adopted.

Moving then to question 3, I wonder if I can just refer back to the submission we made. I am not sure whether members have a copy of that with them. It is not essential if you do not.

The CHAIR: Just give us a moment.

Mr Poustie: I probably should have brought eight copies of it.

Hon GIZ WATSON: No; we should have brought our homework.

The CHAIR: What page is it?

Mr Poustie: I was going to take you to page 2 to revise the trial concept we are talking about.

The CHAIR: Are you on question 3 now?

Mr Poustie: Yes. We are talking about the trial in the context of part V decisions. Perhaps at the start I should have outlined for your benefit, if you are not familiar with them, what the scope of those decisions is. Part V decisions that are currently subject of appeals to the minister include the granting or refusal of clearing permits, the conditions of the clearing permits, other aspects relating to clearing permits and, importantly, works approvals and pollution licences and other matters relating to the amendment and transfer of those. Among that list, the key items of the numerical workload that I imagine would be transferred to SAT on this trial basis are the granting or refusal of clearing permits, works approval and pollution licences.

I now take members to page 3. When I looked at this submission again, it occurred to me that when we said that the application form should be as simple and as user-friendly as possible, we meant that the application form should include space for the grounds of appeal. Perhaps that is overly obvious, but we certainly do not support a system that allows a person to just tick a box and say he objects to a proposal. He would have to state the grounds for his objection. Using clearing as an example, the EP act provides a list of clearing principles against which clearing permit applications are evaluated. Presumably, every objection or appeal against those types of applications would argue that the principles had been applied incorrectly in those cases.

The second point in the middle of page 3 essentially is that the current process involves the drafting of a letter that appeals against the clearing permit—if we continue to use that example—but the level of documentation required is more akin to the level of documentation required in a court; that is, multiple copies of documents must be provided to all parties and that sort of thing. We would not support a move in that direction because that would essentially turn what is currently a fairly community accessible process into something that would seem more like a court process and potentially would be likely to inappropriately scare off applicants.

Moving to page 4, another important point in the second bullet point at the top of the page is that appeals should cost no more than they do currently. Appeals relating to clearing permits are free and it costs $50 for an appeal against works approval and pollution licences. We appreciate that that recommendation has a budgetary consequence and that SAT would need to be appropriately funded. My clients and constituent bodies have made it clear that we should support this trial only if it moves to a system that is comparable to the current system in terms of access and cost.

The second sentence of the fourth paragraph on page 4 refers to one way of assisting not only applicants, but also the person who has applied for a clearing permit. The existing opportunity in SAT to have the matters dealt with solely on the basis of documents tendered will assist with making that process fairly speedy and accessible. It is very much the case that some community members would be prepared to write their concerns in a two or three-page letter, but they might be

intimidated by a process such as this committee. Therefore, it is appropriate for them to have an opportunity to have the matter dealt with on the documents.

The CHAIR: How could anyone be intimidated!

Mr Poustie: It is hard to imagine how anyone would be intimidated by this process, but I am sure that it can be the case.

I refer to the last paragraph on page 4. The legislative changes to move in the direction of this trial would be a good opportunity to address some issues with the current Environmental Protection Act. I am not sure whether that takes you outside the scope of your brief when you are looking into the SAT legislation, but if you are able to make related recommendations about other acts, there is a current lack of logic whereby any person can appeal the refusal by the EPA to assess a proposal under part IV, but they are unable to appeal against either the refusal to grant approval or the conditions of a works approval; they can appeal only the grant or works approval. Sorry, I got that wrong. They are able to appeal only the conditions of a works approval and not the granting of a works approval. We also note that that approach is inexplicably different to the way that part V deals with clearing permits, in relation to which any person can generally appeal the grant of a permit. I will stop there on that submission for the time being.

The committee has given us the opportunity to make further comments about the trial. I want to again note that at the time we made our submission, we felt that we had a reasonable understanding of what our constituent groups thought. We did not feel that we had covered the field. I had not heard about the matter for a few months and was unsure whether the proposal had legs, but then we got the opportunity to attend this hearing today. I have some new staff and have not had an opportunity to consult with all the appropriate groups. Chris Tallentire from the Conservation Council has quite publicly been involved in numerous distractions recently that members are aware of, so we have not had the opportunity to consult further. Essentially, we are seeking today an undertaking that I will go to some of those environment groups in the next few weeks and try to develop some final submissions. I have some submissions about some aspects of the trial, but I can undertake to consult more. The committee might be minded to recommend that the state government proceed with the trial on the basis of first issuing a discussion paper to say what the government proposes to do and then to seek submissions on that. I am conscious that when submissions were sought about the committee's deliberations, it was seeking submissions on the SAT act in general and not on this particular trial. That is a suggestion that we would respectfully make to the committee. We have no firm view on which agency or body is the best to issue such a paper and consider public submissions. However, given that the EPA, the Appeals Convenor, the Minister for the Environment and SAT each have an interest in the current system and what it might be, potentially the Department of the Attorney General is the appropriate department to run such a process. In the meantime, if the committee is not minded to recommend that a discussion paper be released, I will talk through more aspects of the trial.

