REPORT 14
STANDING COMMITTEE ON LEGISLATION
INQUIRY INTO THE JURISDICTION AND OPERATION OF THE STATE ADMINISTRATIVE TRIBUNAL

Presented by Hon Ken Baston MLC (Chairman)

May 2009
STANDING COMMITTEE ON LEGISLATION

Date first appointed:
17 August 2005

Terms of Reference:
The following is an extract from Schedule 1 of the Legislative Council Standing Orders:

“4. Legislation Committee
4.1 A Legislation Committee is established.
4.2 The Committee consists of 5 members.
4.3 The functions of the Committee are to consider and report on any Bill referred by the House or under SO 125A.
4.4 Unless otherwise ordered any amendment recommended by the Committee must be consistent with the policy of a Bill.”

Members for this inquiry:
Hon Graham Giffard MLC (Chair) until 10 August 2008
Hon Giz Watson MLC (Deputy Chair)
Hon Matt Benson-Lidholm MLC from 11 November 2008
Hon Ken Baston MLC (Chairman from 12 November 2008)
Hon Sally Talbot MLC
Hon George Cash MLC (substitute Member for Hon Peter Collier MLC until 7 August 2008 and for Hon Helen Morton from 14 November 2008)

Staff for this inquiry:
Ms Denise Wong, Advisory Officer (Legal)
Ms Kerry-Jayne Braat, Committee Clerk
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Government Response

This Report is subject to Standing Order 337:

After tabling, the Clerk shall send a copy of a report recommending action by, or seeking a response from, the Government to the responsible Minister. The Leader of the Government or the Minister (if a Member of the Council) shall report the Government’s response within 4 months.

The four-month period commences on the date of tabling.
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<tr>
<td>AAT</td>
<td>Administrative Appeals Tribunal</td>
</tr>
<tr>
<td>ACLR</td>
<td>Australian Company Law Reports, 1974-1989</td>
</tr>
<tr>
<td>AVA</td>
<td>Australian Veterinary Association Limited (Western Australian Division)</td>
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<tr>
<td>BDT</td>
<td>Building Disputes Tribunal</td>
</tr>
<tr>
<td>BRB</td>
<td>Builders’ Registration Board</td>
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<tr>
<td>BSQC</td>
<td>Building Surveyors Qualifications Committee</td>
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<tr>
<td>CCWA</td>
<td>Conservation Council of Western Australia</td>
</tr>
<tr>
<td>CLR</td>
<td>Commonwealth Law Reports, 1903-current</td>
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<tr>
<td>COAG</td>
<td>Council of Australian Governments</td>
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<td>Committee</td>
<td>Standing Committee on Legislation</td>
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<td>CSC</td>
<td>Contaminated Sites Committee</td>
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<td>DAF</td>
<td>Development Assessment Forum</td>
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<tr>
<td>DEC</td>
<td>Department of Environment and Conservation</td>
</tr>
<tr>
<td>DFC</td>
<td>Department for Communities</td>
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<tr>
<td>DSC</td>
<td>Disability Services Commission</td>
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<tr>
<td>DOTAG</td>
<td>Department of the Attorney General</td>
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<tr>
<td>DPI</td>
<td>Department of Planning and Infrastructure</td>
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<tr>
<td>EDO</td>
<td>Environmental Defender’s Office</td>
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<tr>
<td>EDRMS</td>
<td>Electronic document and records management system</td>
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<tr>
<td>EIA</td>
<td>Environmental impact assessment under Part IV of the <em>Environmental Protection Act 1986</em></td>
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<td>Elliot Review</td>
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conducted by Mr Ross Elliot, consultant, Competitive Edge Services Pty Ltd. Reported in February 2007

EPA
Environmental Protection Authority

EP Act
*Environmental Protection Act 1986*

FLR
Federal Law Reports, 1956-current

FOI Act
*Freedom of Information Act 1992*

GA Act
*Guardianship and Administration Act 1990*

GWC
Gaming and Wagering Commission of Western Australia

ICMS
Integrated Case Management System operated by the Court and Tribunal Services division of the Department of the Attorney General

LEADR
LEADR Association of Dispute Resolvers

LGPMC
Local Government and Planning Ministers’ Council

MBSQC
Municipal Building Surveyors Qualifications Committee

MHRB
Mental Health Review Board

NSW CTTT
New South Wales Consumer, Trader and Tenancy Tribunal

NSWLR
New South Wales Law Reports, 1971-current

OPA
Office of the Public Advocate

2006 Party Survey
Survey of State Administrative Tribunal parties conducted by the State Administrative Tribunal in 2005/2006

2007 Party Survey
Survey of State Administrative Tribunal parties conducted by the State Administrative Tribunal in consultation with Data Analysis Australia Pty Ltd in 2006/2007

2008 Party Survey
Survey of State Administrative Tribunal parties conducted by the State Administrative Tribunal in 2007/2008

PD Act
*Planning and Development Act 2005*

PRB
Painters’ Registration Board
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<tr>
<td>RPAT</td>
<td>Racing Penalties Appeal Tribunal</td>
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<td>RWWA</td>
<td>Racing and Wagering Western Australia</td>
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<td>SASR</td>
<td>South Australian State Reports, 1921-current</td>
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<td>SAT</td>
<td>State Administrative Tribunal</td>
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<td>SAT Act</td>
<td><em>State Administrative Tribunal Act 2004</em></td>
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<td>SAT Bills Inquiry</td>
<td>Inquiry into the bills which proposed to establish the State Administrative Tribunal (the State Administrative Tribunal Bill 2003 and the State Administrative Tribunal (Conferral of Jurisdiction) Amendment and Repeal Bill 2003) conducted by the Standing Committee on Legislation (2001-2005) between September 2003 and October 2004</td>
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<td>STB</td>
<td>State Training Board</td>
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<td>TAC</td>
<td>Training Accreditation Council</td>
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<td>Tribunal</td>
<td>State Administrative Tribunal</td>
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<td>VCAT</td>
<td>Victorian Civil and Administrative Tribunal</td>
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<tr>
<td>VSB</td>
<td>Veterinary Surgeons’ Board of Western Australia</td>
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<tr>
<td>WACARTT</td>
<td>Western Australian Civil and Administrative Review Tribunal Taskforce</td>
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| WACARTT Report | Western Australian Civil and Administrative Review Tribunal Taskforce, Government of Western Australia,
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<thead>
<tr>
<th>Abbreviation</th>
<th>Full Name</th>
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<tbody>
<tr>
<td>WACOT</td>
<td>Western Australian College of Teaching</td>
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<td>WAIRC</td>
<td>Western Australian Industrial Relations Commission</td>
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<td>WAPC</td>
<td>Western Australian Planning Commission</td>
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<tr>
<td>WAR</td>
<td>Western Australian Reports, 1960-current</td>
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<tr>
<td>WALGA</td>
<td>Western Australian Local Government Association</td>
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<tr>
<td>WALRC</td>
<td>Law Reform Commission of Western Australia</td>
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<tr>
<td>WASAT</td>
<td>Western Australian State Administrative Tribunal</td>
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<tr>
<td>WASC</td>
<td>Supreme Court of Western Australia, unreported judgments</td>
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<td>WASCA</td>
<td>Supreme Court of Western Australia, Court of Appeal</td>
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EXECUTIVE SUMMARY, FINDINGS AND RECOMMENDATIONS

EXECUTIVE SUMMARY

1. On 7 June 2007, the inquiry into the jurisdiction and operation of the State Administrative Tribunal (SAT or Tribunal) was referred by the Legislative Council to the Standing Committee on Legislation (Committee) pursuant to section 173 of the State Administrative Tribunal Act 2004.

2. On 7 August 2008, the Committee was in the process of gathering further information and drafting this Report when the 2008 State Election was called, the 37th Parliament was prorogued and the Legislative Assembly was dissolved. The prorogation of the 37th Parliament terminated this inquiry. However, this inquiry was re-referred to the Committee on 11 November 2008 in the 38th Parliament, which opened on 6 November 2008.

3. Over the course of this inquiry, the Committee received 99 submissions, held 13 public hearings involving 22 witnesses, conducted a site visit of the SAT premises and exchanged numerous items of correspondence with relevant parties in an effort to obtain information about people’s and organisations’ experiences of the operation and jurisdiction of the SAT.

The Committee’s General Observations about the Operation of the SAT

4. The Committee found that the SAT is meeting its objectives and achieving its self-imposed benchmarks and noted that the SAT constantly monitors its operations in attempting to achieve best practice.

5. The Committee made several recommendations to improve the operation of the SAT and to clarify any ambiguities, or remove redundant provisions, in the SAT’s empowering legislation. For example, the Committee recommended that:

- section 24 of the State Administrative Tribunal Act 2004 be amended to expressly require the original decision-maker to provide the SAT with documents and materials which are otherwise subject to legal professional privilege and/or public interest immunity (refer to Recommendation 9);
- certain third parties be permitted to apply to the SAT for the review of planning approval decisions (refer to Recommendation 18);
- the SAT continues to liaise with the Disability Services Commission to develop strategies to address the issue of power imbalances between people
with disabilities and other interested persons in its proceedings (refer to Recommendation 34); and

• the Government provide adequate resources to relocate the SAT to another, permanent location as soon as is practicable after the expiry of the lease for the SAT’s current premises (refer to Recommendation 35).

The Committee’s General Observations about the Jurisdiction of the SAT

6 The Committee recommended that new or altered jurisdictions be conferred on the SAT under 15 Acts (refer to Recommendations 42 to 54 and 57 to 59), many of which will result in a substantial increase in the SAT’s workload. In addition, the Committee recommended that the SAT’s disciplinary jurisdiction relating to various vocations be altered and standardised (refer to Recommendations 55 and 56).

7 The Committee noted that any increase in the jurisdiction of the SAT should be accompanied by a commensurate increase in resources. Accordingly, the Committee recommended the development of a SAT funding model as soon as is practicable (refer to Recommendation 41).

The Committee’s Conclusion

8 The Committee found the SAT to be operating efficiently and effectively and was of the view that this positive result has been due to the considerable efforts and dedication of the members and staff of the SAT. In particular, the Committee acknowledged the initiatives, work and leadership of the Honourable Justice Michael Barker, who served as the inaugural President of the SAT from 24 November 2004 to 6 February 2009.

FINDINGS AND RECOMMENDATIONS

9 Findings and Recommendations are grouped as they appear in the text at the page number indicated:

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Finding 1: The Committee finds that the State Administrative Tribunal has continuing programmes to minimise public confusion about appeal forums.

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Finding 2: The Committee finds that the State Administrative Tribunal has met the objective of having less formal and more flexible procedures than the courts in Western Australia.
Finding 3: The Committee finds that the State Administrative Tribunal is meeting the objective of providing less expensive procedures than the courts in Western Australia.

Finding 4: The Committee finds that the State Administrative Tribunal is meeting the objective of developing best tribunal practices but recognises that this is an ongoing process.

Finding 5: The Committee finds that the State Administrative Tribunal is meeting the objective of providing more appropriate administrative justice.

Finding 6: The Committee finds that the State Administrative Tribunal is meeting the objective of providing more timely administrative justice and has processes to ensure that it continues to meet this objective.

Finding 7: The Committee finds that the State Administrative Tribunal is meeting the objective of improving public accountability of official decision-making but recognises that further improvements can be made.

Finding 8: The Committee finds that the State Administrative Tribunal is meeting the objective of appropriately using the knowledge and experience of its members.

Finding 9: The Committee finds that the State Administrative Tribunal’s application process is generally accessible to all applicants but notes this is an area which requires constant monitoring.

Finding 10: The Committee finds that the State Administrative Tribunal’s processes of informing and notifying parties and potential parties are effective but recognises this is an area which requires constant monitoring.
Finding 11: The Committee finds that the State Administrative Tribunal’s practice of utilising directions hearings is effective.

Finding 12: The Committee finds that the State Administrative Tribunal’s mediations and compulsory conferences are effective.

Recommendation 1: The Committee recommends that the State Administrative Tribunal consider utilising an ‘intake specialist’ to prepare parties for mediations and compulsory conferences.

Recommendation 2: The Committee recommends that the State Administrative Tribunal consider having all of its mediators nationally accredited and/or becoming a recognised mediation accreditation body.

Finding 13: The Committee finds that the State Administrative Tribunal’s procedures for handling expert evidence are satisfactory.

Finding 14: The Committee finds that the State Administrative Tribunal’s approach in determining whether a hearing should be public or private is satisfactory.

Recommendation 3: The Committee recommends that rule 59 of the State Administrative Tribunal Rules 2004 be amended to make the references to the Retirement Villages Act 1992 clear.

Finding 15: The Committee finds that the State Administrative Tribunal’s approach to awarding costs is satisfactory.

Recommendation 4: The Committee recommends that the Criminal Investigation Act 2006 be amended to authorise the State Administrative Tribunal to possess and play audio-visual recordings of police interviews with people who are subsequently respondents in related disciplinary proceedings before the Tribunal.
Recommendation 5: The Committee recommends that the Planning and Development Act 2005 and any other of the State Administrative Tribunal’s relevant enabling Acts be amended so that the right to apply for a State Administrative Tribunal review of a decision relating to a proposal under those Acts does not arise until after:

(a) the completion of any environmental impact assessment process under Part IV of the Environmental Protection Act 1986 which is related to the proposal;

(b) the completion of any appeals which may arise out of that Part IV process; and

(c) the expiry of any appeal periods applicable to that Part IV process.

Recommendation 6: The Committee recommends that the State Administrative Tribunal Act 2004 and all relevant State Administrative Tribunal enabling Acts should be amended to enable the President of the State Administrative Tribunal to determine the constitution of the Tribunal in any matter.

Recommendation 7: The Committee recommends that the Hairdressers Registration Act 1946 be amended to empower the State Administrative Tribunal to:

(a) impose a fine of up to $10,000 for a breach of that Act;

(b) impose a fine of up to $5,000 for a breach of the Hairdressers Registration Regulations 1965; and

(c) reprimand for such breaches.

Recommendation 8: The Committee recommends that all of the State Administrative Tribunal’s relevant enabling Acts be amended:

(a) to enable either the President or a Deputy President to exercise the powers and conduct the tasks which are currently reserved for the President; and

(b) where the Tribunal panel in any matter must currently be constituted by, or include, the President, to allow the panel to be constituted by, or include, either the President or a Deputy President.
Recommendation 9: The Committee recommends that section 24 of the *State Administrative Tribunal Act 2004* be amended to expressly require the original decision-maker to provide the State Administrative Tribunal with documents and materials which are otherwise subject to legal professional privilege and/or public interest immunity.

Recommendation 10: The Committee recommends that should the Government accept Recommendation 9 in this Report, rule 12 of the *State Administrative Tribunal Rules 2004* be amended to:

(a) authorise the State Administrative Tribunal to order original decision-makers to provide documents or materials which are subject to public interest immunity to other parties or people who have been granted leave by the Tribunal to make submissions in the proceedings, unless the documents or materials are 'protected matter' as defined in the *State Administrative Tribunal Act 2004*; and

(b) prohibit the State Administrative Tribunal from ordering original decision-makers to provide documents or materials which would attract legal professional privilege to other parties or people who have been granted leave by the Tribunal to make submissions in the proceedings.

Recommendation 11: The Committee recommends that:

(a) section 69(1) of the *State Administrative Tribunal Act 2004* be amended so that the opportunity offered in that section for a person to refuse to answer a question or produce material during a State Administrative Tribunal proceeding is subject to orders and summonses to produce material under sections 35(2) and 66(4) of the Act, respectively; and

(b) the responsible Minister advise the Legislative Council whether section 69(2) of the *State Administrative Tribunal Act 2004* is intended to interfere with legal professional privilege and public interest immunity.

Recommendation 12: The Committee recommends that section 66 of the *State Administrative Tribunal Act 2004* be amended to enable the State Administrative Tribunal to issue a summons for the production of a document or other material either at the initiative of the Tribunal or at the request of a party.
Recommendation 13: The Committee recommends that section 93 of the State Administrative Tribunal Act 2004 be amended so that in minor proceedings before the State Administrative Tribunal, applicants’ elections under section 93(2), if any, are subject to the approval of the President of the Tribunal.

Recommendation 14: The Committee recommends that section 77B of the Strata Titles Act 1985 be repealed.

Recommendation 15: The Committee recommends that section 81(7) of the Strata Titles Act 1985 be repealed.

Recommendation 16: The Committee recommends that section 83 of the Strata Titles Act 1985 be amended to include:

(a) strata managers; and

(b) any person in possession or control of the records of a strata company,

as additional persons against whom the State Administrative Tribunal may make an order under that Act.

Recommendation 17: The Committee recommends that section 104 of the Strata Titles Act 1985 be amended to:

(a) remove the requirement for orders of the State Administrative Tribunal to be served on the strata company where the strata company is not involved in the proceedings; and

(b) delete the requirement for the reasons for a State Administrative Tribunal decision to be served with the order.
Recommendation 18: The Committee recommends that the Planning and Development Act 2005 be amended to give third parties who have previously made submissions about, or objected to, a planning proposal at earlier stages of the planning approval process, and:

(a) who are directly affected by the planning proposal; or

(b) the planning proposal is a matter of public or environmental interest,

a right to initiate an application for a State Administrative Tribunal review of:

(c) the grant of planning approval;

(d) the refusal to grant planning approval;

(e) the conditions, if any, imposed on the grant of planning approval; or

(f) the amendment, revocation or suspension of the grant of planning approval.

Recommendation 19: The Committee recommends that the Planning and Development Act 2005 be amended to give third parties who have previously made submissions about, or objected to, a planning proposal at earlier stages of the planning approval process, and:

(a) who are directly affected by the planning proposal; or

(b) the planning proposal is a matter of public or environmental interest,

a right to apply to join as parties to any State Administrative Tribunal review of the relevant planning approval decision.

Recommendation 20: The Committee recommends that the Environmental Protection Act 1986 be amended to give third parties a right to initiate applications for State Administrative Tribunal reviews of the granting of pollution licences and works approvals.
Recommendation 21: The Committee recommends that the *Environmental Protection Act 1986* be amended by deleting section 101A(5).

Recommendation 22: The Committee recommends that the *Environmental Protection Act 1986* be amended to give third parties a right to initiate applications for State Administrative Tribunal reviews of the revocation of closure notices, environmental protection notices and vegetation conservation notices.

Recommendation 23: The Committee recommends that the *Environmental Protection Act 1986* be amended to give third parties a right to apply to join as parties to State Administrative Tribunal reviews of environmental regulation decisions.

Recommendation 24: The Committee recommends that the State Administrative Tribunal continue to inform the public about the right to appeal its decisions.

Recommendation 25: The Committee recommends that the Government provides adequate resources to maintain and upgrade the State Administrative Tribunal’s website.

Recommendation 26: The Committee recommends that the Government provides adequate resources to upgrade the State Administrative Tribunal’s information technology facilities to enable the electronic lodgment of documents.

Recommendation 27: The Committee recommends that the Government provides adequate resources to upgrade and transform all State Administrative Tribunal hearing rooms into fully electronic hearing rooms.

Recommendation 28: The Committee recommends that the Government provides adequate resources for the upgrade and transformation of the State Administrative Tribunal into an e-Tribunal.
Recommendation 29: The Committee recommends that the intent of recommendation 73 in Law Reform Commission of Western Australia, Project No 94, Aboriginal Customary Laws Final Report: The interaction of Western Australia law with Aboriginal law and culture, September 2006, be incorporated into the State Administrative Tribunal Act 2004.

Recommendation 30: The Committee recommends that the State Administrative Tribunal be funded to obtain expert advice on Aboriginal and other minority cultures on a case by case basis.

Recommendation 31: The Committee recommends that the State Administrative Tribunal provides regular and ongoing Aboriginal cultural awareness training to its staff and members.

Finding 16: The Committee finds that, for the purposes of the State Administrative Tribunal’s application forms, the current method of identifying parties or potential parties to a Tribunal proceeding as Aboriginal people is satisfactory.

Recommendation 32: The Committee recommends that all of the State Administrative Tribunal’s application forms should prompt the applicant to provide information about the Aboriginality of all the other parties or potential parties to the proceeding.

Recommendation 33: The Committee recommends that the Integrated Case Management System operated by the Court and Tribunal Services division of the Department of the Attorney General be upgraded to allow the State Administrative Tribunal to collect information about the Aboriginal status of its parties electronically.

Finding 17: The Committee finds that the State Administrative Tribunal has strategies in place to ensure that country residents who are involved in Tribunal proceedings do not need to travel to the Tribunal’s building in Perth for hearings and other proceedings.
Finding 18: The Committee finds that the State Administrative Tribunal has strategies in place to ensure that parties or potential parties with low literacy levels are adequately assisted.

Finding 19: The Committee finds that the State Administrative Tribunal has strategies in place to ensure that parties or potential parties whose first language is not English are adequately assisted.

Finding 20: The Committee finds that the State Administrative Tribunal is providing adequate assistance to parties or potential parties with disabilities to obtain independent, ‘well-skilled advocacy’.

Finding 21: The Committee finds that the State Administrative Tribunal does not always adequately minimise the power imbalances between people with disabilities and other interested persons in its proceedings.

Recommendation 34: The Committee recommends that the State Administrative Tribunal continue to liaise with the Disability Services Commission to develop strategies to address the issue of power imbalances between people with disabilities and other interested persons in its proceedings.

Recommendation 35: The Committee recommends that the Government provides adequate resources to relocate the State Administrative Tribunal to another, permanent location as soon as is practicable after the expiry of the lease for the Tribunal’s current premises.

Finding 22: The Committee finds that the availability of accessible disabled parking at the State Administrative Tribunal’s premises continues to be an issue.

Recommendation 36: The Committee recommends that the Government and the State Administrative Tribunal continue to develop strategies to increase the availability of disabled parking at, or in close proximity to, the Tribunal’s premises.
Finding 23: The Committee finds that access to and from, and within, the State Administrative Tribunal’s premises is not ideal, particularly for people with disabilities, and continues to be an issue.

Recommendation 37: The Committee recommends that the Government and the State Administrative Tribunal work to further improve access to and from, and within, the Tribunal’s premises, particularly for people with disabilities.

Finding 24: The Committee finds that the waiting areas outside of hearing rooms and meeting rooms in the State Administrative Tribunal’s premises lack adequate space and privacy.

Recommendation 38: The Committee recommends that the Government and the State Administrative Tribunal work to increase the availability of space and the level of privacy in the waiting areas outside of hearing rooms and meeting rooms in the Tribunal’s premises.

Finding 25: The Committee finds that the State Administrative Tribunal has strategies in place to ensure that people with hearing disabilities who are involved in Tribunal proceedings are adequately assisted.

Recommendation 39: The Committee recommends that the planning and design of new or refurbished justice complexes should have regard for the State Administrative Tribunal’s requirements.

Recommendation 40: The Committee recommends that the Government provides appropriate funding for the State Administrative Tribunal’s staffing requirements.

Recommendation 41: The Committee recommends that the Government and the State Administrative Tribunal develop a funding model for the Tribunal as soon as is practicable.
Recommendation 42: The Committee recommends that the *Freedom of Information Act 1992* be amended to empower the State Administrative Tribunal to conduct a merits review of the decisions of the Information Commissioner, with no further right of appeal.

Recommendation 43: The Committee recommends that section 80 of the *Guardianship and Administration Act 1990* be amended to empower the State Administrative Tribunal to review all of the decisions which may be made by the Public Trustee under that section.

Recommendation 44: The Committee recommends that the *Mental Health Act 1996* be amended to transfer the functions which are currently exercised by the Mental Health Review Board under the Act to the State Administrative Tribunal.

Recommendation 45: The Committee recommends that the *Contaminated Sites Act 2003* be amended to:

(a) empower the State Administrative Tribunal to review the decisions of the Contaminated Sites Committee which are made pursuant to the committee’s original jurisdiction under the Act; and

(b) transfer the Contaminated Sites Committee’s existing merits review jurisdiction under the Act to the State Administrative Tribunal.

Recommendation 46: The Committee recommends that the *Electricity Industry Act 2004* be amended to empower the State Administrative Tribunal to review the decisions made by the Economic Regulation Authority relating to the licensing of electricity suppliers.
Recommendation 47: The Committee recommends that the *Environmental Protection Act 1986* be amended to:

(a) empower the State Administrative Tribunal to review the decisions which are made under Part V of the Act. In reviewing these decisions, the Tribunal must have due regard to any conditions which have been imposed on the activity in question pursuant to Part IV of the Act;

(b) empower the State Administrative Tribunal to refer a review of a decision which is made under Part V of the Act to the Minister for the Environment where the Tribunal considers this appropriate; and

(c) provide that, as soon as practicable after two years from conferral of this review jurisdiction, a Legislative Council committee, whether it is an existing committee or one established for this purpose, is to conduct an inquiry into the State Administrative Tribunal’s exercise of this jurisdiction.

Recommendation 48: The Committee recommends that the *Planning and Development Act 2005* be amended to transfer the functions exercised by the Board of Valuers under that Act to the State Administrative Tribunal.

Recommendation 49: The Committee recommends that the *Planning and Development Act 2005* be amended to provide the option of a State Administrative Tribunal determination to parties to all disputes relating to injurious affection arising under Part 11 of the Act where this form of dispute resolution is not currently available.

Recommendation 50: The Committee recommends that the *Builders’ Registration Act 1939* and the *Home Building Contracts Act 1991* be amended to transfer the functions exercised by the Building Disputes Tribunal under these Acts to the State Administrative Tribunal.
 Recommendation 51: The Committee recommends that the *Gaming and Wagering Commission Act 1987* be amended to empower the State Administrative Tribunal to review the Gaming and Wagering Commission of Western Australia’s decisions to:

(a) refuse to renew an approval, permit or certificate under section 56 of the Act;

(b) revoke or amend an approval, permit or certificate under section 60 of the Act;

(c) cancel a supplier’s licence in relation to minor lotteries and amusements with prizes under section 104C of the Act; and

(d) refuse an application for a further supplier’s licence in relation to minor lotteries and amusements with prizes under section 104B of the Act.

 Recommendation 52: The Committee recommends that the *Racing Penalties (Appeals) Act 1990* be amended to transfer the functions exercised by the Racing Penalties Appeal Tribunal of Western Australia under the Act to the State Administrative Tribunal.

 Recommendation 53: The Committee recommends that the *Residential Tenancies Act 1987* be amended to empower the State Administrative Tribunal to hear ‘prescribed disputes’, as defined in section 12 of the Act.
Recommendation 54: The Committee recommends that the *Vocational Education and Training Act 1996* be amended to empower the State Administrative Tribunal to review the Training Accreditation Council’s decisions:

(a) to register and deregister training providers;

(b) to accredit, vary or cancel the accreditation of courses, skills training programmes and the qualifications which can be gained from such courses and programmes;

(c) to recognise the skills and qualifications obtained by people in Western Australia, or elsewhere, in industry, the workplace or educational institutions; and

(d) establishing the minimum competency to be provided by accredited courses and skills training programmes.

Recommendation 55: The Committee recommends that the Government:

(a) takes note of any drafting instructions it receives from vocational regulatory bodies in relation to their disciplinary functions and powers; and

(b) undertake a review of the legislation for the vocational regulatory bodies which have had, or will have, their disciplinary functions transferred to the State Administrative Tribunal,

in order to develop a standard set of summary disciplinary functions and powers for all of these bodies in relation to minor disciplinary matters.

Recommendation 56: The Committee recommends that, where a vocational regulatory body has had, or will have, its disciplinary functions transferred to the State Administrative Tribunal, but retains or is conferred an original jurisdiction to make minor disciplinary decisions, the Tribunal be empowered to review these decisions.

Recommendation 57: The Committee recommends that the *Child Care Services Act 2007* be amended to empower the State Administrative Tribunal to hear and determine allegations of breaches of the regulations by child care service licensees.
Recommendation 58: The Committee recommends that the Western Australian College of Teaching Act 2004 be amended to empower the State Administrative Tribunal to review Western Australian College of Teaching decisions in relation to the regulation of teachers.

Recommendation 59: The Committee recommends that the Western Australian College of Teaching Act 2004 be amended to provide the State Administrative Tribunal with original jurisdiction in relation to serious disciplinary proceedings against teachers.

Recommendation 60: The Committee recommends that the Government instruct the working party which was established to review the Guardianship and Administration Act 1990 to undertake a re-examination of the structure of the Public Trustee’s supervision of alternate administrators and to consider the issue of the Public Trustee’s potential conflict of interest in supervising these alternate administrators.
CHAPTER 1
INTRODUCTION

REFERRAL

1.1 On 7 June 2007, the inquiry into the jurisdiction and operation of the State Administrative Tribunal (SAT or Tribunal) was referred by the Legislative Council to the Standing Committee on Legislation (Committee) pursuant to section 173 of the State Administrative Tribunal Act 2004 (SAT Act).1 This section provides that:

As soon as practicable after the end of the period of 2 years after the day on which section 7 comes into operation [that period ended on 1 January 2007] an inquiry into the jurisdiction and operation of the [State Administrative] Tribunal is to be conducted by –

(a) a committee of the Legislative Council established to conduct that inquiry; or

(b) an existing committee of the Legislative Council upon which the function of conducting that inquiry is conferred by that House.

1.2 The Committee falls into the latter category prescribed in section 173 of the SAT Act.

1.3 On 7 August 2008, the Committee was in the process of gathering further information and drafting this Report when the 2008 State Election was called, the 37th Parliament was prorogued and the Legislative Assembly was dissolved.2 The prorogation of the 37th Parliament terminated this inquiry. However, this inquiry was re-referred to the Committee on 11 November 2008 in the 38th Parliament, which opened on 6 November 2008.3

BACKGROUND TO THE SAT

1.4 Since 1982, there have been six separate recommendations to reform Western Australia’s system of administrative law, culminating in the Western Australian Civil and Administrative Review Tribunal Taskforce (WACARTT) Report in May 2002
(WACARTT Report)\(^4\), which recommended the establishment of the SAT in substantially the same form as it exists currently.\(^5\) The WACARTT was chaired by Mr Michael Barker QC (as he then was), who was later appointed as a Supreme Court judge and, on 24 November 2004, the inaugural President of the SAT\(^6\). After serving as the SAT’s President for four years, the Honourable Justice Michael Barker was appointed to the Federal Court on 17 December 2008 and commenced his new role on 9 February 2009.\(^7\) His position in the SAT was filled by His Honour Judge John Chaney SC, Deputy President, SAT, who was appointed as a Supreme Court judge and President of the SAT on 10 February 2009.\(^8\)

1.5 Between September 2003 and October 2004, the Standing Committee on Legislation (2001-2005) (Previous Committee) conducted an inquiry into the bills which proposed to establish the SAT (SAT Bills Inquiry). The State Administrative Tribunal Bill 2003 was drafted based on the Victorian Civil and Administrative Tribunal Act 1998 (Vic) and the recommendations made in the WACARTT Report.\(^9\) The Previous Committee tabled the report on its findings in that inquiry on 27 October 2004 (SAT Bills Report).\(^10\)

1.6 In broad terms, the SAT is a tribunal which has the power to make (exercising its ‘original’ jurisdiction) and/or review (exercising its ‘review’ jurisdiction) various administrative\(^11\) and civil decisions. The SAT commenced operation on 1 January 2005 after the two Acts establishing it, the SAT Act and the State Administrative Tribunal (Conferral of Jurisdiction) Amendment and Repeal Act 2004, were passed by the Parliament on 10 November 2004 and were proclaimed to take effect on and from


The SAT also derives its jurisdiction and operational direction from a significant number of ‘enabling Acts’, which are defined as follows:

*another Act* [as opposed to the SAT Act], or a portion of another Act, under which jurisdiction is conferred on the Tribunal and, if relevant, it includes subsidiary legislation under that other Act;13

1.7 At its commencement, the SAT had jurisdiction under 136 enabling Acts. It gained jurisdiction under the *Guardianship and Administration Act 1990 (GA Act)* on 24 January 2005.14 As at 30 June 2007 and 30 June 2008, the SAT exercised jurisdiction under 143 and 145 enabling Acts, respectively.15 The following observation about the SAT’s rapidly expanding and evolving jurisdiction was made in the SAT’s *Annual Report 2007*:

In its first two years of operation 33 new, re-enacted or proposed laws have conferred additional jurisdiction on the Tribunal.

The growth and evolution of jurisdiction requires dedicated and specialised skills to be available to the Tribunal.16

1.8 The Honourable Justice Michael Barker, President, SAT, has described the SAT as:

the most significant reform of administrative law in Western Australia since settlement and is one of the most comprehensive amalgamations of its sort in Australia. It is modelled closely on the Victorian Civil and Administrative Tribunal (VCAT), which in turn owed much to the Commonwealth Administrative Appeals Tribunal (AAT).

The SAT assumed many of the functions of numerous courts and administrative tribunals including the Supreme, District and Local Courts and the Court of Petty Sessions; appeals tribunals; Ministers of the Crown; professional and occupational disciplinary and supervisory tribunals and boards; and primary administrative
tribunals and boards of a personal, commercial and equal opportunity nature.\textsuperscript{17}

1.9 The SAT’s work is divided into four ‘streams’, known as the Human Rights stream, the Vocational stream, the Development and Resources stream and the Commercial and Civil stream.\textsuperscript{18} This division of work enables the SAT’s procedures to be adapted to each stream so that the particular needs of parties in each stream can be met.\textsuperscript{19}

1.10 According to the Department of the Attorney General (\textbf{DOTAG}), the department responsible for the administration of the SAT, the operations of the SAT are summarised as follows:

- The SAT aims to make the correct and preferable decision based on the merits of each application.
- The SAT is not a court and strict rules of evidence do not apply.
- The SAT encourages the resolution of disputes through mediation.
- The SAT allows parties to be represented by a lawyer or a person with relevant experience, or by themselves.
- The SAT holds hearings in public in most cases.
- The SAT provides reasons for all its decisions and publishes written reasons for its decisions on its website.\textsuperscript{20}

1.11 The following diagram illustrates generally how an application progresses through the SAT’s processes, from the receipt of the application to the resolution of the issues involved.

\textsuperscript{17} Written Presentation from the Honourable Justice Michael Barker, President, State Administrative Tribunal, 21 September 2007, p3.

\textsuperscript{18} For more information about these streams, refer to the State Administrative Tribunal’s website: www.sat.justice.wa.gov.au.


\textsuperscript{20} Submission No 84 from the Department of the Attorney General, 7 September 2007, p8.
INQUIRY PROCEDURE

1.12 An advertisement was lodged by the Committee in The West Australian newspaper on 16 June 2007 advising the public of the inquiry and seeking public submissions in respect of the jurisdiction of the SAT and its operation since its establishment. The Committee also issued a media statement on 22 June 2007 covering these matters.

1.13 The Committee invited various members of the public who may have had views on the subject matter of the inquiry to provide a submission by writing to them individually. This included:

- all of the people who, and organisations which, the Previous Committee had written to for the purposes of the SAT Bills Inquiry;
- every person who, and organisation which, had provided a submission to the SAT Bills Inquiry;
- every government department; and

21 Source: Written Presentation from the Honourable Justice Michael Barker, President, State Administrative Tribunal, 21 September 2007, p15.
2,429 randomly-selected people who, and organisations which, were, or had been, parties to proceedings in the SAT as at 30 June 2007.

1.14 In an effort to maintain the confidentiality of the contact details of parties to SAT proceedings, the Committee’s letter of invitation to provide a submission was sent by an arrangement with the SAT without the Committee receiving any of the parties’ contact details. **Appendix 1** lists the people and organisations contacted by the Committee, excluding the randomly-selected SAT parties.

1.15 The Committee received 99 submissions (these are listed in **Appendix 2**), 85 of which have been accepted as public evidence.

1.16 On 21 September 2007, the Committee attended and inspected the SAT’s premises, where Members and staff were briefed by the Honourable Justice Michael Barker, President, and Mr Alexander Watt, Executive Officer, SAT. A public hearing was also held that day with the SAT’s President, Executive Officer and His Honour Judge John Chaney SC, Deputy President, SAT.

1.17 The Committee held further public hearings on 15 February 2008, 25 March 2008, 30 April 2008, and 7 and 14 May 2008. A list of the witnesses who appeared before the Committee is attached as **Appendix 3**. Valuable information was also obtained by the Committee through written correspondence.

1.18 Rather than undertaking a technical review of the SAT Act, the enabling Acts, and all of the subsidiary legislation made under these Acts, the Committee has largely relied upon individuals’ and organisations’ experiences of the operation and jurisdiction of the SAT in order to conduct its inquiry and prepare this Report.

1.19 The Committee extends its appreciation to the individuals who, and the organisations which, provided evidence and information as part of the inquiry. In particular, the Committee acknowledges and thanks the SAT for its assistance and cooperation.

**GENERAL FEEDBACK**

**Feedback Resulting from this Inquiry**

1.20 A number of submissions and one letter received as a result of the initial consultation phase of this inquiry reported that the relevant people and organisations had had
positive experiences with the SAT and/or were satisfied with the operation of the SAT.22

1.21 The vast majority of submitters and one correspondent who responded to the initial consultation phase indicated that they were generally supportive of the SAT.23 Some of these submitters saw the SAT as an impartial reviewer,24 and observed that the SAT has a transparent approach to resolving matters25. However, a number of these submitters also provided suggestions on how the SAT could be improved or commented on aspects of the SAT’s operation and/or jurisdiction with which they were unsatisfied. For example, the Disability Services Commission (DSC) said:

we support absolutely the move from the old guardianship and administration process to the tribunal. We think it has been a success. However, in the lead up to that change we were apprehensive about whether adults with disabilities would in any way be disadvantaged by that move. In our experience, that generally has not been the case. The submission that we put forward, though very supportive of SAT and the guardianship approach, did raise some issues about a relatively small number of cases, whereby we feel that some of the processes and procedures that have been used perhaps have not been in the best interests of adults with disabilities, and that, maybe, some improvements could be made to those processes.

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22 For example, Submission No 5 from the Builders’ Registration Board, Painters’ Registration Board and Building Disputes Tribunal, 1 August 2007; Submission No 10 from the Land Valuers Licensing Board, 9 August 2007; Submission No 11 from GHD Pty Ltd, 10 August 2007; Submission No 12 from Private Submitter, received on 14 August 2007; Submission No 15 from Private Submitter, 15 August 2007; Submission No 16 from the Department of Water, 14 August 2007; Submission No 20 from the Optometrists Registration Board of Western Australia, 14 August 2007; Submission No 27 from Private Submitter, 23 August 2007; Submission No 29 from Private Submitter, 24 August 2007; Submission No 39 from Mrs Lesley Freegard, 29 August 2007; Submission No 45 from the Architects Board of Western Australia, 30 August 2007; Submission No 46 from the Council of Official Visitors, 30 August 2007; Submission No 67 from Ms Dot Price, 31 August 2007; Submission No 70 from Mr Mel Harris, 31 August 2007; and Letter from Private Submitter, 15 August 2007.

23 Refer to Appendix 4 for a list of the relevant submissions and correspondence.

24 For example, Submission No 1 from the Australian Dental Association (WA Branch) Inc, 6 July 2007; Submission No 6 from Office of the Commissioner of Soil and Land Conservation, 9 August 2007; Submission No 10 from the Land Valuers Licensing Board, 9 August 2007; Submission No 13 from the Psychologists Registration Board of Western Australia, 10 August 2007; Submission No 14 from the Nurses Board of Western Australia, 15 August 2007; Submission No 21 from the Optometrists Registration Board of Western Australia, 14 August 2007; Submission No 29 from Private Submitter, 24 August 2007; Submission No 76 from the Department of Fisheries, 31 August 2007; Submission No 91 from The Australian Psychological Society Ltd, Perth Branch, 14 September 2007; and Submission No 98 from Hardy Bowen, Lawyers, 6 November 2007.

25 For example, Submission No 47 from the City of Bayswater, 24 August 2007; and Submission No 98 from Hardy Bowen, Lawyers, 6 November 2007.
Overwhelmingly, we support the move, but we thought it was our responsibility to bring that to your attention.\textsuperscript{26}

1.22 Other submitters have given an account of their negative experiences with the SAT, some of which resulted from the submitters’ dissatisfaction with the outcome of their SAT proceedings.\textsuperscript{27} These negative comments were not confined to one particular stream of SAT matters; rather, from the information provided in each submission, they stemmed from proceedings in at least the Human Rights, Development and Resources, and Commercial and Civil, streams.

1.23 Despite having had no direct, or minimal, exposure to SAT proceedings, some submitters, relying on what they believed to be general perception, made observations about the SAT which were negative.\textsuperscript{28}

**Feedback Resulting from an Internal Review**

1.24 The DOTAG, with the agreement of the SAT President, engaged Mr Ross Elliot, consultant, Competitive Edge Services Pty Ltd, to conduct a review of the SAT’s support processes (\textbf{Elliot Review}).\textsuperscript{29} The DOTAG advised the Committee that Mr Elliot also provided consultancy support to the SAT establishment project team in its design phase.\textsuperscript{30} The report was presented to the DOTAG and the SAT in February 2007 and is concerned mainly with the SAT’s internal efficiencies.

1.25 Mr Elliot was given the following tasks for the review:

1) \textit{assess current processes for SAT – strengths/weaknesses, efficiency, etc and make recommendations to retain, modify or discard.}

2) \textit{recommend any process improvements not requiring additional human or other resources.}

\textsuperscript{26} Dr Ronald Chalmers, Director General, Disability Services Commission, \textit{Transcript of Evidence}, 14 May 2008, pp1-2.

\textsuperscript{27} For example, Submission No 7 from Mrs Deborah Lawrence, received on 10 August 2007; Submission No 9 from Private Submitter, 8 August 2007; Submission No 18 from Ms Sheila K Stanton, 15 August 2007; Submission No 23 from Mr A Sharp, 21 August 2007; Submission No 32 from the Shire of Victoria Plains, 24 August 2007; Submission No 34 from Mr Eric Bew, 28 August 2007; Submission No 55 from Private Submitter, 30 August 2007; Submission No 58 from Private Submitter, 29 August 2007; Submission No 69 from Ms Sally Eves, 31 August 2007; and Submission No 90 from Private Submitter, 21 August 2007.

\textsuperscript{28} For example, Submission 22 from the Armadale Redevelopment Authority, received on 20 August 2007; and Submission 72 from the Department of Local Government and Regional Development, 31 August 2007.

\textsuperscript{29} Submission No 84 from the Department of the Attorney General, 7 September 2007, p14.

\textsuperscript{30} \textit{Ibid.}
3) recommend or propose an investment plan in both technological and other resources which will lead to identified process improvements and cost effectiveness of operations.\textsuperscript{31}

1.26 The review’s main finding was that the SAT is operating effectively despite its demanding workload:

*The Tribunal is considered to be meeting its general objectives all be it \textit{sic} under some duress from the Tribunal workload. The President, members and staff are to be commended for their efforts.*\textsuperscript{32}

1.27 Although the review found that the workload of the SAT is increasing, its performance, as measured by key indicators, is also improving.\textsuperscript{33} However, the following two main areas of concern were identified:

- the implementation of the technology to support the SAT operation has not met expectations set when the SAT was established, largely due to limited funding and resources; and

- the Human Rights stream staff are under pressure and particular focus to alleviate the pressure is required.\textsuperscript{34}

1.28 The Elliot Review identified the following key opportunities for improving the efficiency of the SAT:

- Transforming the SAT into an e-Tribunal (refer to paragraphs 2.539 to 2.568 in this Report).

- Improving the Court and Tribunal Services’ (a division of the DOTAG) Integrated Case Management System (ICMS). The SAT’s members and staff use the ICMS to manage and process case information in SAT matters.

- Improving teleconferencing facilities (refer to paragraphs 2.558 to 2.568 in this Report).

- Improving the SAT’s website (refer to paragraphs 2.531 to 2.538 in this Report).

\textsuperscript{31} Ibid.
\textsuperscript{32} Ibid.
\textsuperscript{33} Ibid, p15.
\textsuperscript{34} Ibid, p14.
- Reviewing staffing needs and providing additional resources in the Human Rights stream (refer to paragraphs 2.707 to 2.733 in this Report).

- Improving internal processes.

- Reviewing the SAT’s structure.

- Developing a training programme specific to the needs of the SAT.

- Developing a workload model that can be used to more accurately predict the resource impact of proposed additional jurisdictions (refer to paragraphs 2.734 to 2.743 in this Report).

- Implementing an improvement programme including a business plan, a process of gathering feedback from parties, a structured approach for improving processes, an accommodation plan and a project resource to support research, training and improvement work.  

Feedback Resulting from SAT’s 2007 Party Survey

1.29 Since 2006, the SAT has held party surveys for every financial year in an effort to obtain feedback from parties about their level of satisfaction with the SAT’s services and the application process. It is anticipated that the annual surveys will be run on an ongoing basis, predominantly in an electronic format.

1.30 The 2006 Party Survey was conducted by the SAT’s staff and provided “very positive” results (2006 Party Survey). In 2007, the SAT engaged Data Analysis Australia Pty Ltd to develop a refined set of survey questions for parties and to report on the results of the survey (2007 Party Survey). The general feedback received from parties in the 2007 Party Survey (with a response rate of 23 per cent) was again positive:

In general, the levels of satisfaction with SAT and their staff were high. In particular, the SAT staff were helpful, had a polite and professional telephone manner, were efficient, informative and timely. SAT letters and notices were also deemed easy to follow and the hearing process was seen to be fair to all parties by most respondents. Most of the respondents stated that they had sufficient information to

37 Ibid.
prepare for their hearing and felt that the length of notice given was appropriate.\textsuperscript{40}

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\textit{In general, satisfaction ratings were higher than those given in last year’s survey and most of the areas that were identified as ‘negative’ were shown to have increased in the level of satisfaction by respondents.}\textsuperscript{41}

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The majority of respondents (79\%) indicated that they would recommend SAT to others in the future if they were having a similar dispute or question to resolve. The comments indicated that the main reason respondents would recommend SAT was due to the confidence they have in SAT’s outcomes.\textsuperscript{42}

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Of those respondents that would recommend SAT to others, the majority believed that they were the successful partly (73\%). Similarly, of those respondents that would not recommend SAT to others, the majority believed that the other party was successful in the application (64\%).\textsuperscript{43}

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\textit{When compared to last year’s survey, satisfaction response rates were higher across all areas of service received by SAT staff . . . . In particular, disability access, the waiting time when visiting SAT offices, the facilities in the waiting area and the timeliness of information and SAT documents showed the greatest increase in either an excellent or good satisfaction rating.}\textsuperscript{44}

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\textsuperscript{40} Ibid.
\textsuperscript{41} Ibid, pii.
\textsuperscript{42} Ibid, p20.
\textsuperscript{43} Ibid, p21.
\textsuperscript{44} Ibid, p23.
More respondents stated that they would recommend SAT to others in the future if they were having a similar dispute or question to resolve, when compared to last year’s survey (up by 11% to 79% in 2007).\textsuperscript{45}

1.31 The key areas in which the SAT was found to be performing well included:

- The service received from SAT staff. In particular, the SAT staff were helpful, had a polite and professional telephone manner, were efficient, informative and timely, and SAT letters and notices were easy to follow.

- The website was easy to navigate and respondents were able to find the information they required, including application forms.

- Compulsory conferences and final hearings are effective at completing an application.

- Very few respondents needed all four hearing methods or a combination of direction and final hearings.

- The hearing process was seen to be fair to all parties by most.

- The mediation and final hearing are effective ... [forums for] ... handing down a decision immediately.

- The final order given by SAT was understood by most.

- All aspects of the hearing were satisfactory, in particular the courtesy of the SAT member and the ease in finding the hearing room.

- Most of the respondents had sufficient information to prepare for the hearing and felt that the length of notice given was appropriate.

- Most of the respondents thought that the length of notice given was appropriate.

- The majority of respondents believed they were successful and would recommend SAT to others in the future, primarily due to the confidence they have in SAT’s outcomes.

\textsuperscript{45} Ibid, p26.
A quarter of the respondents stated that they had no suggestions for improvement and that they were happy with the service that they had received.\textsuperscript{46}

However, the 2007 Party Survey also identified some areas for improvement:

- Reducing the time taken to finalise applications (refer to paragraphs 2.73 to 2.91 in this Report):

  *In particular, reducing this time to less than 12 weeks is recommended as there was a marked decrease in satisfaction with the length of proceedings for those respondents whose proceedings had lasted in excess of 12 weeks.*\textsuperscript{47}

- Increasing the number of issues resolved during mediation and improving the effectiveness of mediations (refer to paragraphs 2.162 to 2.214 in this Report):

  *Whilst the mediation process results in agreed outcomes between the parties and SAT are therefore not required to provide reasons for the decision, further explanation and clarification of the outcomes being discussed and their implications may also increase the feelings that the process is helpful and fair to both parties.*\textsuperscript{48}

- “The comments made suggest that time frames, attention to detail and electronic services could be improved.”\textsuperscript{49}

A 2008 Party Survey (\textit{2008 Party Survey}) was also conducted but the full results for this survey were not publicly available when this Report was finalised. A sample of preliminary results from this survey are provided in the SAT’s \textit{Annual Report 2008}.\textsuperscript{50}

\textsuperscript{46} Ibid, p27.

\textsuperscript{47} Ibid, pi.

\textsuperscript{48} Ibid.

\textsuperscript{49} Ibid, p28.

CHAPTER 2

OPERATION OF THE SAT

OBJECTIVES OF THE SAT

2.1 The WACARTT Report identified the following advantages of the proposed SAT when recommending its establishment:

- Removing confusion in the public mind by creating a single overarching tribunal.
- Providing less formal, less expensive and more flexible procedures than traditional courts by adopting a more inquisitorial and less adversarial approach.
- Developing best tribunal practices, in both procedures and decision-making principles, across various jurisdictions.
- Providing more appropriate and timely administrative justice.
- Improving the public accountability of official decision-making through the heightened scrutiny of administrative decisions.
- Avoiding the ad hoc creation of new tribunals in evolving areas of government decision-making.51

2.2 Many of these perceived advantages of the SAT are covered in the main objectives of the SAT as prescribed in section 9 of the SAT Act, which provides as follows:

The main objectives of the Tribunal in dealing with matters within its jurisdiction are —

(a) to achieve the resolution of questions, complaints or disputes, and make or review decisions, fairly and according to the substantial merits of the case;

(b) to act as speedily and with as little formality and technicality as is practicable, and minimise the costs to parties; and

2.3 The DOTAG, relying on the results of the Elliot Report, submitted that the majority of the objectives set out in the legislation establishing the SAT (and other more broadly-based service objectives) were met within the first 24 months of the SAT’s operation.52

2.4 Some of the comments obtained from the submitters and correspondents during this inquiry are discussed here in relation to each of the perceived advantages of the SAT as identified by the WACARTT.

Removing Public Confusion about Appeal Forums by creating Single Overarching Tribunal

2.5 The positive and negative comments received in relation to this criterion were evenly balanced. Those who were of the opinion that the SAT has met this objective53 provided some of the following comments:

- “In our view the establishment of the SAT has succeeded in alleviating public confusion about appropriate forums, by creating a single tribunal that deals with numerous types of complaints.”54

- “[The SAT] … has reduced the confusion about where decisions can be appealed.”55

- “The amalgamation of the various administrative boards and tribunals into one overarching tribunal is viewed as a success. This means that [Disability Services] Commission staff assisting people with disabilities have only one point of contact and one process to understand. This creates less confusion and also provides a less formal, less expensive and more flexible approach than a traditional court approach.”56

52 Submission No 84 from the Department of the Attorney General, 7 September 2007, pp8-12.
53 Submission No 2 from the Aboriginal Legal Service of Western Australia Inc, 20 July 2007, p1; Submission No 5 from the Builders’ Registration Board, Painters’ Registration Board and Building Disputes Tribunal, 1 August 2007, p1; Submission No 19 from the Water Corporation, 10 August 2007, p1; Submission No 43 from the Disability Services Commission, 29 August 2007, p1; Submission No 53 from the Office of the Deputy Commissioner (Specialist Services), Western Australia Police, 27 August 2007, p1; Submission No 64 from the Land Surveyors Licensing Board of Western Australia, 21 August 2007, p2; Submission No 79 from Mr Arthur Blaquiere, 30 August 2007, p1; Submission No 94 from the Small Business Development Corporation, Western Australia, 30 August 2007, pp1 and 5; and Submission No 98 from Hardy Bowen, Lawyers, 6 November 2007, p1.
54 Submission No 2 from the Aboriginal Legal Service of Western Australia Inc, 20 July 2007, p1.
55 Submission No 19 from the Water Corporation, 10 August 2007, p1.
56 Submission No 43 from the Disability Services Commission, 29 August 2007, p1.
• “The concept of SAT is excellent as a means of removing duplication.”

• “The SBDC considers that the SAT has been generally successful in achieving its objectives, particularly in relation to public accountability and the reduction of the previously confusing variety of procedures and appeal avenues that existed.”

• “The Tribunal has been most effective in consolidating the plethora of tribunals and boards thereby standardising issues in relation to jurisdiction, procedure and the like.”

2.6 Other submitters were not convinced that the SAT was well-known enough to remove the public’s confusion about the most appropriate forums for their disputes or appeals. They suggested that greater efforts should be put into promoting and educating the community about the SAT and its existence, role, functions and services.

2.7 For example, the Strata Centre submitted that it was “unaware of any actions, education or communications that have been designed to remove confusion from the mind of the public” as most of its clients “have not heard of SAT”. In the experience of the Plumbers Licensing Board, the SAT “has not reduced or removed confusion in the public mind” as the SAT has “not been widely promoted” and it is “not common knowledge that SAT is the single overarching tribunal that reviews administrative decisions”. However, the Plumbers Licensing Board indicated its willingness to “further promote the role of the Tribunal to the plumbing industry and the industry’s knowledge of the SAT through joint initiatives”, for example, in the “business and legal elements of the plumbers training courses”.

2.8 These suggestions of greater promotion and community education come despite the SAT’s apparent efforts to engage with the public. It appears that the SAT has, and
continues to put considerable time and resources into offering information seminars on its role, functions and services:

A measure of success for the Tribunal is that the community believes that the Tribunal has made and makes fair decisions, that the Tribunal acts with integrity and that the Tribunal is independent in its decision making.

The Tribunal, in engaging with the community, has a number of planned strategies to provide information about its practices, processes and decision making. Strategies include:

• improving resources and information to self represented and represented parties;

• regular metropolitan and regional forums with key stakeholders;

• publishing information about the Tribunal and its processes;

• publishing information about our performance;

• survey stakeholder experiences and perceptions;

• comparing current performance with published performance benchmarks;

• improving our website to deliver ... informative content;

• developing and implementing a Tribunal disability access and inclusion plan; and

• deploying formalised feedback processes and practices.

During each of the years 2005/2006/2007, Tribunal members have presented to over 60 forums on a range of topics relevant to the business of the Tribunal to groups within the community, including local governments, persons in retirement villages, strata title organisations, health professionals, vocational bodies, planning bodies and persons with interests in matters of human rights.
The Tribunal is finalising a strategic communications plan as part of a planned business activity for 2007. This plan will assist the Tribunal with setting community information objectives out to 2010.\(^{65}\)

2.9 In the SAT’s *Annual Report 2007*, it was stated that community contact remained a significant priority for the SAT in 2006/2007. During that financial year:

> 80 presentations and attendances were made by members to community and special interest groups. Regional information forums and visits were held in the regional centres of the Mid-West and Great Southern. There were a significant number of forums and seminars run in the metropolitan area, both in the Tribunal and in centres within the broader community.\(^{66}\)

2.10 The SAT’s *Annual Report 2008* indicated that the SAT remains dedicated to gathering and disseminating community information and feedback about itself in order to improve its performance. In that financial year, the SAT either held or participated in 88 seminars and forums.\(^{67}\)

2.11 These forums and information sessions are not only a means for the SAT to provide information, assistance and advice to interested members of the public; they are also an important source of feedback for the SAT.\(^{68}\) The Committee was advised by the SAT that it provides its public and special interest group forums and information sessions free of charge, although it is unable, due to budgetary constraints, to go one step further by funding specific organisations to run training sessions on the SAT.\(^{69}\)

2.12 The Western Australian Planning Commission (WAPC) noted that officers of the Department of Planning and Infrastructure (DPI) who assist the WAPC have attended past SAT forums. It was understood that these officers found the forums useful, hence the WAPC’s suggestion that more “user group working sessions be organised to resolve operational issues in SAT processes.”\(^{70}\) DPI officers also proposed the

\(^{65}\) Written Presentation from the Honourable Justice Michael Barker, President, State Administrative Tribunal, 21 September 2007, p20.


\(^{69}\) Written Presentation from the Honourable Justice Michael Barker, President, State Administrative Tribunal, 15 February 2008, pp24 and 32.

\(^{70}\) Letter from Mr Moshe Gilovitz, Secretary, Western Australian Planning Commission, 14 May 2008, pp2-3.
holding of a separate annual SAT forum where the SAT’s performance and “trends in disputation” could be reported.\(^{71}\)

2.13 The Committee noted that 33.7 per cent of the parties who responded to the 2007 Party Survey and who had been SAT applicants indicated that they “already knew about SAT” when they were asked how they had found out about the SAT.\(^{72}\) This was by far the largest response category for that question.

2.14 The Veterinary Surgeons’ Board of Western Australia (VSB) submitted that the establishment of the SAT has created confusion in the public and in the veterinary profession about the respective roles of the VSB and the SAT, the connection between the two bodies, and the connection between the SAT and the veterinary profession.\(^{73}\) It was suggested by the VSB that:

- it is reasonable to assume that the confusion was partly generated by what the VSB considered to be the inconsistent removal of the VSB’s authority to hear and decide all disciplinary matters affecting veterinarians (refer to paragraphs 3.210 to 3.229 in this Report for a discussion of this and similar issues); and

- “prior to the establishment of the SAT, there was no confusion in the public’s mind, in relation to the veterinary profession, that required removal.”\(^{74}\)

2.15 The Australian Veterinary Association Limited (Western Australia Division) (AVA) was of the view that complaints are still initially directed to the VSB prior to being referred to the SAT, and suggests that the public, and indeed, veterinarians, are “unlikely to be any less confused about the process than they were prior to the establishment of the SAT.”\(^{75}\)

2.16 When the Committee raised this issue with the SAT, the SAT’s response was that the responsibility for ensuring that veterinarians and other people associated with the profession are adequately informed about the operation of the current system lies mainly with those in the profession:

Returning then to the question of "confusion", none has been reported by the other numerous vocational boards and bodies which make disciplinary applications to the Tribunal.

\(^{71}\) Ibid, p3.


\(^{73}\) Submission No 25 from the Veterinary Surgeons’ Board of Western Australia, 21 August 2007, p3.

\(^{74}\) Written answer from the Veterinary Surgeons’ Board of Western Australia to proposed question 1(a) for the hearing on 7 May 2008, pp1-2.

\(^{75}\) Submission No 95 from The Australian Veterinary Association Limited (Western Australian Division), received on 5 September 2007, p2.
Before the Tribunal commenced, most vocational bodies took steps through professional newsletters and magazines and other publications to inform the relevant professions of the creation of the SAT, and the role the board would henceforth play in investigating complaints and referring them to the Tribunal, as well as the role the Tribunal would play as an independent and partial arbiter in relation to professional disciplinary complaints.

If there is any confusion, so far as the Veterinary Surgeons’ Board is concerned, then the Board has a responsibility to explain appropriately to its members how the new system works. The Tribunal is more than happy constructively to assist the Board in this task.  

2.17 While the SAT initially had concerns that its establishment and introduction into the sphere of vocational regulation may have caused some confusion:

In the two years of operation of the Tribunal since the period covered by the 2005 Annual Report, the roles and responsibilities of vocational bodies by and large have been settled through experience and practice. 

2.18 The VSB, with which all practising veterinarians in the State are registered, and the AVA, of which approximately 50 per cent of registered veterinarians in the State are members, advised the Committee that they each informed their respective registrants and members, via newsletters, of the creation and role of the SAT when the SAT was first created. Since then, the AVA has not seen a need to continue to inform its members about the SAT. While the AVA confirmed that it had not attended any of the forums or seminars held by the SAT, the VSB was silent on this issue.

76 Written Presentation from the Honourable Justice Michael Barker, President, State Administrative Tribunal, 15 February 2008, pp42-43.

77 Ibid, p15.

78 Dr David Neck, President, The Australian Veterinary Association Limited (Western Australian Division), Transcript of Evidence, 7 May 2008, p4.

79 Ibid, p3.

80 Written answer from the Veterinary Surgeons’ Board of Western Australia to proposed question 1(a) for the hearing on 7 May 2008, p1; and Written answer from The Australian Veterinary Association Limited (Western Australian Division) to proposed question 1(a) for the hearing on 7 May 2008, p1.

81 Written answer from The Australian Veterinary Association Limited (Western Australian Division) to proposed question 1(a) for the hearing on 7 May 2008, p1.

82 Written answer from The Australian Veterinary Association Limited (Western Australian Division) to proposed question 1(b) for the hearing on 7 May 2008, p1.
However, both organisations indicated their willingness to obtain assistance from the SAT to explain the operation of the current system to veterinarians and other people associated with the profession.\textsuperscript{84} For example, the VSB stated it would be “happy to publish articles provided by the SAT in the Board’s newsletter.”\textsuperscript{85}

\begin{boxedtext}
\textbf{Committee Comment}

2.19 The Committee was satisfied with the SAT’s communication strategies, noting its commitment to engaging and educating the community about its existence, role, functions and services.
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\begin{boxedtext}
\textbf{Finding 1: The Committee finds that the State Administrative Tribunal has continuing programmes to minimise public confusion about appeal forums.}
\end{boxedtext}

\textbf{Less Formal, More Flexible Procedures than Courts}

2.20 This perceived advantage of the SAT is reflected in the main objectives of the SAT, which are prescribed in section 9 of the SAT Act. Section 9(b) of the SAT Act provides that the SAT is “to act ... with as little formality and technicality as is practicable”.

2.21 During his first appearance before the Committee, the President of the SAT provided an explanation of the SAT’s flexible approach to decision-making:

\begin{quote}
\textit{In our work we are not bound by the rules of evidence\textsuperscript{86}, a very important point to realise in relation to the tribunal. It means we can then inform ourselves as we think fit. The tribunal is an inquisitorial tribunal in much of what it does. That expression should not be misunderstood. There is some academic writing in Australia as to what an inquisitorial tribunal in Australia means. We are not like a French magistrate out there conducting an inquiry as to whether or not someone should be charged with a criminal offence; but it does}
\end{quote}

\textsuperscript{83} Although the Veterinary Surgeons’ Board of Western Australia “is aware that the SAT ran one or more information sessions for Boards in relation to the application of the SAT legislation”: Written answer from the Veterinary Surgeons’ Board of Western Australia to proposed question 1(b) for the hearing on 7 May 2008, p2.

\textsuperscript{84} Written answer from the Veterinary Surgeons’ Board of Western Australia to proposed question 1(c) for the hearing on 7 May 2008, p2; and Written answer from The Australian Veterinary Association Limited (Western Australian Division) to proposed question 1(c) for the hearing on 7 May 2008, p2.

\textsuperscript{85} Written answer from the Veterinary Surgeons’ Board of Western Australia to proposed question 1(c) for the hearing on 7 May 2008, p2.

\textsuperscript{86} Refer to section 32 of the State Administrative Tribunal Act 2004.
mean that because we are trying to make the best decision we can, if we do not have sufficient information in front of us to make a good decision and we know that information must be out there somewhere, we can ask for it. We are not sitting there at the mercy of the parties, if you like, only able to use what they give us. We can ask for more information, and that is a very important part of being a tribunal. Courts cannot do that.87

2.22 The SAT is also required to “act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms.”88

SAT’s Techniques for Less Formality

2.23 Examples of the techniques employed by the SAT to try to ensure that it operates with as little formality and technicality as is practicable include the following:

• When attending a SAT hearing, parties and their representatives do not stand or bow when the SAT member(s) enters or leaves the hearing room.

• People who enter or leave a hearing room while a SAT proceeding is in session are not expected to bow.

• Parties may remain seated when addressing the SAT member(s).

• The language used in a SAT hearing is less formal than that used in a court. For example, a SAT member may be addressed as ‘Mr’, ‘Ms’, ‘Judge’ or ‘Justice’ as the case may be, while in court, a Judge or a Justice would be addressed as ‘Your Honour’. Phrases like ‘bar table’ and ‘bench’ are replaced with ‘parties’ table’ and ‘members’ table’, respectively.89

2.24 There were concerns, during the SAT Bills Inquiry, that the SAT would not be sufficiently flexible in its procedures.90 However, approximately one quarter of the submissions received by the Committee in this inquiry conveyed the view that the SAT has procedures which are informal, flexible and non-confrontational in

87 The Honourable Justice Michael Barker, President, State Administrative Tribunal, Transcript of Evidence, 21 September 2007, p3.
88 Section 32(2)(b) of the State Administrative Tribunal Act 2004.
89 Written Presentation from the Honourable Justice Michael Barker, President, State Administrative Tribunal, 21 September 2007, p15.
comparison to courts\textsuperscript{91} and other former review or decision-making processes\textsuperscript{92}. Some of these comments are listed below:

- “Our clients have generally appreciated the less adversarial and more inquisitorial and conversational processes of the SAT.”\textsuperscript{93}

- “As a respondent within the Tribunal’s review jurisdiction and an applicant in the exercise of its original jurisdiction, the flexibility in formality and procedures has been a welcome change. [The Committee noted that the Builders’ Registration Board (BRB) and the Painters’ Registration Board (PRB) claimed that the comparative informality and inexpensiveness of the SAT has resulted in a 280 per cent increase in applications for the review of decisions of the BRB and a 1,200 per cent increase for the review of decisions of the PRB between the 2004 and 2006 calendar years.]”\textsuperscript{94}

- “The SAT most definitely provides a less formal approach in comparison to traditional courts. SAT’s decision not to adopt many of the formalities that surround practices in traditional court settings, from the [Nurses] Board’s perspective, promotes a less confronting setting for the consideration of matters by both parties.”\textsuperscript{95}

\textsuperscript{91} Submission No 2 from the Aboriginal Legal Service of Western Australia Inc, 20 July 2007, p2; Submission No 5 from the Builders’ Registration Board, Painters’ Registration Board and Building Disputes Tribunal, 1 August 2007, p2; Submission No 14 from the Nurses Board of Western Australia, 15 August 2007, p2; Submission No 15 from Private Submitter, 15 August 2007, p1; Submission No 19 from the Water Corporation, 10 August 2007, p1; Submission No 30 from Dr Peter J Rudolph, 23 August 2007, p1; Submission No 32 from the Shire of Victoria Plains, 24 August 2007, pp1 and 2; Submission No 36 from the Social Work Department, Sir Charles Gairdner Hospital, 27 August 2007, p1; Submission No 43 from the Disability Services Commission, 29 August 2007, p1; Submission No 47 from the City of Bayswater, 24 August 2007, p1; Submission No 53 from the Office of the Deputy Commissioner (Specialist Services), Western Australia Police, 27 August 2007, p1; Submission No 54 from the Department of Treasury and Finance, 29 August 2007, p1; Submission No 67 from Ms Dot Price, 31 August 2007, p2; Submission No 69 from Ms Sally Eves, 31 August 2007, p1 (unless lawyers are present); Submission No 70 from Mr Mel Harris, 31 August 2007, p1; Submission No 75 from the Plumbers Licensing Board, 31 August 2007, p1; Submission No 76 from the Department of Fisheries, 31 August 2007, p2; Submission No 85 from the Department for Child Protection, 6 September 2007, p2 (except in two planning matters involving the department); Submission No 87 from Ernst & Young, received on 14 September 2007, p1; Submission No 96 from the Office of the Information Commissioner, 5 September 2007, p5 (although the State Administrative Tribunal still operates in a court-like manner); and Submission No 98 from Hardy Bowen, Lawyers, 6 November 2007, pp1-2.

\textsuperscript{92} Submission No 35 from the Department of Corrective Services, 29 August 2007, p1; Submission No 44 from the Western Australia Legal Practice Board, 30 August 2007, p1 (the State Administrative Tribunal’s procedures are “sufficiently flexible to achieve the SAT’s objects, whilst permitting the [Legal Practice] Board to meet its statutory responsibilities.”); and Submission No 74 from the Town of Vincent, 31 August 2007, p1.

\textsuperscript{93} Submission No 2 from the Aboriginal Legal Service of Western Australia Inc, 20 July 2007, p2.

\textsuperscript{94} Submission No 5 from the Builders’ Registration Board, Painters’ Registration Board and Building Disputes Tribunal, 1 August 2007, p2. Refer to Table 2 on page 35 of this Report for more information.

\textsuperscript{95} Submission No 14 from the Nurses Board of Western Australia, 15 August 2007, p2.
• “Less expensive and less formal procedures are often appreciated by a number of staff and families.”

• “The hearing rooms are less intimidating than those at the Magistrates Court and the proceedings are considerably less formal. The environment allows the average person, not familiar with court room proceedings, to feel somewhat relaxed and therefore able to concentrate on giving their evidence in simple, easy terms.”

• “[The SAT] … has been successful in its aims of providing a less formal, less expensive and more flexible forum than traditional courts. The experience of the Commissioner of State Revenue … has been that it is easier and less threatening for taxpayers to apply to the Tribunal for a review of an objection decision than it was to appeal to the Supreme Court.”

• “the SAT process does provide a less formal and more flexible procedure than previously experienced in the Equal Opportunity Tribunal. … the SAT provides an atmosphere conducive to reaching agreement by both the complainant and respondent, being non-adversarial as possible, and is formal enough to ensure co-operation, yet informal enough to allow for conciliation and settlement.”

2.25 A number of the submitters considered that the SAT has failed in its objective to act with as little formality and technicality as is practicable, particularly when compared to the previous review or decision-making process and when lawyers are involved in the proceedings. A sample of the negative comments is provided below:

96 Submission 36 from the Social Work Department, Sir Charles Gairdner Hospital, 27 August 2007, p1.

97 Submission No 53 from the Office of the Deputy Commissioner (Specialist Services), Western Australia Police, 27 August 2007, p1.

98 Submission No 54 from the Department of Treasury and Finance, 29 August 2007, p1.

99 Submission No 35 from the Department of Corrective Services, 29 August 2007, p1.

100 Submission No 6 from the Office of the Commissioner of Soil and Land Conservation, 9 August 2007, p2; Submission No 7 from Mrs Deborah Lawrence, received on 10 August 2007, p1; Submission No 8 from Mr Clement James Allsworth, 8 August 2007, p4; Submission No 17A from Mr Peter Stamford Boam, 27 September 2007, p3; Submission No 22 from the Armadale Redevelopment Authority, received on 20 August 2007, p1; Submission No 25 from the Veterinary Surgeons’ Board of Western Australia, 21 August 2007, pp4-5; Submission No 33 from Siska Drilling Pty Ltd and Havelock Enterprises Pty Ltd, 28 August 2007, p1; Submission No 57 from the Office of the Public Advocate, 29 August 2007, p4 (the State Administrative Tribunal’s procedures are not consistently flexible or informal); Submission No 64 from the Land Surveyors Licensing Board of Western Australia, 21 August 2007, p2 (the process, particularly the application, is adversarial); Submission No 71 from Private Submitter, 31 August 2007, p1; Submission No 78 from Mr Ross Graham Sharland, 31 August 2007, pp1 and 7; Submission No 80 from the Western Australian Local Government Association, 3 September 2007, pp1 and 2; Submission No 88 from the Strata Centre, 21 September 2007, p2; Submission No 94 from the Small Business Development Corporation, Western Australia, 30 August 2007, pp2 and 3; and Submission No 95 from The Australian Veterinary Association Limited (Western Australian Division), received on 5 September 2007, p1.
• “the structure, procedures and operation of the SAT appear in many cases to be much more aligned to those as apply to the traditional courts of the State. These formal procedures and strict codes of the SAT provide a daunting, if not intimidating environment in which retirees must operate, which the original Disputes Tribunal under the RV [Retirement Villages] Act was intended to avoid.” ¹⁰¹

• “In some hearings Tribunal members adopt a legalistic approach to the proceedings. ...

One observation is that when lawyers are involved in this jurisdiction some Tribunal members are more likely to change their processes. This sometimes results in significant delays because lawyers are unavailable for hearings or not prepared for the matter to proceed in a timely manner. For some of the parties, including family members and community organisations, the process becomes more formal and legalistic and they report that they are unable to follow the process. Plain English and informality should not be forgotten just because a lawyer appears for one of the parties.” ¹⁰²

• [In comparison to the previous Strata Titles Referee system] “The “system” with the State Administrative Tribunal requires unqualified people to act as if they were lawyers. Unless legal practitioners are involved in the whole process, the “system” with the Tribunal does not seem to work.” ¹⁰³

• “The Tribunal is seen as being very legalistic, and has seen increasing use of legal representation with its associated costs, in defending good and reasonable decisions [made by local governments].” ¹⁰⁴

• “Given the austere environment and procedures that are followed, strata proprietors consider it [SAT] to be a legal court room situation and are overwhelmed to the extent they consider they are “on the back foot” from the start. Most strata companies have not provided into the budget for legal representation and in the event they must answer a SAT application, they arrive unrepresented. If the applicant appears with a lawyer, the owners are disadvantaged.” ¹⁰⁵

¹⁰¹ Submission No 8 from Mr Clement James Allsworth, 8 August 2007, p4. Mr Peter Stamford Boam made a similar comment: Submission No 17A from Mr Peter Stamford Boam, 27 September 2007, p3.
¹⁰² Submission No 57 from the Office of the Public Advocate, 29 August 2007, pp4-5.
¹⁰³ Submission No 78 from Mr Ross Graham Sharland, on 31 August 2007, p1.
¹⁰⁴ Submission No 80 from the Western Australian Local Government Association, 3 September 2007, p2.
¹⁰⁵ Submission No 88 from the Strata Centre, 21 September 2007, p2
2.26 A common thread among the negative submissions received in relation to this objective was the complaint that SAT parties needed legal representation in order to navigate their way through SAT proceedings. However, the Committee was of the understanding that the SAT practices and procedures are designed to assist self-represented parties and to avoid formal, legalistic approaches and notes the following comments from the SAT:

SAT’s processes are not considered to be “very legalistic” or “overly legalistic”. Compared with courts and earlier tribunals and boards, SAT minimises formality and technicality. Its processes are designed on the basis that parties are generally self-represented. In the DR [Development and Resources] stream, two of the full-time members and all of the sessional members who are actively used are town planners or architects, not lawyers. The head of the stream is a lawyer with considerable specialist experience in planning review. Similar observations apply in respect of other streams in the Tribunal. However, the issues involved in SAT proceedings are often very important and complex. The decisions have to be legally correct and the process must be fair and transparent. This sometimes introduces a greater level of formality in proceedings. The parties and the community must have confidence in the process and the result. It is considered that the SAT process strikes the right balance between informality and formality.

Although there is generally a right to be represented by a lawyer in SAT, SAT has not recorded an increase in the use of legal representation.106

2.27 In fact, there are occasions when the SAT has been criticised because a legally represented party considers the Tribunal has assisted a self-represented party “too much”.107

2.28 The Vocational stream may well involve parties who feel most inclined to be represented by lawyers. For example, both the VSB and the AVA submitted that the introduction of the SAT has resulted in increased formality in the regulation and discipline of veterinarians, a perceived increased need for legal representation and therefore, has increased expenses for both the VSB and the veterinarians.108

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106 Written answer from the State Administrative Tribunal to proposed question 47 for the hearing on 15 February 2008, p28.

107 Written answer from the State Administrative Tribunal to proposed question 27(a) for the hearing on 21 September 2007, p30.

108 Submission No 25 from the Veterinary Surgeons’ Board of Western Australia, 21 August 2007, pp4-5; and Submission No 95 from The Australian Veterinary Association Limited (Western Australian Division), received on 5 September 2007, p1.
President of the SAT offered the view that this inclination may be due to the fact vocational matters often involve a person’s livelihood and professional standing, and very complex issues:

Regulatory bodies will often feel the need ... to obtain legal representation due to the complex factual or legal questions raised by the matters themselves, rather than to deal with the Tribunal's practices and procedures. Because affected professionals fear their livelihoods may be at stake, they also often engage lawyers. ... Indeed, this has been a feature of the disciplinary system, for many years pre-SAT, in proceedings where people's jobs are effectively 'on the line'.

As these bodies become accustomed to the Tribunal's practices, they may come to recognise that in simpler matters, a competent staff member can adequately represent them and this has begun to occur in a number of cases, particularly in the early stages of a proceeding. Local governments are regularly represented by council officers or non-legal agents.\(^\text{109}\)

... the Veterinary Surgeons' Board now finds, compared with their past practices, that all disciplinary complaints cannot be dealt with within the Board alone. ... This may necessitate engaging a solicitor and/or a barrister to advise and represent the Board. However, it is not a requirement that any board engage a legal practitioner in this way. No doubt it all depends on the nature of the particular matter involved. Some boards will, no doubt, develop the practice, at least in relation to preliminary hearings in the Tribunal, of having a senior officer of the board or a registrar or the like attend the early directions hearings. This is already beginning to happen to some extent.

Some boards also need to appreciate the role mediation plays in dispute resolution in the Tribunal. Some boards are now in the practice of having a designated board member attend mediations with authority to resolve a matter, if appropriate.\(^\text{110}\)

\(^{109}\) Written answer from the State Administrative Tribunal to proposed question 30 for the hearing on 21 September 2007, pp33-34.

\(^{110}\) Written answer from the State Administrative Tribunal to proposed question 35 for the hearing on 21 September 2007, p41.
2.29 The VSB disagreed with the President’s comments and remained of the view that:

*matters brought to the SAT have been no more complex than those dealt with by the Board prior to the establishment of the SAT.*

*The complexity is from the way in which the jurisdiction of the SAT is expressed in the SAT legislation ... and the procedures adopted in the SAT.*

2.30 Mr Geoffrey Abbott, a barrister who regularly represents the VSB in SAT proceedings, provided the Committee with the following example of how veterinarian disciplinary proceedings may have been complicated by the operation of the *Veterinary Surgeons Act 1960* as amended by the State Administrative Tribunal (Conferral of Jurisdiction) Amendment and Repeal Act 2004:

*The difficulty that the board has confronted as a practical matter in the resolution of matters in mediation with SAT is that a settlement depends on the vet accepting that his conduct is unprofessional. Without that finding the jurisdiction within the Veterinary Surgeons Act is not enlivened for the SAT and no resolution can be reached. In the diversion process, on the other hand, vets did not necessarily state publicly that their conduct was unprofessional, but they adhered to the sanction to which they agreed. There is a little bit of legal complexity in managing to resolve the matters according [to] the various sections of the SAT act and there is a little bit more complexity in having the vet in the process of mediation accept that his conduct is unprofessional. He might accept the resolution of the matter, but he usually ... does not want to accept that his conduct was unprofessional. That presents a little bit of a hurdle.*

2.31 Section 23 of the *Veterinary Surgeons Act 1960* appears to be the provision which is relevant to Mr Abbot’s comments. The Committee noted that section 23(2aa) empowers the SAT to make certain orders, such as fining a veterinarian or requiring a veterinarian to undertake to refrain from conduct as specified by the VSB, only if the SAT is satisfied that the veterinarian is guilty of ‘unprofessional conduct as a veterinary surgeon’ as that phrase is defined under that Act. It is the Committee’s understanding that section 23(2aa), when read with section 56 of the SAT Act, would restrict the SAT to making settlement orders reflecting the settlement agreement reached in a mediation only if the SAT is satisfied that the veterinarian was guilty of unprofessional conduct; however, the section would not necessarily prevent the VSB

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111 Written answer from the Veterinary Surgeons' Board of Western Australia to proposed question 2(a) for the hearing on 7 May 2008, p2.

and the veterinarian reaching a private settlement. Nevertheless, the Committee acknowledged that the VSB lacks the capacity to fine or otherwise reprimand an unprofessional veterinarian without the involvement of the SAT. The VSB claimed that this situation is likely to be altered in future.  

2.32 The AVA maintained that it has observed an increased feeling amongst veterinarians that there is a need to be legally represented in disciplinary proceedings before the SAT and that this feeling did not previously seem to exist when veterinarians were required to appear before the VSB, although the AVA was unable to identify the exact cause of this change in sentiment. However, the AVA noted that the perceived comparative formality of the SAT was not necessarily a criticism:

_In many ways the AVA likes the formality of the SAT. If vets think it is a step up from being seen in front of five of their mates at the Veterinary Surgeons’ Board, it can only be a good thing._

2.33 In the Development and Resources stream, the Western Australian Local Government Association (WALGA) was of the opinion that the SAT is seen as being “very legalistic” and that there has been increasing use of legal representation in SAT proceedings, resulting in associated costs to local governments and their ratepayers. The SAT contended that the perceived need to retain lawyers may often be due to the complexity of the proceedings rather than the intricacy of the SAT’s practices and procedures:

_SAT’s processes are not considered to be complex and are designed to ensure that it acts as speedily and with as little formality and technicality as is practicable, and minimises the costs to the parties: SAT Act, s 9. To this end, in the DR [Development and Resources] stream, an application is listed before a member within 14 to 21 days to determine the quickest and cheapest method to resolve the dispute. Unlike the former Town Planning Appeal Tribunal, SAT does not require a local government to do anything until the first directions hearing. In more minor development and subdivision applications (involving less than $250,000, or $500,000 for a single house, or three lots or less) the application is listed for a one hour first directions hearing before a member who can immediately explore solutions to the dispute. In more complex matters, it is routine to_

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113 Refer to paragraphs 3.210 to 3.229 in this Report for a discussion on this issue.

114 Written answer from The Australian Veterinary Association Limited (Western Australian Division) to proposed question 2(a) for the hearing on 7 May 2008, pp1-2.

115 Dr David Neck, President, The Australian Veterinary Association Limited (Western Australian Division), Transcript of Evidence, 7 May 2008, p3.

116 Submission No 80 from the Western Australian Local Government Association, 3 September 2007, p2.
undertake a mediation very early in the process in order to seek to resolve the matter by mutual agreement, or at least to narrow the scope of the dispute. While these processes require attendance by a council officer, they have a high success rate and potentially avoid the parties having to incur time and expense in preparing for a hearing or determination on the documents. Whereas 57% of applications in the Town Planning Appeal Tribunal required a final hearing, only 36% of applications in the DR stream require a final hearing or determination on the documents – two thirds of applications are resolved without a final hearing or determination on the documents. If a matter requires a final hearing or determination on the documents, SAT requires assistance from the parties to come to the correct and preferable decision. However, SAT uses standard orders and conferral between experts prior to hearings to minimise the time and expense to all involved. Thirty per cent of all matters that require a final hearing or determination on the documents are carried out on the documents (an increase from 26% in 2005-2006). The DR stream has also published pamphlets ... in plain English which provide detailed and practical guidance to parties and their representatives on how matters proceed in the DR stream from the filing of the application to its finalisation – see the answer to question 9 above. The President considers these processes enhance the timeliness and the quality of decision-making for all parties involved in the process.117

2.34 In response, the WALGA maintained that the complexity of SAT proceedings is unacceptable:

given that it was supportive of the establishment of the SAT with a view to the provision of 'fair, accessible, timely and informal consideration' of matters under review.118

2.35 However, the following comments from the Shire of Dardanup, which were quoted in the WALGA’s response, indicate that a local government’s decision to appoint legal representatives for SAT proceedings is more dependent on case strategy and/or the complexity of the issues involved in the review than the intricacy of the SAT’s practices and procedures:

117 Written answer from the State Administrative Tribunal to proposed question 46 for the hearing on 15 February 2008, pp27-28.

118 Email from Ms Beryl Foster, Policy Manager, Planning and Development, Western Australian Local Government Association, 18 August 2008, Attachment, p3.
The use of lawyers is a decision for the appellant. The appellant makes this decision to give themselves the best advantage to win their case, whether it has to do with the SAT process or the complexity of proceedings is irrelevant. If an appellant appoints a legal team, the Council has to then weigh up whether they should do the same. In complex cases the Council will have no choice but to appoint a lawyer to make sure that the Council’s position is well put and legal argument does not confuse officers.\footnote{Ibid, p3.}

2.36 In response to a claim made by the Office of the Public Advocate (OPA) that some SAT members changed their processes when lawyers were involved\footnote{Submission No 57 from the Office of the Public Advocate, 29 August 2007, pp4-5.}, the SAT said that:

\begin{quote}
SAT does not use a different procedure in cases where there is legal representation and does not agree with the observation. However, members will take more time to explain processes to parties and other interested persons who are not legally represented.\footnote{Written answer from the State Administrative Tribunal to proposed question 16 for the hearing on 15 February 2008, p11.}
\end{quote}

2.37 The OPA’s claim arose from the observations of its staff, who in 2006/2007 attended SAT hearings for more than half of the 600-plus matters which the OPA investigated. Some of the subtle differences which were alleged to have been observed when lawyers were involved in proceedings included the holding of additional hearings and an increased requirement for documented evidence\footnote{Written answer from the Office of the Public Advocate to proposed question 5 for the hearing on 7 May 2008, pp7-8.}. However, the OPA acknowledged that:

\begin{quote}
this is a somewhat difficult area for the Tribunal to manage especially on the one hand ensuring procedural fairness and natural justice is afforded to parties and on the other trying to keep proceedings informal and non-threatening.\footnote{Ibid, p7.}
\end{quote}

2.38 Further, the OPA agreed with the SAT’s contention that its members take more time to explain processes to parties and interested persons who are not legally represented, noting that the “members routinely conduct hearings in a manner which enables all participants to understand the process to the extent this is possible”\footnote{Ibid, p8.}. The OPA also agreed with the SAT’s assertion that it continues to “design, assess and reassess all of
its practices and procedures on the basis that most parties in most proceedings will be self-represented.\textsuperscript{125, 126}

**Committee Comment**

2.39  The Committee is of the view that the SAT has met the objective of having less formal and more flexible procedures than the courts in Western Australia.

**Finding 2:** The Committee finds that the State Administrative Tribunal has met the objective of having less formal and more flexible procedures than the courts in Western Australia.

**Less Expensive Procedures than Courts**

2.40  This objective is reflected in section 9(b) of the SAT Act, which provides that the SAT is to “minimise the costs to parties”.

2.41  The financial costs to parties in SAT proceedings may arise directly, in the form of the SAT’s fees, or indirectly, through incurring fees charged by legal representatives. The SAT’s fees are prescribed in the *State Administrative Tribunal Regulations 2004* (\textit{SAT Regulations}), which are administered by the DOTAG. While the SAT may have some influence over its own fees, it has no statutory or direct control over the legal fees sustained by parties. Some of the ways in which the SAT may have some impact on the parties’ legal fees are:

- to ensure that the SAT operates as speedily\textsuperscript{127} and as informally\textsuperscript{128} as is practicable; and

- for the SAT to make costs orders.\textsuperscript{129}

2.42  The DOTAG’s \textit{Annual Report 2007/2008} indicates that in the 2007/2008 year, the average cost to the DOTAG per case for all matters finalised by the SAT, including matters finalised without a final hearing and those finalised administratively, was $2,513.\textsuperscript{130} As can be seen from the table below, this figure compares favourably with

\begin{itemize}
  \item Written answer from the Office of the Public Advocate to proposed question 6 for the hearing on 7 May 2008, p8.
  \item Refer to paragraphs 2.73 to 2.91 in this Report for a discussion of this objective.
  \item Refer to paragraphs 2.20 to 2.39 in this Report for a discussion of this objective.
  \item Refer to paragraph 2.230 to 2.248 in this Report for a discussion of this issue.
\end{itemize}
the equivalent key efficiency indicators for the Supreme Court, Court of Appeal, District Court, and Coroner’s Court, but is higher than the equivalent figure for the Family Court, and significantly higher than the equivalent figures for the Magistrates Court and Children’s Court.

Table 1: Average cost per case for all matters finalised in a Western Australian court and the SAT in 2007/2008

<table>
<thead>
<tr>
<th>Court/Tribunal</th>
<th>2007/2008 Cost per Case ($)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Supreme Court – criminal</td>
<td>27,878</td>
</tr>
<tr>
<td>Supreme Court – civil</td>
<td>7,643</td>
</tr>
<tr>
<td>Court of Appeal – criminal</td>
<td>23,145</td>
</tr>
<tr>
<td>Court of Appeal – civil</td>
<td>26,733</td>
</tr>
<tr>
<td>District Court – criminal</td>
<td>8,171</td>
</tr>
<tr>
<td>District Court – civil</td>
<td>5,015</td>
</tr>
<tr>
<td>SAT</td>
<td>2,758</td>
</tr>
<tr>
<td>Family Court</td>
<td>2,050</td>
</tr>
<tr>
<td>Magistrates Court – criminal</td>
<td>460</td>
</tr>
<tr>
<td>Magistrates Court – civil</td>
<td>315</td>
</tr>
<tr>
<td>Children’s Court – criminal</td>
<td>268</td>
</tr>
<tr>
<td>Children’s Court – civil</td>
<td>355</td>
</tr>
<tr>
<td>Coroner’s Court</td>
<td>4,603</td>
</tr>
</tbody>
</table>

2.43 Eleven submitters were of the view that the SAT has succeeded in meeting this objective.\textsuperscript{132} The BRB and the PRB reported large increases in the number of

\textsuperscript{131} Source: \textit{ibid}, pp101-103.
CHAPTER 2: Operation of the SAT

applications for review of their decisions after the establishment of the SAT on 1 January 2005. Previously, their decisions were appealed to the District Court and Local Court (as it then was), respectively. They attributed the increases in reviews to the relative informality and inexpensiveness of the SAT.\(^{133}\) The following table provides a comparison of the number of reviews of BRB and PRB decisions in the 2004 calendar year, prior to the establishment of the SAT, and the 2005 and 2006 calendar years, respectively, subsequent to the establishment of the SAT:

<table>
<thead>
<tr>
<th>Calendar Year</th>
<th>BRB Reviews</th>
<th>BRB Reviews % Increase from 2004</th>
<th>PRB Reviews</th>
<th>PRB Reviews % Increase from 2004</th>
</tr>
</thead>
<tbody>
<tr>
<td>2004</td>
<td>5</td>
<td>-</td>
<td>1</td>
<td>-</td>
</tr>
<tr>
<td>2005</td>
<td>12</td>
<td>140</td>
<td>2</td>
<td>100</td>
</tr>
<tr>
<td>2006</td>
<td>19</td>
<td>280</td>
<td>13</td>
<td>1200</td>
</tr>
<tr>
<td>2007 (up to 01/08/2007)</td>
<td>1</td>
<td>-80</td>
<td>0</td>
<td>-100</td>
</tr>
</tbody>
</table>

2.44 The BRB and the PRB advised that the number of reviews of their decisions declined substantially in the 2007 calendar year due to the SAT making some key decisions in 2006, which resulted in improvements in the boards’ consultation with, and education of, applicants for registration, and in the manner in which applications are processed and considered by the two boards.\(^{134}\)

2.45 The Fairholme Disability Support Group saw the SAT as a costly jurisdiction.\(^{135}\) Other submitters contended that SAT proceedings, while they are inquisitorial, are

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\(^{132}\) Submission No 5 from the Builders’ Registration Board, Painters’ Registration Board and Building Disputes Tribunal, 1 August 2007, p2; Submission No 15 from Private Submitter, 15 August 2007, p1; Submission No 36 from the Social Work Department, Sir Charles Gairdner Hospital, 27 August 2007, p1; Submission No 39 from Mrs Lesley Freegard, 29 August 2007, p1; Submission No 47 from the City of Bayswater, 24 August 2007, p1; Submission No 53 from the Office of the Deputy Commissioner (Specialist Services), Western Australia Police, 27 August 2007, p1; Submission No 54 from the Department of Treasury and Finance, 29 August 2007, p1 (particularly for taxpayers); Submission No 67 from Ms Dot Price, 31 August 2007, p2 (but only in comparison to courts); Submission No 75 from the Plumbers Licensing Board, 31 August 2007, p1; Submission No 87 from Ernst & Young, received on 14 September 2007, p1; and Submission No 94 from the Small Business Development Corporation, Western Australia, 30 August 2007, p1 (regrading the minor proceedings jurisdiction).

\(^{133}\) Submission No 5 from the Builders’ Registration Board, Painters’ Registration Board and Building Disputes Tribunal, 1 August 2007, p2.

\(^{134}\) Ibid, p3.

\(^{135}\) Submission No 81 from the Fairholme Disability Support Group, received on 6 September 2007, p2.
more costly than their former review procedures, which were also inquisitorial in nature, due to the increased need for legal representation in the SAT; that is, these submitters argued that the SAT’s proceedings are not necessarily less costly than the inquisitorial review procedures which have been replaced. For example, the VSB provided the Committee with details of its legal expenses for the processing and hearing of complaints against veterinarians for the 2002/2003 to the 2006/2007 financial years:

Table 3: The VSB’s legal expenses for disciplinary proceedings between 2002/2003 and 2006/2007

<table>
<thead>
<tr>
<th>Financial Year</th>
<th>Legal Expenses ($)</th>
</tr>
</thead>
<tbody>
<tr>
<td>2002/2003</td>
<td>26,000</td>
</tr>
<tr>
<td>2003/2004</td>
<td>18,000</td>
</tr>
<tr>
<td>2004/2005 (SAT established on 1 January 2005)</td>
<td>55,000</td>
</tr>
<tr>
<td>2005/2006</td>
<td>87,000</td>
</tr>
<tr>
<td>2006/2007</td>
<td>97,443</td>
</tr>
</tbody>
</table>

Dr Punch, Chairman, VSB, provided further information about the VSB’s costs at a Committee hearing:

As far as costs are concerned, in the documents we submitted [refer to Table 3 above] we only identified the direct costs for legal fees etc, but on top of that—it is very difficult to document—there has been a massively increased administrative cost to the board. The board has actually increased its staff by one, as, I would suggest, a direct result.

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136 Submission No 6 from the Office of the Commissioner of Soil and Land Conservation, 9 August 2007, p2; Submission No 13 from the Psychologists Registration Board of Western Australia, 10 August 2007, p1; Submission No 14 from the Nurses Board of Western Australia, 15 August 2007, p2; Submission No 21 from the Optometrists Registration Board of Western Australia, 14 August 2007, p1; Submission No 25 from the Veterinary Surgeons’ Board of Western Australia, 21 August 2007, p5; Submissions No 65 from The Pharmaceutical Council of Western Australia, 31 August 2007, p1; Submission No 72 from the Department of Local Government and Regional Development, 31 August 2007, p1; Submission No 74 from the Town of Vincent, 31 August 2007, p1; Submission No 91 from The Australian Psychological Society Ltd, Perth Branch, 14 September 2007, p1; and Submission No 95 from The Australian Veterinary Association Limited (Western Australian Division), received on 5 September 2007, pp1-2.

137 Source: Submission No 25 from the Veterinary Surgeons’ Board of Western Australia, 21 August 2007, p5.
of the increased workload required for administration for documentation to the SAT.\textsuperscript{138}

Roughly, when the board was conducting an inquiry our legal costs ran between about $15,000 and $25,000. In the cases before the SAT they have cost us up to $100,000 for one case [which went to a SAT hearing].\textsuperscript{139}

2.47 The Committee was advised by Mr Geoffrey Abbott, a barrister who regularly represents the VSB in SAT proceedings, that only one case out of seven veterinarian disciplinary matters which have come before the SAT has required a hearing.\textsuperscript{140}

2.48 In response to the above complaints, the SAT maintained that its processes are designed to assist self-represented parties, whether they are individuals or organisations, and to avoid formal, ‘legalistic’ approaches in an effort to minimise costs for parties.\textsuperscript{141} Paragraphs 2.26 to 2.35 of this Report contain a discussion on the issue of the perceived increased need for legal representation in the SAT system.

2.49 With respect to the SAT’s fees, the Small Business Development Corporation submitted that fees should be maintained at “modest levels” to facilitate access to justice by small businesses.\textsuperscript{142} The Legal Practice Board of Western Australia was concerned with the “recent large increases in the fee structure for applications lodged with SAT”\textsuperscript{143} introduced on 1 July 2007. It contended that “the change in fee structure does nothing to improve the efficiency of the operations of either the SAT or [the Legal Practice] Board”\textsuperscript{144} and suggested that the imposition of fees on bodies such as the Legal Practice Board and the Legal Practitioners Complaints Committee\textsuperscript{145} be reviewed, given that their resources are limited and that these organisations have statutory functions aimed at protecting the public interest\textsuperscript{146}. Table 4 below provides a

\textsuperscript{138} Dr Peter Punch, Chairman, Veterinary Surgeons’ Board of Western Australia, Transcript of Evidence, 7 May 2008, p2.
\textsuperscript{139} Ibid, p7.
\textsuperscript{140} Mr Geoffrey Abbott, Barrister, Transcript of Evidence, 7 May 2008, p4.
\textsuperscript{141} Written answer from the State Administrative Tribunal to proposed question 30 for the hearing on 21 September 2007, p33.
\textsuperscript{142} Submission No 94 from the Small Business Development Corporation, Western Australia, 30 August 2007, p4.
\textsuperscript{143} Submission No 44 from the Western Australia Legal Practice Board, 30 August 2007, p1.
\textsuperscript{144} Ibid, p2.
\textsuperscript{145} This committee, now known as the Legal Profession Complaints Committee, is a committee of the Legal Practice Board: section 555 of the Legal Profession Act 2008.
\textsuperscript{146} Submission No 44 from the Western Australia Legal Practice Board, 30 August 2007, p5.
comparison of the application fees which were, and are, applicable to these organisations before, and after, amendments to the SAT’s fees on 1 July 2007 and 1 July 2008, respectively.\textsuperscript{147}

2.50 The Committee noted that fees are now being charged to the Legal Practice Board and the Legal Practitioners Complaints Committee for all applications whereas, previously, some applications did not attract a fee. However, where a fee was previously charged, those fees tended to be much higher than the fees charged currently.

Table 4: Comparison of SAT Application Fees applicable to the Legal Practice Board and the Legal Practitioners Complaints Committee\textsuperscript{148}

<table>
<thead>
<tr>
<th>Section\textsuperscript{149}</th>
<th>Fee before 01.07.07</th>
<th>Fee on/after 01.07.07</th>
<th>Fee on/after 01.07.08</th>
</tr>
</thead>
<tbody>
<tr>
<td>20(9)</td>
<td>$837</td>
<td>$270</td>
<td>$279</td>
</tr>
<tr>
<td>26(2)</td>
<td>$837</td>
<td>$270</td>
<td>$279</td>
</tr>
<tr>
<td>28(5)</td>
<td>$837</td>
<td>$270</td>
<td>$279</td>
</tr>
<tr>
<td>34(4)</td>
<td>$837</td>
<td>$270</td>
<td>$279</td>
</tr>
<tr>
<td>39(2)</td>
<td>$0</td>
<td>$270</td>
<td>$279</td>
</tr>
<tr>
<td>39(3)</td>
<td>$0</td>
<td>$270</td>
<td>$279</td>
</tr>
<tr>
<td>44</td>
<td>$837</td>
<td>$270</td>
<td>$279</td>
</tr>
<tr>
<td>60(3)</td>
<td>$0</td>
<td>$270</td>
<td>$279</td>
</tr>
<tr>
<td>69(1)</td>
<td>$837</td>
<td>$270</td>
<td>$279</td>
</tr>
<tr>
<td>70(1)</td>
<td>$837</td>
<td>$270</td>
<td>$279</td>
</tr>
<tr>
<td>70(2)</td>
<td>$837</td>
<td>$270</td>
<td>$279</td>
</tr>
<tr>
<td>87(2)</td>
<td>$837</td>
<td>$270</td>
<td>$279</td>
</tr>
<tr>
<td>87(3)</td>
<td>$221</td>
<td>$270</td>
<td>$279</td>
</tr>
</tbody>
</table>

\textsuperscript{147} As at 28 April 2009, there were no further changes to the State Administrative Tribunal’s fees.

\textsuperscript{148} See regulation 9 of the State Administrative Tribunal Regulations 2004 as amended from time to time.

\textsuperscript{149} In the Legal Practice Act 2003. This Act was repealed and replaced by the Legal Profession Act 2008 on 1 March 2009, but as at 28 April 2009, there were no consequential updates to the State Administrative Tribunal Regulations 2004 in relation to references made to the Legal Practice Act 2003.
### Table: Fee Schedule for SAT Operations

<table>
<thead>
<tr>
<th>Section</th>
<th>Fee before 01.07.07</th>
<th>Fee on/after 01.07.07</th>
<th>Fee on/after 01.07.08</th>
</tr>
</thead>
<tbody>
<tr>
<td>94(4)</td>
<td>$0</td>
<td>$270</td>
<td>$279</td>
</tr>
<tr>
<td>113</td>
<td>$837</td>
<td>$270</td>
<td>$279</td>
</tr>
<tr>
<td>132(2)</td>
<td>$837</td>
<td>$270</td>
<td>$279</td>
</tr>
<tr>
<td>132(3)</td>
<td>$221</td>
<td>$270</td>
<td>$279</td>
</tr>
<tr>
<td>135</td>
<td>$837</td>
<td>$270</td>
<td>$279</td>
</tr>
<tr>
<td>149(1)</td>
<td>$837</td>
<td>$270</td>
<td>$279</td>
</tr>
<tr>
<td>149(3)</td>
<td>$221</td>
<td>$270</td>
<td>$279</td>
</tr>
<tr>
<td>150(1)</td>
<td>$837</td>
<td>$270</td>
<td>$279</td>
</tr>
<tr>
<td>153(b)</td>
<td>$221</td>
<td>$270</td>
<td>$279</td>
</tr>
<tr>
<td>155</td>
<td>$837</td>
<td>$270</td>
<td>$279</td>
</tr>
<tr>
<td>156(1)</td>
<td>$837</td>
<td>$270</td>
<td>$279</td>
</tr>
<tr>
<td>156(4)</td>
<td>$221</td>
<td>$270</td>
<td>$279</td>
</tr>
<tr>
<td>180(1)</td>
<td>$0</td>
<td>$270</td>
<td>$279</td>
</tr>
<tr>
<td>182(1)</td>
<td>$837</td>
<td>$270</td>
<td>$279</td>
</tr>
<tr>
<td>202</td>
<td>$837</td>
<td>$270</td>
<td>$279</td>
</tr>
<tr>
<td>204(6)</td>
<td>$0</td>
<td>$270</td>
<td>$279</td>
</tr>
</tbody>
</table>

2.51 The SAT and the DOTAG’s responses to the suggestion were similar in nature: vocational bodies, such as the Legal Practice Board, should consider applying for a reduction or waiver of fees. Fees may be waived, reduced, refunded or their payment postponed on application to the Executive Officer of the SAT, on the ground of financial hardship or if it is in the interests of justice to do so. The SAT advised the Committee that it had already notified the Legal Practitioners Complaints

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150 Written answer from the State Administrative Tribunal to proposed question 11 for the hearing on 15 February 2008, p8; and Written answer from the Department of the Attorney General to proposed question 15 for the hearing on 25 March 2008, p10.

151 Regulation 8(4) of the *State Administrative Tribunal Regulations 2004*. 

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39
Committee of this possibility. In the case of individuals in receipt of pension and concession cards, fees are reduced or waived on the production of proof of the concession.152

2.52 Part 3 of the SAT Regulations153 prescribe the various SAT fees which are payable. Section 171 of the SAT Act provides that “regulations or rules may require the payment of fees relating to proceedings and hearings.” Other sections of the SAT Act which authorise the imposition of fees by regulations or rules are section 43, fees for commencing proceedings, section 54, fees for mediation, and section 155(4), fees for inspecting the register of proceedings.

2.53 The SAT advised the Committee that its current fee structure is similar to that in the Victorian Civil and Administrative Tribunal (VCAT),154 on which the SAT was partly modelled. The DOTAG provided the following information on the SAT’s fee structure, pointing out that the overall level of cost recovery for the current fees is comparatively low:

The SAT fee structure was reviewed by the DOTAG in 2006/07, with a number of changes implemented on the basis of simplification, access to justice and comparability. The initial fee regime was highly complicated and contained some inequities, such as different fees being charged for similar services. The result of the 2006/07 fees review was the implementation of a simpler, more consistent fee regime for the SAT which recovers a greater portion of costs.155

Following the implementation of this new fee structure, fees are estimated to comprise a total of 4.5% of the total cost of the SAT in 2007-08. However this low rate of recovery is due in part to roughly 45% of the tribunal’s work relating to the Human Rights matters for which no fees are charged. Taking the Human Rights stream out of the equation, the rate of cost recovery for SAT rises to 8.1%.

152 Written Presentation from the Honourable Justice Michael Barker, President, State Administrative Tribunal, 21 September 2007, p14.
153 See also, Schedules 3, 4, 5, 6, 7 and 20 of the State Administrative Tribunal Regulations 2004.
154 Written answer from the State Administrative Tribunal to proposed question 53 for the hearing on 21 September 2007, p57.
155 See State Administrative Tribunal Amendment Regulations (No. 2) 2007. The majority of these provisions, including those relevant to the increase of fees, commenced operation on 1 July 2007.
Additionally, it is worth noting that the current cost recovery rate for SAT of 8.1% is relatively low when compared to the civil court jurisdictions in Western Australia. Civil cost recovery in 2005-06 was 14% in the Supreme Court (excluding probate fees), 19% in the District Court and 28% in the Magistrates Court. This creates a further argument for an increased contribution from fees.\(^\text{156}\)

2.54 Currently, the SAT is funded predominantly through appropriations from the Consolidated Account, and, as can be seen from the DOTAG’s information quoted above, fees are a comparatively small component of the SAT’s overall funding.\(^\text{157}\)

2.55 The DOTAG also advised the Committee that it intends to propose amendments to the SAT Regulations to authorise the annual review of the SAT’s fees.\(^\text{158}\) The SAT’s fees were increased again on 1 July 2008 by the *State Administrative Tribunal Amendment Regulations 2008*.\(^\text{159}\)

2.56 In contrast to the complaints which were made about the SAT’s fee structure, the WAPC voiced the concern that SAT fees, when compared to the often higher planning fees, may be discouraging planning applicants from lodging new applications with, or seeking reconsiderations of applications from, the WAPC or local governments. Given the SAT’s lower fees, planning applicants may prefer applying for a SAT review of WAPC or local government planning decisions.\(^\text{160}\)

2.57 When the Committee queried whether the WAPC has noticed a trend in applicants preferring one system over another, the WAPC said that:

> *It has been too short a time for us to know. The variability in our rates of application for initial applications and reconsideration is very high and it is very hard for us to see a trend but where there is a dollar there is a motivation for people to do it.*\(^\text{160}\)

2.58 The Committee was advised by the WAPC that generally, planning decision-makers’ fees will always exceed the SAT application fee.\(^\text{161}\)

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\(^\text{156}\) Submission No 84 from the Department of the Attorney General, 7 September 2007, p13.


\(^\text{158}\) Written answer from the Department of the Attorney General to proposed question 54 for the hearing on 25 March 2008, p27.

\(^\text{159}\) Submission No 93 from the Western Australian Planning Commission, 5 October 2007, p10.

\(^\text{160}\) Mr Moshe Gilovitz, Secretary, Western Australian Planning Commission, *Transcript of Evidence*, 14 May 2008, p5.

\(^\text{161}\) Letter from Mr Moshe Gilovitz, Secretary, Western Australian Planning Commission, 14 May 2008, p3.
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Application fees to the WAPC for subdivision vary depending on the stage of the application process and the number of lots in a subdivision proposal. ... Application fees to a local government are a portion of the projected development cost.\(^\text{162}\)

2.59 The following table provides a comparison of the WAPC’s and the SAT’s application fees:

<table>
<thead>
<tr>
<th>No of Lots to be Created</th>
<th>WAPC Initial Application</th>
<th>WAPC Reconsideration</th>
<th>SAT Class 1 Application(^\text{164})</th>
<th>SAT Class 2 Application(^\text{165})</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 (amalgamation)</td>
<td>$935</td>
<td>$620</td>
<td>$341</td>
<td>$620</td>
</tr>
<tr>
<td>2</td>
<td>$1,325</td>
<td>$685</td>
<td>$341</td>
<td>$620</td>
</tr>
<tr>
<td>10</td>
<td>$1,595</td>
<td>$820</td>
<td>$341</td>
<td>$620</td>
</tr>
<tr>
<td>101</td>
<td>$4,305</td>
<td>$2,173</td>
<td>$341</td>
<td>$620</td>
</tr>
</tbody>
</table>

2.60 The ‘reconsideration’ process available in the WAPC for unsuccessful subdivision applications\(^\text{166}\) appears to be an alternative to applying to the SAT for a review. Although the reconsideration process attracts a higher application fee, the Committee understands that it would not result in ongoing costs for an applicant, unlike the situation with a SAT proceeding, which may progress to further hearings, requiring the payment of a hearing fee if the hearing is scheduled for more than one day,\(^\text{167}\) mediations and compulsory conferences.

Mr Gilovitz: ... [Reconsideration] ... is akin to an analysis of the initial application. Our workflow studies have shown that we put more effort into a reconsideration because we do the work that we did previously and we check ourselves to make sure that the decision initially arrived at was either correct or can be amended to reflect the representation given us. To answer the question more correctly, it is

\(^{162}\) Ibid.

\(^{163}\) Source: \textit{ibid}. See also, regulation 10 of the \textit{State Administrative Tribunal Regulations 2004}.

\(^{164}\) Fee as at 1 July 2008.

\(^{165}\) Fee as at 1 July 2008.

\(^{166}\) Pursuant to sections 144 or 151 of the \textit{Planning and Development Act 2005}.

\(^{167}\) The hearing fee is $300 per day or part of a day for Class 1 applications and $390 per day or part of a day for Class 2 applications: regulation 10 of the \textit{State Administrative Tribunal Regulations 2004}.
an opportunity for an applicant to come back to the commission and say that we might have got it wrong.

The CHAIR: It is like asking for a second opinion.

Mr Gilovitz: Yes.

The CHAIR: Does the second opinion process involve precisely the same people who were involved in the first matter?

Mr Gilovitz: I do not know whether it involves precisely the same people, but I think it might. ... It is certainly the same team. From our cost-analysis work I know that the reconsideration is given every opportunity to be independently determined. We certainly do not just rubber-stamp it; we confirm the view that was already taken and ensure it is carefully analysed. As I have said, it generally costs more to do the reconsideration than the initial application.168

2.61 The Committee noted that under the SAT’s procedures, the SAT could also invite the WAPC or a local government to reconsider its decision.169

2.62 Mr Moshe Gilovitz, Secretary, WAPC, told the Committee that the competitiveness of the WAPC’s fees are a concern for his organisation due to the high costs of processing an application and reconsidering an application:

The WAPC is required by policy to engage in full cost recovery.

We are effectively competing with SAT in the reconsideration market. We would like to offer an effective reconsideration service to the community. That would be better all around, especially for some matters, rather than engaging in mediation or resolving a dispute through SAT. At other times the parties might be too entrenched in their views and would need to have the matter resolved by SAT. When we were setting our fees, we departed somewhat from the policy and set the reconsideration fee below full cost recovery to create a situation of equity. However, we could stretch that only so far.170

2.63 Mr Gilovitz made it clear that he was not advocating an increase in the SAT’s fees:

168 Mr Moshe Gilovitz, Secretary, Western Australian Planning Commission, and Hon Giz Watson MLC, Deputy Chair, Standing Committee on Legislation, Transcript of Evidence, 14 May 2008, p5.
169 Section 31 of the State Administrative Tribunal Act 2004.
170 Mr Moshe Gilovitz, Secretary, Western Australian Planning Commission, Transcript of Evidence, 14 May 2008, pp4-5.
I would prefer another way for the WAPC to offer a reduced reconsideration fee. Perhaps we could work together to consider which matters are best dealt with by reconsideration and which are best dealt with by referral to SAT.\textsuperscript{171}

2.64 With respect to the planning application fees charged by local governments, the WAPC and the WALGA advised that these fees are generally determined as a percentage of the projected cost of the development.\textsuperscript{172} Rather than reconsider a planning application, the WALGA suggested that the planning applicant may be required to lodge a new planning application. In the case of a proposal to build an ‘average single house’, the WALGA advised the Committee that the planning application fee may be, for example, $800, which is comparatively more expensive than the application fees associated with Class 1\textsuperscript{173} and Class 2\textsuperscript{174} planning appeals in the SAT (see Table 5 on page 42 of this Report). Larger commercial development applications would cost considerably more.\textsuperscript{175}

2.65 While the above discussion is concerned with application fees, the Committee noted that additional fees may be incurred by applicants for the SAT’s review of planning decisions. For example, where an application proceeds to a SAT hearing, a fee of $310 per day for Class 1 applications or $403 per day for Class 2 applications would be incurred for each day or part of a day that is allocated for the hearing, other than the first day of the hearing.\textsuperscript{176}

\begin{center}
\textbf{Committee Comment}
\end{center}

2.66 The Committee noted that, where the SAT has replaced review or decision-making processes conducted by courts, there has generally been a comparative reduction in costs for parties. This may not always be the case where the SAT has replaced a tribunal or another inquisitorial or non-court process.

\begin{footnotesize}
\begin{itemize}
\item[171] Mr Moshe Gilovitz, Secretary, Western Australian Planning Commission, Transcript of Evidence, 14 May 2008, p5.
\item[172] Letter from Mr Moshe Gilovitz, Secretary, Western Australian Planning Commission, 14 May 2008, p3; and Email from Ms Beryl Foster, Policy Manager, Planning and Development, Western Australian Local Government Association, 18 August 2008, Attachment, p2.
\item[173] Applications for developments with a value of less than $250,000 or a development that is a single house with a value of less $500,000: regulation 10 of the \textit{State Administrative Tribunal Regulations 2004}.
\item[174] Applications for developments which are not Class 1 applications: \textit{ibid}.
\item[175] Email from Ms Beryl Foster, Policy Manager, Planning and Development, Western Australian Local Government Association, 18 August 2008, Attachment, pp2-3.
\item[176] Regulation 10 of the \textit{State Administrative Tribunal Regulations 2004} as at 1 July 2008.
\end{itemize}
\end{footnotesize}
Finding 3: The Committee finds that the State Administrative Tribunal is meeting the objective of providing less expensive procedures than the courts in Western Australia.

Developing Best Tribunal Practices

The Committee received six submissions which stated the view that the SAT is developing best tribunal practices, particularly in ensuring consistency in decision-making and procedures. The following are some of the comments which were received:

- “The introduction of SAT has facilitated greater consistency in decision making and outcomes across various jurisdictions. This in turn has enabled improvements in tribunal practices and assurance of natural justice principles.”

- “In the Department’s experience, the Tribunal’s practice is effective and efficient in identifying and resolving key preliminary issues, either as to jurisdiction or substantive issues.

A strength of the Tribunal’s operation is the rigorous case management process. ... This ensures that no one party is able to use case management as a pressure point nor is case management left to shifting priorities within a Department or the vagaries of staff levels/part time staffing hours.

... the fact that the public and Government both know that any review of a relevant decision will be in accordance with the clear and established processes and principles under which the Tribunal operates, provides a benchmark of standards in the making of the original decision.”

177 Submission No 5 from the Builders’ Registration Board, Painters’ Registration Board and Building Disputes Tribunal, 1 August 2007, p3; Submission No 14 from the Nurses Board of Western Australia, 15 August 2007, p2; Submission No 53 from the Office of the Deputy Commissioner (Specialist Services), Western Australia Police, 27 August 2007, p1; Submission No 64 from the Land Surveyors Licensing Board of Western Australia, 21 August 2007, p3; Submission No 76 from the Department of Fisheries, 31 August 2007, pp2 and 3; and Submission No 98 from Hardy Bowen, Lawyers, 6 November 2007, p1.

178 Submission No 14 from the Nurses Board of Western Australia, 15 August 2007, p2.

179 Submission No 76 from the Department of Fisheries, 31 August 2007, pp2-3.
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- “The Tribunal has been most effective in consolidating the plethora of tribunals and boards thereby standardising issues in relation to jurisdiction, procedure and the like.”\(^{180}\)

2.68 In contrast, the Plumbers Licensing Board was of the opinion that it is questionable whether the SAT is developing best tribunal practices in both procedures and decision-making principles, citing the example of a case before the SAT which was unable to proceed until related charges against the plumber were resolved in the Magistrates Court:

An application to review a decision of the Board to place conditions on a licence was made to the SAT. The conditions relate to recent charges against the licensee that are yet to be heard by the Magistrates Court. The licensee is aggrieved by the conditions and has been advised by the Board that upon determination of the facts by the Magistrates Court the conditions will be reviewed. The application was made to SAT in February 2007, SAT is yet to hear the matter. In this instance SAT has indicated it can not review the decision until the Magistrates Court has determined the facts. The licensee is aggrieved by the interim licence conditions, not that the conditions will remain on the licence. SAT are not addressing this issue.\(^{181}\)

Finding 4: The Committee finds that the State Administrative Tribunal is meeting the objective of developing best tribunal practices but recognises that this is an ongoing process.

More Appropriate Administrative Justice

2.69 This perceived advantage of the SAT is reflected in section 9(a) of the SAT Act, which provides that the SAT is to:

achieve the resolution of questions, complaints or disputes, and make or review decisions, fairly and according to the substantial merits of the case;

2.70 When exercising its review jurisdiction, the SAT is to “produce the correct and preferable decision” having regard to the facts existing at the time of the SAT

\(^{180}\) Submission No 98 from Hardy Bowen, Lawyers, 6 November 2007, p1.

\(^{181}\) Submission No 75 from the Plumbers Licensing Board, 31 August 2007, p2.
proceedings.\textsuperscript{182} In other words, the SAT review process is a review on the merits, which is defined as:

\begin{quote}
Review by a court or tribunal of the decision of a primary decision-maker where the review body is able to examine the facts and substitute its decision for that of the primary decision-maker\textsuperscript{183} as to what is the preferable outcome on the facts of the particular case.\textsuperscript{184}
\end{quote}

2.71 Eleven submitters who commented on this objective were of the view that the SAT delivers appropriate administrative justice.\textsuperscript{185} Five submitters expressed the view that the SAT had failed to meet this objective.\textsuperscript{186}

2.72 The City of Bayswater, which provided some negative comment in relation to this objective, was dissatisfied with the SAT’s approach to the review of applications for residential development. It was of the view that the SAT’s decision-making principles which underpin the reviews are disproportionately biased towards the applicant and the Residential Design Codes. In particular, the City was concerned by the SAT’s approval of the construction of parapet walls. The City suggested that greater recognition be given to the “role and jurisdiction of local governments to provide good governance and balance the desires and expectations of the rate payers”.\textsuperscript{187} Similarly, the WALGA was of the view that the SAT appears to give “undue support

\begin{footnotesize}
\textsuperscript{182} Section 27 of the State Administrative Tribunal Act 2004.
\textsuperscript{183} This power is conferred on the State Administrative Tribunal in section 29(3) of the State Administrative Tribunal Act 2004.
\textsuperscript{184} The Honourable Dr PE Nygh and P Butt (General Editors), Butterworths Australian Legal Dictionary, Butterworths, Perth, 1997, p1028.
\textsuperscript{185} Submission No 5 from the Builders’ Registration Board, Painters’ Registration Board and Building Disputes Tribunal, 1 August 2007, p3; Submission No 6 from the Office of the Commissioner of Soil and Land Conservation, 9 August 2007, p1 (at least in relation to cases on land draining works); Submission No 10 from the Land Valuers Licensing Board, 9 August 2007, p1; Submission No 15 from Private Submitter, 15 August 2007, p1; Submission No 30 from Dr Peter J Rudolph, 23 August 2007, p1 (in relation to guardianship and administration matters); Submission No 53 from the Office of the Deputy Commissioner (Specialist Services), Western Australia Police, 27 August 2007, p1; Submission No 67 from Ms Dot Price, 31 August 2007, p1 (approves of the de novo process); Submission No 74 from the Town of Vincent, 31 August 2007, p1; Submission No 76 from the Department of Fisheries, 31 August 2007, p2; Submission No 77 from the Bentley Health Service, received on 31 August 2007, p1; and Submission No 98 from Hardy Bowen, Lawyers, 6 November 2007, p2 (praises the focus on merits based arguments).
\textsuperscript{186} Submission No 18 from Ms Sheila K Stanton, 15 August 2007, p1; Submission No 47 from the City of Bayswater, 24 August 2007, p1; Submission No 80 from the Western Australian Local Government Association, 3 September 2007, p2 (“SAT is looking for a compromise decision, rather than a proper planning decision.”); Submission No 82 from the East Perth Redevelopment Authority, 4 September 2007, p2 (“there is a risk that mediation sessions may focus on resolving issues between parties, rather than on the overall outcome that is achieved.”); and Submission No 94 from the Small Business Development Corporation, Western Australia, 30 August 2007, p2 (“there is not enough ‘common sense’ in the SAT’s processes”).
\textsuperscript{187} Submission No 47 from the City of Bayswater, 24 August 2007, p1.
\end{footnotesize}
The SAT’s response to the City’s concerns demonstrates how the SAT adheres to its objective of making the fair, correct and preferable decision within the relevant legislative framework:

The Tribunal does not consider the City’s views to be justified. The City’s specific concern is in relation to “the Tribunal’s approach to the review of applications for residential development which include parapet walls”. In conducting a review, the Tribunal exercises the functions and discretions of the original decision-maker: SAT Act, s 29(1). The Tribunal is required to come to the “correct and preferable decision” in all review matters, which requires a legally correct decision: SAT Act, s 27(2). Clause 8.5.2 of the City’s District Town Planning Scheme No 24 states that “unless otherwise provided for in this Scheme, the development of land for any of the residential purposes dealt with by the Residential Design Codes must conform to the provisions of those Codes”. While the City can override a provision of the Codes by a specific provision in its local planning scheme, it does not appear to have done so in relation to parapet walls. The Tribunal is also required by cl 3.6.1(f) of the City’s local planning scheme to have regard to any Local Planning Policy. The Tribunal does so in conducting a review. If the City considers that SAT has made a legal error in conducting a review, it can seek review on a question of law by the President under s 244 of the Planning and Development Act 2005 if the decision was not made by a legally-qualified member, or by a judge of the Supreme Court in any other case. The City does not appear to have sought review in relation to any decision concerning parapet walls. The Tribunal does not accept that its “decision-making principles” are “disproportionately biased towards the applicant”. SAT’s “decision-making principles” in planning reviews are to come to the legally correct and preferable decision. SAT proceedings on occasion highlight failures or omissions in local government’s local planning schemes or policies. The cause of the City’s concern may stem from such a failure.

Finding 5: The Committee finds that the State Administrative Tribunal is meeting the objective of providing more appropriate administrative justice.

188 Email from Ms Beryl Foster, Policy Manager, Planning and Development, Western Australian Local Government Association, 18 August 2008, Attachment, p1.

189 Written answer from the State Administrative Tribunal to proposed question 12 for the hearing on 15 February 2008, p9.
More Timely Administrative Justice

2.73 Timely administrative justice is prescribed in section 9 of the SAT Act as one of the main objectives of the SAT:

\[
\text{The main objectives of the Tribunal in dealing with matters within its jurisdiction are –}
\]

\[
\ldots
\]

\[
(b) \quad \text{to act as speedily … as is practicable …}
\]

2.74 The DOTAG’s Annual Report 2007/2008 indicates that in the 2007/2008 year, the median time taken to finalise all matters in the SAT was 13 weeks.\(^{190}\) As can be seen from the table below, this figure compares favourably with the equivalent key efficiency indicators for the Supreme Court, Court of Appeal, District Court, Family Court, Magistrate’s Court (criminal and civil – time to trial), Children’s Court and Coroner’s Court, but is higher than the equivalent figure for the Magistrates Court (civil – time to finalise non-trial matters).

Table 6: Median times for reaching trial and for finalising matters in Western Australian courts and the SAT in 2007/2008\(^{191}\)

<table>
<thead>
<tr>
<th>Court/Tribunal</th>
<th>2007/2008 Median Time (weeks)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Supreme Court – criminal – time to trial</td>
<td>33</td>
</tr>
<tr>
<td>Supreme Court – civil – time to trial</td>
<td>21.5</td>
</tr>
<tr>
<td>Supreme Court – civil – time to finalise non-trial matters</td>
<td>16</td>
</tr>
<tr>
<td>Court of Appeal – criminal – time to finalise</td>
<td>35.5</td>
</tr>
<tr>
<td>Court of Appeal – civil – time to finalise</td>
<td>42</td>
</tr>
<tr>
<td>District Court – criminal – time to trial</td>
<td>47</td>
</tr>
<tr>
<td>District Court – civil – time to trial</td>
<td>102</td>
</tr>
<tr>
<td>District Court – civil – time to finalise non-trial matters</td>
<td>29</td>
</tr>
<tr>
<td>SAT – time to finalise</td>
<td>13</td>
</tr>
</tbody>
</table>


\(^{191}\) Source: ibid, pp98-100.
<table>
<thead>
<tr>
<th>Court/Tribunal</th>
<th>2007/2008 Median Time (weeks)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Family Court – time to trial</td>
<td>78</td>
</tr>
<tr>
<td>Family Court – time to finalise non-trial matters</td>
<td>23</td>
</tr>
<tr>
<td>Magistrates Court – criminal and civil – time to trial</td>
<td>20</td>
</tr>
<tr>
<td>Magistrates Court – civil – time to finalise non-trial matters</td>
<td>3</td>
</tr>
<tr>
<td>Children’s Court – criminal – time to trial</td>
<td>17</td>
</tr>
<tr>
<td>Children’s Court – civil – time to trial</td>
<td>33.5</td>
</tr>
<tr>
<td>Coroner’s Court – time to trial</td>
<td>126</td>
</tr>
<tr>
<td>Coroner’s Court – time to finalise non-trial matters</td>
<td>21.6</td>
</tr>
</tbody>
</table>

2.75 The SAT’s 2007 Party Survey revealed that the majority of the surveyed parties obtained decisions either immediately or reasonably soon after a ‘hearing’. When compared to the results of the 2006 Party Survey, it was found that a greater percentage of parties in the 2007 Party Survey had spent more than four weeks finalising a matter in the SAT jurisdiction: the increase was from 27 per cent of the surveyed parties in the 2006 Party Survey to 84 per cent in the 2007 Party Survey. Twenty-four per cent of the parties surveyed in 2007 indicated that their matters had taken more than 12 weeks to be resolved. In terms of the parties’ satisfaction with the time taken to finalise their matters:

*Nearly a quarter of respondents (24%) stated that the proceedings took too long until completion, however 74% of the respondents stated that the length of the proceedings was appropriate.*

2.76 Sixty-five per cent of the parties in the 2007 Party Survey rated the timeliness of processing their applications from lodgment to completion as either excellent or

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192 In the context of that survey question, ‘hearing’ appeared to include mediations, compulsory conferences, directions hearings and final hearings: Data Analysis Australia, *State Administrative Tribunal 2007 Party Survey*, November 2007, p15.


195 *Ibid*. 
However, Data Analysis Australia Pty Ltd, which assisted the SAT with the 2007 Party Survey and reported on the results of the survey, recommended that the SAT reduce the time taken in processing applications, from lodgment to completion:

In particular, reducing this time to less than 12 weeks is recommended as there was a marked decrease in satisfaction with the length of proceedings for those respondents whose proceedings had lasted in excess of 12 weeks.\(^{197}\)

In order to monitor the SAT’s timeliness, in 2005/2006, the President of the SAT established benchmarks against which the activities of the SAT can be measured. The benchmarks are expressed in terms of the number of weeks taken to finalise 80, 50 and 30 per cent of matters within a particular jurisdiction. For example, the 80 per cent benchmark for the following jurisdictions are:

- eight weeks for GA Act applications in the Human Rights stream. This benchmark was achieved in 2006/2007 and 2007/2008;\(^{198}\)
- 28 weeks for the Commercial and Civil stream. This benchmark was exceeded in 2006/2007 and 2007/2008 as 80 per cent of the matters were finalised in 24 weeks on average;\(^{199}\)
- 45 weeks for local government notice applications and 30 weeks for all other Development and Resources matters. These benchmarks were not met in 2006/2007, with 80 per cent of local government notice applications finalised in 63 weeks and 80 per cent of all other applications resolved in 34 weeks.\(^{200}\) In 2007/2008, the relevant figures were 20 weeks and 32 weeks, respectively;\(^{201}\) and
- 27 weeks for the Vocational Regulation stream. This benchmark was not met in 2006/2007, with 80 per cent of matters finalised in 35 weeks.\(^{202}\)

\(^{196}\) Ibid, p9.
\(^{197}\) Ibid, pi.
the benchmark was exceeded in 2007/2008, as 80 per cent of matters were finalised in 25 weeks.\textsuperscript{203}

2.78 In the President’s opinion, the 80 per cent benchmark is the most crucial measurement of timeliness. In respect of the remaining 20 per cent, the President said:

\begin{quote}
In my experience, it is this 20 per cent category over which, by reason of its own complexity or by reason of external factors, we do not have much control.\textsuperscript{204}
\end{quote}

2.79 That is, the time taken to finalise applications to the SAT depends on various factors, not all of which are controllable by the SAT. For example, the SAT’s Annual Report 2007\textsuperscript{205} indicated that the average time from lodgment to the completion of an application in SAT’s Development and Resources stream, Vocational Regulation stream, and Commercial and Civil stream increased slightly from equivalent figures in the SAT’s Annual Report 2006\textsuperscript{206}. While the President of the SAT was of the opinion that these increases in finalisation times were of no real significance, simply demonstrating the “ebbs and flows” of the SAT’s work from year to year,\textsuperscript{207} the SAT offered the following reasons for the increases:

\begin{quote}
In relation to the Development and Resources (DR) stream, the average time from lodgment to completion increased slightly because:
\end{quote}

\begin{itemize}
\item \textit{The DR stream experienced a very significant increase in work load between 2005-2006 and 2006-2007.\textsuperscript{208}} During this period, the number of applications received increased by 29\% (from 367 to 474) and the number of applications finalised increased by 27\% (from 379 to 481).
\item A number of significant and complex subdivision applications took a considerable period of time to mediate, including four ‘legacy’ matters; that is, matters inherited from previous adjudicators.
\end{itemize}

\textsuperscript{204} The Honourable Justice Michael Barker, President, State Administrative Tribunal, \textit{Transcript of Evidence}, 21 September 2007, p13.
\textsuperscript{207} The Honourable Justice Michael Barker, President, State Administrative Tribunal, \textit{Transcript of Evidence}, 15 February 2008, p2.
\textsuperscript{208} The President of the State Administrative Tribunal attributed this increased workload to the booming construction sector and the economy in Western Australia: The Honourable Justice Michael Barker, President, State Administrative Tribunal, \textit{Transcript of Evidence}, 15 February 2008, p2.
• The inability of the Tribunal to determine a number of applications until the completion of environmental assessment by the Environmental Protection Authority and authorisation by the Minister for the Environment under the Environmental Protection Act 1986 (EP Act) ... . [209]

In relation to the Vocational Regulation (VR) stream, the increase was mainly on account of the increased number of complex and longer matters lodged with the Tribunal. [210]

In relation to the Commercial and Civil (CC) stream, a more detailed discussion of the reasons for the delay in completion of some matters in the more significant jurisdiction areas (based on the volume of applications), is set out at page 27 and following of the 2007 Annual Report.

By way of example, applications under the Local Government (Miscellaneous Provisions) Act 1960 represent a significant jurisdiction of the Tribunal. During the 2005-2006 reporting year, the tendency was to set matters down for a mediation hearing, which brought matters to a head fairly quickly. However, it placed local governments under pressure and was not always convenient for the parties. As a result, in the 2006-2007 reporting year, the tendency has been, in the majority of cases, for the local government and the applicant to cooperate with regard to the provision of evidence sufficient to satisfy the local government that the application should be granted without the need for a mediation hearing. While that process has been more convenient for the parties, it has resulted in the time taken to complete matters being a little longer.

In the areas of Commercial Tenancy and Building Dispute Tribunal (BDT) reviews, there were some more complex cases which took longer to finalise in the 2006-2007 reporting year, when compared to the previous year. In relation to Commercial Tenancy matters, that has been due to some extent to the nature of the disputes and the need to adopt procedures which differ from the Tribunal’s standard practices. Members of the CC stream have recognised that it will be necessary to ensure that tight case management is maintained so that the parties are compelled to progress matters with all due expedition.

209 Refer to paragraphs 2.267 to 2.300 in this Report for a discussion of this issue.

210 Some vocational regulation matters are also delayed by the need to resolve related criminal proceedings: The Honourable Justice Michael Barker, President, State Administrative Tribunal, Transcript of Evidence, 15 February 2008, pp2-3.
In relation to BDT reviews, as explained at page 28 of the 2007 Annual Report, the Tribunal is continuing to experience delays in the provision by the BDT of transcripts of evidence and written reasons for decision. It is hoped the BDT will be able to remedy this during the next reporting period.\(^{211}\)

2.80 Eighteen submitters were of the view that the SAT provides timely administrative justice.\(^{212}\) One of these submitters, the Town of Vincent, requested that the SAT review its procedures relating to the Development and Resources and Commercial and Civil streams to ensure, amongst other things, that:

adequate timeframes are given to parties to make appropriate responses as required, say a minimum of 2 weeks for general matters and for a longer time frame of 6 weeks for other matters that are required to be advertised and then referred to Council for consideration.\(^{213}\)

2.81 In the SAT’s opinion, the above suggestion would result in the SAT’s procedures becoming less flexible and would also compromise the SAT’s objective of acting as speedily as is practicable:

Timeframes are flexible and are determined at directions hearings in relation to the facts and circumstances of each case. A statement of issues and relevant documents are generally required within two weeks, but in particularly complex cases, longer periods are often allowed. Where an application or amendment requires advertising, SAT generally does not require the respondent to file a statement of

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\(^{211}\) Written answer from the State Administrative Tribunal to proposed question 1 for the hearing on 15 February 2008, pp1-2.

\(^{212}\) Submission No 2 from the Aboriginal Legal Service of Western Australia Inc, 20 July 2007, p2; Submission No 5 from the Builders’ Registration Board, Painters’ Registration Board and Building Disputes Tribunal, 1 August 2007, pp2 and 4; Submission No 10 from the Land Valuers Licensing Board, 9 August 2007, p1; Submission No 15 from Private Submitter, 15 August 2007, p1; Submission No 30 from Dr Peter J Rudolph, 23 August 2007, pp1-2 (except when making hospital discharge orders); Submission No 43 from the Disability Services Commission, 29 August 2007, p2; Submission No 47 from the City of Bayswater, 24 August 2007, p1; Submission No 53 from the Office of the Deputy Commissioner (Specialist Services), Western Australia Police, 27 August 2007, p1; Submission No 57 from the Office of the Public Advocate, 29 August 2007, p6 (generally); Submission No 61 from Landgate, 30 August 2007, p2; Submission No 67 from Ms Dot Price, 31 August 2007, p1; Submission No 74 from the Town of Vincent, 31 August 2007, p1; Submission No 77 from the Bentley Health Service, received on 31 August 2007, p1; Submission No 79 from Mr Arthur Blaquiere, 30 August 2007, p1; Submission No 87 from Ernst & Young, received on 14 September 2007, p1; Submission No 94 from the Small Business Development Corporation, Western Australia, 30 August 2007, p1 (in the State Administrative Tribunal’s minor proceedings jurisdiction); Submission No 97 from the Department for Communities, 31 August 2007, pp2-3 (although the department was concerned by one delayed reserved decision); and Submission No 98 from Hardy Bowen, Lawyers, 6 November 2007, p2 (cases are expedited where appropriate).

\(^{213}\) Submission No 74 from the Town of Vincent, 31 August 2007, p2.
issues until the end of the advertising period or otherwise requires a draft document - for example to advance a mediation - and allows it to be supplemented after the advertising is completed. If periods in excess of two weeks were generally allowed for statements of issues and documents, SAT’s ability to meet its objective to act as speedily as is practicable, SAT Act, s 9, would be compromised and so SAT would not support the practice.214

2.82 Seventeen submitters contended that the SAT has not satisfied its objective of providing timely administrative justice.215 Despite this view, one of these submitters, the WALGA, requested that the SAT review its case management procedures to provide local governments with more time in which to file documents, in much the same terms as suggested by the Town of Vincent above.216 This attracted a similar response from the SAT (refer to paragraph 2.80 to 2.81 of this Report).

2.83 The Office of the Commissioner of Soil and Land Conservation submitted that, to date, the amount of time taken to determine appeals of the Commissioner’s decisions relating to drainage works has been 20 months; much longer than any of the parties would have considered desirable, although the decisions were regarded by all, except the applicants, to be the correct decision.217 In response, the SAT explained that the cases in question related to notices given to four adjoining land owners, and were therefore dealt with simultaneously, and confirmed that they had taken 20 months to

214 Written answer from the State Administrative Tribunal to proposed question 38 for the hearing on 15 February 2008, p23.

215 Submission No 6 from the Office of the Commissioner of Soil and Land Conservation, 9 August 2007, pp1 and 2; Submission No 7 from Mrs Deborah Lawrence, received on 10 August 2007, p1; Submission No 14 from the Nurses Board of Western Australia, 15 August 2007, p2; Submission No 18 from Ms Sheila K. Stanton, 15 August 2007, p1; Submission No 25 from the Veterinary Surgeons’ Board of Western Australia, 21 August 2007, pp8-9; Submission No 30 from Dr Peter J Rudolph, 23 August 2007, p1 (when waiting for the State Administrative Tribunal’s hospital discharge orders); Submission No 36 from the Social Work Department, Sir Charles Gairdner Hospital, 27 August 2007, p2 (when waiting for the State Administrative Tribunal’s hospital discharge orders); Submission No 64 from the Land Surveyors Licensing Board of Western Australia, 21 August 2007, p3 (proceedings which go beyond mediation are delayed); Submissions No 65 from The Pharmaceutical Council of Western Australia, 31 August 2007, p2; Submission No 66 from the Public Trustee, 11 September 2007, p5 (concerned about delayed reserved decisions); Submission No 69 from Ms Sally Eves, 31 August 2007, p1; Submission No 71 from Private Submitter, 31 August 2007, p1; Submission No 75 from the Plumbers Licensing Board, 31 August 2007, p2; Submission No 80 from the Western Australian Local Government Association, 3 September 2007, p1; Submission No 82 from the East Perth Redevelopment Authority, 4 September 2007, p1; Submission No 94 from the Small Business Development Corporation, Western Australia, 30 August 2007, p2 (concerned about the length of one case); and Submission No 95 from The Australian Veterinary Association Limited (Western Australian Division), received on 5 September 2007, p2.

216 Submission No 80 from the Western Australian Local Government Association, 3 September 2007, pp1 and 2.

217 Submission No 6 from the Office of the Commissioner of Soil and Land Conservation, 9 August 2007, p1.
be finalised.\textsuperscript{218} However, the SAT informed the Committee that the progress of the applications was largely driven by the applicants, who requested that the SAT schedule proceedings around their activities and events, such as harvesting, floods and seeding, and the availability of their expert witness:

*The timing of the mediation and the hearing was set to suit the convenience of the parties, and at their request. Had the Tribunal not listed to suit the parties’ requirements, the matters would have been dealt with considerably quicker.*\textsuperscript{219}

2.84 The Nurses Board submitted that, the SAT does not deliver more timely outcomes. It was submitted that proceedings before the board could be heard and resolved, and its findings could be handed down, on the same day. Comparatively, the SAT practice of utilising directions hearings and mediation conferences has resulted in more protracted proceedings.\textsuperscript{220} The VSB made similar comments.\textsuperscript{221} While the Land Surveyors Licensing Board observed that the SAT delivers a prompt mediation service, where mediation is not successful, the continuation of the application becomes:

*more complex with a high degree of procedural rigour, to the extent that timeliness can no longer be maintained as an objective.*\textsuperscript{222}

2.85 However, according to the SAT, its procedures are flexible enough to accommodate the timing requirements of each case:

*The Tribunal does not accept this observation and would suggest that on closer analysis the contrary is true for vocational bodies. Where the urgency of the matter warrants it, the Tribunal is able to receive an application, hold a substantive hearing and provide final orders to the parties within one day. This occurs in the vocational regulation stream on a not-infrequent basis, particularly in the context of legal practitioners and real estate agents suspected of defalcation. This was not so easily achieved in the pre-SAT period where vocational bodies had to assemble a quorum of their part-time members.*

\textsuperscript{218} Written answer from the State Administrative Tribunal to proposed question 24 for the hearing on 21 September 2007, p26.

\textsuperscript{219} Written answer from the State Administrative Tribunal to proposed question 32 for the hearing on 21 September 2007, p27. See also, the Honourable Justice Michael Barker, President, and His Honour Judge John Chaney SC, Deputy President, State Administrative Tribunal, *Transcript of Evidence*, 21 September 2007, p36.

\textsuperscript{220} Submission No 14 from the Nurses Board of Western Australia, 15 August 2007, p2.

\textsuperscript{221} Submission No 25 from the Veterinary Surgeons’ Board of Western Australia, 21 August 2007, pp8-9; and Dr Peter Punch, Chairman, Veterinary Surgeons’ Board of Western Australia, *Transcript of Evidence*, 7 May 2008, p2.

\textsuperscript{222} Submission No 64 from the Land Surveyors Licensing Board of Western Australia, 21 August 2007, p3.
In all other applications, the Tribunal is primarily concerned to ensure that natural justice is upheld and parties are given the opportunity to present submissions and evidence. To this end, each application is listed for a directions hearing within 21 days of the application being lodged. At this hearing, the matter is analysed and the parties are consulted as to the most appropriate way to progress the matter to resolution. Often, the matter is referred to and resolved at an early mediation. If mediation is unsuccessful, the matter will proceed to a final hearing. Any significant delay between mediation and final hearing generally occurs as parties request additional time to prepare submissions and gather evidence, especially expert evidence.

Since the commencement of the Tribunal, the Nurses Board has been a party to 24 matters. Twelve of these are on-going. Of the completed matters, only three took longer than six months to reach resolution. In some matters, the Tribunal has been obliged to wait for courts to resolve connected criminal proceedings, the outcomes of which are relevant to the Tribunal’s determination. In all of these cases interim restrictions on practice imposed by the Board have been extended pending the final hearing of the applications. The Tribunal’s experience with other vocational bodies is that matters proceed with appropriate expedition, save for those matters which by reason of their inherent complexity and involvement of expert witnesses take longer to prepare for hearing.223

2.86 Dr Peter Rudolph was another submitter who had concerns about the length of time taken to resolve applications in the SAT. With regard to guardianship and/or administration matters, he submitted that:

if a medically stable hospital patient requires an order from the State Administrative Tribunal so that the patient can be discharged from hospital, then the Tribunal should process the case as a matter of urgency and not have to wait the standard six to ten weeks.224

2.87 Dr Rudolph’s suggestion stemmed from his concern about the delay between the date of the application and the date of the hearing - “a delay that seems to be increasing” and which has a “major impact ... in relation to patients occupying hospital beds.”225

223 Written answer from the State Administrative Tribunal to proposed question 31 for the hearing on 21 September 2007, pp34-35.
224 Submission No 30 from Dr Peter J Rudolph, 23 August 2007, p1.
225 Ibid.
Dr Rudolph also cites the following examples of the SAT delaying the discharge of hospital patients:

*I have had several patients over the past eighteen months who have had to wait in Public Hospital beds for six to eight weeks for a State Administrative Tribunal Hearing to be held so that a decision could be made regarding the patients’ accommodation on discharge from hospital. On these occasions, the Social Worker involved at the hospital has explained to the Tribunal Administrative Officer the difficulties in relation to keeping the patients in a hospital bed but it seems that there is a total inflexibility in this regard and that the hearing could not be brought forward.*\(^{226}\)

2.88 The Social Work Department, Sir Charles Gairdner Hospital, made a similar observation.\(^ {227}\) The SAT’s response to these concerns was as follows:

*The Tribunal agrees that applications for patients in hospitals should be dealt with as quickly as possible. The Tribunal regularly acts on this concern. In doing so it continues a long-standing practice that urgent matters are dealt with urgently and the usual time periods for the listing of hearings do not apply. In urgent matters the Tribunal may shorten the required statutory period of notice to the proposed represented person and hear the matter urgently. Some urgent matters are dealt with after hours and on weekends. The Tribunal relies on parties to draw to the attention of the Tribunal the urgency of an application. These cases include where there is considered to be an immediate risk to the person or an immediate risk to their estate or where consent is required for a medical or forensic procedure and a guardian is required to give that consent. It will be appreciated that, in this area of decision-making where the Tribunal is dealing with vulnerable members of the community, there is a degree of urgency in every case coming before the Tribunal.*\(^ {228}\)

2.89 In the context of development and planning applications, the East Perth Redevelopment Authority considered that:

*generally Tribunal proceedings may take too long to be decided when a hearing is involved ... . It is a regular occurrence for reserved decisions to take two to three months before the decision is published.*


\(^{227}\) Submission No 36 from the Social Work Department, Sir Charles Gairdner Hospital, 27 August 2007, p2.

\(^{228}\) Written answer from the State Administrative Tribunal to proposed question 41 for the hearing on 21 September 2007, p48.
This compares with four to six weeks under the former Town Planning Appeals Tribunal.229

2.90 The SAT did not agree with the authority for the following reasons:

It should be noted that the East Perth Redevelopment Authority appears to have had only very limited experience of the Tribunal. Since January 2005, the East Perth Redevelopment Authority has been involved in only six applications, of which three have been completed and three – two commenced in September 2007 and one in November 2007 – are current. It should also be noted that of the three applications involving the East Perth Redevelopment Authority that have been completed, none required a final hearing or determination on the documents – each was resolved through facilitative dispute resolution by members, in particular mediation.

... This expression of this concern is curious, given that the East Perth Redevelopment Authority has not had any decision published by SAT and does not appear to have had any decision published by the former Town Planning Appeal Tribunal during 2003 and 2004.

Section 76 of the SAT Act requires a reserved decision to be published within 90 days, unless the President grants an extension. No other court or tribunal in Western Australia is subject to such a time limit. In the DR [Development and Resources] stream, members aim to deliver their decision as soon as possible, but the stream has had a very significant increase in workload between 2005-2006 and 2006-2007, without any increase in the number of full-time members allocated to the stream. During this period, the number of applications received increased by 29% (from 367 to 474) and the number of applications finalised increased by 27% (from 379 to 481). It is not known how long the former Town Planning Appeal Tribunal took to deliver decisions. However, the DR stream received and finalised 49% more applications during 2006-2007 than did the Town Planning Appeal Tribunal during the equivalent time period in 2004 (an increase from 323 to 481). Furthermore, only 36% of applications in the DR stream require a final hearing or determination on the documents, compared to 57% in the Town Planning Appeal Tribunal in 2004. The Tribunal would therefore be

229 Submission No 82 from the East Perth Redevelopment Authority, 4 September 2007, p1.
surprised if the comment on comparative lengths of time were accurate.\textsuperscript{230}

Committee Comment

2.91 The Committee noted that, where the SAT has replaced review or decision-making processes previously conducted by courts, there has been a comparative increase in timeliness. This may not always be the case where the SAT has replaced a tribunal or another inquisitorial or non-court process, although the Committee is of the view that the SAT can provide very prompt decision-making.

Finding 6: The Committee finds that the State Administrative Tribunal is meeting the objective of providing more timely administrative justice and has processes to ensure that it continues to meet this objective.

Improving Public Accountability of Official Decision-Making

2.92 The President of the SAT was firmly of the view that the establishment of the SAT has improved the public accountability of official decision-making:

\textit{There is no doubt that, by having created the State Administrative Tribunal, a whole lot of areas of public decision making that were tucked away in quiet little corners about which nobody much knew anything except those people who went there, are much more in the public eye. From an accountability point of view, I think there is no doubt the tribunal is showing the public the complexity of some of its decision making and explaining fully the reasons for the decisions it makes.}\textsuperscript{231}

\textsuperscript{230} Written answer from the State Administrative Tribunal to proposed question 49 for the hearing on 15 February 2008, pp29-30.

2.93 Thirteen submitters agreed with the President. They provided some of the following comments:

- “the SAT appeal process ... should be regarded as being impartial, the process is more transparent and probably accountable as the decisions and their reasons are in the public domain. The previous Ministerial appeals were a private process and required careful management to ensure that it remained at “arm’s length” from the Commissioner.”

- “We believe that it is important that the Tribunal continue to operate in order to give individuals the ability to seek to make local and state government bodies accountable for their conduct without incurring considerable expense.”

- “In terms of vocational regulation this objective has been met by the provision of a well-designed web site with a decisions database. The consumer of professional services can access the site and use a key word search to effectively research any issues they may have. There is anecdotal advice from practitioners that just being named as a respondent on the site is in itself a penalty that should be taken into account.”

- “The rigorous case management process also improves public accountability. ...

  The written reasons for decision provide a good level of public accountability. In particular, reported decisions are readily accessible, and easy to read and understand.

...
The key issue is, accountability in the exercise of public power. This provides confidence, as well as and timely justice, for the public. For Government, accountability assists with utilising resources efficiently as well as leading to job satisfaction for public officers.

... the Tribunal's operation has had a significant and positive influence on the administration of the FRMA [Fish Resources Management Act 1994].”

- “In our view, the Tribunal creates a greater public accountability of official decision makers. In our experience, more taxpayers are availing themselves of the opportunity to seek a review of State tax matters. We have also observed a greater tendency of official decision makers to exercise more care when making decisions.”

Some submitters also recognised that the SAT’s decisions can influence and improve industry standards and conduct:

- “The Valuer General also commends SAT on the timely delivery of decisions, the contents of which are readily understood by professionals and applicants alike and which provide a more authoritative and robust framework upon which to base valuation decisions and develop associated policies and procedures.”

- “the fact that the public and Government both know that any review of a relevant decision will be in accordance with the clear and established processes and principles under which the Tribunal operates, provides a benchmark of standards in the making of the original decision. ...”

The Tribunal’s decisions in effect provide a ‘reality check’ to ensure that management plans made by the Minister operate as they were intended to operate.”

- “DET [Department of Education and Training] is aware that SAT decisions under the Working with Children Act can influence the standards and conduct that are acceptable for those employed in positions that deal with children.”

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236 Submission No 76 from the Department of Fisheries, 31 August 2007, pp3-4.
237 Submission No 87 from Ernst & Young, received on 14 September 2007, p1.
238 Submission No 61 from Landgate, 30 August 2007, p2.
239 Submission No 76 from the Department of Fisheries, 31 August 2007, pp3-4.
240 Submission No 92 from the Department of Education and Training, 17 September 2007, p3.
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• “Both inquiries [the two review proceedings in the SAT to date] and their resulting reasons for decisions have provided the Department with valuable guidance for future decision-making and policy setting.”

2.95 The Plumbers Licensing Board disagreed with the above comments, submitting that the review process which existed prior the SAT’s establishment was “just as effective”. Further, the board maintained that the public are generally unaware of the SAT and its role. The SAT provided the following response:

SAT’s procedures are largely uniform and appear to be generally accepted as effective in the most areas of vocational regulation within the Tribunal’s jurisdiction. Thus this comment is a relatively isolated one which reflects the past practices of this Board.

2.96 The WALGA made a slightly different point. According to the WALGA’s observations, the SAT does not appear accountable for its own decisions because community concerns resulting from SAT town planning decisions will generally “fall back” onto the local government involved.

As a result, this should place additional onus on the SAT to take account of decisions by the elected Council where due process has been taken and a legal (even if discretionary) decision has been made. There seems to be little regard taken of the general powers of Local Government to act for the good governance of the district.

2.97 The OPA submitted that the SAT’s operations would be more transparent and consistent if it published written reasons in relation to every application. Currently, the SAT is not required to provide written reasons for a decision unless the decision is reserved or written reasons are requested by a party. The OPA suggested that the

241 Submission No 97 from the Department for Communities, 31 August 2007, p2.
242 Previously, the Plumbers Licensing Board was authorised to conduct disciplinary inquiries and impose sanctions resulting from these inquiries. Certain decisions of the board could be appealed to the then Local Court: regulations 29, 34 and 100 of the Water Services Licensing (Plumbers Licensing and Plumbing Standards) Regulations 2000 as at 31 December 2004.
243 Submission No 75 from the Plumbers Licensing Board, 31 August 2007, p2.
244 Ibid.
245 Written answer from the State Administrative Tribunal to proposed question 39 for the hearing on 15 February 2008, p23.
246 Submission No 80 from the Western Australian Local Government Association, 3 September 2007, p3.
247 Ibid.
248 Submission No 57 from the Office of the Public Advocate, 29 August 2007, p7.
249 Section 76 of the State Administrative Tribunal Act 2004.
250 Section 78 of the State Administrative Tribunal Act 2004.
practice of publishing written reasons in every instance would also assist parties to better understand how and why a decision was made because this enabled the reasons to be reviewed.\textsuperscript{251}

Finding 7: The Committee finds that the State Administrative Tribunal is meeting the objective of improving public accountability of official decision-making but recognises that further improvements can be made.

Avoiding \textit{ad hoc} Creation of New Tribunals

2.98 This anticipated advantage of the SAT received comment from only two submitters, a private submitter and the Office of the Deputy Commissioner (Specialist Services), Western Australia Police. Both submissions indicated that the SAT has been successful in avoiding the \textit{ad hoc} creation of new tribunals and other decision-making bodies.\textsuperscript{252}

2.99 The Committee noted that, consistent with this broad objective, the SAT’s jurisdiction expanded rapidly in its first 30 months of operation. As one measure of this growth, the SAT had 137 enabling Acts in January 2005 and 143 enabling Acts on 30 June 2007.\textsuperscript{253} The SAT’s \textit{Annual Report 2007} advised that the first 24 months of the SAT’s operation saw 33 new, re-enacted or proposed laws confer additional jurisdiction on the SAT\textsuperscript{254} in place of other bodies which may otherwise have been created. As at 30 June 2008, the SAT had 145 enabling Acts.\textsuperscript{255}

Committee Comment

2.100 While the Committee acknowledged that the rate of growth of the SAT’s jurisdiction is commensurate with its status as a generalist civil and administrative tribunal, it also cautions that any future increases in jurisdiction must be properly resourced. Refer to paragraphs 2.734 to 2.743 in this Report for a discussion of this issue.

\begin{flushleft}
\textsuperscript{251} Submission No 57 from the Office of the Public Advocate, 29 August 2007, p7.
\textsuperscript{252} Submission No 15 from Private Submitter, 15 August 2007, p1; and Submission No 53 from the Office of the Deputy Commissioner (Specialist Services), Western Australia Police, 27 August 2007, p1.
\end{flushleft}
Appropriate Use of Knowledge and Experience of SAT Members

2.101 Section 9(c) of the SAT Act prescribes “making appropriate use of the knowledge and experience of Tribunal members” as one of the main objectives of the SAT.

2.102 Mr Murray Lampard APM, Deputy Commissioner (Specialist Services), Western Australia Police, advised the Committee that he had been informed by his operational staff who have had dealings with the SAT that:

SAT members hearing the applications are conversant with the relevant legislation and have delivered consistent, sound reasons for their decisions.256

2.103 The Department for Child Protection was supportive of what it had observed to be the SAT’s practice of appointing specialist members to hear and decide applications made under the Children and Community Services Act 2004:

In all cases so far relating to the review of the CEO’s decision on a case planning matter, a panel of 3 members with knowledge, qualifications or experience in relevant fields (eg social work) has been appointed to hear the case. The expertise of such members aids appropriate decision-making in this specialised area. It also supports the development of best tribunal practices in decision-making principles.257

2.104 According to the Heritage Council of Western Australia, the SAT has, to date, dealt with appeals affecting places protected by the Heritage of Western Australia Act 1990 in a “more balanced and informed way than ... its predecessors.”258 The SAT’s main predecessor in that jurisdiction was the Town Planning Appeal Tribunal.259

2.105 With respect to the Development and Resources stream, the SAT reported that utilising a SAT member with significant, relevant experience as the mediator or the person presiding at a compulsory conference “adds a useful dimension to the process, and undoubtedly results in a higher rate of success.”260 All mediations and

256 Submission No 53 from the Office of the Deputy Commissioner (Specialist Services), Western Australia Police, 27 August 2007, p1.
257 Submission No 85 from the Department for Child Protection, 6 September 2007, p3.
258 Submission No 4 from the Heritage Council of Western Australia, 29 July 2007, p1.
259 See sections 30, 37, 42, 59, 60, 73 and 76 of the Heritage of Western Australia Act 1990 as at 31 December 2004.
compulsory conferences in this stream are conducted by either members of this stream or relevantly-experienced members from other streams.\textsuperscript{261}

2.106 In contrast, other submitters have contended that the SAT does not utilise sufficiently qualified and/or experienced members to preside over certain matters.\textsuperscript{262} For example, the Armadale Redevelopment Authority was concerned that the SAT “\textit{does not contain planning professionals with the necessary expertise to effectively determine}” town planning appeals, despite having had “\textit{little direct contact}” with the SAT.\textsuperscript{263} The VSB made a similar submission with respect to disciplinary matters involving veterinarians.\textsuperscript{264} The SAT’s response was as follows:

\textit{The expression of concern by the Armadale Redevelopment Authority is surprising and wrong. The development and resources stream of the Tribunal has two full-time members who are planners by profession and a number of sessional members who are planners and others who have relevant expertise such as architects, surveyors, environmental scientists and engineers. The other full-time members are lawyers with extensive experience in planning law. The Tribunal is constituted for each case having regard to the background of the member or members chosen so as to ensure that so far as possible the background is suited to the nature of the issues in the particular case.}

\textit{In the case of the comment by the Veterinary Surgeons’ Board, the SAT Act [section 11] requires that matters involving veterinary surgeons be dealt with by a Tribunal including a person with experience in the vocation (i.e. a veterinary surgeon), and a person who has knowledge or experience enabling them to understand the interests of persons dealing with veterinary surgeons. The Tribunal observes that obligation without fail.}

\textit{Accordingly we do not think there is a general perception that the Tribunal does not utilise people with relevant experience and expertise, and think that the perception (and the fact) is quite the opposite.}\textsuperscript{265}

\textsuperscript{261} \textit{Ibid.}

\textsuperscript{262} Submission No 22 from the Armadale Redevelopment Authority, received on 20 August 2007, p1; Submission No 25 from the Veterinary Surgeons’ Board of Western Australia, 21 August 2007, p8; Submission No 75 from the Plumbers Licensing Board, 31 August 2007, p1; and Submission No 88 from the Strata Centre, 21 September 2007, p3.

\textsuperscript{263} Submission No 22 from the Armadale Redevelopment Authority, received on 20 August 2007, p1.

\textsuperscript{264} Submission No 25 from the Veterinary Surgeons’ Board of Western Australia, 21 August 2007, p8.

\textsuperscript{265} Written answer from the State Administrative Tribunal to proposed question 32 for the hearing on 21 September 2007, p36.
However, it was noted by the SAT that the requisite number of full-time and sessional members must be monitored and revised constantly. The President of the SAT provided the Committee with the following history of the recruitment of SAT members:

When the tribunal was established there were all these earlier bodies that had part-time, sessional memberships. Considerable effort was put into advertising nationwide in relation to full-time positions. They were subject to full interviews and recommendations to government, which were accepted. The sessional membership was an area where we never fully comprehended at the outset just what our needs were going to be, and many people who were on pre-existing bodies were appointed as sessional members. The result was that, I think, at one stage we had nearly 150 sessional members of the tribunal. In some respects it could be embarrassing because we had too many and people wanted to serve. We were not able to train them properly and could not promise everyone a job. Their initial contingent appointments ran out at the end of last year. Again, we advertised statewide and invited expressions of interest from existing sessional members as well as anybody else who was interested. We then went through a process of reappointment. We worked out just what we needed. We worked out in relation to each area what full-time members can do in development, resources, commercial and human rights; what sort of people we were looking for as sessional members to be complementary to them; the sort of workload that those sessional members would be likely to get; what we could offer them; and what sort of training we would need to give them.

That is what has happened in 2007. The re-appointments were made at the beginning of this year and we now have these people in place in each stream. Some sessional members are quite busy; others come in to sit on vocational matters; and we have a group of sessional members who sort of rotate into various matters so that we keep people busy and we keep them experienced.  

At times, the SAT has reported some difficulties in attracting people with particular qualifications to its sessional membership, including psychiatrists, plumbers and

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268 Written answer from the State Administrative Tribunal to proposed question 40 for the hearing on 15 February 2008, p24.
people who are appropriately qualified to sit on reviews of Building Disputes Tribunal decisions (Commercial and Civil stream) or BRB decisions (Vocational stream).  

2.109 In relation to the availability of psychiatrists to serve as sessional members, the SAT reported that the situation was manageable, due to the appointment of another psychiatrist in August 2006, but continues to be a concern. The President of the SAT identified various reasons for these difficulties:

- The relatively low number of psychiatrists.
- The disparity between psychiatrists’ private consultancy fees and the remuneration rates for the SAT’s sessional members.
- The SAT’s practice of ensuring that people who are in the decision-making sector are not also conducting the reviews of the decisions.

2.110 The WAPC suggested that the SAT should engage its own panel of experts in various matters within the SAT’s jurisdiction and cited the practice in the Land and Environment Court of New South Wales as an example.

2.111 Given the breadth and diversity of veterinary practice, the AVA and the VSB would prefer to have more than one member of their profession sit on any SAT panel which is hearing and determining disciplinary proceedings against veterinarians in order to maximise the range of knowledge and experience available to each panel. They also suggested that they should have some input into the appointment of veterinarians who serve as SAT members.

2.112 A number of submitters claimed that the varying qualifications, knowledge and experiences of the SAT’s members have sometimes resulted in bad, inconsistent or erratic decision-making.

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272 Submission No 93 from the Western Australian Planning Commission, 5 October 2007, p10.
273 See dialogue between Dr David Neck, President, The Australian Veterinary Association Limited (Western Australian Division), Hon Graham Giffard, Chair, and Hon George Cash MLC, substitute Member, Standing Committee on Legislation, Transcript of Evidence, 7 May 2008, pp3-4; and Dr Peter Punch, Chairman, Veterinary Surgeons’ Board of Western Australia, Transcript of Evidence, 7 May 2008, p2.
274 Submission No 2 from the Aboriginal Legal Service of Western Australia Inc, 20 July 2007, p1; Submission No 43 from the Disability Services Commission, 29 August 2007, p2; Submission No 74 from the Town of Vincent, 31 August 2007, p2; Submission No 78 from Mr Ross Graham Sharland, 31 August 2007, p7; Submission No 82 from the East Perth Redevelopment Authority, 4 September 2007, p2; Submission No 98 from Hardy Bowen, Lawyers, 6 November 2007, p2.
2.113 For example, the Aboriginal Legal Service of Western Australia suggested that greater resources be allocated to the training and on-going legal education of SAT members due to its experience on a few occasions when it appeared that a SAT member lacked familiarity with particular legislation, which in its view, led to some erratic decision-making.\textsuperscript{275} When these comments were put to the SAT, the Committee was advised that the judicial members of the SAT are responsible for the continuing education, training and professional development of the SAT’s members, a role which they take very seriously:

\textit{The President does not consider this is an area which requires improvement. Full-time and sessional members of the Tribunal who determine particular matters in the Tribunal are initially appointed to the Tribunal and later appointed by the President to sit on particular matters by reason of their training, knowledge and expertise in an area. While there may be occasions when as a result of the conferral of jurisdiction under new legislation, the Tribunal lacks immediate familiarity with legislation, there is no particular area in which the Tribunal lacks expertise and the Tribunal ensures the continuing professional development of members. The President is unaware of any “erratic” decision-making as asserted in this non-specific observation, and is surprised by the comment which has never been brought to his attention in the two and a half years of the Tribunal’s operation.}

\textit{... The judicial members of the Tribunal have the responsibility under s 143 of the SAT Act for directing the education, training and professional development of the Tribunal members. This responsibility is taken very seriously in the Tribunal and regular training and on-going legal and non-legal education of Tribunal members is undertaken within each stream and generally for both full-time and sessional members. This has been a particular feature of the 2006/07 reporting period, which has focused on the professional development of Tribunal members following the re-appointment of the sessional members in early 2007. Induction programs were run for sessional members in early 2007.}\textsuperscript{276}

\textsuperscript{275} Submission No 2 from the Aboriginal Legal Service of Western Australia Inc, 20 July 2007, p1.

\textsuperscript{276} Written answer from the State Administrative Tribunal to proposed question 21 for the hearing on 21 September 2007, pp22-23.
2.114 The President of the SAT informed the Committee that regular, stream-specific meetings are held virtually every week, during which members discuss their cases and workflow with the senior member in the stream or one of the deputy presidents.277

2.115 Mr Ross Sharland and the DSC complained that there are differences in the ways in which SAT members conduct similar cases.278 The DSC and the Town of Vincent also claimed that there have been different outcomes for individuals with similar issues.279 In response to the allegations of procedural inconsistencies, the SAT argued that its procedures are designed to be flexible and adapted to suit the particular case at hand, making it inevitable that some frequent parties to SAT proceedings will regard procedures to be inconsistent. While a greater degree of consistency could be achieved with more specific procedural rules, the SAT was of the opinion that such a move would be contrary to its objectives.280 However, with respect to consistency in decision-making, the President of the SAT was adamant that this is closely monitored:

we do try to keep a close eye within each stream on consistency of decision making. It is very important that a body not be going off in different areas. You do not want a like matter dealt with in three different ways. Not only is it unfair to the two who got the wrong treatment, but also it is bad for your organisation. We watch closely.281

2.116 Hardy Bowen, Lawyers, made the observation that there are discernible differences in the quality of decision-making between members, but accepted that “this is a function of every judicial or quasi-judicial exercise”.282

Finding 8: The Committee finds that the State Administrative Tribunal is meeting the objective of appropriately using the knowledge and experience of its members.

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277 The Honourable Justice Michael Barker, President, State Administrative Tribunal, Transcript of Evidence, 21 September 2007, p35.
278 Submission No 78 from Mr Ross Graham Sharland, 31 August 2007, p7; and Submission No 43 from the Disability Services Commission, 29 August 2007, p2.
279 Submission No 43 from the Disability Services Commission, 29 August 2007, p2; Submission No 74 from the Town of Vincent, 31 August 2007, p2.
280 Written answer from the State Administrative Tribunal to proposed question 43 for the hearing on 15 February 2008, p26.
281 The Honourable Justice Michael Barker, President, State Administrative Tribunal, Transcript of Evidence, 21 September 2007, p35.
282 Submission No 98 from Hardy Bowen, Lawyers, 6 November 2007, p2.
THE APPLICATION PROCESS

2.117 Under section 42(2) of the SAT Act, the SAT’s Executive Officer is required to ensure that a person wishing to commence proceedings before the SAT is given every reasonable assistance that the person seeks. The SAT noted that:

This is a particularly important function for the staff of the Tribunal.
Although staff cannot give legal advice they can assist all parties with giving information and referring parties to good sources of information and assistance.\(^{283}\)

Completing the Application

2.118 The President of the SAT informed the Committee that a goal of the SAT’s strategic plan is for applications and documents to be lodged electronically.\(^{284}\) Currently, in addition to obtaining hard copies, application forms are available from the SAT’s website and can be filled in electronically, printed and lodged in hard copy. While the applications may be lodged by email, through prior arrangement with the SAT in special circumstances,\(^{285}\) the details on the forms are then required to be installed manually by the SAT’s staff.\(^{286}\) At present, documents other than application forms cannot be filed electronically.\(^{287}\) The SAT advised that it will soon be trialling an ‘eFiling’ facility for registered users.\(^{288}\)

2.119 Potential applicants who complete their forms electronically are able to make use of the ‘SAT Wizard’, which is an interactive programme which ‘walks’ an applicant through the completion of an application form, from helping the applicant identify the relevant enabling Act and provision, to obtaining vital details of the application through a questionnaire, and finally, generating the completed application form. The programme also provides information and procedural notes which are relevant to specific applications. While the SAT Wizard appears to have been designed for potential applicants who are completing their forms electronically, the programme would also be useful for those who are completing hard copy application forms.

\(^{283}\) Written Presentation from the Honourable Justice Michael Barker, President, State Administrative Tribunal, 21 September 2007, p13.

\(^{284}\) Ibid, p14.

\(^{285}\) Application forms may be emailed to the Executive Officer, with his or her prior approval, in accordance with rule 6 of the State Administrative Tribunal Rules 2004: rule 4(3) of the State Administrative Tribunal Rules 2004.

\(^{286}\) The Honourable Justice Michael Barker, President, State Administrative Tribunal, Transcript of Evidence, 15 February 2008, p12.