I should explain that we are keen for a trial to take place rather than to move to the new system.

[12 noon.]

We support the rationale of the task force in 2002, which was conducted by Barker, QC, as he was then. We understand the rationale that essentially matters should go to SAT unless there is a good reason for them not to go to SAT. We accept that probably part V matters are appropriate matters for SAT rather than the minister. However, on the other hand, part IV matters are probably too political; that is, they are too much about political judgements and high-level policy judgements that are more appropriately made by the minister. However, we would say also that that assumption needs to be road tested. Therefore, we would support part V matters going to SAT on a two-year trial basis. Perhaps then the trial could proceed on the basis that SAT would have the power to refuse to hear a part V matter if it realised when the matter came to it that it was more appropriate for the minister to deal with that matter. It might be, as I have said, that the matter was considered

to be too political or too much about high-level policy making. It might also be a pollution licence matter, for example, where a proper decision on the issue could not really be made because there was an absence of appropriate EPA policy. There are certainly a number of areas in which there is an absence of detailed EPA policy. Therefore, SAT might say it does not really have the criteria against which to properly consider the matter. Previously, the minister would have just made the call on the basis of what was in the public interest. If SAT was confronted with a matter like that during the trial, we would suggest that the legislation should not give SAT the power to essentially refer the matter back to the minister to be dealt with in that way. We would say that such an approach would be better than having everything go to SAT, but with the minister having the power to claw a matter back out of SAT if it was thought appropriate, because that would essentially give the minister the opportunity to politicise something that was not necessarily appropriately politicised but was more appropriately dealt with by SAT. We would say that the converse that would be appropriate would be for SAT to have the capacity to say, "This is beyond the scope of our decision making. We will send it to the minister for the minister's political judgement."

In short, the trial we are suggesting is a pretty significant one in terms of governance on environmental issues in Western Australia. Apart from question marks about whether the SAT process will be dealing with matters that are considered to be too political or too high level, I have already indicated that the risk from the point of view of my clients is that the process will be too legalistic and too intimidating for community members. Therefore, part of what should be trialled is whether SAT was well set up to handle community-based appeals and applications, and was appropriately informal or appropriately not intimidating.

I turn now to question 4—which I guess is throwing it open to any other issues—and I want to take you back, if I may, to the submission that we made in September. I have talked about the trial in the context of part V of the EPA act. I now want to talk about planning matters. I will talk first about some key matters at pages 5 and 6 of our submission. In some ways, when we look at the current EPA process as against the planning process, it really throws into stark relief some of what we would say are the deficiencies of the current planning process. For example, any person can go to the EPA and say that a proposal should have been formally assessed. However, it is not the case that any person can currently go to SAT about a planning matter. A person cannot appeal a planning matter to SAT unless that is specifically provided for in the relevant local government town planning scheme. Albany had two planning schemes that are now administered by the City of Albany. The shire town planning scheme has a third party planning right. I think that is the only jurisdiction out of the 140-odd local governments that still provides that power. We would say that it is a very significant problem that the planning process is shut out from a community perspective. A neighbour who may be directly and immediately impacted upon by the consequences of a particular planning proposal—such as a change in land use, adding a few storeys to a building, or whatever—is given the opportunity to be notified and to participate in the local government's decision making. However, when that decision has been made, the person who is proposing to build that excessively large building, or whatever, is given the opportunity to appeal that decision to SAT, but the neighbour is not. If a proponent does appeal to SAT, the neighbour can seek to intervene. However, it is a fairly restrictive opportunity. I will talk more about that in a moment. As I have said in the last two paragraphs on page 5, a person can seek to intervene, and that person will technically be a party at that stage. However, as was recently observed in the Court of Appeal, an intervener, unlike a party, will ordinarily be allowed only to support or oppose the position contended for by one of the other parties. An intervener will not be permitted to expand on the issues that have been decided. Therefore, it is very much a limited right to participate. The person essentially needs to demonstrate that he can add something extra to the proceedings, but he can do that only in relation to a matter that has already been dealt with by SAT.