\(^{287}\) Written Presentation from the Honourable Justice Michael Barker, President, State Administrative Tribunal, 21 September 2007, p14.
Results from the 2007 Party Survey indicated that the SAT’s application forms are “easy to follow”, with 74 per cent of the parties surveyed rating this aspect of the SAT’s services as either excellent or good.\(^{289}\) Mr Alistair Borg, Acting Executive Officer, SAT, informed the Committee that very few applicants are turned away on the basis that the SAT does not have jurisdiction over their matters. While no formal records are kept of the number of applicants in this situation, Mr Borg advised that the number would not be more than five per year.\(^ {290}\) Similarly, there have been “perhaps two” applications in the last 12 months which were accepted and recorded on the ICMS but which did not proceed due to a lack of jurisdiction.\(^ {291}\) Mr Borg provided the following reasons for the low incidence of these types of applications:

\[\text{The reason for the small numbers appears to be because if there is any doubt most people telephone the Tribunal first to clarify the situation. The Tribunal also has the Web Wizard which is used extensively by people wishing to lodge an application.}\(^ {292}\)\]

In contrast, the OPA submitted that it had received comments from individuals and agencies that the application process is too difficult because of the requirement to identify the correct enabling provision.\(^ {293}\) Therefore, the OPA recommended that the SAT appoint “specially trained higher level staff to manage applications where there are complexities and to exercise judgement about how the application is progressed.”\(^ {294}\)

The Fairholme Disability Support Group also considered the SAT’s application process to be complex. It was submitted that:

\[\text{The process through which an application is made to the Tribunal is a complex one. Persons and their significant others find it a daunting exercise to complete the formalities in preparation for a hearing. While access is available electronically many of the clientele with a disability and/or their families or advisers are not able to access such material. To receive a bundle of complex documents can be very disturbing indeed. Some are almost frightened to proceed without an}\]


\(^{290}\) Email from Mr Alistair Borg, Acting Executive Officer, State Administrative Tribunal, 30 June 2008.

\(^{291}\) Ibid.

\(^{292}\) Ibid.

\(^{293}\) Submission No 57 from the Office of the Public Advocate, 29 August 2007, p3.

\(^{294}\) Ibid, p6.
advocate or adviser present. This can mean considerable costs to the individual or family.  

2.123 On this point, the Committee noted section 40(2) of the SAT Act, which provides that:

If a person who is not of full legal capacity is a party or potential party to a proceeding or proposed proceeding, the Tribunal may appoint a litigation guardian in accordance with the rules to conduct the proceeding on the person’s behalf. (emphases added)

2.124 Rule 39 of the *State Administrative Tribunal Rules 2004* (SAT Rules) governs the appointment, replacement, removal, conduct and payment of litigation guardians who are appointed for adults under section 40(2) of the SAT Act. Pursuant to rule 39(5) of the SAT Rules, the SAT may order the costs of the litigation guardian to be paid by either a party to the proceedings or from the income or property of the person for whom the litigation guardian is appointed.

2.125 Paragraphs 2.20 to 2.39, 2.150 to 2.161, 2.569 to 2.571 and 2.724 to 2.726 in this Report contain a discussion of the ways in which the SAT can help parties to manage their proceedings after the lodgement of the application: for example, through directions hearings and an inquisitorial approach.

**Finding 9:** The Committee finds that the State Administrative Tribunal’s application process is generally accessible to all applicants but notes this is an area which requires constant monitoring.

**THE SAT’S PROVISION OF NOTIFICATION AND INFORMATION**

2.126 Mrs Lesley Freegard, who was involved in a planning dispute before the SAT, advised the Committee that she was “kept well informed of the procedure and what was expected of us.” Mrs Freegard praised the members as well as the staff involved in her proceeding, saying:

I was very pleased to find that the Justices always took the time to explain procedures and legal issues to me.

Other officers of the Tribunal were very efficient ...

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295 Submission No 81 from the Fairholme Disability Support Group, received on 6 September 2007, p2.
296 Submission No 39 from Mrs Lesley Freegard, 29 August 2007, p1.
2.127 The Public Trustee submitted that his office occasionally fails to receive notice of a hearing but noted that this is the exception rather than the rule.\textsuperscript{298} The Public Trustee also complained of the SAT’s failure to inform his officers of the conclusion of a hearing when the officers had made themselves available to be telephoned during hearings where their physical presence was not required. This would result in the Public Trustee’s officers being occupied unnecessarily.\textsuperscript{299} However, the SAT advised the Committee that procedures are now in place for the SAT’s staff to advise the Public Trustee’s office once a hearing has ended.\textsuperscript{300}

2.128 Results from the 2007 Party Survey indicated that the majority of parties surveyed were satisfied with the level, clarity and the timing, of information and notifications they received in their proceedings:

\textit{SAT letters and notices were also deemed easy to follow ... Most of the respondents stated that they had sufficient information to prepare for their hearing and felt that the length of notice given was appropriate.}\textsuperscript{301}

2.129 In the 2008 Party Survey, 80 per cent of the participating parties found the SAT’s letters and notices easy to follow.\textsuperscript{302}

2.130 Ninety per cent of the parties surveyed in 2006/2007 believed that they had sufficient information to prepare for the hearing, 85 per cent of them felt that the length of notice given was appropriate, and 71 per cent of them had two to less than six weeks’ notice of the hearing.\textsuperscript{303}

2.131 However, the DSC, two private submitters, the Strata Centre and the Small Business Development Corporation were of the view that the SAT’s notification procedures were either inadequate or required improvement.\textsuperscript{304}

\textsuperscript{298} Submission No 66 from the Public Trustee, 11 September 2007, p2.
\textsuperscript{299} Ibid, p3.
\textsuperscript{300} Written answer from the State Administrative Tribunal to proposed question 27 for the hearing on 15 February 2008, p17.
\textsuperscript{301} Data Analysis Australia, \textit{State Administrative Tribunal 2007 Party Survey}, November 2007, pi; see also, p10.
\textsuperscript{304} Submission No 43 from the Disability Services Commission, 29 August 2007, p3; Submission No 58 from Private Submitter, 29 August 2007, p2; Submission No 71 from Private Submitter, 31 August 2007, p1; Submission No 88 from the Strata Centre, 21 September 2007, p3; and Submission No 94 from the Small Business Development Corporation, Western Australia, 30 August 2007, p3.
The DSC’s main concern in this area was that people with disabilities, and the people in their lives, are appropriately informed about the SAT proceedings in which they may be involved:

For example, families and carers may lack understanding of the principles of the Guardianship and Administration Act 1990 and of concepts such as the ‘least restrictive alternative’. In addition, they may have no knowledge of what they may be asked to say during a hearing. A person with a disability, on the other hand, may experience lack of suitably formatted information and lack of assistance to understand the processes of the Tribunal.

... Written decisions from the Tribunal may not be useful if the person is not literate, and the need to apply in writing for written decisions may preclude some people with disabilities from asking for these.305

Consistent with the DSC’s suggestions about improving the means of conveying information to people with disabilities, section 32(6) of the SAT Act provides as follows:

The Tribunal is to take measures that are reasonably practicable —

(a) to ensure that the parties to the proceeding before it understand the nature of the assertions made in the proceeding and the legal implications of those assertions;

(b) to explain to the parties, if requested to do so, any aspect of the procedure of the Tribunal, or any decision or ruling made by the Tribunal, that relates to the proceeding; ...

The measures which may be undertaken by the SAT in fulfilment of the requirements of section 32(6) may involve the SAT’s staff explaining procedural rules to parties or members explaining concepts to the parties during hearings or other proceedings. The Committee was informed of the following SAT practices in this respect:

Under s 32(6) of the SAT Act, SAT is required to take measures that are reasonably practicable to ensure that the parties understand the nature of the assertions made in the proceedings and the legal implications of those assertions, and if requested to do so, any of the procedures of the Tribunal. In practice, where the parties are not represented by lawyers, which is in the majority of cases, the

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305 Submission No 43 from the Disability Services Commission, 29 August 2007, p3.
The SAT also publishes several ‘information pamphlets’ which are tailored to parties or other interested persons in particular jurisdictions. For example, with respect to the GA Act jurisdiction, there are pamphlets entitled:

- ‘Applications and Proceedings’, which provides information on such matters as how to file an application, what to expect after an application has been filed, whom to expect to be present at a hearing, what to bring to a hearing and what to expect will happen at a hearing; and

- ‘Information concerning conduct of hearings’, which provides information on some of the following matters: a person’s entitled to be present at a hearing or to be represented at a hearing; the types of orders which can be made by the SAT at the hearing; an explanation of what is covered in guardianship or administration orders; and whether a person is entitled to know what information is before the SAT.

Fact-sheets published by other agencies may also be available from the SAT. For example, with respect to the GA Act jurisdiction, a person may access fact-sheets published by the OPA on:

- the ‘Role of the Public Advocate’;
- ‘Guardianship’;
- ‘Sterilisation’; and
- ‘Enduring Powers of Attorney’.

These pamphlets and fact-sheets are available in hard copy or may be downloaded from the SAT’s website.

With respect to the ways in which a SAT decision may be communicated, the Committee noted the SAT’s advice that its members endeavour to hand down oral decisions at the end of hearings wherever possible:

What we have tried to do though - we have worked very hard at this over the last 12 months - is identify areas of decision making where

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306 Written answer from the State Administrative Tribunal to proposed question 62(b) for the hearing on 15 February 2008, pp36-37.
we think we can give the decision there and then and give reasons for it at the same time verbally. There are so many areas where if you push yourself, you can do it. So members have been trained and are continuing to be trained in giving a decision at the time and giving reasons. For example, in the area of guardianship and administration, many of those hearings only take half an hour to an hour and at the end of it orders are made. The members know why they are making the order and what the reasons are. They are now encouraged, and have been since the tribunal started - differently from the board before it - to give their reasons. They have developed pro forma as to the matters they should cover and they add structure to it and they deliver them verbally.\textsuperscript{307}

2.139 Further, the Committee is of the understanding that final hearings in most human rights matters are conducted orally.\textsuperscript{308} The DSC is aware of the practice of giving contemporaneous oral decisions wherever possible:

Yes, this practice has been observed. Generally this is well done and with due regard for the needs of the parties. [However] The nature of the situation, its formality and the limitations of the represented person’s capacity to understand, and their emotional response to the situation my mean that they do not derive benefit from this.\textsuperscript{309}

2.140 It was suggested by Dr Ronald Chalmers, Director General, DSC, that:

the tribunal …[should]…be doing everything possible to make that communication as effective as possible as well, and, again, that could be through using the intermediary of an advocate to explain to a person with a disability, the rationale for a decision, rather than just having an order read out or a bit of paper, which, in many cases, means nothing to a person with a disability. That is the essence of this one here. In many cases it is done well; in a few cases we feel that there could be improvement in that area.\textsuperscript{310}

2.141 Further, the DSC’s written response to Committee questions suggested that:

\textsuperscript{307} The Honourable Justice Michael Barker, President, State Administrative Tribunal, \textit{Transcript of Evidence}, 21 September 2007, p12.

\textsuperscript{308} State Administrative Tribunal, \textit{Annual Report 2007}, 28 September 2007, p68.


\textsuperscript{310} Dr Ronald Chalmers, Director General, Disability Services Commission, \textit{Transcript of Evidence}, 14 May 2008, p8.
It would be useful if an independent person could provide follow up information to the person with a disability to ensure that they understood the decision and what it meant in practical terms.

The issue is not just about the reasons for the decision, but also about what the order means in terms of the represented person’s decision making autonomy.\textsuperscript{311}

2.142 The Committee noted that this intermediary role may be conducted by a representative or litigation guardian who is appointed under section 40 of the SAT Act (refer to paragraphs 2.123 to 2.124 in this Report in relation to SAT-appointed legal guardians) or a legal advocate who is provided by other means, such as through an independent advocacy agency. The issue of independent advocacy for people with disabilities is discussed further in paragraphs 2.625 to 2.637 in this Report.

2.143 The DSC also suggested that the SAT explain the responsibilities of guardianship to people who are appointed as guardians. In particular, the SAT should point out:

\[\text{[the]} \text{ need to respect the wishes of the person with a disability and to ensure that they understand the situation and have a say where possible.}\textsuperscript{312}\]

2.144 However, the Committee noted that this is a function of the OPA, as reflected in section 97 of the GA Act:

\textit{97. Functions of Public Advocate}

\textit{(1) The functions of the Public Advocate are as follows —}

\textit{(a) to make applications under this Act and to attend hearings of the State Administrative Tribunal when he thinks fit and when required to do so by the Tribunal;}

\textit{...}

\textit{(e) to provide information and advice —}

\textit{(i) to a proposed guardian or administrator, as to the functions of guardians and administrators; and}


\textsuperscript{312} \textit{Ibid.}
(ii) to any person, as to the operation of Part 4
[applications for guardianship and administration orders]; ...(emphases added)

2.145 With respect to the DSC’s concerns about people with disabilities being precluded from obtaining the SAT’s written decisions due to the need to apply for such decisions, the Committee noted that sections 74 and 75 of the SAT Act make it mandatory for the SAT to give final decisions in writing and for at least each party in a matter to be given a copy of any written decision. However, written reasons for a decision are not mandatory unless the decision was a reserved decision,\(^\text{313}\) or a party requests, within 28 days after the day on which the decision is made, that the reasons for a decision be given in writing\(^\text{314}\).

2.146 The Small Business Development Corporation considered that the practice notes that have been prepared to assist claimants are “written in advanced English and are complicated to follow.”\(^\text{315}\) The SAT disagreed with this view, saying that it:

\[\text{considers that the practice notes are provided in a simple and clear form. Presiding members at directions hearings assess the nature of the case and endeavour to adopt processes which best suit the particular case. Standard forms of directions are used as the basic model but are varied in each case as the circumstances require. SAT endeavours to keep the procedures to be followed as simple as possible.}\(^\text{316}\)

2.147 Mrs Agnes Goedhart suggested that SAT proceedings could be improved by providing parties, prior the actual hearing day, with a written outline of what to expect at a hearing. Mrs Goedhart submitted that this would be helpful in preparing someone who has never been in a court-like setting.\(^\text{317}\) In response, the SAT referred the Committee to its various information pamphlets on planning matters, which in the SAT’s view, are written in plain English. These pamphlets provide detailed and practical guidance to parties and their representatives on how matters proceed in the Development and Resources stream, from the filing of the application to its finalisation, and the SAT is satisfied with the effectiveness of this method of

\[\text{313} \text{ Section 76 of the State Administrative Tribunal Act 2004.}\]
\[\text{314} \text{ Section 78 of the State Administrative Tribunal Act 2004.}\]
\[\text{315} \text{ Submission No 94 from the Small Business Development Corporation, Western Australia, 30 August 2007, p3.}\]
\[\text{316} \text{ Written answer from the State Administrative Tribunal to proposed question 62(a) for the hearing on 15 February 2008, p36.}\]
\[\text{317} \text{ Submission No 42 from Mrs Agnes Goedhart, 27 August 2007, p1.}\]
providing information. The SAT has also indicated that it has not received any other comments about this issue in relation the Development and Resources stream.\(^{318}\)

2.148 His Honour Judge John Chaney SC, Deputy President, SAT, advised the Committee, that, in addition to the information pamphlets which are available for planning matters, it is very common practice in class 1 planning matters or minor planning matters for the following to occur:

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.\(^{319}\)

2.149 The SAT also intends for a video example of SAT hearings and other proceedings to be prepared and posted on its website in order to help parties and other interested persons prepare for such proceedings:

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 am hoping that ... 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.\(^{320}\)

Finding 10: The Committee finds that the State Administrative Tribunal’s processes of informing and notifying parties and potential parties are effective but recognises this is an area which requires constant monitoring.

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\(^{318}\) Written answer from the State Administrative Tribunal to proposed question 9 for the hearing on 15 February 2008, pp6-7.


\(^{320}\) The Honourable Justice Michael Barker, President, State Administrative Tribunal, Transcript of Evidence, 15 February 2008, p16.
THE SAT’S USE OF DIRECTIONS HEARINGS

2.150 Once an application has been lodged with the SAT, it will usually be listed for a ‘directions hearing’. The two exceptions to this are GA Act matters, which, after some initial case processing assessments, are normally listed for a final hearing, and applications pursuant to section 13(7) of the Commercial Tenancy (Retail Shops) Agreements Act 1985, which are dealt with ‘on the papers’ rather than being listed for a final hearing.\(^{321}\)

2.151 The President of the SAT provided the Committee with the following general description of the purpose of directions hearings:

\[
\text{in many, many areas we go to a first directions hearing quite quickly. That is where we start to sort out what sort of treatment and what sort of decision-making approach we should take in relation to a matter that is before us. One of the first questions that comes up is whether a matter should be referred to mediation.}^{322}\]

2.152 Some of the tasks undertaken by the SAT member presiding in a directions hearing include the following:

- Identifying the exact nature of the application and the issues involved.
- Assessing the likely complexity of the case.
- Determining what the SAT will need to decide and how the matter should proceed.
- Determining the people who are likely to be called as witnesses, and whether expert witnesses will be required.
- Determining how best to deal with the evidence.
- Assessing how long the case is going to take to resolve.
- Assessing whether the matter is amenable to mediation.\(^{323}\)
- Assessing whether the matter is more suited to a compulsory conference.

\(^{321}\) Written Presentation from the Honourable Justice Michael Barker, President, State Administrative Tribunal, 21 September 2007, p14.

\(^{322}\) The Honourable Justice Michael Barker, President, State Administrative Tribunal, Transcript of Evidence, 15 February 2008, p5.

\(^{323}\) The Honourable Justice Michael Barker, President, State Administrative Tribunal, Transcript of Evidence, 21 September 2007, p6.
• Determining whether a matter should be dealt with on the papers rather than be listed for a final hearing.

• Identifying suitable dates for future proceedings, such as mediation, compulsory conference and the final hearing.324

• Identifying what documents should be filed by which party325 and setting a timetable for this to occur.

2.153 The SAT sees the directions hearing as an early dispute resolution opportunity for the parties:

A directions hearing gives parties an opportunity to find joint understanding of issues and to consider practical pathways to the resolution of the questions or dispute.326

2.154 The SAT observed the dispute resolution advantages of directions hearings in its Annual Report 2007, with respect to matters in the Commercial and Civil stream:

In some cases, it is the first time at which the parties each reach an understanding of the position of the other. This sometimes leads to the proceedings being adjourned to enable discussions between the parties and, quite frequently, in strata matters, for appropriate proposals to be put to the strata company to be considered in a general meeting of members.327

2.155 Directions hearings also provide the SAT with the ability to focus the parties on the real issues at hand:

Our experience has shown us that by asking those questions early, you get to the essential issues of a case, you decide the right matters and you do not let the parties entirely fashion their own issues and take us off on a journey that they think is important but that is irrelevant to the decision making that we have to engage in at the end of the day.328


325  The Honourable Justice Michael Barker, President, State Administrative Tribunal, Transcript of Evidence, 21 September 2007, p40.

326  Written Presentation from the Honourable Justice Michael Barker, President, State Administrative Tribunal, 21 September 2007, p14.


328  The Honourable Justice Michael Barker, President, State Administrative Tribunal, Transcript of Evidence, 21 September 2007, p6.
2.156 The Legal Practitioners Complaints Committee was satisfied with this aspect of the SAT process, submitting that the SAT’s:

practice of directions hearings for all matters has greatly assisted in programming Applications to a timely conclusion and its referral of matters to mediation where appropriate has facilitated the disposition of some matters without the need to proceed to a defended hearing.\(^{329}\)

2.157 Of the parties who responded to the 2007 Party Survey, 79.7 per cent of those who had attended a directions hearing found it to be helpful to their case, compared with 71.8 per cent of the responding parties who had attended a mediation, 81.9 per cent of those who had attended a compulsory conference, and 85.8 per cent of those who had attended a final hearing.\(^{330}\) The survey also revealed that 40.7 per cent of the proceedings involving parties who had attended a directions hearing were resolved completely at the directions hearing.\(^{331}\) The corresponding figures for mediations, compulsory conferences and final hearings were 48.4, 65.2 and 86.6 per cent, respectively.\(^{332}\) Further, it was claimed that 64.2 per cent of the directions hearings which did not result in a full resolution of the proceedings resolved some of the issues at hand. The corresponding figures for mediations, compulsory conferences, and final hearings were 67.7, 47.3 and 71.4 per cent, respectively.\(^{333}\)

2.158 The East Perth Redevelopment Authority and the Strata Centre were not completely satisfied with the effectiveness of directions hearings and suggested some improvement.\(^{334}\) The East Perth Redevelopment Authority suggested, as a method of dispensing with the need for directions hearings, that if both parties:

were required to indicate a preference for mediation, where those preferences matched, the matter could be listed directly for mediation without the time and expense involved in attendance at a directions hearing.\(^{335}\)

2.159 In response, the SAT advised the Committee that in more minor development and subdivision applications,\(^{336}\) the directions hearing is often a \textit{de facto} mediation,

\(^{329}\) Submission No 26 from the Legal Practitioners Complaints Committee, 22 August 2007, p1.
\(^{331}\) \textit{Ibid}, p14. The corresponding figure was 90 per cent in the 2006 party survey: \textit{ibid}, p24.
\(^{332}\) \textit{Ibid}, p14.
\(^{333}\) \textit{Ibid}.
\(^{334}\) Submission No 82 from the East Perth Redevelopment Authority, 4 September 2007, p1; and Submission No 88 from the Strata Centre, 21 September 2007, p2.
\(^{335}\) Submission No 82 from the East Perth Redevelopment Authority, 4 September 2007, p1.
\(^{336}\) That is, those involving less than $250,000, or $500,000 for a single house, or three lots or less.
conducted before a member who can immediately explore solutions to the dispute. In relation to more significant development and subdivision applications, the SAT did not support the East Perth Redevelopment Authority’s recommendation for the following reasons:

- “Although mediation is used extensively and successfully in the DR [Development and Resources] stream to resolve proceedings and narrow issues in dispute (see Senior Member David Parry ‘A Cultural Change – The Use of Facilitative Dispute Resolution in the State Administrative Tribunal of Western Australia’, Brief Vol 34 No 10, November 2007, pages 23 – 26), it may not be useful in every case. The SAT system allows a member to determine the quickest and cheapest method to resolve a dispute at a directions hearing within two to three weeks of the filing of the application and, where mediation is appropriate, to refer the matter to mediation, often within days.”

- “A respondent is not required to file any document prior to the first directions hearing. As is apparent from other submissions … , local governments and other respondents are concerned to minimise the amount of work they need to do.”

- “In order for a mediation to be most effective, particularly in more complex planning matters, it may be necessary for the respondent to formulate and provide a statement of issues, facts and contentions, or simply a statement of issues, or for the applicant to provide alternative or additional conditions of approval, in advance of the mediation. At the directions hearing, the member considers what orders should be made in advance of a mediation to maximise its prospects of success.”

- “It is often not clear on the documents filed with the application which member or members should most appropriately be listed as the mediator for a particular matter. Discussion with the parties at the directions hearing assists in the allocation of the matter to the mediator best suited to the matter.”

- “Staff would be required to obtain available dates from parties and then co-ordinate with members. This would be administratively time consuming and is more efficiently dealt with by a member at a directions hearing with access to all parties.”

337 Written answer from the State Administrative Tribunal to proposed question 51 for the hearing on 15 February 2008, p30-31.
2.160 As another example of the concerns expressed, the Strata Centre contended that the SAT’s usual practice of listing most applications for a directions hearing is flawed because:

   *It means that a respondent must travel, sometimes from a ... country town and at considerable expense, to attend such a hearing for the sole purpose of a date being set for a mediation or later hearing.*

2.161 The SAT disagreed entirely with the Strata Centre’s contention:

   *The submitter unfortunately has an incomplete understanding of SAT’s process. The standard notice of directions hearing, which is sent out on every occasion, explains the purpose of the directions hearing and informs the recipient how to arrange teleconferencing, videoconferencing, interpreting services or special access requirements. There is no reason for a respondent to have to travel from a country town to attend a directions hearing. It is very common for directions hearings to be conducted by way of a teleconference. Further, the use of directions hearings, in the view of SAT, has been an outstanding success, particularly in relation to strata matters. Under the former regime before the Strata Titles Referee, there was no opportunity to mediate disputes, or for the parties to communicate other than in writing with the Referee. Directions hearings enable the Tribunal to assess whether a matter is suitable for mediation and importantly, provide an opportunity for the parties to communicate with each other and be properly informed about the position of the other, at an early stage. This results in a number of ‘disputes’ being referred back for proper consideration at general meetings of the strata company and to misconceived applications being withdrawn.*

**Finding 11: The Committee finds that the State Administrative Tribunal’s practice of utilising directions hearings is effective.**

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338 Submission No 88 from the Strata Centre, 21 September 2007, p2.
339 Written answer from the State Administrative Tribunal to proposed question 57 for the hearing on 15 February 2008, p34.
The SAT’s Use of Mediation and Conciliation

Distinction between Mediation and Conciliation

2.162 Section 54(4) of the SAT Act provides that the purpose of mediation is to “achieve the resolution of the matters by a settlement between the parties”, while section 52(3) provides that the purpose of compulsory conferences is to “identify and clarify the issues in the proceedings and promote the resolution of the matters by a settlement between the parties.”

2.163 Under the Australian National Mediator Standards, ‘mediation’ is defined as follows:

The purpose of a mediation process is to maximise participants’ decision making.

A mediation process is a process in which the participants, with the support of a mediator, identify issues, develop options, consider alternatives and make decisions about future actions and outcomes. The mediator acts as a third party to assist the participants to reach their decision.

The mediation process may:

a) assist the participants to define and clarify the issues under consideration;

b) assist participants to communicate and exchange relevant information;

c) invite the clarification of issues and disputes to increase the range of options;

d) provide opportunities for understanding;

e) facilitate an awareness of mutual and individual interests;

f) help the participants generate and evaluate various options; and

g) promote a focus on the interests and needs of those who may be subject to, or affected by, the situation and proposed options.
Mediators do not advise upon, evaluate or determine disputes. They assist in managing the process of dispute and conflict resolution whereby the participants agree upon the outcomes, when appropriate. Mediation is essentially a process that maximises the self determination of the participants. The principle of self determination requires that mediation processes be non-directive as to content.

...

Some mediators may use a ‘blended process’ model whereby they provide advice. These processes are sometimes referred to as ‘advisory mediation’, ‘evaluative mediation’ or ‘conciliation’. Such processes may involve the provision of expert information and advice, provided it is given in a manner that enhances the principle of self-determination and provided that the participants request that such advice be provided. Mediators who provide expert advice are required to have appropriate expertise (see Approval Standards at Section 5(4)) and to obtain the consent of participants prior to providing any advisory process.340

2.164 Ms Margaret Halsmith, Chair, LEADR Association of Dispute Resolvers (LEADR), informed the Committee of the National Alternative Dispute Resolution Advisory Council’s definition of mediation:

Mediation is the structured problem-solving process. It is an opportunity for parties with the assistance of an impartial facilitator to do four things; that is, to identify the disputed issues, to develop options, to consider alternatives and to endeavour to reach agreement.

The definition goes on, but I just want to make the point that the emphasis there is on the parties doing these things as distinct from the mediator doing them. ... The mediator has no advisory nor determinative role in regard to the content nor the outcome. The mediator does advise on and determine the process of mediation whereby resolution is attempted.341

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341 Ms Margaret Halsmith, Chair, LEADR Association of Dispute Resolvers, Transcript of Evidence, 14 May 2008, p2.
2.165 The SAT’s mediation process varies slightly from traditional models of mediation in that the SAT members who conduct the mediations have knowledge of the matters.\footnote{342} However, the aim of mediation remains the same:

\begin{quote}
Mediation is an entirely consensual process, and either party is free to withdraw from it whenever he or she wishes. The role of the mediator is to facilitate the parties reaching their own solution to the dispute. Where the real dispute between the parties is wider than the issue before the Tribunal, mediation can be used to achieve an overall settlement.\footnote{343}
\end{quote}

2.166 All mediations or compulsory conferences are conducted by SAT members who are trained in mediation.\footnote{344} This was confirmed by LEADR:

\begin{quote}
I think all or almost all of the SAT mediators have done a four-day mediation course with LEADR. If they have not done one with LEADR then they have done it with, maybe, IAMA [Institute of Arbitrators and Mediators Australia]. However, I understand that most of them have done a course with LEADR.\footnote{345}
\end{quote}

2.167 While mediators have a neutral role, the members who preside in compulsory conferences appear to be akin to ‘conciliators’, and have a “more directive role in the conferral process”\footnote{346}. ‘Conciliation’ is defined as:

\begin{quote}
A method of alternative dispute resolution in which a third party attempts to facilitate an agreed resolution of a dispute in accordance with relevant legal principles. In Australia, conciliation is distinguished from mediation in terms of the conciliator’s input to the substance of the agreement.\footnote{347}
\end{quote}

2.168 It is this fundamental, practical difference between the two processes which helps the SAT member who is presiding at a directions hearing decide whether a matter, which...

\footnote{342}{The Honourable Justice Michael Barker, President, State Administrative Tribunal, Transcript of Evidence, 15 February 2008, p18.}
\footnote{343}{State Administrative Tribunal, Annual Report 2007, 28 September 2007, p23.}
\footnote{344}{State Administrative Tribunal, Annual Report 2007, 28 September 2007, p23.}
\footnote{345}{Ms Margaret Halsmith, Chair, LEADR Association of Dispute Resolvers, Transcript of Evidence, 14 May 2008, p4.}
\footnote{346}{Written answer from the State Administrative Tribunal to proposed question 2 for the hearing on 15 February 2008, p2. “Except to the extent that the rules may specify the procedure for a compulsory conference, the Tribunal member presiding at a compulsory conference may determine the procedure for the conference”: section 52(5) of the State Administrative Tribunal Act 2004. To the Committee’s knowledge, no rules have been made pursuant to this section of the Act.}
\footnote{347}{The Honourable Dr PE Nygh and P Butt, General Editors, Butterworths Australian Legal Dictionary, Butterworths, Perth, 1997, p238-239.}
should benefit from a facilitative dispute resolution process rather than a final hearing, should be listed for a mediation or a compulsory conference. As the President of the SAT explained:

compulsory conferences do not happen a lot in the tribunal. ... 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. ... an enormous number of matters do resolve at mediation. ... 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.[348] 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.[349]

2.169 While attendance at a mediation is voluntary (although the SAT can order the parties to attend a mediation without their consent[350]), parties must attend a compulsory conference where one is called.[351] Both processes are confidential, being held in private, unless the mediator or presiding member directs otherwise.[352] Subject to some exceptions, no evidence can be given in the substantive hearing of the matter of anything said or done in the course of a mediation or compulsory conference.[353]

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348 For example, guardianship and/or administration matters are not generally mediated as they tend to be listed immediately for a final hearing: The Honourable Justice Michael Barker, President, State Administrative Tribunal, Transcript of Evidence, 15 February 2008, p6.
349 Ibid, pp5-6.
350 Section 54(3) of the State Administrative Tribunal Act 2004.
351 Written Presentation from the Honourable Justice Michael Barker, President, State Administrative Tribunal, 21 September 2007, p48. See also, sections 52(1) and 53 of the State Administrative Tribunal Act 2004.
352 Sections 52(4) and 54(6) of the State Administrative Tribunal Act 2004.
Further Participation of Mediator or Presiding Member

2.170 Another point of difference between mediation and compulsory conferences is the role which the mediator or presiding member may play at a later stage in the proceedings if a settlement is not reached. If mediation does not result in the settlement of the matter, the member who conducted the mediation cannot be involved in the determination of the matter unless the parties consent. If a compulsory conference does not result in the settlement of the matter, the presiding member cannot be involved in the determination of the matter under any circumstances. 354 The President of the SAT offered the following explanation for this distinction:

*I think what we have decided is that the compulsory conference provision was put in there as an extra safety belt, if you like. If parties will not agree to mediate, and if the tribunal still believes, despite the attitude of the parties, that meeting its section 9 objectives means going to a compulsory conference and forcing them to talk, we can do it. However, I think it also implies that the convenor of the compulsory conference might perhaps be a bit more willing, might express views, not take sides and really try to help the parties get somewhere, and if they did take that approach, it would probably seem inappropriate for them to be later sitting and hearing the case.
*I think that is probably the sort of thinking on the prohibition of the convenor sitting later.* 355

2.171 When the Committee queried whether there would be any benefit in amending the SAT Act to allow members presiding at compulsory conferences to participate further in the resolution of a matter after parties fail to reach settlement at the compulsory conferences, the President indicated his support for the suggestion:

*I think that would be a very good idea, if you adopted the same provision that appears in the section dealing with mediation so that if the parties agreed, they could go on. I say that for this reason: our experience, whether the thing was called a compulsory conference or a mediation, in some areas it is such that - you have a building dispute. ... There is a long list of things that people complain about - the front doorstep is cracked, the tap in the shower does not work - and you work your way through them all in a compulsory conference or a mediation, and they cannot agree on a few things. Then the parties say, "All right; we’re happy about that. Now can you just*

354 State Administrative Tribunal, Annual Report 2007, 28 September 2007, p48; and sections 52(7) and 54(10) of the State Administrative Tribunal Act 2004.

355 The Honourable Justice Michael Barker, President, State Administrative Tribunal, Transcript of Evidence, 21 September 2007, p7.
decide on the other things?” and they say, “Well, we can’t.” In a mediation they can say, “All right; we consent. You now decide it.” However, if you have somehow slipped into a compulsory conference, you cannot. Sometimes it happens accidentally as to where they finish up.356

2.172 The DOTAG considered that the suggested amendment appeared to be consistent with one of the SAT’s main objectives: to make appropriate use of the knowledge and experience of SAT members357 358

Effectiveness

2.173 The SAT’s view is that mediation and compulsory conferences are highly effective in helping parties to clarify issues and/or resolve matters quickly and with a minimum of cost. In relation to mediation, the SAT has reported that this process:

is regularly used throughout all streams of the Tribunal.

Mediated outcomes have the great advantage of producing effective, lasting results. They also often have the advantage of producing a final decision more quickly and at less cost to the parties than other means of formal decision-making.359

2.174 In the SAT’s Annual Report 2007, facilitative dispute resolution procedures were credited with generating three important benefits for applications within the Development and Resources stream:

• First, the significant reduction in the proportion and number of planning and local government notice proceedings which require a final hearing or determination on the documents, compared with the former adjudicator, means that considerably fewer parties must incur the time and expense of preparation for and participation in a final hearing or determination.

• Second, a planning result which is the product of discussion and agreement between a proponent and a responsible

357 Section 9(c) of the State Administrative Tribunal Act 2004.
358 Mr Gavan Jones, Director Higher Courts, Court and Tribunal Services, Department of the Attorney General, Transcript of Evidence, 25 March 2008, p4.
authority generally reflects a superior community planning outcome than an imposed, win/loss Tribunal determination.

- Third, even if an application is not resolved through case management, mediation or a compulsory conference, at the very least contested issues are often identified and narrowed, so that the final hearing is quicker and cheaper.\(^{360}\)

2.175 Approximately 60 per cent of the applications in the Development and Resources stream during the 2006/2007 year were resolved through facilitative dispute resolution processes; that is, principally involving active case management, mediations and compulsory conferences rather than final hearings or final determinations on the documents. In 2007/2008, this figure was approximately 75 per cent.\(^{361}\) In the *Annual Report 2006*, it was noted that the experience during the 2005/2006 reporting year indicated that news of the success of the SAT’s mediation process had spread and that parties often jointly requested mediation at the outset of an application.\(^{362}\) This trend continued during the 2006/2007 reporting year.\(^{363}\)

2.176 The Committee noted that 13 per cent of the parties which responded to the 2007 Party Survey indicated that their applications ended with a decision made following mediation or compulsory conference.\(^{364}\) Compared to the 2006 Party Survey, fewer parties found that the mediation process had resolved some of the issues in dispute, from 98 per cent in 2006 to 47 per cent in 2007.\(^{365}\) Further details of the results with respect to the comparative perceived success of directions hearings, mediations, compulsory conferences and final hearings are discussed at paragraph 2.157 in this Report.

2.177 An exit survey, conducted in May, June and July 2008, of parties who had undergone mediation at the SAT confirmed that the SAT’s version of this form of facilitative dispute resolution is effective.\(^{366}\)

2.178 Given that mediation is used much more frequently in the SAT than compulsory conferences,\(^{367}\) most of the comments received from submissions in this inquiry

\(^{360}\) *Ibid*, p43.
related to mediation. The Land Valuers Licensing Board, the Nurses Board, LEADR, the OPA, Mr Arthur Blaquiere, the Small Business Development Corporation and Hardy Bowen, Lawyers, were supportive of the SAT’s use of mediation and/or of the view that mediation is effective in resolving SAT applications.\[368\] The Small Business Development Corporation suggested that mediation should occur prior to the directions hearing so as to create a preliminary, less formal and low cost approach to dispute resolution.\[369\]

2.179 The East Perth Redevelopment Authority also acknowledged and supported the SAT’s “preference for mediation”, but was concerned that “mediation sessions may focus on resolving issues between parties, rather than on the overall outcome that is achieved.”\[370\] The WALGA expressed a similar concern about the SAT’s processes generally.\[371\] However, the Committee noted that, in a mediation, it is the parties who are essentially in control of the negotiations, and a decision-making authority which is undergoing mediation would be able to identify why certain alternative solutions should not be pursued on the basis that they would not result in good planning outcomes.

2.180 In contrast, despite having had no actual experience with SAT proceedings\[372\], the Armadale Redevelopment Authority, relying on what it believed to be a general concern held by town planning professionals and planning agencies, contended that “Mediation hearings under the present SAT process can often be confrontational experiences for the participants. A more regulated forum for mediation may be required.”\[373\] The SAT did not agree with this contention:

\emph{It [is] difficult to understand what is being suggested by a “more regulated forum”. All SAT members have undergone mediation training, and thus are trained to ensure that persons engaging in mediation are made comfortable with the process, and that confrontation is avoided. Mediation is highly successful and is}

\[368\] Submission No 10 from the Land Valuers Licensing Board, 9 August 2007, p1; Submission No 14 from the Nurses Board of Western Australia, 15 August 2007, p2; Submission No 50 from LEADR Association of Dispute Resolvers, 28 August 2007, p1; Submission No 57 from the Office of the Public Advocate, 29 August 2007, p5 (although mediation is used infrequently in the guardianship and administration jurisdiction); Submission No 79 from Mr Arthur Blaquiere, 30 August 2007, p1; Submission No 94 from the Small Business Development Corporation, Western Australia, 30 August 2007, pp4-5; and Submission No 98 from Hardy Bowen, Lawyers, 6 November 2007, p2.

\[369\] Submission No 94 from the Small Business Development Corporation, Western Australia, 30 August 2007, pp4-5.

\[370\] Submission No 82 from the East Perth Redevelopment Authority, 4 September 2007, pp1 and 2.

\[371\] Submission No 80 from the Western Australian Local Government Association, 3 September 2007, p2.

\[372\] Written answer from the State Administrative Tribunal to proposed question 33 for the hearing on 15 February 2008, p37.

\[373\] Submission No 22 from the Armadale Redevelopment Authority, received on 20 August 2007, p1.
undertaken by the Tribunal as a preferred manner of dispute resolution precisely because of its informality, cost effectiveness, and potential to produce outcomes satisfactory to all parties. The Tribunal has, especially in the development and resources stream, generally been complimented for the regular use of mediation and facilitative dispute resolution techniques that avoid adversarial decision-making.\footnote{Written answer from the State Administrative Tribunal to proposed question 33 for the hearing on 21 September 2007, p37.}

2.181 The mediation processes experienced by the Office of the Commissioner of Soil and Land Conservation, the Shire of Victoria Plains and Mr Ross Sharland have led them to believe that SAT mediation is a non-effective form of dispute resolution.\footnote{Submission No 6 from the Office of the Commissioner of Soil and Land Conservation, 9 August 2007, p1; Submission No 32 from the Shire of Victoria Plains, 24 August 2007, p2 (the State Administrative Tribunal places “undue emphasis on mediation and conciliation”); and Submission No 78 from Mr Ross Graham Sharland, 31 August 2007, pp1, 5 and 7 (recommended a mediation process outside of the State Administrative Tribunal).} For example, the Office of the Commissioner of Soil and Land Conservation made the observation that “In some regulatory situations, the issues are “black” and “white” with little scope to adopt positions of “grey” through mediation.”\footnote{Submission No 6 from the Office of the Commissioner of Soil and Land Conservation, 9 August 2007, p1.} When the Committee queried whether there any matters within the SAT’s jurisdiction which are particularly ill-suited to mediation or conciliation, representatives of LEADR provided the following reasons why mediation can be useful, even in a seemingly intractable dispute:

\begin{quote}
a mediated outcome is not a compromise position between the black and the white. It is something we step away from, the black and the white continuum and actually come up with something creative that meets the needs of all the parties involved.  

In terms of whether some matters are suited to mediation, basically, all matters can be mediated. It is really whether the parties in the particular matters are well supported enough to participate in a mediation and to come up with an agreement that is realistic and sufficiently durable and that they can manage. \end{quote}\footnote{Ms Margaret Halsmith, Chair, LEADR Association of Dispute Resolvers, \textit{Transcript of Evidence}, 14 May 2008, p5.}
were communicating in a way that for some reason they do not always before there is a review application. I think the same thing would happen in the SAT with things like disciplinary proceedings. It might seem difficult in a disciplinary proceeding to say that there is some room for a creative outcome but there is always a benefit from getting the parties talking in an environment where they feel able to discuss things that perhaps they cannot by the time it gets to a hearing. Therefore, in my experience there are very, very few matters that do not benefit from mediation.  

... Quite often I am asked to mediate matters where there is unlikely to be an agreement but where the issues will be identified. I am told by the legal profession that that can halve the length of the trial, so that it can be helpful just to get to the issues point and then take it into a court sitting where it needs to go. It is amazing how often a mediation looks like it is just about a financial transaction or a financial settlement when, in fact, many more than one agreement is reached. One agreement might be reached on the financial aspects and a whole lot of interpersonal stuff can be sorted out in a mediation, which would otherwise just remain bad blood between people.

... a mediation can thrash out what the real issues are, refine them and get it into a more efficient state.

2.182 The President of the SAT had similar views about the effectiveness of mediation as a dispute resolution process:

mediation is not just negotiation; it is not just talking. It is different ... 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.

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378 Mr Graham Castledine, Member of LEADR WA Chapter Committee, LEADR Association of Dispute Resolvers, Transcript of Evidence, 14 May 2008, p6.

379 Ms Margaret Halsmith, Chair, LEADR Association of Dispute Resolvers, Transcript of Evidence, 14 May 2008, p6.

380 Mr Graham Castledine, Member of LEADR WA Chapter Committee, LEADR Association of Dispute Resolvers, Transcript of Evidence, 14 May 2008, p6.

381 The Honourable Justice Michael Barker, President, State Administrative Tribunal, Transcript of Evidence, 15 February 2008, p7.
2.183 With respect to ‘Class 2’, or more complex, planning and development matters, His Honour Judge John Chaney SC, Deputy President, SAT, estimated that approximately 80 per cent of these matters would be referred to mediation very quickly. The usual reason not referring the remaining matters to mediation is that the parties have already been through a lengthy process of discussion and the issues which are left after those discussions are irreconcilable and narrowly defined, so that there is nothing more to be gained by further negotiation. In such instances, it is more efficient to resolve the matters by making a final determination.  

2.184 The Department of Local Government and Regional Development submitted, based on feedback from the WALGA and Local Government Managers Australia, that, in mediations involving local governments, individual councillors are invited to represent their local governments and are expected to make decisions that could or should be made by their councils as a whole. In the SAT’s Annual Report 2007, it was reported that:

- during the 2005/2006 and the 2006/2007 reporting years, local government councillors had played a constructive role in the process of mediation and in the communication of the outcome to the rest of the elected council; and

- during the 2006/2007 reporting year, the President, His Honour Judge John Chaney SC, Deputy President, and Mr David Parry, Senior Member, SAT, met with representatives of the WALGA who suggested improvements to the form of the standard order used to invite councillors to attend mediations and compulsory conferences. As a result of those discussions, standard order 14 was amended to read as follows:

   The Mayor or President of the respondent is invited to attend and/or nominate one or more councillors and/or the chief executive officer of the respondent to attend the [mediation/compulsory conference].

2.185 The Committee was informed that the SAT’s standard order 14 is not made in every case involving a local government. Where it has been made, the SAT’s experience is that the local government’s authorised representative can assist a development or planning applicant to understand the reasons for the council’s decision and facilitate constructive discussions to either resolve matters or narrow the scope of the dispute.

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383 Submission No 72 from the Department of Local Government and Regional Development, 31 August 2007, p1.

The involvement of such a representative can also promote effective communication with the full council.\textsuperscript{385} Importantly:

\begin{quote}
*It is generally accepted in SAT mediations – in contrast to traditional mediations – that any proposals arising out of the process require formal consideration by the local government after the mediation. Councillors attending a mediation are therefore not expected to make decisions that could or should be made by the council as a whole.*\textsuperscript{386}
\end{quote}

2.186 In this way, the local government’s authorised representative could not misrepresent the council’s position on a matter.\textsuperscript{387}

2.187 The WALGA considered that the SAT’s emphasis on mediation is undue.\textsuperscript{388} It submitted that where the parties are “not interested in mediation”, the matter should proceed to either a final hearing or a final determination on the documents; otherwise, the mediation would then be undertaken “merely for appearances” and would increase legal, staff and travel costs, particularly for regional local governments.\textsuperscript{389} The SAT has also perceived a reluctance on the part of local governments to undergo mediation, although it stated that this attitude is changing:

\begin{quote}
*It is something that a lot of people in local governments are not familiar with. Sometimes the local government elected members feel that once they have made a decision, the only way it should be changed is if there is a full and final adversarial hearing in the tribunal. We fundamentally do not share that view, if there is such a view. We believe that mediation is a very worthwhile decision-making process on its own. Mediation has to be seen as a decision-making process; it is not an alternative thing. ... We will not sit around and mediate something impossible. Issues that are capable of discussion and resolution and where aspects of them can be agreed, get agreed. The reality is that local governments and applicants at mediation are agreeing consent outcomes. It is happening. I think that with experience, many local governments are coming to understand how it works. ... It requires extra work and extra thought.*
\end{quote}

\textsuperscript{385} Written answer from the State Administrative Tribunal to proposed question 36 for the hearing on 15 February 2008, p22.

\textsuperscript{386} Written answer from the State Administrative Tribunal to proposed question 36 for the hearing on 15 February 2008, p22.

\textsuperscript{387} See also, the Honourable Justice Michael Barker, President, State Administrative Tribunal, *Transcript of Evidence*, 15 February 2008, p28.

\textsuperscript{388} Submission No 80 from the Western Australian Local Government Association, 3 September 2007, p3.

\textsuperscript{389} Email from Ms Beryl Foster, Policy Manager, Planning and Development, Western Australian Local Government Association, 18 August 2008, Attachment, p1.
However, once the people involved in the process come to better understand what is involved, there will be less discomfort with it. But it really is a facilitative process that is producing real outcomes.\textsuperscript{390}

2.188 In its submission, the WAPC suggested that the confidentiality of the SAT’s mediations may actually constrain the resolution of issues and proposed that the SAT may need to consider the attendance of people, other than the parties, at mediations.\textsuperscript{391} Mr Moshe Gilovitz, Secretary, WAPC, explained that this proposal was aimed at ensuring that parties at a mediation had all of the relevant information before them:

\textit{information from referral agencies and other bodies will frequently be important in framing a planning solution to a dispute about a subdivision or development proposal. In an evolving mediation the information needed cannot always be anticipated before the mediation commences. Referral agencies may need to examine a proposition in detail before advice can be put to a mediation. ... The WAPC would be concerned if the SAT’s confidentiality provisions compromised the information flows necessary for well considered planning decisions.}\textsuperscript{392}

2.189 The Committee acknowledged the WAPC’s concern, given that mediations and compulsory conferences are to be held in private unless otherwise directed by the mediator or the presiding member\textsuperscript{393} and section 55 of the SAT Act provides that no evidence can be given in the substantive hearing of the matter of anything said or done in the course of a mediation or compulsory conference.\textsuperscript{394}

2.190 However, section 55 does authorise the admission of things said or done in a mediation or compulsory conference at a later stage of the proceeding if, amongst other things, all parties agree to the admission of the evidence. Consistent with that policy, parties to a mediation or compulsory conference would, where necessary, be able to agree on the disclosure of details to individuals or organisations not privy to the discussion.

2.191 Alternatively, if more information must be sought from an individual or organisation not privy to the mediation or compulsory conference, the mediator or presiding

\textsuperscript{390} The Honourable Justice Michael Barker, President, State Administrative Tribunal, Transcript of Evidence, 21 September 2007, p39. Refer to paragraphs 2.174 to 2.175 in this Report for a discussion of the success of mediation and compulsory conferences in the Development and Resources stream.

\textsuperscript{391} Submission No 93 from the Western Australian Planning Commission, 5 October 2007, p8.

\textsuperscript{392} Letter from Mr Moshe Gilovitz, Secretary, Western Australian Planning Commission, 14 May 2008, p2.

\textsuperscript{393} Sections 52(4) and 54(6) of the State Administrative Tribunal Act 2004.

\textsuperscript{394} Ibid, section 55; and State Administrative Tribunal, Annual Report 2007, 28 September 2007, p23.
member could direct the attendance of that individual or organisation or the discussion could be adjourned until the information is obtained.

2.192 The SAT’s Practice Note 2 (‘Review Proceedings’) and Practice Note 3 (‘Original Proceedings’) are documents which describe the important aspects of the SAT’s practice and procedure in its review and original jurisdictions, respectively. A copy of Practice Note 2 is attached as Appendix 5 and a copy of Practice Note 3 is attached as Appendix 6 to this Report. The Committee noted that Practice Note 2 and Practice Note 3 advise that a party wishing to bring a person other than their representative to the mediation or compulsory conference must inform the presiding member and the other parties of that wish at the directions hearing at which the matter is referred to mediation or compulsory conference. This indicates that, with the appropriate notice and agreement from parties and the SAT, non-parties may also attend mediations and compulsory conferences.

2.193 A brochure entitled ‘Mediation and Compulsory Conference in the State Administrative Tribunal’ is attached to this Report as Appendix 7. This brochure is sent to all parties in a SAT proceeding who will be undergoing mediation or a compulsory conference. It contemplates the attendance of experts, who may be engaged by the parties, at the mediation or compulsory conference.

### Finding 12: The Committee finds that the State Administrative Tribunal’s mediations and compulsory conferences are effective.

### Suggestions for Improving Effectiveness

2.194 LEADR suggested that the SAT could improve the effectiveness of its mediations by introducing an ‘intake process’, where parties are prepared for mediation:

> in terms of parties’ states of mind and so on, and for the mediator to be able to prepare and analyse the dispute, I think for the SAT to consider an intake process would really be a valuable asset to the whole process.

> ... An intake process occurs when the parties are met separately, usually by the mediator but in some schemes Australia-wide there are

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395 Sections 52(4) and 54(6) of the State Administrative Tribunal Act 2004.


intake specialists, so you might do a phone intake with someone who is representing the mediator but who actually is not [the mediator]. However, let us look at it from the point of view that the mediator meets with each of the parties and their representatives and support people separately and develops some rapport with the parties, answers any questions and finds out about the dispute from the party’s perspective and starts to, by their questioning, shift the party’s mindset from being “I am right and they’re wrong” into “Well, I’m right but, you know, they could be right as well” sort of mindset. Respectfully creating doubt is what it is known as. Just getting basic details and being more familiar with the matter and encouraging parties to get more information if there seems to be gaps and coaching a bit in how will you cope if this happens. What might go wrong in a mediation … .

... It would be nice if the legal profession had reached a point where you could trust legal representatives to explain what mediation is about and do that kind of coaching that Margaret is talking about, but that cannot be relied upon at this stage because there is still quite a number of people in the legal profession who themselves do not properly understand what mediation is about. Therefore, I think the intake process that Margaret is talking about is to be a bit more deliberate about that, to ensure that the parties are understanding the process before they go to it.

2.195 In addition to the intake process, LEADR submitted that the SAT should:

- prepare a document which is distributed to parties prior to a mediation and which explains very clearly what the mediation process is and how it differs from a final hearing on the merits; and

- improve the description of, and increase the accessibility of information about, mediation on its website:

The description of mediation on the SAT website could be fuller. If you know what mediation is, the description is great. If you do not know what mediation is, there is probably not quite enough there … . It was also a bit hard to find. When I did a search for “mediation” on

398 Ms Margaret Halsmith, Chair, LEADR Association of Dispute Resolvers, Transcript of Evidence, 14 May 2008, p7.

399 Mr Graham Castledine, Member of LEADR WA Chapter Committee, LEADR Association of Dispute Resolvers, Transcript of Evidence, 14 May 2008, p7.

the site, it was about the fifteenth or twentieth of the listings that came up which I found; so I persisted, but I am not sure that everyone would persist in looking for what mediation means to the SAT.  

2.196 The President of the SAT informed the Committee that it is already aware of the need to educate parties about, and be prepared for, 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.*

2.197 The brochure which the President referred to is entitled, ‘Mediation and Compulsory Conference in the State Administrative Tribunal’ (see Appendix 7 in this Report). Importantly, the brochure advises parties that mediations and compulsory conferences provide a forum for parties, with the help of the mediator or presiding member, to find their own solutions to their problems:

*At a mediation or compulsory conference the parties themselves are expected to be actively involved in the mediation or conference, with full authority to negotiate and settle issues. If the authority to settle is restricted the restriction and the procedure for obtaining authority should be disclosed at the first opportunity.*

*Parties may attend with their legal representatives or other professional representatives. However, it must be borne in mind at all times that the mediation or conference is intended to be a relatively informal meeting between the parties and not an occasion with [sic] lawyers or other professional representatives to act as advocates or participate in an adversarial courtroom-style contest with each other or the other party.*

2.198 The Committee also noted that the SAT’s *Practice Note 2* (refer to Appendix 5 in this Report) and *Practice Note 3* (refer to Appendix 6 in this Report) each contain a short description of mediation and compulsory conferences and a guide as to whom should, and must, attend these processes. Each document explains what can be expected to happen at directions hearings and final hearings, making it clear that mediation and compulsory conferences are distinct from the former processes.

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Committee Comment

2.199 The Committee was satisfied that the SAT is adequately preparing parties for mediations and compulsory conferences. However, the Committee was of the view that the use of an ‘intake specialist’ to prepare parties for mediations and compulsory conferences would be appropriate and useful.

2.200 With respect to the establishment of an ‘intake process’ for parties who will undergo mediation or compulsory conferences, the Committee observed that SAT mediations are usually, and SAT compulsory conferences are always, conducted by a SAT member who has access to the information already before the SAT. Therefore, the need to gather basic information from the parties may not arise unless an ‘intake specialist’ who is not a SAT member is appointed.

Recommendation 1: The Committee recommends that the State Administrative Tribunal consider utilising an ‘intake specialist’ to prepare parties for mediations and compulsory conferences.

Transparency

2.201 The Health Consumers’ Council WA and the East Perth Redevelopment Authority were concerned about the lack of transparency in proceedings which are resolved in mediation, given the tendency for mediations to be held in private. For example, the Health Consumers’ Council WA’s concern related to disciplinary proceedings against medical practitioners, the more serious of which are referred by the Medical Board to the SAT:

It is our view that mediation undermines the transparency that we seek from the SAT in the handling of high order complaints against doctors. ...

Changes to processes for dealing with complaints against doctors must meet the community’s expectations for greater transparency. This is in the light of the strong historical evidence that closed, peer regulated disciplinary processes are weak and undermine community confidence in the medical profession.

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403 Sections 52(2) and 54(1) and (2) of the State Administrative Tribunal Act 2004.
404 Submission No 38 from the Health Consumers’ Council WA (Inc), 30 August 2007, p1; and Submission No 82 from the East Perth Redevelopment Authority, 4 September 2007, p2.
405 Submission No 38 from the Health Consumers’ Council WA (Inc), 30 August 2007, p1.
2.202 The Health Consumers’ Council WA was also concerned that medical practitioners facing complaints will elect to have the complaints heard by the SAT “so they may benefit from the opportunities for processes closed to the public.”

2.203 In response, the SAT confirmed that, as at 21 September 2007, there were no known examples of mediations having been conducted in public. It maintained that confidentiality is integral to mediation as the parties, in an effort to negotiate a solution between themselves, must feel able to discuss matters freely, and this may involve the release of confidential information. However, the SAT advised the Committee that public accountability in mediated resolutions of vocational matters are achieved in two ways:

Firstly, if a vocational body and a practitioner reach agreement in mediation, the tribunal will not make orders affecting that outcome unless it considers it is an appropriate outcome in the light of the facts. The second and perhaps more significant point is that we usually require the parties to set out for the purposes of the order the material facts upon which the conclusion was based and the order as to what the penalty is, which is published on the website. Therefore, it is public information. Anyone can look at it and see what the practitioner had done and can see the outcome that the tribunal had imposed. That got around the concern we had about mediation in that context.

2.204 Occasionally, the SAT will publish anonymous case details on its website to protect the privacy of individuals, including the complainants, any other interested persons and, very rarely, the person whose conduct is under review. Further discussion on this issue appears at paragraphs 2.226 to 2.227 in this Report.

Monitoring Outcomes

2.205 LEADR submitted that it has received feedback which suggests that SAT mediations are not conducted in a consistent style:

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406 Submission No 38 from the Health Consumers’ Council WA (Inc), 30 August 2007, p1.
407 Written answer from the State Administrative Tribunal to proposed question 50(a) for the hearing on 21 September 2007, p55.
408 The State Administrative Tribunal may make orders necessary to give effect to a settlement provided that the orders sought are within the power of the Tribunal: section 56(2) of the State Administrative Tribunal Act 2004. See also, section 54(8) with regard to settlements reached during a mediation.
409 His Honour Judge John Chaney SC, Deputy President, State Administrative Tribunal, Transcript of Evidence, 21 September 2007, p43.
Yes, [feedback] indicating very different mediation styles and very different understandings of the definition of mediation. ...

2.206 In LEADR’s view, the SAT would have achieved consistency in its style of mediation if:

the parties who are repeat presenters at the SAT can recognise mediation as being the same for each of their visits. They might be in a variety of streams and they might be with a variety of mediators, but the sense that they are actually attending the same sort of process, I think, is important.  

2.207 LEADR has also observed that the SAT’s mediators are sometimes not as neutral as they should be:

Most of my experience is in the development and resources stream of SAT. The mediators do a good job but, based on my experience and anecdotal reports, it seems that the mediators will often come close to expressing a view or in fact express a view, on the merits of the case as a method of, perhaps, progressing the mediation. That would not fall within the—if I can put it this way—pure LEADR style of mediation in which the mediator is entirely neutral and does not express a view. . . . However, if that happens too often, then mediation starts to become just another adversarial process and parties come with their lawyers ready to push their arguments as strongly as they can in an attempt to get the mediator on side. The need for an audit is to look at things like that: are there some streams where the mediation is in fact verging on something different, more like a conciliation approach or early neutral evaluation when the mediator expresses the view in an attempt to persuade a party to settle now or suffer the consequences later? That is not what we would call mediation. ...  

...  

It is inappropriate to make comments which go down that path of suggesting that the merits of the case may be weak or strong.  

410 Ms Margaret Halsmith, Chair, LEADR Association of Dispute Resolvers, Transcript of Evidence, 14 May 2008, p3.  

411 Ibid, p2.  

412 Mr Graham Castledine, Member of LEADR WA Chapter Committee, LEADR Association of Dispute Resolvers, Transcript of Evidence, 14 May 2008, p4.
2.208 For these reasons, LEADR suggested that the “different styles of mediation used across and within SAT streams” should be audited and analysed for their “effectiveness and appropriateness for the issues under review” and that the performance of SAT members as mediators be continually monitored and ‘peer reviewed’. LEADR also recommended that the SAT establish “a process of reviewing mediated outcomes ‘down the track’ to measure the durability of the agreements reached and identify any pitfalls or mistakes for future mediations which concern similar issues.”

2.209 The SAT advised the Committee that it is keeping its own statistics on the methods, consistency, scale and outcomes of its mediations:

> 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.

2.210 In December 2008, the SAT informed the Committee that the above-mentioned paper was prepared by Mr Maurice Spillane, a full-time member of the SAT in the Commercial and Civil and Development and Resources Streams, and delivered by him at the ninth National Mediation Conference in Perth in September 2008. Part of this paper was based on the results of an exit survey, conducted in May, June and July 2008, of parties who had undergone mediation at the SAT. These results, summarised in the SAT’s Annual Report 2008, confirmed that the SAT’s version of mediation is effective.

2.211 Further, the SAT has undertaken the following additional initiatives in an effort to promote consistency in mediation styles:

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413 “[Peer review] ... can be done in an endless variety of ways: you can have individual peer review, you can have group peer review and part of that can be mentoring, debriefing, defusing, training and complaints handling so there are all sorts of ways of going about peer review. Everyone needs to be trained to provide and to receive peer review. ... having done the four-day LEADR training and maybe some training for peer review, there needs to be ongoing training; it is not kind of a one-off, it is more of an ongoing process.”: Ms Margaret Halsmith, Chair, LEADR Association of Dispute Resolvers, Transcript of Evidence, 14 May 2008, p5.

414 Submission No 50 from LEADR Association of Dispute Resolvers, 28 August 2007, p2.

415 Ibid, p3.


• Discussion sessions between SAT members.

• Mediations are sometimes conducted by co-mediators, allowing these members to experience the approach of each mediator involved.

• Members have attended a mediation conducted by another member purely as an observer.419

2.212 When the Committee queried whether these audit and review procedures should be conducted internally or whether they should be carried out by an external consultant, LEADR was of the view that:

the procedures need to be undertaken internally and externally. Internally because, I think, you get a different angle on things when you know the ins and outs and the finer details; and externally for all the reasons that most things should be done externally—for transparency, to avoid conflicts of interest, for accountability, and so on.420

2.213 While LEADR does not offer these consulting services, it did suggest that the SAT should consider having all of its mediators nationally accredited as a means of monitoring mediation standards:

national mediation accreditation requirements ... have a threshold entry and then the requirement for ongoing CPD [continuing professional development]. That scheme commenced on 1 January this year and it is in a two-year period of refining what is practical, what works, what the profession needs and what the clients of the profession need. ... For example, one of the concepts in there is the RMAB—recognised mediation accreditation body. LEADR is one of four RMABs in Australia so far, but there are lots of other groups looking at becoming a RMAB. The SAT itself might be interested to do that or it might be interested to connect with a RMAB, such as LEADR and LEADR then helps the SAT to monitor the standards in terms of the national mediation accreditation.421

419 Written answer from the State Administrative Tribunal to proposed question 13 for the hearing on 15 February 2008, pp9-10.

420 Ms Margaret Halsmith, Chair, LEADR Association of Dispute Resolvers, Transcript of Evidence, 14 May 2008, pp2-3.

Committee Comment

2.214 The Committee considered that LEADR’s suggestions have merit and that audits of the SAT’s mediation and compulsory conference outcomes should be done internally and externally. The Committee was also of the view that the SAT should give consideration to having all of its mediators nationally accredited and/or to becoming a recognised mediation accreditation body.

Recommendation 2: The Committee recommends that the State Administrative Tribunal consider having all of its mediators nationally accredited and/or becoming a recognised mediation accreditation body.

THE SAT’S HANDLING OF EXPERT EVIDENCE

2.215 The SAT manages expert evidence in a distinctive way, as explained by the President:

*We require experts to meet, to prepare a [joint] report for the tribunal, to set out in that report what they agree on and what they do not agree on. When they go to a hearing they sit together in a witness box and they answer questions from the presiding member of the tribunal. They can each ask each other questions and at the end the parties, or their representatives, get to ask questions as well. We base this system on pioneering work of the Land and Environment Court in New South Wales. That work has been carried over into the Supreme Court of New South Wales and is being used also in the Commonwealth Administrative Appeals Tribunal. We find it is one of the singly most important practices we have introduced into the tribunal. It is a practice whereby tribunal members can best understand what the expert evidence is. It is a practice by which you get the experts to focus on what is really important. They are there at the same time talking about the same things. We find it also means that the evidence is given in a much shorter time period. We reckon that what might have taken three days is usually done in one day. We have had some very sophisticated subject areas for expert evidence in which we have used this technique. It also enables the expert witnesses to be truly expert. ... the general feedback we get is that expert witnesses like it. It is a way of recognising their expertise. It has been one of the important introductions into the tribunal.*

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2.216 While it may not be unusual for experts to be directed by a court or tribunal to exchange their reports, and to then confer between them to identify, resolve or narrow any points of difference in their opinions, it is unusual for experts to be ordered to produce a joint report and give evidence concurrently. At the final hearing, parties are not permitted to adduce any evidence that is inconsistent with any agreement in the joint report unless the SAT gives leave to do so.

2.217 Landgate and Hardy Bowen, Lawyers, praised the SAT’s procedures for expert evidence:

- “the Valuer General acknowledges the benefits of Joint Witness Statements and the practice of the parties’ expert witnesses being examined together (‘hot tubbing’) during hearings.”

- “[a pleasing feature of the SAT’s operations include] ... the compulsory conferral of expert witnesses and the production of joint expert reports, which can save days of hearing time ...”

2.218 However, Hardy Bowen, Lawyers, also observed that on occasion, people who purport to:

- bring their independent, expert opinion on a matter to the SAT; and

- be an advocate for a party to the proceeding,

have blurred the distinction between their two roles. This is despite the SAT’s introduction of a requirement for experts to give an undertaking in relation to independence. The President of the SAT confirmed that this blurring of roles is an issue for the SAT but noted that its procedures for expert evidence minimise the likelihood of it occurring:

One of the problems historically with expert witnesses in courts and tribunals is that they become advocates of parties. The decision makers’ problem is that they do not know what is advocacy and what is an expert opinion honestly given. When we adopt this practice [conferral between experts, the preparation of joint expert reports and

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423 See, for example: Order 29, rule 2(1)(s); Order 29A, rule 3(2)(m); and Order 31A, rule 10(4) of the Rules of the Supreme Court 1971; and rule 24(2)(f) of the District Court Rules 2005.

424 State Administrative Tribunal, A guide for experts giving evidence in the State Administrative Tribunal.

425 Submission No 61 from Landgate, 30 August 2007, p2.

426 Submission No 98 from Hardy Bowen, Lawyers, 6 November 2007, p2.

427 Ibid.
concurrent expert evidence] the experts know that they are giving their evidence and they are really being peer assessed ... 428

2.219 Further, a brochure entitled, ‘A guide for experts giving evidence in the State Administrative Tribunal’ clearly explains the role of an expert giving evidence in the SAT and emphasises the importance of giving independent evidence. Parties who will undergo mediation, a compulsory conference or a final hearing will usually be ordered by the SAT to give the brochure to any experts whom they have engaged. The Committee noted the following excerpts of the brochure:

It is fundamental that experts giving evidence in the Tribunal appreciate and acknowledge that:

- An expert witness has an overriding duty to assist the Tribunal impartially on matters relevant to the expert’s area of expertise.

- An expert witness's paramount duty is to the Tribunal and not to the party engaging the expert.

- An expert witness is not an advocate for a party.

It is recognised that an expert may have been engaged by a party before the proceedings were commenced or may have been engaged by a party in another capacity, for example as an advocate, in addition to being engaged to give expert evidence. Nevertheless, when the expert is giving evidence in the Tribunal, he or she must appreciate and acknowledge the obligations set out above.

... 

An expert must exercise his or her independent professional judgment in relation to the conference and joint statement and must not act on any instruction or request to withhold or avoid agreement.429

2.220 In its Annual Report 2008, the SAT reported that its expert evidence procedures continue to work very successfully and are well-received by expert witnesses.430

428 The Honourable Justice Michael Barker, President, State Administrative Tribunal, Transcript of Evidence, 21 September 2007, p10.

429 State Administrative Tribunal, A guide for experts giving evidence in the State Administrative Tribunal.

Finding 13: The Committee finds that the State Administrative Tribunal’s procedures for handling expert evidence are satisfactory.

THE SAT’S PRIVATE HEARINGS

2.221 Section 61 of the SAT Act requires the SAT’s hearings to be held in public unless another provision of the SAT Act provides otherwise. The Committee was advised that the SAT very rarely conducts hearings in private.\(^{431}\) However, the SAT may, decide that all or part of a hearing is conducted in private and that only certain persons may be present.\(^{432}\) Such an order can only be made by a legally qualified member or, where the SAT is not constituted by, or does not include, a legally qualified member, the presiding member.\(^{433}\)

2.222 Section 61(4) of the SAT Act governs the circumstances where evidence can be taken in private, and provides as follows:

(a) to avoid endangering the national or international security of Western Australia or Australia;
(b) to avoid damaging inter-governmental relations;
(c) to avoid prejudicing the administration of justice;
(d) to avoid endangering the physical or mental health or safety of any person;
(e) to avoid offending public decency or morality;
(f) to avoid endangering property;
(g) to avoid the publication of confidential information or information the publication of which would be contrary to the public interest; or
(h) for any other reason in the interests of justice.

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\(^{431}\) The Honourable Justice Michael Barker, President, and His Honour Judge John Chaney SC, Deputy President, State Administrative Tribunal, Transcript of Evidence, 15 February 2008, p10 and 11, respectively.

\(^{432}\) Section 61(2) of the State Administrative Tribunal Act 2004.

\(^{433}\) Ibid, section 61(3).
2.223 When the SAT considers an application for a hearing, or part of a hearing, to be held in private, the Committee was advised that the views of the parties to the proceeding are always considered before an order is made. For example, if the application for a private hearing is made in writing, the legally qualified member or presiding member will seek the views of all other parties by either listing an additional hearing just to deal with the application or ask for written submissions. Where the application is made orally at a hearing, the other parties will be asked for their views contemporaneously. The legally qualified member or the presiding member will then deliver oral or written reasons for his or her decision.

2.224 Alternatively, the SAT may conduct a hearing in public but order the non-publication of people’s names in an effort to strike the right balance between public and private interests. For example, this practice has been used in vocational matters and GA Act and mental health matters, where the SAT is statutorily obliged to maintain confidentiality.

Vocational Proceedings

2.225 As discussed at paragraphs 2.201 to 2.202 of this Report, the Health Consumers’ Council WA expressed a concern about disciplinary proceedings against medical practitioners being held in private.

2.226 In response, the SAT advised that, as at 21 September 2007, no proceedings in vocational regulation had ever been held in private. While the preference is to hold public hearings and “primarily subscribe to openness”, there have been instances where the names of complainants and other interested persons have not been published for various reasons. However, a party’s name, that is, either the practitioner or the vocation’s regulatory body, is very rarely suppressed. For example, in Medical Board of Western Australia and Smith [2006] WASAT 213, the

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434 Either the parties or the State Administrative Tribunal may raise this issue at any stage of the proceedings: section 61(2) of the State Administrative Tribunal Act 2004; and written answer from the State Administrative Tribunal to proposed question 7(a) for the hearing on 15 February 2008, p5.

435 Written answer from the State Administrative Tribunal to proposed question 7(a) for the hearing on 15 February 2008, pp5-6.


437 The Honourable Justice Michael Barker, President, State Administrative Tribunal, Transcript of Evidence, 21 September 2007, p42.

438 Ibid, p43.

439 Written answer from the State Administrative Tribunal to proposed question 50(c) for the hearing on 21 September 2007, p55.

440 The Honourable Justice Michael Barker, President, State Administrative Tribunal, Transcript of Evidence, 21 September 2007, p43.
SAT removed all of the names, except for that of the medical practitioner, in order to preserve people’s privacy.441

2.227 The SAT provided the following examples of vocational regulation matters where the practitioner’s name was not published in the reasons for decision:

For example, a medical practitioner was suffering mental illness and the Medical Board agreed with all the psychiatrist evidence that the practitioner could practise medicine if a certain regime was put in place. The board believed that the practitioner would make a recovery and be a fine, upstanding and productive member of the community. Each of us, in the appropriate cases, thought that it would be counterproductive to publish the doctor’s name in those circumstances. It would have been a matter of public notoriety rather than public interest.

...

The question of suppression of medical practitioners’ names during ongoing proceedings excites a bit of debate. I recently did it again when evidence before the tribunal suggested on psychiatric advice that if the name of a practitioner were published, it might cause him to self-harm. That was the reason for making that decision at that point. It is a very difficult matter but generally speaking I think the balance is right.442

Exclusion of Parties or Witnesses

2.228 Three submitters contended that there was a lack of procedural fairness when they and/or other seemingly interested parties were excluded from hearings for GA Act applications.443 The SAT advised that hearings for these types of applications are usually held in public and that people are excluded only in unusual circumstances where a private hearing is justified under Schedule 1, Part B, clause 11(2) of the GA Act,444 which provides as follows:

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441  Written answer from the State Administrative Tribunal to proposed question 50(c) for the hearing on 21 September 2007, p55.
442  The Honourable Justice Michael Barker, President, State Administrative Tribunal, Transcript of Evidence, 21 September 2007, pp42-43.
443  Submission No 55 from Private Submitter, 30 August 2007; Submission No 69 from Ms Sally Eves, 31 August 2007, p1; and Submission No 71 from Private Submitter, 31 August 2007, p1.
444  Written answer from the State Administrative Tribunal to proposed question 35(b) for the hearing on 15 February 2008, p21.
Where, in a particular case, the State Administrative Tribunal determines that it would be in the best interests of the person to whom proceedings commenced under this Act relate for the hearing or part of the hearing to be closed to the public, the Tribunal may, subject to subclause (3), direct that a person shall not be present at the hearing unless —

(a) in the opinion of the Tribunal, he is directly interested in the proceedings; or

(b) he has been authorised by the Tribunal to be present.

2.229 The above clause reflects the principle that the SAT’s main concern in GA Act applications is the best interests of the person whom the application concerns. The relevant factors considered by the SAT when determining whether to exclude a person from a GA Act hearing include:

- the nature of the person’s relationship with the person in respect of whom the application was made;
- whether the person has a proper interest in the proceedings;
- whether the person’s presence poses any risk to the security of others attending the hearing;
- whether the person can provide information relevant to the proceedings;
- whether that information could be provided by that person in writing; and
- whether the person’s attendance would cause any distress to the person in respect of whom the application was made.

Finding 14: The Committee finds that the State Administrative Tribunal’s approach in determining whether a hearing should be public or private is satisfactory.

THE SAT AS A ‘NO COST’ JURISDICTION

2.230 A costs order is defined as:

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445 See also, section 4(2)(a) of the Guardianship and Administration Act 1990.

446 Written answer from the State Administrative Tribunal to proposed question 35(c) for the hearing on 15 February 2008, p22.
A court or tribunal order to pay the costs of and incidental to proceedings generally made against the unsuccessful party in favour of the successful party.447

2.231 Costs are said to ‘follow the event’ because it is normally the successful party who should have the benefit of a costs order unless special circumstances exist.448

Costs of Parties

2.232 For the purposes of this discussion, the word ‘costs’ is taken to be restricted to the costs of parties involved in SAT proceedings, which would include, for example, SAT fees, legal fees, expert witness fees and incidental costs, unless otherwise indicated. The general position is that parties to SAT proceedings are to bear their own costs. This is prescribed in section 87(1) of the SAT Act. However, this general position may not apply where:

- the SAT Act, and any subsidiary legislation made under it, provides otherwise;
- an enabling Act, and any subsidiary legislation made under it, provides otherwise; or
- the SAT makes an order for a party to pay all or part of another party’s costs pursuant to section 87(2) of the SAT Act.449

2.233 That is, section 87(2) provides the SAT with the general discretion to award costs against a party for the benefit of another. In deciding whether to order a party to pay all or part of another party’s costs, the SAT Act stipulates that the SAT must:

- consider, where a matter falls within the SAT’s review jurisdiction, whether the applicant genuinely attempted to enable and assist the making of the original decision on its merits or whether the original decision-maker genuinely attempted to make a decision on its merits;450 and
- take into account, where a matter falls within the SAT’s original jurisdiction and where a settlement offer has been made, the fact that a party had rejected

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448  Ibid.
449  Section 87(1) of the State Administrative Tribunal Act 2004.
450  Ibid, section 87(4).
an offer that was more favourable to that party than the SAT’s decision in the matter.451

2.234 Other factors which the SAT may consider when exercising its discretion to award costs include:

- whether a party has acted in a way that has resulted in unnecessary costs,452 for example, costs are more likely to be awarded against a party where that party has behaved unreasonably or vexatiously or where a party has “pursued a hopeless case after the deficiencies of the case have been pointed out or should otherwise have been appreciated by the party”;453 and

- whether an award of costs in favour of a party will serve the public interest; for example, costs are likely to be awarded to a vocational regulatory body in successful vocational disciplinary proceedings;454

2.235 Where the SAT does make a costs order, it will generally be made against the unsuccessful party.

2.236 The WAPC and the Department for Communities supported the SAT’s general position on awarding costs.455 For example, the Department for Communities considered that the SAT’s “default position that each party bears its own costs encourages [child care] licensees to apply to review the Department’s decisions.” It also noted the fact that, despite this general position:

the Tribunal has discretion to grant costs where proceedings are frivolous or vexatious [and this] encourages licensees to first consider whether their review might have some merit.456

2.237 Other submitters were concerned about various aspects of the SAT’s approach to awarding costs.457 For example, the Shire of Victoria Plains, the Hairdressers

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451 Section 87(5) of the State Administrative Tribunal Act 2004 and rule 42 of the State Administrative Tribunal Rules 2004.

452 Written Presentation from the Honourable Justice Michael Barker, President, State Administrative Tribunal, 21 September 2007, p1. See, for example, Chew and Director General of the Department of Education and Training [2006] WASAT 248 at paragraph 85, which is quoted at paragraph 2.242 of this Report.

453 Written answer from the State Administrative Tribunal to proposed question 43 for the hearing on 21 September 2007, pp50-51.

454 Written Presentation from the Honourable Justice Michael Barker, President, State Administrative Tribunal, 21 September 2007, p1.

455 Submission No 93 from the Western Australian Planning Commission, 5 October 2007, p10; and Submission No 97 from the Department for Communities, 31 August 2007, p2.

456 Submission No 97 from the Department for Communities, 31 August 2007, p2.
Registration Board and Mr Arthur Blaquiere were of the opinion that a party’s ability to obtain a costs order in the SAT should be made more certain so as to, on the one hand, discourage vexatious and/or frivolous applications and, on the other hand, encourage the mounting of vocational regulation proceedings:

- The Shire of Victoria Plains suggested that “The ability to claim costs against an appellant as in the court system must also be made easier to discourage frivolous or vexatious reviews that have little chance of success and seem to be seeking a sympathetic hearing and delay in proceedings.”

- The Hairdressers Registration Board argued that it has limited resources and that disciplinary actions are a financial burden on the board. It therefore suggested that the relevant legislation be amended so as to clearly authorise the board’s recovery of its costs in disciplinary proceedings “so that there is no disincentive to bringing proceedings.”

- Mr Blaquiere was concerned about the “ease and low cost avenue for frivolous claim to be lodged and not filtered.” He contended that “The SAT system does not provide a means of claiming costs from Applicants who make vexatious [sic] frivolous claims” and submitted that, in his experience, the applicant caused “major disruption, stress, cost and unnecessary emotional strain”. Mr Blaquiere suggested that the “ability to claim costs and costs to be awarded may deter some of these time wasting claims.”

2.238 With respect to frivolous and/or vexatious applications, section 47 of the SAT Act empowers the SAT to dismiss applications which are vexatious, lacking in substance or misconceived. The Committee was advised that, while the SAT does exercise this power from time to time:

> It is not always easy to determine whether that course is appropriate, and it is not a course taken lightly to deprive someone of their right to have their grievance heard and determined. As a result some cases do go all the way to hearing before it can be confidently said that they were without merit in the first place. Because the Tribunal has relatively little information before it at the first directions hearing, it is difficult to make a determination that a claim is vexatious or

457 Submission No 32 from the Shire of Victoria Plains, 24 August 2007, pp1 and 2; Submission No 37 from the Hairdressers Registration Board of Western Australia, 30 August 2007, pp3 and 4; Submissions No 65 from The Pharmaceutical Council of Western Australia, 31 August 2007, p1; and Submission No 79 from Mr Arthur Blaquiere, 30 August 2007, p1.

458 Submission No 32 from the Shire of Victoria Plains, 24 August 2007, p2.

459 Submission No 37 from the Hairdressers Registration Board of Western Australia, 30 August 2007, pp3 and 4.

460 Submission No 79 from Mr Arthur Blaquiere, 30 August 2007, p1.
hopeless at that stage. In some cases it is obvious that the Tribunal lacks jurisdiction or that the case is somehow doomed to failure and it is not uncommon for cases to be withdrawn when that is explained at the initial directions hearing, or even for them to be dismissed at that stage.\footnote{Written answer from the State Administrative Tribunal to proposed question 43 for the hearing on 21 September 2007, p50.}

2.239 As a result, it is very unusual for the SAT to award costs against a party. However, costs have been awarded against unsuccessful parties in cases of, for example, unreasonable conduct\footnote{Written answer from the State Administrative Tribunal to proposed question 45(a) for the hearing on 15 February 2008, p27.}.\footnote{Summerville and Department of Education and Training [2006] WASAT 368.}

2.240 The SAT also noted that Mr Blaquiere’s case was affected by section 81(7) of the \textit{Strata Titles Act 1985}, which prohibits the SAT from making any order for the payment of costs except in relation to two particular types of applications identified in that section. Refer to paragraphs 2.411 to 2.412 in this Report for a discussion of this issue.

2.241 With respect to vocational proceedings, it was noted earlier in this Report (at paragraph 2.234) that vocational proceedings represent an exception to the general philosophy of the SAT being a ‘no-cost jurisdiction’:

\begin{quote}
If a vocational body succeeds, it gets its costs. We have taken that view in the public interest, because it would be a disincentive to vocational bodies to bring those proceedings forward if they are going to pay costs if they lose. There are few other circumstances in which in our discretion we decide that costs ought to be paid.\footnote{The Honourable Justice Michael Barker, President, State Administrative Tribunal, \textit{Transcript of Evidence}, 21 September 2007, p38.}
\end{quote}

2.242 In contrast, Mr Clement Allsworth and Mr Peter Boam were concerned that the removal of the provision against the use of the solicitors and barristers in resolving retirement village disputes\footnote{Section 47 of the \textit{Retirement Villages Act 1992} was repealed by section 1032 of the State Administrative Tribunal (Conferral of Jurisdiction) Amendment and Repeal Act 2004.} means that there is an increased risk of costs being awarded against retirement village residents involved in SAT proceedings. Mr Allsworth and Mr Boam submitted that this perceived increased risk of costs being awarded against retirement village residents will deter them from making complaints.\footnote{Submission No 8 from Mr Clement James Allsworth, 8 August 2007, pp2 and 5; and Submission No 17A from Mr Peter Stamford Boam, 27 September 2007, pp1 and 4.} The SAT’s response was that a mere relaxation of the restriction on the
rights of parties to be legally represented does not necessarily correspond with an increased risk of costs being awarded against an unsuccessful retirement village resident:

Under the pre-SAT regime, it was still possible for parties to a retirement village dispute to retain legal representatives in a number of circumstances. While such parties are now entitled to legal representation as of right, it does not correspond to an increased risk of costs being awarded against unsuccessful retirement village residents.

First, ... the Tribunal's procedures are designed to ensure that self-represented parties are not at a disadvantage to legally-represented parties. The fact of legal representation should not increase a party's chances of success, as the Tribunal considers the merits of the decision under review.

Secondly, the Tribunal is fundamentally a no-cost jurisdiction: SAT Act s 87(1). An unsuccessful retirement village resident is therefore not liable for the costs of the successful party. The Tribunal will only award costs against an unsuccessful party where "a party has conducted itself in such a way as to unnecessarily prolong the hearing; has acted unreasonably or inappropriately in its conduct of the proceedings, has been capricious; or the proceedings in some other way constitute an abuse of process. The Tribunal might also make an order as to costs where a matter has been brought vexatiously or for improper purposes": Chew and Director General of the Department of Education and Training [2006] WASAT 248 at [85]. Therefore, retirement village residents who conduct their proceedings in good faith are extremely unlikely to be at the mercy of an unfavourable award of costs.467

2.243 The Committee also noted that rule 59(3) of the SAT Rules provides that a party to a SAT proceeding under the Retirement Villages Act 1992 is not entitled to be represented by a legal practitioner unless:

(a) all the parties agree and any party who is not so represented will not be unfairly disadvantaged;

(b) one of the parties is a legally qualified person;
(c) one of the parties is a body corporate and any other party elects to be so represented;

(d) one of the parties is unable to appear personally or conduct the proceedings properly himself or herself; or

(e) the proceedings are instituted or defended, or the conduct thereof has been assumed, by the Commissioner [for Consumer Protection].