If I can turn now to page 6, I would say simply that even the terminology "intervener" suggests that that person is a second-class citizen in the SAT proceedings. If I can take you then to paragraph

four, the alternative approach that we would very much recommend is that SAT be given an unrestricted capacity to hear from any third parties that apply for the opportunity to make a submission. If a party was accepted in this way and was defined as a party under the SAT act, any misuse of that opportunity could be more than adequately dealt with under SAT's existing powers. In a lot of public interest environmental matters and planning matters, there is often a concern that if we open the door to all these crazy community litigants, they will block up the system and introduce all sorts of vexatious and frivolous claims. Well, the courts already have the capacity to deal with frivolous and vexatious claims. SAT also has the capacity to deal with frivolous and vexatious claims. If a person came to SAT and essentially wasted everyone's time, SAT would have the power to make an order for costs against that person. We would say that would be a sufficient deterrent against misuse of the so-called open-standing provisions or third-party provisions. The legislation itself should provide an unlimited opportunity for people to at least have their voices heard at SAT.

The CHAIR: What would happen in a proceeding if an intervener or a third party was a $2 shelf company that was worth nothing? Who would pay the costs?

Mr Poustie: I do not know what the answer would be under the SAT act. However, in the context of the court, I think potentially costs would be awarded against the person behind the shelf company. I am sure the Supreme Court has the power to do that, so I would be surprised if that was not also the case with SAT.

The CHAIR: I do not remember the circumstances of the appeal that was lodged by that particular coastal residents action group, but I understand that group was pretty well penniless.

Mr Poustie: Apart from the power to make orders against people, which I think does exist, it is certainly the case that if there was a concern about the capacity of a group to pay, the court could make orders upfront to get security for costs. A community group could be required to put up $10 000 or $20 000, or whatever, essentially in trust, in case that money needed to be accessed.

The CHAIR: There are ways around it.

Mr Poustie: Yes. Those types of orders are problematic from the point of view of my clients; however, the power to make those orders already exists. The capacity to control the misuse of the SAT process also already exists. Therefore, we would say that the legislation should be changed so that neighbours and interested community groups—whoever it might be—will at least have the capacity to go to SAT on appeal, or go to SAT when an appeal has been lodged, and participate equally as a party and have their voices heard on that level, in the same way that that opportunity is currently extended only to the proponent.

[12.10 pm]

Paragraph 5—actually, I think I probably have largely made that point.

I guess the last sentence there is that apart from we say the strong logical and sort of merit-based, if you like, reasons for moving to third party planning appeals—I should take you to the two-page document I supplied to you today, which is a little bit out of date in some respects but I am confident it is not out of date in any significant way. That document illustrates that WA is the only jurisdiction that does not have at least some limited form of third party appeal rights. So, even the Northern Territory, you can say because they were the last to come on board, has been progressive enough to recognise the community interest in planning matters and provide at least in that case a limited opportunity for third party planning appeals. Some jurisdictions will say any person can take the appeal; some of them will say you must have participated in an earlier stage of the process in order for you to have a subsequent appeal right. Even such an approach would still be a great advance on what the WA system currently is. Therefore, we would say that WA is behind the eight ball in that respect.

I apologise, I do not have this document here, but I can get it to you later. I ran out of time to actually read the report. I did not want to table it to you unless I had read it, but I am aware of an Independent Commission Against Corruption report in New South Wales late last year and one of its key recommendations was—and I should say New South Wales already has third party appeals in relation to planning matters—they actually felt that an improvement and expansion of those third party rights was a way to reduce corruption at a local government level. I will get that report to you but at this stage, for the purposes of Hansard, it is the New South Wales Independent Commission Against Corruption report 2007. It is an additional reason, we would say, to support that move, to improve democracy, I suppose, at that grassroots level and minimise the extent to which inappropriate decisions can be made.

I should also note that Dr Janet Woollard in the Legislative Assembly has introduced a bill and I actually do not know off the top of my head what stage it is at, whether it has been read in or whether it is a draft bill, but you may be aware of it anyway. It is the Planning and Development Amendment (Third Party) Bill 2007. In short, it recommends the introduction of third party planning rights. We have made a submission in response to Dr Woollard's bill and the short version is that we largely support the proposal. There are ways in which we say her bill could be improved and expanded in the direction of maximising community input but it is a worthy bill we would say and maybe one that the committee should have a look at, if it is so minded, to make some findings about third party rights in the planning context. I think that is all I had by way of my submission, so I am happy to take questions.

The CHAIR: I have one additional question. I will read it to you, but you will also receive a written copy because it is a lengthy question.

Mr Poustie: A question without notice.

The CHAIR: It is. I ask whether you are in a position to comment on this today —

> The Committee understands that under the *Planning and Development Act 2005*, the provisions regarding compensation for injurious affection allow disputes to be determined by arbitration under the *Commercial Arbitration Act 1985*, by referral to the SAT or by some other method agreed by the parties. There has been a suggestion that all questions of compensation for injurious affection (including the valuation of the affected land and the compensation which should be payable) should be determined by the SAT.