2.244 However, rule 59(3) does not apply to retirement village proceedings which involve $7,500 or less ($10,000 or less, on and from 1 January 2009).\(^{468}\) In these cases, the applicant can essentially control whether the parties can be represented by legal practitioners by either making or declining to make a ‘no legal representation election’ at or before an initial directions hearing.\(^{469}\)

**Committee Comment**

2.245 The Committee noted that there appears to be a minor drafting error in rule 59 of the SAT Rules. Rule 59(1) defines ‘the RV Act’ as the Retirement Villages Act 1992 so as to distinguish that term from ‘the Act’, which is a reference to the SAT Act.\(^{470}\) However, rules 59(2) and (3) do not use the term ‘the RV Act’ when they are apparently referring to the Retirement Villages Act 1992. The Committee acknowledged that the meaning of the provisions in this respect is quite clear, given that rule 59 is entitled “Retirement Villages Act 1992” and appears in Part 3 of the SAT Rules, which provides special rules for various enabling Acts. This conclusion is based on a purposive approach to the interpretation of the provisions.\(^{471}\) Nevertheless, the Committee was of the view that rule 59 ought to be amended to make the references to the Retirement Villages Act 1992 clear.

**Recommendation 3:** The Committee recommends that rule 59 of the State Administrative Tribunal Rules 2004 be amended to make the references to the Retirement Villages Act 1992 clear.

\(^{468}\) Rule 59(4) of the State Administrative Tribunal Rules 2004.

\(^{469}\) Section 93(2)(a) of the State Administrative Tribunal Act 2004.

\(^{470}\) Rule 3 of the State Administrative Tribunal Rules 2004.

\(^{471}\) The purposive approach to the interpretation of legislation is reflected in section 18 of the Interpretation Act 1984: “In the interpretation of a provision of a written law, a construction that would promote the purpose or object underlying the written law (whether that purpose or object is expressly stated in the written law or not) shall be preferred to a construction that would not promote that purpose or object.”
2.246 The Pharmaceutical Council submitted that the SAT should adopt a general policy that costs be awarded on a full indemnity basis.\textsuperscript{472} The council maintained that it has consistently raised concerns about the shortfalls in the recovery of its costs in SAT proceedings. As at 31 August 2007, two disciplinary matters involving pharmacists had been resolved to the council’s satisfaction at mediation. In each case, the SAT ordered that the council’s costs be agreed between the parties, and in the absence of agreement, for the costs to be set by the SAT. The council’s costs were agreed and paid but fell short of full recovery.\textsuperscript{473} This shortfall was a concern to the council because:

- “any shortfall in recovery of its costs (where an adverse finding is made against a pharmacist) must be funded by other practitioners because they are the only source of funds for the Council. This would be clearly unfair on law abiding practitioners”; and
- “Shortfalls in cost recovery could also represent a significant funding problem for authorities such as the Council and may result in a reduction in the protection the public expects from registering authorities.”\textsuperscript{474}

2.247 The VSB informed the Committee that it has had a similar experience with regard to the recovery of its costs:

\begin{quote}
my impression is that the SAT is reluctant to let the board recover full costs, and in most cases it is only 20 per cent or 30 per cent if we get them at all. There are occasions when the board, as part of our conciliation, agrees not to pursue costs in order to avoid going to a full hearing. It is cheaper to waive costs than it is to fight the hearing, but certainly the bulk of the costs are being worn by the board.\textsuperscript{475}
\end{quote}

\begin{quote}
... Could I just indicate that there has been no matter where the SAT has actually made an order for costs as a result of anything other than an agreed award. The agreed awards are generally much lower than the amount of costs that have been expended, because there are various practical reasons why we would agree lower costs across the board than a full indemnity for the costs that have been incurred.\textsuperscript{476}
\end{quote}

\textsuperscript{472} Submissions No 65 from The Pharmaceutical Council of Western Australia, 31 August 2007, p1.

\textsuperscript{473} Ibid.

\textsuperscript{474} Ibid.

\textsuperscript{475} Dr Peter Punch, Chairman, Veterinary Surgeons’ Board of Western Australia, Transcript of Evidence, 7 May 2008, p8.

\textsuperscript{476} Mr Geoffrey Abbott, Barrister, Transcript of Evidence, 7 May 2008, p8.
2.248 The President of the SAT confirmed that the above ‘agreed awards’ approach is preferred by the SAT when ordering costs against a practitioner:

*If vocational bodies proceed against somebody, they come to us and say that they are claiming X dollars in costs. It has reached a situation at which the experienced boards ... now know that they fairly calculate their costs. They take into account their legal representatives and other things incurred and they produce a piece of paper to the other side. I say to them, particularly if they are represented, that I will not sit there and calculate the costs. I ask them to tell me what they have agreed. That is the figure and it is done. It happens in medicine and all the other areas. It works out appropriately.*

Finding 15: The Committee finds that the State Administrative Tribunal’s approach to awarding costs is satisfactory.

THE SAT’S ABILITY TO ENFORCE ORDERS

Final Orders

2.249 Mr Eric Bew was concerned that the SAT is limited in its power to ensure that parties comply with its final orders and with mediated or conciliated agreements. Mr Bew was of the view that the SAT should be empowered to make supplementary orders aimed at ensuring compliance. The Hairdressers Registration Board and the DSC held a similar concern.

2.250 The SAT confirmed that it does not have the power to ensure compliance with its final orders and that this was a deliberate decision based on the fact that the SAT is not a court. The President of the SAT went so far as to state that he did not want the SAT to have these enforcement powers. However, final orders and mediated or conciliated agreements, when they are reflected in SAT orders, can be enforced in two ways:

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478 Submission No 34 from Mr Eric Bew, 28 August 2007, p3.

479 Submission No 37 from the Hairdressers Registration Board of Western Australia, 30 August 2007, p3; and Submission No 43 from the Disability Services Commission, 29 August 2007, p3.

480 Written answer from the State Administrative Tribunal to proposed question 45(a) for the hearing on 21 September 2007, p52.
• Criminal prosecution. Section 95 of the SAT Act provides that it is an offence for a person to fail to comply with a decision of the SAT and the maximum penalty which may be imposed is $10,000. This section only applies if the SAT has made an order declaring it to apply and to the extent that the decision is not a monetary order. Section 95 can also apply to interim decisions of the SAT. As criminal prosecutions can only be commenced by certain authorised persons, such as police officers in the case of this offence, the person seeking to enforce the SAT decision would be required to notify one of these authorised persons of the non-compliance. While the threat of criminal prosecution under section 95 of the SAT Act may operate to deter failure to comply with a SAT decision, and a successful prosecution will punish the person in default, this threatened or actual punishment of the person in default will not necessarily result in the default being remedied.

• Civil enforcement. Under section 85 of the SAT Act, a person seeking to enforce a monetary order may file certain prescribed documents in a court of competent jurisdiction, and on filing, the monetary order is taken to be an order of that court, and may be enforced accordingly. Under section 86, a person seeking to enforce a non-monetary order would have to undergo a similar process, but that process would occur in the Supreme Court. In both situations, the courts are prohibited from imposing a charge for the filing of the required documents.

2.251 In addition to these two methods of enforcing final orders, where the SAT makes a decision in its review jurisdiction, the person seeking to enforce the order will also be

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481 The Honourable Justice Michael Barker, President, State Administrative Tribunal, Transcript of Evidence, 21 September 2007, p41.

482 Unless the contrary intention appears, this includes an order, direction or determination of the State Administrative Tribunal: ‘definition of ‘decision’ in section 3(1) of the State Administrative Tribunal Act 2004.

483 Section 95(3) of the State Administrative Tribunal Act 2004.

484 Ibid, section 95(2). Unless the contrary intention appears, a ‘monetary order’ means an order of the State Administrative Tribunal requiring the payment of money, includes “(a) an order for the payment of a fine or other pecuniary penalty; and (b) an order under Part 4 Division 5 [for costs]”: definition of ‘monetary order’ in ibid, section 3(1).

485 Section 20 of the Criminal Procedure Act 2004; and see State Administrative Tribunal, Complying with Orders made by the State Administrative Tribunal, p2.

486 This will depend upon the amount that is payable under the monetary order. If the amount is $50,000 (or $75,000 as of 1 January 2009) or less, the Magistrates Court would be the appropriate court. If the amount is more than $50,000 (or $75,000 as of 1 January 2009) and not more than $500,000 (or $750,000 as of 1 January 2009), the District Court would be the appropriate court: State Administrative Tribunal, Complying with Orders made by the State Administrative Tribunal, p2.

487 Sections 85(2) and 86(3) of the State Administrative Tribunal Act 2004.
required to consult the enabling Act for any procedures to be followed when enforcing the SAT decision.\textsuperscript{488}

2.252 The Committee noted that, generally, the responsibility for ensuring that an order of the SAT is complied with rests with the party having the benefit of the order.\textsuperscript{489} The SAT has prepared a brochure entitled, ‘Complying with Orders made by the State Administrative Tribunal’, which provides parties with guidelines on how the SAT’s orders may be enforced. The brochure may be obtained in either hard copy, from the SAT’s premises, or electronically, from the SAT’s website, and is attached to this Report as \textbf{Appendix 8}.

2.253 Despite the above enforcement provisions in the SAT Act, the DSC alleged that there have been instances in guardianship and/or administration matters before the SAT where people have failed to comply with the orders that were made. It suggested that there is a need for “\textit{enforcement provisions in the legislation to ensure that decisions taken by the Tribunal are enforceable and that the decisions and action is reviewed.}”\textsuperscript{490}

2.254 The Committee also noted Part 7 of the GA Act, which deals with the SAT’s review of its guardianship and/or administration orders. Under Part 7, the SAT is required to review its orders periodically, and at least once every 5 years.\textsuperscript{491} In addition to the periodic reviews of its guardianship and/or administration orders, the SAT is also required to conduct reviews:

- in certain prescribed situations, including, for example, when the guardian or administrator dies;\textsuperscript{492} and

- at any time, at the request of the OPA, the Public Trustee, the represented person, the guardian, the administrator or any other person who is given leave to apply for a review.\textsuperscript{493}

2.255 The Committee noted that the DSC has made use of the review requirements under the GA Act, but has not always been satisfied with the result:

\textit{The legislation that the commission operates under does not give us the powers to compel anyone to do anything, quite frankly, so we cannot be part of the enforcement of a particular order by SAT, or}

\begin{footnotesize}
\begin{itemize}
\item[488] State Administrative Tribunal, \textit{Complying with Orders made by the State Administrative Tribunal}, p3.
\item[489] \textit{Ibid}, p1.
\item[490] Submission No 43 from the Disability Services Commission, 29 August 2007, p3.
\item[491] Section 84 of the \textit{Guardianship and Administration Act 1990}.
\item[492] \textit{Ibid}, section 85.
\item[493] \textit{Ibid}, section 86.
\end{itemize}
\end{footnotesize}
any other jurisdiction for that matter. Our role is around the provision of support and services and so on. I guess we see our role as this: when we become aware of situations, we bring them to the relevant authority. In one of the examples here, we did that on multiple occasions, but our view was that there was no change, even though we continued to bring that back to the tribunal itself [over ten hearings]. In other situations in which we have done that, the outcome has been different; that change has been made. However, again, in a number of complex situations, we have found that things can continue to roll on without being attended to.

2.256 The DSC suggested that the level of compliance with the SAT’s guardianship and/or administration orders could be improved if:

- the reviews of orders, including whether the people bound by the orders were observing them, are conducted sooner and more regularly after the orders are handed down; and

- fines are imposed for non-compliance.

2.257 In response to the above example to which the DSC alluded, the SAT confirmed that ten hearings were held in the 12 months after the making of guardianship orders: five involved the making of substantive directions, and in the remaining five, only programming orders were made. However, the SAT did not agree with the DSC’s observations and advised that the series of hearings resulted in the represented person receiving regular respite care, among other changes. The SAT informed the Committee that the matter was “extremely complex, rare and handled with considerable oversight by the President himself for much of the time.” It was argued that the matter required case management over the series of hearings due to the difficult and sensitive nature of the issues and personalities involved. The SAT was also satisfied that the current provisions allow it to convene hearings flexibly, and at short notice if necessary, so that its orders can be monitored and reviewed.

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494 Dr Ronald Chalmers, Director General, Disability Services Commission, Transcript of Evidence, 14 May 2008, p7; and Disability Services Commission, Disability Services Commission Response, 13 May 2008, pp10 and 11.

495 Dr Ronald Chalmers, Director General, Disability Services Commission, Transcript of Evidence, 14 May 2008, p8.


497 Letter from the Honourable Justice Michael Barker, President, State Administrative Tribunal, 22 December 2008, Enclosure 1, p2.

Programming/Interim Orders

2.258 Landgate suggested that the SAT should be stricter on parties in breach of programming orders for the lodging of submissions in order to improve the review process of valuation matters under the *Valuation of Land Act 1978*. It submitted that defaults in lodging submissions can result in hearings and other proceedings being adjourned, therefore prolonging matters and increasing costs. Landgate recommended that presiding members at directions hearings should warn parties of the possible consequences of failing to attend, or failing to prepare fully, for proceedings.\(^{499}\)

2.259 In response, the SAT advised that it is not common for parties to be in breach of its programming orders, and when it does occur, the parties are usually self-represented and unfamiliar with formal processes.\(^{500}\) However, upon application by the party seeking to enforce an interim order, the SAT can, amongst other things:

- where the defaulting party is the applicant, consider dismissing or striking out the proceeding under section 48 of the SAT Act;
- where the defaulting party is not the applicant, consider determining the proceeding in favour of the applicant or ordering the defaulting party to be struck out of the proceeding under section 48 of the SAT Act;
- make a costs order against the defaulting party pursuant to section 87(2) of the SAT Act;
- initiate proceedings for contempt against the defaulting party under section 100 of the SAT Act; or
- declare that section 95 of the SAT Act applies, which may result in the criminal prosecution of the defaulting party (refer to paragraph 2.250 in this Report for a discussion about this process).\(^{501}\)

**Committee Comment**

2.260 The Committee was satisfied with the SAT’s current methods of ensuring compliance with, and enforcing, its orders.

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\(^{499}\) Submission No 61 from Landgate, 30 August 2007, pp2-3.

\(^{500}\) Written answer from the State Administrative Tribunal to proposed question 22 for the hearing on 15 February 2008, p15.

\(^{501}\) State Administrative Tribunal, *Complying with Orders made by the State Administrative Tribunal*, p3.
OTHER SUGGESTED LEGISLATIVE AMENDMENTS OR PROCEDURAL CHANGES

Criminal Investigation Act 2006

Section 120

2.261 The President of the SAT alerted the Committee to an apparent unintended consequence of section 120 of the Criminal Investigation Act 2006, which restricts the possession and playing of audio-visual recordings of police interviews and provides as follows:

(1) In this section —

“authorised person” means any of the following, acting in the course of duty —

(a) a police officer;

(b) a person authorised for the purposes of this Part by the Commissioner of Police;

(c) the DPP or a person acting under the authority of the DPP;

(d) a lawyer acting for or representing the State;

(e) a CCC officer;

(f) the Parliamentary Inspector;

(g) an ombudsman officer;

(h) a court or a person acting at the direction of a court;

(i) a coroner or a person acting at the direction of a coroner;

(j) a person prescribed to be an authorised person.

(2) A person who is in possession of an audiovisual recording of an interview commits an offence unless the person —

(a) is an authorised person;

(b) is the suspect or the suspect’s lawyer;
(c) has possession of the recording in a sealed package as part of his or her duties as a person engaged by a person referred to in paragraph (a) or (b) to transport it; or

(d) was served with the recording under the Criminal Procedure Act 2004 section 35, 42, 61 or 95.

(3) A person who plays an audiovisual recording of an interview to another person commits an offence except when —

(a) the recording is played for purposes connected with the prosecution or defence of, or legal proceedings relating to, a charge to which the interview relates;

(b) the recording is played for purposes connected with proceedings before a coroner;

(c) the recording is played for purposes connected with proceedings under the Police Act 1892 to remove a member, as that term is defined in section 33K of that Act;

(d) the recording is played under a direction of a court; or

(e) the recording is played under section 124 [for teaching purposes].

(4) Subsection (3) does not apply to any of the following when acting in the course of duty —

(a) a police officer;

(b) a CCC officer;

(c) the Parliamentary Inspector;

(d) an ombudsman officer.

...
respondent in related disciplinary proceedings before the SAT and the interview had been conducted as part of related criminal proceedings against the nurse, which were later dismissed. The SAT found that section 120 limits the power of the SAT to order the production of audio-visual recordings of an interview conducted by the police with a person who has subsequently become a respondent in disciplinary proceedings before the SAT.502

2.263 In arriving at this decision, the SAT determined that:

- the section 120(1) definition of ‘authorised person’ does not include the SAT;503
- accordingly, section 120(2) did not authorise the SAT to possess the audio-visual recording in this matter;504 and
- section 120(3) did not authorise the SAT to play the audio-visual recording in this matter.505

2.264 The Committee noted the following comments made in the SAT’s decision, particularly those regarding the anomalous public policy outcome of the operation of section 120 on the SAT’s powers:

*In broad terms, the intent of the CI Act in protecting audiovisual recordings of an interview made in relation to criminal investigation seems to be such that relevant recordings cannot be used other than for criminal investigation and criminal trial purposes. *...

*...*

*In the Tribunal’s view, the restrictions placed on the possession and playing of an audiovisual recording of an interview made for the purposes of criminal investigation under the CI Act apply equally to the Tribunal as they do to any other person, not being an authorised person as defined in that Act. This means that, notwithstanding the broad powers of the Tribunal under s 35 of the SAT Act to require production of any document or material from any person, notwithstanding any legal privilege (save for legal professional privilege) or public interest to the contrary, the Tribunal is unable to*

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502 Nurses and Midwives Board of Western Australia and Watson [2008] WASAT 259, at paragraphs 45 and 52 per Barker J.

503 Ibid, at paragraph 39 per Barker J.

504 Ibid, at paragraphs 39 and 41 per Barker J.

505 Ibid, at paragraph 43 per Barker J.
compel the production of an audiovisual recording of interview made by the police that obviously would be relevant to the disciplinary proceedings brought by the Board against the respondent nurse in this case.

This statutory position seems to the Tribunal to produce an odd public policy outcome, especially given the Tribunal’s view that access to the audiovisual recording of the interview is probably available to the Board under the FOI Act [Freedom of Information Act 1992].

... Accordingly, it would seem open to a vocational regulatory body such as the Board to apply to the Commissioner of Police for access to an audiovisual recording of interview conducted as part of a criminal investigation, at least in a case such as this where there is no ongoing prosecution of the subject of the interview.

Finally, the Tribunal is concerned that the Parliament, in passing the CI Act, may have overlooked the fact that the terms of s 120 of the CI Act limit the power of this Tribunal to require the production of documents that may be relevant in disciplinary proceedings before the Tribunal. This is something that the Parliament may wish to reconsider, especially if, as the Tribunal has suggested, a vocational regulatory body such as the Board may well be entitled to gain access to the document in question under the FOI Act. In such circumstances it is difficult to understand why the Tribunal should not be able to order production of the document by the Commissioner of Police to the Tribunal if it would assist in the determination of disciplinary proceedings in the Tribunal.506

2.265 The Explanatory Memorandum for, and the Legislative Council’s consideration in detail507 of, the Criminal Investigation Bill 2005, which became the Criminal Investigation Act 2006, do not provide any further explanation for the restriction on the SAT’s powers to require the production of documents or materials.

506 Ibid, at paragraphs 44, 45-46 and 51-52 per Barker J.
507 Clause 119 of the Criminal Investigation Bill 2005 was equivalent to section 120 of the Criminal Investigation Act 2006. Clause 119 of the bill was put and passed by the Legislative Council without debate during the consideration of the bill in detail: Parliament of Western Australia, Legislative Council, Parliamentary Debates (Hansard), 24 October 2006, p7429.
Committee Comment

2.266 The Committee considered that section 120 of the Criminal Investigation Act 2006 should authorise the SAT to possess and play audio-visual recordings of police interviews with people who are subsequently respondents in related disciplinary proceedings before the SAT.

Recommendation 4: The Committee recommends that the Criminal Investigation Act 2006 be amended to authorise the State Administrative Tribunal to possess and play audio-visual recordings of police interviews with people who are subsequently respondents in related disciplinary proceedings before the Tribunal.

Environmental Protection Act 1986

Section 41

2.267 Section 41 of the Environmental Protection Act 1986 (EP Act) appears in Part IV of the Act, which regulates the environmental impact assessment process. Section 41 is operative once a ‘proposal’ is referred to the Environmental Protection Authority (EPA). Other provisions in the EP Act, and in other legislation, contain prohibitions against implementing ‘significant proposals’ without authorisation from a ‘decision-making authority’. These provisions, coupled with section 38 of the EP Act, provide a scheme for ensuring that the EPA is aware of any proposals which might have a significant effect on the environment. For example, a decision-making authority is required to refer a significant proposal, or a proposal of a prescribed class, to the EPA as soon as it has notice of the proposal. Once a proposal is referred to the EPA, it must decide whether it will assess the proposal for environmental impact.

2.268 The Appeals Convenor under the EP Act advised that:

508 Unless the contrary intention appears, ‘proposal’ “means a project, plan, programme, policy, operation, undertaking or development or change in land use, or amendment of any of the foregoing, but does not include scheme”: section 3(1) of the Environmental Protection Act 1986.
509 For example, see ibid, Part V (environmental regulation).
510 For example, see section 135 of the Planning and Development Act 2005 (subdivision approvals).
511 Unless the contrary intention appears ‘decision-making authority’ “means a public authority empowered by or under — (a) a written law; … to make a decision in respect of any proposal and, in Division 2 of Part IV, includes, in relation to a particular proposal, any Minister prescribed for the purposes of this definition as being the Minister responsible for that proposal”: section 3(1) of the Environmental Protection Act 1986.
512 Ibid, section 38(5).
513 Ibid, section 39A.
Proposals the subject of EPA assessments are those where the EPA (or the Minister on appeal) determines that the proposal is environmentally significant (see Environmental Impact Assessment (Part IV Division 1) Administrative Procedures 2002, section 4). Most proposals, therefore, are not subject to EPA assessment and the constraints of section 41.514

Where, for example, a development or subdivision proposal is being assessed by the EPA for environmental impact, sections 41(2) and (3) of the EP Act prohibit the decision-making authorities, operating under the Planning and Development Act 2005 (PD Act), from making any decision relating to the proposal that could have the effect of causing or allowing the proposal to be implemented until the Minister for the Environment issues an authority515 for them to do so. However, these decision-making authorities would not be prevented by section 41 from conducting their own processes for assessing the proposal, provided that they do not make a decision which could have the effect of causing or allowing the proposal to be implemented:

Decision-making authorities like Government departments, for example, cannot make final decisions which would have the effect of allowing referred proposals to be implemented until environmental conditions, where appropriate, have been set and the Minister so advises. However, decision-making authorities are not prevented under these measures from beginning negotiations with relevant parties at all levels as if the proposal were to proceed, other than to make that final decision. The ultimate decision to proceed with a project can only follow receipt of the report of the EPA and the agreed conditions. The conditions have to be complied with.516

This view was also expressed by the Appeals Convenor, the Department of Environment and Conservation (DEC) and the EPA.517 Dr Paul Vogel, Chairman, EPA, was of the opinion that this aspect of the practical operation of section 41 is not well understood and informed the Committee that he would soon issue statements to clarify the situation.518 Dr Vogel informed the Committee that the EPA is currently

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514 Letter from Mr Garry Middle, Appeals Convenor, Office of the Appeals Convenor, 29 April 2008, p1.
515 Pursuant to section 45(7) of the Environmental Protection Act 1986.
516 Town Planning Appeal Tribunal, Re: Ex parte Environmental Protection Authority (2003) 27 WAR 374, at pp397-398 per McKechnie J, quoting the Second Reading Speech for the Minister for the Environment on the Environmental Protection Bill in the Legislative Assembly on 24 July 1986.
517 Letter from Mr Garry Middle, Appeals Convenor, Office of the Appeals Convenor, 29 April 2008, p2, the Letter from Mr Robert Atkins, Acting Deputy Director General, Department of Environment and Conservation, 30 April 2008, p2; and Written answer from the Environmental Protection Authority to proposed question 1 for the hearing on 7 May 2008, p1.
518 Dr Paul Vogel, Chairman, Environmental Protection Authority, Transcript of Evidence, 7 May 2008, pp1-2.
conducting a review of the environmental impact assessment process and that it is hoped that the operation of section 41 will be clarified by this review.\footnote{The report on the review of the environmental impact assessment process was published on 30 March 2009: see Environmental Protection Authority, Review of the Environmental Impact Assessment Process in Western Australia, March 2009. Refer to paragraph 2.274 in this Report for a discussion of some of the recommendations resulting from the review.}

I wish to inform the Committee of the review of the EIA process in WA and its underpinning policy settings. This wide-ranging reform initiative has a risk-based and outcomes focus and relates to the EPA’s assessment process and not the Minister’s process.

One of the outcomes of the review will [be] the clarification for DMAs [decision-making authorities] and proponents on the application and interpretation of EIA legislation, policy, procedure and practice, e.g. section 41 in relation to parallel approvals processes.\footnote{Written answer from the Environmental Protection Authority to proposed question 6 for the hearing on 7 May 2008, p2.}

2.271 Further, the section 41 prohibition would not apply to decisions rejecting the proposal.\footnote{Town Planning Appeal Tribunal, Re: Ex parte Environmental Protection Authority (2003) 27 WAR 374, at p377 per Malcolm CJ and p390 per Steytler J.}

2.272 Once the EPA has completed its environmental impact assessment, the Minister for the Environment must, amongst other things, provide a copy of the report to:

- any other Minister appearing to him or her to be likely to be concerned in the outcome of the proposal;
- each decision-making authority by which the proposal was referred to the EPA or which had been given notice that the EPA was conducting an assessment; and
- where the proposal had been referred to the EPA by the proponent or another person, the proponent or that other person.\footnote{Section 44(3)(b) of the Environmental Protection Act 1986.}

2.273 Under section 45 of the EP Act, the Minister for the Environment must then consult the decision-making authorities which were given a copy of the EPA report on whether the proposals may be implemented, and if so, how. Where at least one of these decision-making authorities is another Minister, the Minister for the Environment need only consult that other Minister or those other Ministers. Where
possible, the Minister for the Environment is to agree with the decision-making authorities consulted.  

2.274 The report on the review of the environmental impact assessment process was published on 30 March 2009. This report made various recommendations to improve the integration of the environmental impact assessment of a proposal and any parallel approval processes affecting the proposal. For example, it was recommended that:

- the EPA should issue an Environmental Protection Bulletin to clarify the restrictions and obligations under Part IV of the EP Act regarding parallel processing and decision-making. The EPA had commenced drafting this bulletin; and

- the EPA should only constrain those decision-making authorities that have a substantial decision-making role relevant to the proposal and where there is an expectation that the Minister for the Environment would consult with, and reach agreement with, these decision-making authorities before a decision is made on whether the proposal should be implemented.

2.275 The SAT is a decision-making authority which is caught by section 41 of the EP Act. In its Annual Report 2006, the SAT commented on the fact that section 41 is constraining its ability to deliver timely decisions in the Development and Resources stream. The following is an excerpt of the relevant comments from the report:

"the DR stream has been constrained in its ability to achieve the objective stated in section 9(a) of the State Administrative Tribunal Act 2004, to act as speedily as is practicable, by the referral of proposals, which are the subject of review proceedings, by original decision-makers to the Environmental Protection Authority (EPA) for environmental assessment under the Environmental Protection Act 1986 or the requirement of the EPA that [the] Tribunal itself refer proposals the subject of review applications to the EPA for environmental assessment.

Although, where a proposal has been referred for environmental assessment, the DR stream is able to undertake mediations or compulsory conferences and to determine preliminary issues, [the] Tribunal is precluded by section 41 of the Environmental Protection Act 1986 from making a decision which could have the effect of causing or allowing the proposal to be implemented and it seems,

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523 Ibid, section 45.
524 Recommendations 4.2.1 and 4.2.6 in Environmental Protection Authority, Review of the Environmental Impact Assessment Process in Western Australia, March 2009, piii and 17.
therefore, from making a final decision in relation to the review, until an authority is served on it by the Minister for Environment under section 45(7). As the Tribunal determined in Burns and Commissioner of Soil and Land Conservation [2006] WASAT 83 at [27], the word, could, in section 41 of the Environmental Protection Act 1986 refers to a potential event or situation. Section 41 does not only apply to a decision which will remove the last impediment to the lawful implementation of a proposal.

Section 27(3)\textsuperscript{525} of the State Administrative Tribunal Act 2004 states that the purpose of the review is to produce the correct and preferable decision at the time of the decision upon the review. ... If the correct and preferable decision is that the review should succeed, the Tribunal is bound to so determine. However, section 41 of the Environmental Protection Act 1986 precludes the Tribunal from making a decision that could have the effect of allowing a referred proposal to be implemented.

The environmental assessment process in relation to referred proposals, while no doubt complex, appears to take a considerable period of time. The result is that a number of applications have had to be repeatedly adjourned from directions hearing to directions hearing, awaiting the result of environmental assessment by the EPA and then any appeal to the Minister for Environment.\textsuperscript{526}

2.276 The Commissioner of Soil and Land Conservation informed the Committee of four SAT applications relating to soil conservation notices, issued as a result of land clearing proposals, which were withdrawn approximately two years after lodgment.\textsuperscript{527} The applications were put ‘on hold’ because the land clearing proposals became the subject of environmental impact assessment by the EPA and section 41 of the EP Act applied to constrain the SAT, and for that matter, the Commissioner of Soil and Land Conservation, from making any decision which could have the effect of causing or allowing the proposals to be implemented.\textsuperscript{528} The Commissioner of Soil and Land Conservation observed that:

\textsuperscript{525} This should be a reference to section 27(2) of the State Administrative Tribunal Act 2004.
\textsuperscript{526} State Administrative Tribunal, Annual Report 2006, 30 September 2006, p42.
\textsuperscript{527} Submission No 6 from the Office of the Commissioner of Soil and Land Conservation, 9 August 2007, pp1-2.
\textsuperscript{528} Ibid, pp1-2; and Written answer from the State Administrative Tribunal to proposed question 24 for the hearing on 21 September 2007, p27.
It is unlikely that there will be future appeals against land clearing decisions heard by SAT unless the legislation is amended.  

2.277 The Environmental Defender’s Office (EDO) provided the following reasons why delays in the EPA’s environmental impact assessment process can occur:

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.

...

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.

2.278 Given the delays which have been caused by the operation of section 41 of the EP Act, the SAT made the following recommendation for the amendment of the section as a possible solution to the problem:

the Tribunal suggests that it should be able to determine proceedings which fall within its current jurisdiction without having to place proceedings “on hold” while the environmental assessment process runs its course. ... a solution would be to amend s 41 of the Environmental Protection Act to permit the Tribunal to finally determine proceedings involving a referred proposal, but to preclude the implementation of the proposal until the Minister is satisfied that there is no reason why a proposal in respect of which a statement has been published under s 45(5)(b) should not be implemented. If the Tribunal determines that a proposal that is the subject of environmental assessment should not receive development, subdivision or other approval (which is within the Tribunal’s jurisdiction), it will be unnecessary for the environmental assessment process under the Environmental Protection Act to be completed as the proposal cannot be implemented. On the other hand, if the

529 Submission No 6 from the Office of the Commissioner of Soil and Land Conservation, 9 August 2007, p2.

530 Mr Cameron Poustie, Principal Solicitor, Environmental Defender’s Office of Western Australia (Inc), Transcript of Evidence, 30 April 2008, pp5-6.
Tribunal determines that the application should receive development, subdivision or other approval (which is within the Tribunal’s jurisdiction) then the Minister for the Environment would still have the ability to preclude the implementation of the proposal on the basis of the environmental assessment under the Environmental Protection Act.\(^{531}\)

2.279 Other interested parties in this area, such as the DEC, the EPA, the WAPC and the EDO were not in favour of the SAT’s suggested amendment of section 41 of the EP Act.\(^{532}\) The Appeals Convenor noted that the issue of whether decision-making authorities should be constrained by section 41 is a matter of Government policy.\(^{533}\) It was acknowledged by the SAT that the Government remains unsupportive of the proposed amendment.\(^{534}\)

2.280 The DEC, EPA and WAPC based their views on consistency with the current Government policy to give primacy to a cohesive, whole-of-government approach to the consideration of environmental impacts of proposals:

- “it is current government policy for decision-making authorities to be constrained from making a decision that would have the effect of causing or allowing a proposal to be implemented until the processes under part IV of the EP Act are completed. This was most recently confirmed in 2003, when the government did not support implementation of recommendation 7 of the “Review of the Project Development Approval System 2002”, commonly referred to as the “Keating Review”.”\(^{535}\)

- “The Keating review, some five or six years ago, confirmed that [policy stance]. Recommendation 7, which is to amend section 41 to allow DMAs [decision-making authorities] to give their approvals before formal

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\(^{531}\) Written answer from the State Administrative Tribunal to proposed question 57 for the hearing on 21 September 2007, pp61-62.

\(^{532}\) Submission No 24 from the Department of Environment and Conservation, 20 August 2007, p1; Letter from Mr Robert Atkins, Acting Deputy Director General, Department of Environment and Conservation, 30 April 2008, pp2-5; Written answer from the Environmental Protection Authority to proposed question 1 for the hearing on 7 May 2008, p1; Letter from Mr Moshe Gilovitz, Secretary, Western Australian Planning Commission, 14 May 2008, p3; and Mr Cameron Poustie, Principal Solicitor, Environmental Defender’s Office of Western Australia (Inc), Transcript of Evidence, 30 April 2008, p2; and

\(^{533}\) Letter from Mr Garry Middle, Appeals Convenor, Office of the Appeals Convenor, 29 April 2008, p2.

\(^{534}\) Written answer from the State Administrative Tribunal to proposed question 4 for the hearing on 15 February 2008, p4; and State Administrative Tribunal, Annual Report 2007, 28 September 2007, pp62-63.

\(^{535}\) Mr Robert Atkins, Acting Deputy Director General, Department of Environment and Conservation, Transcript of Evidence, 30 April 2008, p3.
assessment has concluded, was rejected by government. The current government policy is that that is how it wishes to have appeals dealt with.”\textsuperscript{536}

- “Importantly, section 41 is a whole-of-government decision-making process. I do think it has been well understood by decision-making authorities that the minister, in consulting with decision-making authorities on implementation agreements, consults with other DMAs [decision-making authorities].”\textsuperscript{537}

- “The WAPC supports the consideration of environmental issues early in the planning approval process so that the environmental impact of a proposal is understood before a planning decision is contemplated. The WAPC considers that the same protocol should apply to planning decisions at the SAT notwithstanding that in some cases the hearing may be delayed.”\textsuperscript{538}

2.281 The DEC and the EDO cited the Parliament’s intent to give primacy to the EP Act as another reason not to amend section 41 in the manner suggested by the SAT.\textsuperscript{539} This argument was summarised by Mr Cameron Poustie, Principal Solicitor, EDO, during a hearing with the Committee:

> 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\textsuperscript{[540]} at paragraph 27. ... —

> Reading the word “could”[in section 41 of the EP Act] 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

\textsuperscript{536} Dr Paul Vogel, Chairman, Environmental Protection Authority, \textit{Transcript of Evidence}, 7 May 2008, p2.

\textsuperscript{537} \textit{Ibid}. The requirement on the Minister for the Environment to consult decision-making authorities after receiving the Environmental Protection Authority’s report is imposed by section 45 of the \textit{Environmental Protection Act 1986}.

\textsuperscript{538} Letter from Mr Moshe Gilovitz, Secretary, Western Australian Planning Commission, 14 May 2008, p3.

\textsuperscript{539} Letter from Mr Robert Atkins, Acting Deputy Director General, Department of Environment and Conservation, 30 April 2008, p4; and Mr Cameron Poustie, Principal Solicitor, Environmental Defender’s Office of Western Australia (Inc), \textit{Transcript of Evidence}, 30 April 2008, p3.

\textsuperscript{540} Burns and Commissioner of Soil and Land Conservation [2006] WASAT 83.
In 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 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.

... 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?541

2.282 The legislative intention for primacy of the EP Act and the protection of the State’s environment, as reflected in Part IV of the EP Act, has been noted by the Full Court of the Supreme Court:

Parliament intends that any proposal which, if implemented, is likely to have a significant effect on the environment, must be first assessed by the EPA. In order to give the EPA time to carry out that assessment, other decision-making bodies must pause until the assessment has been completed.542

2.283 Consistent with the Government’s policy approach and the legislative intention to promote ecologically sustainable development, the DEC noted that section 41 was drafted so as to avoid difficulties and challenges arising from the need to revisit final decisions regarding proposals until after the EPA had assessed the proposal and the Minister was able to consult, and reach agreement with, all relevant decision-making authorities.543 On a practical level, Mr Robert Atkins, Acting Deputy Director General, DEC noted that:

*If a decision-making authority [such as the SAT] makes a final determination about a proposal prior to [the EPA completing its*

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541 Mr Cameron Poustie, Principal Solicitor, Environmental Defender’s Office of Western Australia (Inc), Transcript of Evidence, 30 April 2008, p3.

542 Town Planning Appeal Tribunal, Re; Ex parte Environmental Protection Authority (2003) 27 WAR 374, at p401, paragraph 136 per McKechnie J.

543 Letter from Mr Robert Atkins, Acting Deputy Director General, Department of Environment and Conservation, 30 April 2008, p4.
assessments and] consultation with the Minister for the Environment [under section 45 of the EP Act]. It may then find it difficult to alter or depart from their final decision when consulting with or seeking agreement with the Minister for the Environment in the process ...[under section 45] ...  

2.284 However, even if section 41 was amended to allow the SAT to make a decision which could have the effect of causing or allowing the proposal to be implemented before the conclusion of the environmental impact assessment process, the SAT may not be exposed to the practical challenge of having to revisit its decision with the Minister for the Environment under the section 45 consultation procedures. In Town Planning Appeal Tribunal, Re; Ex parte Environmental Protection Authority (2003) 27 WAR 374, the Full Court of the Supreme Court held that the former Town Planning Appeals Tribunal, which has been replaced by the SAT, was a decision-making authority for the purposes of section 41, but not for the purposes of the consultation procedures prescribed in section 45, except for subsection (7). Some of the relevant passages are quoted here for the information of the House:

- “in the context in which the term “decision-making authority” appears in these provisions [sections 45(1), (3) and (5) of the EP Act], that term does not comprehend the [Town Planning Appeals] Tribunal. It could not sensibly be thought that the Tribunal was intended to be consulted by the Minister in the respects specified or that it should, in any way, be party to the appeal processes to which I have referred. ...

... the fact that the Tribunal is not a decision-making authority for the purposes of the earlier subsections of s 45 does not mean that it is not a decision-making authority for the purposes of s 45(7). In my

544 Mr Robert Atkins, Acting Deputy Director General, Department of Environment and Conservation, Transcript of Evidence, 30 April 2008, p3.

545 Town Planning Appeal Tribunal, Re; Ex parte Environmental Protection Authority (2003) 27 WAR 374, at p377, paragraphs 10 and 11 per Malcolm CJ; at pp384-385 and 389, particularly paragraphs 42, 43 and 66 per Steytler J; and at pp396-402, particularly at paragraphs 105 and 134-136 per McKechnie J.

546 After consultation, once the Minister for the Environment is satisfied that there is no reason why a proposal should not be implemented, section 45(7) requires him or her to issue a written authority to each decision-making authority, which was precluded from making a decision that could have the effect of causing or allowing the proposal to be implemented, to make such a decision.

547 Town Planning Appeal Tribunal, Re; Ex parte Environmental Protection Authority (2003) 27 WAR 374, at p389, paragraphs 62-63 per Steytler J; and at p401, paragraphs 132 and 135, per McKechnie J.
opinion, this is a situation in which “the contrary intention appears” in those earlier subsections but not in s 45(7)."

- “There is force in the submission that s 45 cannot be intended to cover the Town Planning Appeal Tribunal because it is hardly to be supposed that an independent body [which] is exercising administrative powers judicially and, subject to a right of appeal to the Supreme Court on a questions of law, was intended by Parliament to be a party to an appeal to the Appeals Committee.

... I would construe s 41 and s 45(7) as expressing a very clear intention to include the Town Planning Appeal Tribunal as a “decision-making authority”. I have reached this view notwithstanding that other subsections of s 45 may be construed differently.

**Committee Comment**

2.285 The Committee noted that the SAT has assumed the role of the former Town Planning Appeals Tribunal and shares the characteristics of the former tribunal which were fundamental in the Supreme Court’s reasons for its finding that section 45 of the EP Act, other than section 45(7), does not apply to the former tribunal. Accordingly, the Committee was of the view that the SAT would not be subject to the consultation requirements in section 45 of the EP Act, other than the procedure prescribed in section 45(7).

2.286 However, even if the SAT is not considered to be affected by certain consultation procedures under section 45 of the EP Act, the SAT may be forced to amend its decision causing or allowing the proposal to be implemented if the implementation

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548 Section 3(1) of the Environmental Protection Act 1986 provides that “unless the contrary intention appears — “decision-making authority” means a public authority empowered by or under — (a) a written law; ... to make a decision in respect of any proposal and, in Division 2 of Part IV, includes, in relation to a particular proposal, any Minister prescribed for the purposes of this definition as being the Minister responsible for that proposal”.

549 Town Planning Appeal Tribunal, Re; Ex parte Environmental Protection Authority (2003) 27 WAR 374, at pp 389, paragraphs 62-63 per Steytler J.

550 An appeals committee is appointed where the Minister for the Environment and any decision-making authorities which are consulted pursuant to section 45(1) cannot agree on any of the following matters: whether the proposal may be implemented, and if so, to what conditions and procedures the implementation should be subject: section 45(3) of the Environmental Protection Act 1986.

551 Town Planning Appeal Tribunal, Re; Ex parte Environmental Protection Authority (2003) 27 WAR 374, at pp 401, paragraphs 132 and 135 per McKechnie J.
agreement between the Minister for the Environment and other decision-making authorities is inconsistent with the SAT decision:

-suppose the SAT approved the plan of subdivision that was on appeal—whereas the minister, other concerned ministers and the commission agree that areas of native vegetation should be set aside for conservation, which may or may not prevent the plan of subdivision being undertaken or require a new plan of subdivision to be lodged—to remove any inconsistency, this may place SAT in the position of having to amend its initial orders.  

2.287 Consistent with this observation, the Committee noted that it is an offence under section 47(1) of the EP Act for the proponent of the proposal to implement the proposal in a way that does not comply with any implementation conditions set in the implementation agreement; that is, an earlier SAT decision allowing the implementation of the proposal would still need to be consistent with the ultimate implementation agreement in order to avoid becoming obsolete.

2.288 Where section 41 of the EP Act is amended in the way suggested by the SAT, the DEC also pointed out the possibility that the proponent of a proposal would expend time and money in prior SAT proceedings without any certainty as to the finality of the SAT decision. This outcome was acknowledged by the SAT:

-if the Tribunal determines that the application should receive development, subdivision or other approval (which is within the Tribunal’s jurisdiction) then the Minister for the Environment would still have the ability to preclude the implementation of the proposal on the basis of the environmental assessment under the Environmental Protection Act.  

2.289 The advantage of the current section 41 system is that the SAT would only be making its decision once the environmental, social and political arguments had been considered and reconciled by the Minister for the Environment and other decision-making authorities:

-an advantage of the existing procedure is that the minister and other decision-making authorities are able to reach agreement, and in this process the consideration is peculiar to other ministers and decision-

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552 Mr Robert Atkins, Acting Deputy Director General, Department of Environment and Conservation, Transcript of Evidence, 30 April 2008, p4.

553 Written answer from the State Administrative Tribunal to proposed question 57 for the hearing on 21 September 2007, p62.
making authorities and can be considered without constraint in an effort to facilitate a decision.\footnote{Mr Robert Atkins, Acting Deputy Director General, Department of Environment and Conservation, \textit{Transcript of Evidence}, 30 April 2008, p4.}

2.290 The DEC argued that if, as suggested by the SAT, the SAT was empowered to make a prior decision causing or allowing the implementation of a proposal but that implementation is precluded until the Minister for the Environment has issued a section 45(7) notice\footnote{After consultation, once the Minister for the Environment is satisfied that there is no reason why a proposal should not be implemented, section 45(7) of the \textit{Environmental Protection Act 1986} requires him or her to issue a written authority to each decision-making authority, which was precluded from making a decision that could have the effect of causing or allowing the proposal to be implemented, to make such a decision.}, it would be difficult for the DEC to ensure that the proponent complies with the preclusion:

\begin{quote}
SAT’s final determination of a matter may also place a greater burden on enforcement; that is, ensuring proposals are not implemented in accordance with any SAT decision before the administration of part IV of the \textit{Environmental Protection Act} is completed. While the enforcement action may be successful, any action taken by the proponent in the meantime may be irreversible; for example, clearing of native vegetation that the minister requires to be protected.\footnote{Mr Robert Atkins, Acting Deputy Director General, Department of Environment and Conservation, \textit{Transcript of Evidence}, 30 April 2008, p4.}
\end{quote}

2.291 The EDO also noted that environmental impact assessments by the EPA are not the only processes which can delay SAT proceedings and argued that applications for ‘proposals’, as defined in the EP Act, are no more deserving of expedition than other applications before the SAT:

\begin{quote}
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 \textit{Environmental Protection Act} primacy over the SAT legislation and, indeed, over all other Western Australian legislation.\footnote{Mr Cameron Poustie, Principal Solicitor, Environmental Defender’s Office of Western Australia (Inc), \textit{Transcript of Evidence}, 30 April 2008, p3.}
\end{quote}
2.292 The EDO raised another important point when considering the SAT’s suggested amendment to section 41. It noted that the SAT should be subject to the same limitations as the primary decision-maker whose decision is being reviewed, given that the SAT, in its review jurisdiction, is to ‘step into the shoes’ of the original decision-maker and has the ability to affirm, vary or set aside the primary decision, and, where the primary decision is set aside, substitute the primary decision with its own decision.\(^{558}\):

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\(^{559}\) —

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

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558 Section 29 of the State Administrative Tribunal Act 2004.
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.  

2.293 This point was also made by the Full Court of the Supreme Court in *Town Planning Appeal Tribunal, Re; Ex parte Environmental Protection Authority* (2003) 27 WAR 374. For example, Justice Steytler stated that:

> It would be odd ... to assume that the legislature had intended that a local council [the primary decision-maker in this case] should be constrained by the provisions of s 41(2) from making a decision that could have the effect of causing or allowing a proposal to be implemented, notwithstanding that the proposal was to be the subject of an assessment by the EPA, but that no similar constraint was intended to be imposed upon an appellate body [the Town Planning Appeals Tribunal in this case], standing in its shoes for the purpose of making that decision.

2.294 As an alternative solution to the one proposed by the SAT, the DEC and the EDO suggested that the SAT could become involved at a later stage in the approval process for a ‘proposal’, as defined in the EP Act. In order to avoid any delays which may be caused by an initiation of the environmental impact assessment process under Part IV of the EP Act, the right to apply for a SAT review could be postponed until after the conclusion of this assessment process. The DEC made the following recommendation:

> An alternative approach would be to amend the Planning and Development Act, and other legislation giving rights of review to the SAT in circumstances where the primary decision making is constrained by section 41 of the Environmental Protection Act from making a decision, such that the right of review ... does not arise until after the primary decision maker is either served with a notice under section 39A of the Environmental Protection Act that the proposal is

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560 Mr Cameron Poustie, Principal Solicitor, Environmental Defender’s Office of Western Australia (Inc), Transcript of Evidence, 30 April 2008, pp3-4.

561 *Town Planning Appeal Tribunal, Re; Ex parte Environmental Protection Authority* (2003) 27 WAR 374, at p377, paragraphs 7 and 10 per Malcolm CJ; p383, paragraph 37 per Steytler J; and pp401-402, paragraph 136 per McKechnie J.

562 Ibid, at p283, paragraph 37.

563 Letter from Mr Robert Atkins, Acting Deputy Director General, Department of Environment and Conservation, 30 April 2008, p5; and Mr Cameron Poustie, Principal Solicitor, Environmental Defender’s Office of Western Australia (Inc), Transcript of Evidence, 30 April 2008, p4.
not going to be assessed or, alternatively, if the proposal is going to be assessed, the minister issues an authority under section 45(7) of the EP act. This would avoid the matter coming before the SAT until the processes under part IV of the EP act were completed, if indeed at that stage it is still necessary at all for this matter to go before SAT.

2.295 In an effort to minimise any delays in Development and Resources matters due to the operation of section 41 of the EP Act, the SAT also suggested amending section 37 of the SAT Act to allow the Minister for the Environment to intervene in these matters as of right. The SAT made the following observations regarding section 37:

It is to be noted that section 37(1) of the State Administrative Tribunal Act 2004 confers a right on the Attorney General, on behalf of the State, to intervene in proceedings of the Tribunal at any time and that section 37(3) confers a discretion on the Tribunal to permit any person to intervene in proceedings. Section 37 could be amended to permit the Minister for Environment to intervene in proceedings which concern a proposal which has been referred to the EPA for environmental assessment under the Environmental Protection Act 1986. This would enable all environmental planning issues to be determined in a single proceeding.

2.296 The Committee noted that section 37(3) of the SAT Act already empowers the SAT to give leave at any time for a person to intervene in a proceeding on conditions, if any, that the SAT thinks fit. When the Committee queried why it is considered preferable for the Minister for the Environment to have an ‘automatic’ right to intervene in SAT proceedings involving proposals which have been referred to the EPA, the President of the SAT provided the following clarification:

The other way we thought about it [that is, apart from amending section 41 of the EP Act] 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. ... to say that perhaps the Minister for Environment can come down here and argue their case.

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564 After consultation, once the Minister for the Environment is satisfied that there is no reason why a proposal should not be implemented, section 45(7) requires him or her to issue a written authority to each decision-making authority, which was precluded from making a decision that could have the effect of causing or allowing the proposal to be implemented, to make such a decision.

565 Mr Robert Atkins, Acting Deputy Director General, Department of Environment and Conservation, Transcript of Evidence, 30 April 2008, p4.

The DOTAG did not express a view on this matter. However, the DEC, the Appeals Convenor, the EPA, the WAPC and the EDO were opposed to the SAT’s suggestion to amend section 37 essentially because it is unlikely that the Minister for the Environment would have any meaningful contribution to make to the SAT proceedings prior to receiving an assessment report from the EPA, and, therefore, it would not necessarily result in any expedition of the SAT’s proceedings. Some of their comments were as follows:

- “all he [the Minister for the Environment] does is advise the SAT that he is still considering the matter—until after an authority is served under section 45(7) of the EP act, at which point in time the minister could seek leave of the tribunal to intervene; although, if the minister had issued a statement of implementation with conditions, that may not be necessary.”

- “if the PD [Planning and Development] Act, and other legislation, is amended in the manner suggested by the DEC above, the amendment to section 17 of the SAT Act would not appear to be necessary.”

- “Given that section 45 of the EP Act [which prescribes consultation procedures for deciding on the implementation of proposals] would still apply … it is not clear why the Minister would need to intervene where a proposal is already the subject of an EPA assessment given that he has his own decision to make independent of the SAT process.”

- “Even with the power to intervene it is unlikely that the Minister for the Environment would be in a position to intervene as he/she may not have received the EPA’s report and recommendations on the referred proposal, i.e. he/she would not be aware of the EPA’s view on the environmental acceptability of the referred proposal and thus the intervention may be of limited value.”

- “it would not be of any great value unless the minister had received the EPA’s report and recommendations on the referred proposal. Is the minister in a position to intervene in a sensible way in that process? If the minister does

568 Mr Robert Atkins, Acting Deputy Director General, Department of Environment and Conservation, Transcript of Evidence, 30 April 2008, pp4-5.
569 Refer to paragraph 2.294 in this Report.
570 Letter from Mr Robert Atkins, Acting Deputy Director General, Department of Environment and Conservation, 30 April 2008, p6.
571 Letter from Mr Garry Middle, Appeals Convenor, Office of the Appeals Convenor, 29 April 2008, p2.
572 Written answer from the Environmental Protection Authority to proposed question 2 for the hearing on 7 May 2008, p1.
not have any information from the EPA, on what basis is he or she intervening? There is some uncertainty about whether that would be a useful thing to do. I am also advised that perhaps the minister already has that power. I would need to seek further advice on that. I am advised by someone in the department that the minister already has that power. ...

• [The WAPC reiterated its comments regarding the SAT’s suggestion to amend section 41 of the EP Act and then stated that] “The WAPC prefers the separate consideration of environmental matters as an input to the consideration of planning matters. The WAPC does not consider that the SAT’s proposal [to amend section 37 of the SAT Act] would lead to improved decision making or efficiencies in decision making."

• “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. ... That said, if the minister has made a decision, then section 41 will generally not

573 Dr Paul Vogel, Chairman, Environmental Protection Authority, Transcript of Evidence, 7 May 2008, p2.
574 Letter from Mr Moshe Gilovitz, Secretary, Western Australian Planning Commission, 14 May 2008, p3.
575 Section 100 of the Environmental Protection Act 1986 provide for rights of appeals to the Minister in respect of levels of environmental impact assessment of, and reports on, proposals, and conditions or procedures attached to the implementation of proposals.
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 [and the length of this intervening period may vary greatly].

... If [that intervening period is very long] ... , then potentially the minister could intervene in that ... 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.

... 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.”

2.298 The EDO also queried whether it was appropriate for a right to intervene to be used purely for the purpose of expediting a matter:

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.

Committee Comment

2.299 The Committee supported the DEC’s recommendation to delay the right to apply for a SAT review of a decision relating to a proposal until after the completion of any environmental impact assessment process associated with the proposal (refer to paragraph 2.294 of this Report) as it will:

- ensure that any delays caused by environmental impact assessments will occur
well before the SAT first becomes involved in the approval process for the proposals, thus having no impact on the SAT’s timeliness;

- ensure that the order of decision-making in the approval process for proposals remains consistent with the objectives of the EP Act; and

- maintain the SAT’s current scope for decision-making with respect to proposals which are assessed for environmental impact. For example:

  (a) where the Minister for the Environment and the other decision-making authorities agree that the proposal may not be implemented, and notification of this agreement has been given to the proponent under section 45(8) of the EP Act, it is an offence under section 47(4) of the EP Act for the proponent to do anything to implement the proposal; that is, the SAT decision would still need to be consistent with the ultimate implementation agreement in order to avoid becoming obsolete, regardless of whether the SAT decision occurs before or after the completion of the Part IV process; but

  (b) where the implementation agreement is that the proposal may be implemented, the SAT is still free to either allow or refuse the proposal. Where the SAT decides to allow the proposal, its decision would still need to be consistent with the ultimate implementation agreement in order to avoid becoming redundant, regardless of whether the SAT decision occurs before or after the completion of the Part IV process. This is because it is an offence under section 47(1) of the EP Act for the proponent to implement the proposal in a way that does not comply with any implementation conditions set in the implementation agreement.

2.300 Further, the Committee was of the view that the right to apply to the SAT for a review of a decision relating to a proposal should not arise until after any appeals in the environmental impact assessment process are finalised and until after any appeal periods in that process have expired.
Recommendation 5: The Committee recommends that the Planning and Development Act 2005 and any other of the State Administrative Tribunal’s relevant enabling Acts be amended so that the right to apply for a State Administrative Tribunal review of a decision relating to a proposal under those Acts does not arise until after:

(a) the completion of any environmental impact assessment process under Part IV of the Environmental Protection Act 1986 which is related to the proposal;

(b) the completion of any appeals which may arise out of that Part IV process; and

(c) the expiry of any appeal periods applicable to that Part IV process.

Guardianship and Administration Act 1990

2.301 The Committee was advised by both the SAT and the DOTAG that a ‘working party’ has been set up to review the GA Act. The working party was established by the President of the SAT and the immediate former Public Advocate, and is comprised of these two office-holders, representatives from the OPA, representatives from the State Solicitor’s Office, a Senior Member of the SAT’s Human Rights stream, and the Public Trustee.

2.302 The President anticipated that the working party would not be in a position to present its findings to the Attorney General and the Minister for Health until at least mid-2008. In December 2008, the President advised the Committee that this project had progressed little in the preceding 12 months due to a general lack of resources.

2.303 In the SAT’s Annual Report 2007, it was noted that:

there are a number of procedural provisions in the [GA] Act which would benefit from amendment. These include the flexibility to constitute the Tribunal by one, two or three members, clarification of the review provisions, and streamlining of notice provisions.

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579 The Honourable Justice Michael Barker, President, State Administrative Tribunal, Transcript of Evidence, 21 September 2007, pp24-25; and, for example, Letter from Hon Jim McGinty MLA, Attorney General, 29 May 2008, Enclosure 1, p2.

580 The Honourable Justice Michael Barker, President, State Administrative Tribunal, Transcript of Evidence, 21 September 2007, p24.


582 Letter from the Honourable Justice Michael Barker, President, State Administrative Tribunal, 22 December 2008, Enclosure 1, p4.

2.304 Section 5 of the GA Act relevantly provided that the SAT may sit only as one or three members, but the President sought the flexibility for the SAT to also sit as two members. Section 5 of the GA Act prevailed over section 11 of the SAT Act, which gives the President the general discretion to specify the number of members, usually up to a maximum of three, and which members will constitute the SAT in a proceeding.  

2.305 Given the wide scope and complexity of the review, the DOTAG considered it appropriate to defer commenting on various issues raised in the Committee’s inquiry in respect of the SAT’s work in the GA Act jurisdiction until after the working group has reported. However, the DOTAG agreed with the SAT’s suggestion that the constituency of the SAT panel, when hearing GA Act applications, should be more flexible. Further, the DOTAG indicated its support for amendments to both the GA Act and the SAT Act to enable the President to determine the constitution of the SAT in any given matter.

2.306 Section 5 of the GA Act was repealed on 30 September 2008, leaving the President with the discretion to determine whether the SAT is constituted by one, two or three members in each GA Act proceeding, pursuant to section 11 of the SAT Act.

**Committee Comment**

2.307 The Committee considered that there is merit in the DOTAG’s suggestion to empower the President of the SAT to determine the constitution of the SAT in any matter.

**Recommendation 6:** The Committee recommends that the *State Administrative Tribunal Act 2004* and all relevant State Administrative Tribunal enabling Acts should be amended to enable the President of the State Administrative Tribunal to determine the constitution of the Tribunal in any matter.

**Hairdressers Registration Act 1946**

2.308 Section 16(1aa) of the *Hairdressers Registration Act 1946* empowers the SAT to either cancel or suspend a hairdresser’s registration if it is satisfied that proper cause exists for disciplinary action brought by the Hairdressers Registration Board. As an alternative to these penalties, the Hairdressers Registration Board suggested that the...

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584 See section 5 of the *State Administrative Tribunal Act 2004*.
585 Refer generally to *ibid*, section 11.
587 See section 56(1) of the *Acts Amendment (Justice) Act 2008*, which commenced operation on 30 September 2008.
SAT be authorised to impose a fine of up to $10,000 in relation to hairdresser disciplinary proceedings, and provided the following supporting reasons:

_The Board considers that there are acts that could be done by a hairdresser which would give rise to disciplinary action but would not necessarily require a draconian penalty of suspension or cancellation [of registration]. Such acts could be a breach of the Hairdressers Act such as failing to pay an annual registration fee._ 588

2.309 In addition, the Hairdressers Registration Board recommended that the SAT should have the power to fine a hairdresser:

- up to $10,000 for a breach of the _Hairdressers Registration Act 1946_; and
- up to $5,000 for a breach of the _Hairdressers Registration Regulations 1965_. 589

2.310 When the Committee consulted the SAT and the DOTAG about these recommendations, both organisations were supportive on the basis that the SAT should have powers which are consistent for all vocational matters and the range of penalties open to the SAT under the _Hairdressers Registration Act 1946_ is more limited than the penalties available under other vocational regulation Acts. 590

2.311 The SAT also suggested that it may be appropriate for it to have the power to reprimand 591 and the DOTAG was in agreement 592.

**Committee Comment**

2.312 The Committee supported the above suggestions for amending the _Hairdressers Registration Act 1946_.

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588 Submission No 37 from the Hairdressers Registration Board of Western Australia, 30 August 2007, p2.
590 Written answer from the State Administrative Tribunal to proposed questions 48 and 49 for the hearing on 21 September 2007, p54; and Letter from Hon Jim McGinty MLA, Attorney General, 29 May 2008, Enclosure 1, p10. For example, see section 57(2)(b) of the _Architects Act 2004_.
591 Written answer from the State Administrative Tribunal to proposed question 48 for the hearing on 21 September 2007, p54.
Recommendation 7: The Committee recommends that the *Hairdressers Registration Act 1946* be amended to empower the State Administrative Tribunal to:

(a) impose a fine of up to $10,000 for a breach of that Act;

(b) impose a fine of up to $5,000 for a breach of the *Hairdressers Registration Regulations 1965*; and

(c) reprimand for such breaches.

**Planning and Development Act 2005**

*Substantive Changes to Planning Proposals*

2.313 In Western Australia, applications to the SAT to review planning decisions generally arise in the context of proposals to either subdivide or develop land. Subdivision proposals (including strata subdivision and some long-term leasing) usually fall into the jurisdiction of the WAPC, while development proposals are largely lodged with the relevant local government, although the WAPC and other State agencies can also be involved in various circumstances.  

2.314 The WAPC suggested that “*major changes*” to a planning proposal, even if that planning proposal is currently before the SAT, “*should be the subject of a new application*” to the [original] decision maker” in order that the original decision-maker can properly perform its role. For example, where the original decision-maker is the WAPC, it would consult the affected local governments and other relevant agencies about any ‘fresh’ planning proposals it received. The DPI agreed that substantially amended proposals should be lodged with the WAPC as new applications:

> The Department believes that SAT should only assess proposals that were initially considered by the original decision-maker. If a proposal is amended substantially, then the original decision-maker is disadvantaged as it has to effectively reassess the proposal in order to make submissions before SAT.

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593 Submission No 93 from the Western Australian Planning Commission, 5 October 2007, p1.

594 As opposed to lodging an amendment to an existing, initial planning proposal: Letter from Mr Moshe Gilovitz, Secretary, Western Australian Planning Commission, 14 May 2008, p2.

595 Submission No 93 from the Western Australian Planning Commission, 5 October 2007, pp9 and 12.

If an applicant wishes to substantially amend its proposal, then the applicant should be required to make a new application for approval to the WAPC. This allows the WAPC to undertake its usual assessment role and seek comments from the relevant bodies, including local governments.\textsuperscript{597}

2.315 The Committee noted that the SAT was established with the policy that it is to review decisions \textit{de novo}\textsuperscript{598}, or anew, taking into account the evidence available before it when determining the review, and not to be restricted to the evidence before the original decision-maker. This is prescribed in section 27 of the SAT Act. Amongst other things, section 29 of the SAT Act gives the SAT, when exercising its review jurisdiction, the functions and discretions corresponding to those exercisable by the original decision-maker in making the reviewable decision. However, section 29(9) of the SAT Act relevantly provides that these powers do not require or enable the SAT to consider a matter that is substantially different to the matter before the original decision-maker:

\textit{To avoid doubt it is declared that this section [section 29] and section 27 do not extend to requiring or enabling the Tribunal to deal with a matter that is different in essence from the matter that was before the decision-maker.}

2.316 Where a matter does fall within the SAT’s jurisdiction, the Committee noted that, pursuant to section 31 SAT Act, the SAT may invite the original decision-maker to reconsider its decision, and this is acknowledged by the WAPC as an available option.\textsuperscript{599} In the SAT’s experience, this process works well and helps to emphasise the important role of the original decision-maker.\textsuperscript{600} The SAT may invite a section 31 reconsideration where, for example:

• the parties request it after mediation;\textsuperscript{601}

• the proceedings are for the review of a deemed refusal and the invitation will enable the original decision-maker to make an actual decision;

\textsuperscript{597} Letter from Mr Eric Lumsden, Director General, Department of Planning and Infrastructure, 18 April 2008, p1.

\textsuperscript{598} “A matter heard \textit{de novo} is heard over again from the beginning. The body conducting the hearing \textit{de novo} is not confined to the evidence or materials which were presented in the original hearing”: The Honourable Dr PE Nygh and P Butt, General Editors, \textit{Butterworths Australian Legal Dictionary}, Butterworths, Perth, 1997, p322.

\textsuperscript{599} Letter from Mr Moshe Gilovitz, Secretary, Western Australian Planning Commission, 14 May 2008, p2.

\textsuperscript{600} Written answer from the State Administrative Tribunal to proposed question 61 for the hearing on 15 February 2008, p36.

\textsuperscript{601} \textit{Ibid.}
• the applicant has provided additional information or clarification since the original decision;
• the applicant has amended the application which is the subject of the decision;
• the factual or legal circumstances have changed since the decision was made;
• the SAT has determined a preliminary issue that might affect the decision; and
• the reasons given for the decision by the original decision-maker are inadequate.  

2.317 Where, after reconsideration pursuant to section 31, the original decision-maker decides to approve the proposal, the applicant may withdraw the SAT application for review or the SAT proceedings may be used to mediate or resolve the conditions of approval.  

2.318 When the Committee queried what the WAPC considered to be a major change to a planning proposal, it provided the following response:

as a guide and without binding the WAPC, a major change to a proposal could be evidenced by:

- the need to make a new reference to or seek substantial additional information from a local government, referral agency or other body;
- a change in the principal land use or uses intended in a proposal;
- a change in a proposal that would impose greater material detriment or loss of amenity to adjoining properties.  

2.319 The Committee was advised by the WAPC that, anecdotally, major changes to planning proposals would occur in five to ten per cent of relevant appeals before the SAT.  

Where this does occur, the WAPC submitted that, typically, the SAT would be “fairly accommodating” to the applicant and invite the respondent to reconsider

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602 State Administrative Tribunal, Section 31 invitation by SAT for decision-maker to reconsider its decision.
603 Letter from the Honourable Justice Michael Barker, President, State Administrative Tribunal, 22 December 2008, Enclosure 1, p7.
604 Letter from Mr Moshe Gilovitz, Secretary, Western Australian Planning Commission, 14 May 2008, p2.
605 Ibid.
606 Mr Malcolm Logan, Team Leader, Appeals Unit, Statutory Planning Division, Western Australian Planning Commission, Transcript of Evidence, 14 May 2008, p4.
the decision under review pursuant to section 31 of the SAT Act. However, contrary to the WAPC’s view, the SAT advised the Committee that inviting a section 31 reconsideration is not an “automatic or “default” step" that is taken by the SAT in the process of reviewing a decision.

2.320 The Town of Vincent recommended that the SAT review its processes and practice notes to clarifying when a planning proposal which is the subject of a SAT application has been altered significantly enough for it to constitute a new proposal which should be lodged afresh with the original decision-maker rather than be appealed to the SAT.

2.321 In a similar vein to the views discussed above, the WALGA thought that it is inappropriate for the SAT to order local governments to prepare ‘without prejudice’ conditions of approval prior to the determination of a review by the SAT because the conditions would reflect the original development application that was before the local government and not necessarily the application before the SAT, which is not confined to matters that were before the original decision-maker. The requirement on the respondent (in this case, the WAPC, the relevant local government or other State agency) to lodge ‘without prejudice’ conditions of approval does not appear to be reflected in any of the SAT’s practice notes nor the SAT’s brochure entitled ‘Documents that may be required by the State Administrative Tribunal in planning applications’. However, the WAPC also expressed its concern about this requirement, albeit on a different basis.

2.322 The SAT confirmed that it does not have the power to consider an application for the review of planning decisions where the proposal is substantially different to the proposal before the original decision-maker; “both as a matter of established planning

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607 Mr Moshe Gilovitz, Secretary, Western Australian Planning Commission, Transcript of Evidence, 14 May 2008, p4.
608 Submission No 93 from the Western Australian Planning Commission, 5 October 2007, p9.
609 Written answer from the State Administrative Tribunal to proposed question 61 for the hearing on 15 February 2008, p36.
610 Submission No 74 from the Town of Vincent, 31 August 2007, p2.
611 Section 27(1) of the State Administrative Tribunal Act 2004.
612 Submission No 80 from the Western Australian Local Government Association, 3 September 2007, p2.
613 The Western Australian Planning Commission was concerned that the requirement may “consume scarce time and resources when the respondent is endeavouring to prepare a proper response to an appeal” and “convey an erroneous impression that a proposal is capable of approval, and it can raise expectations of applicants that a proposal is to be approved”: Submission No 93 from the Western Australian Planning Commission, 5 October 2007, p8. The Western Australian Local Government Association was also of the view that this requirement was a waste of resources and had the potential to create a perception or expectation that the State Administrative Tribunal is likely to overturn the respondent’s decision: Submission No 80 from the Western Australian Local Government Association, 3 September 2007, p2.
The SAT has held that the words ‘different in essence’ in section 29(9) of the SAT Act “simply restate” the common law position on this issue.615

In our opinion it would be manifestly inconvenient if an appellant were unable to amend his application or plan in any respect in the course of or for the purposes of an appeal to the [Town Planning Appeals] Tribunal. The question in any particular case must be whether the amendment if made will constitute a new proposal or whether the proposal as amended remains in substance the same proposal. This is a question of degree.616

2.323 The SAT advised the Committee that, in accordance with the above planning appeals principles which have applied in Western Australia for at least 30 years, it must determine the following question in every instance where an applicant for the review of a planning decision applies for leave to amend the proposal which is before the SAT:

whether the amendment if made will constitute a new proposal or whether the proposal as amended remains in substance the same proposal. This is a question of fact and degree in every case. If the amendment constitutes in essence a new proposal then SAT must reject the application to amend. The matter then proceeds on the basis of the unamended proposal or the applicant may apply to withdraw the application and lodge a fresh application with the original decision-maker.617

2.324 Even if the SAT determines that an amended proposal would not constitute a new proposal in essence, and grants the applicant leave to amend the proposal, the SAT will often invite the original decision-maker to reconsider its decision in relation to the amended proposal, pursuant section 31 of the SAT Act.618

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614 Letter from the Honourable Justice Michael Barker, President, State Administrative Tribunal, 22 December 2008, Enclosure 1, p.5.
615 Moore River Company Pty Ltd v Western Australian Planning Commission [2006] WASAT 269, at paragraph 22 per Chaney J.
617 Letter from the Honourable Justice Michael Barker, President, State Administrative Tribunal, 22 December 2008, Enclosure 1, p.6.
Section 216

2.325 Section 216 of the PD Act permits a responsible authority\(^{619}\) to apply to the Supreme Court for an injunction to restrain a contravention of the Act, an interim development order, a planning scheme or a condition of approval. An injunction is a “court order of an equitable\(^ {620}\) nature requiring a person to do, or refrain from doing, a particular action”\(^ {621}\).

2.326 In its Annual Report 2007, the SAT recommended that section 216 be amended to confer concurrent jurisdiction on the SAT, as constituted by, or including, a judicial member for the following reasons:

The reason for this suggestion is that the Tribunal has been established, in part, as a specialist planning tribunal which already has jurisdiction under section 255 of the Planning and Development Act to review directions given by local governments under section 214 where development is undertaken in contravention of a planning scheme, an interim development order, a planning control area requirement or a condition of approval. The Tribunal undertakes a very similar inquiry under section 255 to the inquiry which would be undertaken in determining an application for civil enforcement under section 216. The only real difference is that section 255 applications are commenced by the recipient of a direction, whereas section 216 applications are commenced by the issuer of a direction.

It is also to be noted that other Australian jurisdictions confer exclusive or concurrent civil enforcement jurisdiction on the equivalent court or tribunal to the DR [Development and Resources] stream of the Tribunal: see Planning and Environment Act 1987 (Vic) section 114 (Victorian Civil and Administrative Tribunal); Land and Environment Court Act 1979 (NSW) sections 20(1), 20(2) and 71 (New South Wales Land and Environment Court); and Land Use Planning and Approvals Act 1993 (Tas) sections 64(1) and (3).

\(^{619}\) Depending on the circumstances, and unless a contrary intention appears in the Act, a ‘responsible authority’ would either be a local government or the Western Australian Planning Commission: section 4(1) of the Planning and Development Act 2005.

\(^{620}\) ‘Equity’ is the term given to “The separate body of law, developed in the [English] Court of Chancery, which supplements, corrects, and controls the rules of common law”: The Honourable Dr PE Nygh and P Butt, General Editors, Butterworths Australian Legal Dictionary, Butterworths, Perth, 1997, p427. After the English Judicature Acts of 1873 and 1875 were passed, the administration of equity and common law were merged into one court, although the two sets of principles remain distinct: M Evans, Outline of Equity and Trusts 3rd Edition, Butterworths, Perth, 1996, p9.

\(^{621}\) The Honourable Dr PE Nygh and P Butt, General Editors, Butterworths Australian Legal Dictionary, Butterworths, Perth, 1997, p600.
2.327 The SAT raised this issue again in its Annual Report 2008.623

2.328 The Committee noted that the SAT is able to grant interim injunctions under section 90 of the SAT Act, but that this power is only exercisable by the SAT in matters which are within its jurisdiction. Currently, applications pursuant to section 216 of the PD Act cannot be considered by the SAT.624

2.329 The Committee also noted that, since the English Judicature Acts of 1873 and 1875 were re-enacted in Australian jurisdictions, the administration of equitable principles, including the granting of remedies of an equitable nature, such as injunctions, has been traditionally regarded as the special purview of the Supreme Court,625 although limited jurisdiction has been granted by statute to the District Court, Magistrates Court and other inferior adjudicative bodies such as the SAT626. This fundamental legal convention was acknowledged by the President of the SAT:

There is a great reluctance, I think, by superior courts around Australia, including the Supreme Court of Western Australia, to see inferior courts and tribunals like ours exercising equitable powers. For lawyers, putting it lightly, equity is something that should only be held at the highest levels by very careful hands, and there is insufficient trust for it to be handled lower down the chain, ... The same issues apply to the Magistrates Court and even the District Court.627

2.330 The DOTAG did not express a view on the SAT’s suggestion, instead referring the Committee to the DPI, the department administering the PD Act, and the President of the SAT.628 The DPI agreed with the suggested amendment. In fact, the DPI

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624 Written answer from the State Administrative Tribunal to proposed question 10 for the hearing on 21 September 2007, p10.
626 Section 57(1) of the District Court of Western Australia Act 1969; section 10 of the Magistrates Court Act 2004; and, for example, section 90 of the State Administrative Tribunal Act 2004.
627 The Honourable Justice Michael Barker, President, State Administrative Tribunal, Transcript of Evidence, 21 September 2007, p43.
supported the amendment of section 216 of the PD Act so that applications for injunction under that section could only be dealt with by the SAT, rather than giving a responsible authority the option of applying to either the Supreme Court or the SAT.629

**Committee Comment**

2.331 The Committee did not support widening the scope of the SAT’s powers to grant injunctions.

**Sections 239(2) and 246(2)**

2.332 In its *Annual Report 2005*, the SAT made the following proposals for improving its operations:

> Under some enabling Act provisions, ... the President is either the only member who may exercise a power or the President must be part of the Tribunal which makes a decision. There seems no compelling reason why a Deputy President should not be able to exercise all of the powers given to the President by an enabling Act. This change would assist the Tribunal in the timely disposition of its work.630

2.333 The SAT informed the Committee that sections 238(3) and (4), 239(2), 244 and 246(2) of the PD Act also limit the flexibility of the constitution of the SAT,631 with the last three of these provisions requiring the President to exercise certain powers or conduct certain tasks.

2.334 The Committee noted that the *Acts Amendment (Justice) Act 2008* repeals sections 238(3) and (4) and amends section 244 to address this issue, but does not affect sections 239(2) and 246(2).632

2.335 When the Committee queried these apparent oversights in the *Acts Amendment (Justice) Act 2008*, the DOTAG advised the Committee that this is a policy consideration for the Government:

> however the Department does not consider there to be any legal impediments to amending the legislation to enable the Deputy

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629 Letter from Mr Eric Lumsden, Director General, Department of Planning and Infrastructure, 18 April 2008, p1.


631 Written answer from the State Administrative Tribunal to proposed question 16 for the hearing on 21 September 2007, p18.

President to exercise powers currently reserved to the President under the relevant sections of the Planning and Development Act 2005 … 633

Committee Comment

2.336 The Committee was of the view that all of the SAT’s relevant enabling Acts should be amended:

- to enable either the President or a Deputy President to exercise the powers and conduct the tasks which are currently reserved for the President; and

- where the SAT panel in any matter must currently be constituted by, or include, the President, to allow the panel to be constituted by, or include, either the President or a Deputy President.

Recommendation 8: The Committee recommends that all of the State Administrative Tribunal’s relevant enabling Acts be amended:

(a) to enable either the President or a Deputy President to exercise the powers and conduct the tasks which are currently reserved for the President; and

(b) where the Tribunal panel in any matter must currently be constituted by, or include, the President, to allow the panel to be constituted by, or include, either the President or a Deputy President.

State Administrative Tribunal Act 2004

Section 11(4)

2.337 When the SAT is dealing with a vocational matter, section 11(4) of the SAT Act requires the determining SAT panel to be comprised of three persons, being:

(a) one person who is a legally qualified member [of the SAT];

(b) one person who has extensive or special experience in the same vocation as the person affected by or the subject of the decision or matter; and

(c) one person not engaged in that vocation who is familiar with the interests of persons dealing with persons engaged in that vocation or has knowledge or experience enabling the person to understand those interests.

2.338 For the purposes of section 11(4), vocational matters include:

- matters brought before the SAT by any person under a vocational Act. ‘Vocational Acts’ are the enabling Acts prescribed in Schedule 1 of the SAT Regulations, and include, for example, the Osteopaths Act 2005.

- applications for the review of decisions of vocational regulatory bodies. ‘Vocational regulatory bodies’ are bodies which, or persons who, pursuant to a ‘vocational Act’, exercise control over a person’s capacity to lawfully pursue a vocation; and

- matters brought before the SAT by a vocational regulatory body.

2.339 Section 11(5) of the SAT Act provides that the requirement for the SAT panel to be comprised of three people does not apply to:

- a directions hearing or other procedural hearing;

- a compulsory conference; or

- the appointment of a Tribunal member as a mediator.

2.340 The Committee understands that the section 11(4) requirement has caused the SAT some difficulties, particularly when dealing with urgent vocational matters. As a result, the SAT has recommended that:

- the range of vocational regulatory bodies and vocational Acts classified by Schedule 1 of the SAT Regulations be reconsidered, with a view to narrowing this range;

- there be some extension of the occasions where the section 11(4) requirement does not apply; and

- the President be given discretion as to the constitution of the SAT in urgent vocational matters, such as determining whether an interim restriction on a person’s right to practise their vocation should be confirmed, extended or revoked while his or her disciplinary proceedings are being considered by the
SAT (refer to paragraph 2.341 below for a more detailed discussion of this scenario).\(^{634}\)

2.341 The SAT’s *Annual Report 2005* provided some examples of the difficulties caused by section 11(4):

- “Under a number of vocational Acts, a vocational regulatory body has the power to impose a short-term restriction on the right of practice of a licensed person. In those cases, the body is required to refer the matter to the Tribunal. The Tribunal will often be required to make an order confirming or revoking the interim restriction or extending the period of time of its operation through to a hearing of a substantive application for disciplinary action. It is important that the Tribunal be in a position to deal with those types of applications expeditiously given that a person’s livelihood is at stake, even if only for a limited period of time. The obligation to convene a three-person tribunal consisting of appropriately qualified people can affect the timeliness within which the Tribunal can deal with a particular matter.”\(^{635}\)

- “[The exceptions prescribed in section 11(5)] do not enable the Tribunal to deal with matters immediately, if for example, a respondent to a disciplinary matter wished to plead guilty to the allegation against them at the initial directions hearing, because of the need to constitute the Tribunal in accordance with section 11(4) of the *State Administrative Tribunal Act 2004* or an applicant affected by a registration decision wishes to obtain an order staying its effect pending a final hearing of the application. This may result in delay and inconvenience to the parties. In many cases, the appropriate outcome is relatively clear, and there remains a question as to whether anything is gained by the requirement for additional members to deal with the issues of penalty.”\(^{636}\)

- Travelling to regional areas with a three-person SAT panel may be difficult, in which case the SAT has tended to resort to the use of telephone or videoconferencing.

- The SAT has had problems identifying and appointing persons who would satisfy the requirements of section 11(4)(b) in vocational matters under the *Security and Related Activities (Control) Act 1996*.

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\(^{635}\) *Ibid*, p53.

\(^{636}\) *Ibid*, p27.
2.342 When the SAT’s recommendations were put to the DOTAG, it indicated that it would “support amendments to the SAT Act to enable the President to determine the constitution of the tribunal for any given matter.”

Committee Comment

2.343 The Committee was of the view that the SAT Act and all relevant SAT enabling Acts should be amended to enable the President of the SAT to determine the constitution of the SAT in any matter. The Committee reiterates Recommendation 6 in this Report.

Section 24

2.344 Section 24 of the SAT Act applies in relation to the SAT’s review jurisdiction and provides as follows:

24. Provision of documents and material by decision-maker

If a proceeding for the review of a decision is commenced, the decision-maker is to provide the following to the Tribunal in accordance with the rules —

(a) a statement of the reasons for the decision;

(b) other documents and other material in the decision-maker’s possession or under the decision-maker’s control and relevant to the Tribunal’s review of the decision. (emphasis added)

2.345 The Committee noted that while section 24 requires the decision-maker to provide the above material to the SAT, rule 12 of the SAT Rules authorises the SAT to order a decision-maker to provide a copy of this material to any other party or to a person who has been granted leave by the SAT to make submissions in the proceedings.

Abrogation of Fundamental Common Law Rights

2.346 The Department of Treasury and Finance submitted that it is currently unclear whether section 24 of the SAT Act requires documents that are subject to legal professional privilege to be produced to the SAT. It recommended that “the SAT Act should be amended to confirm that section 24 of the SAT Act does not require decision-makers to produce privileged material to the Tribunal.”

637 Written answer from the Department of the Attorney General to proposed question 9 for the hearing on 25 March 2008, p8.

638 Submission No 54 from the Department of Treasury and Finance, 29 August 2007, pp1-2.
2.347 Similarly, the State Solicitor’s Office considered that the SAT Act is not entirely clear in relation to whether decision-makers are required to produce, to the SAT, documents and information that would ordinarily be protected from production in court proceedings by public interest immunity and legal professional privilege. It recommended that the SAT Act be amended to clarify these issues.639

2.348 ‘Legal professional privilege’ has been defined as:

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A \text{ common law principle protecting the confidentiality of statements and other materials made between a legal practitioner and client where those statements and other materials have been made or brought into existence for the dominant purpose of the client obtaining, or the legal practitioner giving, legal advice or for use in existing or contemplated judicial or quasi-judicial proceedings.}^{640}
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2.349 In Daniels Corporation International Pty Ltd and Another v Australian Competition and Consumer Commission (2002) 213 CLR 543, the High Court recognised legal professional privilege as an “important common law right, or, perhaps more accurately, an important common law immunity.”641 Legal professional privilege is an absolute privilege because it:

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\text{promotes the public interest by preserving the confidentiality of communications between lawyer and client, encouraging the client to make a full and frank disclosure of the relevant circumstances to the legal adviser. In so doing, the privilege outweighs the competing public interest that in the interests of a fair trial all relevant material should be available.}^{642}
\]

2.350 ‘Public interest immunity’, sometimes also known as ‘Crown privilege’, has been defined as “A rule of evidence exempting the production of documents or information where their disclosure would be against the public interest.”643 As an example of the type of material that may be subject to public interest immunity, there is a general assumption that important state documents relating to high level policy decisions, in particular, Cabinet decisions and Cabinet papers, are immune from production.644

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639 Submission No 86 from the State Solicitor’s Office, 14 September 2007.
641 Daniels Corporation International Pty Ltd and Another v Australian Competition and Consumer Commission (2002) 213 CLR 543, at paragraph 11 per Gleeson CJ, Gaudron, Gummow and Hayne JJ; and see also at paragraph 44 per McHugh J and paragraph 132 per Callinan J.
642 Halsbury’s Laws of Australia, LexisNexis, paragraph 195-7450; and see also Grant v Downs (1976) 135 CLR 674, at p685.
644 Ibid, quoting Sankey v Whitlam (1978) 142 CLR 1 at p95.
Claims of public interest immunity have also been made in relation to State secrets and for the protection of police informers. Categories of public interest immunity are not closed.\textsuperscript{645}

2.351 Public interest immunity has also been recognised as a basic common law doctrine.\textsuperscript{646} However, unlike legal professional privilege, public interest immunity is not an absolute immunity; in determining whether to allow a claim of public interest immunity, a court must balance the public interest in withholding the production of a document against the public interest in ensuring that courts performing the functions of justice should have access to relevant evidence.\textsuperscript{647}

2.352 Historically, the courts have carefully guarded fundamental common law principles, rights, freedoms and immunities when interpreting legislation – statutory provisions are construed to presume that these principles, rights, freedoms and immunities are not eroded or abrogated unless there are clear words, or there is necessary implication, to that effect. In Coco v The Queen (1994) 179 CLR 427, it was held that:

\begin{quote}
The courts should not impute to the legislature an intention to interfere with fundamental rights. Such an intention must be clearly manifested by unmistakable and unambiguous language. General words will rarely be sufficient for that purpose if they do not specifically deal with the question because, in the context in which they appear, they will often be ambiguous on the aspect of interference with fundamental rights.\textsuperscript{648}
\end{quote}

2.353 The High Court also acknowledged that where a statutory provision does not contain express words displacing the presumption against interfering with fundamental common law rights, the presumption may be displaced by necessary implication. However, this effect would only be implied if it were necessary to prevent a statutory provision from becoming inoperative or meaningless. In the High Court’s view, such a case would be rare where general words are used.\textsuperscript{649}

2.354 This threshold approach to interpreting statutes was reaffirmed by the High Court in Daniels Corporation International Pty Ltd and Another v Australian Competition and Consumer Commission. In this case, the High Court, in finding that legal professional privilege was not abrogated by section 155 of the Trade Practices Act 1974 (Cth), re-

\begin{itemize}
\item \textsuperscript{645} Halsbury’s Laws of Australia, LexisNexis, paragraphs 90-3150 and 195-7520.
\item \textsuperscript{646} Jacobsen and Another v Rogers (1995) 127 A LR 159 at p165 per Mason CJ, Deane, Dawson, Toohey and Gaudron JJ.
\item \textsuperscript{647} Encyclopaedic Australian Legal Dictionary, On-line, LexisNexis, quoting Sankey v Whitlam (1978) 142 CLR 1; and see also Commonwealth v Northern Land Council (1992) 176 CLR 604.
\item \textsuperscript{648} Coco v The Queen (1994) 179 CLR 427, at p437 per Mason CJ, Brennan, Gaudron and McHugh JJ.
\item \textsuperscript{649} Coco v The Queen (1994) 179 CLR 427, at p437 per Mason CJ, Brennan, Gaudron and McHugh JJ.
\end{itemize}
stated its view that statutory provisions are not to be construed as abrogating important common law rights, privileges and immunities in the absence of clear words or a necessary implication to that effect.\(^{650}\)

2.355 The Department of Treasury and Finance observed that there is no provision in the SAT Act which expressly overrides legal professional privilege. It advised that the Commissioner of State Revenue, being of the view that section 24 also does not implicitly abrogate legal professional privilege, has consistently held the position that section 24 does not require the decision-maker to produce documents which fall into this category. Bundles of documents, prepared by the State Solicitor’s Office on behalf of the Commissioner of State Revenue, have been lodged pursuant to section 24 without documents which are subject to legal professional privilege and statements to this effect are placed on each bundle. The Department advised that the SAT has not taken issue with this practice and appears to have been able to conduct its review proceedings satisfactorily over the first two years of its operation despite that practice.\(^{651}\) The SAT confirmed that this practice has been occurring:

> 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.”\(^{652}\)

2.356 The State Solicitor’s Office held a similar view to the Department of Treasury and Finance and the Commissioner of State Revenue. It maintained that there are no provisions in the SAT Act, including section 24, which either expressly or implicitly abrogate legal professional privilege and public interest immunity. Instead, the State Solicitor’s Office argued that the SAT Act, when it is examined as a whole, indicates that the Parliament intended to actively preserve both basic common law immunities in all instances.\(^{653}\) The State Solicitor’s Office relied on sections 34, 35, 66, 159, and, to a lesser extent, 69, of the SAT Act for its interpretation. These provisions are replicated below for the information of the Legislative Council:

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\(^{650}\) Daniels Corporation International Pty Ltd and Another v Australian Competition and Consumer Commission (2002) 213 CLR 543, at paragraph 11 and 132 per Gleeson CJ, Gaudron, Gummow and Hayne JJ, paragraph 43 per McHugh J and paragraph 132 per Callinan J.

\(^{651}\) Submission No 54 from the Department of Treasury and Finance, 29 August 2007, p2.

\(^{652}\) The Honourable Justice Michael Barker, President, State Administrative Tribunal, Transcript of Evidence, 15 February 2008, p21.

\(^{653}\) Submission No 86 from the State Solicitor’s Office, 14 September 2007, pp4-8.
34. **Directions**

(1) The Tribunal may give directions at any time in a proceeding and do whatever is necessary for the speedy and fair conduct of the proceeding.

(2) The Tribunal’s power to give directions is exercisable by —

(a) a legally qualified member; or

(b) the presiding member if the Tribunal as constituted for a hearing does not consist of or include a legally qualified member.

(3) The Tribunal may give directions on its own initiative or at the request of a party.

(4) A directions hearing conducted or presided over by a legally qualified member may be held for the purposes of this section before any other hearing in the proceeding.

(5) The Tribunal may give a direction requiring a party to produce a document or other material, or provide information, to the Tribunal or another party despite any rule of law relating to privilege (other than legal professional privilege) or the public interest in relation to the production of documents.

(6) However if the Tribunal considers that any document is or contains protected matter[^654], the Tribunal cannot direct a party to produce it to another party.

35. **Obtaining information from third parties**

(1) On the application of a party to a proceeding, the Tribunal may order that a person —

(a) who is not a party to the proceeding; and

[^654]: Unless the contrary intention appears, “protected matter” means “(a) any information or document to which a certificate under section 159(2) applies, except to the extent that an order of the Tribunal under section 159(4) that its disclosure would not be contrary to the public interest has effect; or” (b) matter that is exempt under Schedule 1 to the Freedom of Information Act 1992 or a document that contains such matter: section 3(1) of the State Administrative Tribunal Act 2004.
(b) who has, or is likely to have, in the person’s possession or under the person’s control a document or other material that is relevant to the proceeding, produce the document or material to the Tribunal or the party within the time specified in the order.

(2) The Tribunal may order a person to produce a document or other material despite any rule of law relating to privilege (other than legal professional privilege) or the public interest in relation to the production of documents.

(3) However if the Tribunal considers that any document is or contains protected matter, the Tribunal cannot order a person to produce it to a party.

…

66. Summoning witness

(1) The Tribunal may, by summons signed on behalf of the Tribunal by the executive officer, require —

(a) the attendance before the Tribunal of any person;

(b) the production before the Tribunal of any document or other material.

(2) A summons under subsection (1)(a) may be issued on the Tribunal’s initiative or at the request of a party.

(3) A summons under subsection (1)(b) may be issued on the Tribunal’s initiative.

(4) A summons under subsection (1)(b) may require a person to produce a document or other material despite any rule of law relating to privilege (other than legal professional privilege) or the public interest in relation to the production of documents.

(5) A person who attends in answer to, or to comply with, a summons is entitled to be paid the fees and allowances prescribed in the rules or, if no fees and allowances are prescribed, the fees and allowances (if any) determined by the Tribunal.
(6) The Tribunal may determine —

(a) by which party; or

(b) by which parties and in which proportions,

the fees and allowances are to be paid.

...

69. Other claims of privilege

(1) Unless it would be contrary to section 68 or a direction under section 34(5), a person is excused from answering a question or producing a document or other material in a proceeding if the person could not be compelled to answer the question or produce the document or material in proceedings in the Supreme Court.

(2) The Tribunal may require a person to produce a document or other material to it for the purpose of determining whether or not it is a document or material that the Tribunal has power to compel the person to produce.

...

159. Whether disclosure contrary to public interest

(1) In this section —

“certificate” means a certificate under subsection (2);

“document” includes a part of a document.

(2) The Attorney General may certify in writing that the disclosure of information about a specified matter, or the disclosure of any matter contained in a document, would be contrary to the public interest for a reason described in subsection (3) that is specified in the certificate.

(3) The certificate may specify that the disclosure would be contrary to the public interest —

Section 68 of the State Administrative Tribunal Act 2004 is entitled, “Privilege against self-incrimination”.


(a) because the disclosure would reveal deliberations or decisions of —

(i) Cabinet;

(ii) a committee of Cabinet;

(iii) a subcommittee of a committee of Cabinet; or

(iv) Executive Council;

(b) because the disclosure would reveal something that parliamentary privilege protects from disclosure;

(c) because the disclosure would endanger the national or international security of Western Australia or Australia;

(d) because the disclosure would damage intergovernmental relations; or

(e) for any other reason that could form the basis for a claim by the State in a proceeding in the Supreme Court that the information or matter should not be disclosed.

(4) The Tribunal constituted by the President sitting alone may order that the disclosure of any particular information or document to which a certificate applies would not be contrary to the public interest and, subject to subsection (7), the order has effect despite the certificate.

(5) Any information or document to which a certificate applies is required, if requested, to be disclosed to the Tribunal constituted by the President sitting alone for the purpose of deciding whether to make an order under subsection (4).

(6) For the purposes of section 105 the question of whether or not the disclosure of any particular information or document would be contrary to the public interest is a question of law.

(7) If the Attorney General appeals under section 105 from a decision of the Tribunal to make an order under subsection (4), the Attorney General may notify the Tribunal in writing that the certificate is confirmed and in that case the
certificate continues to have effect and the order ceases to have effect —

(a) pending the determination of the application for leave to appeal; and

(b) if leave is granted, pending the determination of the appeal.

2.357 With respect to legal professional privilege, the State Solicitor’s Office observed that sections 34(5) and 35(2) of the SAT Act expressly protect people who hold material which falls under this category from being directed or ordered to produce such material to the SAT or another party. Section 66 of the SAT Act deals with, among other things, the summoning of a person to produce a document or other material to the SAT only. Section 66(4) then provides that a summons of this nature cannot require a person to produce a document or material that is subject to legal professional privilege.656

2.358 Section 69 also appears to preserve legal professional privilege, except to the extent where the SAT requires a person to produce the relevant material for the purpose of determining whether or not the material is something that the SAT has the power to compel the person to provide. This erosion of legal professional privilege appears to be necessarily implied in section 69(2) because this provision would become inoperative and meaningless if, for example, the SAT was unable to require a person to produce a document or material claimed to be subject to legal professional privilege for the purpose set out in this section.

2.359 In relation to public interest immunity, the State Solicitor’s Office argued that the Parliament had intended to preserve this immunity because:

- with respect to the provision of material to other parties pursuant to section 34(5), a person cannot be directed to provide material which the SAT considers is or contains protected matter.657 Similarly, while the SAT can order a person to provide material to a party pursuant to section 35(2), the SAT cannot order such production in relation to material which the SAT considers is or contains protected matter.658 ‘Protected matter’659 includes

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656 Submission No 86 from the State Solicitor’s Office, 14 September 2007, pp7-8.
657 See section 34(6) of the State Administrative Tribunal Act 2004; and Submission No 86 from the State Solicitor’s Office, 14 September 2007, p6.
658 See section 35(3) of the State Administrative Tribunal Act 2004.
material which is certified by the Attorney General under section 159(2) as being of such a nature that its disclosure would be contrary to the public interest for a reason that is prescribed in section 159(3) and specified in the certificate. The term also includes exempt matter under Schedule 1 of the Freedom of Information Act 1992 (FOI Act), which includes some examples of material that would be subject to public interest immunity;

- with respect to the provision of material to the SAT pursuant to sections 34(5), 35(2), 66(4) and 69(2), these sections only interfere with the immunity in very limited circumstances; that is, where a section 159(2) certificate has not been issued by the Attorney General in relation to the relevant material; 660 and

- “it is extremely unlikely that, in relation to proceedings in the Tribunal, Parliament would have intended to afford less protection to documents held by a decision maker that would ordinarily be protected from production by public interest immunity, than the protection afforded to documents held by the decision maker that are subject to legal professional privilege.” 661

2.360 The basis of the State Solicitors Office’s argument with respect to the provision of material to the SAT, set out in the preceding paragraph, is that section 159 only authorises the certified material to be examined by the President of the SAT, sitting alone, for the purposes of determining whether disclosure of the material would be contrary to the public interest; any other construction of the above provisions (sections 34(5), 35(2), 66(4) and 69(2)) would result in any SAT member, not just the President, being able to examine material certified under section 159. 662 Therefore, the State Solicitor’s Office recommended that sections 34(5), 35(2) and 66(4) be amended to clarify that, with respect to the provision of material to the SAT, these provisions do not apply to material certified under section 159(2). 663

2.361 However, the Committee noted that section 160 of the SAT Act, entitled, “How Tribunal is to deal with protected matter”, contemplates that material certified under section 159, which falls within the definition of protected matter, may be disclosed to people other than the President, being:

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659 Unless the contrary intention appears, ‘protected matter’ means ‘(a) any information or document to which a certificate under section 159(2) applies, except to the extent that an order of the Tribunal under section 159(4) that its disclosure would not be contrary to the public interest has effect; or’ (b) matter that is exempt under Schedule 1 to the Freedom of Information Act 1992 or a document that contains such matter: ibid, section 3(1).

660 Submission No 86 from the State Solicitor’s Office, 14 September 2007, p7.


662 Ibid, pp5 and 7.

(a) a sitting member[664] of the Tribunal; or

(b) a person to whom disclosure is allowed under subsection (3).

(3) The Tribunal, with the consent of the President, may allow a party, or a representative of a party, to have access to information, or inspect a document, to which a certificate under section 159(2) applies on any conditions the Tribunal thinks fit except that a person cannot be given access to matter that the Tribunal considers to be exempt matter[665], or allowed to inspect a document that the Tribunal considers to be an exempt document[666].

2.362 The operation of section 160 is consistent with directions, orders or summonses given, made or issued, under sections 34(5), 35(2) and 66(4), respectively, for people to produce material to the SAT “despite any rule of law relating to ... the public interest in relation to the production of documents.” The State Solicitor’s Office observed that the term ‘public interest’ in section 34(5) is not defined or qualified by reference to the description of ‘public interest’ in section 159(3). The same observation can be made of sections 35(2) and 66(4). In fact, the three sections refer to “any rule of law relating to ... the public interest in relation to the production of documents”, which is a clear reference to the common law doctrine of public interest immunity. As such, the reference to ‘public interest’ in sections 34(5), 35(2) and 66(4) is wider than, and includes, the reasons prescribed in section 159(3). Therefore, the scope of material contemplated by sections 34(5), 35(2) and 55(4) is wider than, and would include, material certified under section 159.

2.363 The Committee also noted that sections 34(5) and 35(3) of the SAT Act prohibit the SAT from directing or ordering a person to produce any document “if the Tribunal considers that any document is or contains protected matter ...” (emphasis added). That is, the operation of these sections assumes that the documents in question have already been provided to, and examined by, the SAT.

[664] Unless the contrary intention appears, ‘sitting member’ of the State Administrative Tribunal means “a person who constitutes, or is one of the persons constituting, the Tribunal for dealing with the matter concerned”: section 3(1) of the State Administrative Tribunal Act 2004.

[665] Unless the contrary intention appears, ‘exempt matter’ means “matter that is exempt under Schedule 1 to the Freedom of Information Act 1992”: ibid, section 3(1).

[666] Unless the contrary intention appears, ‘exempt document’ means “a document that contains exempt matter”: ibid, section 3(1).

Section 69(1) also contemplates the erosion of public interest immunity because it provides that a person cannot be excused from answering a question or producing material during a SAT proceeding if, by refraining from answering or producing the relevant material, he or she is in contravention of a section 34(5) direction – and that direction may require the person to provide information or material that is otherwise subject to public interest immunity to either the SAT or a party. Given that a section 35(2) order and a section 66(4) summons can, like a section 34(5) direction, compel a person to produce otherwise privileged material, the Committee noted that it is unusual that there should be a reference in section 69(1) to section 34(5) directions but not also to section 35(2) orders and section 66(4) summonses.

Section 69(2) also appears to erode public interest immunity. Where a person wants to be excused from answering a question or producing material which is subject to public interest immunity and a section 34(5) direction does not exist, the SAT may require a person to produce the relevant material for the purpose of determining whether or not the material is something that the SAT has the power to compel the person to provide. This erosion of public interest immunity appears to be necessarily implied in section 69(2) because this provision would become inoperative and meaningless if, for example, the SAT was unable to require a person to produce a document or material claimed to be subject to public interest immunity for the purpose set out in this section.

The SAT was aware of the views held by the Department of Treasury and Finance (Commissioner of State Revenue) and the State Solicitor’s Office in relation to section 24 of the SAT Act and stated that “This is a policy issue that requires resolution by Government and the Parliament sooner rather than later.” In the opinion of the President of the SAT, section 24 should require all materials in the decision-maker’s control, including those which are subject to legal professional privilege, to be provided to the SAT. If the policy position is different, the SAT Act should be amended. The President provided the following reasons for his view:

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.

668 Written Presentation from the Honourable Justice Michael Barker, President, State Administrative Tribunal, 21 September 2007, p32.
669 Written answer from the State Administrative Tribunal to proposed question 15 for the hearing on 15 February 2008, pp10-11.
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.

... 

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.670

2.367 The President’s view accords with the purposive approach to interpreting legislation, as reflected in section 18 of the Interpretation Act 1984:

18. Purpose or object of written law, use of in interpretation

In the interpretation of a provision of a written law, a construction that would promote the purpose or object

underlying the written law (whether that purpose or object is expressly stated in the written law or not) shall be preferred to a construction that would not promote that purpose or object.

2.368 One of the objectives of the SAT is to “make or review decisions ... according to the substantial merits of the case”. The review of administrative decisions on their merits has been defined as follows:

Review by a court or tribunal of the decision of a primary decision-maker where the review body is able to examine the facts and substitute its decision for that of the primary decision-maker as to what is the preferable outcome on the facts of the particular case.

2.369 Given that merits review requires the reviewer to essentially ‘step into the shoes’ of the original decision-maker, the President’s interpretation of section 24 is worth noting. The State Solicitor’s Office was concerned that such an interpretation would result in privileged material being provided to, examined by, and used by, the SAT members to determine matters without necessarily providing the other parties with an opportunity to view, call evidence relating to, or make any submissions on, the privileged material, particularly where the material is considered to be protected matter. However, the Committee noted that this situation could also arise in the original decision-maker’s consideration of a matter.

2.370 When the Committee sought the DOTAG’s views in relation to section 24 and the issues discussed above, it stated that the SAT Act should be amended to clarify any uncertainties and inconsistencies in these respects.

Committee Comment

2.371 The Committee was of the view that:

- legal professional privilege appears to be preserved throughout the SAT Act, including section 24, except perhaps for section 69(2) where an erosion of the

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671 Section 9(a) of the State Administrative Tribunal Act 2004.


673 Submission No 86 from the State Solicitor’s Office, 14 September 2007, p3. However, section 160(3) of the State Administrative Tribunal Act 2004 authorises the State Administrative Tribunal, with the consent of the President, to allow a party, or a representative of a party, to have access to information, or inspect a document, to which a section 159(2) certificate applies on any conditions the Tribunal thinks fit. The Tribunal may not exercise this authority if it considers the matter to be exempt matter or an exempt document.

privilege may be necessarily implied; and

- the protection of public interest immunity is less clear. While section 24 is silent in this aspect, the abrogation of the immunity is evident in sections 34(5), 35(2), 66(4), 69 and 160. Contrary to the contentions of the State Solicitor’s Office, the Parliament has clearly and purposefully afforded less protection to material which is subject to public interest immunity than material which is subject to legal professional privilege.

2.372 The Committee was of the view that section 24, in its current form, does not require original decision-makers to provide the SAT with material which is subject to legal professional privilege and public interest immunity. In arriving at this conclusion, the Committee relied on the approach adopted by the High Court in *Coco v The Queen*675 and *Daniels Corporation International Pty Ltd and Another v Australian Competition and Consumer Commission*676 and considered the following factors:

- Section 24 does not expressly erode or abrogate legal professional privilege or public interest immunity. In fact, the section is silent in this respect.

- Section 24 does not implicitly erode or abrogate these immunities because it would still be operative and meaningful if the original decision-maker did not provide material that is subject to legal professional privilege and/or public interest immunity. This is evidenced by the fact that the Commissioner for State Revenue has continuously and openly omitted documents of this nature from the section 24 bundles lodged by his office, so far without any objection from the SAT.

- The purposive approach espoused by the President has merit. However, the Committee formed the view that the general nature of the words used in section 24 is incapable of conveying the very significant purpose of interfering with such fundamental common law immunities as legal professional privilege and public interest immunity. That is, the interpretation preferred by the President is not available within the confines of the words which were used.

- An examination of sections 34(5), 35(2), 66(4), 69, 159 and 160(3) of the SAT Act would not necessarily be determinative of the issues in relation to section 24 because they are different sections which appear in a different Part of the SAT Act. The question of whether a particular statutory provision overrides a fundamental common law principle should be resolved with

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regard to the words and intent of that statutory provision in relation to the object of the Act in which it appears. Section 24, which appears in Part 3, Division 3, stands alone from the other sections, which appear in Parts 4 and 8 – it only applies to the SAT when exercising its review jurisdiction whereas sections 34, 35, 66, 69, 159 and 160 appear to have general application across both the SAT’s original and review jurisdictions. In the event of any inconsistency between section 24 and the other sections, section 24 would prevail as it is more specific in application.677

2.373 However, the Committee supported the President’s preferred approach; if the SAT is to review decisions on their merits and ‘step into the shoes’ of the original decision-maker, as envisaged by the Parliament, it must have access to all of the relevant documents and materials in the possession, or under the control, of the original decision-maker. In a practical sense, it is nonsensical to allow a claim of public interest immunity in section 24 when the SAT can merely:

- direct, order, summon or require material which is otherwise subject to public interest immunity to be provided to it under sections 34(5), 35(2), 66(4) and 69(2), respectively; or

- direct or order production of such material to another party under sections 34(5) and 35(2), respectively, or allow another party to have access to such material under section 160(3).

2.374 If section 24 is to require original decision-makers whose decisions are under review by the SAT to provide the SAT with documents and materials which are otherwise subject to legal professional privilege and/or public interest immunity, as the Committee believed it should, this intent should be expressed clearly and unambiguously. As recently stated in the Supreme Court:

*The most satisfactory means of manifesting a legislative intent to abrogate common law rights and privileges is by the use of “express and specific words” …*678

2.375 As an example of the express words which could be used in section 24 of the SAT Act, the equivalent sections in the *Administrative Appeals Tribunal Act 1975* (Cth) and the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) provide as follows:

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678 *Rugs–a–Million (WA) Pty Ltd v Walker* [2007] WASCA 23, at paragraph 37 per Pullin JA, quoting *Coco v The Queen* (1994) 179 CLR 427 at p446 per Deane and Dawson JJ.
• “This section has effect notwithstanding any rule of law relating to privilege or the public interest in relation to the production of documents.” 679

• “This section applies despite any rule of law relating to privilege or the public interest in relation to the production of documents.” 680

2.376 However, if section 24 is amended in this way, rule 12 of the SAT Rules may also need to be amended in order to clarify whether the SAT may order the original decision-maker to provide a copy of documents or materials that are subject to legal professional privilege and/or public interest immunity to other parties or people who have been granted leave by the SAT to make submissions in the proceedings in that case.

2.377 With regard to rule 12, the Committee considered that the SAT should be empowered to order original decision-makers to provide documents or materials which are subject to public interest immunity to other parties or people who have been granted leave by the SAT to make submissions in the proceedings, unless the document or material is protected matter. In addition, the SAT should be prohibited from ordering the provision of documents which would attract legal professional privilege to other parties or people with leave to make submissions. This policy position accords with the general intent in sections 34, 35, 66, 69, and to a lesser extent, in section 160(3), of the SAT Act. It would require rule 12 to be amended.

2.378 If accepted by the Government, this policy option would require the original decision-maker to identify the documents in relation to which it claims legal professional privilege and public interest immunity, which, the Committee was advised, is an exercise which original decision-makers already undergo when preparing their section 24 bundles. Original decision-makers may also need to identify the documents which would constitute protected matter. The SAT would then be required to decide if the claims are justified in order to identify those documents which should not be provided to the other parties or people who have been granted leave by the SAT to make submissions in the proceedings.

2.379 The Committee’s policy position with respect to rule 12 is different to the approaches in the VCAT and the Administrative Appeals Tribunal (AAT), which are summarised as follows:

• Section 49 of the Victorian Civil and Administrative Tribunal Act 1998 (Vic), which is equivalent to section 24 of the SAT Act, does not provide that the applicant for review or any other person must be given a copy of the

679 Section 37(3) of the Administrative Appeals Tribunal Act 1975 (Cth).
680 Section 49(5) of the Victorian Civil and Administrative Tribunal Act 1998 (Vic).
documents provided under this section. Even so, the VCAT has observed that section 49 contemplates the lodging of relevant material with the VCAT and the provision of access of this material to the applicant, despite any rule of law relating to privilege or the public interest. Therefore, the VCAT may give a direction that the applicant be given a copy of the section 49 documents so long as other sections of the Victorian Act, which seek to restrict disclosure of certain matters (such as where the Premier has certified that the disclosure of a document would be contrary to the public interest681), are not infringed. The VCAT was of the view that this approach accords with common sense because an applicant who is seeking to challenge a decision of an original decision-maker should, in general, have access to the documents upon which the original decision-maker relied. However, the VCAT emphasised that any document provided under section 49 would be “subject to an implied undertaking that it not be used for purposes other than the proceeding before the Tribunal.”682

- Section 37 of the Administrative Appeals Tribunal Act 1975 (Cth) is equivalent to section 24 of the SAT Act. Section 37(1AE) of the Commonwealth Act provides that the original decision-maker whose decision is being reviewed must, in addition to providing its relevant documents to the AAT, provide a copy of these documents to each other party to the proceeding. However, the original decision-maker may apply to the AAT for a direction prohibiting or restricting the disclosure of evidence given to, or the contents of documents lodged with, the AAT.683

On the related issue of section 69 of the SAT Act, the Committee was of the view that:

- the opportunity offered in section 69(1) for people to refuse to answer a question or produce material during a SAT proceeding should also be subject to orders and summonses to produce material under sections 35(2) and 66(4), respectively. This proviso should be stated expressly; and

- section 69(2) may need to be amended if it was not intended to interfere with legal professional privilege or public interest immunity.

681 Section 53 of the Victorian Civil and Administrative Tribunal Act 1998 (Vic).
683 See section 35(2)(c) of the Administrative Appeals Tribunal Act 1975 (Cth).
Recommendation 9: The Committee recommends that section 24 of the *State Administrative Tribunal Act 2004* be amended to expressly require the original decision-maker to provide the State Administrative Tribunal with documents and materials which are otherwise subject to legal professional privilege and/or public interest immunity.

Recommendation 10: The Committee recommends that should the Government accept Recommendation 9 in this Report, rule 12 of the *State Administrative Tribunal Rules 2004* be amended to:

(a) authorise the State Administrative Tribunal to order original decision-makers to provide documents or materials which are subject to public interest immunity to other parties or people who have been granted leave by the Tribunal to make submissions in the proceedings, unless the documents or materials are ‘protected matter’ as defined in the *State Administrative Tribunal Act 2004*; and

(b) prohibit the State Administrative Tribunal from ordering original decision-makers to provide documents or materials which would attract legal professional privilege to other parties or people who have been granted leave by the Tribunal to make submissions in the proceedings.

Recommendation 11: The Committee recommends that:

(a) section 69(1) of the *State Administrative Tribunal Act 2004* be amended so that the opportunity offered in that section for a person to refuse to answer a question or produce material during a State Administrative Tribunal proceeding is subject to orders and summonses to produce material under sections 35(2) and 66(4) of the Act, respectively; and

(b) the responsible Minister advise the Legislative Council whether section 69(2) of the *State Administrative Tribunal Act 2004* is intended to interfere with legal professional privilege and public interest immunity.

Penalty

2.381 A private submitter suggested that a penalty should apply if an original decision-maker fails to comply with section 24.\(^{684}\) The SAT advised the Committee that there had been no difficulties with section 24 compliance and was of the view that there are

\(^{684}\) Submission No 62 from Private Submitter, 30 August 2007, p5.
sufficient incentives under the SAT Act to ensure that original decision-makers complied. These included the risk of the original decision-maker:

- being made liable to pay the other party’s costs under a costs order;685 and
- being referred to in the SAT’s annual report for failing to provide written reasons for his or her decision when requested to do so.686 687

2.382 Similarly, the DOTAG thought that the imposition of a penalty is unnecessary:

Section 30 of the SAT Act requires a decision maker to use its “best endeavours” to assist the Tribunal. Further the imposition of the statutory obligations under the SAT Act along with the supervision of SAT would be sufficient to ensure compliance.688

2.383 The Committee noted that the SAT could also determine the review in favour of the applicant and make any appropriate, associated orders under section 48 of the SAT Act if an original decision-maker was non-compliant with his or her section 24 obligations and that non-compliance was believed to have unnecessarily disadvantaged the applicant.

Practical Issues

2.384 The President informed the Committee that the current definition of ‘exempt matter’ in the SAT Act imposes a clerical and administrative burden and additional costs on original decision-makers who are required under section 24 to provide the SAT with all documents and other materials which are in their possession or control and are relevant to the review of their decisions.689 In making this observation, the President confirmed his view that section 24 requires material that is subject to legal professional privilege and public interest immunity to be provided by the original decision-maker to the SAT690 (refer to the discussion at paragraphs 2.346 to 2.380 on this issue).

2.385 Section 3(1) defines ‘exempt matter’ and ‘exempt document’, respectively, as, unless the contrary intention appears, “matter that is exempt under Schedule 1 to the

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685 See section 87 of the State Administrative Tribunal Act 2004.
686 See section 150(2)(d) of the State Administrative Tribunal Act 2004.
687 Written answer from the State Administrative Tribunal to proposed question 23 for the hearing on 15 February 2008, p15.
688 Written answer from the Department of the Attorney General to proposed question 19 for the hearing on 25 March 2008, p12.
689 Written Presentation from the Honourable Justice Michael Barker, President, State Administrative Tribunal, 21 September 2007, p31.
Freedom of Information Act 1992” and “a document that contains exempt matter”. Some of the matters prescribed in Schedule 1 of the FOI Act include Cabinet and Executive Council material, matter that would damage intergovernmental relations, personal information, commercial or business information, and matter that would impair law enforcement, public safety and property security if it were disclosed.

2.386 Exempt matter and exempt documents fall within the definition of protected matter, along with matters certified under section 159(2) of the SAT Act. It is clear that the original decision-maker would be keen to prevent his or her protected matter from being disclosed to the other parties. In the President’s view, the SAT has access to exempt matter and exempt documents, as part of the material provided pursuant to section 24, but the SAT is not entitled to disclose the information to any other party.

2.387 The Committee observed that the SAT can also direct the original decision-maker to provide the SAT with protected matter. However, the SAT cannot direct the original decision-maker to provide the other parties with protected matter.

2.388 The President advised that, in practice, the section 24 obligations result in the original decision-maker having to:

provide two bundles of documents to the Tribunal, one for the Tribunal which contains all materials including exempt matter, and another bundle for the other parties to the proceeding which includes all documents excluding the exempt matter.

2.389 This practice not only imposes additional burdens and costs on the original decision-maker but causes administrative and document-handling difficulties for the SAT.

2.390 The President suggested that the process of supplying the SAT with the original decision-maker’s documents and materials would be simplified if the definition for ‘exempt matter’ is changed to the following (with related consequential amendments to related provisions):

“Exempt matter” means –

(a) information that is the subject of legal professional privilege;

691 See section 3(1) of the State Administrative Tribunal Act 2004.

692 Written Presentation from the Honourable Justice Michael Barker, President, State Administrative Tribunal, 21 September 2007, p32.

693 Section 34(5) of the State Administrative Tribunal Act 2004.

694 Ibid, section 34(6).

695 Written Presentation from the Honourable Justice Michael Barker, President, State Administrative Tribunal, 21 September 2007, p31.
(b) information the disclosure of which would be against the public interest.

2.391 The President submitted that this amendment would result in original decision-makers needing to lodge only one bundle of documents in most cases. The DOTAG was cautious of supporting the proposed amendment:

This is a policy issue for Government that may on the one hand ease the administrative burden on SAT, but may introduce the complexity that some confidential and potentially sensitive information could be more widely available. Any amendment to legislation would need to ensure consistency, clarity and that there are no unintended consequences. 697

Committee Comment

2.392 The Committee supported the DOTAG’s cautious approach to the President’s suggestion.

Section 66

2.393 In its Annual Report 2005, the SAT made the following observations regarding section 66 of the SAT Act:

Section 66[(1)(a) and (2)] provides that a summons for the attendance before the Tribunal of any person may be issued on the Tribunal's initiative or at the request of a party. A summons for the production before the Tribunal of any document may be issued on the Tribunal's initiative [section 66(1)(b) and (3)], but on the face of it no provision is made for those summonses to be issued at the request of a party. That distinction is not easy to understand. Possibly it exists to avoid the risk of abuse of the coercive power of a summons.

...

This issue having emerged, the Tribunal is developing procedures to deal with the issue of summonses, but it may be that consideration will need to be given to the amendment of section 66 to enable a summons for the production of documents to be issued at the request of the parties rather than only at the Tribunal's initiative. 698

696 Ibid.
In order to assist the SAT’s exercise of its initiative to issue a summons for the production of a document or other material, the SAT’s Rules Committee amended rule 24 of the SAT Rules on 13 April 2006 to provide as follows:

(2) Where a party wishes the Tribunal to exercise its initiative to require the production of any document or other material under the Act section 66(1)(b), the party must state briefly on the approved form the reasons why it considers that the Tribunal should do so.\(^{699}\)

The DOTAG supported the amendment of section 66 so as to authorise the issue of a summons for the production of a document or other material either at the initiative of the SAT or at the request of a party, stating that:

The issue of summonses for production of documents or attendance of a person should be as practised in other court jurisdictions.\(^{700}\)

The Committee supported the proposed amendment to section 66.

Recommendation 12: The Committee recommends that section 66 of the State Administrative Tribunal Act 2004 be amended to enable the State Administrative Tribunal to issue a summons for the production of a document or other material either at the initiative of the Tribunal or at the request of a party.

Section 93

Section 93 of the SAT Act deals with the procedures for minor SAT proceedings. ‘Minor proceedings’ are:

- proceedings in which a monetary value of $7,500 ($10,000 on and after 1 January 2009) or less can be ascribed to the matter in issue, other than vocational matters and proceedings of a kind which are excluded from the operation of section 93 by an enabling Act;

- proceedings of a kind which are included in the operation of section 93 by the SAT Regulations,\(^{701}\) or

\(^{699}\) Written answer from the State Administrative Tribunal to proposed question 15 for the hearing on 21 September 2007, p17.

proceedings of a kind which are included in the operation of section 93 by enabling Acts.\footnote{702}

Section 93(2) authorises the applicant in a minor proceeding to make, either at or before the initial directions hearing, one or more of the following elections in relation to the proceeding:

- No legal representation. If this choice is made, it will prohibit any party to the proceedings from being represented by a legally qualified person\footnote{703}, although a party may still be represented by a non-legally qualified person pursuant to section 39(1)(a) to (f) of the SAT Act.\footnote{704}

- No hearings. If this choice is made, the SAT must conduct the proceeding in accordance with section 60(2) of the SAT Act; that is, “\textit{entirely on the basis of documents without the parties or their representatives or any witnesses attending or participating in a hearing}”\footnote{705} \footnote{706}.

- No appeals. If this choice is made, any decision which is made by the SAT in the proceeding is final and is not subject to appeal or review, whether under Part 5 of the SAT Act (“Appeals from Tribunal’s decisions”) or otherwise.\footnote{707}

Section 93 was inserted into the State Administrative Tribunal Bill 2003 by the Legislative Council in accordance with Recommendation 12 of the Previous Committee in its SAT Bills Report.\footnote{708} The recommendation was made after the Previous Committee considered the model of the previous Small Claims Tribunal, now subsumed in the jurisdiction of the Magistrates Court, and the perceived legalistic nature of the SAT. It appeared that the Previous Committee made the recommendation because it was of the view that applicants in minor matters in the SAT, like those who elected to lodge claims in the Small Claims Tribunal, should have the option to proceed with less expensive, less formal and timelier procedures, and with a higher degree of certainty of resolution by the SAT, than would usually be

\footnote{701 As at the time of preparing this Report, no proceedings had been prescribed in the \textit{State Administrative Tribunal Regulations 2004} for this purpose.}

\footnote{702 Section 93(1) of the \textit{State Administrative Tribunal Act 2004}.}

\footnote{703 A ‘legally qualified person’ means “(a) a legal practitioner or a person entitled to practise as a legal practitioner in any other place; or (b) any other person who, in the opinion of the Tribunal, has such qualifications or experience in law (whether acquired in Western Australia or in any other place in or outside Australia) as would be likely to afford an advantage in the proceeding”: \textit{ibid.}}

\footnote{704 \textit{Ibid}, section 93(3).}

\footnote{705 \textit{Ibid}, section 60(2).}

\footnote{706 \textit{Ibid}, section 93(4).}

\footnote{707 \textit{Ibid}, section 93(5).}

\footnote{708 Parliament of Western Australia, Legislative Council, \textit{Parliamentary Debates (Hansard)}, 10 November 2004, p7753.}
the case. This assumes that the involvement of legal practitioners and the conduct of hearings increase the complexity and duration of proceedings in the SAT.

2.400 The President of the SAT identified section 93 as a provision which should be amended, contending that it provides the applicant of a minor proceeding too much control over the parties’ rights to be legally represented, the manner in which evidence and arguments are to be obtained by the SAT, and the parties’ rights to appeal a SAT decision:

*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 rid 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

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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”.

... 

... 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.\footnote{The Honourable Justice Michael Barker, President, State Administrative Tribunal, and Hon George Cash MLC, substitute Member, Standing Committee on Legislation, \textit{Transcript of Evidence}, 15 February 2008, pp30-31.}
Committee Comment

2.401 The Committee was of the view that in minor proceedings before the SAT, the applicants’ election(s) under section 93(2) of the SAT Act, if any, should be subject to the approval of the President of the SAT.

Recommendation 13: The Committee recommends that section 93 of the State Administrative Tribunal Act 2004 be amended so that in minor proceedings before the State Administrative Tribunal, applicants’ elections under section 93(2), if any, are subject to the approval of the President of the Tribunal.

Section 116

2.402 Section 116 provides that a magistrate is a member of the SAT by virtue of his or her office. The section also authorises the President of the SAT and the Chief Stipendiary Magistrate to enter into arrangements regarding magistrates’ performance of functions as members of the SAT. Magistrates are only authorised to perform functions as a member of the SAT:

- when performing functions as a magistrate, as directed by the Chief Stipendiary Magistrate, in a place prescribed in Schedule 2 of the SAT Regulations\(^\text{711}\), and
- as authorised by, and in conformity with, any relevant arrangements between the President and the Chief Stipendiary Magistrate.

2.403 Section 116 was inserted into the State Administrative Tribunal Bill 2003 by the Legislative Council in accordance with Recommendation 31 of the Previous Committee in its SAT Bills Report\(^\text{712}\). The Previous Committee made the recommendation, in conjunction with Recommendation 30 in the SAT Bills Report, after considering the practical problems associated with the operation of the SAT, which would be based in Perth, in country and remote areas of the State. It was of the opinion that all magistrates sitting outside of the metropolitan area should be made \textit{ex officio} SAT members, acting under a general delegation of the President of the SAT.

\(^\text{711}\) The prescribed places are Albany, Armadale, Broome, Bunbury, Busselton, Carnarvon, Collie, Coolgardie, Derby, Esperance, Fremantle, Geraldton, Joondalup, Kalgoorlie, Karratha, Katanning, Kununurra, Mandurah, Manjimup, Meekatharra, Merredin, Midland, Moora, Mount Magnet, Narrogin, Norseman, Northam, Perth, Rockingham, Roebourne and South Hedland.

\(^\text{712}\) Parliament of Western Australia, Legislative Council, \textit{Parliamentary Debates (Hansard)}, 10 November 2004, p7753.
rather than the more impractical approach of appointing magistrates individually, on a case by case basis.\textsuperscript{713}

2.404 The Committee was informed by the President that the arrangements authorised by section 116 are a useful ‘back-up’ rather than a mechanism that is employed regularly by the SAT:

\textit{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.}\textsuperscript{714}

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\textbf{Committee Comment}
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2.405 The Committee acknowledged the President’s comments and opinions on this matter but was of the view that magistrates should retain their status as \textit{ex officio} members of the SAT.
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Strata Titles Act 1985

2.406 In its Annual Report 2006 and Annual Report 2007, the SAT reported that the President had provided the Attorney General with comments and recommendations which have formed part of the basis for instructions which have been given to the Parliamentary Counsel. The information provided by the President consisted of:

- comments on a report to the Attorney General prepared by the former Strata Titles Referee715; and

- a number of other recommendations for amendments to the Strata Titles Act 1985.716

2.407 The SAT’s Annual Report 2008 indicated that the proposed amendments had not yet been carried into effect.717 Some of the President’s recommendations for amendments are discussed below.

Section 77B

2.408 This section requires an applicant to file a certificate advising whether there are relevant provisions in the by-laws of the strata company that relate to the resolution of the matter in dispute, and where there are such provisions, that the applicant has, so far as is possible, complied with them. In its Annual Report 2006, the SAT recommended that section 77B of the Strata Titles Act 1985 be repealed because it is no longer necessary:

The Strata Titles Act 1985 did not empower the Strata Titles Referee to conduct a mediation of the dispute. It was therefore important that, if the by-laws contained dispute resolution provisions, they were followed, prior to making application to the Referee. The Tribunal’s experience is that very few strata companies adopt by-laws containing dispute resolution provisions. In one of the few cases in which the by-laws did contain such a provision, it was so badly drawn that it was of doubtful effect and resulted in an argument as to its enforceability. By contrast the Tribunal has the power to mediate, and makes an early assessment at the directions hearing in all cases, to ascertain

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715 The jurisdiction of the former Strata Titles Referee was incorporated into the jurisdiction of the State Administrative Tribunal: see Part 2, Division 121 of the State Administrative Tribunal (Conferral of Jurisdiction) Amendment and Repeal Act 2004.


whether it would be appropriate to attempt mediation of the dispute. There is now no advantage in having the certificate.\(^{718}\)

2.409 Landgate, the department which administers the \textit{Strata Titles Act 1985}, supported the SAT’s suggestion to repeal section 77B and confirmed that this amendment will be the subject of a draft bill for which Cabinet has given approval.\(^{719}\) In January 2009, the Office of the Minister for Lands informed the Committee that because this amendment had not been drafted before the 2008 State Election, the new Minister for Lands was reviewing this and other amendments to the \textit{Strata Titles Act 1985} with a view to making a Cabinet submission to renew the drafting approval.\(^{720}\)

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**Committee Comment**

2.410 The Committee supported the SAT’s suggestion to repeal section 77B of the \textit{Strata Titles Act 1985}.
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**Recommendation 14:** The Committee recommends that section 77B of the \textit{Strata Titles Act 1985} be repealed.
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\section*{Section 81}

2.411 In its \textit{Annual Report 2006}, the SAT effectively recommended that section 81(7) of the \textit{Strata Titles Act 1985} be deleted so that the power to award costs in strata title disputes in the SAT are subject to the same costs regime as provided in section 87 of the SAT Act\(^{721}\). The reasons for the recommendation are contained the following excerpt from the \textit{Annual Report 2006}:

\begin{quote}
Subsection 81(7) of the Strata Titles Act 1985 provides that the Tribunal cannot make an order for payment of costs except to compensate persons for time unnecessarily spent in connection with an application as a result of an amendment, or where a party has unreasonably opposed an application under section 103H for a variation of unit entitlements. Members of strata councils are volunteers. When a persistent litigant pursues a strata company, it is common for the strata company to engage solicitors because
\end{quote}

\begin{footnotes}

719 Letter from Ms Meg Somers, Executive Director, Strategic Planning and Development, Landgate, 21 April 2008.

720 Letter from Mr Doug Cunningham, Chief of Staff, Office of the Minister for Lands, 5 January 2009.

721 See paragraphs 2.230 to 2.248 in this Report for a discussion of the usual costs regime in the State Administrative Tribunal.
\end{footnotes}
individual council members do not have the time nor the skill to deal properly with the matter. The strata company can therefore become exposed to significant legal costs without any prospect of recovery notwithstanding that the claim may be vexatious, frivolous or an abuse of process.

The Tribunal's ability to award costs is sufficiently constrained under section 87 of the State Administrative Tribunal Act 2004 and it is recommended that the power to award costs in respect of strata title disputes should be subject to the same regime. In the ordinary course, one would expect that costs would not be ordered in a strata matter but that the bringing of vexatious or frivolous proceedings, or causing wasted costs, or the unreasonable conduct of proceedings might result in an adverse costs order. The power to award costs in such circumstances would discourage irresponsible behaviour in the conduct of strata disputes.722

2.412 Landgate agreed with the SAT’s suggestion to repeal section 81(7) and confirmed that this amendment will be the subject of a draft bill for which Cabinet has given approval.723 In January 2009, the Office of the Minister for Lands informed the Committee that because this amendment had not been drafted before the 2008 State Election, the new Minister for Lands was reviewing this and other amendments to the Strata Titles Act 1985 with a view to making a Cabinet submission to renew the drafting approval.724

Committee Comment

2.413 The Committee supported the SAT’s suggestion to repeal section 81(7) of the Strata Titles Act 1985.

Recommendation 15: The Committee recommends that section 81(7) of the Strata Titles Act 1985 be repealed.

Section 83

2.414 Amongst other things, section 83 of the Strata Titles Act 1985 prescribes the types of:

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723 Letter from Ms Meg Somers, Executive Director, Strategic Planning and Development, Landgate, 21 April 2008.
724 Letter from Mr Doug Cunningham, Chief of Staff, Office of the Minister for Lands, 5 January 2009.
• people who, and organisations which, are entitled to make an application to the SAT under that Act. Currently, these people and organisations are strata companies, administrators, proprietors, persons having an estate or interest in a lot, and an occupier or other resident of a lot, in respect of a strata scheme or a survey-strata scheme; and

• people against whom, and organisations against which, a SAT order may be made under that Act. Currently, these people and organisations are those who are entitled to make an application to the SAT and the council, chairman, secretary or treasurer of the strata company.

2.415 The SAT recommended that section 83 be amended to include:

• strata managers; and

• any person in possession or control of the records of a strata company,

as additional persons against whom a SAT order may be made under the Strata Titles Act 1985.725

Committee Comment

2.416 The Committee supported the SAT’s recommendation to amend section 83 of the Strata Titles Act 1985.

Recommendation 16: The Committee recommends that section 83 of the Strata Titles Act 1985 be amended to include:

(a) strata managers; and

(b) any person in possession or control of the records of a strata company,

as additional persons against whom the State Administrative Tribunal may make an order under that Act.

Section 104

2.417 In its Annual Report 2006, the SAT suggested that section 104 of the Strata Titles Act 1985 be amended to:

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- remove the requirement for orders of the SAT to be served on the strata company where the strata company is not involved in the proceedings; and

- delete the requirement for the reasons for a SAT decision to be served with the order.\textsuperscript{726} The SAT argued that, under the SAT Act, the SAT is obliged to give reasons for final decisions only,\textsuperscript{727} although a party is entitled to request written reasons for an interim decision within 28 days after the day on which the decision is given\textsuperscript{728}. The SAT preferred the SAT Act regime because “it facilitates the grant of interim orders on a very urgent basis.”\textsuperscript{729}

2.418 Landgate supported the SAT’s suggestion to amend section 104 and confirmed that this amendment will be the subject of a draft bill for which Cabinet has given approval.\textsuperscript{730} In January 2009, the Office of the Minister for Lands informed the Committee that because this amendment had not been drafted before the 2008 State Election, the new Minister for Lands was reviewing this and other amendments to the \textit{Strata Titles Act 1985} with a view to making a Cabinet submission to renew the drafting approval.\textsuperscript{731}

Committee Comment

2.419 The Committee supported the SAT’s suggestion to amend section 104 of the \textit{Strata Titles Act 1985}.

Recommendation 17: The Committee recommends that section 104 of the \textit{Strata Titles Act 1985} be amended to:

(a) remove the requirement for orders of the State Administrative Tribunal to be served on the strata company where the strata company is not involved in the proceedings; and

(b) delete the requirement for the reasons for a State Administrative Tribunal decision to be served with the order.

\textsuperscript{726} \textit{Ibid}, p24.

\textsuperscript{727} See section 77 of the \textit{State Administrative Tribunal Act 2004}.

\textsuperscript{728} See \textit{ibid}, section 78.


\textsuperscript{730} Letter from Ms Meg Somers, Executive Director, Strategic Planning and Development, Landgate, 21 April 2008.

\textsuperscript{731} Letter from Mr Doug Cunningham, Chief of Staff, Office of the Minister for Lands, 5 January 2009.
Third Party Participation in SAT Proceedings

2.420 For the purpose of these discussions, anyone other than a party to a SAT proceeding is referred to as a ‘third party’.

2.421 Section 36 of the SAT Act deems certain classes of persons to be parties to proceedings before the SAT. A person or organisation is a party if she, he or it is:

- the applicant. Generally, the enabling Acts will determine who can apply to the SAT for a decision;
- a person joined under section 38 of the SAT Act as a party;
- a person intervening in the proceeding (see section 37 of the SAT Act);
- a person specified by the SAT Act or an enabling Act to be a party to the proceeding;
- in a proceeding in the SAT’s original jurisdiction, a person in respect of whom a decision of the SAT is sought;
- in a vocational matter, a person affected by, or the subject of, the decision or matter; or
- in a proceeding in the SAT’s review jurisdiction, the original decision-maker.

2.422 The processes of ‘intervening in a proceeding’ under section 37 and ‘joining as a party’ under section 38 are significant methods of becoming a party to proceedings for third parties who would not ordinarily fall into any of the other categories of parties prescribed in section 36.

2.423 An ‘intervener’ is a “person who seeks to intervene as a party in proceedings to protect their interests where those interests are different from those of the existing parties”.732 Section 37 provides the Attorney General and the Commissioner for Consumer Protection with a right to intervene in SAT proceedings at any time on behalf of the State.733 With respect to the Attorney General, it is anticipated that his or her right to intervene will only used in limited circumstances where the overriding

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733 The Commissioner for Consumer Protection’s right to intervene is restricted to proceedings where the Minister for Consumer Protection is responsible for the administration of the relevant enabling Act: section 37(2) of the State Administrative Tribunal Act 2004.
public interest of the State requires it.\textsuperscript{734} Under section 37(3), the SAT may give leave at any time for any other person to intervene in a proceeding on any conditions the SAT thinks fit.

2.424 Section 38 authorises the SAT to order that a person be joined as a party to a SAT proceeding if the SAT considers that:

(a) the person ought to be bound by, or have the benefit of, a decision of the Tribunal in the proceeding;

(b) the person’s interests are affected by the proceeding; or

(c) for any other reason it is desirable that the person be joined as a party.

2.425 Other than becoming a party, a third party may also participate in SAT proceedings if:

- the SAT orders the third party to produce a document or other material pursuant to section 35 of the SAT Act;
- the third party is summonsed or called as a witness under sections 66 or 67 of the SAT Act, respectively; and/or
- the relevant enabling Act provides for some other form of participation.

2.426 However, a person or organisation wishing to ‘actively’ participate in SAT proceedings (that is, tender evidence, make submissions, examine witnesses, appeal decisions and so forth) would seek to be a party.

2.427 The above information indicates that, apart from the SAT Act, it is the relevant enabling Acts in a matter which have a large impact on the ability for third parties to have a role in SAT proceedings. In some cases, as will be seen from the discussions under the headings ‘Planning Approval Decisions’ and ‘Environmental Regulation Decisions’ below, the relevant enabling Acts significantly limit the opportunities for third party participation.

\textit{Planning Approval Decisions}

2.428 For the purpose of these discussions, anyone other than:

- a party to a SAT review of a planning approval decision; or

the applicant for planning approval or the decision-maker whose approval is being sought, is referred to as a ‘third party’.

2.429 Planning approval (that is, subdivision or development approval) is only one phase of the overall planning process. It is preceded, and informed, by strategic planning, which involves, for example, the making of regional and local planning schemes by the WAPC and local governments, respectively.735

2.430 Members of the general public may be able to provide their comments during:

- the strategic planning phase: for example, where a regional planning scheme is advertised for the purpose of drawing public submissions;736

- the EPA’s process of environmental impact assessment where a planning proposal is referred for such an assessment. Depending on the level of assessment that is chosen by the EPA, there may be a period of public review of the proposal.737 All members of the general public, the proponent of the planning proposal and any decision-making authority, have the right to appeal various EPA decisions to the Minister for the Environment with which they do not agree, including, for example, the EPA’s decision not to assess a proposal, the EPA’s decision with regard to the level of assessment, and the EPA’s recommendations in its report to the Minister for the Environment;738 or

- the local government or the WAPC’s assessment of a planning application.

2.431 However, members of the general public are more restricted in voicing their objections to planning approval decisions after they have been made. Generally, in Western Australia, only the applicants for planning approval may seek a merits review of the planning decisions resulting from their applications. The applications for review must be heard by the SAT in accordance with Part 14 of the PD Act.739 The sources of these rights of review are:

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735 Ironbridge Holdings Pty Ltd and Western Australian Planning Commission [2007] WASAT 325, at paragraphs 35-36.

736 See Part 4, Division 3 of the Planning and Development Act 2005.

737 See clause 5 and Schedule 1 of the Environmental Impact Assessment (Part IV Division 1) Administrative Procedures 2002.

738 Section 100 of the Environmental Protection Act 1986.

739 Section 236 of the Planning and Development Act 2005.
• Part 14 of the PD Act. The provisions in Part 14, Division 2 only afford planning applicants with the right to apply to the SAT for a review of the responsible authority’s planning approval decision. Part 14, Division 3, also provides persons undertaking the development or land owners to apply for a review of certain decisions.

• planning schemes. Part 14, Division 1 and section 252(3) of the PD Act contemplate that planning schemes may afford rights of review. In addition, Schedule 7, clause 14 of the PD Act contemplates planning schemes giving rights of review to people other than the applicant – the term used is “a person aggrieved by the exercise of the power” of a responsible authority. However, apart from one local planning scheme which is administered by the City of Albany and which provides for third party rights of review,740 the Committee understands that the overwhelming majority of planning schemes operating in this State limit the right to seek review of planning approval decisions to planning applicants.741

2.432 Significantly, section 243 of the PD Act prohibits the joinder of third parties to the review of planning approval decisions before the SAT:

Section 38 of the State Administrative Tribunal Act 2004 does not apply to a proceeding for a review in accordance with this Part [Part 14 of the PD Act].

2.433 It appears that this legislative intent to limit the rights of third parties in the planning approval process was first introduced in the precursor to section 243, section 63 of the repealed Town Planning and Development 1928, on 1 January 2005.742

2.434 The Committee also noted section 242 of the PD Act, which allows third parties to apply for the SAT’s permission to provide submissions in respect of planning approval decisions which are being reviewed by the SAT. To have the opportunity of providing submissions, third parties must show that they have ‘sufficient interest’ in the matter:

The State Administrative Tribunal may receive or hear submissions in respect of an application [for a SAT review of a planning approval

740 See clause 6.7 of the Shire of Albany Town Planning Scheme No 3.
741 Mr Cameron Poustie, Principal Solicitor, Environmental Defender’s Office of Western Australia (Inc), Transcript of Evidence, 30 April 2008, p8; Parliament of Western Australia, Legislative Council, Standing Committee on Public Administration and Finance (2001-2005), Report 1, Planning Appeals Amendment Bill 2001, March 2002, p38.
742 Section 1213 of the State Administrative Tribunal (Conferral of Jurisdiction) Amendment and Repeal Act 2004. See also ING Development Australia Pty Ltd and Western Australian Planning Commission [2008] WASAT 104, at paragraph 26, per Chaney J.
decision] from a person who is not a party to the application if the Tribunal is of the opinion that the person has a sufficient interest in the matter.

2.435 Given the effect of section 36 of the SAT Act and the PD Act, a person or organisation who is not either the planning applicant or the original decision-maker in relation to a planning approval decision cannot be a party to a review of a planning approval decision by the SAT unless she, he or it is accepted as an intervener.

2.436 Therefore, the only options available to a third party to object to a planning approval decision are:

- to apply to the Supreme Court for a judicial review of the planning approval decision;
- to make a submission in a SAT review (merits review) of the planning approval decision, if any, pursuant to section 242 of the PD Act;
- to be accepted as an intervener in a SAT review (merits review) of the planning approval decision, if any, pursuant to section 37(3) of the SAT Act; or
- where the planning application relates to land which falls within the jurisdiction of the City of Albany, to apply for a SAT review (merits review) of the planning approval decision, pursuant to clause 6.7 of the Shire of Albany Town Planning Scheme No 3.

2.437 The processes involved in, and the consequences of, each of the first three options are discussed below under the relevant headings. The Committee noted that the second and third options do not amount to third party appeal rights as they do not entitle third parties to initiate appeals; they simply provide third parties with an opportunity to participate in an appeal once it has been commenced by the planning applicant.

Judicial Review of Planning Approval Decisions

2.438 One option for third parties is to seek the judicial review of planning approval decisions by the Supreme Court, which, if successful, could result in the Supreme Court exercising its inherent jurisdiction to issue a prerogative remedy, an injunction or a declaration. However, the judicial review of an administrative
decision such as a planning approval decision is only concerned with the legality of the decision, not its merits, and in this respect, may not be the most appropriate source of review for third parties seeking to challenge a decision with which they disagree but which is otherwise legally made. The Law Reform Commission of Western Australia (WALRC) provided the following informative comparison between judicial review and merits review:

The judicial review of administrative decisions is a compendious description of the process whereby a court determines whether or not decisions having an administrative character comply with the requirements of the law. The process includes the remedies the court should provide in consequence of any non-compliance with the law.

... 

It is important to emphasise that the judicial review of administrative decisions is concerned only with the legality of those decisions. Judicial review is not concerned with the general merits of the decision under review, in the sense of whether the decision was the correct or preferable decision. The court will only be concerned with factual issues to the extent that a breach of the law is said to have occurred in the determination of the facts. Further, in conducting a judicial review, the court will only consider policy to the extent that it is said that the application of any particular policy contravened the law. If the decision maker complied with the law in arriving at his or her conclusion, the court has no power to intervene.

Judicial review is, therefore, very different to the review of administrative decisions on their merits. “Merits review” will not ordinarily be concerned with the legality of the decision under review because, unlike a court, the jurisdiction of the merits reviewer to intervene is not dependent upon the establishment of legal error. The merits reviewer will be concerned with the identification of the legal principles governing the decision under review. The primary focus of merits review, however, will be other factors relating to the decision under consideration. These other factors include the identification of relevant facts relating to the decision, the elucidation of any policy or policies appropriately applied in the administration of the power being exercised in the making of the decision and the application of that policy or policies to the facts as determined.

The contrast in the powers available to a merits reviewer as compared to a judicial reviewer reflects the fundamental difference in the functions being undertaken by those reviewers.
completing a review on the merits, it is usual for the merits reviewer to have power to substitute his or her decision for that of the original decision maker. By contrast, if a court arrives at the conclusion that an administrative decision has been made in contravention of the law, its powers will generally be limited to the making of declarations or orders giving effect to that conclusion and setting aside the decision under review. The usual result of such a conclusion is that the decision has to be made again by the decision maker, but this time according to the law as declared by the court. In this way the court confines itself to the determination of whether or not the law has been contravened and does not usurp the administrative powers and functions of the decision maker.\(^745\) (emphasis added)

2.439 A third party wishing to apply for the judicial review of an administrative decision must have ‘standing’ to do so; that is, an entitlement to involve the jurisdiction of a court or tribunal to hear a case.\(^746\) It has been held by the High Court in *Australian Conservation Foundation Inc v Commonwealth of Australia* (1980) 146 CLR 493 that an individual who, or an organisation which, has no private right affected by the administrative action does not have standing to seek judicial review unless he or she, or it, has a special interest in the subject matter of the action over and above that enjoyed by the public generally.\(^747\) The responsibility for preventing an administrative interference with a public right or for enforcing the performance of a public duty rests more appropriately with the Attorney General.\(^748\)

2.440 Where a person seeks judicial review, he or she must demonstrate more than:

- a “belief, however strongly felt, that the law generally, or a particular law, should be observed, or that conduct of a particular kind should be prevented”;

- a “mere intellectual or emotional concern” about the subject matter,

in order to satisfy the test for standing.\(^749\)

2.441 In terms of the accessibility of the SAT as opposed to the Supreme Court, proceedings in the SAT are designed to be less expensive\(^750\) and less formal\(^751\) than those of the


\(^{746}\) *Encyclopaedic Australian Legal Dictionary*, On-line, LexisNexis.

\(^{747}\) *Australian Conservation Foundation Inc v Commonwealth of Australia* (1980) 146 CLR 493, at pp526-527 and 547-548 per Gibbs J and Mason J.

\(^{748}\) *Ibid*, at p526 per Gibbs J.

\(^{749}\) *Ibid*, at p530 per Gibbs J, with whom Mason J agreed at pp547-548.
courts. Further, parties in the SAT are less likely to be exposed to a costs order in the event that they are unsuccessful, given the general rule that parties will bear their own costs.\textsuperscript{752}

**Making Submissions in SAT Review of Planning Approval Decisions**

2.442 As discussed earlier, a third party seeking the SAT’s permission to make a submission in relation to a SAT review of a planning approval decision must convince the SAT that they have a ‘sufficient interest’ in the matter.\textsuperscript{753} It has been held by the Western Australian Court of Appeal and the SAT that a third party seeking this permission will satisfy the test for ‘sufficient interest’ if they can pass the test for standing for judicial review.\textsuperscript{754} The requirements for the latter test are strict, as discussed in this Report at paragraphs 2.439 to 2.440.

2.443 However, even if the test for ‘sufficient interest’ is satisfied by the third party, the SAT is not obliged to give the requested permission to make submissions. In this respect, the Committee noted that the wording used in section 242 of the PD Act confers a discretionary power on the SAT to grant permission. In order for the third party to persuade the SAT to exercise this discretion in their favour, they will also generally need to demonstrate that their submission is necessary to enable the SAT to meet its objectives under the SAT Act, including the minimising of costs and avoiding delays, and the PD Act.\textsuperscript{755} In exercising its discretion, the SAT will consider the following factors:

- The contribution which the submission is likely to be able to make to the proper disposition of the issues before the SAT.
- Whether the interest which the third party submitter represents and the material to be advanced in the submission will be adequately dealt with by the parties already before the SAT.
- The submission’s impact on the proceedings.

\textsuperscript{750} Refer to paragraphs 2.40 to 2.66 in this Report for a discussion about this issue.
\textsuperscript{751} Refer to paragraphs 2.20 to 2.39 in this Report for a discussion about this issue.
\textsuperscript{752} Refer to paragraphs 2.230 to 2.248 in this Report for a discussion about this issue.
\textsuperscript{753} Section 242 of the Planning and Development Act 2005.
\textsuperscript{754} *Shire of Augusta-Margaret River v Gray & Another* (2005) WASCA 227, at paragraph 139 per Pullin JA, with whom Le Miere AJA agreed; and *ING Development Australia Pty Ltd and Western Australian Planning Commission* [2008] WASAT 104, at paragraph 29 per Chaney J.
\textsuperscript{755} *ING Development Australia Pty Ltd and Western Australian Planning Commission* [2008] WASAT 104, at paragraphs 28(v) and 29 per Chaney J.
• The interests of the people who, and organisations which, are parties ‘as of right’ and the public interest in the prompt and efficient dispatch of the proceedings.

• Any other matter that, in the particular circumstances of the case, justifies the granting of permission to make submissions.\(^\text{756}\)

2.444 The Committee also noted that a third party’s right to seek permission to make submissions to the SAT does not even arise unless the planning applicant has appealed the planning approval decision to the SAT – and this would generally occur only if the applicant was aggrieved; that is, if the planning approval was either refused or approved subject to conditions.

**Intervening in SAT Review of Planning Approval Decisions**

2.445 As discussed earlier in this Report, an intervener has been defined as a “person who seeks to intervene as a party in proceedings to protect their interests where those interests are different from those of the existing parties.”\(^{757}\) The willingness of courts and tribunals to permit third parties to intervene is largely dependent on the degree to which the third parties rights and interests are affected by the proceeding: the more directly and substantially the rights and interests are affected, the greater the likelihood that leave for intervention will be granted.\(^\text{758}\)

2.446 In *ING Development Australia Pty Ltd v Western Australian Planning Commission* [2008] WASAT 104, the SAT considered, amongst other things, the proper approach to the intervention of a third party in a SAT review of a planning approval decision pursuant to section 37(3) of the SAT Act, and made the following conclusions:

\[\text{(i) to be granted leave to intervene, a person must demonstrate at least an interest sufficient to meet the test for standing identified in *Australian Conservation Foundation*;\(^{759}\)}\]

\[\text{(ii) merely demonstrating a sufficient interest does not by itself enliven a right to intervene ... [particularly where the rights or interests are indirectly affected.\(^{760}\)}\]

\(^{756}\) Ibid.


\(^{758}\) *Halsbury’s Laws of Australia*, LexisNexis, paragraph 325-1360.

\(^{759}\) Refer to paragraphs 2.439 to 2.440 in this Report for a discussion about this test for standing.

\(^{760}\) *Levy v Victoria* (1997) 189 CLR 579, at p603-604 per Brennan CJ.
(iii) an incorporated or unincorporated body will not gain standing to intervene merely because it has constitutional objects directed to promoting outcomes relevant to the matter under a review. Similarly private citizens will not gain standing to intervene merely because they hold strong beliefs or emotions concerning the matter under review;

(iv) although the third party's interest may not necessarily be a legal interest (although it commonly will involve a legal interest), merely demonstrating any of the other matters referred to in s 38 of the SAT Act [for joining as a party] will not usually be sufficient to secure leave to intervene under s37;

(v) the third party will generally need to demonstrate that its intervention is necessary to enable the Tribunal to meet the objectives of the SAT Act (including minimising cost and avoiding delay ... ), and the PD Act. Factors which the Tribunal will take into account when considering an application for leave to intervene will include:

- the contribution which the applicant for joinder is likely to be able to make to the proper disposition of the issues before the Tribunal;

- whether the interest which the applicant for intervention represents and the material to be advanced by that person will be adequately dealt with by the parties already before the Tribunal,

- the impact on the proceedings of the intervention;

- the interests of the parties before the Tribunal as of right and the public interest in the prompt and efficient dispatch of proceedings

- any other matter that, in the particular circumstances of the case, justifies leave to intervene;

...

(vi) an intervener becomes a party to the proceedings with all the privileges of a party, such as being allowed to appeal, tender evidence and participate fully in all aspects of the
argument. However, an intervenor [sic], unlike a party, will ordinarily be allowed only to support or oppose a decision contended for by one or other of the parties to the proceedings and will not be permitted to expand the issues to be decided (McCourt at [41]);

(vii) intervention will generally not be permitted where the third party simply seeks to argue on the very same basis as an existing party to the proceedings ...

2.447 The Committee noted that, as with a third party’s opportunity to seek the SAT’s permission to make submissions on a planning approval decision being reviewed by the SAT, a third party’s opportunity to intervene in such proceedings is, in the first place, dependent on the planning applicant appealing the planning approval decision to the SAT.

Differing Views on Third Party Participation in SAT Reviews of Planning Approval Decisions

2.448 The WAPC, DPI and the DOTAG submitted to the Committee that the current level of third party participation in relation to the SAT’s review of planning approval decisions should be maintained.

2.449 The DOTAG argued that the current situation is consistent with the Government’s policy position on this issue.

2.450 The WAPC was of the view that general or unrestricted third party rights to appeal planning approval decisions are not desirable or workable. Any changes in this respect may have complex implications and would therefore require extensive consultation and investigation. It argued that the current planning approval process provides certainty for planning approval applicants:

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761 Corporate Affairs Commission v Bradley [1974] 1 NSWLR 391 at p396 per Hutley JA.
762 This is a reference to Re The State Administrative Tribunal; Ex parte McCourt (2007) 34 WAR 342, at paragraph 41 per Steytler P, Wheeler JA and McLure JA.
763 ING Development Australia Pty Ltd and Western Australian Planning Commission [2008] WASAT 104, at paragraph 28 per Chaney J.
764 Refer to paragraphs 2.442 to 2.444 of this Report for a discussion of this issue.
765 Letter from Mr Moshe Gilovitz, Secretary, Western Australian Planning Commission, 14 May 2008, pp1-2; Mr Malcolm Logan, Team Leader, Appeals Unit, Statutory Planning Division, Western Australian Planning Commission, Transcript of Evidence, 14 May 2008, p2; and Letter from Hon Jim McGinty MLA, Attorney General, 29 May 2008, Enclosure 1, p12.
766 Mr Gavan Jones, Director Higher Courts, Court and Tribunal Services, Department of the Attorney General, Transcript of Evidence, 25 March 2008, p4.
767 Submission No 93 from the Western Australian Planning Commission, 5 October 2007, pp5-6.
... The WAPC prefers the current provisions for third party intervention in appeals in s.242 of the Planning and Development Act 2005 (PD Act) and for representation to the Minister in PD Act s.211.[768]

...

The granting of general rights of appeal to third parties could and at times would, complicate contractual relationships between a successful developer applicant for a subdivision or development approval and parties contracting to that developer.

General third party rights of appeal would provide opportunities for unreasonable or vexatious third parties to cause commercial or personal damage to developers who had obtained a subdivision approval or development approval.[769]

2.451 However, the WAPC recognised that there is an argument for introducing restricted third party rights of appeal into the planning approval process:

... While maintaining its opposition to third party rights of appeal, the WAPC submits that if legislation was to be amended to support such appeals, the rights to appeal should be specific and not general.

... Proposals to enable third party rights of appeal would need to be considered by the WAPC in detail.

... The policy might only provide for example, for a right of appeal where the SAT is satisfied that a third party has suffered material detriment as a result of a planning decision or where it is held that the decision maker exercised a discretion in departure from the provisions of a relevant planning instrument.[770]

2.452 The WAPC also argued that third parties, like all members of the general public, are afforded the opportunity to participate in the earlier phases of the overall planning process, and that it is these earlier planning stages where third party participation is more appropriate:

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768 This section empowers the Minister for Planning and Infrastructure to order a local government to: “(a) to do all things necessary for enforcing the observance of the scheme or any of the provisions of the scheme; or (b) to do all things necessary for executing any works which, under the scheme or this Act the local government is required to execute, as the case requires”: section 211(4) of the Planning and Development Act 2005.

769 Letter from Mr Moshe Gilovitz, Secretary, Western Australian Planning Commission, 14 May 2008, p1.

Mr Gilovitz: I think the point of democracy is an important one. I would submit that the time for the democratic intervention is in the setting of policy and rules by which developers and builders need to behave and to which they must conform. Once those rules are set in place, the building and development industry needs the certainty of knowing that it can work within those rules and produce complying development outcomes. My view would be to discourage third party intervention at the time when a development proposal is being framed. The work should have been done before then, if possible, and I know it is not always possible. I think a similar view is taken by the WAPC, and I think that is why it argues against a general third party right of appeal.

The CHAIR: I would argue that in other areas of law you have the policy and settings, but you still have the capacity to assess each case on its merits.

Mr Gilovitz: Yes. That capacity is given to the decision maker, rather than to the community in general. There may well be an argument, as I have suggested here, for particular rights of appeal but perhaps not a general right of appeal.771

2.453 The DPI appeared to be similarly cautious of the introduction of further rights of third party participation in the planning approval process:

Mr Logan: ... It does make it more democratic to a degree, but I think it is a matter that would have to be very carefully considered and investigated.

The CHAIR: What do you see the disadvantages as being, given that it is arguably more democratic? Thank you for giving me that line!

Mr Logan: I think perhaps one of the disadvantages is that it may result in a longer period to reach finalisation on matters. There might be greater democracy and openness, but there might be a trade-off as well. Certainly, there is considerable pressure at times to try to finalise matters as reasonably quickly as possible.772

2.454 The Committee noted that the issue of third party appeals in the planning approval process was considered by the Standing Committee on Public Administration and

771 Mr Moshe Gilovitz, Secretary, Western Australian Planning Commission, Transcript of Evidence, 14 May 2008, pp2-3.

772 Mr Malcolm Logan, Team Leader, Appeals Unit, Statutory Planning Division, Western Australian Planning Commission, Transcript of Evidence, 14 May 2008, p2.
Finance (2001-2005) during the 36th Parliament. That committee was divided over, and did not make any formal recommendations in regard to, this issue but made the comment that any consideration of the introduction of third party planning appeals will require extensive research and consultation.\(^{773}\) A submission from the DPI to that committee provided very similar policy reasons for opposing the introduction of third party planning appeals as those made by the WAPC and the DPI in this inquiry.\(^{774}\)

2.455 Four submitters suggested that third parties should have greater access to the SAT’s jurisdiction to review planning approval decisions.\(^{775}\) The Law Society of Western Australia did not indicate how that third party access should be achieved, other than to recommend that greater accessibility should be afforded to “third parties with a valid interest in relation to planning applications” (emphasis added). The society alleged that the SAT has been “very restrictive in its control of intervention by third parties to Review Applications.”\(^{776}\) The SAT defended its approach to the intervention of third parties:

> The Tribunal has generally applied accepted rules in relation to intervention and joinder of parties. In the planning area, the Planning and Development Act 2005, s 243, specifically excludes the power to join third parties. The Tribunal has, in certain circumstances, permitted intervention, but it has been careful to ensure that the legislative intent in the Planning and Development Act 2005 is not circumvented by parties seeking intervention under s 37 of the SAT Act instead of seeking joinder under s 38.\(^{777}\)

2.456 Ms Dot Price was of the opinion that the “justice possible through the SAT is not accessible to all” until third party rights of appeal with respect to planning approval decisions are provided. Ms Price observed that one of the key findings in the SAT matter in which she was involved was that the proposed development would have had a negative impact on the amenity of the area and noted that “The amenity is enjoyed by


\(^{774}\) Ibid, Appendix 2.

\(^{775}\) Submission No 59 from The Law Society of Western Australia, 31 August 2007, p3; Submission No 67 from Ms Dot Price, 31 August 2007, pp1-2; Submission No 80 from the Western Australian Local Government Association, 3 September 2007, p1; and Submission No 83 from the Environmental Defender’s Office WA (Inc) and Conservation Council of Western Australia Inc, 7 September 2007, pp5-6.

\(^{776}\) Submission No 59 from The Law Society of Western Australia, 31 August 2007, p3.

\(^{777}\) Written answer from the State Administrative Tribunal to proposed question 20(a) and (b) for the hearing on 15 February 2008, pp13-14.
all citizens who live in the area, but the right to defend that amenity (or not) does not reside with those who enjoy it.\textsuperscript{778}

2.457 The WALGA was concerned that local government views are not being considered by the SAT when reviewing subdivision approval decisions, being decisions which are generally made by the WAPC and in relation to which local governments are usually third parties:

\textit{the SAT process is increasingly being used by proponents to by-pass Local Governments and community consultation. This is apparent in relation to appeals on subdivisional approvals and conditions where Local Governments are not a direct party but have important local knowledge, understanding of community concerns and potential impacts which are often not fully understood or appreciated by either the SAT or the Western Australian Planning Commission ...}

2.458 The WALGA submitted that it is a “fundamental flaw” to leave the local community, and the local government, as their representatives, out of the decision-making process for subdivision approvals as the local community are the people who are potentially the most impacted by the decision.\textsuperscript{779}

2.459 However, the Committee noted that local governments who are interested in participating in the SAT’s review of subdivision approval decisions, or any other SAT proceedings where they would not generally be parties as of right, have the option of either:

- seeking permission from the SAT to make submissions, pursuant to section 242 of the PD Act; or
- seeking leave from the SAT to intervene in the proceedings, pursuant to section 37(3) of the SAT Act.

2.460 In addition, local governments have the opportunity to participate in the WAPC’s decision-making processes:

- With respect to the assessment of subdivision applications, the WAPC is obliged to seek objections or recommendations from any affected local governments, public authority or utility services provider.\textsuperscript{780} The WAPC must also have “due regard” for the provisions of any local planning scheme which applies to the land in question and must consult the relevant local government

\textsuperscript{778} Submission No 67 from Ms Dot Price, 31 August 2007, pp1-2.
\textsuperscript{779} Submission No 80 from the Western Australian Local Government Association, 3 September 2007, p1.
\textsuperscript{780} Sections 142 and 143 of the \textit{Planning and Development Act 2005}. 
where the subdivision proposal appears to be in conflict with the local planning scheme.\footnote{Section 138 of the Planning and Development Act 2005.}

- Where a development application is to be determined by the WAPC rather than a local government in whose district the land is situated,\footnote{These situations are prescribed in clause 29(1) of the Metropolitan Regional Scheme.} the relevant local government may make recommendations to the WAPC in relation to the application.\footnote{\textit{Ibid}, clause 29(3).}

2.461 The Committee noted that the SAT, when reviewing a planning approval decision made by the WAPC, would have access to any recommendations or objections of affected local governments received by the WAPC in relation to the particular planning application in question as these documents would presumably be part of the bundle of documents which the WAPC would be required to lodge with the SAT pursuant to section 24 of the SAT Act. Therefore, it appears that where the affected local governments have provided the WAPC with comments, the SAT would at least be aware of the local governments’ views on the planning approval application, even if these local governments are not given leave to intervene or make submissions in the SAT proceedings.

2.462 For example, in \textit{ING Development Australia Pty Ltd and Western Australian Planning Commission} [2008] WASAT 104, the City of Fremantle sought leave to intervene, and, in the alternative, sought permission to make a submission, in proceedings where the SAT was reviewing the WAPC’s development approval decision in relation to land within the city’s district. The city was successful in demonstrating the interest that would be sufficient for the purposes of section 242 of the PD Act (submissions) and section 37(3) of the SAT Act (intervention).\footnote{\textit{ING Development Australia Pty Ltd and Western Australian Planning Commission} [2008] WASAT 104, at paragraph 37 per Chaney J. See paragraphs 2.442 to 2.443 (submissions) and 2.446 (intervention) in this Report for a discussion of the relevant tests for seeking permission to make a submission to the State Administrative Tribunal and seeking leave to intervene in proceedings before the State Administrative Tribunal, respectively.} The SAT was willing to grant the city permission to make a submission on any issues which remained in dispute after the parties had conducted their negotiations, but the review proceedings were fully settled before the SAT handed down its decision in relation to the city’s application to make a submission or intervene.\footnote{\textit{ING Development Australia Pty Ltd and Western Australian Planning Commission} [2008] WASAT 104, at paragraph 40 per Chaney J.} However, with regard to the application to intervene, the SAT ruled that it would not have granted the requested leave on the following bases:
• The city had already made submissions to the WAPC in relation to the proposed development, and since these submissions would have been part of the bundle of documents required to be filed by the WAPC under section 24 of the SAT Act, if the matter had proceeded to a hearing, the SAT would not have been “deprived of any materials necessary for it to make the correct and preferable decision.” 786

• The parties, the WAPC and the development (and review) applicant, were close to reaching a resolution and the SAT was of the view that granting leave to the city to intervene could potentially adversely affect the interests of the parties and the “public interest in the prompt and efficient dispatch of the proceedings.” However, the SAT noted that even if the parties had not been close to resolution, it could not, at this stage of the proceedings, conclude that it would have benefited from the city being involved as an intervener. 787

2.463 When the Committee asked the WALGA whether local governments would exercise their options to apply to intervene or make submissions in planning matters in the SAT where they would not normally be a direct party but in which they have an interest, the WALGA provided the following response:

> It is unlikely a Local Government would want to intervene in any matter before SAT that it was not already involved in.

> However, Local Government shouldn’t have to apply to intervene, if there is a matter before SAT that involves a local government they should automatically be invited to be a party to proceedings. Local Government may not be aware of all matters under review and are required under the current SAT process to administer any decision made and accommodate its impact on the local community, which can be significant. 788

2.464 Instead of the above options, the WALGA submitted that local governments would prefer to have the opportunity to be joined as parties to planning matters in which they have an interest:

> Yes, voluntary participation by Local Government would enable community and policy impacts to be considered and encourages communication between the affected parties. 789

786 *Ibid*, at paragraph 38 per Chaney J.
787 *Ibid*, at paragraph 39 per Chaney J.
788 Email from Ms Beryl Foster, Policy Manager, Planning and Development, Western Australian Local Government Association, 18 August 2008, Attachment, p1.
2.465 The EDO and the Conservation Council of Western Australia (CCWA) advised the Committee that Western Australia is the only jurisdiction in Australia which does not provide for merits-based third party appeal rights in the planning approval process.\(^{790}\) In their submission, this situation must change:

any person can go to the EPA and say that a proposal should have been formally assessed [for its environmental impact]. 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. …

…

… 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, …\(^{791}\)

2.466 As alternatives to giving third parties the right to initiate a merits review of planning approval decisions, the EDO and CCWA recommended that the SAT should have the following powers:

- The ability to join third parties, under section 38 of the SAT Act, in reviews of planning approval decisions because the current prohibition is “illogical”.\(^{792}\)

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\(^{790}\) Submission No 83 from the Environmental Defender’s Office WA (Inc) and Conservation Council of Western Australia Inc, 7 September 2007, p6.

\(^{791}\) Mr Cameron Poustie, Principal Solicitor, Environmental Defender’s Office of Western Australia (Inc), Transcript of Evidence, 30 April 2008, p8. See also, Submission No 83 from the Environmental Defender’s Office WA (Inc) and Conservation Council of Western Australia Inc, 7 September 2007, p6.
These submitters acknowledged the availability of the application to intervene but noted the limitations of this form of participation:

*such an approach has the effect of not putting the input of those third parties on equal footing with the interests of the developer and the local government. Although still technically a party, …* [793] … it was recently observed by the Supreme Court of WA’s Court of Appeal, in relation to the SAT, that:

- “an intervener, unlike a party, will ordinarily be allowed only to support or oppose a decision contended for by one or other of the parties to the proceedings and will not be permitted to expand the issues to be decided …”[794], and

- “unlike the case of a joinder of a party under s 38, s 37 provides that leave to intervene may be given “on conditions, if any, that the Tribunal thinks fit”.” [795] 796

As Mr Cameron Poustie, Principal Solicitor, EDO, explained:

*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.* 797

The EDO and CCWA also submitted that the very use of the term ‘intervener’ suggests that the interests of these parties are “second class.” 798

- An “unrestricted capacity to hear from any third parties that apply for the opportunity to make a submission”. 799 This is a reference to the requirement in section 242 of the PD Act for a third party to show a ‘sufficient interest’ in

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792 Submission No 83 from the Environmental Defender’s Office WA (Inc) and Conservation Council of Western Australia Inc, 7 September 2007, p5.
793 There is a reference in the submission to section 36(1)(c) of the *State Administrative Tribunal Act 2004.*
794 This is a quote from *Re The State Administrative Tribunal; Ex parte McCourt* (2007) 34 WAR 342, at paragraph 41 per Steytler P, Wheeler JA and McLure JA.
795 This is a quote from *Re The State Administrative Tribunal; Ex parte McCourt* (2007) 34 WAR 342, at paragraph 43 per Steytler P, Wheeler JA and McLure JA.
796 Submission No 83 from the Environmental Defender’s Office WA (Inc) and Conservation Council of Western Australia Inc, 7 September 2007, pp5-6.
797 Mr Cameron Poustie, Principal Solicitor, Environmental Defender’s Office of Western Australia (Inc), *Transcript of Evidence,* 30 April 2008, p8.
798 Submission No 83 from the Environmental Defender’s Office WA (Inc) and Conservation Council of Western Australia Inc, 7 September 2007, p6.
the SAT’s review proceedings when they are applying for the SAT’s permission to make submissions. The EDO and CCWA submitted that this requirement is “unnecessarily restrictive and intimidating, especially for unrepresented litigants.” Further, the EDO and CCWA suggested that if these third parties were defined as ‘parties’ under the SAT Act, any misuse of their opportunity to make submissions could be dealt with by the SAT exercising its “broad powers to deal with ‘misbehaving’ parties.” For further control over the ‘submitting parties’, the SAT could also accept these parties on any conditions it thinks fit. In order to introduce this initiative, the EDO and CCWA indicated that sections 242 and 237 of the PD Act and/or section 36(1) of the SAT Act may need to be amended.

2.467 In answer to the concerns that a general third party appeal right would expose planning applicants to unreasonable or vexatious applications for review, the EDO suggested that the SAT already had sufficient powers to deal with these situations:

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.