Are you in a position to comment on that today?

Mr Poustie: I would actually like to take that on notice, if I could. My convenor, Dr Hannes Schoombee, has done a lot of work about injurious affection, so it would be well placed to come up with an answer.

The CHAIR: All right, we will look forward to a response from you.

Mr Poustie: What would be the time frame—just as soon as possible?

The CHAIR: As soon as practically you can. We are not under a shocking time frame—we do not have one of these limited time referrals—but, certainly, if we can get that from you in an approximate time from receiving your evidence that would obviously assist us.

It has been pointed out to me that this table you have presented, the third party appeal rights—you made the point earlier about SAT's merit review function. These other state jurisdictions, are they merit reviews? Are they all merit reviews? I notice you mentioned Victoria, but —

Mr Poustie: I believe so, yes.

The CHAIR: So, across the board we are talking about merit reviews here?

Mr Poustie: My understanding is yes, merit review third party appeals exist in every jurisdiction except Western Australia. There are also superior third party rights, certainly in New South Wales, for judicial review, but this table is about merits review.

The CHAIR: Okay, thanks for that.

Hon GIZ WATSON: I just had a question with regards to the fact that this appeal right has been available in other states and judges for varying amounts of time, and I note in New South Wales since 1979. Is there any evidence of the right of appeal being abused in a way that we were discussing before in terms of seeking to frustrate processes or vexatious use of the appeal process?

Mr Poustie: Not that I am aware of. I am not aware of any, I suppose, commission of inquiry or anything of that nature that has had that sort of recommendation, other than this New South Wales commission I mentioned, which was recommending the expansion of rights. I am sure it is the case that there would be industry representatives in some of these jurisdictions who would say that there should not be any third party rights and they are probably able to point to examples of what they say are inappropriate uses of those rights. I am sure that is the case but there are plenty of examples in the Western Australian context where there is simply no right to take matters that seem clearly to me to be good candidates for merits-based appeals, so it is frustrating to advise people here that they—just by sort of legislative accident, I suppose—do not have that right here but if they were in South Australia or New South Wales they would.

Hon GEORGE CASH: I have a question on the proposed trial that Mr Poustie mentioned. Do you have a view on the argument that can be put that if you separate the part IV and V that you get inconsistencies coming through, perhaps a lack of efficiencies, that general line that is often used? What is your view in response to that?

Mr Poustie: Essentially, I think with respect, Barker QC's view in 2002 was the right approach; that the SAT would have the capacity, when dealing with the part V matter, to consider what was happening about the related part IV matter. In fact, I think the EP act is pretty clear that those part V decisions must be consistent with the part IV ones anyway. So, I think the SAT would simply be placed in that position of having that restriction on its jurisdiction and, certainly, it would be required to but also obviously very strongly inclined to make decisions that were consistent with part IV.

Hon GEORGE CASH: You do not see a significant issue in that area?

Mr Poustie: No.

Hon GIZ WATSON: If I could also, you mentioned the case of the City of Albany or shire—whatever it is—

Mr Poustie: It is the city these days, yes.

Hon GIZ WATSON: I think it is the City of Albany these days. The situation there, which I am familiar with because my parents were actually some of the people involved, but the SAT was able to hear from third party, I guess, appellants in regards to a planning decision. I do not know whether you could give more information, but it seems to me that was because the city, by virtue of having amalgamated with the shire, had adopted that provision in its own law. Does that mean that other councils could do the same thing?

[12.20 pm]

Mr Poustie: Yes. I would have to confess that I am not 100 per cent sure whether that—are we talking about the Earl Street apartment building or something?

Hon GIZ WATSON: Yes, an Earl Street apartment.

Mr Poustie: I am not 100 per cent sure whether that was an example of third party planning rights, but it is certainly the case that Albany has held on to these third party planning rights—in one of its

schemes anyway. The last I heard there were moves down there to expand that right across both the schemes that the city administers, producing a new scheme to replace the two existing ones. It is open to any local government to seek to introduce third party planning appeal rights. It would then be Minister MacTiernan's power to allow that or disallow that. There is no right to introduce it without the minister's involvement, but I think there was a point a few years back when the minister was asked whether or not those Albany provisions can be retained and she was happy to have those retained. I am not sure what her current view is about expanding third party appeal rights.

The CHAIR: Thank you very much for your evidence today. We look forward to hearing from you with respect to the question that we asked you that you are taking away and the report that you are going to investigate for us from ICAC. Thank you very much. That concludes today's hearing.

Hearing concluded at 12.21 pm.