2.468 The SAT did not agree with the EDO and CCWA’s view that interveners are ‘second class’ parties, arguing that an intervener has all the rights of a party, because they are defined as a party under section 36 of the SAT Act, subject to any conditions which may be imposed on them under section 37(3) of that Act. When the Committee

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800 Refer to paragraphs 2.442 to 2.443 in this Report for a discussion of the test for seeking permission to make a submission to the State Administrative Tribunal under that provision.
801 See sections 46, 47, 48, 87 and 88 of the State Administrative Tribunal Act 2004.
802 Submission No 83 from the Environmental Defender’s Office WA (Inc) and Conservation Council of Western Australia Inc, 7 September 2007, p6.
803 See sections 46, 47, 48, 87 and 88 of the State Administrative Tribunal Act 2004.
804 Mr Cameron Poustie, Principal Solicitor, Environmental Defender’s Office of Western Australia (Inc), Transcript of Evidence, 30 April 2008, p9.
805 Written answer from the State Administrative Tribunal to proposed question 20(e) for the hearing on 15 February 2008, p14.
queried the potential impact of introducing third party rights of appeal against planning approval decisions, the SAT provided the following information:

Third party rights of appeal exist in other States in Australia, notably in Victoria where a significant portion of the planning review work of the Victorian Civil and Administrative Tribunal involves objector appeals. A similar proportion might be expected if similar third party rights were extended in Western Australia. If that were to occur, it would not be unreasonable to expect that the caseload of the DR [Development and Resources] stream would double. That increase could not be adequately dealt with by the Tribunal's existing membership. Additional full-time members would certainly be required, and there would likely be severe strain on the hearing room and support staff availability for the increased workload.806

2.469 The Appeals Convenor informed the Committee that:

It has been my experience that one of the reasons why individuals and community groups use the provisions of Part IV of the EP Act is that the Planning system does not allow third party appeal rights. Many appeals against EPA decisions [to] not assess proposals [for environmental impact] are because the community has more confidence in the environmental assessment process than the planning process.807

Other Jurisdictions

2.470 The EDO advised the Committee that:

WA is the only jurisdiction that does not have at least some limited form of [merits-based] 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

806 Written answer from the State Administrative Tribunal to proposed question 20(d) for the hearing on 15 February 2008, p14.

807 Letter from Mr Garry Middle, Appeals Convenor, Office of the Appeals Convenor, 29 April 2008, p6.
have a subsequent appeal right. Even such an approach would still be a great advance on what the WA system currently is. ... 808

2.471 The WAPC offered the following information in regard to the availability of third party rights of appeal in the planning approval process:

It is not one of my areas of expertise. However, I do understand that third party appeals are available in other jurisdictions, more so than in Western Australia. They are mostly available in New South Wales and they are available with some constraints in Victoria. The New South Wales system of planning and development approval going through to obtaining a building licence or permit issues, including a certificate of construction, is quite different from systems elsewhere in Australia and should not necessarily be emulated. It may be that the system we have here or the similar system used in Victoria is a better system in terms of efficiency of process and clarity of outcomes for the community and developers.

Hon GEORGE CASH: What about Queensland, South Australia and Tasmania?

Mr Gilovitz: They are in between the two extremes. Tasmania is more similar to Victoria. 809

2.472 Mr Cameron Poustie, Principal Solicitor, EDO, was not aware of any third party appellant seeking to use the merits review processes available in other jurisdictions to frustrate the proponent or to use the processes vexatiously:

Not that I am aware of. ... [However,] 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—

808 Mr Cameron Poustie, Principal Solicitor, Environmental Defender’s Office of Western Australia (Inc), Transcript of Evidence, 30 April 2008, p9.

809 Mr Moshe Gilovitz, Secretary, Western Australian Planning Commission, and Hon George Cash MLC, substitute Member, Standing Committee on Legislation, Transcript of Evidence, 14 May 2008, p2.
do not have that right here but if they were in South Australia or New South Wales they would.810

2.473 The table in Appendix 9 provides a summary and comparison of the merits-based third party rights of appeal which are available in the planning approval processes in each state and territory in Australia. That table is current as at March 2009.

2.474 Most other Australian states and territories have either recently introduced planning reforms or are in the process of reviewing their planning system. A common reform objective is to streamline development approval processes and the availability and extent of third party appeals is pertinent in this regard.811 The impetus for reform stems largely from discussions at a federal level812 and in particular, a recent decision by the Council of Australian Governments (COAG).

Federal Planning Reform

2.475 The regulatory reform stream of the National Reform Agenda, agreed at the 17th meeting of the COAG in February 2006, included six “priority cross-jurisdictional ‘hot spot’ areas where overlapping and inconsistent regulatory regimes are impeding economic activity.”813 One of the identified priority areas for reform was development assessment arrangements and the COAG resolved to request the Local Government and Planning Ministers’ Council (LGPMC) to:

systematically review its local government development assessment legislation, policies and objectives to ensure that they remain relevant, effective, efficiently administered, and consistent across the jurisdictions ….814

Leading Practice Model for Development Assessment

2.476 The Development Assessment Forum (DAF) is an independent body established in 1998 to promote the development and adoption of improved development assessment processes that are streamlined and efficient. Membership includes representatives

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810 Mr Cameron Poustie, Principal Solicitor, Environmental Defender’s Office of Western Australia (Inc), Transcript of Evidence, 30 April 2008, p11.
811 For example, Mr Stuart Clues from the Housing Industry Association in Tasmania has argued that unrestrained third party appeals under the current planning appeals process is a significant cause of delay. ‘Planning reforms needed: HIA’; http://www.abc.net.au/news/stories/2008/06/17/2277168.htm, (viewed on 24 June 2008).
from the Commonwealth, states, territories and local government, and from industry

2.477 The DAF’s Leading Practice Model for Development Assessment was published in
2005 and provides a development assessment ‘blueprint’ for jurisdictions.\footnote{Ibid.}

2.478 The ten leading practices contained in the model include:

- track-based assessment: development applications are assessed according to a
  track system which relates to the complexity and impact of the project. The
  track system will determine how an application is assessed including whether
  notifications or assessments need to occur and what appeal and review
  processes are applicable;\footnote{Development Assessment Forum, A Leading Practice Model for Development Assessment in Australia, March 2005, p17.}

- notification: when assessment of a development application involves an
  evaluation of policy objectives (as opposed to adherence to objective rules and
  tests), “opportunities for third party involvement may be provided”\footnote{Ibid, p21.}, and

- third party appeals: these should only be available in limited cases and not in
  circumstances where an application is assessed against set rules and tests.\footnote{Ibid, p30.}

2.479 The continuing significance of development assessment reform was reiterated at the
communiqué, the LGPMC reported that states and territories had reported on their
progress in implementing the Leading Practice Model for Development Assessment
and all jurisdictions had made good progress in relation to planning reform.\footnote{http://www.lgpmcouncil.gov.au/communiqué/20080327.aspx, (viewed on 1 July 2008).}

State and Territory Planning Reform

New South Wales

2.480 The EDO alerted the Committee to a 2007 review of the New South Wales
development approval process for corruption risks, which found that an extension of
merits-based third party appeal rights in that state could help to reduce the incidence
of corruption:
Merits-based reviews can provide a safeguard against corrupt decision-making by consent authorities as well as enhancing their accountability. Consequently, the extension of third-party merit-based appeal rights [in New South Wales] may act as a disincentive for corrupt decision-making by consent authorities.\textsuperscript{822}

2.481 The New South Wales planning reforms, which will be introduced in the \textit{Environmental Planning and Assessment Amendment Act 2008}\textsuperscript{823}, seek to streamline the assessment of development applications through the use of complying development codes for different classes of development.\textsuperscript{824}

2.482 The reforms will include third party planning appeals in the form of ‘neighbourhood reviews’. Third party appeal rights will apply to those directly affected by development proposals that exceed development standards:

\textit{This is an important part of the planning reforms because currently third-party appeals apply only in relation to designated developments such as coalmines and cement factories. This new type of review will apply to certain types of commercial and residential developments where, if approved, development standards for height and floor space ration would be exceeded by more than 25 per cent. This review power will provide an appropriate check on decisions. It is appropriate that those who are directly affected by such decisions have a right to seek a review. Appropriately, the right to seek a review is limited to people who own or occupy property within the immediate vicinity of the proposed development and who lodged an objection to the development.}

\textit{In addition, the bill includes provisions to ensure that commercial competitors are not able to take advantage of these reviews for the sole purpose of securing a financial advantage over a competitor}\textsuperscript{825}, \textsuperscript{826}


\textsuperscript{823} This Act was assented to on 25 June 2008 but at the time of finalising this Report, not all of its provisions had commenced operation.

\textsuperscript{824} Hon Frank Terenzini MLA, New South Wales, Legislative Assembly, \textit{Parliamentary Debates (Hansard)}, 3 June 2008, pp7957-7958.

\textsuperscript{825} Proposed section 79C(1A) of the \textit{Environmental Planning and Assessment Act 1979} (NSW) to be inserted by clause 19, Schedule 2.1 of the \textit{Environmental Planning and Assessment Amendment Act 2008} (NSW), which, at the time of finalising this Report, had not yet commenced operation.

\textsuperscript{826} Hon Lylea McMahon MLA, New South Wales, Legislative Assembly, \textit{Parliamentary Debates (Hansard)}, 3 June 2008, p7997.
2.483 According to the Minister for Planning, the reforms will:

strengthen democracy by allowing the introduction of neighbourhood appeal rights, which have been debated tonight. These rights will give locals a chance to appeal inappropriate developments in their neighbourhoods. The member for Sydney also claimed that we had forgotten the mums and dads next door. That is simply not true. The complying development code that we are developing in partnership with local government will protect neighbours. The rules will be clear and everyone will know what they are.\(^\text{827}\)

\textit{South Australia}

2.484 The Committee noted that a key part of the extensive reform of South Australia’s planning system will be the introduction of a Residential Development Code, which will streamline development applications and speed up the process for projects that meet the code criteria. Minor matters will be quickly moved through the system or removed from it altogether.\(^\text{828}\)

2.485 The draft Residential Development Code states that complying developments will be exempt from public notification and third party appeal rights.\(^\text{829}\)

\textit{Tasmania}

2.486 In early May 2008, while calling for submissions in relation to a review of Tasmania’s planning system, the Minister for Planning and Workplace Relations confirmed that the Government did not intend to substantially change key characteristics of the planning system:

\textit{That means retaining local councils’ planning powers, keeping public involvement and appeal rights, and the need for independent statutory decision making.”}\(^\text{830}\)

2.487 The Government media release noted that the review coincides with similar inquiries in other states and that the impetus for reform has, in large part, been generated by the

\(^{827}\) Hon Frank Sartor MLA, Minister for Planning, New South Wales, \textit{Parliamentary Debates (Hansard)}, 3 June 2008, p8032.


National Reform Agenda required under the COAG, including the DAF leading practice model for streamlined development assessment.\footnote{Ibid.}

2.488 Consistent with a more streamlined approach, the Housing Industry Association, Tasmania, argued that residential construction which complies with the planning system should be exempted from the planning process in order to avoid delays. Third party appeals should also be limited to parties who have a direct interest in whether the property is built.\footnote{‘Planning reforms needed: HIA’: http://www.abc.net.au/news/stories/2008/06/17/2277168.htm, (viewed on 24 June 2008).}

2.489 The steering committee conducting the review of the Tasmanian planning system published its report on 13 February 2009. Among other things, the steering committee recommended that the existing third party planning appeal system remain unchanged.\footnote{Recommendation 25 in Steering Committee, Government of Tasmania, \textit{Review of the Tasmanian Planning System: Steering Committee Report}, 13 February 2009, pp6 and 37-39.}

\textit{Victoria}

2.490 The \textit{Cutting Red Tape in Planning} review of the Victorian planning system in 2006 produced 15 recommendations, including the proposed introduction of a ‘code assess track’ system of development assessment, which would apply objective standards to different types of development. Compliant applications are automatically approved and there is no third party notice or right to review. Non-compliance with track criteria will result in an application being refused or referred to a merit assessment process.\footnote{Department of Sustainability and Environment, Government of Victoria, \textit{Cutting Red Tape in Planning}, August 2006, p7.} Another result of the \textit{Cutting Red Tape in Planning} project will be the review of the \textit{Planning and Environment Act 1987} (Vic).\footnote{‘Cutting Red Tape in Planning Progress Report - September 2008’: http://www.dse.vic.gov.au/DSE/nrenpl.nsf/LinkView/2536997AF8EB7221CA2572EA000BB15ECD7F5DB76A5D5BDB8CA2572CF007CE90, (viewed on 5 March 2009).}

\textit{Queensland}

2.491 In 2006/2007, the Queensland Government conducted an extensive review of the state’s planning and development system, including a review of the \textit{Integrated Planning Act 1997}. The findings are documented in the report entitled, \textit{Planning for a}
Prosperous Queensland, A reform agenda for planning and development in the Smart State.  

2.492 The objectives of the reform agenda set by the review include:

- the introduction of new planning legislation in late 2008;
- simplified processes through greater standardisation; and
- streamlined dispute resolution processes.  

Northern Territory

2.493 The Planning Amendment (Development Applications) Act 2008, which amended the Planning Act, came into effect on 1 July 2008. This legislation made some changes in relation to development application processes, particularly in relation to notification requirements. Third party appeal rights were unaffected. 

Australian Capital Territory

2.494 According to the Revised Explanatory Statement for the Planning and Development Bill 2006, now the Planning and Development Act 2007, the introduction of legislative reform in the Australian Capital Territory will provide:

simplified development assessment through a track system that matches the level of assessment and process to the impact of the proposed development. As well as being simpler, more consistent, and easier to use, this system is a move towards national leading practice in development assessment. 

2.495 The new system would also:

have less red tape and more appropriate levels of assessment, notification and appeal rights. This will make it easier to understand what does and does not need approval, what is required for a development application and how it will be assessed. 

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840 Ibid, p3.
Committee Comment

2.496 The Committee was of the view that certain third parties should have a right to initiate an application for a SAT review of:

- grants of planning approval;
- refusals to grant planning approval;
- the conditions, if any, imposed on a grant of planning approval; or
- the amendment, revocation or suspension of a grant of planning approval.

2.497 This right should be available only to third parties who have previously made submissions about, or objected to, the relevant planning proposal at earlier stages of the approval process, and:

- who are directly affected by the planning proposal, for example, through their ownership or occupancy of a property which shares a boundary with the relevant land; or
- the planning proposal is a matter of public or environmental interest.

2.498 These restrictions may:

- minimise any delays which may be caused by the third party application for review as the views of the third party would already have been considered earlier in the planning approval process; and
- provide developers with more certainty of the issues and objections which may be raised in the third party application for a SAT review.

2.499 As the above restrictions would effectively require all third parties to be notified of planning proposals, the Committee considered that the PD Act should oblige the applicant for planning approval to advertise the planning proposal in a regional newspaper circulating in the area of the proposed development or subdivision.

2.500 The Committee noted that a concern was raised with the Previous Committee about the potential for the SAT to require an undertaking as to costs or damages when it grants an interim injunction (see section 90 of the SAT Act). It also considered the SAT’s power to make costs orders against parties. The Committee was of the view

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that, generally, if third parties are able to become parties to a SAT review of a planning approval decision, they should only be required to bear their own costs in the proceedings. This accords with the SAT’s general approach to awarding costs.\textsuperscript{842} However, in exceptional circumstances, such as the making of vexatious applications or abuses of process, the Committee considered that it is appropriate for the SAT to retain its discretion to make costs orders and to require undertakings as to costs or damages.

2.501 In addition to giving third parties the right to initiate applications for SAT reviews of planning approval decisions, the Committee was of the view that third parties should be able to apply to join as parties to SAT reviews of planning approval decisions for example, where planning approval is refused and only the applicant for planning approval has applied to the SAT for a review of that refusal. This may involve deleting section 243 of the PD Act. The right to apply for joinder should only be made available to third parties who can meet the Committee’s suggested criteria, which are discussed at paragraph 2.497 of this Report.

2.502 If third parties are given the right to apply to join SAT proceedings for the review of planning approval decisions, the Committee considered that it would be appropriate for the SAT to retain its power to make costs orders and require undertakings as to costs and damages where it deems necessary.

2.503 The Committee noted that, depending on the form of legislative amendment that is used to confer third parties with the right to seek joinder, the third parties may have to satisfy the requirements of section 38 of the SAT Act – requirements which the EDO has previously warned may not be met by environmental or public interest groups.\textsuperscript{843} The Committee was of the view that these concerns should be considered.

2.504 The Committee recommends that the above changes be implemented in order to:

- ensure that all individuals and organisation with legitimate interests in planning matters are treated fairly; and

- promote greater consistency in state planning laws across Australia.

2.505 Any increase in third party rights of participation in the planning approval process as suggested above would have an impact on the SAT’s resources. Accordingly, the Committee reiterates Recommendation 41 in this Report.

\textsuperscript{842} Refer to paragraphs 2.230 to 2.248 in this Report for a discussion about this issue.

\textsuperscript{843} Parliament of Western Australia, Legislative Council, Standing Committee on Legislation (2001-2005), Report 24, State Administrative Tribunal Bill 2003 and the State Administrative Tribunal (Conferral of Jurisdiction) Amendment and Repeal Bill 2003, October 2004, p123.
Recommendation 18: The Committee recommends that the *Planning and Development Act 2005* be amended to give third parties who have previously made submissions about, or objected to, a planning proposal at earlier stages of the planning approval process, and:

(a) who are directly affected by the planning proposal; or

(b) the planning proposal is a matter of public or environmental interest,

a right to initiate an application for a State Administrative Tribunal review of:

(c) the grant of planning approval;

(d) the refusal to grant planning approval;

(e) the conditions, if any, imposed on the grant of planning approval; or

(f) the amendment, revocation or suspension of the grant of planning approval.

Recommendation 19: The Committee recommends that the *Planning and Development Act 2005* be amended to give third parties who have previously made submissions about, or objected to, a planning proposal at earlier stages of the planning approval process, and:

(a) who are directly affected by the planning proposal; or

(b) the planning proposal is a matter of public or environmental interest,

a right to apply to join as parties to any State Administrative Tribunal review of the relevant planning approval decision.

*Environmental Regulation Decisions*

2.506 If the SAT’s jurisdiction is expanded to include appeals against environmental regulation decisions made under Part V of the EP Act as recommended in Recommendation 47 of this Report, the question of whether third parties should have the right to appeal against these decisions arises. For the purpose of these discussions, anyone other than:

- the applicant for environmental regulation approval under Part V, Divisions 2 and 3 of the EP Act;
• the person aggrieved by a notice issued under Part V, Division 4 of the EP Act; or

• the decision-maker whose approval is being sought or who issued the notice, is referred to as a ‘third party’.

2.507 Environmental regulation approval relates to the granting of pollution licences\textsuperscript{844}, permits to clear native vegetation\textsuperscript{845} and works approvals\textsuperscript{846} to applicants. Notices, which impose certain requirements, are issued either by, or with the approval of, the Chief Executive Officer of the DEC and consist of closure notices\textsuperscript{847}, environmental protection notices\textsuperscript{848}, vegetation conservation notices\textsuperscript{849} and prevention notices\textsuperscript{850}.

2.508 Among other things, Part VII of the EP Act provides for rights of appeal against these environmental regulation decisions but the availability of third party appeals in this area is inconsistent. Third parties may appeal against:

• the grant of a clearing permit,\textsuperscript{851}

• the refusal of an application for a pollution licence, a clearing permit or works approval,\textsuperscript{852}

• the conditions, if any, imposed on a pollution licence, a clearing permit or works approval;\textsuperscript{853}

• the amendment, revocation or suspension of a pollution licence, a clearing permit or works approval;\textsuperscript{854} and

• a requirement in, or an amendment of, a ‘pollution abatement’ notice.\textsuperscript{855}

\textsuperscript{844} Under section 57 of the \textit{Environmental Protection Act 1986}.

\textsuperscript{845} \textit{Ibid}, section 51E.

\textsuperscript{846} \textit{Ibid}, section 54.

\textsuperscript{847} \textit{Ibid}, section 68A.

\textsuperscript{848} \textit{Ibid}, section 65.

\textsuperscript{849} \textit{Ibid}, section 70.

\textsuperscript{850} \textit{Ibid}, section 73A.

\textsuperscript{851} \textit{Ibid}, section 101A(4).

\textsuperscript{852} \textit{Ibid}, sections 101A(3)(a) and 102(3)(a).

\textsuperscript{853} \textit{Ibid}, sections 101A(3)(a) and 102(3)(a).

\textsuperscript{854} \textit{Ibid}, sections 101A(3)(b) and 102(3)(b).

\textsuperscript{855} \textit{Ibid}, section 103(2).
2.509 However, third parties do not have a right of appeal against the grant of a pollution licence or works approval. The EDO and CCWA submitted that there is a “lack of logic” in this:

any person can appeal the refusal by the EPA to assess a proposal [for its environmental impact] under part IV [of the EP Act], but ... They [third parties] 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.857

2.510 In the DEC’s view, if the SAT’s jurisdiction is expanded to include reviews of environmental regulation decisions, the availability of third party rights of appeal should be maintained:

Environmental regulation in Western Australia is achieved by way of a combination of industry self-monitoring and management and government regulation. Third party appeals are fundamental to the transparency and operation of industry self-monitoring and management. Third party appeals afford those people in the immediate community and in the broader community an opportunity to challenge decisions made under the EP Act and bring to the attention of the regulator issues which may not otherwise be known to the regulator.858

2.511 The EDO and CCWA also drew the Committee’s attention to the effect of section 101A(5) of the EP Act, which, among other things, precludes the rights of third parties to appeal the refusal of, conditions specified in, or the grant of, a clearing permit if the Chief Executive Officer of the DEC has granted, or would have granted, the clearing permit pursuant to an undertaking which he or she gave the applicant under section 51E(9) of the EP Act.859 The Chief Executive Officer is empowered by section 51E(9) to give the applicant a written undertaking that he or she will grant a clearing permit to the applicant:

856 Submission No 83 from the Environmental Defender’s Office WA (Inc) and Conservation Council of Western Australia Inc, 7 September 2007, p4.
857 Mr Cameron Poustie, Principal Solicitor, Environmental Defender’s Office of Western Australia (Inc), Transcript of Evidence, 30 April 2008, p7.
858 Letter from Mr Robert Atkins, Acting Deputy Director General, Department of Environment and Conservation, 30 April 2008, p7.
859 Submission No 83 from the Environmental Defender’s Office WA (Inc) and Conservation Council of Western Australia Inc, 7 September 2007, p4.
• where, at the time of the application, the applicant is not the owner of the land on which the clearing is proposed to be done; but

• the applicant is likely to become the owner of the land,

if the applicant becomes the owner of the land.

2.512 The Committee noted that third parties are still able to appeal amendments to, revocations of, and suspensions of, clearing permits, even when the clearing permit was granted pursuant to a section 51E(9) undertaking.  

2.513 Where a section 51E(9) undertaking exists, the applicant for the clearing permit is also prohibited from appealing against the Chief Executive Officer's:

• refusal to grant the permit for all of the clearing applied for; that is, a partial grant of the clearing permit; and

• specification of any conditions in the permit.

2.514 However, the applicant would still have a right of appeal where he or she is aggrieved by a refusal to grant the clearing permit, or an amendment, revocation or suspension of the clearing permit.

2.515 The EDO and CCWA were of the view that section 101A(5) of the EP Act creates an anomaly and should be repealed.

2.516 Third party appeal rights are also offered under section 103 of the EP Act in relation to ‘pollution abatement’ notices imposed under Part V, Division 4 of the Act. Under section 103(2), third parties may appeal any requirements contained in, or amendments made to, a notice. However, the Committee noted that third parties do not have the right to appeal the revocation of a notice under section 65(4).

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860 Section 101A(3)(b) of the Environmental Protection Act 1986.
861 Ibid, section 101A(5).
862 Ibid, sections 101A(1)(a)(i) and (2).
863 Submission No 83 from the Environmental Defender’s Office WA (Inc) and Conservation Council of Western Australia Inc, 7 September 2007, p4.
864 Closure notices, environmental protection notices and vegetation conservation notices may be amended by the Chief Executive Officer of the Department of Environment and Conservation: sections 65(4), 68A(10) or 70(8) of the Environmental Protection Act 1986. In contrast, prevention notices cannot be amended: ibid, section 73A.
865 Closure notices, environmental protection notices and vegetation conservation notices may be revoked by the Chief Executive Officer of the Department of Environment and Conservation: sections 65(4), 68A(10) or 70(8) of the Environmental Protection Act 1986. In contrast, prevention notices cannot be revoked: ibid, section 73A.
Committee Comment

2.517 The Committee was of the view that there is no apparent reason to continue to preclude third parties from appealing against grants of pollution licences and works approvals, particularly when third parties are able to appeal against all other decisions relating to these forms of environmental regulation.

2.518 The Committee considered that it is anomalous to preclude some applicant and some third party rights of appeal in relation to clearing permits purely because the permits were, or would have been, issued pursuant to an undertaking given under section 51E(9) of the EP Act. The Explanatory Memorandum for section 101A(5) of the EP Act was not helpful in this regard. Accordingly, section 101A(5) of the EP Act should be deleted.

2.519 Similarly, third parties should have the right to appeal the revocation of ‘pollution abatement’ notices: that is, closure notices, environmental protection notices and vegetation conservation notices.

2.520 The Committee was also of the view that third parties to environmental regulation reviews in the SAT should be able to join as parties to review proceedings which have been initiated by the applicant for environmental regulation approval. The Committee noted that, depending on the form of legislative amendment that is used to confer third parties with this right to seek joinder, the third parties may have to satisfy the requirements of section 38 of the SAT Act – requirements which the EDO has previously warned may not be met by environmental or public interest groups.866 The Committee was of the view that these concerns should be considered.

Recommendation 20: The Committee recommends that the Environmental Protection Act 1986 be amended to give third parties a right to initiate applications for State Administrative Tribunal reviews of the granting of pollution licences and works approvals.

Recommendation 21: The Committee recommends that the Environmental Protection Act 1986 be amended by deleting section 101A(5).

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Recommendation 22: The Committee recommends that the *Environmental Protection Act 1986* be amended to give third parties a right to initiate applications for State Administrative Tribunal reviews of the revocation of closure notices, environmental protection notices and vegetation conservation notices.

Recommendation 23: The Committee recommends that the *Environmental Protection Act 1986* be amended to give third parties a right to apply to join as parties to State Administrative Tribunal reviews of environmental regulation decisions.

APPEALING THE SAT’S DECISIONS

2.521 Pursuant to section 105 of the SAT Act, a party to SAT proceedings may appeal a decision of the SAT to the:

- Court of Appeal, if the decision was made by a judicial member (that is, the President or the Deputy President) or the SAT was constituted by members who included a judicial member; or
- Supreme Court, in any other case.

2.522 An appeal may only be brought on a question of law. Amongst other appeal procedures prescribed in section 105, parties wishing to appeal a SAT decision must first seek leave to appeal from the appropriate appeal court and an application for leave to appeal must be made within 28 days after the day on which the SAT’s decision was given. The right of appeal provided, and the appeal procedures prescribed, in section 105 are of course subject to other provisions in the SAT Act and the enabling Acts.

2.523 Mr Ross Sharland was of the opinion that the appeal rights from decisions of the SAT are complicated, unclear and not well-known to the public. Mr Sharland recommended that this problem could be overcome by the SAT issuing a simple public information document on the topic of appeals from the SAT.

867 A ‘question of law’ has been defined as “A question to be resolved by applying legal principles, rather than by determining a factual situation; and issue involving the application or interpretation of a law and reserved for a judge”: The Honourable Dr PE Nygh and P Butt (General Editors), *Butterworths Australian Legal Dictionary*, Butterworths, Perth, 1997, p970.

868 For example, parties to a minor proceeding in the State Administrative Tribunal have no right of appeal from a decision made in that matter where the applicant had made a ‘no appeals election’ pursuant to sections 93(2)(c) and (5) of the *State Administrative Tribunal Act 2004*. Refer to paragraphs 2.397 to 2.401 in this Report for a discussion of minor proceedings.

869 Section 5 of the *State Administrative Tribunal Act 2004*.

870 Submission No 78 from Mr Ross Graham Sharland, 31 August 2007, pp1 and 8.
2.524 The SAT agreed with Mr Sharland’s views and advised that, while information about appeal rights under the SAT Act is already available on its website, it would give consideration to publishing a brochure on the topic.

Recommendation 24: The Committee recommends that the State Administrative Tribunal continue to inform the public about the right to appeal its decisions.

THE SAT’S USE OF TECHNOLOGY

2.525 The SAT’s use of modern technology is demonstrated by various means, including the conduct of hearings and other proceedings by video or telephone-conferencing, the ability for applicants to lodge their applications by email, and as the DOTAG explains, the SAT’s use of the ICMS and the provision of an informative, and sometimes interactive, website:

SAT technology is reflected through its website and the Court Tribunal Services Integrated Case Management System (ICMS). Users of the website can access all relevant information concerning the tribunal’s operation, jurisdiction, the making of applications, practices and procedure, and decision-making. Staff use ICMS to [electronically] process case information.

The SAT website offers a wizard [via its website] which continues to be well used by the community and many applications lodged with the SAT have been generated by use of the SAT Wizard. The Department is still working towards [the SAT becoming] an e-Tribunal and the online lodgement of applications and other documents for the Tribunal and subject to funding remains committed to online documents lodgement processes.

872 Written answer from the State Administrative Tribunal to proposed question 44 for the hearing on 15 February 2008, p26.
873 Refer to paragraphs 2.558 to 2.568 in this Report for a discussion of these facilities.
874 Refer to paragraph 2.118 in this Report for a discussion of this facility.
875 “This system records and allocates a number to an application, books hearings and stores information about the member hearing a matter, hearing room activities and the orders made”: Written Presentation from the Honourable Justice Michael Barker, President, State Administrative Tribunal, 21 September 2007, p11.
876 Refer to paragraph 2.119 in this Report for a discussion of this facility.
877 Submission No 84 from the Department of the Attorney General, 7 September 2007, p12.
2.526 The President of the SAT advised the Committee that the SAT is at the “forefront of judicial administration” for providing its sessional members with the on-line ‘SAT Members Portal’, which is the preferred method by which sessional members interact with the SAT:

In general terms, the SAT Members Portal is a secure site where communities are established for members of a group within the DOTAG IT system. A community page can contain various tools or information that is provided to the member via individual portlets. The SAT Members Portal provides its members with portlets such as availability, webmail, news boards, application types, decisions database and claims for payment.878

2.527 The WACARTT recognised the importance of technology for the efficient operation of the SAT; for instance, recommending that:

from its inception the SAT should acquire and utilise information technology that will enable the efficient receipt and processing of all applications to it, relating to all functions of the SAT. …879

2.528 In keeping with that recommendation, the DOTAG advised the Committee that:

The SAT was established with a vision that it would be equipped with cutting edge modern technology. The Attorney General states “…the SAT will employ the best practices and information technology systems available today.”880

2.529 However, the Elliot Review found that this did not occur:

the implementation of the technology to support the SAT operation has not met expectations set when the SAT was established, largely due to limited funding and resources;881

2.530 In its submission to the Committee, the DOTAG acknowledged that the SAT has had to develop cost effective processes since its establishment and maintain a continuous improvement approach in order to ensure that it could continue operating in circumstances where the demand for its services was increasing without the benefit of

878 Written Presentation from the Honourable Justice Michael Barker, President, State Administrative Tribunal, 21 September 2007, p11.
879 Western Australian Civil and Administrative Review Tribunal Taskforce, Government of Western Australia, Western Australian Civil and Administrative Review Tribunal Taskforce Report on the Establishment of the State Administrative Tribunal, May 2002, p163.
880 Submission No 84 from the Department of the Attorney General, 7 September 2007, p12.
additional revenue.\textsuperscript{882} The DOTAG also conceded that further investment in technology for the SAT is needed:

Further work is required in the update and deployment of technology that supports and promotes the Tribunals objectives and internal resource use and allocation will be reviewed. The Department’s technology plan for Court and Tribunals has been delayed in its implementation as the funding for improvements has not yet been secured. During the budget processes for the 2008/09 budget year the Department will seek funding for its technology objectives for SAT.\textsuperscript{883}

The SAT Website

2.531 The SAT’s website, www.sat.justice.wa.gov.au, is an important source of information about the SAT’s jurisdiction, powers, practices and procedures. It contains the following main sections or ‘links’:

- ‘About SAT’. This link provides general information, or more links to further information, about the SAT, its key personnel, history, reports and publications, its streams of work and news.

- ‘Jurisdiction & Legislation’.

- ‘Applications’. This link provides information which would assist an applicant, such as the time limits which apply and directions to contact the SAT regarding the fees and charges, if any, which will be payable. It also incorporates a link to the SAT Wizard program, which can be used to create applications to the SAT (refer to paragraph 2.119 in this Report for a discussion about the SAT Wizard).

- ‘Procedures’.

- ‘Decisions Database’. This contains the written decisions made by the SAT and some former adjudicators which have been replaced by the SAT, including the Guardianship and Administration Board, Commercial Tribunal, Strata Titles Referee, Retirement Villages Disputes Tribunal and the Town Planning Appeals Tribunal. All written reasons for final decisions and some decisions on important preliminary issues, as well as final orders made by the SAT are published on the decisions database, as long as they do not involve

\textsuperscript{882} \textit{Ibid}, p12.
\textsuperscript{883} \textit{Ibid}, p28.
areas that are confidential under an enabling Act.\textsuperscript{884} The database can be searched using, for example, the date of the decision, the case name, a party’s name, the name(s) of the member(s) who constituted the SAT for the purpose of the proceeding, the relevant legislation and the type of orders which were made.

- ‘Decisions Bulletins’. This link allows the website user to access monthly bulletins published by the SAT which contain summaries of the SAT’s decisions in the Development and Resources stream, the Commercial and Civil stream, the Vocational Regulation stream and the GA Act matters.

- ‘Daily Hearings’. This link provides a list of the matters which will be heard or facilitated by the SAT on a particular day.

- ‘Links’.

- ‘Contact SAT’.\textsuperscript{885}

2.532 The President of the SAT described the website as the SAT’s “flagship”\textsuperscript{886} and the Committee received positive feedback about the website from five submitters, particularly in relation to the usefulness of the decisions database.\textsuperscript{887} Some of their comments are quoted here:

- “The SAT website provides excellent reference material in respect to the tribunal practices and procedures for remaining jurisdictions, which is widely accessible.”\textsuperscript{888}

- “In terms of vocational regulation this objective [improving the public accountability of official decision-making] has been met by the provision of a well-designed web site with a decisions database. The consumer of professional services can access the site and use a key word search to

\textsuperscript{884} A number of the State Administrative Tribunal’s decisions are also published in commercial law reports for the benefit of the legal profession and the community generally. The decisions also appear on the Austlii website at www.austlii.edu.au: State Administrative Tribunal, \textit{Annual Report 2007}, 28 September 2007, p6.


\textsuperscript{886} The Honourable Justice Michael Barker, President, State Administrative Tribunal, \textit{Transcript of Evidence}, 21 September 2007, p9.

\textsuperscript{887} Submission No 36 from the Social Work Department, Sir Charles Gairdner Hospital, 27 August 2007, p2; Submission No 64 from the Land Surveyors Licensing Board of Western Australia, 21 August 2007, p4; Submission No 88 from the Strata Centre, 21 September 2007, p1; Submission No 93 from the Western Australian Planning Commission, 5 October 2007, pp10 and 11; and Submission No 94 from the Small Business Development Corporation, Western Australia, 30 August 2007, p1.

\textsuperscript{888} Submission No 36 from the Social Work Department, Sir Charles Gairdner Hospital, 27 August 2007, p2.
effectively research any issues they may have. There is anecdotal advice from practitioners that just being named as a respondent on the site is in itself a penalty that should be taken into account.”

- “One area of advancement is the availability of information via the SAT website and in particular the recording of “decisions data base” on the website.”

2.533 The WAPC praised the decisions database for the “publication and ready availability of SAT decisions on a dedicated website”, submitting that the database is “highly successful and helpful for all stakeholders in the planning system”. It suggested that the database could be improved by ‘back-capturing’ additional Town Planning Appeals Tribunal decisions.

2.534 Of the 41 per cent of the parties in the 2007 Party Survey who had used the SAT’s website, 80 per cent visit the website as the need arises, 79 per cent were able to find the information they required, 76 per cent found the website easy to navigate and 67 per cent claimed that they had obtained their application form through the SAT website. Preliminary results from the 2008 Party Survey indicated that 85 per cent of the parties who had used the SAT’s website found it to be easy to navigate.

2.535 Conversely, the VSB advised that it had been told by individuals that they had found it difficult to navigate the SAT’s website, particularly in relation to locating information on a particular case. The VSB suggested that:

*The SAT may be able to improve transparency through simplifying the website navigation to individual cases and case results.*

2.536 LEADR recommended that the SAT’s website should contain a “fuller” description of mediation (refer to paragraph 2.195 in this Report for a discussion of this issue).

2.537 The consultant who conducted the Elliot Review also suggested that the SAT’s website could be more user-friendly:

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889 Submission No 64 from the Land Surveyors Licensing Board of Western Australia, 21 August 2007, p4.
890 Submission No 88 from the Strata Centre, 21 September 2007, p1.
891 Submission No 93 from the Western Australian Planning Commission, 5 October 2007, p11.
894 Written answer from the Veterinary Surgeons’ Board of Western Australia to proposed question 4 for the hearing on 7 May 2008, p4.
It is now at a point where it would be worthwhile looking at the user friendliness of the site to get greater leverage of the information available.

There is an opportunity to make it more appealing to high volume application areas such as GAA and commercial tenancy that do not appear to be making great use of the web facilities available. For instance, given their volume, it may be appropriate to have an entry point to the wizard specifically for GAA applications, or at least make it clearer what the SAT wizard is. (even use a term that is more user friendly). 895

2.538 In response to the above suggestion, the DOTAG advised that it, through its Community Relations branch, and the SAT are “developing specifications for improvements to the navigation of the website.” However, “Full re-development of the website is not possible at current resource levels.” 896 When representatives of the DOTAG appeared before the Committee in March 2008, they provided the Committee with an update on the status of this initiative:

Mr Jones: It a resourcing issue. We are doing what we can. We upgraded the website this year and we are constantly looking at ways to improve our service, and the website is one area that we focus on. That is why it remains a work in progress. 897

Recommendation 25: The Committee recommends that the Government provides adequate resources to maintain and upgrade the State Administrative Tribunal’s website.

The SAT as an e-Tribunal

2.539 As part of the SAT’s vision of being one of Australasia’s leading tribunals, the SAT aims to become an e-Tribunal. However, the SAT submitted that the e-Tribunal technology that the DOTAG currently supplies the SAT falls short of the technology that is available to other Australian tribunals such as the VCAT 898, the New South

895 Submission No 84 from the Department of the Attorney General, 7 September 2007, p20.
897 Mr Gavan Jones, Director Higher Courts, Court and Tribunal Services, Department of the Attorney General, Transcript of Evidence, 25 March 2008, p5.
898 Which has on-line lodgment facilities: Written Presentation from the Honourable Justice Michael Barker, President, State Administrative Tribunal, 21 September 2007, p29.
Wales Consumer, Trader and Tenancy Tribunal\textsuperscript{899} (\textbf{NSW CTTT}) and the Western Australian Industrial Relations Commission\textsuperscript{900} (\textbf{WAIRC}).\textsuperscript{901}

2.540 The Elliot Review found that “the implementation of an e-tribunal would potentially have the most significant impact on efficiency and effectiveness in the Tribunal” and would be “another key element in the Tribunal providing services for remote and regional parties.”\textsuperscript{902}

2.541 The DOTAG advised the Committee that it will support the SAT’s strategic objective of becoming an e-Tribunal by 2010:

\begin{quote}
Looking out to 2010, the Department will partner the Tribunal in its key result areas through direct support for the following strategies: These Strategies include the Tribunal’s objectives to be … an e-Tribunal;\textsuperscript{903}
\end{quote}

2.542 However, any attempt to install full e-Tribunal capabilities will be dependent on the level of funding available from the Government. Representatives of the DOTAG, who appeared before the Committee in March 2008, advised that:

\begin{quote}
The Department has applied to Treasury for funding in the 2008/09 budget to fund the e-Business Plan. It is awaiting a formal response from Treasury. The e-Business Plan identifies a development path for SAT to become an e-Tribunal over the life of the plan.\textsuperscript{904}
\end{quote}

2.543 In December 2008, when the Committee requested an update on the DOTAG’s application for funds for its e-Business Plan, the DOTAG advised that its application was unsuccessful and, consequently, no work had commenced on the SAT’s e-Tribunal development.\textsuperscript{905}

2.544 The President of the SAT provided the following reasons why he was of the view that the implementation of e-Tribunal technology should be occurring faster:

\textit{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}

\textsuperscript{899} Which has on-line lodgment facilities: \textit{ibid.}
\textsuperscript{900} Which has on-line lodgment facilities, electronic document management and digital hearing rooms: \textit{ibid.}
\textsuperscript{901} \textit{Ibid.}
\textsuperscript{902} Submission No 84 from the Department of the Attorney General, 7 September 2007, pp16-17.
\textsuperscript{903} \textit{Ibid}, p27.
\textsuperscript{904} Written answer from the Department of the Attorney General to proposed question 29 for the hearing on 25 March 2008, p16.
\textsuperscript{905} Letter from Mr Ray Warnes, Executive Director, Court and Tribunal Services, Department of the Attorney General, 24 December 2008.
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. ... 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.906

2.545 His Honour Judge John Chaney SC, Deputy President of the SAT, was of the view
that the SAT could potentially develop its e-Tribunal technologies faster if it was
operating independently of the DOTAG and the rest of the justice system in this
respect. The President agreed with that view in principle:

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 [the
ICMS], 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.907

...

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.908

906 The Honourable Justice Michael Barker, President, State Administrative Tribunal, Transcript of

907 His Honour Judge John Chaney SC, Deputy President, State Administrative Tribunal, Transcript of

908 The Honourable Justice Michael Barker, President, State Administrative Tribunal, Transcript of
2.546 The following comments were made by the President in the SAT’s Annual Report 2008:

*I have mentioned in previous reports that the Tribunal believes it will be able to provide increased convenience and access to citizens throughout the State once the Tribunal has the capacity to act fully as an eTribunal, and receive applications and other documents on-line onto its computer system.* Financial resources of government are required, however, to achieve this outcome in a timely manner. Thus far they have been lacking right across the courts and tribunals sector. For some reason, government often seem to share a stereotypical view that courts and tribunal are, and should remain, relics of the age of Queen Victoria. *It is time for that view to be replaced with an understanding that the service offered to the public will be immeasurably improved by the implementation of an eJustice plan.*

2.547 The hallmarks of an e-Tribunal include several interdependent components such as:

- a case input and records management system. The SAT advised that this is currently being met by the ICMS;

- electronic case files and an electronic document and records management system (EDRMS), which would allow for the electronic delivery of ‘digital documents’ and a reduction in the handling of hard copy documents. The SAT indicated that it may be possible to adapt and develop the ICMS to achieve this. The WAIRC already has this facility;

- the ability for the public to search for a register of proceedings before the SAT. This facility has not yet been developed but could be based on the ICMS or the EDRMS;

- the ability for people to lodge their applications and other documents and pay any required fees on-line. The WAIRC, VCAT and the NSW CTTT already have this facility. In September 2007, the SAT advised that work was underway to deploy on-line lodgment for the SAT.

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910 Submission No 84 from the Department of the Attorney General, 7 September 2007, p16.
911 Ibid.
912 Written Presentation from the Honourable Justice Michael Barker, President, State Administrative Tribunal, 21 September 2007, p30.
• e-Tribunal hearing rooms; that is, ‘virtual’ hearing rooms. The SAT was of the view that the demand for these hearing rooms will increase over time, particularly in relation to directions hearings, and is monitoring the work of interstate jurisdictions in this area;

• a SAT members’ electronic interface. This facility is already provided to sessional members of the SAT and is known as the SAT Members Portal (refer to paragraph 2.526 in this Report);

• electronic tribunal rooms and hearings. These rooms would offer “full access to electronic documents, integrated audio visual and digital recording.” The SAT already has rooms where members and staff are connected to the SAT’s network and the Internet;

• the integration of analogue audio, video and data communications and information. This involves the digital recording of hearings, the provision of hearing loops, audio and video systems, voice reinforcement systems, expanded video and telephone-conferencing systems (the SAT already has the capacity of two video-conferencing codecs) and closed circuit television linkage between hearing rooms; and

• the electronic publication of decisions. This is already being achieved through the decisions database on the SAT’s website.

2.548 On-line lodgment, electronic hearing room facilities and video and telephone-conferencing are discussed further below.

On-line Lodgment

2.549 The on-line lodgment or e-lodgment of documents has been described as a “significant cornerstone” of e-Tribunals. The consultant who conducted the Elliot Review recommended the implementation of e-lodgment and/or on-line forms because this would:

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913 Submission No 84 from the Department of the Attorney General, 7 September 2007, p17.
914 ‘Hearing loops’ are “are usually installed in meeting rooms or in other places where people gather. They assist people who have hearing aids fitted with a T-switch. They can even assist people without hearing aids if the user is provided with a loop receiver device”: http://www.deafnessforum.org.au/pdf/1036%20DF%20Hearing%20Loop.pdf, (viewed on 2 September 2008).
915 A ‘codec’ is a “device which can encode and decode or compress and decompress a signal or block of data to facilitate transmission or storage; esp. one which converts analog video into compressed video or analog sound into digital sound”: Oxford English Dictionary, On-line.
916 Written Presentation from the Honourable Justice Michael Barker, President, State Administrative Tribunal, 21 September 2007, pp29-31.
917 Ibid, p30.
significantly reduce the time required to enter application data and improve data quality.

The online forms functionality is also expected to include automated listing capability, providing parties with a listing when their application is lodged. Listings information would also be available online for parties. This once again would provide significant time savings for lodgement and listings processes.  

2.550 In response to the above recommendation, the DOTAG advised that it was analysing the requirements for the delivery of e-lodgment services at the SAT and that the current level of funding and the allocation of e-lodgment priorities across the whole justice system were barriers to this initiative. Despite these barriers, the Committee was advised by the President of the SAT in September 2007 that work was being undertaken to deploy e-lodgment facilities for the users of the SAT’s services. However, the SAT reported in September 2008 that it still did not have this capability.

2.551 On a similar note, the WAPC indicated that administrative decision-making is evolving to incorporate higher levels of digital communication, and that when whole-of-government standards for ‘digital documents’ are available, the SAT must adopt these standards.

2.552 The Committee noted that 67 per cent of the parties in the 2007 Party Survey who had used the SAT’s website claimed that they had obtained their application form from the SAT’s website. However, only:

- 38.1 per cent of these parties indicated that they would lodge an application electronically, either by email or via the Internet, if this option was available and

- 30.6 per cent of these parties said that they may make use of this option.

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918 Submission No 84 from the Department of the Attorney General, 7 September 2007, p16.
919 Ibid, p16.
920 Written Presentation from the Honourable Justice Michael Barker, President, State Administrative Tribunal, 21 September 2007, p30.
922 Submission No 93 from the Western Australian Planning Commission, 5 October 2007, p8.
923 Forty-one per cent of the parties who responded to the survey had used the State Administrative Tribunal website: Data Analysis Australia, State Administrative Tribunal 2007 Party Survey, November 2007, p10.
924 Ibid.
925 Ibid, p11.
2.553 In the 2008 Party Survey, 60 per cent of the parties who had used the SAT’s website indicated that they had obtained their application form from the website.\textsuperscript{926}

**Committee Comment**

2.554 The Committee noted that the above statistics are only a preliminary indicator of how favourably the e-lodgment and online forms facility would be received by the public. The number of people who are willing to utilise this form of information technology is likely to increase as the public becomes more aware of this option.

**Recommendation 26:** The Committee recommends that the Government provides adequate resources to upgrade the State Administrative Tribunal’s information technology facilities to enable the electronic lodgment of documents.

**Electronic Hearing Rooms**

2.555 The Elliot Review recommended the establishment of fully electronic hearing rooms in the SAT on the basis that it will result in time and cost savings:

\textit{This would provide full access to electronic documents, integrated audio visual and digital recording. ...}

\textit{Members would have access to application information electronically, providing facilities such as search capability and easier access to transcripts. This will assist in both the conduct of hearings and the preparation of orders and decisions.}

\textit{Staff efficiencies would include reduced time to set up hearing rooms, more efficient time usage in hearings and after hearings and reduced time in requesting transcripts.}

\textit{There would be direct costs savings in transcript preparation costs and storage space for recordings.}\textsuperscript{927}

2.556 In September 2007, the DOTAG advised the Committee that the recording equipment in each of the SAT’s hearing rooms was scheduled to be upgraded during 2007/2008 but that full digital hearing rooms were not achievable within the resource allocation at the time.\textsuperscript{928} In March 2008, the DOTAG provided the following update:

\textsuperscript{927} Submission No 84 from the Department of the Attorney General, 7 September 2007, p17.
\textsuperscript{928} \textit{Ibid.}
The Department has installed a stand-alone digital recording system in one of the Hearing Rooms and the remainder will be upgraded throughout 2008/09.  

In September 2008, the SAT reported that it had introduced a fully functional digital recording system during 2007/2008.

**Recommendation 27:** The Committee recommends that the Government provides adequate resources to upgrade and transform all State Administrative Tribunal hearing rooms into fully electronic hearing rooms.

**Video and Telephone-Conferencing**

In keeping with the SAT’s objective of acting with as little formality as practicable, the Committee understands that, since its commencement, the SAT has been anxious to keep inconvenience to parties and witnesses, and consequently, the costs to parties to a minimum. One way of achieving this is to allow parties and witnesses to participate in proceedings by telephone or video-conference where their personal attendance is difficult, for example, where they are based outside the metropolitan area, the State or Australia, and their personal absence is unlikely to prejudice the fair hearing of the case.

For example, during a visit to the SAT on 21 September 2007, the Committee observed a video-conference between a SAT member and a number of people who were situated in a hospital in a regional city. The Committee was advised that the SAT has conducted telephone-conferences with people who were in places as diverse as the person’s private residence in Broome, a fishing boat, and a shopping centre, although the President acknowledged that he preferred parties or witnesses to be located in an area with minimal distractions.

The SAT utilises a list of video-conferencing locations within the State provided by the DOTAG, Department of Corrective Services, Department of Health and Department of Agriculture, as well as more than 100 telecentres in locations around

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929 Written answer from the Department of the Attorney General to proposed question 25 for the hearing on 25 March 2008, p14.


931 Section 9(b) of the *State Administrative Tribunal Act 2004*.


the State. The party requesting the video link is required to pay the cost, unless the presiding member waives or reduces the cost.934

2.561 It appeared to the Committee that the SAT’s use of video and telephone-conferencing is an important method of meeting its obligations to service remote and regional Western Australia:

- The Elliot Review report noted that these methods of communication with country residents are “extremely cost effective” have been “well received by Tribunal parties.”935

- The OPA was supportive of the use of video-conferencing in regional areas as a practical solution to the problems associated with distance and remoteness. However, the OPA noted that, in many cases, it may be more appropriate for the SAT to visit these areas, and a “balanced approach” was required in this respect. The OPA also observed that the usefulness of video-conferencing is variable and is dependent on a number of factors, such as the quality of the equipment and the level of technical support which is available to people who are attending the video-conference from a regional location. The OPA suggested that the successfulness of video-conferences “could be enhanced by ensuring that relevant SAT staff have the necessary expertise to manage the hearing process.”936

- The Town of Vincent submitted that there should be “wider usage of telephone conferences in directions hearings”.937

2.562 The President of the SAT explained to the Committee that video and telephone-conferencing are options increasingly used by the SAT to assist regional parties:

we always say to the parties - indeed, it is on the notice of hearing that goes out - that if you have any special needs, if you cannot attend and if you want to participate by telephone or videoconference, contact the tribunal and let us know. There are many situations where it is useful to have people in person but we are increasingly finding that it is no real impediment to have people by telephone. So we encourage people to do that.938

934 Written Presentation from the Honourable Justice Michael Barker, President, State Administrative Tribunal, 21 September 2007, p17.
935 Submission No 84 from the Department of the Attorney General, 7 September 2007, p19.
936 Submission No 57 from the Office of the Public Advocate, 29 August 2007, p6.
937 Submission No 74 from the Town of Vincent, 31 August 2007, p2.
938 The Honourable Justice Michael Barker, President, State Administrative Tribunal, Transcript of Evidence, 21 September 2007, pp11-12.
2.563 However, while the growth of video-conferencing facilities in regional areas was a positive development, access to these facilities is not always convenient:

_The point about videoconferencing is very interesting because, at the moment - and things have been changing over some years - there are a certain number of places where you can find a videoconferencing facility. In regional Australia now, particularly through commonwealth government assistance, there are a whole lot of telecentres where you can find that as well. A number of hospitals in Western Australia have videoconferencing facilities because they use that, particularly in the mental health area, and we take advantage of that. It is not always convenient for us._  

2.564 The consultant who conducted the Elliot Review was of the opinion that “addressing the shortcomings of the current teleconferencing facilities is the highest priority in” the area of remote communications and suggested that dedicated telephone-conferencing facilities should be provided in more of the SAT’s hearings rooms:

_The benefits will be realised in the easier set up of rooms, more efficient running of hearings through better sound quality and a far more professional looking and running hearing._

2.565 The DOTAG advised the Committee that, in response to the above recommendation, the SAT upgraded two of its hearing rooms to an integrated telephone-conferencing standard in July 2007.

2.566 In comparison, the Elliot Review found that the SAT’s video-conferencing facilities were generally operating effectively, “other than having to share a control box between two hearing rooms.” The consultant recommended that a “dedicated video conference controller (AMX Touch Panel) [be provided] for each of hearing rooms 8.13 and 9.05” in order to avoid:

- having to move the control box between the hearing rooms; and
- being unable to access the control box when the hearing room in which it is situated is in use. This could be particularly frustrating if the control box was not also being used.

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939 _Ibid_, p11.
940 _Ibid_, p19.
941 _Ibid_, p19.
942 _Ibid_.

The Committee observed that this set-up would also allow for contemporaneous video-conferencing in each of the hearing rooms. The Committee was advised by the DOTAG in September 2007 that, in July 2007, the SAT upgraded all of its video-conferencing facilities to address the Elliot Review recommendation. \(^{(943)}\) In March 2008, the DOTAG provided the following further information:

> The Department upgraded all of the video and teleconferencing rooms in 2007 and subject to funding for the DOTAG e-Business Plan envisages further upgrades over the next three to four years. \(^{(944)}\)

**Committee Comment**

2.568 The Committee endorses the continued upgrades to the SAT’s video and telephone-conferencing facilities.

**Recommendation 28:** The Committee recommends that the Government provides adequate resources for the upgrade and transformation of the State Administrative Tribunal into an e-Tribunal.

THE SAT’S PROVISION OF ASSISTANCE TO CERTAIN PARTIES AND WITNESSES

**Self-Represented Parties**

2.569 In its *Annual Report 2008*, the SAT made the following observation:

> The Tribunal continues to find that the vast majority of parties in the Tribunal are self-represented or not legally represented. However, in some areas of decision-making, such as those involving state revenue, serious vocational regulatory proceedings and major planning and development proposals, the parties continue to be legally represented. In some significant guardianship and administration proceedings, parties are also increasingly legally represented.

> Nonetheless, the Tribunal continues to design, assess and reassess all of its practices and procedures on the basis that most parties will be self-represented or represented by persons other than lawyers. \(^{(945)}\)

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\(^{(943)}\) Ibid.

\(^{(944)}\) Written answer from the Department of the Attorney General to proposed question 24 for the hearing on 25 March 2008, p14.

The Committee noted that the SAT Act authorises the SAT to appoint a person to represent a party where that party is unrepresented.\(^946\) The Act also obliges the SAT:

- “to act ... with as little formality and technicality as is practicable ...”: section 9(b);
- to “act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms”: section 32(2);
- to take measures that are reasonably practicable to:
  - “ensure that the parties to the proceeding before it understand the nature of the assertions made in the proceeding and the legal implications of those assertions”: section 32(6)(a);
  - “explain to the parties, if requested to do so, any aspect of the procedure of the Tribunal, or any decision or ruling made by the Tribunal, that relates to the proceeding”: section 32(6)(b); and
  - ensure that parties have the opportunity to call or give evidence, to examine, cross-examine or re-examine witnesses, and to be heard or otherwise have their submissions considered: section 32(6)(c);
- to ensure that all relevant material is disclosed to it “so as to enable it to determine all of the relevant facts in issue in a proceeding”: section 32(7); and
- through its Executive Officer, to ensure that a person wishing to commence a proceeding before the SAT is given “reasonable assistance that the person seeks”: section 42(2).

Paragraphs 2.20 to 2.39, 2.117 to 2.125, 2.126 to 2.149 and 2.724 to 2.726 in this Report contain discussions about how well the SAT has performed some of the above obligations.

**Aboriginal People**

In this Report, a reference to Aboriginal people includes Torres Strait Islander people.

**Cultural Awareness**

The WALRC submitted that the intent of recommendation 73 in its report on Aboriginal customary laws\(^947\) be incorporated into the SAT Act.\(^948\) Recommendation

\(^946\) Section 40(1) of the *State Administrative Tribunal Act 2004*. 

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73 was focused on the consideration of Aboriginal perspectives when assessing the decision-making ability of an Aboriginal person for the purpose of GA Act applications:

**Recommendation 73 - Assessment of decision-making capacity of an Aboriginal person**

That, as part of its assessment of its procedures and protocols for dealing with hearings involving Aboriginal people, the State Administrative Tribunal take steps to ensure that members are aware of Aboriginal perspectives in the process of assessing the decision-making capacity of an Aboriginal person who may be the subject of an order for guardianship or administration.

2.574 However, the intent of this recommendation may be applied more generally to all aspects of the SAT’s operation. The WALRC considered that “legislative measures informed by the Recommendation 73 will assist in making the legal system of Western Australia more just and accessible for Aboriginal people.”

2.575 The SAT advised that it supports recommendation 73 and assured the Committee that it takes Aboriginal perspectives into account in its decision-making. The following scenario was an example of the initiatives the SAT has taken to develop culturally appropriate procedures for Aboriginal people:

In assessing the decision-making capacity of an Aboriginal person who was the subject of an administration order the Tribunal recently invited an anthropologist to assist the Tribunal as a witness with expert knowledge on the cultural practices and needs of the proposed represented person (PRP). The expert was knowledgeable about the cultural practices and requirements of the PRP’s people through over 30 years’ involvement with the community. The witness knew the PRP’s family well and, as well as giving evidence at the hearing, prepared a written report for the Tribunal. See FS [2007] WASAT 202.

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948 Submission No 31 from the Law Reform Commission of Western Australia, 28 August 2007, p1.
950 Written answer from the State Administrative Tribunal to proposed question 17 for the hearing on 15 February 2008, p11.
951 Written answer from the State Administrative Tribunal to proposed question 42(a) for the hearing on 21 September 2007, p49.
2.576 The President of the SAT was of the view that the calling of the expert witness and reliance on the expert’s advice was accepted by the Aboriginal community involved in that case.\textsuperscript{952} While the cost of calling the expert witness was met by the SAT in that case, the President advised the Committee that such a practice would not be common because of the lack of an “expense line” for that sort of activity.\textsuperscript{953}

2.577 The SAT also agreed with the WALRC’s suggestion that the intent of recommendation 73 be incorporated into the SAT Act, noting that it had previously indicated this through the DOTAG.\textsuperscript{954}

Recommendation 29: The Committee recommends that the intent of recommendation 73 in Law Reform Commission of Western Australia, Project No 94, Aboriginal Customary Laws Final Report: The interaction of Western Australia law with Aboriginal law and culture, September 2006, be incorporated into the State Administrative Tribunal Act 2004.

Recommendation 30: The Committee recommends that the State Administrative Tribunal be funded to obtain expert advice on Aboriginal and other minority cultures on a case by case basis.

2.578 The OPA was aware of the case example provided by the SAT, and discussed above, and considered that “the involvement of an anthropologist was of great assistance to the proceedings.” It was also aware that the SAT uses video-conferencing to enable people in regional and remote areas to participate in hearings in addition to conducting hearings in the country from time to time.\textsuperscript{955} However, the OPA made the following suggestions for improving the SAT’s interaction with Aboriginal people:

- Develop more appropriate facilities and venues in regional areas for SAT hearings as it is important to hold face-to-face hearings in complex matters involving Aboriginal people. This issue is discussed further in paragraphs 2.699 to 2.702 in this Report.

- Employ Aboriginal liaison officers to: facilitate contact between Aboriginal people and Aboriginal service providers; assist Aboriginal people

\textsuperscript{952} The Honourable Justice Michael Barker, President, State Administrative Tribunal, Transcript of Evidence, 21 September 2007, p40.

\textsuperscript{953} Ibid, p40.

\textsuperscript{954} Written answer from the State Administrative Tribunal to proposed question 42(b) for the hearing on 21 September 2007, p50.

\textsuperscript{955} Written answer from the Office of the Public Advocate to proposed question 3(a) for the hearing on 7 May 2008, p6.
participating in SAT hearings; and assist the SAT in the consideration of cultural issues and customary law and to identify the most appropriate people in a family to provide advice and information in GA Act applications.

- Provide Aboriginal cultural awareness training. The Committee noted that the OPA was not aware of the training which is already provided to the SAT’s staff and members but the suggestion for this form of training was made on the basis that it is useful for all organisations which work with Aboriginal people.\(^{956}\)

2.579 In December 2008, the SAT advised the Committee that its members participate in Aboriginal cultural awareness seminars as appropriate, from time to time. Over the course of 2008, members attended the following seminars:

- a presentation by Dr Julie Owen, an Aboriginal Fullbright scholar, on her studies into Aboriginal health policy matters in Western Australia, the United States and Canada;

- on 25 February 2008, a presentation at the SAT premises by Lieutenant General Sanderson on Indigenous Cultural Considerations and his policy proposals for the State of Western Australia in respect of Aboriginal affairs;\(^{957}\)

- a presentation by Dr Sandra Eades on Aboriginal English in the courts; and

- a presentation by Dr Stephanie Fryer-Smith on the second edition of the Aboriginal Benchbook, which is provided to all members of the judiciary in the State and the SAT.\(^{958}\)

2.580 Additionally, the Honourable Justice John Chaney, President, SAT, attended the National Judicial College’s Aboriginal cultural awareness tour of the Perth metropolitan area on 13 February 2009.\(^{959}\)

2.581 The SAT also informed the Committee that it began a “concerted effort” to train its staff in Aboriginal cultural awareness. Four staff have already attended a full-day

\(^{956}\) Written answer from the Office of the Public Advocate to proposed question 3 for the hearing on 7 May 2008, p6.


\(^{958}\) Letter from the Honourable Justice Michael Barker, President, State Administrative Tribunal, 22 December 2008, Enclosure 1, p8.

\(^{959}\) *Ibid*; and Email from Mr Alistair Borg, Executive Officer, State Administrative Tribunal, 26 March 2009.
training programme offered by the DOTAG and it is expected that most of the SAT’s staff will have attended this programme by the end of 2009.960

2.582 In the first three and a half years of the SAT’s operation, it employed one anthropologist, who is also a mediator, as a sessional member.961 In addition, one Indigenous community representative was employed as a sessional member in the 2004/2005 and 2005/2006 years,962 but it appears that the skills set of this member was not replaced in the 2006/2007 and 2007/2008 years.

2.583 In relation to 2005/2006, the SAT reported that it had implemented an Aboriginal Service Plan,963 which resulted in its application processes being adjusted to allow applicants to identify themselves as Aboriginal people, thereby giving the SAT information to assist it in responding to the specific needs of these members of the community prior to, during and after the proceedings964. The same annual report indicated that the following initiatives were planned for 2006/2007:

- The implementation of methods to collate data on Aboriginal users of the SAT’s services. This issue is discussed further below (see paragraphs 2.587 to 2.592).

- The response to recommendation 73 in the WALRC’s report on Aboriginal customary laws. As mentioned earlier in this discussion (see paragraphs 2.573 to 2.577 in this Report), the SAT advised the Committee of its support for, and observance of, the recommendation.

- The recruitment of Aboriginal staff.

- Consider strategies for people located in remote locations to access the SAT’s services.965 This issue is discussed further in paragraphs 2.558 to 2.568, 2.600 to 2.603 and 2.699 to 2.702 in this Report.

2.584 However, the Annual Report 2007 and the Annual Report 2008 did not provide any update information on the progress of the above initiatives. In December 2008, the

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960 Letter from the Honourable Justice Michael Barker, President, State Administrative Tribunal, 22 December 2008, Enclosure 1, p7.
964 Ibid, p64.
965 Ibid, pp64-65.
SAT advised the Committee that its Aboriginal Service Plan is linked to the DOTAG’s Aboriginal Service Plan. The DOTAG’s focus in 2007 was the development of local justice plans, as part of the Western Australian Aboriginal Justice Agreement\textsuperscript{966}. The SAT’s Executive Officer participated in the development of the local justice plan for Gosnells/Armadale. The DOTAG is currently focused on training staff in Aboriginal cultural awareness.\textsuperscript{967}

2.585 The SAT also advised the Committee that it has actively encouraged the recruitment of Aboriginal staff and has been involved in the DOTAG’s Aboriginal trainee programme, as follows:

- In 2007/2008, the SAT recruited four Aboriginal staff and provided a placement for an Aboriginal trainee.
- One of the SAT’s managers sat on the DOTAG’s selection panel for the Aboriginal trainee programme, which placed approximately 15 trainees in various positions throughout the State, including one at the SAT.\textsuperscript{968}

Committee Comment

2.586 The Committee was of the view that the SAT should ensure that its members and staff are aware of Aboriginal culture and perspectives, and are able to engage with Aboriginal people effectively.

Recommendation 31: The Committee recommends that the State Administrative Tribunal provides regular and ongoing Aboriginal cultural awareness training to its staff and members.

\textsuperscript{966} The Western Australian Aboriginal Justice Agreement, March 2004, was jointly developed by the Department of Justice, Department for Community Development, Department of Indigenous Affairs, Western Australia Police, the Aboriginal and Torres Strait Islander Commission, the Aboriginal and Torres Strait Islander Services and the Aboriginal Legal Service of Western Australia for the improvement of justice-related outcomes for Aboriginal people in Western Australia: Western Australian Aboriginal Justice Agreement, pi. The agreement will create a series of justice forums across the State which will be responsible for creating one state, ten regional and 56 local justice plans: http://www.justice.wa.gov.au/W/wa_aboriginal_justice_agreement.aspx?uid=4342-1114-3498-1551, (viewed on 24 December 2008).

\textsuperscript{967} Letter from the Honourable Justice Michael Barker, President, State Administrative Tribunal, 22 December 2008, Enclosure 1, p7.

\textsuperscript{968} Ibid, p8.
SAT’s Application Forms

2.587 With regard to the SAT’s application forms for GA Act matters, the Committee noted that the current application form for a guardianship or administration order (section 40(1) of the GA Act) asks the applicant to indicate whether:

- he or she identifies himself or herself as being of Aboriginal descent (this part of the form is optional); and

- the proposed represented person identifies themselves as being of Aboriginal descent (this part of the form is mandatory).

2.588 The SAT stated that “Self-identification is an accepted way of determining Aboriginality for the purposes of gathering demographic information”969 and the OPA did not disagree with this statement970. The Committee noted that ‘self-identification’ is only one of the four criteria recommended by the WALRC for assisting with the determination of a person’s Aboriginality for the purposes of Western Australian legislation or the application of government policy:

Recommendation 4

Definition of Aboriginal person and Torres Strait Islander person

That s 5 of the Interpretation Act 1984 (WA) be amended to include the following standard definitions of ‘Aboriginal person’ and ‘Torres Strait Islander person’ for all written laws of Western Australia:

‘Aboriginal person’ means any person who is wholly or partly descended from the original inhabitants of Australia.

In determining whether a person is an Aboriginal person the following factors may be considered:

(a) genealogical evidence;

(b) evidence of genetic descent from a person who is an Aboriginal person;

(c) evidence that the person identifies as an Aboriginal person; and

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969 Written answer from the State Administrative Tribunal to proposed question 18 for the hearing on 15 February 2008, p12.

970 Written answer from the Office of the Public Advocate to proposed question 4 for the hearing on 7 May 2008, p6.
(d) evidence that the person is accepted as an Aboriginal person in the community in which he or she lives.

'Torres Strait Islander person' means any person who is wholly or partly descended from the original inhabitants of the Torres Strait Islands.

In determining whether a person is a Torres Strait Islander person the following factors may be considered:

(a) genealogical evidence;

(b) evidence of genetic descent from a person who is a Torres Strait Islander person;

(c) evidence that the person identifies as a Torres Strait Islander person; and

(d) evidence that the person is accepted as a Torres Strait Islander person in the community in which he or she lives.  

2.589 The WALRC suggested that these inclusive definitions of ‘Aboriginal person’ and ‘Torres Strait Islander person’ be inserted into the Interpretation Act 1984 so that standard and consistent definitions of the terms would be applied by all administrative decision-makers within the State and the need for costly court proceedings to determine the application of legislation on Aboriginal people would be minimised. At the time of preparing this Report, the WALRC’s recommended definitions had not been inserted into the Interpretation Act 1984, nor did they appear to the Committee to have been reflected in any other Western Australian Act. Consequently, different definitions of ‘Aboriginal’, ‘Aboriginal person’, or other equivalent terms, continue to appear in Western Australian legislation.

Committee Comment

2.590 The Committee considered that, for the purposes of the SAT’s application forms, the current method of identifying parties or potential parties to a SAT proceeding as Aboriginal people, that is, through ‘self-identification’, is satisfactory. The Committee formed this view on the basis that an application form is a preliminary notification to the SAT of whether it will need to consider Aboriginal customs and perspectives in the conduct of the proceedings in question.

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Where the outcome of the proceeding turns on a person’s Aboriginality, the SAT will be required to determine whether the person meets the definition for ‘Aboriginal person’, or an equivalent term, contained in the relevant enabling Act.

The Committee supported Recommendation 4 of the WALRC’s report into Aboriginal customary laws, which is quoted in paragraph 2.588 of this Report.

Finding 16: The Committee finds that, for the purposes of the State Administrative Tribunal’s application forms, the current method of identifying parties or potential parties to a Tribunal proceeding as Aboriginal people is satisfactory.

The OPA observed that information about the Aboriginality of the represented person is not sought on the application form for the review of a guardianship order, even though this sort of information about the applicant is sought on that form (albeit as an optional field). The Committee noted that the application forms for other types of GA Act applications (for example, an application under section 59(1) of the GA Act for the sterilisation of a represented person and an application under section 95(2) of the GA Act for the OPA, where it is the guardian or administrator, to delegate any of its functions) also fail to prompt the applicant to provide information about the Aboriginality of the represented person. Similarly, application forms for other types of applications, such as:

- an application under section 103I(1) of the Strata Titles Act 1985 for an order that a proprietor in a strata scheme pay money to the strata company; and

- an application under section 170(5) of the PD Act for a review of a requirement of a local government made under section 170(3) of the PD Act,

only seek, as an optional field, information about the applicant’s Aboriginality.

An application for the review of a guardianship or administration order may be made by various people under sections 85 and 86 of the GA Act, including the represented person. However, the Committee was advised by the OPA that it is rare for the represented person to be the applicant for the review of their guardianship or administration order, meaning that the represented person’s Aboriginality, which is vital demographic information about this person, may often be left off the application.

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973 Written answer from the Office of the Public Advocate to proposed question 4 for the hearing on 7 May 2008, pp6-7.
974 Section 86(1)(b) of the Guardianship and Administration Act 1990.
975 Written answer from the Office of the Public Advocate to proposed question 4 for the hearing on 7 May 2008, p7.
form. It was submitted by the OPA that it would be “beneficial for all details to be routinely collected on all forms”.976

2.595 With respect to applications for the review of a guardianship or administration order, the Committee reasoned that the SAT may already have the represented person’s details on its records and therefore, would not require the further provision of demographic information about her or him. However, the application form already seeks much of the same information which would have been provided to the SAT when the application for the order was made and which are unlikely to have changed over time: for example, the person’s gender, given names and date of birth.

Recommendation 32: The Committee recommends that all of the State Administrative Tribunal’s application forms should prompt the applicant to provide information about the Aboriginality of all the other parties or potential parties to the proceeding.

2.596 The consultant who conducted the Elliot Review recognised that:

Due to a requirement from a recent Law Reform Commission report [recommendation 73 in the WALRC’s report on Aboriginal customary law], the SAT will need to identify indigenous parties. If ICMS does not have this capability then this will need to be recorded manually.977

2.597 In response to the Elliot Review recommendation, the DOTAG informed the Committee that:

The SATs [sic] application form has an optional field which asks parties to nominate if they are indigenous Australians [as discussed in paragraph 2.593 above, the use of this optional field tends to be restricted to determining the applicant’s Aboriginality]. It is not possible to manage a manual register for the collection of such data. The Department will incorporate the data collection in the roll out of ICMS Criminal functionality.978

2.598 This issue was expected to be addressed in the first half of 2008, resources permitting, along with the majority of issues identified with the ICMS in the Elliot Review report.979 A representative of the DOTAG, who appeared before the Committee in

977 Submission No 84 from the Department of the Attorney General, 7 September 2007, p18.
978 Ibid.
March 2008, supported the efficient progress of its e-Business Plan, which includes upgrades to the ICMS, “wholeheartedly”. However, in December 2008, the DOTAG further advised the Committee that its application for funds in the 2008/2009 Budget process for its e-Business Plan, which included the development of ICMS Criminal, had not been successful. As a consequence, no work had commenced on this initiative.

Committee Comment

The Committee supports the continued upgrade of the ICMS to allow the SAT, and indeed, all other courts and tribunals using the ICMS, to collect information about the Aboriginal status of its parties electronically. The Committee reiterates Recommendation 28 in this Report and makes the following additional recommendation:

Recommendation 33: The Committee recommends that the Integrated Case Management System operated by the Court and Tribunal Services division of the Department of the Attorney General be upgraded to allow the State Administrative Tribunal to collect information about the Aboriginal status of its parties electronically.

Country Residents

During this inquiry, the Committee received a number of complaints about the SAT requiring people who are located in regional areas to travel long distances in order to attend SAT hearings and other proceedings. For instance:

- a submitter alleged that the presiding SAT member “more or less demanded” his elderly and house-bound parents travel from Mandurah to Perth in order to attend a hearing. He also claimed that, when his parents did not appear, he and others were later “castigated” for not allowing the other party to cross-examine his parents, and

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980 Mr Gavan Jones, Director Higher Courts, Court and Tribunal Services, Department of the Attorney General, Transcript of Evidence, 25 March 2008, pp4-5.
981 Letter from Mr Ray Warnes, Executive Director, Court and Tribunal Services, Department of the Attorney General, 24 December 2008.
982 Submission No 9 from Private Submitter, 8 August 2007, p1; Submission No 81 from the Fairholme Disability Support Group, received on 6 September 2007, p2; Submission No 88 from the Strata Centre, 21 September 2007, p2; and Email from Ms Beryl Foster, Policy Manager, Planning and Development, Western Australian Local Government Association, 18 August 2008, Attachment, p4.
983 Submission No 9 from Private Submitter, 8 August 2007, p1.
the Fairholme Disability Support Group was of the opinion that the SAT does not hold hearings outside of the metropolitan area:

There appears to be no country or outside hearings by the Tribunal. The centralization of hearings particularly in the Human Rights area is a very unfortunate step in the process of the Tribunal. It is essential for the Member or Members hearing a matter in this jurisdiction to be as fully informed as possible before arriving at a decision. Access to the proposed represented person and all with an interest in his or her best interests is an under girding principal [sic] for the Tribunal. Many of these folk cannot travel to the central city or at best such a journey and experience would be detrimental to their welfare and health. If people cannot travel in to the central business district of Perth for a hearing that principal [sic] is in danger of being lost.  

2.601 However, the SAT provided evidence to the Committee that it does hold hearings in regional areas and that it commonly utilises video and telephone-conferencing technology in situations where it is impracticable for parties or witnesses to attend proceedings in person:

- In 2005/2006, the SAT conducted 41 video-conferences and at least 311 telephone-conferences with parties situated in places outside of Perth.

- Since January 2007, SAT members have travelled to Broome, Newman, Cervantes, Bunbury, Albany and Collie, among other towns. In addition, members who work in the Human Rights stream also hear GA Act applications in large regional centres.

2.602 The Committee was advised that the standard ‘Notice of Hearing’, which is sent to every party before each hearing, including directions hearings and mediations, explains that the SAT is willing to have parties participate by video or telephone-conference. Consequently, the SAT contended that it does not usually require people to travel long distances to attend hearings and other proceedings.
Finding 17: The Committee finds that the State Administrative Tribunal has strategies in place to ensure that country residents who are involved in Tribunal proceedings do not need to travel to the Tribunal’s building in Perth for hearings and other proceedings.

2.603 The lack of independent advocacy services for country residents with disabilities was raised by the DSC and is discussed further in paragraphs 2.625 to 2.637 in this Report.

People with Low Levels of Literacy

2.604 Ms Dot Price expressed a concern that people who have, or believe they have, a low level of literacy may feel unable to lodge an application with the SAT and therefore, be denied the right to seek justice. Ms Price suggested that the SAT should provide these people with face-to-face assistance with lodging an application.989

2.605 In response, the SAT advised the Committee that an application may be made orally under certain enabling Acts.990 Where an application is made orally, the Executive Officer of the SAT is obliged, under section 8(2) of the SAT Rules, to complete a written application form.991

2.606 Pursuant to section 42(2) of the SAT Act, the Executive Officer must also ensure that a person wishing to commence a proceeding in the SAT is given “reasonable assistance”, if he or she seeks assistance. The SAT maintained that this obligation is fulfilled in many ways and that it is “open to creating opportunities to assist disadvantaged” people. Paragraphs 2.117 to 2.125 in this Report contain a general discussion about how well the SAT meets this obligation.

2.607 The Committee noted that the following requirements and practices of the SAT would also be relevant for people with literacy problems:

- The SAT’s obligations under section 32(6) of the SAT Act (refer to paragraphs 2.133 to 2.134 in this Report).
- The SAT’s commitment to deliver oral and contemporaneous decisions wherever possible. This is discussed further in paragraph 2.138 of this Report.

989 Submission No 67 from Ms Dot Price, 31 August 2007, p2.
990 For example, see section 40 of the Guardianship and Administration Act 1990.
991 Written answer from the State Administrative Tribunal to proposed question 32(a) for the hearing on 15 February 2008, p19.
Finding 18: The Committee finds that the State Administrative Tribunal has strategies in place to ensure that parties or potential parties with low literacy levels are adequately assisted.

People whose First Language is not English

2.608 Ms Dot Price was also concerned that people who do not speak English as their first language may feel “hampered from a perception that they lack the requisite language skills to make a case [in the SAT] and provide evidence for it …”. Ms Price suggested that the SAT should provide these people with interpreter services, over the telephone as well as face-to-face assistance, when lodging an application with SAT.992

2.609 The Committee noted that the SAT’s obligations under section 32(6)993 and 42(2)994 of the SAT Act are again relevant for this discussion.

2.610 The SAT advised that a number of its application forms (for example, in the GA Act jurisdiction) ask applicants to indicate whether interpreter services will be needed by any of the parties attending the hearing.995 In all other matters, the SAT’s staff are required to assess whether interpreter services are required, based on their reading of the documents filed with the SAT and the staff’s interaction with the parties before and during hearings. The standard ‘Notice of Hearing’, which is sent to every party prior to a hearing in a proceeding, also asks the parties to contact the SAT if they require an interpreter.996 Once the need for an interpreter has been identified:

A senior Tribunal staff member then arranges for an appropriate interpreter to attend relevant hearings. The Tribunal generally uses the On Call Interpreters and Translating Society or the WA Deaf Society. Where an interpreter is urgently required or an appropriate interpreter cannot be found in Western Australia, the Tribunal may use the Telephone Interpreter Service.997

992 Submission No 67 from Ms Dot Price, 31 August 2007, p2.
993 Refer to paragraphs 2.133 to 2.134 in this Report for a discussion of how the State Administrative Tribunal endeavours to meet these obligations.
994 Paragraphs 2.117 to 2.125 in this Report contain a general discussion about how well the State Administrative Tribunal meets this obligation.
995 Written answer from the State Administrative Tribunal to proposed question 38(b) for the hearing on 21 September 2007, p46; and Written answer from the State Administrative Tribunal to proposed question 19(b) for the hearing on 15 February 2008, p12.
996 Written answer from the State Administrative Tribunal to proposed question 19(b) for the hearing on 15 February 2008, p12.
997 Ibid.
Language interpreters are said to be used “routinely”.998 In 2005/2006, the SAT used 86 interpreters for 18 languages, and in 2006/2007, 91 interpreters were used for 25 languages.999 To the President’s knowledge, there has not yet been an occasion when they could not cater for a particular language.1000 The SAT has also been able to arrange for the translation of its written decisions.1001

The SAT only uses the services of Commonwealth-accredited interpreters and requests interpreters with higher level accreditation on the assumption that these interpreters have appropriate training and experience in tribunal and court proceedings.1002

Finding 19: The Committee finds that the State Administrative Tribunal has strategies in place to ensure that parties or potential parties whose first language is not English are adequately assisted.

People with Physical or Mental Disabilities

This discussion concerns the practices and procedures of the SAT. See paragraphs 2.649 to 2.702 in this Report for a discussion of the facilities which the SAT offers people who attend its premises.

The DSC stated that the majority of SAT proceedings in which it has participated have been relatively simple, straightforward and well managed.1003 However, the DSC suggested that the SAT’s practices and procedures are lacking when it is presented with complex GA Act matters:

The DSC has a generally positive appreciation of the work of the SAT in its dealing with people with disabilities and their families. This is reflected in the opening paragraphs of the DSC’s submission to this Inquiry. SAT members have extensive experience and skills.

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998 Written answer from the State Administrative Tribunal to proposed question 38(b) for the hearing on 21 September 2007, p46.

999 Written answer from the State Administrative Tribunal to proposed question 32(a) for the hearing on 15 February 2008, pp19-20.

1000 The Honourable Justice Michael Barker, President, State Administrative Tribunal, Transcript of Evidence, 15 February 2008, p37.

1001 Written answer from the State Administrative Tribunal to proposed question 38(b) for the hearing on 21 September 2007, p46.

1002 Written answer from the State Administrative Tribunal to proposed question 19(c) for the hearing on 15 February 2008, p12; and the Honourable Justice Michael Barker, President, State Administrative Tribunal, Transcript of Evidence, 15 February 2008, p37.

1003 Dr Ronald Chalmers, Director General, Disability Services Commission, Transcript of Evidence, 14 May 2008, p2.
Although there are only a small number of situations where the safeguards available were not implemented, these have been complex cases with multiple issues.\textsuperscript{1004}

2.615 For example, the DSC alleged that, in the past:

- the SAT has not addressed the power dynamics within hearings involving both the victim of abuse or violence and the alleged perpetrator;
- the SAT has not addressed the lack of access to support or advocacy by people with disabilities, particularly in some country areas;
- SAT members have had different levels of experience in, and knowledge of, disability and welfare issues, resulting in different practices (refer to paragraph 2.115 in this Report for a discussion about this issue);
- individual SAT members have interpreted the GA Act differently, resulting in inconsistent outcomes for people with similar issues (refer to paragraph 2.115 in this Report for a discussion about this issue); and
- there have been instances where the SAT’s orders have failed to protect the rights of people with disabilities or the compliance with orders has not been monitored adequately.\textsuperscript{1005}

2.616 Some of these concerns of the DSC are discussed further below under separate subheadings.

2.617 When the Committee raised this issue with the SAT, the SAT provided the following written response:

\begin{itemize}
\item[(a)] The Disability Services Commission has not raised these matters with SAT, either generally or in relation to particular cases, notwithstanding opportunities to do so. On the basis of the Tribunal’s experience to date, the President does not consider the claims to be valid, for the reasons given in (b) and (c) below.
\item[(b)] It should be noted that SAT members who hear these matters are selected for their experience and skills in dealing with a wide range of complex social and cultural issues, including those outlined. Hearings are managed according to the
\end{itemize}


\textsuperscript{1005} Submission No 43 from the Disability Services Commission, 29 August 2007, p2.
circumstances of the case. Mediation and conflict resolution skills are used during the hearing and, where a matter involves violence, abuse or conflict, parties may be able to attend by telephone or videolink, or make written submissions. Sometimes, the hearing will be conducted with the parties in separate rooms.

(c) Where a person is not of full legal capacity, SAT may appoint a litigation guardian to conduct the proceedings on their behalf: SAT Act, s 40.[1006] Proceedings may be adjourned to enable support, advocacy and representation where necessary. The Public Advocate has a statutory function at hearings to advance the best interests of the person concerned and to seek assistance for any person in respect of whom an application is made: s 87 [this should be a reference to section 97], Guardianship and Administration Act 1990. These processes apply in metropolitan and country areas. Under s 32(b) [this should be a reference to section 32(6)(b)], SAT Act, the Tribunal has a duty to take measures to ensure parties understand the proceedings.[1007] Members strive to achieve this within the context of each particular matter. SAT also has available a brochure outlining the Tribunal's facilities for people with disabilities.[1008]

The President assured the Committee that the SAT’s members were very serious about “responding to people with disability problems, any power imbalance problems or anything that makes them vulnerable in the decision-making process.”[1009]

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.[1010]

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1006 Refer to paragraphs 2.123 to 2.124 in this Report for a discussion about the State Administrative Tribunal’s appointment of litigation guardians.

1007 Refer to paragraphs 2.133 to 2.134 in this Report for a discussion about section 32(6) of the State Administrative Tribunal Act 2004.

1008 Written answer from the State Administrative Tribunal to proposed question 10 for the hearing on 15 February 2008, pp7-8.

1009 The Honourable Justice Michael Barker, President, State Administrative Tribunal, Transcript of Evidence, 15 February 2008, p16.

1010 Ibid.
2.619 The SAT also indicated that the opportunities which have been available to the DSC to raise these matters with the SAT have been, for example, during the course of the proceedings, during public information sessions run by the SAT, and during regular meetings between interested groups in the Human Rights stream, which would have included the DSC, and the SAT members who are responsible for the operation of that stream.1011

2.620 The DSC disagreed with the SAT’s contention that the DSC has not previously raised these matters with the SAT directly. It acknowledged that its field staff may feel unable to raise issues during SAT hearings because:

- they are not trained advocates. Their role is to find advocates for people with disabilities, not to act as the advocates;

- they rely on the information that is already before the SAT and may not have the expertise to provide further information;

- some of them are Local Area Coordinators who provide services to the whole family involved in a dispute. These coordinators may have a conflict of interest in a matter if they attempt to act for the welfare of particular members of the family; and

- they feel unable to interrupt SAT proceedings.1012

2.621 In addition, the DSC submitted that public information sessions may not be the most appropriate forums for its field staff to raise problems from individual cases.1013 In order to address the above hindrances in the DSC’s provision of feedback to the SAT, the DSC’s Service Resource Consultant position was created after discussions in 2006 between the DSC and the SAT. The functions of this consultant include acting as the point of contact between the DSC, the SAT and the OPA, and raising matters of concern with the Team Leader of the Human Rights stream of the SAT. According to the DSC, the consultant has raised issues with the Team Leader of the Human Rights stream in the past.1014

2.622 The DSC informed the Committee that any feedback process between it and the SAT is generally of a relatively informal nature, but is conducted by higher level officers:

There is not a high level of formality. When these discussions have been held, they tend to be focused on the systemic issue: so what is

1011 Ibid, p17.
1013 Ibid.
1014 Ibid.
the problem here? Is it around the management of client funds within our accommodation services? What are the issues that are starting to emerge? They might get illustrated by way of a particular case or a particular client, if you like, but they tend to be not, “Let’s get together at the point around an individual.” They tend to be when a systemic matter starts to appear.

Hon GIZ WATSON: At what level is that discussion held between your organisation and SAT?

Dr Chalmers: The meeting that was held in 2006 is a good example, where that involved the second-tier officer. Angus Buchanan ... is a director in the commission, so this is at second-tier level within our organisation, so the discussions are treated seriously. It is not field officer level discussions.  

In contrast to the DSC’s observations about the SAT’s handling of complex GA Act matters, Mr Mel Harris, a senior occupational therapist, advised the Committee that he had had a very positive experience while participating in such a matter before the SAT:

The matter was extremely complex involving a large number of stakeholders with differing views as to what they perceived would be a satisfactory outcome. There was a history of fairly deep animosity and distrust among several of the people involved, with the potential for the case to be very difficult to resolve.

I found the whole process, investigation, information gathering and the hearing to be thorough, fair and with always the best interests of the vulnerable person to the fore. The approach was less adversarial than I had imagined, gave everyone involved the opportunity to put their case and focused on gathering informed comment. As a result what could have been a very confrontational situation was resolved with the agreement of all parties.

Non-Compliance with SAT’s Orders

This issue is discussed at paragraphs 2.249 to 2.260 in this Report. Paragraphs 2.253 to 2.257 are of particular relevance.

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1015 Dr Ronald Chalmers, Director General, Disability Services Commission, Transcript of Evidence, 14 May 2008, p6.

1016 Submission No 70 from Mr Mel Harris, 31 August 2007, p1.
Lack of Independent Advocacy for People with Disabilities

2.625 The DSC’s submission alleged that there have been instances in guardianship and/or administration matters before the SAT where people with disabilities, particularly in country areas, appeared without support or advocacy and did not always understand the process or what was expected of them.\textsuperscript{1017} The problem was summarised as follows:

\textit{In some country towns this [finding independent advocates for people with disabilities] has not been possible because of the lack of services, or because the family may have seen the only legal service in the town, meaning that they cannot then act for the person with the disability. In these situations attempts [by the DSC] have been made to find out of town help, or OPA has been asked to give the person information about the hearing.}\textsuperscript{1018}

2.626 As discussed at paragraphs 2.569 to 2.571 in this Report, the SAT is obliged to ensure, as far as is reasonably practicable, that parties to SAT proceedings understand the nature of the proceedings and the SAT’s procedures, and that they have an opportunity to present their case. Paragraphs 2.20 to 2.39, 2.117 to 2.125, 2.126 to 2.149 and 2.724 to 2.726 in this Report contain discussions about how, and how well, the SAT has performed some of these obligations.

2.627 The Committee noted that one form of assistance which could be rendered by the SAT for unrepresented parties is to appoint a person to represent that party, pursuant to section 40(1) of the SAT Act. Where the party is not of full legal capacity, the SAT may also appoint a litigation guardian under section 40(2) to conduct the proceedings on the party’s behalf. Evidence from the SAT indicated that, in the past, it has made arrangements to assist parties with disabilities to obtain legal representation. For example, the Committee was informed of an occasion where the Executive Officer sought Legal Aid funding for separate legal representation for a mentally disabled woman whose guardian was seeking the SAT’s consent to a sterilisation procedure.\textsuperscript{1019}

2.628 The DSC is responsible for advancing opportunities, community participation and the quality of life for people with disabilities. It provides a range of direct services and support, and also funds non-government agencies to provide services, to people with

\textsuperscript{1017} Submission No 43 from the Disability Services Commission, 29 August 2007, p2. For example, see Disability Services Commission, \textit{Disability Services Commission Response}, 13 May 2008, pp4-6.


\textsuperscript{1019} Written answer from the State Administrative Tribunal to proposed question 27(a) for the hearing on 21 September 2007, p30.
disabilities, their families and carers. However, the DSC advised the Committee that its services do not extend to legal advocacy:

the required legal advocacy for vulnerable people with disabilities is not provided by the DSC. DSC is not in a position to provide parallel services to people with disabilities. DSC uses mainstream medical, legal and other community services and provides specialist disability services to address disability issues. The DSC also funds and provides accommodation services where these are required.

Rather, one of the DSC’s functions is:

to inform people with disabilities about services available to them specifically, and about services available to the general public which meet the needs of people with disabilities, and to promote the use by them of such services;

Similarly, the OPA supports the Public Advocate’s role of promoting and protecting the rights, dignity and autonomy of people with decision-making disabilities and to reduce their risk of neglect, exploitation and abuse. It fulfils this role by, for example, making GA Act applications to the SAT, attending SAT proceedings in order to provide relevant information and/or to seek to advance the best interests of the person who is the subject of the proceedings (the ‘represented person’), and investigating matters referred by the SAT or any other court or tribunal. However, with regard to legal advice and advocacy for the represented person or proposed represented person, it appears that the OPA’s services extend only to arranging legal representation for the person, as reflected in the Public Advocate’s statutory functions:

1022 Section 12(1)(f) of the Disability Services Act 1993.
1025 Ibid, section 97(1)(d).
2.631 Dr Ronald Chalmers, Director General, DSC, commented on this limitation in the roles of his organisation and the OPA, and suggested that there should be an increased availability of “well-skilled advocates” to represent people with disabilities in what he believed to be the small number of situations where they are unable to access independent legal advocacy services when they are involved in SAT proceedings:

Again, we have a bit of a role conflict in these situations as well, where the commission through its field officers and through our resource consultant—they have a particular role to play and it may not be the full role that might be needed to support the individual who was appearing in these tribunal hearings. However, in this case, in one of the examples we gave, our resource consultant did fly to Kalgoorlie to be present at the hearing, so, again, we were always available to provide a level of support in the hearing itself, but that role has limitations to it. To get to the heart of this, we actually believe that well-skilled advocates would be advantageous in the small number of situations in which we feel that things are still not being dealt with appropriately. The Office of the Public Advocate’s people have a particular role to play, but, again, it does not extend to taking on that function for those individuals concerned. Some of their function is around investigatory processes—that does not equal good advocacy support for the adult with the intellectual disability.  

... sometimes SAT and the Office of the Public Advocate, because of changes in staff and so on, do not fully appreciate the limitations of the role of our staff, and we continually need to talk about that with them, and we do.

2.632 According to Dr Chalmers, these ‘well-skilled advocates’ would have experience and expertise in working with people with disabilities and some legal training:

there are probably two dimensions. Again, it would depend on the circumstance of the case and the individual and their level of capacity and so on. Probably two dimensions: one is someone skilled in being able to work with the person with an intellectual disability themselves ... ; secondly, in some cases, skilled advocacy with a legal dimension to it as well. Finding that combination of skills is what is needed in some of these situations. There are funded advocacy agencies in this

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1026 Dr Ronald Chalmers, Director General, Disability Services Commission, Transcript of Evidence, 14 May 2008, p4.
state that we believe could perform that role if they were to be drawn into this process of supporting the individual, but also with some expertise around the legalities of these things.\textsuperscript{1028}

2.633 Dr Chalmers went on to advise the Committee that the three advocacy agencies which can currently provide ‘well-skilled advocates’ are:

- the Sussex Street Community Law Service, which is funded by the Commonwealth Government;
- People with Disabilities (WA), which is funded by the DSC; and
- the Ethnic Disability Advocacy Centre, which is funded by the DSC, although it is not always easy to access their services in country areas.\textsuperscript{1029} The DSC also advised the Committee that Legal Aid Western Australia has provided its staff with training in working with people with disabilities.\textsuperscript{1030}

2.634 Dr Chalmers was of the view that the resourcing of the above providers of ‘well-skilled advocacy’ was not an issue. However:

If it is demonstrated that increased resources are needed, then I guess it falls back on the state to address that. I think it is more the preparedness on the part of OPA and SAT to explore in these small number of cases whether everything been done to give maximum support to that individual. If it means drawing some expertise out of those [three] organisations [which provide ‘well-skilled advocacy’], I would support that.\textsuperscript{1031}

2.635 Dr Chalmers also suggested that the SAT should enlist independent, ‘well-skilled advocates’ to cater for what he believed to be the small number of parties with disabilities who are unable to obtain independent legal representation.\textsuperscript{1032}

\textsuperscript{1028} \textit{Ibid}, pp4-5.
\textsuperscript{1029} \textit{Ibid}, p5.
\textsuperscript{1031} Dr Ronald Chalmers, Director General, Disability Services Commission, \textit{Transcript of Evidence}, 14 May 2008, p5.
\textsuperscript{1032} \textit{Ibid}, p8.
Committee Comment

2.636 Given the SAT’s role as an adjudicative body, the Committee was satisfied that the SAT is providing adequate assistance to parties or potential parties with disabilities to obtain independent, ‘well-skilled advocacy’ from outside of the SAT.

2.637 The Committee acknowledged the DSC’s comments and concerns but was of the view that the sourcing and availability of independent, ‘well-skilled advocacy’ for people with disabilities is a State-wide issue which extends well beyond the scope of this inquiry.

Finding 20: The Committee finds that the State Administrative Tribunal is providing adequate assistance to parties or potential parties with disabilities to obtain independent, ‘well-skilled advocacy’.

Power Imbalances

2.638 In its submission, the DSC alleged that in some SAT hearings in which the DSC was involved, the SAT did not address the power dynamics between the parties who attended because, for example:

- the victims of abuse or violence have been required to sit in the same room as the alleged perpetrators; and
- the victims of abuse or violence have been required to answer questions put to them by the alleged perpetrators.\(^\text{1033}\)

2.639 Dr Ronald Chalmers, Director General, DSC, provided the following observation:

\(\text{Within a hearing itself, we have experienced that people with intellectual disability still may not understand what is going on; they may be in a hearing where other individuals make them uncomfortable—alleged perpetrators in some cases—so some aspects of the forum itself may not be conducive to the views of the person with a disability coming forward, despite the very best interests of tribunal members.}\(^\text{1034}\)

2.640 The SAT responded to these allegations by advising that power imbalance issues can be addressed in several ways, all of which involve the relevant SAT panel’s

\(^{1033}\) Submission No 43 from the Disability Services Commission, 29 August 2007, p2.

\(^{1034}\) Dr Ronald Chalmers, Director General, Disability Services Commission, Transcript of Evidence, 14 May 2008, p3.
management of the proceedings. For example, parties may participate in hearings or other proceedings by video or telephone-conference or by making written submissions, or hearings may be conducted with parties situated in different rooms. The SAT noted that the members who hear GA Act matters are selected for their experience and skills in dealing with a wide range of complex social and cultural issues. These members also use their mediation and conflict resolution skills during these hearings.1035

2.641 These practices accord with those recommended in the Australian National Mediator Standards to nationally accredited mediators who are faced with power imbalance issues, issues relating to control and intimidation, safety issues, and actual, implied or threatened abuse. In these circumstances, mediators should be:

a) activating appropriate pre-determined security protocols;

b) using video conferencing or other personal protective and screening arrangements;

c) requiring separate sessions with the participants;

d) enabling a friend, representative, advocate, or legal representative to attend the mediation sessions;

e) referring the participants to appropriate resources; and

f) suspending or terminating the mediation session, with appropriate steps to protect the safety of the participants.1036

2.642 Of course, the particular circumstances of each case must be taken into consideration. For example, the DSC submitted that “People with disabilities may not feel comfortable to speak on the phone or on a video link.”1037

2.643 The President of the SAT explained that in country areas, despite the best efforts of the members and staff, the locations available for hearings and other proceedings may not be conducive to the management of the power dynamics between the parties. This issue is discussed at paragraphs 2.699 to 2.702 in this Report.

2.644 However, Dr Chalmers did not accept that it is only logistical problems which cause or contribute to an inadequate management of power imbalance issues:

1035 Written answer from the State Administrative Tribunal to proposed question 10(b) for the hearing on 21 September 2007, pp7-8.


I am not sure that it is a logistical problem. I think it is more a willingness to use the capacity that is there to hear one-on-one or in a supported way with a well-trained advocate to actually allow the person with the intellectual disability to come forward, perhaps, directly to the chair of SAT or whoever is hearing at the time. I guess we are aware—because in the commission we deal with this all the time—that people with intellectual disability can become incredibly confused: they do not know what is going on in the process, and trying to get a comfort level where they are willing to come forward is not easy. Although the panels do their very best to make it appear to be as informal as possible to increase that comfort level, it is not always the case.

2.645 Dr Chalmers concluded that the SAT needs to develop “A little bit more understanding” of the processes and procedures which could be used in hearings for GA Act matters to reassure and increase the “comfort levels” of people with disabilities.

Committee Comment

2.646 The Committee was not satisfied that the SAT always adequately minimises the power imbalances between people with disabilities and other interested persons in its proceedings and considered that improvement in this area is required.

2.647 The Committee was of the view that the SAT should continue to liaise with the DSC to develop strategies to address this issue.

Finding 21: The Committee finds that the State Administrative Tribunal does not always adequately minimise the power imbalances between people with disabilities and other interested persons in its proceedings.

Recommendation 34: The Committee recommends that the State Administrative Tribunal continue to liaise with the Disability Services Commission to develop strategies to address the issue of power imbalances between people with disabilities and other interested persons in its proceedings.

1038 Dr Ronald Chalmers, Director General, Disability Services Commission, Transcript of Evidence, 14 May 2008, p4.

Notifying and Informing People with Disabilities

2.648 The issue of notifying and informing people with disabilities is discussed at paragraphs 2.132 to 2.142 in this Report.

THE SAT PREMISES

2.649 The SAT is located on the ground floor and on levels 4, 8, 9 and 10 at 12 St Georges Terrace, Perth, occupying an area of 4,259 m². These premises are leased until 31 July 2010, after which there are another two options to renew, which would secure the floor space for another four years in total if exercised.\(^\text{1040}\)

2.650 Evidence obtained throughout the course of this inquiry revealed that there are three main issues that require consideration in relation to the adequacy of the SAT’s premises:

- Whether a ‘permanent home’ should be established for the SAT.
- The adequacy of the current building to meet current and future needs, given the continued growth of its jurisdiction.
- The SAT’s requirements for regional visits and hearings.

A ‘Permanent Home’

2.651 The President of the SAT has put forward the view in the past\(^\text{1041}\) and in evidence to this Committee that it would be appropriate, given the SAT’s role, for it to have a “permanent home”:

\[
\text{We are able to perform our duties there very well. However, the tribunal will keep growing in size. We hope to be taking some more space, but not all, on the tenth level. As the extra work comes through, we will be very tight at the seams. The building has been strata-titled by its owners, who are keen, no doubt, to sell it off in various portions. The limits of our use of it are apparent. I have a view that it would be useful, as in the case of the courts, for this tribunal, which I think is going to continue to prove it has an}
\]

\(^{1040}\) State Administrative Tribunal, Annual Report 2008, 12 September 2008, p101; and Email from Mr Alistair Borg, Executive Officer, State Administrative Tribunal, 26 March 2009.


Mr Gavan Jones, Director Higher Courts, Court and Tribunal Services, Department of the Attorney General, *Transcript of Evidence*, 25 March 2008, p3.
Adequacy of Current Premises

2.656 Annual reports of the SAT have pointed out that its premises, while currently adequate in terms of accommodating staff, do not provide scope for expansion. The *Annual Report 2005* noted that staff accommodation was “at capacity” and this message was repeated in the *Annual Report 2007*. The need for more space is supported by the consultant who conducted the Elliot Review, who similarly concluded that:

> There is insufficient space, particularly for records and the decision support group. This will become a greater problem as the SAT expands.\(^\text{1047}\)

2.657 In response, the DOTAG advised the Committee in September 2007 that it:

> is in the process of acquiring 200m\(^2\) to provide appropriate workstation and storage areas to meet staff requirements.\(^\text{1048}\)

2.658 According to the SAT’s *Annual Report 2007*, advice from DOTAG regarding the adequacy of the current accommodation was that:

> a business case will be prepared to articulate and inform the Tribunal's accommodation requirements into the medium and longer term. This business case will analyse the likely or predicated growth in the Tribunal's work and how this translates in spatial and location requirements, in the first instance out to 2014 and then the strategic term out to 2032.\(^\text{1049}\)

2.659 In confirmation of the above comments made in the SAT’s *Annual Report 2007*, the DOTAG also advised the Committee that:

> For the longer term, the Department has obtained resources to engage a consultant to examine the accommodation and facility requirements of the SAT for the next 25 years. These requirements are due to be completed by June 2008.\(^\text{1050}\)

2.660 On 22 December 2008, the SAT obtained the use of 227 m\(^2\) on the ground floor of its building, adding to the floor space it already occupied on levels 4, 8, 9 and 10. The

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\(^{1047}\) Submission No 84 from the Department of the Attorney General, 7 September 2007, p15.

\(^{1048}\) *Ibid*.


\(^{1050}\) Submission No 84 from the Department of the Attorney General, 7 September 2007, p15.
SAT’s Annual Report 2008 advised that the SAT had contracted two experienced organisations to undertake the examination mentioned in the above paragraph. This project will include an analysis of the predicted growth in the SAT’s work and how this growth translates into spatial and location requirements.\textsuperscript{1051}

Parking

2.661 Parking facilities consist of three bays at the rear of the building\textsuperscript{1052} and, according to the President, people attending the SAT have not raised parking problems as a significant issue:

\begin{quote}
we have not found any real difficulty with parking bays not being available for people. If you are in the city centre, it is always going to be difficult to provide a lot of on-site parking. I do not think it has been an issue.\textsuperscript{1053}
\end{quote}

2.662 The Committee was informed that an access and facilities brochure is routinely sent to all parties attending the SAT. The brochure outlines the process for reserving a parking bay at the SAT and provides information on other nearby parking facilities available to the public.\textsuperscript{1054} Each of these bays may also be pre-booked for use as a “drop-off point” for people who are frail, aged or disabled. The SAT advised that the bays are not “at 100% use” and therefore, saw no current requirement for further parking bays.\textsuperscript{1055}

2.663 While the Committee acknowledged the evidence from the SAT, evidence presented to this inquiry indicated that the lack of accessible parking is a matter of some import, particularly for the disabled. For example, the submission from the Fairholme Disability Support Group indicated that the SAT’s premises are not in a convenient location for people with a disability. While a limited number of bays are available at the rear of the building, accessing them can be difficult for the disabled:

\begin{quote}
It is a very difficult location due to the heavy flow of traffic throughout the day. There are no bays for disability parking near to the location. The bays behind the Tribunal building are small in number and accessible through a quite narrow access laneway off St
\end{quote}


\textsuperscript{1052} Mr Alexander Watt, Executive Officer, State Administrative Tribunal, Transcript of Evidence, 21 September 2007, p39.

\textsuperscript{1053} The Honourable Justice Michael Barker, President, State Administrative Tribunal, Transcript of Evidence, 21 September 2007, p39.

\textsuperscript{1054} Mr Alexander Watt, Executive Officer, State Administrative Tribunal, Transcript of Evidence, 21 September 2007, pp39-40.

\textsuperscript{1055} Written answer from the State Administrative Tribunal to proposed question 39 for the hearing on 21 September 2007, p47.
George’s Terrace. One client of the Tribunal reported that her specially equipped vehicle could not access the space without scrapping [sic] the side on a bollard. A bay must be booked well in advance of a hearing and at least one bay is booked of necessity for a Tribunal member with a disability.  

2.664 The Committee noted that the need for better parking is an issue that was similarly raised in the 2007 Party Survey and in a private submission to this inquiry.  

Committee Comment

2.665 The Committee considered that the lack of accessible disabled parking at the SAT’s Perth premises requires the SAT’s attention. However, the Committee recognised that, in this respect, the SAT is largely limited by the design and location of the building.

2.666 The Committee reiterates Recommendation 35 in this Report, which relates to relocating the SAT.

Finding 22: The Committee finds that the availability of accessible disabled parking at the State Administrative Tribunal’s premises continues to be an issue.

Recommendation 36: The Committee recommends that the Government and the State Administrative Tribunal continue to develop strategies to increase the availability of disabled parking at, or in close proximity to, the Tribunal’s premises.

Access

2.667 In the view of a residents’ advocate from the Fairholme Disability Support Group, the Reverend Canon Leslie Goode, the building in which SAT is located is:

quite threatening to people with a disability. It has a dark appearance is accessible through a revolving door and a button operated sliding door then by lift to the relevant floor. There have been a number of incidents where visitors have been caught in the

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1056 Submission No 81 from the Fairholme Disability Support Group, received on 6 September 2007, p1.
1058 Submission No 27 from Private Submitter, 23 August 2007.
revolving door and quite disturbed by the various requirements to reach the correct location for their hearing.\textsuperscript{1059}

2.668 Accessibility was also raised as a concern with the Previous Committee,\textsuperscript{1060} which, following a tour of the proposed SAT premises and the Guardianship and Administration Board’s premises at the Hyatt Centre, concluded that:

Based on the Committee’s site visits, it considers that, from a general perspective, the accessibility of the premises at 12 St George’s Terrace is considerably worse than at the Hyatt Centre.\textsuperscript{1061}

2.669 The accessibility issues identified by the Previous Committee included the absence of secure elevator access for SAT members on all floors:

The premises at 12 St George’s Terrace, Perth, include a tenants’ elevator that provides access to the secure, internal office sections, of only certain floors of the building, depending on the design and layout of each floor. A secure elevator is important to ensure that tribunal members can enter and exit the building without the possibility of coming into contact with any of the parties or witnesses in the cases that they are involved in. Such an arrangement is essential from both a security and natural justice (that is, avoidance of any appearance of bias) aspect.

Unfortunately, not all of the floors of 12 St George’s Terrace, Perth, have a secure elevator access.\textsuperscript{1062}

2.670 Deficiencies in relation to elevator access for the disabled members and staff of the SAT were also identified:

The elevator is also only accessible at the tenants’ car park level by way of a small staircase. The elevator is thus impractical for wheelchair access.\textsuperscript{1063}

2.671 In contrast, the three bays which are available for the use of people attending the SAT, located at the rear of the building, are linked to the foyer and lifts via an entry ramp

\textsuperscript{1059} Submission No 81 from the Fairholme Disability Support Group, received on 6 September 2007, p1.


\textsuperscript{1061} Ibid, p281.

\textsuperscript{1062} Ibid, p202.

\textsuperscript{1063} Ibid, p203.
and disabled access which are also situated in the rear of the building. The Committee understood that at least one of these bays is regularly booked for the use of a SAT member with a disability.

2.672 It would appear that the above issues have remained unresolved. The DOTAG advised the Committee that it had “explored the technical options for alternative evacuation and egress for persons with disabilities” but that there were “no viable options other than those that are documented in SAT Safety and Security Management Plan.”

2.673 The DOTAG also pointed out that the current evacuation procedures meet Australian standards and while some inherent difficulties with the building were acknowledged, the DOTAG was generally satisfied that suitable modifications have been made to address access issues:

_Hon GEORGE CASH:_ — you say that you have done what you can, so to speak, within the constraints.

_Mr Jones:_ And we have documented the evacuation procedures in relation to persons with disabilities. It is not a new building; it is a building that is modified for our purposes but it complies with the Australian standard and the building owner is aware of that.

_The DEPUTY CHAIR:_ So, I suppose really the only other option would be to move to a different building?

_Mr Jones:_ That is right.

_The DEPUTY CHAIR:_ And that is not anticipated.

_Mr Jones:_ It is not on the agenda at the moment.

_Hon GEORGE CASH:_ Could I ask through you, Madam Deputy Chair, is Mr Jones aware of any significant issues in respect to the disability question? Have you received complaints, so to speak?

_Mr Jones:_ We did receive a complaint and we identified the concern. We spoke to the building owner and that is when we came up with the only viable option that we have with persons of disability.

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1064 State Administrative Tribunal brochure, _Access and Facilities._
1065 See Submission No 81 from the Fairholme Disability Support Group, received on 6 September 2007, p1.
1067 Ibid.
Hon GEORGE CASH: But, it is not as if you are receiving complaints on a very regular basis?

Mr Jones: No. 1068

Committee Comment

2.674 The Committee considered that access to and from, and within, the SAT’s premises is not ideal, particularly for people with disabilities. However, the Committee acknowledged that the Government and the SAT have attempted to rectify this issue despite the restrictions imposed by the building itself.

2.675 The Committee reiterates Recommendation 35 in this Report, which relates to relocating the SAT.

Finding 23: The Committee finds that access to and from, and within, the State Administrative Tribunal’s premises is not ideal, particularly for people with disabilities, and continues to be an issue.

Recommendation 37: The Committee recommends that the Government and the State Administrative Tribunal work to further improve access to and from, and within, the Tribunal’s premises, particularly for people with disabilities.

Floor Plan and Facilities

2.676 The 2007 Party Survey found that 78 per cent of the responding parties rated facilities in the hearing room as either good or excellent, while 64 per cent considered disability services as either good or excellent. 1069 The corresponding figure in the 2008 Party Survey for disability services was 58 per cent. 1070 The 2007 Party Survey also found that most (89 per cent) of the responding parties were able to find the appropriate hearing room with ease. 1071

2.677 The 2007 Party Survey identified some problems and suggestions for improvement, including:

1068 Hon Giz Watson MLC, Deputy Chair, and Hon George Cash MLC, substitute Member, Standing Committee on Legislation, and Mr Gavan Jones, Director Higher Courts, Court and Tribunal Services, Department of the Attorney General, Transcript of Evidence, 25 March 2008, pp2-3.
• a lack of signage at hearing room doors to direct people to wait in the hearing room;\textsuperscript{1072} and

• the provision of tea and coffee facilities as some hearings can last several hours.\textsuperscript{1073}

2.678 The authors of the survey concluded that:

\textit{Whilst perhaps not an issue at present, it is important to continue focusing on providing a welcoming environment to the participants. In particular, a comfortable and well-signed waiting room and access to tea/coffee/water facilities would be advised.}\textsuperscript{1074}

\textbf{Waiting Areas}

2.679 Inadequacies in relation to the waiting areas have been identified in a submission to this inquiry and in the Elliot Review. The submission from the Fairholme Disability Support Group pointed out that the lack of space and privacy in waiting rooms can be a significant issue in certain circumstances:

\textit{There is very little provision for privacy. If a person becomes disturbed while waiting for a hearing or particularly after a hearing there is little space in which to deal with such circumstances. One may access the floor from one of the lifts and be among clients who are anxiously awaiting a hearing or venting the feelings about the outcome of such. The potential for disturbances is very high indeed. The seating provided allows for very little space between those awaiting and leaving hearings.}\textsuperscript{1075}

2.680 In this respect, the Elliot Review reached the following conclusion regarding the adequacy of the waiting area for GA Act matters:

\textit{The reception area is not considered appropriate, particularly in relation to the limited room for parties involved in guardianship and administration hearings in the hearing rooms off the reception area.}\textsuperscript{1076
Committee Comment

2.681 Having visited the SAT’s premises at the invitation of the President, the Committee shared the above concerns about the lack of space and privacy of waiting areas situated immediately outside of hearing and meeting rooms. However, the Committee noted that the SAT had attempted to offer some privacy in the waiting area off the guardianship and administration hearing and meeting rooms by partitioning that area from the general reception zone. Again, the Committee acknowledged the constraints imposed by the building in this respect.

2.682 The Committee reiterates Recommendation 35 in this Report, which relates to relocating the SAT.

Finding 24: The Committee finds that the waiting areas outside of hearing rooms and meeting rooms in the State Administrative Tribunal’s premises lack adequate space and privacy.

Recommendation 38: The Committee recommends that the Government and the State Administrative Tribunal work to increase the availability of space and the level of privacy in the waiting areas outside of hearing rooms and meeting rooms in the Tribunal’s premises.

Hearing Rooms and Meeting Rooms

2.683 The Previous Committee’s report identified some design and fit-out issues with the hearing rooms, including the positioning of tables and other furniture for security and practical purposes.\textsuperscript{1077} The SAT’s Annual Report 2005 reported that the hearing rooms required:

\textit{redesign and alteration soon after the Tribunal commenced to make them more amenable to the way a tribunal normally operates.}\textsuperscript{1078}

2.684 The Committee heard evidence that these problems have now been resolved\textsuperscript{1079} and noted that the 2007 Party Survey found that 77.5 per cent of the responding parties rated the hearing room facilities as either excellent or good.\textsuperscript{1080}


\textsuperscript{1078} State Administrative Tribunal, Annual Report 2005, 30 September 2007, p41.

\textsuperscript{1079} Written answer from the State Administrative Tribunal to proposed question 12 for the hearing on 21 September 2007, p14.
2.685 The SAT provides:

\[ a \text{ range of hearing and mediation rooms, from small rooms which allow for more informal proceedings and conference-style hearings or mediations to medium size and larger hearing rooms for more formal proceedings where parties are represented.}^{1081} \]

2.686 GA Act proceedings are usually held in smaller hearing rooms where the parties and the member(s) are seated on the same level at a table, across from each other.\(^{1082}\)

**Set-up and Facilities**

2.687 While previously identified design issues have been resolved, the Elliot Review found deficiencies in the set-up and facilities in some of the hearing rooms:

\[ The \text{ set up of hearing rooms ... is not always adequate or appropriate. For instance, there is now a requirement to accommodate expert witness panels which the current set up does not support well. The limitations on the number of videoconferencing rooms available can make scheduling hearings difficult at times.}^{1083} \]

2.688 In response to the above comments, the DOTAG submitted that it is “satisfied there is sufficient mediation room and hearing room capacity.”\(^{1084}\) It also advised that:

\[ The \text{ Department upgraded all of the video and teleconferencing rooms in 2007 and subject to funding for the DOTAG e-Business Plan envisages further upgrades over the next three to four years.}^{1085} \]

2.689 The SAT’s video and telephone-conferencing facilities are discussed further at paragraphs 2.558 to 2.568 in this Report.

**Acoustics**

2.690 A private submission to the Committee advised that:

\[ My \text{ father is deaf and had trouble with the set up in the room ...}^{1086} \]

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1081 Written answer from the State Administrative Tribunal to proposed question 38 for the hearing on 21 September 2007, p45.
1083 Submission No 84 from the Department of the Attorney General, 7 September 2007, p15.
1084 *Ibid*.
In response to this issue, the SAT advised the Committee that there is a range of room types available for different proceedings and that “usually there are no practical difficulties encountered by parties in the Tribunal.”

The SAT pointed out that the application forms notify applicants that various modes of assistance are available and that:

sound reinforcement, such as hearing loops, is routinely used in hearings and where required Auslan interpreters have been engaged at the Tribunal’s expense to facilitate the participation of hearing-impaired persons in a hearing.

The SAT further explained that:

The Tribunal is committed to the exploration and promotion of innovative technologies to improve access and participation of all users, especially those with disabilities.

The Committee acknowledged the SAT’s attempts, and supports the SAT’s commitment to developing strategies, to address this issue.

Finding 25: The Committee finds that the State Administrative Tribunal has strategies in place to ensure that people with hearing disabilities who are involved in Tribunal proceedings are adequately assisted.

It was observed by the Previous Committee that:

the design of mediation or hearing rooms can have a significant impact on the behaviour of the people that use them.

Submission No 27 from Private Submitter, 23 August 2007.

Written answer from the State Administrative Tribunal to proposed question 38 for the hearing on 21 September 2007, p45.

‘Hearing loops’ are “are usually installed in meeting rooms or in other places where people gather. They assist people who have hearing aids fitted with a T-switch. They can even assist people without hearing aids if the user is provided with a loop receiver device”:


Written answer from the State Administrative Tribunal to proposed question 38 for the hearing on 21 September 2007, p46.

Ibid.
2.696 While 86 per cent of the parties who responded to the 2007 Party Survey found the layout of the hearing rooms either excellent or good,\textsuperscript{1092} the submission from the Fairholme Disability Support Group commented that the hearing rooms were “sterile” and that the hearing rooms had a formal, “court-like atmosphere”.\textsuperscript{1093} In the 2008 Party Survey, 87 per cent of the participating parties found that the layout of their hearing rooms was excellent or good.\textsuperscript{1094}

**Committee Comment**

2.697 The Committee noted that the meeting rooms, which it observed, were relatively informal: they were generally furnished with a communal table and chairs distributed around the table, and all participants would be sitting at the same level. The hearing rooms were more ‘court-like’ in appearance, with the SAT panel sometimes seated higher than the other participants and always distinctly at the head of the room. In all rooms, the colour scheme was largely neutral and there were very few embellishments in the way of artwork and pot plants.

2.698 The Committee acknowledged the concerns of the Fairholme Disability Support Group but was of the view that some level of formality is appropriate for hearing rooms and meeting rooms in adjudicative bodies such as the SAT. However, the Committee would support any continued attempts by the SAT to make its hearing and meeting rooms more welcoming to parties and other interested persons, provided that such attempts do not detract from the formality of SAT proceedings.

**Site Visits and Regional Hearings**

*Facilities for Hearings in Regional Areas*

2.699 The Committee heard evidence that while the SAT regularly hears matters in regional areas, the facilities available are not always appropriate in terms of design, access or security:

*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*


\textsuperscript{1093} Submission No 81 from the Fairholme Disability Support Group, received on 6 September 2007, p2.

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.\(^{1095}\)

2.700 The President suggested in his evidence to the Committee that the current difficulties stemming from conducting hearings in inappropriate regional facilities could be addressed if the needs of the SAT are incorporated into the development of new regional courts:

> But one important development, I think, is in the growth of new courts in regional Western Australia. It will be important to take account of the needs of the State Administrative Tribunal and we will need rooms to be developed which fit the tribunal’s requirements and are not court-like; they are the sort of rooms set up informally . . . . They include easy-to-use videoconferencing.\(^{1096}\)

2.701 Ideally, the new regional facilities would include “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.”\(^{1097}\) The Albany Justice Complex and Great Southern District Police Complex, which was opened in October 2005\(^{1098}\) as a joint initiative between the DOTAG and the Western Australia Police Service, is an example of the regional court development which has been occurring. According to the DOTAG, the complex offers “improved court and custodial services” and combines “the heritage-listed buildings at the site with state-of-the-art building and security features.”\(^{1099}\) However, the Committee is not aware of whether this complex satisfies the SAT’s requirements. As at February 2008, His Honour Judge John Chaney SC, Deputy President, SAT, was sitting on two steering committees for the

\(^{1095}\) The Honourable Justice Michael Barker, President, State Administrative Tribunal, Transcript of Evidence, 15 February 2008, p17.

\(^{1096}\) The Honourable Justice Michael Barker, President, State Administrative Tribunal, Transcript of Evidence, 21 September 2007, p11.

\(^{1097}\) The Honourable Justice Michael Barker, President, State Administrative Tribunal, Transcript of Evidence, 15 February 2008, p17.


development of new justice complexes in Kalgoorlie and Carnarvon. The DOTAG’s Annual Report 2006/07 indicated that plans were also underway for the development of a court in Harvey.

Recommendation 39: The Committee recommends that the planning and design of new or refurbished justice complexes should have regard for the State Administrative Tribunal’s requirements.

Video and Telephone Conferencing

Linked to the need for appropriate facilities for the conduct of regional hearings is the need for suitable video and telephone-conferencing venues that provide the necessary degree of privacy and which, importantly, are accessible to the SAT when needed. These methods of communication are discussed at paragraphs 2.558 to 2.568 of this Report.

Funding and Resourcing the SAT

In accordance with section 148 of the SAT Act, the Chief Executive Officer of the DOTAG provides for the administration of the SAT. Advice from the DOTAG is that SAT is predominantly funded through the Consolidated Account with a “relatively small contribution via fees paid by applicants.”

Evidence provided to this inquiry indicates that the level of funding, particularly in light of past and the expected future expansion of the SAT’s jurisdiction, has been an issue of contention. Financial overview figures in the SAT’s Annual Report 2008 (Graph 10), which show that the 2007/2008 Budget allocations were generally below the SAT’s actual operating expenses for that financial year, were accompanied by the following comment:

The budget setting for the Tribunal is the subject of ongoing discussions with the Department of the Attorney General.

On the issue of funding, the President of the SAT provided the following evidence to the Committee:

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1100 The Honourable Justice Michael Barker, President, State Administrative Tribunal, Transcript of Evidence, 15 February 2008, p17.
1102 Submission No 84 from the Department of the Attorney General, 7 September 2007, p13.
The level of resources made available by Government to the Tribunal has been the subject of prolonged discussion and problem solving over the last 2 1/2 years involving both the staff of the Tribunal and the staff of DOTAG. In 2007, Government adjusted the forward estimates for the Tribunal and the funding provided is being monitored against the Tribunal’s current resource consumption.\footnote{Written Presentation from the Honourable Justice Michael Barker, President, State Administrative Tribunal, 21 September 2007, p26.}

2.706 The President explained to the Committee that, in his view, further expansion of the SAT’s jurisdiction without a commensurate increase in funding would threaten the ability of the SAT to perform its statutory duties:

\textit{The objectives of the Tribunal are clearly outlined in the Act and without timely and appropriate adjustments to the Tribunal’s resources the attainment of the statutory objectives are at risk. New jurisdictions that may involve significant amounts of work have been conferred to the Tribunal and it is expected that new and significant jurisdictions will continue to be conferred to the Tribunal into the future. For those known new jurisdictions the Tribunal remains unfunded both for establishment and recurrent operations for determining matters under Acts that are likely to involve significant work.}\footnote{Ibid.}

\textbf{Staffing}

2.707 In his evidence to the Committee, the President of the SAT explained that the initial staffing estimates made when the SAT was established are in need of review, particularly in relation to the number of staff and the classification of non-judicial members and other staff:

\textit{There ought to be revision upwards, we should have more staff on the ground and there should be appropriate revision of levels so that there are more senior people in the tribunal.}\footnote{The Honourable Justice Michael Barker, President, State Administrative Tribunal, \textit{Transcript of Evidence}, 21 September 2007, p18.}

\textbf{Higher Classification for Non-Judicial Members.}

2.708 The \textit{Annual Report 2006} noted the following in relation to the adequacy of remuneration for non-judicial members:
Critical to the future work and growth of the Tribunal are skilled and talented members. The current remuneration of the Tribunal’s non judicial members has not been adjusted since early 2004 and compares unfavourably with the remuneration arrangements offered to the non judicial members of like Tribunals elsewhere in Australia. I am optimistic that the members remuneration will be reviewed and adjusted during 2006/07 and that the adjustment will both attract and retain the knowledge and attributes that the community expects of the Tribunal.1107

The Committee understood that this issue is now resolved and noted the following from the SAT Annual Report 2007:

in 2007, the Salaries and Allowances Tribunal (S&AT) assumed responsibility from the Executive Government for assessing the remuneration of full-time, non-judicial members of the Tribunal. The S&AT inquired into the remuneration of the full-time, non-judicial members, and recognised the value of the functions performed by these members and set new remuneration levels effective as of 26 February 2007. Since then, the Governor in Executive Council has approved remuneration increases for sessional members.1108

The President of the SAT told the Committee that while these decisions had addressed some of the staffing issues, others are yet to be resolved:

The tribunal is working extremely well. ... It has been recognised by the recent setting by the Salaries and Allowances Tribunal on an interim basis of highly increased remuneration packages compared with what had initially been set by the government. It is the volume of work coming into the tribunal that requires attention and having the appropriate staff to deal with it at appropriate levels.1109

This issue of re-structuring the SAT’s staff is discussed further at paragraphs 2.712 to 2.732 in this Report.

Staffing Numbers and Classification Levels

The SAT’s Annual Report 2008 indicated that there is a human resources shortfall in relation to the SAT’s current workload:

1109 The Honourable Justice Michael Barker, President, State Administrative Tribunal, Transcript of Evidence, 21 September 2007, p18.
The Tribunal's approved member and staffing level is 92 full-time equivalents, however the Tribunal is currently operating at an average of 90 member and staff full-time equivalents, owing to current labour market conditions.

The above figures include three judicial members, four senior members, 10 ordinary members and five full-time equivalents allocated for sessional member usage.\textsuperscript{1110}

2.713 The Annual Report 2007 identified a need for an increase in the number of administrative staff, as well as a review of staff classification levels in order to ensure the SAT is able to attract and retain appropriately qualified staff:

The members and administrative staff of the Tribunal have been working at optimal levels throughout the life of the Tribunal, including during this last 12 months. In my view, additional resources are required by way of administrative staffing of the Tribunal to meet the growing workload and including that likely to arise from projected new jurisdictions. A review of the Tribunal's staffing needs should also consider the adequacy and mix of staff and opportunities for promotion within the Tribunal so that there are sufficient senior people supporting the Tribunal and opportunities for well-qualified people to gain promotion within the Tribunal.\textsuperscript{1111}

2.714 The view of the SAT is that the current staff structure, which includes too few higher level staff, has resulted in unacceptable pressure being placed on the role of the Executive Officer:

\textit{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.}\textsuperscript{1112}


\textsuperscript{1112} The Honourable Justice Michael Barker, President, State Administrative Tribunal, \textit{Transcript of Evidence}, 15 February 2008, p12.
The Committee understands that the staffing issues identified by the SAT in its annual reports \(^{1113}\) and in evidence to this Committee, have been brought to the attention of the DOTAG \(^{1114}\) and will be addressed in the anticipated review of the SAT’s staff structure, \(^{1115}\)

\[
\text{The department has accepted that it is important to look closely at this issue [staffing profile], and I understand that we are soon to pursue a review with an externally engaged consultant to look at the way we work in respect of those very issues.}^{1116}\]

The DOTAG’s submission in September 2007 indicated that a “draft staff re-structure has been developed to address both member support requirements and operational efficiencies” and that following consultation with members and staff, the proposals will be “fine-tuned and finalised.”\(^{1117}\)

The Annual Report 2008 indicated that the DOTAG had recently “moved to review and improve the administrative resources available to the Tribunal and the systems they use” and that some restructuring of the SAT’s administrative support systems had begun.\(^{1118}\) This restructuring is discussed at paragraphs 2.731 to 2.732 of this Report.

### Human Rights Stream

Evidence provided to the Committee indicated that some streams within the SAT are experiencing particular staffing strains. These difficulties may stem from expansion of the SAT’s jurisdiction, and in the case of the Human Rights stream, due to the sheer volume of applications.

The Annual Report 2007 observed that the continued growth in GA Act applications had not resulted in a corresponding re-assessment and adjustment of resources to meet the increased need:

\[
\text{Growth in the number of the GA Act applications is expected to continue at 10% per year for the next four years. When 2005-2006 is compared to the 2003-2004 activity of the former Guardianship and Administration Board, the Tribunal has experienced growth of 38% in}\]

\(^{1113}\) For example, State Administrative Tribunal, Annual Report 2007, 28 September 2007, p1.

\(^{1114}\) Written answer from the State Administrative Tribunal to proposed question 8 for the hearing on 15 February 2008, p6.

\(^{1115}\) The Honourable Justice Michael Barker, President, State Administrative Tribunal, Transcript of Evidence, 15 February 2008, pp11-12.

\(^{1116}\) Ibid, p11.

\(^{1117}\) Submission No 84 from the Department of the Attorney General, 7 September 2007, p28.

the number of applications. It is imperative that Government consider appropriate resources to meet demand shifts in this particular jurisdiction.\textsuperscript{1119}

2.720 Given that the Human Rights stream constitutes a large proportion of the SAT’s overall workload, the significance of this issue, and the impact on the SAT as a whole, is made clear in the DOTAG’s submission, which quotes the Elliot Review report:

\textit{the Human Rights stream is under particular stress due to the staff overload generated by GAA applications. Given that approximately 45\% of applications to the Tribunal are in this area then it is important that this issue is addressed.}\textsuperscript{1120}

2.721 In addition to the volume of applications, The President of the SAT explained to the Committee that the very nature of GA Act matters means that appropriate human resources need to be allocated in order to provide the necessary case management required by these applications:

\textit{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. ... 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 ... . 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 –}

\textsuperscript{1120} Submission No 84 from the Department of the Attorney General, 7 September 2007, p21.
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. ... We need many more staff members working in guardianship and administration than we do in VR [Vocational Regulation], DR [Development and Resources] or CC [Commercial and Civil].

2.722 While evidence before the Committee showed that the Human Rights stream has been under significant pressure, it would appear that this has not negatively impacted on the timeliness of decisions. However, the DOTAG’s submission, quoting the Elliot Review report, indicated that this situation is not sustainable:

*It must be said that despite difficulties experienced in this process [preparing a case for hearing], it is understood that very few hearings have been adjourned due to preparation for the hearing being inadequate. Therefore the staff and members have been able to meet a fundamental goal, albeit under duress.*

*It is apparent that there is a degree of stress for both staff and members with the current operation. It is important that steps are taken to alleviate this stress as the current situation is not sustainable. The Tribunal has commenced a process with staff and members to look at the issues and identify solutions.*

2.723 The SAT is seeking to address the human resource issues within the Human Rights stream through a review of internal processes, including the GA Act case management approach, as well as a review of the staff structure and an increase in staff numbers:

*The Tribunal is seeking growth funding for an additional 4 service support staff in the HR stream to cater for the increasing number of GAA applications. ... The actual number of additional staff required would be dependent on the projected growth and the efficiencies gained from other improvement areas identified (for instance, by addressing some of the ICMS issues).*

*Critical to addressing the difficulties in the Human Rights stream is the development of the skills of the Human Rights stream staff .... The job levels of the Human Rights stream staff should be reviewed given their responsibilities. Inclusion of a more senior officer in the stream to provide support for less experienced staff and to assist with some*


1122 Submission No 84 from the Department of the Attorney General, 7 September 2007, p21.
matters that are currently referred to members should also be considered.\textsuperscript{1123}

2.724 The addition of more senior staff within the Human Rights stream is supported by the submission from the OPA, which points out that:

Guardianship and administration applications in the human rights stream can involve sensitive and complex matters. Currently relatively junior staff at the Tribunal are required to deal with a reasonably high volume of applications. It is an observation that the Tribunal might need specially trained higher level staff to manage applications where there are complexities and to exercise judgement about how the application is progressing.\textsuperscript{1124}

2.725 While the OPA’s view was acknowledged, the Committee also noted that evidence from the President of the SAT indicated that the SAT does provide substantial assistance to parties, particularly unrepresented applicants. In relation to a question about the viability of a chamber magistrate position to which ‘day-to-day’ matters are brought, the President advised that directions hearings essentially perform this role at the SAT:

An enormous amount of work goes into the directions hearings. We really try to find out what everything is about and give people advice. ... The act actually says that we have to explain to people what their rights are and the like and to assist them as far as we can. The staff on the fourth floor do what they can to assist people with matters. We do not need a chamber magistrate because we do that idea some other way.\textsuperscript{1125}

2.726 The President pointed out to the Committee that, given that a large number of unrepresented parties appear before the SAT, the SAT endeavours to ensure that all applicants “know what is required of them and what they have to do and how they have to present a case to get to where they want to be”.\textsuperscript{1126} According to the President, the nature of the SAT essentially requires that it provide information and assistance to parties. While this assistance may include helping parties to obtain legal advice from outside agencies if required, in many cases it involves providing practical assistance in relation to the SAT’s processes and the progress of their application:

\textsuperscript{1123} Ibid, p22.
\textsuperscript{1124} Submission No 57 from the Office of the Public Advocate, 29 August 2007, p6.
\textsuperscript{1125} The Honourable Justice Michael Barker, President, State Administrative Tribunal, Transcript of Evidence, 21 September 2007, p34.
\textsuperscript{1126} Ibid.
I think that system, generally speaking, is working but the real point is that the tribunal seeks to bend over backwards to meet its own objectives to make sure that self-represented parties know what their rights are and what is expected of them. It raises questions about the sort of evidence they might need and the witnesses they might need to call in order to pursue their case. That is the notion of the inquisitorial tribunal. We want to make sure that we have got before us, as decision makers, all the relevant information. We do not just sit back and watch the parties flounder.\textsuperscript{1127}

2.727 Paragraphs 2.123 to 2.124 in this Report contain a discussion about the appointment of litigation guardians for people who are not of full legal capacity.

2.728 While internal re-organisation and improved efficiencies will assist in addressing the demand in the Human Rights stream, the DOTAG’s submission in September 2007 pointed out that these steps alone, without corresponding staffing increases, will leave other areas of the SAT under-resourced:

\begin{quote}
In response to growth in the Guardianship area the Executive Officer has reallocated staff resources internally. However this re-allocation is likely to be at the expense of staffing requirements to service other parts of SAT. The Department is optimistic that funding for growth in Guardianship, together with technology enhancements will create improvements in case processing procedures.\textsuperscript{1128}
\end{quote}

2.729 In February 2008, in response to a Committee question regarding funding for growth in the GA Act area, the SAT provided the following written response:

\begin{itemize}
\item[a)] Funding for additional resources to support the growth in the Guardianship and Administration Act jurisdiction was sought.
\item[b)] The Tribunal has diverted staff resources from other activities to ensure service levels are maintained in this jurisdiction.\textsuperscript{1129}
\end{itemize}

2.730 Subsequent information provided by the DOTAG in March 2008 revealed that the funding application was not successful but does not explain how, apart from shifting resources from other areas of the SAT, the issue will be addressed in the long term:

\begin{footnotes}
\item[1127] Ibid.
\item[1128] Submission No 84 from the Department of the Attorney General, 7 September 2007, p23.
\item[1129] Written answer from the State Administrative Tribunal to proposed question 65 for the hearing on 15 February 2008, p38.
\end{footnotes}
Court & Tribunal Services submitted a budget funding application for growth funding in last year’s submissions which was unsuccessful. SAT shifted existing resources to support GA Act.\textsuperscript{1130}

2.731 In its Annual Report 2008, the SAT reported that an increase in staffing levels in the Human Rights stream in early 2007 had resulted in a greater consistency in the processing of GA Act applications over the course of 2007/2008. The SAT has also begun work to re-structure part of its administrative support services in that financial year, by replacing the Service Support and Decision Support teams, which served all four of the SAT’s work streams, with one service team dedicated to the Human Rights stream and another service team for the three remaining streams.\textsuperscript{1131} The proposed new staff structure will also include an Operations Manager position, which will sit between the Executive Officer and the stream managers.\textsuperscript{1132} It is anticipated that this proposed division of service support will improve the control and management of all proceedings\textsuperscript{1133} and:

- deliver increased service delivery to customers by providing a single point of contact from lodgement to resolution of the case;
- increase the consistency of administrative support to tribunal members;
- ensure work is equitably divided among teams and staff at the tribunal;
- provide clearer career paths and opportunities for progression by including a range of position levels in each of the streams; and
- provide more effective opportunities for training and staff development.\textsuperscript{1134}

2.732 The proposed new staff structure for the SAT was largely based on many of the recommendations made in the Elliot Review but was also informed by a Work Environment Assessment by Prime XL in October 2008. In December 2008, the SAT

\textsuperscript{1130} Letter from Hon Jim McGinty MLA, Attorney General, 29 May 2008, Enclosure 1, p17.
\textsuperscript{1132} Letter from the Honourable Justice Michael Barker, President, State Administrative Tribunal, 22 December 2008, Enclosure 1, p10.
\textsuperscript{1134} Letter from the Honourable Justice Michael Barker, President, State Administrative Tribunal, 22 December 2008, Enclosure 1, pp10-11.
advised the Committee that the report recommending the re-structure was close to being finalised and presented to the President and the DOTAG. The President indicated that he was hopeful that the State Government’s three per cent efficiency dividend policy, which was being considered by the DOTAG at the time of his response, will not impact on the proposed staff re-structure.1135

Committee Comment

2.733 The Committee supports the provision of appropriate funding for the SAT’s staffing requirements.

Recommendation 40: The Committee recommends that the Government provides appropriate funding for the State Administrative Tribunal’s staffing requirements.

New Jurisdictions: Funding Implications

2.734 The SAT indicated to the Committee that while some adjustment to its funding has been made, it remains insufficient in terms of current workload and the expected further growth in jurisdiction:

At commencement of operations in January 2005, the Tribunal’s allocated operating budget was less than what the President had envisaged would be allocated. An adjustment made by Government to the 2007/08 budget is intended to correct the base allocation to a level sufficient for the Tribunal’s workload as measured in December 2006, excluding growth in the human rights jurisdiction. Funding for growth in existing work and for new jurisdictions is the subject of further likely submissions to Government.1136

2.735 Since its inception, there has been a progressive expansion of the SAT’s jurisdiction1137 and the expectation is that this growth will continue. According to the President of the SAT, “the work of the tribunal is projected to increase as a result of further legislative proposals.”1138

1135 Ibid, p11.
1136 Written answer from the State Administrative Tribunal to proposed question 17 for the hearing on 21 September 2007, p18.
1137 For example, the Annual Report 2007 notes that “In its first two years of operation 33 new, re-enacted or proposed laws have conferred additional jurisdiction on the Tribunal”: State Administrative Tribunal, Annual Report 2007, 28 September 2007, p12.
1138 The Honourable Justice Michael Barker, President, State Administrative Tribunal, Transcript of Evidence, 21 September 2007, p20.
The President gave evidence to the Committee that the SAT is currently under-funded for anticipated new jurisdictions, illustrating the need for appropriate resource considerations to be taken into account when there is further expansion of the SAT’s jurisdiction:

The conferral of a new jurisdiction may often involve significant volumes of additional work for the Tribunal. It is expected that new and significant jurisdictions will continue to be conferred on the Tribunal into the future. The Tribunal is currently unfunded for known new areas of jurisdiction involving or likely to involve significant work. Ideally, Government will work to an agreed methodology to address the Tribunal’s resource requirements whenever a new jurisdiction is proposed.\footnote{Written Presentation from the Honourable Justice Michael Barker, President, State Administrative Tribunal, 21 September 2007, p2.}

The President explained that in the absence of commensurate funding increases, the addition of new work for the SAT will adversely affect other areas of work. Conferral of new jurisdictions requires additional staff:

You need more members; if I take the members of planning matters, and put them into dealing with these things [new jurisdictions], I would be dealing with fewer planning matters. So, the likelihood is that we will draw more on our sessional membership, we will need to add to our full-time membership, as well. Existing work is leading to the view, at the moment, that we need more full-time members anyway.\footnote{The Honourable Justice Michael Barker, President, State Administrative Tribunal, \textit{Transcript of Evidence}, 21 September 2007, pp20-21.}

Consequently, a funding review following conferral of each new jurisdictions will:

\textit{ensure the Tribunal has the necessary member and administrative resources to complete its new work without detriment to its performance in existing areas of work.}\footnote{State Administrative Tribunal, \textit{Annual Report 2007}, 28 September 2007, p2.}

In a written answer to the Committee, the SAT advised that an appropriate way of reviewing and adjusting the SAT’s funding would be through a funding formula that enables \textit{“each conferral of new jurisdiction [to be] accompanied by the approval of additional funding for the Tribunal.”}\footnote{Written answer from the State Administrative Tribunal to proposed question 64 for the hearing on 15 February 2008, p38.}
The DOTAG’s submission in September 2007 indicated that a basic funding model was being developed and was expected to be finalised by December 2007:

As the SAT jurisdiction grows, an appropriate funding model will assist Government in setting the appropriate level of resources relative to the performance outcomes sought. In this respect the Department has developed a basic funding model that provides a total cost of service figure for categories of application in each of the Tribunal’s four streams. ... The Department is further developing this model, ready for December 2007.\[1143\]

However, in a later response to the Committee in March 2008, the DOTAG advised that the model in development was subsequently considered unsuitable but no further work had been done in relation to this matter due to staffing constraints:

No [the basic funding model has not been implemented]. A basic tool was developed, however it was determined a more advanced tool would be needed to assist the Department. With the loss of key personnel this project has not been progressed.\[1144\]

The DOTAG’s response to the Committee does not indicate whether a funding model is likely to be developed in the future.

Committee Comment

2.743 The Committee was of the view that any increase in the jurisdiction of the SAT should be accompanied by a commensurate increase in resources. Accordingly, the Committee recommends the development of a SAT funding model as soon as is practicable.

Recommendation 41: The Committee recommends that the Government and the State Administrative Tribunal develop a funding model for the Tribunal as soon as is practicable.

e-Tribunal

2.744 The SAT has a vision of becoming one of Australia’s leading tribunals by adopting best practice, innovative technology in making decisions. Part of this vision involves

\[1143\] Submission No 84 from the Department of the Attorney General, 7 September 2007, p28.

transforming the SAT into an e-Tribunal. However, this goal has ongoing funding implications. These issues are discussed in paragraphs 2.539 to 2.568 in this Report.

New Governance Model - Courts Administration Authority

2.745 The President of the SAT told the Committee that, in his opinion, the administration of the State’s courts and tribunals by a separate court authority would be preferable to the current governance model:

I have formed the clear view whilst I have been president of the State Administrative Tribunal over the past two and a half years that the entire governance system for courts and tribunals in Western Australia should be changed so that a courts administration authority, along the lines of that which operates in South Australia, is created and it be responsible for the entire administration of the courts. In that way we would not have the confusing arrangement whereby the Department of the Attorney General services the courts and tribunals.  

2.746 There are various models of court governance currently operating in Australia. A paper delivered at the 2000 Australasian Institute of Judicial Administration’s Annual Conference by Professor Peter Sallman provides an outline of the main forms of judicial administration operating throughout Australia:

- The “traditional model, in which a multi-disciplinary department of state (commonly a justice or attorney-general’s department) provides services to the judiciary and the judiciary has no responsibility for, or formal power over, those providing the support.

- The “separate department” model which provides a range of services to an independent judiciary which, as in the case of the traditional model, has no responsibility for, or power over, the administration.

- The current Federal model, in which each court individually controls its own administration (the “chief justice autonomous” model).

- The High Court or “autonomous collegiate” model.

\[1145\] The Honourable Justice Michael Barker, President, State Administrative Tribunal, Transcript of Evidence, 21 September 2007, p33.
The current South Australian model involving a judicial governing council and separate courts administration authority which together provide all the needs of the court system under judicial direction and control (the “judicial commission autonomous” model).  

According to the President of the SAT, a separate courts administration authority, similar to that operating in South Australia, would work better than the current administrative arrangements in Western Australia because:

Courts and tribunals, in serving the public of Western Australia, would do a far better job in the allocation and use of public funds if they were making all of those decisions. I think that the morale and administration of courts and tribunals would be far improved if the people who work for them are actually working for them and do not owe two allegiances - one to the department and their superiors and one to the court, president and judges and so on in other places. The Chief Justice of Western Australia has supported that view and has recommended that there be the creation of a new governance model. The department is currently considering it and giving a report to the Attorney.

A criticism that has been put forward regarding the traditional model of court governance (where a multi-disciplinary government department administers the courts) is that such an arrangement can lead to problems relating to the independence, efficiency and effectiveness of the courts. A lack of control over finances, staff and infrastructure, it is argued, may lead to judicial independence being compromised, particularly in instances where the priorities of public servants diverge from those of the judiciary.

A contrary view has been expressed by Mr Laurie Glanfield, Director General, Attorney General’s Department of New South Wales, who disputes the proposition that traditional governance models pose a threat to judicial independence. Mr Glanfield argues that the concept of judicial independence has little relevance to a discussion about court governance in Australia as it is “clearly concerned with issues

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1147 The Honourable Justice Michael Barker, President, State Administrative Tribunal, Transcript of Evidence, 21 September 2007, p33.

relating to the appointment, tenure and removal of judges”.1149 Furthermore, he points out that most of the arguments in favour of a separate court authority rely upon theoretical rather than actual threats to judicial independence.1150

2.750 Mr Glanfield considers that each governance model has benefits and weaknesses however there has been insufficient research done to adequately analyse, compare and assess the different systems of court administration. Any such study, according to Mr Glanfield, should evaluate each governance model according to how well the administrative arrangements serve the community rather than the judiciary.1151

If the issue of the effectiveness of the various models of court administration is considered not from the judicial autonomy perspective but from a community perspective I believe it is clear that each model has its own strengths and weaknesses. Is it suggested for example that the Family Court is more adequately resourced under its existing autonomous arrangements? Is the South Australian Supreme Court able to deliver more timely justice through its unique Courts Administration Authority model?

The question then is whether specific court governance models are indicative of particularly higher or lower levels of efficiency and effectiveness in the delivery of quality justice.1152

2.751 Evidence provided to the Committee by the DOTAG indicated that the question of court and tribunal governance has been considered by the Government:

This is a decision for Government. ... The Department completed a report on the creation of a new governance model for courts and tribunals and submitted it to the Attorney General in January 2008. That report is with Government.1153

2.752 In December 2008, the DOTAG advised the Committee that the above-mentioned report was not acted upon after its initial presentation to the Government and that the


incumbent Attorney General had indicated that the current governance arrangements will not be changed.\textsuperscript{1154}

\begin{center}
\textbf{Committee Comment}
\end{center}

2.753 The Committee noted that the administration of the State’s courts and tribunals by a separate court authority is a policy matter for the Government. The Committee noted that the current Attorney General was not persuaded by the arguments for change.

\textsuperscript{1154} Letter from Mr Ray Warnes, Executive Director, Court and Tribunal Services, Department of the Attorney General, 24 December 2008.
CHAPTER 3

JURISDICTION OF THE STATE ADMINISTRATIVE TRIBUNAL

3.1 In keeping with the WACARTT’s views on the advantages of establishing the SAT, its approach to determining which jurisdictions should be incorporated into the SAT was summarised as follows:

24. Once a generalist tribunal is set up to deal with administrative decisions, the need to provide appeal rights in respect of various administrative decisions to the courts ceases to be rational, at least where policy issues or the exercise of administrative discretions are involved. The court system is not the place for administrative decision making to be reviewed on its merits. Courts typically determine disputes between citizens, and between citizens and government, according to established rules of the general law and other rules laid down by statute. Courts are concerned with the declaration and enforcement of existing legal rights, not with formulation or application of government policy or the review of administrative decision making.

25. With the development of a generalist tribunal such as the SAT there can be very few compelling reasons why the existing array of administrative review appeals to courts should not be assumed by the SAT.

26. Similarly, a number of ministerial appeals in respect of administrative decisions should no longer be determined by the minister of the day. Such ‘appeals’ are often in the nature of internal reviews of departmental decision making and not truly independent and impartial appeals at all. Citizens today demand more of an appeal process than that. Many, though not all, of these appeals involve the assessment of technical matters or matters suited to determination by an independent and impartial tribunal review, rather than departmental or political review.

27. Nonetheless, the Taskforce recognises there is a range of government decision making involving ministerial appeals that require the exercise of political or policy judgment by the Government of the day or that are otherwise unsuited to determination by an independent and expert review tribunal.
33. Once a generalist tribunal, such as the SAT, is developed to deal with this wide range of administrative review or appeal decision making, it becomes relevant to consider what might be done to improve the system whereby a range of disciplinary and supervisory boards operate in this State. As we have explained in Chapter 1, these types of boards have both regulatory and disciplinary functions. For example, they licence people to carry on activities in designated professional, occupational and business areas. Additionally, they receive complaints about misconduct. Finally, they hear and determine the complaints and impose disciplinary penalties.

39. In short, we believe the public of Western Australia today are entitled to expect that decisions of a disciplinary and supervisory kind that may result in the cancellation or suspension of a professional, occupational or business licence or a substantial fine, are arrived at entirely independently and impartially and for the primary purpose of protecting the interests of the public.

42. Once the major disciplinary/supervisory function of these types of boards is separated from the regulatory/investigatory function, the boards will remain responsible for complaint handling and investigation, a most important task. It will be open to the Government to determine whether the boards, in particular the Consumer Affairs boards and committees, should retain a separate existence.

62. Additionally, appeals against minor disciplinary decisions made by boards would henceforth be to the SAT and not to a court as under existing legislation.
63. Once the SAT is developed in this way, only the position of the existing civil ‘original’ decision makers we identified in Chapter 1 remains to be considered.\(^{1155}\)

3.2 The Committee took note of the WACARTT’s approach when undertaking its task of reviewing the jurisdiction of the SAT. Given that the WACARTT conducted an expert and exhaustive analysis of the potential SAT jurisdictions, the Committee did not attempt to do the same. With regard to the SAT’s existing jurisdiction, the Committee considered only those areas of operation which were the subject of evidence provided to the Committee. For jurisdictions which are outside of the SAT’s purview, the Committee both:

- relied upon views expressed in evidence; and
- compiled a list of original and review jurisdictions\(^{1156}\) concentrating on boards, tribunals and other non-judicial and non-Ministerial decision-makers, and sought the views of the SAT President and the DOTAG on the appropriateness of incorporating each jurisdiction into the SAT. After this process, the Committee identified a number of jurisdictions for which further opinions were sought from various interested parties.

3.3 For the purposes of this Report, the Committee has made comments only in relation to a selected number of the jurisdictions which were considered.

**Funding New Jurisdictions**

3.4 In the SAT’s *Annual Report 2007*, it was noted that, in 2006/2007, ten jurisdictions had been conferred on the SAT, consolidated or modified.\(^{1157}\) In 2007/2008, this figure was 23, although the relevant parts of one Act had not yet been proclaimed at the end of that financial year.\(^{1158}\) In the SAT’s *Annual Report 2008*, it was indicated that there were legislative proposals to further increase the SAT’s jurisdiction in the following areas:

- Advance health care planning.
- Allied health professions.
- Aquatic facilities.


\(^{1156}\) These jurisdictions are listed in Appendix 10 of this Report.


- Betting and racing (refer to paragraphs 3.154 to 3.160 and 3.161 to 3.165 in this Report).
- Biosecurity and agriculture management.
- Building disputes (refer to paragraphs 3.127 to 3.137 in this Report).
- Building surveyors (refer to paragraphs 3.247 to 3.254 in this Report).
- Child care services (refer to paragraphs 3.238 to 3.246 in this Report).
- Dog control.
- Energy regulation (refer to paragraphs 3.61 to 3.64 in this Report).
- Food.
- Freedom of information (refer to paragraphs 3.9 to 3.21 in this Report).
- Incorporated associations.
- Information privacy (refer to paragraphs 3.9 to 3.21 in this Report).
- Local government.
- Medical professionals.
- Mental health (refer to paragraphs 3.27 to 3.42 in this Report).
- Official conduct of local government council members.
- Public collections.
- Residential parks long term stay.
- Residential tenancies (refer to paragraphs 3.166 to 3.188 in this Report).
- Security and related activities.
- Sterilisation of children with intellectual disabilities.
- Swan and Canning River matters.
- Tobacco control.
• Waste Avoidance and Resource Recovery Bill 2006 (now the Waste Avoidance and Resource Recovery Act 2007\textsuperscript{[1159]}.\textsuperscript{[1160]}

3.5 Further, the Committee noted the Law Society of Western Australia’s view that “all tribunals should come under the umbrella of the SAT.”\textsuperscript{[1161]} However, any expansion of the SAT’s jurisdiction gives rise to funding implications, and this issue is discussed at paragraphs 2.734 to 2.743 in this Report.

**HUMAN RIGHTS STREAM**

**Criminal Injuries Compensation**

3.6 Pursuant to the *Criminal Injuries Compensation Act 2003*, assessors of criminal injuries compensation determine applications, lodged by victims of crime and/or their close relatives, for the payment of compensation. Payments of compensation which are made under this Act are funded from the Consolidated Account, which may be reimbursed by the offender.\textsuperscript{[1162]} Currently, the decisions of the assessors may be appealed to the District Court.\textsuperscript{[1163]}

3.7 After considering this jurisdiction for inclusion in the SAT’s scope of activities, the WACARTT recommended that it remain unaffected. However, the WACARTT also recommended that the Government review this position after two years of the SAT’s operation:

*The 1999 WALRC Report recommended that decisions of the Assessor of Criminal Injuries Compensation should be subject to the appellate jurisdiction of a body like the SAT, rather than of the District Court as is currently the case. Given the subject matter of such appeals and the District Court’s long experience in handling related issues, the Taskforce believes that this appellate jurisdiction should not be initially transferred to the SAT. Nor should the original jurisdiction be made part of the SAT. It would be anomalous to have the primary decision made by the SAT with a right of appeal to the District Court. Thus, the status quo should be maintained. However, Government*

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\textsuperscript{[1159]} The enabling sections in this Act commenced operation on 1 July 2008.


\textsuperscript{[1161]} Submission No 59 from The Law Society of Western Australia, 31 August 2007, p2.

\textsuperscript{[1162]} Sections 46 and Part 6 of the *Criminal Injuries Compensation Act 2003*.

\textsuperscript{[1163]} Section 55 of the *Criminal Injuries Compensation Act 2003*. 

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should review this decision after the SAT has been operating for two years.\textsuperscript{1164}

3.8 When the Committee sought information about the WACARTT’s recommended review of this jurisdiction, the DOTAG advised, during a hearing, that there had not been a review conducted, nor were there any plans for a review.\textsuperscript{1165} The DOTAG confirmed this advice in writing in the following terms from the former Attorney General:

\begin{quote}
The Government does not intend to conduct a review as the President of the SAT and the Chief Assessor are satisfied that current arrangements and processes for hearings of applications for criminal injuries compensation should remain.\textsuperscript{1166}
\end{quote}

**Freedom of Information**

3.9 The main function of the Information Commissioner, an office created under section 55 of the FOI Act, is to deal with and decide upon complaints about the decisions made by agencies\textsuperscript{1167} in respect of people’s applications to access information, or amend their personal information, as held by those agencies.\textsuperscript{1168} The Committee was advised by the Office of the Information Commissioner that the current process for dealing with complaints is as follows:

- The applicant or third party who is dissatisfied with the agency’s decision can ask the agency to review the decision.

- If that process does not result in a satisfactory outcome for the applicant or third party, he or she may make a complaint to the Information Commissioner.

- The Information Commissioner investigates the complaint and, where possible, resolves the complaint by conciliation. If the complaint cannot be resolved in this way, it is determined by formal decision of the Information Commissioner.

\textsuperscript{1164} Western Australian Civil and Administrative Review Tribunal Taskforce, Government of Western Australia, *Western Australian Civil and Administrative Review Tribunal Taskforce Report on the Establishment of the State Administrative Tribunal*, May 2002, pp121-122.

\textsuperscript{1165} Mr Michael Johnson, Director Magistrates Court and Tribunals, Court and Tribunal Services, Department of the Attorney General, *Transcript of Evidence*, 25 March 2008, p5.

\textsuperscript{1166} Letter from Hon Jim McGinty MLA, Attorney General, 29 May 2008, Enclosure 1, p27.

\textsuperscript{1167} Unless the contrary intention appears, ‘agency’ means “(a) a Minister; or (b) a public body or office”: section 9 and the Glossary, Item 1, in the *Freedom of Information Act 1992*.

\textsuperscript{1168} *Ibid*, sections 63 and 76.
Formal decisions of the Information Commissioner are published.\textsuperscript{1169}

3.10 The Information Commissioner’s investigation and determination of a complaint is seen as an ‘external review’ as opposed to any ‘internal review’ that may be conducted within the relevant agency. Currently, the decisions of the Information Commissioner may be appealed to the Supreme Court in certain circumstances: for example, a decision of the Information Commissioner relating to an application for access to information may be appealed to the Supreme Court on a question of law.\textsuperscript{1170, 1171}

3.11 During the 37\textsuperscript{th} Parliament\textsuperscript{1172}, there were proposals to amend the FOI Act so that the Information Commissioner’s decision-making power would be conferred upon the SAT, although the Information Commissioner would retain his or her conciliation function under the FOI Act. These proposed amendments were contained in the Freedom of Information Amendment Bill 2007. In practice, a person’s complaint about an agency’s decision under the FOI Act would, after exhausting the agency’s internal review system, be lodged with the Information Commissioner for conciliation. If that process was unable to resolve the complaint, a SAT application would be made.\textsuperscript{1173} SAT decisions can be appealed to the Supreme Court on questions of law and with leave of the Court.\textsuperscript{1174}

3.12 The Information Privacy Bill 2007 proposed a similar process for dealing with complaints which would have been made under the legislation resulting from that bill.\textsuperscript{1175} Both the Freedom of Information Amendment Bill 2007 and the Information Privacy Bill 2007 were before the Legislative Council when the 37\textsuperscript{th} Parliament was prorogued on 7 August 2008, and as a result, the passage of these bills through the Parliament was terminated on that date.

3.13 In 1999, the WALRC recommended that the adjudicative functions exercised by the Information Commissioner under the FOI Act be conferred on an administrative tribunal like the SAT.\textsuperscript{1176} However, the above proposal to amend the external review

\textsuperscript{1169} Submission No 96 from the Office of the Information Commissioner, 5 September 2007, p1.
\textsuperscript{1170} A ‘question of law’ has been defined as “A question to be resolved by applying legal principles, rather than by determining a factual situation; and issue involving the application or interpretation of a law and reserved for a judge”: The Honourable Dr PE Nygh and P Butt (General Editors), Butterworths Australian Legal Dictionary, Butterworths, Perth, 1997, p970.
\textsuperscript{1171} See Part 4, Division 5 of the Freedom of Information Act 1992.
\textsuperscript{1172} The 37\textsuperscript{th} Parliament ran from 29 March 2005 to 7 August 2008.
\textsuperscript{1173} Submission No 96 from the Office of the Information Commissioner, 5 September 2007, p1.
\textsuperscript{1174} Section 105 of the State Administrative Tribunal Act 2004.
\textsuperscript{1175} Submission No 96 from the Office of the Information Commissioner, 5 September 2007, p1.
\textsuperscript{1176} Law Reform Commission of Western Australia, Review of the Criminal and Civil Justice System, Project No 92, 1999, p294.
process for freedom of information complaints differed from the WACARTT’s recommendations about this jurisdiction:

69. The Taskforce does not believe that the existing functions of ... the Information Commissioner should be altered. However, the majority of the Taskforce is of the view that the existing right of appeal on a question of law against a decision of the Information Commissioner should no longer be to the Supreme Court, but should be directly to the SAT. One member is of the view that the nature and extent of the existing review mechanisms within the Freedom of Information Act, and the nature of the issues raised by access applications under that Act, are such that the present system of appeals to the Supreme Court on questions of law should continue.

...  

188. Currently, a decision of the Information Commissioner may be the subject of an appeal to a judge of the Supreme Court. Given the primary function of the SAT to deal with administrative decision making in this State, the majority of the Taskforce recommends that the existing right of appeal in the Freedom of Information Act against decisions of the Information Commissioner should be to the SAT in the first instance. Decisions of the SAT might then be the subject of appeal on questions of law to the Supreme Court of Western Australia, with leave of the Court. As the SAT should review the Information Commissioner’s decision on appeal it is appropriate the Commissioner should not be incorporated into the SAT and should continue to operate independently.1177

3.14 The Previous Committee noted this proposed diversion from the WACARTT’s recommendation and reported the Government’s further plans to eventually give the SAT a review role for all decisions relating to the accessing of information.1178 It appeared that the Previous Committee favoured the WACARTT’s suggestion and made the following recommendation:


Recommendation 47: The Committee recommends that the Government amend, as a matter of urgency, the Freedom of Information Act 1992 so as to provide for a full merits review of decisions of the Information Commissioner by the State Administrative Tribunal. The Government should also streamline the appeal processes under the Freedom of Information Act 1992 so as to eliminate some of the earlier stages of review.  

3.15 The Office of the Information Commissioner opposed the proposed change contained in the Freedom of Information Amendment Bill 2007 for external reviews of freedom of information decisions to be determined by the SAT rather than the Information Commissioner, and similar proposals in the Information Privacy Bill 2007, on the following bases:

- It would merely introduce an additional and unnecessary step in the process of resolving a complaint. It was submitted that the additional step would:

  delay the achievement of resolution of complaints which, in cases of access to documents, has the potential to negate any benefit that may have been achieved by timely access to information and, in the case of a breach of privacy, has the potential to allow damage from an ongoing breach to continue. 

  This potential result:

  would appear to be contrary to the policy underlying the SAT which is understood to include the simplification, streamlining and improved accessibility of external review of government decisions.

- The rate of complaint resolution through conciliation would inevitably be reduced by the separation of the decision-making and conciliation functions. The Committee was advised that, at the time the submission was made, 74 per cent of the complaints to the Information Commissioner were resolved by conciliation. This “high rate of success” was mainly attributed to the Information Commissioner’s determinative powers under the FOI Act:

  it is inevitable that without the “persuader” of being the ultimate decision-maker the rate of conciliated outcomes achieved by the office

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1179 Ibid, p326.
1180 Submission No 96 from the Office of the Information Commissioner, 5 September 2007, p2.
1181 Ibid.
1182 Ibid.
will significantly reduce and, in turn, the number requiring formal decision and therefore referral to the SAT will increase. 1183

- The SAT’s processes would be more formal, complex and intimidating for complainants. 1184 For example, the Information Commissioner rarely holds hearings, rarely requires attendance and rarely requires evidence to be given on oath. 1185 The Committee was advised of the following procedures utilised by the Information Commissioner:

  Most complaints are dealt with by informal processes including face to face meetings, attendances and inquiries at agencies and elsewhere and written or informal oral submissions where necessary and appropriate. If a complainant or third party wants to meet but has difficulty in attending at the office, the Information Commissioner’s officers will go to visit them. Matters can be dealt with by telephone and e-mail where appropriate. 1186

- The proposal is contrary to the Government’s desire to establish a ‘one-stop shop’ for people seeking advice or information, or seeking to make a complaint against a government agency. It was submitted that this ‘one-stop shop’ policy is illustrated by the 2004 co-location of the Office of the Information Commissioner, the State Ombudsman, the Office of Health Review, the Commissioner for Public Sector Standards and the Commonwealth Ombudsman. 1187

- Separating the conciliation and decision-making functions under the FOI Act will increase the public cost of resolving complaints because the complainant will need to undergo two different external review processes instead of essentially one process. It was submitted that the work of the Information Commissioner would not reduce significantly under the proposal because the vast majority of the work involved in resolving complaints is done prior to the conciliation or formal decision stage. 1188

- Unlike the Information Commissioner, the SAT does not have an “active investigative role”. Among other things, the Information Commissioner’s investigation of a complaint would involve attending at the relevant agency,

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1183 Ibid, pp3-4.
1184 Ibid, pp2, 4 and 5.
1185 Ibid, p5.
1186 Ibid.
1187 Ibid, p3.
making inquiries into its processes and practices, and interviewing its officers. The Office of the Information Commissioner argued that:

Although it [the SAT] may require the production of documents and giving of information, that is done in a hearing rather than by investigators actively going out to investigate complaints.\[1189\]

- It was argued that the current process of complaint resolution under the FOI Act is recognised internationally as a preferred model of external review.\[1190\]

3.16 The Office of the Information Commissioner proposed an alternative complaints resolution model whereby the decision-making power under freedom of information legislation and information privacy legislation remains with the Information Commissioner and the relevant privacy commissioner, respectively, with an appeal on questions of law to the judicial members of the SAT, and no further appeal. It considered that this alternative model would be more efficient and accessible than the ones contained in the Freedom of Information Amendment Bill 2007 and Information Privacy Bill 2007, and would be a “more streamlined process”, without the expense and formality of an appeal to the Supreme Court.\[1191\] The Office of the Information Commissioner identified the following benefits of its suggested model:

- The Information Commissioner’s decisions would still be reviewable on questions of law by a senior judicial officer; that is, a judge of either the Supreme Court or District Court.

- A right of appeal to the SAT rather than the Supreme Court would be more accessible for complainants.

- It would not add any further steps to the process of complaints resolution. This was considered by the Office of the Information Commissioner to be the most significant benefit of its proposed model.

- It would not preclude the decisions which are the subject of complaints from being judicially reviewed by the Supreme Court.\[1192\]

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<th>Committee Comment</th>
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<td>3.17 The Committee understood that neither the previous Government’s model nor the Office of the Information Commissioner’s model would automatically preclude the</td>
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\[1189\] Ibid, p5.
\[1191\] Ibid, pp2-3.
\[1192\] Ibid, p3.
option of having the original freedom of information decision judicially reviewed by
the Supreme Court. However, the distinction between the two models is that:

- under the previous Government’s model, the complainant would be seeking a
  primary decision from the SAT. If the complainant was not satisfied with the
  SAT’s primary freedom of information decision, he or she would have the
  option of either appealing that decision to the Supreme Court on a question of
  law or seeking a judicial review of the decision by the Supreme Court.

- under the Office of the Information Commissioner’s model, the primary
  freedom of information decision would be made by the Information
  Commissioner and the SAT would only be involved at the review stage. A
  complainant who is not satisfied with the primary decision would have the
  option of either seeking a review of that decision by the SAT on questions of
  law or pursuing a judicial review of the decision by the Supreme Court.

Significantly, once the complainant has initiated one of these review options,
the other option would no longer be available. The complainant would also
be prohibited from commencing both review options simultaneously.

However, a complainant who decides to apply for a SAT review of the
primary decision and who is not satisfied with the SAT’s review decision
would have the option of seeking a judicial review of the review decision by
the Supreme Court.

3.18 The SAT did not have a particular view on this matter, indicating that it was a policy
consideration for the Government. However, it did indicate that the proposal was
feasible and that it was confident that it would be able to make quick and reliable
decisions in this jurisdiction, at a minimum of cost.

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

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1193 In relation to the Office of the Information Commissioner’s model, see section 19(2) of the State

1194 Under section 105 of the State Administrative Tribunal Act 2004.

1195 Pursuant to the Supreme Court’s inherent jurisdiction: refer to paragraph 2.438 in this Report for a
discussion about the features of judicial review.

1196 Pursuant to the Supreme Court’s inherent jurisdiction: refer to paragraph 2.438 in this Report for a
discussion about the features of judicial review.

1197 Section 19(3) of the State Administrative Tribunal Act 2004.

1198 Pursuant to the Supreme Court’s inherent jurisdiction: refer to paragraph 2.438 in this Report for a
discussion about the features of judicial review. See also, section 19(4)(b) of the State Administrative

1199 Written answer from the State Administrative Tribunal to proposed question 76 for the hearing on 15
February 2008, p43.
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.  

3.19 In response to a Committee question on this issue, the DOTAG adhered to the previous Government’s policy position, as reflected in the Freedom of Information Amendment Bill 2007 and Information Privacy Bill 2007. 

**Committee Comment**

3.20 The Committee considered that the Office of the Information Commissioner’s model for the external review of freedom of information decisions would be more practicable than the previous Government’s model. However, the Committee was of the view that any review of the Information Commissioner’s decisions by the SAT should be a merits review.

3.21 With respect to the constitution of the SAT when reviewing decisions of the Information Commissioner, the Committee reiterates Recommendation 6 in this Report. The Committee noted that, in determining the constitution of the SAT in these reviews, the President of the SAT would be guided by section 59 of the SAT Act, which already provides a mechanism for deciding questions of law which arise in a proceeding: that is, according to the opinion of a legally qualified SAT member, the opinion of the President of the SAT or a decision by the Supreme Court, depending on the relevant circumstances.

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1202 Refer to paragraph 2.438 in this Report for a discussion about the features of merits review, as distinguished from the characteristics of judicial review.
Recommendation 42: The Committee recommends that the Freedom of Information Act 1992 be amended to empower the State Administrative Tribunal to conduct a merits review of the decisions of the Information Commissioner, with no further right of appeal.

Guardianship and Administration

3.22 Section 80 of the GA Act deals with:

- the requirements on the administrators of represented persons to submit accounts relating to the estates they administer to the Public Trustee; and
- the Public Trustee’s examination of these submitted accounts.

The history of section 80 and the examination of administrator’s accounts are discussed in the Previous Committee’s SAT Bills Report.1203

3.23 Section 80(3) provides that, upon examining a submitted account, the Public Trustee may:

- allow the account;
- disallow any amount paid; or
- determine that any amount or asset has been omitted, or that any loss has occurred.

3.24 Under section 80(6a), any person who is aggrieved by a decision of the Public Trustee under section 80(3) may apply to the SAT for a review of that decision. The Public Trustee was of the view that the SAT ought to have an unfettered right to review section 80 decisions of the Public Trustee, submitting that at present “there is concern that there is a lack of clarity about this section and that the review function of SAT is limited only to section 80(3)”1204. The Committee understood that there are other decisions which may be made by the Public Trustee under section 80 which do not appear to be subject to a right of review. For example, under section 80(1), the Public Trustee may make decisions such as when the administrator is required to submit his or her accounts, and whether the administrator is exempted from the requirement to submit accounts.


1204 Submission No 66 from the Public Trustee, 11 September 2007, p4.
3.25 The SAT agreed with the Public Trustee’s suggestion\textsuperscript{1205} while the DOTAG preferred to reserve its comments until after the working party for the review of the GA Act\textsuperscript{1206} reports\textsuperscript{1207}.

3.26 The Public Trustee was also of the view that the suggested ‘unfettered right of review’ should be exercisable within six months after the Public Trustee’s decision.\textsuperscript{1208} However, it appears that rule 9 of the SAT Rules would apply in this case, requiring the application for review to be lodged within 28 days of:

(a) the day on which the decision-maker gives a notice under the [SAT] Act section 20(1);

(b) the day on which the decision-maker makes the decision under the [SAT] Act section 20(5); or

(c) if, under the [SAT] Act section 3(3)(a), the [SAT] Act applies as if a person had made a decision, the day on which any provision of the enabling Act as to when the decision is taken to have been made has effect.

Recommendation 43: The Committee recommends that section 80 of the Guardianship and Administration Act 1990 be amended to empower the State Administrative Tribunal to review all of the decisions which may be made by the Public Trustee under that section.

Mental Health Reviews

3.27 In the area of mental health decisions, the SAT largely exercises a review function. For example, section 148A of the Mental Health Act 1996 provides as follows:

148A. Application for review

(l) A person in respect of whom the [Mental Health Review] Board makes a decision or order who is dissatisfied with the decision or order may, without payment of any fee, apply to the State Administrative Tribunal for a review of the decision or order.

\textsuperscript{1205} Written answer from the State Administrative Tribunal to proposed question 71 for the hearing on 15 February 2008, p41.

\textsuperscript{1206} Refer to paragraphs 2.301 to 2.307 in this Report for a discussion about this Working Party.

\textsuperscript{1207} Letter from Hon Jim McGinty MLA, Attorney General, 29 May 2008, Enclosure 1, p2.

\textsuperscript{1208} Submission No 66 from the Public Trustee, 11 September 2007, p4.
(2) Any other person who, in the opinion of the State Administrative Tribunal, has a sufficient interest in the matter may, with the leave of the Tribunal and without payment of any fee, appeal to the Tribunal against the decision or order.

3.28 The SAT also has some original jurisdiction in this area as the Mental Health Review Board (MHRB) may refer questions of law which arise during its proceedings to the SAT for determination. The MHRB, established under Part 6 of the Mental Health Act 1996, has the role of reviewing the status of people who have been made ‘involuntary patients’, as defined under that Act, and determining whether the orders, by psychiatrists, leading to their detention or treatment should continue to have effect.

3.29 The WACARTT recommended that the MHRB be retained but be aligned to, and physically co-located with, the SAT. It suggested that the President or a Deputy President of the SAT should chair the MHRB, that SAT members should comprise the other members of the MHRB, and that the registry and staffing requirements of the MHRB should also be sourced from the SAT. These recommendations were made on the basis that the MHRB has a “very special jurisdiction and exercises original decision making powers” but that it should function as part of the wider administrative decision-making and review environment, where best practices can be developed and applied consistently.

3.30 Although the bills which proposed to establish the SAT initially sought to abolish the MHRB and transfer its functions to the SAT, the Parliament effectively accepted the recommendations of the Previous Committee in its SAT Bills Report to retain the MHRB in its then existing form and to provide for an avenue of appeal to the SAT rather than directly to the Supreme Court. The Previous Committee’s recommendations were based on its main concern about the ability of the SAT to effectively administer the mandatory periodic review of involuntary patient orders. Other practical concerns were also discussed in the SAT Bills Report:

- The accessibility and security of SAT hearings.

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1209 See section 148E of the Mental Health Act 1996.
1210 Unless the contrary intention appears, an “involuntary patient means a person who is for the time being the subject of — (a) an order under section 43(2)(a), 49(3)(a), 50 or 70(1) for detention of the person in an authorised hospital as an involuntary patient; or (b) a community treatment order”: section 3 of the Mental Health Act 1996.
1211 See ibid, Part 6, Division 2.
1212 Western Australian Civil and Administrative Review Tribunal Taskforce, Government of Western Australia, Western Australian Civil and Administrative Review Tribunal Taskforce Report on the Establishment of the State Administrative Tribunal, May 2002, pp80-85 and 120-121.
1213 Ibid, pp84-85.
The potential for the SAT’s proceedings to be more legalistic than those of the MHRB.

The confidentiality of records held by the SAT.

Changes to the role of the Chief Psychiatrist as a consequence of the abolition of the MHRB, which was an issue which may have been unique to the State Administrative Tribunal (Conferral of Jurisdiction) Amendment and Repeal Bill 2003 prior to its amendment in the Legislative Council.1214

3.31 Mr Murray Allen, President of the MHRB, who is also a senior member of the SAT, advised the Committee that a decision was made in late 2004 by the then Department of Justice and the Department of Health to physically co-locate the MHRB with the SAT and for the SAT and the then Department of Justice, as opposed to the Department of Health, to provide all of the MHRB’s funding and administrative needs. The two departments formalised this arrangement with a Memorandum of Understanding.1215

3.32 The MHRB works in its own part of the SAT premises and stores its files separately, in an area with restricted access. These working and storage areas were observed by the Committee during its visit to the SAT premises on 21 September 2007. The MHRB uses a unique computerised case management system which is separate from the ICMS and the MHRB is serviced by a small team of staff who are not involved in SAT activities.1216 During the Committee’s site visit, the Committee was also advised that the mental health review files are coded and identified differently to the files in other SAT matters.

3.33 Mr Allen also informed the Committee that, prior to the establishment of the SAT, when decisions of the MHRB were able to be appealed to the Supreme Court directly, the right to appeal the decisions was “rarely exercised”. In contrast, there have been “a considerable number” of applications for the SAT to review MHRB decisions. Mr Allen argued that the increase in the number of appeals has been due to aggrieved persons taking advantage of the SAT’s “simpler and quicker procedures”.1217 The Royal Australian and New Zealand College of Psychiatrists, WA Branch, agreed that the current avenue of appeal is “more realistic”.1218

1215 Submission No 89 from the Mental Health Review Board, 20 September 2007, p1.
1216 Ibid, pp1 and 2.
1217 Ibid, p3.
1218 Submission No 52 from the Royal Australian and New Zealand College of Psychiatrists, WA Branch, 27 August 2007, p2.
3.34 The SAT, the DOTAG and the two submitters which commented on this jurisdiction, the MHRB and the Royal Australian and New Zealand College of Psychiatrists, WA Branch, were of the view that the MHRB’s jurisdiction should now be transferred to the SAT. The SAT offered the following reasons for the transfer of jurisdiction:

In a very practical sense, the work of that board is consistent with work we do in the tribunal in the guardianship and administration areas. There is indeed an overlap of parties. It is a form of decision making that the tribunal is equipped to do. The Mental Health Review Board operates, apart from Murray Allen who is the full-time member, on a sessional membership.

They are the sorts of people who could otherwise contribute to the work of the tribunal. It would be a good, efficient use of the resources to go that way. I have absolutely no doubt that the performance of the review board will not be affected adversely. If anything, it will improve if the functions are integrated. The question of confidentiality and the handling [of] the records has been demonstrated to not be an issue over the past two and a half years.

3.35 The SAT also endorsed the comments made in the MHRB’s submission to the Committee in this inquiry. The MHRB was of the view that the suggested transfer of the mental health review jurisdiction to the SAT would not result in the lowering of accessibility and security in such hearings, nor would it necessarily cause such hearings to be more formal or legalistic:

My assessment is that the co-location of and generally closer relationship between the Board and SAT for almost three years has not provided any evidence that these perceived problems were ever likely to be realised.

3.36 As the discussions in paragraphs 2.656 to 2.698 of this Report indicate, it was clear to the Committee that the SAT’s current premises are less than ideal. The MHRB argued that the limitations of the SAT premises would largely be avoided in mental health review cases because:

The Honourable Justice Michael Barker, President, State Administrative Tribunal, Transcript of Evidence, 21 September 2007, pp22-23; The Honourable Justice Michael Barker, President, State Administrative Tribunal, Transcript of Evidence, 15 February 2008, p32; Written answer from the State Administrative Tribunal to proposed question 73 for the hearing on 15 February 2008, p42; Letter from Hon Jim McGinty MLA, Attorney General, 29 May 2008, Enclosure 3, p20; Submission No 52 from the Royal Australian and New Zealand College of Psychiatrists, WA Branch, 27 August 2007, p2; and Submission No 89 from the Mental Health Review Board, 20 September 2007, pp3-4.

The Honourable Justice Michael Barker, President, State Administrative Tribunal, Transcript of Evidence, 21 September 2007, p22.

Submission No 89 from the Mental Health Review Board, 20 September 2007, p2.
The Board has continued to hold the vast majority of its hearings at the hospitals or clinics involved in the patient’s care. Hearings involving regional hospitals and clinics continue to be conducted by way of video conference between SAT premises and the venue concerned. That is how the Board operated prior to 2005 and how SAT intended hearings would be conducted had the incorporation proceeded.\textsuperscript{1222}

3.37 The MHRB was similarly unconvinced by previous concerns about the perceived formality of the SAT in comparison to the MHRB:

Whether the mental health jurisdiction is exercised by the Board or by a body such as SAT, it will always be necessary for an appropriate balance to be found between formality and informality in the way hearings are conducted and for hearings to take full account of special circumstances. Board members are well aware of those needs - as are member of SAT (some of whom are also Board members). The SAT jurisdiction under the Guardianship and Administration Act 1990 requires a similar sensitivity to the special needs of the persons concerned in such proceedings.\textsuperscript{1223}

3.38 The Royal Australian and New Zealand College of Psychiatrists, WA Branch, agreed with the MHRB on this issue, despite the fact that its main concern during the SAT Bills Inquiry was that the SAT would have functioned in a more legalistic manner than the MHRB, to the detriment of involuntary patients. It observed that:

A number of the legal members of the Review Board are also members of the Tribunal. The Review Board’s operation has not become more ‘legalistic’ in the way feared so the Branch no longer opposes the Mental Health Review Board becoming part of the Tribunal.\textsuperscript{1224}

3.39 The MHRB was also confident about the SAT’s ability to confidentially hold and manage private information about involuntary patients. This view was based on the following factors:

- The MHRB’s existing administrative arrangements within the SAT’s premises.

\textsuperscript{1222} Ibid.
\textsuperscript{1223} Ibid.
\textsuperscript{1224} Submission No 52 from the Royal Australian and New Zealand College of Psychiatrists, WA Branch, 27 August 2007, p2.
The SAT already securely holds and manages large amounts of very sensitive information in a number of its jurisdictions, particularly in GA Act matters.

All of the SAT’s members and staff, some of whom are also MHRB staff, are subject to legal obligations to maintain the confidentiality of any personal information obtained in the performance of their functions.\textsuperscript{1225, 1226}

In relation to the SAT’s capacity to efficiently administer the mandatory periodic reviews of involuntary patient orders, the Committee notes its finding that the SAT is meeting the objective of providing more timely administrative justice (refer to Finding 6 in this Report).

As was noted in the SAT’s Annual Report 2007, the suggested transfer of the mental health review jurisdiction has been accepted in principle by the Government:

\textit{An important recommendation made by the Tribunal during the past year is that the functions of the Mental Health Review Board be conferred on the Tribunal. This recommendation is supported by the President of the Tribunal and the President of the Mental Health Review Board and has been accepted in principle by the Attorney.}\textsuperscript{1227}

The MHRB advised the Committee that the recommendation, which was put to the Government by the President of the SAT and the President of the MHRB, involved the SAT’s conduct of two tiers of mental health review, as follows:

- The ‘first tier’ of review would, for all practical purposes, be the same as the reviews currently conducted by the MHRB. It was suggested to the Government that the SAT panel conducting this review be constituted by a legally qualified member, a member who is a psychiatrist and one other member.

- A ‘second tier’ of review could then be available for people who are dissatisfied with the SAT’s first tier decision, in much the same way that people who are aggrieved by a MHRB decision may currently apply for a review of the decision by the SAT. However, this review would be conducted by a SAT panel consisting of a judicial member (this is currently not a requirement), a member who is a psychiatrist and one other member.

\textsuperscript{1225} See section 157 of the \textit{State Administrative Tribunal Act 2004}. Section 206 of the \textit{Mental Health Act 1996} also imposes a duty of confidentiality on people who perform functions under that Act and the \textit{Mental Health Act 1962}.

\textsuperscript{1226} Submission No 89 from the Mental Health Review Board, 20 September 2007, p2.

FOURTEENTH REPORT

CHAPTER 3: Jurisdiction of the State Administrative Tribunal

- The right to appeal to the Supreme Court from a second tier SAT decision would be retained.  

Recommendation 44: The Committee recommends that the Mental Health Act 1996 be amended to transfer the functions which are currently exercised by the Mental Health Review Board under the Act to the State Administrative Tribunal.

DEVELOPMENT AND RESOURCES STREAM

Contaminated Sites

3.43 The Contaminated Sites Committee (CSC) was established under section 33 of the Contaminated Sites Act 2003 and may:

- make decisions regarding matters prescribed in sections of that Act, for example, deciding who is responsible for the remediation, or the cost of remediation, of a contaminated site, and deciding to grant, cancel, amend or transfer an exemption certificate; and

- hear and decide appeals against decisions of the Chief Executive Officer of the DEC made under that Act, for example, sections 18 (appeals against the classification of a site) and 52 (appeals from investigation notices or clean up notices).

3.44 That is, the CSC exercises both an original and a review jurisdiction. Of all the decisions that the CSC is empowered to make, it is only the original decisions made by it and prescribed in sections 40, 55(6) and 67 of the Contaminated Sites Act 2003 which may be appealed. These appeals may be made to the Supreme Court on questions of law only and are regulated by Part 8, Division 1 of the Contaminated Sites Act 2003.

3.45 The DEC advised the Committee that the CSC is an “expert committee”. Under section 33 of the Contaminated Sites Act 2003, the panel from which the responsible Minister appoints members of the CSC must contain the following people:

It has a legal representative on it. It is required to have a person who is an accredited auditor under the Contaminated Sites Act, and other members who have experience in the science of contaminated sites.

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1228 Submission No 89 from the Mental Health Review Board, 20 September 2007, p3.
1229 Sections 27(3), 28(1), (2) and (4), 29(1)(d), 36(2), 54(1)(c) and 55(3) of the Contaminated Sites Act 2003.
1230 Ibid, sections 64(4), 65(5) and 66.
1231 Ibid, sections 77 and 82.
There is also a town planning expert on it as well, so it is an expert panel of review; … . The main issues that the Contaminated Sites Committee addresses are levels of determination or classification of the site—so whether the site is deemed to be contaminated, whether further investigation is required or whether it is contaminated and remediation is required. So there are decisions that need to be made, based on, if you like, the condition of the site, and those decisions cannot be made without being informed in those matters.\textsuperscript{1232}

3.46 The Committee consulted the SAT, the DOTAG, the CSC, the Minister for the Environment, the Supreme Court, the DEC and the EDO about the merits of transferring the Supreme Court’s function of reviewing the CSC’s primary decisions, as prescribed in sections 40, 55(6) and 67 of the \textit{Contaminated Sites Act 2003}, to the SAT. This consultation revealed that:

- the CSC and the Minister for the Environment were in favour of retaining the current arrangements;\textsuperscript{1233}

- the DEC would be in favour of the transfer in jurisdiction as long as:
  
  a. the SAT is constituted by the President, who must be a Supreme Court judge\textsuperscript{1234}, when exercising this jurisdiction;
  
  b. the SAT is also restricted to determining questions of law arising from the CSC’s primary decisions; and
  
  c. the CSC continues not to be liable for any costs of the review other than costs incurred by the CSC\textsuperscript{1235,1236};

- the SAT was of the view that if the Committee was to recommend that people aggrieved by the primary decisions of the CSC should have a right to seek reviews of these decisions on the merits, the merits review ought to be conducted by the SAT;\textsuperscript{1237}

\textsuperscript{1232} Mr Robert Atkins, Acting Deputy Director General, Department of Environment and Conservation, \textit{Transcript of Evidence}, 30 April 2008, p6.

\textsuperscript{1233} Letter from Mr Jim Malcolm, Chairman, Contaminated Sites Committee, 11 June 2008; and Letter from Hon David Templeman MLA, Minister for the Environment, 23 June 2008.

\textsuperscript{1234} See section 108 of the \textit{State Administrative Tribunal Act 2004}.

\textsuperscript{1235} See section 78(3) of the \textit{Contaminated Sites Act 2003}.

\textsuperscript{1236} Letter from Mr Keiran McNamara, Director General, Department of Environment and Conservation, 22 May 2008.

• the DOTAG, the EDO and the Honourable Chief Justice Wayne Martin supported the conferral of a merits review function, which includes a review of questions of fact and law\textsuperscript{1238}, on the SAT with respect to the CSC’s primary decisions.\textsuperscript{1239}

3.47 The CSC and the Minister for the Environment contended that a merits review of its primary decisions would not be consistent with the Parliament’s intent when passing section 77 and other sections of the \textit{Contaminated Sites Act 2003} which deal with appeals processes.\textsuperscript{1240} They advised the Committee that the policy behind these sections is best articulated in the responsible Minister’s comments during the second reading debate in the Legislative Assembly for the Contaminated Sites Bill on 11 March 2003, which were quoted to the Committee as follows:

\begin{quote}
The appeals, compared to those in that Act [Environmental Protection Act 1986], are quite limited, but the thinking behind that was to try to have a fairly straightforward system that has as its sole focus cleaning up contaminated sites and using the dollars for that purpose, rather than getting bogged down for months on end in appeals.\textsuperscript{1241}
\end{quote}

3.48 In an effort to minimise the number of appeals brought against the CSC’s primary decisions, a policy decision was made to restrict the types of issues which could be appealed to the Supreme Court to, what was considered to be, the most complex issues before the CSC - questions of law:

\begin{quote}
I was involved in the drafting of the Bill. It was identified at that time, that the determination of questions of law by the Committee would likely be less straightforward than the determination of matters of fact. As a result, relevant parties and their lawyers will be more likely to dispute the findings of the Committee regarding questions of law. In view of this, and to accord with the policy referred to above, s.77 of the Act was drafted to limit appeals to the Supreme Court on questions of law only.\textsuperscript{1242}
\end{quote}

3.49 The Minister for the Environment also emphasised the need for contaminated sites decisions to be made quickly:

\begin{flushright}\textsuperscript{1238} Refer to paragraph 2.438 in this Report for a discussion about the features of merits review, as distinguished from the characteristics of judicial review.

\textsuperscript{1239} Letter from Hon Jim McGinty MLA, Attorney General, 29 May 2008, Enclosure 2, p9; Letter from Mr Cameron Poustie, Principal Solicitor, Environmental Defender’s Office of Western Australia (Inc), 16 June 2008; and Letter from the Honourable Chief Justice Wayne Martin, Chief Justice of Western Australia, Supreme Court of Western Australia, 24 June 2008.

\textsuperscript{1240} Letter from Mr Jim Malcolm, Chairman, Contaminated Sites Committee, 11 June 2008; and Letter from Hon David Templeman MLA, Minister for the Environment, 23 June 2008, p2.

\textsuperscript{1241} Letter from Hon David Templeman MLA, Minister for the Environment, 23 June 2008, p1.\end{flushright}
Pursuant to section 8, the object of the Contaminated Sites Act 2003 is to protect human health, the environment and environmental values by providing for the identification, recording, management and remediation of contaminated sites in the State, having regard to principles set out in the section. It is implied that this be achieved expeditiously and efficiently, and the processes established under the Act, including appeal mechanisms, were drafted to achieve this.\textsuperscript{1243}

3.50 It appeared to the Committee that the CSC and the Minister’s concern about the transfer of the review jurisdiction to the SAT was based on a view that:

- a SAT review would automatically involve a merits review; and
- the SAT would not conduct reviews of the CSC’s primary decisions expeditiously.

3.51 However, the Committee noted that, if the review jurisdiction is conferred on the SAT, the Contaminated Sites Act 2003, as the enabling Act, could restrict the SAT’s review jurisdiction in this context to matters involving questions of law only, by overriding the SAT Act.\textsuperscript{1244} This possibility was also observed by the DEC and the Supreme Court.\textsuperscript{1245} In relation to the SAT’s capacity to efficiently manage its caseload, the Committee notes its finding that the SAT is meeting the objective of providing more timely administrative justice (refer to Finding 6 in this Report).

3.52 The DEC considered that the question of transferring the review of the CSC’s primary decisions from the Supreme Court to the SAT is a policy matter for the Government. However, it could not identify any policy or legal impediments to the suggestion, as long as certain provisos, as set out earlier in this Report at paragraph 3.46, are met in order to ensure adherence to the legislative intent behind the appeal processes in the Contaminated Sites Act 2003.\textsuperscript{1246}

3.53 The DEC was of the view that the SAT’s objectives, procedures and powers appear to be consistent with the policy behind the appeal processes under the Contaminated Sites Act 2003 and that the SAT appeared to be more “user friendly” than the Supreme Court. However, if, as the DEC recommended, the SAT’s reviews are limited to matters involving questions of law, the DEC observed that:

\textsuperscript{1242} Letter from Mr Jim Malcolm, Chairman, Contaminated Sites Committee, 11 June 2008.

\textsuperscript{1243} Letter from Hon David Templeman MLA, Minister for the Environment, 23 June 2008, p2.

\textsuperscript{1244} See section 5 of the State Administrative Tribunal Act 2004.

\textsuperscript{1245} Letter from Mr Keiran McNamara, Director General, Department of Environment and Conservation, 22 May 2008, p2; and Letter from the Honourable Chief Justice Wayne Martin, Chief Justice of Western Australia, Supreme Court of Western Australia, 24 June 2008, p1.

\textsuperscript{1246} Letter from Mr Keiran McNamara, Director General, Department of Environment and Conservation, 22 May 2008, p4.
it is likely to be necessary for parties to obtain legal advice and representation in relation to such an application. In that respect, there may be little difference to the current mechanism of appeal to the Supreme Court, whose more formal procedures on most occasions make legal representation necessary.\textsuperscript{1247}

3.54 The Honourable Chief Justice Wayne Martin agreed with the above observation from the DEC:

\textit{If ... it is simply proposed to transfer the existing appellate jurisdiction of the Supreme Court to the Tribunal limited to appeals on questions of law, there would appear to be little point or purpose to be served by that transfer of jurisdiction. However, on the assumption that the proposal is to confer jurisdiction upon the Tribunal to review on their merits decisions of the kind currently subject to limited review by the Supreme Court, the proposal would have the effect of significantly expanding the efficacy of the rights of review conferred upon persons aggrieved by decisions of this kind. Given that the interests affected by decisions in respect of remediation and the grant of exemption certificates can be significant, an increase in the efficacy of the rights of review conferred upon person aggrieved by those decisions would seem to me to be desirable.}

\textit{Accordingly, if the assumptions I have made and which I have set out above are correct, I would support the proposal to confer review jurisdiction upon the Tribunal in place of the limited appellate jurisdiction currently conferred upon the Court.}

\textit{That would not, of course, mean that the Supreme Court would no longer have any role in relation to these decisions, because an appeal lies from the Tribunal to the Supreme Court on questions of law [this right of appeal is provided in section 105 of the SAT Act]. Accordingly, the Supreme Court would remain the ultimate authority responsible for the determination of contested questions of law arising from decisions of this kind. In my view, that is appropriate.}\textsuperscript{1248}

3.55 In confirmation of the observations made by the Chief Justice and the DEC above, the Committee noted that if the SAT is conferred the review jurisdiction of the Supreme Court and the jurisdiction is limited to matters involving questions of law, the nature

\textsuperscript{1247} \textit{Ibid}, p3.

\textsuperscript{1248} Letter from the Honourable Chief Justice Wayne Martin, Chief Justice of Western Australia, Supreme Court of Western Australia, 24 June 2008, pp1-2.
of the SAT’s review would be very similar to that of the reviews currently exercised by the Supreme Court for the following reasons:

• Appeals under section 77 of the Contaminated Sites Act 2003 are heard by a single Supreme Court judge sitting in the court’s General Division, as opposed to the Court of Appeal.1249

• SAT reviews are conducted as hearings de novo.1250 Similarly, appeals to the General Division of the Supreme Court are heard by way of re-hearing unless another written law provides otherwise.1251 An appeal by way of re-hearing gives the appeal court:

    a special power to adduce new evidence, and to make a decision in light of that new evidence: Wigg v Architects Board of South Australia (1984) 36 SASR 111. The judgment given ought to be one that would be made if the case came before the court of first instance at the time of the appeal (Quilter v Mapleson (1882) 9 QBD 672 at 676), taking into account circumstances and law as they exist at the time of the appeal, and allowing the court to draw new inferences of fact in light of the new material before it: Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd (1976) 135 CLR 616 ... 1252

• The Supreme Court’s powers when determining appeals under section 77 of the Contaminated Sites Act 2003 are similar to those of a body which conducts merits reviews.1253 Section 78(1) of the Contaminated Sites Act 2003, which is comparable to section 29(3) of the SAT Act, provides as follows:

    The Supreme Court is to hear and determine the question of law arising on the appeal and, as the Court sees fit, is to —

    

    (a) affirm the decision appealed against;

    (b) substitute or vary the decision appealed against; or

1249 Letter from Mr Keiran McNamara, Director General, Department of Environment and Conservation, 22 May 2008, p1; and section 41 of the Supreme Court Act 1935.

1250 Section 27 of the State Administrative Tribunal Act 2004. “A matter heard de novo is heard over again from the beginning. The body conducting the hearing de novo is not confined to the evidence or materials which were presented in the original hearing”: The Honourable Dr PE Nygh and P Butt, General Editors, Butterworths Australian Legal Dictionary, Butterworths, Perth, 1997, p322.

1251 Order 65, rule 8 of the Rules of the Supreme Court 1971,


1253 Refer to paragraph 2.438 in this Report for a discussion about the features of merits review, as distinguished from the characteristics of judicial review.
On the subject of the CSC’s existing merits review jurisdiction, the EDO recommended that that function be transferred to the SAT:

We cannot see any reason why a decision of the CSC in its merits review capacity would be the subject of a further merits review opportunity to the SAT. We would therefore suggest that to the extent that the CSC was exercising a merits review function, that merits review opportunity should be re-directed to the SAT.\textsuperscript{1254} ...

... [anecdotally] the CSC is considered under-resourced to make such decisions [merits reviews of certain decisions made by the Chief Executive Officer of the DEC under the Contaminated Sites Act 2003], which therefore compromises its perceived independence from the CEO of the DEC. We understand that the CSC has never made a decision at variance to the view of the CEO of the DEC. We would observe in this context that the existing opportunity for judicial review\textsuperscript{1255} in the Supreme Court of decisions of the CSC does not, in our view, make for sufficient “quality control” of those decisions, that avenue only being available to a limited number of stakeholders in WA (i.e. those with sufficient financial resources).\textsuperscript{1256}

The DEC’s immediate reaction to any proposed transfer of the CSC’s merits review function to the SAT was that the CSC is constituted by highly and relevantly skilled people, and that the SAT panels exercising this function would need to be similarly comprised.\textsuperscript{1257} The Committee noted there is no reason the SAT could not achieve this (refer to paragraphs 2.101 to 2.116 and Finding 8 in this Report regarding the SAT’s use of the knowledge and experience of its members).

The Minister for the Environment also advised the Committee that, pursuant to section 99 of the Contaminated Sites Act 2003, a review of the operation and effectiveness of the Act is to be carried out by the Minister as soon as is practicable after 1 December 2011, and a report of the review must be tabled in Parliament. The Minister

\textsuperscript{1254} Letter from Mr Cameron Poustie, Principal Solicitor, Environmental Defender’s Office of Western Australia (Inc), 16 June 2008, p1.

\textsuperscript{1255} Refer to paragraphs 2.438 to 2.441 in this Report for a discussion about the judicial review of administrative decisions.

\textsuperscript{1256} Letter from Mr Cameron Poustie, Principal Solicitor, Environmental Defender’s Office of Western Australia (Inc), 16 June 2008, p2.

\textsuperscript{1257} Mr Robert Atkins, Acting Deputy Director General, Department of Environment and Conservation, Transcript of Evidence, 30 April 2008, p6.
considered that it would be appropriate for any Committee recommendations relating to the jurisdiction of the CSC to be made during this review process.\textsuperscript{1258}

\textbf{Committee Comment}

3.59 With respect to the review of the CSC’s original decisions, the Committee was of the view that people who are aggrieved by these decisions should have a right to seek a merits review of the decisions, and this review should be conducted by the SAT.

3.60 The Committee also considered that the SAT should exercise the CSC’s existing merits review function.

\textbf{Recommendation 45:} The Committee recommends that the \textit{Contaminated Sites Act 2003} be amended to:

(a) empower the State Administrative Tribunal to review the decisions of the Contaminated Sites Committee which are made pursuant to the committee’s original jurisdiction under the Act; and

(b) transfer the Contaminated Sites Committee’s existing merits review jurisdiction under the Act to the State Administrative Tribunal.

\textbf{Electricity Supply Licensing Reviews}

3.61 Synergy proposed that the SAT should have the jurisdiction to review decisions made by the Economic Regulation Authority relating to the licensing of electricity suppliers, just as it does for licensing decisions made by the Economic Regulation Authority in relation to gas suppliers\textsuperscript{1259} and water services providers\textsuperscript{1260}.\textsuperscript{1261} Synergy and the Economic Regulation Authority acknowledged that this anomaly resulted because of the passing of the relevant governing Act, the \textit{Electricity Industry Act 2004}, while the bills establishing the SAT were still being considered by the Parliament. As an interim measure, the function of reviewing electricity supply licensing decisions was conferred on the Western Australian Gas Review Board.\textsuperscript{1262}

\textsuperscript{1258} Letter from Hon David Templeman MLA, Minister for the Environment, 23 June 2008, p2.
\textsuperscript{1259} See section 11ZH of the \textit{Energy Coordination Act 1994}.
\textsuperscript{1260} See sections 44 and 54 of the \textit{Water Services Licensing Act 1995}.
\textsuperscript{1261} Submission No 56 from Synergy, 31 August 2007.
\textsuperscript{1262} \textit{Ibid}; and Letter from Mr K Peter Kolf, General Manager, Economic Regulation Authority, 14 August 2007. See also section 130 of the \textit{Electricity Industry Act 2004}. 
Synergy’s recommendation is consistent with the WACARTT’s findings in this area, some of which are excerpted here:

114. From the understanding the Taskforce has gained in respect of developing economic regulation in this State, it may be that there are some areas of decision making and review or dispute resolution that are not suited to the functions of the SAT. For example, whether or not one corporation is entitled to have access to gas, electricity or rail services currently controlled or managed by another corporation would appear to involve issues not obviously amenable to the SAT jurisdiction. However, in respect of licensing decisions and other administrative decisions made in accordance with pre-determined criteria and established policies, the SAT would appear a reasonably obvious choice to provide an independent and impartial review of a primary decision.

117. An electricity industry licensing role for the Economic Regulation Authority is subject to the Government’s consideration of the recommendations of the Electricity Reform Taskforce. Nevertheless, consideration of the issue will involve assessing the potential role of the SAT as an appropriate appeals body for industrial licensing decisions in the electricity industry. A potential outcome may be the establishment of an electricity licensing regime with appropriate appeals provisions. Should that be the case, it would be sensible, and the Under Treasurer agrees, to consider a potential role for the SAT as the body responsible for hearing appeals against electricity-industry licensing decisions.

119. ... [the WACARTT] ... considers that once water appeals are determined by the SAT, it would seem sensible to include gas and electricity licensing reviews as well. There is no suggestion, however, that access questions should be resolved by the SAT. 1263

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3.63 The SAT and the DOTAG supported Synergy’s recommendation.1264

3.64 The Economic Regulation Authority also advised the Committee that it anticipated that the review functions for gas supply and electricity supply licensing decisions will be reassigned in the future: from the SAT to the Australian Competition Tribunal, under uniform legislation, and from the Western Australian Gas Review Board to the SAT, respectively.1265

**Recommendation 46:** The Committee recommends that the *Electricity Industry Act 2004* be amended to empower the State Administrative Tribunal to review the decisions made by the Economic Regulation Authority relating to the licensing of electricity suppliers.

**Environmental Appeals**

3.65 Currently, under Part VII of the EP Act, all environmental appeals are heard by the Minister for the Environment. Environmental appeals fall into two categories: those arising from decisions made by the EPA relating to environmental impact assessment (EIA) and those arising from decisions made by the Chief Executive Officer of the DEC relating to environmental regulation, such as licensing and pollution control matters. The Minister for the Environment’s decisions on appeal are not subject to further administrative review.1266

3.66 The question of whether the SAT’s jurisdiction should include the review of environmental appeals was discussed in some detail in the SAT Bills Report. A majority of the Previous Committee was in favour of the retention of the then current appeals system under the EP Act.1267 The Appeals Convenor1268 advised the Committee that it was a deliberate decision by the Government not to include environmental appeals in the SAT’s jurisdiction because:

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1265 Letter from Mr K Peter Kolf, General Manager, Economic Regulation Authority, 14 August 2007.

1266 For example, see sections 101, 107 and 109 of the *Environmental Protection Act 1986*.


1268 The Appeals Convenor, a position established under section 107A of the *Environmental Protection Act 1986*, amongst other things, provides advice to the Minister for the Environment on environmental appeals.
the environmental appeals allow for third party appeals, and because the environmental appeals process has traditionally been a merits based process rather than one involving legal arguments. 1269

Committee Comment

3.67 The Committee noted there is no reason third party appeals could not be available if the function of reviewing the EPA’s and the Chief Executive Officer’s decisions is transferred to the SAT.

3.68 The Committee also noted that the SAT conducts merits-based reviews and refers to the discussion in paragraphs 2.69 to 2.72 and Finding 5 in this Report.

Reviews of Decisions made under Part IV Environmental Protection Act 1986 (Environmental Impact Assessment)

3.69 The rights of appeal relating to EIA are prescribed in section 100 of the EP Act. The Appeals Convenor and the DEC advised the Committee that appeals may be lodged with the Minister for the Environment against three main categories of EPA ‘decisions’:

- Category one: A recorded decision of the EPA that a proposal is not to be assessed.
- Category two: A decision of the EPA as to the level of assessment of a proposal.
- Category three: The content of, or any recommendation in, the EPA’s EIA report to the Minister. 1270 The Appeals Convenor informed the Committee that this is the most common type of appeal. 1271

3.70 Each of the above avenues of appeal may be accessed by any decision-making authority, responsible authority, proponent or other party which disagrees with the ‘decision’; that is, the rights of appeal are available to third parties.

3.71 The Appeals Convenor also advised the Committee of a fourth category of appeal rights to the Minister: the proponent’s right to appeal any conditions or procedures imposed by the Minister on the implementation of the proposal. 1272 In these

1269 Letter from Mr Garry Middle, Appeals Convenor, 13 August 2007.
1270 Letter from Mr Garry Middle, Appeals Convenor, Office of the Appeals Convenor, 29 April 2008, p5 and Letter from Mr Robert Atkins, Acting Deputy Director General, Department of Environment and Conservation, 30 April 2008, p2. See sections 100(1)(a), (b), (d) and (e) of the Environmental Protection Act 1986.
1271 Letter from Mr Garry Middle, Appeals Convenor, Office of the Appeals Convenor, 29 April 2008, p5.
1272 Ibid. See section 100(3) of the Environmental Protection Act 1986.
circumstances, the Minister must appoint an appeals committee to consider the appeal and report to the Minister with its findings and recommendations.  

3.72 The Committee understood that the following four further categories of appeal rights to the Minister exist in relation to the EIA process:

- **Category five:** The right of any decision-making authority, responsible authority, proponent or other party to appeal against the content of the EPA’s instructions for the EIA of a planning scheme, as set out in a public record.  

- **Category six:** The right of any decision-making authority, responsible authority, proponent or other party to appeal against a recorded declaration by the EPA that a proposal is a ‘derived proposal’, a declaration which could effectively exempt a proposal from the need to undergo EIA.  

- **Category seven:** The right of a proponent to appeal the decision of the EPA to refuse to declare a proposal a ‘derived proposal’.

- **Category eight**, which relates to the proponent’s implementation of an assessed proposal where the proponent is not complying with a condition(s) or procedure(s) to which the implementation is subject - the right of a proponent to appeal:
  
  (a) an order by the Minister requiring the proponent to take steps to comply with the condition(s) or procedure(s); or

  (b) the taking of any steps, at the request of the Minister, to either comply with the condition(s) or procedure(s) or to avoid, control or abate any pollution or environmental harm caused by the non-compliance.  

3.73 The Minister’s decisions on appeal in relation to the above categories of appeal are final, although they may be the subject of judicial review by the Supreme Court.

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1273 Sections 101(1a), 106(2) and 109 of the *Environmental Protection Act 1986.*

1274 *Ibid,* section 100(1)(c).

1275 *Ibid,* sections 100(1)(f) and 39B.

1276 *Ibid,* sections 100(2) and 39B.

1277 *Ibid,* section 100(4).

1278 *Ibid,* sections 101(1), 101(2e), 107(2) and 109(3).
under its inherent jurisdiction to issue a prerogative remedy, an injunction or a declaration.

3.74 The WACARTT found that it was appropriate for EIA appeals to remain within the jurisdiction of the Minister for the Environment, categorising these appeals as one of a group of Ministerial appeals which should be retained because they require the “exercise of policy or political judgment.”

3.75 Similarly, the SAT, Commissioner of Soil and Land Conservation, DEC, EDO and CCWA, Appeals Convenor and DOTAG were of the view that EIA appeals should continue to be heard by the Minister. The departmental responses were largely based on Government policy.

3.76 The President of the SAT provided the following comments in support of the SAT’s stance on this issue:

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\text{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...}
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1279 “Prerogative remedies involve the [Supreme] Court’s exercise of powers delegated to it by the Sovereign in relation to the direction of the actions of administrative officials, and the remedies granted by the Court are granted in the form of writs issued in the name of the Sovereign”: Law Reform Commission of Western Australia, Report on Judicial Review of Administrative Decisions, Project No 95, December 2002, p3; Halsbury’s Laws of Australia, LexisNexis, paragraphs 10-1300 and 10-1339.

1280 Definition of ‘judicial review’ in Encyclopaedic Australian Legal Dictionary, On-line, LexisNexis.

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.  

3.77 During its hearing with the Committee, the EDO confirmed its support for the WACARTT’s findings and added that:

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.

3.78 The Appeals Convenor and the DEC argued that, in addition to Government policy, EIA appeals should remain in the Minister’s jurisdiction because some of the categories of appeal rights are not in the nature of ‘true’ appeals. The Appeals Convenor considered ‘true’ appeals to be those where the appellants are objecting to actual decisions. He considered that the appeal rights listed above as category three, the most common type of appeal, were more in the nature of submissions to the Minister on the EPA’s EIA than appeals:

The [category three] appeal process is really one of providing further information to the Minister as part of his section 45 considerations [that is, the considerations leading to the Minister’s determination of

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1283 Mr Cameron Poustie, Principal Solicitor, Environmental Defender’s Office of Western Australia (Inc), Transcript of Evidence, 30 April 2008, p7.
whether a proposal may be implemented]. *For this reason alone, SAT is not the most suitable body to deal with these matters as it does not typically have an advisory role.*

3.79 According to the Appeals Convenor, EIA appeals may involve questions of public interest, questions which are arguably best resolved by the political process.

3.80 Similarly, the DEC did not view category three appeals as ‘true’ appeals, and described category one and category two appeals as appeals relating to process.

The DEC also argued that relevant decisions under Part IV of the EP Act are “reviewed impartially and independently by the Environmental Appeals Convenor’s Office” and that it is “logical and desirable for the Environmental Appeals Convenor’s Office to continue this function.”

3.81 The Commissioner of Soil and Land Conservation provided the following reason for his view that EIA appeals should remain with the Minister:

> In my opinion, it is appropriate that the Minister for the Environment determine appeals under Part IV of the Environmental Protection Act 1986. The nature and types of proposals usually assessed by the EPA under this part are more typically infrastructure development projects of State significance, rather than simple applications to clear or carry out some other agricultural practice.

3.82 In contrast, the Law Society of Western Australia and Hardy Bowen, Lawyers considered that appeals under the EP Act should be transferred from the Minister for the Environment to the SAT.

Hardy Bowen, Lawyers, made the following observations:

> This has been the subject of numerous submissions in the past, by The Law Society of Western Australia and others. The transparency of decision making afforded by the Tribunal would be of assistance in dealing with appeals of this nature and in my view would instil a greater level of public confidence in the appellate procedure.

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1285 Letter from Mr Garry Middle, Appeals Convenor, Office of the Appeals Convenor, 29 April 2008, p5.
1286 Ibid.
1287 Letter from Mr Robert Atkins, Acting Deputy Director General, Department of Environment and Conservation, 30 April 2008, p6.
1288 Submission No 24 from the Department of Environment and Conservation, 20 August 2007, p1.
1289 Submission No 6 from the Office of the Commissioner of Soil and Land Conservation, 9 August 2007, p2.
1290 Submission No 59 from The Law Society of Western Australia, 31 August 2007, p2; and Submission No 98 from Hardy Bowen, Lawyers, 6 November 2007, p1.
1291 Submission No 98 from Hardy Bowen, Lawyers, 6 November 2007, p1.
In May 2008, the WAPC and the EPA informed the Committee that a review of the EIA process was underway.  

*I wish to inform the Committee of the review of the EIA process in WA and its underpinning policy settings. This wide-ranging reform initiative has a risk-based and outcomes focus and relates to the EPA’s assessment process and not the Minister’s process.*

*One of the outcomes of the review will [be] the clarification for DMAs [decision-making authorities] and proponents on the application and interpretation of EIA legislation, policy, procedure and practice, e.g. section 41 in relation to parallel approvals processes.*

The EPA further advised that the EIA review, which commenced on 27 February 2008, would last at least a further three months in order to complete the consultation with the stakeholder reference group. Any decisions about the changes which are to be made to the EP Act as a result of the review would take another two to three years to be formulated. The WAPC preferred not to comment on the question of transferring EIA appeals to the SAT until after the EIA review. The report on the EIA review was published on 30 March 2009.

If the SAT’s jurisdiction was expanded to include EIA appeals, the DEC, EPA and Appeals Convenor would favour the retention of third party rights of appeal:

- “Environmental regulation in Western Australia is achieved by way of a combination of industry self-monitoring and management and government regulation. Third party appeals are fundamental to the transparency and operation of industry self-management. Third party appeals afford those people in the immediate community and in the broader community an opportunity to challenge decisions made under the EP act and bring to the attention of the regulator issues that may not otherwise be known to the

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1292 Letter from Mr Moshe Gilovitz, Secretary, Western Australian Planning Commission, 14 May 2008, pp3-4; and Written answer from the Environmental Protection Authority to proposed question 6 for the hearing on 7 May 2008, p2.

1293 Written answer from the Environmental Protection Authority to proposed question 6 for the hearing on 7 May 2008, p2.


1296 Letter from Mr Moshe Gilovitz, Secretary, Western Australian Planning Commission, 14 May 2008, pp3-4.

1297 Environmental Protection Authority, *Review of the Environmental Impact Assessment Process in Western Australia*, March 2009. Refer to paragraph 2.274 in this Report for a discussion of some of the recommendations resulting from the review.
regulator, simply through local knowledge and experience of dealing with those premises.”\textsuperscript{1298}

- “The principle of third party appeals rights under the E P Act is one which the community holds dear for reasons of simplicity, accessibility and cost. Indeed it is one of the fundamental principles of best practice environmental impact assessment for which the Western Australian system has international recognition.”\textsuperscript{1299}

- “It has been my experience that one of the reasons why individuals and community groups use the provisions of Part IV of the EP Act is that the Planning system does not allow third party appeal rights.”\textsuperscript{1300}

**Committee Comment**

3.86 Given the strategic and political nature of appeals arising from the EIA process, the Committee considered they should continue to be heard by the Minister for the Environment.

**Reviews of Decisions made under Part V Environmental Protection Act 1986 (Environmental Regulation)**

3.87 Environmental regulation relates to the control of activities which have the potential to pollute or adversely affect the environment through the grant of licences and other approvals, and through notices requiring people to undertake certain tasks in order to protect the environment. Appeal rights can arise in relation to the following ‘decisions’, which are either made by, or with the approval of, the Chief Executive Officer of the DEC:

- the grant or refusal to grant licences or other approvals;
- any conditions imposed on the licences or other approvals;
- the amendment, revocation or suspension of a licence or other approval;
- the refusal to transfer a licence or approval; or
- a requirement in, or an amendment of, a notice.\textsuperscript{1301}

\textsuperscript{1298} Mr Robert Atkins, Acting Deputy Director General, Department of Environment and Conservation, Transcript of Evidence, 30 April 2008, pp5-6.

\textsuperscript{1299} Written answer from the Environmental Protection Authority to proposed question 6 for the hearing on 7 May 2008, p2.

\textsuperscript{1300} Letter from Mr Garry Middle, Appeals Convenor, Office of the Appeals Convenor, 29 April 2008, p6.

\textsuperscript{1301} See sections 101A, 102 and 103 of the Environmental Protection Act 1986.
3.88 The Minister’s decisions on these appeals are final, although they may be the subject of judicial review by the Supreme Court under its inherent jurisdiction to issue a prerogative remedy, an injunction or a declaration.

3.89 The DEC and the Appeals Convenor argued that environmental regulation appeals should continue to be heard by the Minister for the Environment. Apart from their contention that this is a matter of Government policy, the DEC and the Appeals Convenor were of the view that both EIA and environmental regulation appeals should be heard by one body, the Minister, so as to ensure consistency between EIA recommendations and policies and environmental regulation matters:

- “Frequently, appellants use the different appeal rights arising under part IV and part V of the act in respect of the same operation or proposal to raise what is effectively the same or similar grounds of appeal. Having one appellant body handling appeals under both part IV and part V is therefore more efficient, provides a greater degree of transparency and reduces the opportunity for inconsistencies to arise between the two parts. A separate appeal regime for decisions under part IV and part V could potentially have an adverse effect on that link.”

- “There are often strong links between Parts … [IV and V] …, notably where a proposal is subject to an EPA assessment and then later requires works approval and licence. Having a single entity (the Minister) determining appeals for both Parts of the EP Act would better ensure consistency of appeal determination and a consistent policy approach being applied.”

- “There may be occasions where a Part IV not assessed decision is carried out concurrently with a DEC decision. The decision for the EPA … [to] … ‘not assess’ a proposal may be based on the ability of Part V to manage the proposal (for example, if the only environmental issue involves clearing of native vegetation, then Part V can deal with the proposal). Appeals could be received on both decisions and the Minister can determine the appeals concurrently and consistently.”

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1302 Ibid, sections 107(2) and 109(3).
1303 “Prerogative remedies involve the [Supreme] Court’s exercise of powers delegated to it by the Sovereign in relation to the direction of the actions of administrative officials, and the remedies granted by the Court are granted in the form of writs issued in the name of the Sovereign”: Law Reform Commission of Western Australia, Report on Judicial Review of Administrative Decisions, Project No 95, December 2002, p3; Halsbury’s Laws of Australia, LexisNexis, paragraphs 10-1300 and 10-1339.
1304 Definition of ‘judicial review’ in Encyclopaedic Australian Legal Dictionary, On-line, LexisNexis.
1305 Letter from Mr Robert Atkins, Acting Deputy Director General, Department of Environment and Conservation, 30 April 2008, p6.
1306 Letter from Mr Garry Middle, Appeals Convenor, Office of the Appeals Convenor, 29 April 2008, p5.
1307 Ibid.
“In cases where no Part IV assessment is required but a Part V approval is, there will be cases where a certain policy matter is relevant that was set up by the Minister through an unrelated appeal on a Part IV assessment ... . Having the same entity determining these directly unrelated Part V appeals means that it is more likely that a common policy position and related decision-making is adopted.”

The DEC was also of the view that appeals determined by the Minister would be dealt with more quickly and less expensively than a SAT review:

Part V has appeal rights in addition to those raised earlier, relevant to applications to clear native vegetation, works approvals and licences. These include a range of notices, including vegetation conservation notices, environmental protection notices and pollution prevention notices. Often, these notices are applied quickly, and require urgent action on the part of the proponent to prevent pollution or environmental harm occurring. In these circumstances, there are occasions on which appeals on notices need to be determined rapidly in order to ensure protection of the environment while still according due process and justice to appellants. DEC considers that these matters can be more efficiently and effectively managed by the appeals convenor and the Minister.

Committee Comment

On the issue of the SAT’s timeliness, the Committee refers to the discussion in paragraphs 2.73 to 2.91 and to Finding 6 in this Report.

The Committee noted that the WACARTT recommended, for reasons set out at pages 66 and 110 to 112 of its report, that environmental regulation matters under Part V of the EP Act should be determined by the SAT and that all other matters under that Act should remain subject to Ministerial appeal. In particular, the WACARTT said that it is “appropriate for an independent and impartial review mechanism to be available in respect of Part V pollution control matters [as they were known prior to Part V being renamed on 8 July 2004]”. Further, the WACARTT found that:

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1309 Mr Robert Atkins, Acting Deputy Director General, Department of Environment and Conservation, Transcript of Evidence, 30 April 2008, pp6-7.
1310 Section 35 of the Environmental Protection Amendment Act 2003.
1311 Western Australian Civil and Administrative Review Tribunal Taskforce, Government of Western Australia, Western Australian Civil and Administrative Review Tribunal Taskforce Report on the Establishment of the State Administrative Tribunal, May 2002, p111.
there is no sufficient reason why the Ministerial appeal system in relation to pollution control matters under Part V of the Environmental Protection Act should not be replaced by a tribunal experienced in land use planning appeals and comprised of persons with appropriate experience in the environmental sciences.\footnote{1312}

3.93 The WACARTT was conscious of the fact that it was recommending that the hearing of environmental appeals be split: EIA appeals would remain within the Minister’s jurisdiction and environmental regulation appeals would be heard by the SAT. However, it was of the view that the ‘link’ between EIA policies and environmental regulation could be maintained and managed, despite this split in jurisdiction:

146. The question of the relationship between matters that we have recommended should remain with the Minister for Environment – matters of environmental assessment and conditions, and of appeals in relation thereto that arise under Part IV of the Act – and those arising in respect of pollution control under Part V, is at the heart of the concerns raised. There is said to be, in practice, a close link in many cases between the setting of conditions by way of environmental impact assessment under Part IV of the Act, and licences and pollution control that is effected under Part V of the Act. The proper concern of the Department of Environmental Protection is to ensure that the outcomes of appeals determined in respect of Part V matters conform with decisions earlier made in respect of Part IV matters.

147. The Taskforce remains of the opinion that it is appropriate for an independent and impartial review mechanism to be available in respect of Part V pollution control matters. So far as the question of harmony between Part V appeal decisions and Part IV environmental impact assessment conditions is concerned, the Taskforce believes that this can be achieved by providing in the Environmental Protection Act and the SAT legislation that, in determining an appeal of a Part V matter, the SAT must have due regard to the conditions which have been imposed on a proposal according to Part IV of the Act, in those cases where Part IV has been applied (which is not all cases by any means).\footnote{1313}

\footnote{1312} Ibid, p66.  
\footnote{1313} Ibid, p111.
3.94 The SAT, Law Society of Western Australia, EDO and CCWA, Hardy Bowen, Lawyers and DOTAG supported the proposal to confer the function of reviewing environmental regulation decisions to the SAT, although the EDO and CCWA suggested that the transfer of jurisdiction be trialled for an initial period of two years.\textsuperscript{1314} Some of these views were based on creating independence in the review process as the Minister for the Environment would no longer be reviewing the decisions of organisations over which he or she has ultimate control.

3.95 In February 2008, the President of the SAT offered the following comments on this issue:

\begin{quote}
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 [in comparison to EIA], 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.\textsuperscript{1315}
\end{quote}

\textsuperscript{1314} Written answer from the State Administrative Tribunal to proposed question 57 for the hearing on 21 September 2007, p61; The Honourable Justice Michael Barker, President, State Administrative Tribunal, \textit{Transcript of Evidence}, 21 September 2007, p43; The Honourable Justice Michael Barker, President, State Administrative Tribunal, \textit{Transcript of Evidence}, 15 February 2008, p9; Submission No 59 from The Law Society of Western Australia, 31 August 2007, p2; Submission No 83 from the Environmental Defender’s Office WA (Inc) and Conservation Council of Western Australia Inc, 7 September 2007, pp2-4; Submission No 98 from Hardy Bowen, Lawyers, 6 November 2007, p1; and Letter from Hon Jim McGinty MLA, Attorney General, 29 May 2008, Enclosure 2, p5.

\textsuperscript{1315} The Honourable Justice Michael Barker, President, State Administrative Tribunal, \textit{Transcript of Evidence}, 15 February 2008, p9.
Mr Cameron Poustie, Principal Solicitor, EDO, explained why the EDO and CCWA proposed that the SAT adopt this jurisdiction on a trial basis for an initial two years:

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, 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... 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.”

... 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.\textsuperscript{1316}
3.97 The EDO and CCWA also indicated that they wished to be consulted as to the precise form that the trial, if any, should take. Further, the EDO did not consider the splitting of jurisdiction of environmental appeals to be a significant issue:

Essentially, I think with respect, ... [the WACARTT’s view] ... 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.

3.98 On this issue of ensuring consistency between the EIA process and environmental regulation matters, the Committee noted the DEC’s advice that the Chief Executive Officer of the DEC, in performing his or her duties under Part V of the EP Act, is to perform those duties in accordance with any implementation decisions made by the Minister and/or any implementation agreements reached between the Minister and other decision-making authorities as part of the EIA process. As the SAT is obliged to ‘step into the shoes’ of the Chief Executive Officer when conducting merits reviews of the Chief Executive Officer’s decisions under Part V of the EP Act, the Committee was of the view that the SAT would be under a similar constraint. This would be in keeping with the Parliament’s intention of ensuring that environmentally significant decisions are made with whole-of-government involvement.

3.99 The Committee also observed that, in conducting reviews of environmental regulation decisions, the SAT could be apprised of any relevant policies, including environmental and planning policies, through the documents and material provided by the Chief Executive Officer, as the primary decision-maker, to the SAT under section 24 of the SAT Act. Further, the SAT must have regard to any relevant policy if a

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1317 Submission No 83 from the Environmental Defender’s Office WA (Inc) and Conservation Council of Western Australia Inc, 7 September 2007, p3.

1318 Mr Cameron Poustie, Principal Solicitor, Environmental Defender’s Office of Western Australia (Inc), Transcript of Evidence, 30 April 2008, p11.

1319 Letter from Mr Robert Atkins, Acting Deputy Director General, Department of Environment and Conservation, 30 April 2008, p6. See, for example, sections 51F, 51M, 54, 57 and 59B of the Environmental Protection Act 1986.

1320 Refer to the discussion in paragraph 2.438 in this Report regarding the nature of merits review, as contrasted with judicial review. See also, sections 27 and 29 of the State Administrative Tribunal Act 2004.

1321 This issue is discussed at paragraphs 2.267 to 2.300 in relation to section 41 of the Environmental Protection Act 1986.

1322 Section 24 of the State Administrative Tribunal Act 2004 is discussed in paragraphs 2.344 to 2.392 in this Report.
statement of the policy had been published in the Western Australian Government Gazette, the responsible Minister has certified the existence of the policy, the Chief Executive Officer has stated in the section 24 material which he or she provided to the SAT, and the policy is within power.\textsuperscript{1323}

3.100 The issue of third party appeals in relation to environmental regulation is discussed in paragraphs 2.506 to 2.520 in this Report.

**Committee Comment**

3.101 The Committee considered that it would be appropriate for the SAT to be conferred the review jurisdiction in relation to environmental regulation decisions on the basis that it will give people and organisations aggrieved by these decisions an independent and impartial review mechanism. However, given the concerns raised in the evidence obtained by the Committee, the review jurisdiction should be transferred to the SAT on the following conditions:

- In reviewing an environmental regulation decision, the SAT must have due regard to any conditions which have been imposed on the activity in question as a result of an EIA process pursuant to Part IV of the EP Act, in those cases where Part IV has been applied.

- The SAT should be empowered to refer a review of an environmental regulation decision to the Minister for the Environment where it considers this appropriate.

- As soon as practicable after two years from conferral of the review jurisdiction, a Legislative Council committee, whether it is an existing committee or one established for this purpose, is to conduct an inquiry into the SAT's exercise of this jurisdiction.

3.102 The Committee noted that, for the reasons discussed in paragraphs 2.267 to 2.300 in this Report, the right to seek a SAT review of an environmental regulation decision should not arise until after:

- any applicable EIA process is complete;

- any appeals in that process are finalised; and

- any appeal periods in that process have expired.

3.103 Accordingly, the Committee makes the following recommendations and reiterates Recommendation 5 in this Report.

\textsuperscript{1323} See section 28 of the State Administrative Tribunal Act 2004.
Recommendation 47: The Committee recommends that the Environmental Protection Act 1986 be amended to:

(a) empower the State Administrative Tribunal to review the decisions which are made under Part V of the Act. In reviewing these decisions, the Tribunal must have due regard to any conditions which have been imposed on the activity in question pursuant to Part IV of the Act;

(b) empower the State Administrative Tribunal to refer a review of a decision which is made under Part V of the Act to the Minister for the Environment where the Tribunal considers this appropriate; and

(c) provide that, as soon as practicable after two years from conferral of this review jurisdiction, a Legislative Council committee, whether it is an existing committee or one established for this purpose, is to conduct an inquiry into the State Administrative Tribunal’s exercise of this jurisdiction.

Planning and Development Matters

Injurious Affection

3.104 An owner of land of whose land is injuriously affected\textsuperscript{1324} by the making or amendment of a planning scheme may be entitled to be compensated for that injurious affection by the responsible authority, which may be either a local government or the WAPC.\textsuperscript{1325} Part 11, Division 2 of the PD Act regulates this compensation process.

3.105 Where, for example, the injurious affection results from the land being reserved under the planning scheme for a public purpose\textsuperscript{1326}, compensation may only be payable by the responsible authority if:

- the land is sold after the date of reservation; or

\textsuperscript{1324} ‘Injurious affection’ has been defined as the “Depreciation in the value of land caused by the adverse effects of public works through such things as noise, vibration, overshadowing, loss of support, and restriction or loss of access. It is usually associated with carrying out substantial public undertakings such as the construction of freeways or airports”: Encyclopaedic Australian Legal Dictionary, On-line, LexisNexis.

\textsuperscript{1325} See section 173 of the Planning and Development Act 2005.

\textsuperscript{1326} Injurious affection may also result from the making or amendment of a planning scheme which prohibits all development on the land except for developments for a public purpose: see ibid, section 174.
• the responsible authority has either refused an application for the development of the land or has granted the development approval subject to conditions which are unacceptable to the owner.1327

3.106 If there is a dispute as to whether the land has been injuriously affected, either the owner or the responsible authority may apply to the SAT for a determination. A dispute about the amount and manner of payment of compensation is to be decided by arbitration under, and in accordance with, the Commercial Arbitration Act 1985, unless the parties agree on some other method.1328

3.107 The remaining discussion under this heading, until and including paragraph 3.114, relates only to owners of injuriously affected land resulting from the reservation of that land under a planning scheme for a public purpose.

3.108 Among other conditions which must be met by the owner selling the injuriously affected land in order for compensation to be payable, the owner must give prior written notice to the responsible authority of the owner’s intention to sell the land.1329 The claim for compensation must be made within six months after the land is sold1330 and the amount of compensation cannot exceed the difference between the value of the land, as if it were unaffected by the reservation, and the actual value of the land at the date of the sale1331.

3.109 An owner who intends to sell injuriously affected land and claim compensation from the responsible authority must also apply to the Board of Valuers for a valuation of the land as if it were unaffected by the reservation, unless the responsible authority waives this requirement.1332 The Board of Valuers is established under section 182 of the PD Act. As explained by the Board of Valuers:

valuations by the Board are concerned with facilitating a method of establishing compensation for injurious affection where the subject property sells for a depressed price ... [and helps to establish] the financial effect of the reservation ... [of the land under the planning scheme for a public purpose] ... in the market place.1333

1327 Ibid, section 177(1).
1328 Ibid, section 176.
1329 Ibid, section 177(3).
1330 Ibid, section 178(1)(a).
1331 Ibid, section 179.
1332 Ibid, section 183.
1333 Letter from Mr Gerald Gauntlett, Chair, Board of Valuers, 31 July 2008, p1.
Section 183 of the PD Act regulates the process of valuations made by the Board of Valuers. Section 183(2) provides that a valuation by the Board of Valuers is final. However:

- section 183(4) enables the Board of Valuers, at the owner’s request, to review its own valuation if the land is not sold within six months of that initial valuation, and if the board considers it just to do so in the circumstances. The board may either confirm or vary its initial valuation; and

- the judicial review\[1334\] of the board’s valuations by the Supreme Court, under its inherent jurisdiction to supervise inferior courts and tribunals,\[1335\] is also available.\[1336\]

The Board of Valuers advised the Committee that its valuations of land and its reviews of its initial valuations under section 183 of the PD Act involve the following exercises:

*There is a form of merit review in that the Board member’s [sic] recommendations are weighed within the Board prior to concluding a final decision as to the considered valued of the land as unaffected [by the reservation for a public purpose]. *

*In practice, the Board makes a consensus determination and gives owners an opportunity to make representation before reaching a decision.*\[1337\]

The Board of Valuers informed the Committee that it had first been established in 1967 under the repealed *Metropolitan Region Town Planning Scheme Act 1959*. Since 1997, the board had only met on one or two occasions, although applications for the board’s valuations were “more commonplace” during the years immediately after its initial establishment. As at July 2008, the board was in the process of determining two applications and considered that there was “some prospect” of additional applications being lodged.\[1338\]

The Board of Valuers acknowledged that its valuation services have not been used greatly in the past, but “That is not to say that the functions of the Board in some form might not be required into the future.” It was of the view that there remains an independent statutory role for the board:

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1334 Judicial review is discussed at paragraphs 2.438 to 2.441 in this Report.
1336 For example, see *Re Board of Valuers; Ex Parte Bond Corporation Pty Ltd* [1999] WASC 54.
1337 Letter from Mr Gerald Gauntlett, Chair, Board of Valuers, 31 July 2008, p2.
Perhaps in some contrast [to the SAT’s role in determining questions of whether injurious affection has occurred], the role of the Board is concerned with a valuation function to establish the injurious effect of the Scheme in the first instance. …

…

The existence of the Board with an appointed Chairperson[1339] has in [the] past provided an avenue of independent determination with responsibility and surety that relevant legislation and appropriate valuation principle is adhered to in the carrying out of its functions …[1340]

3.114 However, the Board of Valuers recognised that it may be appropriate for owners to have a right of appeal to the SAT from the board’s valuation decisions.[1341]

3.115 In contrast, the SAT, the WAPC, the DPI and the Minister for Planning and Infrastructure were of the view that the jurisdiction exercised by the Board of Valuers should be conferred on the SAT as one part of what they consider should be the SAT’s specialist role in determining all matters of injurious affection and related compensation, in addition to its review of planning approval decisions under the PD Act.[1342] Presently, disputes relating to injurious affection arising under Part 11 of the PD Act may be determined by various means. The parties to these types of disputes are usually given the option of:

• arbitration in accordance with the Commercial Arbitration Act 1985; or

• some other method agreed by the parties,[1343]

although the option of a SAT determination is also sometimes offered.[1344]

[1339] The chairperson of the Board of Valuers is nominated by the Western Australian Planning Commission and, like all other members of the board, he or she must also be an Associate or a Fellow of the Australian Property Institute: section 182 of the Planning and Development Act 2005.

[1340] Letter from Mr Gerald Gauntlett, Chair, Board of Valuers, 31 July 2008, p2.

[1341] Ibid.

[1342] State Administrative Tribunal, Tribunal’s Responses to Committee’s List of Boards and Tribunals Currently Not Under State Administrative Tribunal’s Jurisdiction, 4 April 2008, pp4-6; Letter from Mr Moshe Gilovitz, Secretary, Western Australian Planning Commission, 28 March 2008; Letter from Mr Eric Lumsden, Director General, Department of Planning and Infrastructure, 18 April 2008, p2; and Letter from Hon Alannah MacTiernan, Minister for Planning and Infrastructure, 23 June 2008.

[1343] See, for example, sections 176(2), 184(4), 185(3) and 188(2) of the Planning and Development Act 2005.

[1344] See, for example, ibid, sections 176(1) and 188(2).
3.116 Although the WAPC was in favour of the SAT being given this specialist role, it advised the Committee that it would like to see the retention of the option of ‘some other method agreed by the parties’ because:

*Parties should always be encouraged to and have the flexibility to find mutually acceptable ways to resolve disagreements as well as the formal option of SAT.*

3.117 The SAT considered that it should be the “one stop shop” in relation to all property matters involving administrative action, including injurious affection, because it has the appropriate expertise. The SAT provided the following further comments to the Committee in support of its view:

*The Tribunal is unaware of how extensively s 182 and s 183 of the Planning and Development Act 2005 (WA) are used. It sees no compelling reason why these actions should remain as they are. The Tribunal exercises a broad jurisdiction in relation to the valuation of land under the Valuation of Land Act 1978 (WA) and the Land Administration Act 1997 (WA). All land valuation issues under the Planning and Development Act 2005, indeed under any other Act, should in these circumstances be determined by the Tribunal. If the Board of Valuers process is to be retained, it would seem appropriate to make the Board’s determination reversible by SAT. It will be noted that valuation in relation to injurious affection through reservation under a planning scheme requires an understanding of planning and planning law, which is also the province of this Tribunal. The Tribunal also adds that s 176(2) requires determination of the amount of compensation to be made under the Commercial Arbitration Act 1985. It appears that the reason why it was retained in the Planning and Development Act 2005 (WA) is that the Planning and Development Act was originally developed prior to the establishment of the SAT. If the Planning and Development Act had been developed since 2005, there is every probability that this particular function would have been conferred on the Tribunal. The Tribunal considers that all questions of compensation for injurious affection should be determined by SAT.*

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1345 Letter from Mr Moshe Gilovitz, Secretary, Western Australian Planning Commission, 28 March 2008, p2.

1346 Written answer from the State Administrative Tribunal to proposed question 75 for the hearing on 15 February 2008, p43.

3.118 The Minister for Planning and Infrastructure and the WAPC advised the Committee that the transfer of the Board of Valuers’ functions to SAT was intended to occur as part of the first review of the PD Act. However, the Government would not be adverse to the transfer those functions before the review of the PD Act.\textsuperscript{1348}

3.119 The WAPC, the DPI and the Minister for Planning and Infrastructure offered the following reasons for establishing the SAT as the sole decision-making body for injurious affection and related compensation matters under the PD Act:

- In the WAPC’s experience, “legal practitioners in particular prefer to refer matters to arbitration should the jurisdiction of the Supreme Court not be available.” SAT proceedings, which offer case management arrangements, flexible procedures and formality, and a well-structured mediation approach, compare favourably to the process of arbitration. “Arbitrations are often conducted as de facto Supreme Court litigation before Senior Counsel or retired judges under similar rules of evidence and rules that would apply in the Supreme Court.”\textsuperscript{1349}

- This would “ensure a consistent specialised and transparent method of dealing with such matters.”\textsuperscript{1350}

- “SAT is the appropriate decision body on valuation matters, as it is a specialised tribunal with members with planning experience.”\textsuperscript{1351}

- The DPI and the Minister for Planning and Infrastructure noted with approval that SAT decisions may be appealed to the Supreme Court on questions of law under section 105 of the SAT Act.\textsuperscript{1352} The WAPC considered that any appeals arising from a SAT decision concerning land valuation and compensation should be based only on errors of law.\textsuperscript{1353}

\textsuperscript{1348} Letter from Hon Alannah MacTiernan, Minister for Planning and Infrastructure, 23 June 2008, p2; and Letter from Mr Moshe Gilovitz, Secretary, Western Australian Planning Commission, 28 March 2008, p1.

\textsuperscript{1349} Letter from Mr Moshe Gilovitz, Secretary, Western Australian Planning Commission, 28 March 2008, p1.

\textsuperscript{1350} Submission No 93 from the Western Australian Planning Commission, 5 October 2007, p11.

\textsuperscript{1351} Letter from Mr Eric Lumsden, Director General, Department of Planning and Infrastructure, 18 April 2008, p2.

\textsuperscript{1352} Ibid; and Letter from Hon Alannah MacTiernan, Minister for Planning and Infrastructure, 23 June 2008, p1.

\textsuperscript{1353} Submission No 93 from the Western Australian Planning Commission, 5 October 2007, p11.
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- “This will be administratively expedient, free up limited Court resources and reduce the number of government boards and committees as part of the general reduction in government red tape.”

3.120 Similarly, the EDO could not:

foresee any problems with the suggestion put by the Committee, that all questions of compensation for injurious affection would be determined by SAT rather than by a selection of possible methods.

3.121 The DOTAG’s view was that:

This is a policy issue for Government although the proposal is in line with the overall objectives for SAT it may unnecessarily deprive a client of the right to make claims in whatever manner they see fit.

3.122 In contrast to all of the other submissions made to the Committee in this jurisdiction, the Law Society of Western Australia suggested that the Supreme Court should be added as a further option available to parties for the resolution of questions arising in injurious affection matters. The society’s view was based on the following factors:

- Injurious affection matters can be complex, involving a lot of expert evidence which requires a rigorous application of the rules of evidence. The society was concerned that the SAT is not a forum where this sort of rigour must occur.

- Disputes about compulsory acquisition, which can also involve complex land compensation principles and are regulated by the Land Administration Act 1997, may be resolved through:

  (a) agreement between the land owner and the acquiring authority;

  (b) a referral by the land owner or an application by the acquiring authority to the SAT; or

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1354 Letter from Hon Alannah MacTiernan, Minister for Planning and Infrastructure, 23 June 2008, p1.
1355 Letter from Mr Cameron Poustie, Principal Solicitor, Environmental Defender’s Office of Western Australia (Inc), 9 May 2008, p3.
1357 Submission No 59 from The Law Society of Western Australia, 31 August 2007, pp2-3.
1358 ‘Compulsory acquisition’ has been defined as “The taking of land or any interest in the land by the government without needing the consent of the owner”: Encyclopaedic Australian Legal Dictionary, Online, LexisNexis.
1359 Section 220(a) of the Land Administration Act 1997.
1360 Ibid, sections 220(c) and 221.
3.123 Landgate and the DPI disagreed with the Law Society of Western Australia’s suggestion. Landgate appeared to be of the view that the current system of determining disputes in injurious affection matters is effective, submitting that:

- the parties to the disputes can obtain expert valuations as to the amount of any injurious affection;
- any doubt about whether land has been injuriously affected can already be resolved by the SAT under section 176(1) of the PD Act;
- any process for resolving a dispute as to the amount of compensation payable or the manner in which it must be paid, under section 176(2) of the PD Act, can be informed by expert valuations and the SAT’s determination that injurious affection has occurred; and
- “The involvement of the Supreme Court would place an additional cost burden on the Valuer-General and would involve the use of the State Solicitor in any appearance with further costs.”

3.124 The DPI’s views are discussed earlier in this heading.

Committee Comment

3.125 Given the SAT’s existing jurisdiction and expertise in land valuation matters, the Committee considered that:

- the Board of Valuers’ functions should be transferred to the SAT; and
all parties to injurious affection disputes should have a right to seek a SAT determination of their dispute.

3.126 While the Committee acknowledged the submissions in favour of establishing the SAT as a specialist tribunal in all injurious affection and related compensation matters, the Committee was conscious of unnecessarily restricting the current range of dispute resolution options which are available to the parties to these matters. Accordingly, the Committee was of the view that the option of a SAT determination should be provided to parties to all disputes relating to injurious affection arising under Part 11 of the PD Act where this form of dispute resolution is not currently available.

Recommendation 48: The Committee recommends that the Planning and Development Act 2005 be amended to transfer the functions exercised by the Board of Valuers under that Act to the State Administrative Tribunal.

Recommendation 49: The Committee recommends that the Planning and Development Act 2005 be amended to provide the option of a State Administrative Tribunal determination to parties to all disputes relating to injurious affection arising under Part 11 of the Act where this form of dispute resolution is not currently available.

COMMERCIAL AND CIVIL STREAM

Building Disputes Tribunal

3.127 The Building Disputes Tribunal (BDT) was established under section 26 of the Builders’ Registration Act 1939 in order to resolve disputes regarding building workmanship under that Act and disputes over home building contracts under the Home Building Contracts Act 1991. The BDT is constituted by a chairperson, who is also the chair of the BRB, a legally qualified deputy chair, a builders’ representative and a consumers’ representative. These members serve the BDT part time.\footnote{1366}

3.128 The Committee was informed by the BDT that it hears complaints informally. A typical hearing lasts two hours and decisions are generally delivered at the end of the hearing. The average time required to obtain a hearing after the receipt of a complaint is six weeks.\footnote{1367}

\footnote{1366} Letter from Mr Kim Fare, Registrar, Building Disputes Tribunal, received on 19 March 2008, pp1-2. See sections 27 and 28 of the Builders’ Registration Act 1939.

\footnote{1367} Letter from Mr Kim Fare, Registrar, Building Disputes Tribunal, received on 19 March 2008, p1.
3.129 The BDT is largely funded by the BRB but also charges a nominal filing fee, which was $30 in March 2008, from complainants.1368

3.130 During a hearing with the Committee on 15 February 2008, the President of the SAT suggested to the Committee that the adjudicative functions of the BDT should be subsumed into the SAT. The President indicated that his view had been formed due to a continuous delay in the BDT’s provision of its written reasons for the decisions which are appealed to the SAT.1369 This also results in the delay of the review proceedings in the SAT, particularly because the statement of reasons is vital to the SAT’s consideration of the applicant’s request for leave to seek review, which must be lodged and granted before the review application can be made.1370

3.131 The SAT and the BDT have met on more than one occasion in order to discuss measures which may be put in place to help minimise the delays. The SAT notifies the BDT of any applications to seek a review of the BDT’s decisions so that the latter tribunal can prioritise the provision of its written reasons for decisions. In addition, the SAT also issues orders, which the applicants must serve on the BDT’s Registrar, which require the BDT to provide written reasons for its decisions within a stated period, usually at least four to six weeks after the date of the SAT’s order.1371 However, the SAT continued to report delays in the BDT’s provision of written reasons.1372 The following comments were contained in the SAT’s Annual Report 2008:

\[
\text{It appears that the chairpersons presiding over hearings of the Building Disputes Tribunal are making an effort to provide reasons for decision as soon as possible. Quite frequently the Registrar of the Building Disputes Tribunal will write to advise when some delay is anticipated, and that is of considerable assistance to the Tribunal in allocating dates for directions hearings. Nevertheless, there are some matters in which considerable delay continues to be experienced.}\] 1373

3.132 The President of the SAT provided the following reasons for his suggestion:

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1368 Letter from Mr Kim Fare, Registrar, Building Disputes Tribunal, received on 19 March 2008, p1.
1369 These concerns have previously been reported by the State Administrative Tribunal in its annual reports: State Administrative Tribunal, Annual Report 2006, 30 September 2006, p19; and State Administrative Tribunal, Annual Report 2007, 28 September 2007, p28.
1370 The Honourable Justice Michael Barker, President, State Administrative Tribunal, Transcript of Evidence, 15 February 2008, pp3-4 and 7. See section 41 of the Builders’ Registration Act 1939.
1371 Written answer from the State Administrative Tribunal to proposed question 3 for the hearing on 15 February 2008, p3.
He believed that the SAT would be able to acquit the work involved in resolving building disputes more quickly than the BDT because of its ability to utilise its full-time membership, compared with the part-time membership of the BDT:

_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 dispute._\(^{1374}\)

- The SAT would be seen as a totally independent and impartial dispute resolution body. While the President did not suggest that there is a public perception of bias in the BDT, he did say that if that perception existed, it would be removed by the transfer of jurisdiction to the SAT.

- The SAT would bring all of the benefits of an overarching tribunal to this jurisdiction, including greater consistency and timeliness in decision-making and the enhancement of the training and education of members.\(^{1375}\)

3.133 Under the President’s proposal to transfer the BDT’s adjudicative functions to the SAT, building disputes would be heard by the SAT in two tiers:

- The first tier of dispute resolution would be performed by a panel of SAT members constituted similarly to the BDT. Section 11 of the SAT Act would apply to give the President discretion as to the constitution of the panel:


\(^{1375}\) Letter from the Honourable Justice Michael Barker, President, State Administrative Tribunal, 21 February 2008, p1.
Accordingly, the President would have regard to whether “workmanship” issues were raised in a proceeding and, in such cases, ensure that a sessional member of the Tribunal with appropriate building experience is appointed along with other appropriate members to determine a dispute.\(^\text{1376}\)

- The second tier of dispute resolution would be a review process for parties who are not satisfied with the first tier decision of the SAT. The President suggested that these reviews should only proceed with the leave of the SAT and should be brought on questions of law only. This suggests that second tier matters would be heard by either judicial or otherwise legally qualified members of the SAT, as is the case when questions of law in any SAT matter require determination.\(^\text{1377}\) However, in relation to any decisions or orders made by the Registrar of the BDT under the position’s limited delegated dispute resolution jurisdiction,\(^\text{1378}\) the President proposed that any party aggrieved by such a decision or order should have the right to apply for a SAT review without the need to seek prior leave. Currently, such an aggrieved party is not required to seek leave before applying to the BDT for a review of the Registrar’s decisions or orders.\(^\text{1379}\)

3.134 The DOTAG supported the President’s proposal subject to sufficient resources being provided.\(^\text{1380}\) When the Committee sought comment from the Minister for Consumer Protection about the President’s proposal, the Minister deferred to the Attorney General.\(^\text{1381}\)

3.135 In contrast, the BDT, Master Builders Association of Western Australia and Housing Industry Association of Western Australia were of the view that the BDT’s

\(^{1376}\) Letter from the Honourable Justice Michael Barker, President, State Administrative Tribunal, 21 February 2008, p2.

\(^{1377}\) See section 59 of the \textit{State Administrative Tribunal Act 2004}.

\(^{1378}\) See section 33A of the \textit{Builders’ Registration Act 1939} and regulation 2 of the \textit{Building Disputes Committee Regulations 1992}. The President of the State Administrative Tribunal recommended that, if the adjudicative functions of the Building Disputes Tribunal are transferred to the former tribunal, the Registrar’s limited delegated dispute resolution jurisdiction should be transferred to the Department of Consumer and Employment Protection, now known as the Department of Commerce: Letter from the Honourable Justice Michael Barker, President, State Administrative Tribunal, 21 February 2008, p2.


\(^{1380}\) Written answer from the Department of the Attorney General to proposed question 52 for the hearing on 25 March 2008, p27.

The BDT did not support the President’s recommendations for the following reasons:

- The BDT argued that the SAT cannot deliver timelier building dispute resolution, stating that BDT members who had had experience with the SAT are of the view that hearing delays at the SAT are, at best, comparable with those at the BDT. The BDT suggested that this is due to the relative informality of the BDT’s proceedings and the expertise and experience of its staff and members in building dispute matters.

- There is no evidence of a public perception that the BDT is not fully independent and impartial.

- The BDT could not see how the SAT could provide greater consistency in decision-making.

- The BDT conceded that it may benefit from having full-time members but added that this would result in higher costs.

- The BDT, unlike the SAT, is a specialist building tribunal which has access to the expertise of builder members and the benefit of a close working relationship with the BRB’s building inspectors. This view was shared by the Master Builders Association of Western Australia and the Housing Industry Association of Western Australia. However, the Committee noted that the SAT had five registered builders who were sessional members in 2005 and 2005/2006, three registered builders who were sessional members in 2006/2007 and three registered builders who were sessional members in 2007/2008.

- The SAT was not established to deal with ‘civil’ matters between private parties at the first instance. However, the Committee noted that the SAT already exercises an original decision-making function in some commercial and civil matters between private parties: for example, under the Commercial Tenancy (Retail Shops) Agreements Act 1985, Credit Act 1984, Marketing of Potatoes Act 1946, Retirement Villages Act 1992, and Strata Titles Act 1985.

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1382 Letter from Mr Kim Fare, Registrar, Building Disputes Tribunal, received on 19 March 2008; Letter from Mr Gavan Forster, Housing Director, Master Builders Association of Western Australia, 16 April 2008; and Letter from Mr John Dastlik, Regional Director, Housing Industry Association of Western Australia, 22 April 2008.

1383 Letter from Mr Gavan Forster, Housing Director, Master Builders Association of Western Australia, 16 April 2008; and Letter from Mr John Dastlik, Regional Director, Housing Industry Association of Western Australia, 22 April 2008.
The BDT’s volume of work would significantly increase the SAT’s workload.

Given that the SAT has already provided parties to building disputes with a cheaper means of appeal, and therefore, a “relatively cheaper means of prolonging disputes already dealt with by the BDT”, the BDT warned that a full transfer of the BDT’s adjudicative functions to the SAT would exacerbate this effect.

In addition, the Master Builders Association of Western Australia indicated that it was satisfied with the existing system of building disputes resolution, with the SAT offering a less costly appeal mechanism than the previous appellate body, the District Court.

The Committee noted that the SAT’s Annual Report 2008 indicated that the BDT’s jurisdiction in building disputes resolution is expected to be transferred to the SAT. The Honourable Justice John Chaney, President, SAT, indicated that the present Government is in favour of this transfer in principle.

Recommendation 50: The Committee recommends that the Builders’ Registration Act 1939 and the Home Building Contracts Act 1991 be amended to transfer the functions exercised by the Building Disputes Tribunal under these Acts to the State Administrative Tribunal.

Consumer/Trader Disputes

The WACARTT recommended that the Small Claims Tribunal (now incorporated into the Magistrates Court) be excluded from the SAT’s jurisdiction, but that the Government should review this position after the SAT had been operating for two years:

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1385 Prior to the establishment of the State Administrative Tribunal, decisions of the Building Disputes Tribunal were heard by the District Court.

1386 Letter from Mr Kim Fare, Registrar, Building Disputes Tribunal, received on 19 March 2008, pp2-3.

1387 Letter from Mr Gavan Forster, Housing Director, Master Builders Association of Western Australia, 16 April 2008, p2.


1389 Letter from the Honourable Justice John Chaney, President, State Administrative Tribunal, 23 March 2009, p3.
189. The 1999 WALRC Report proposed the transfer of the functions of the Small Claims Tribunal to the SAT. On balance, the Taskforce considers that recent policy developments within government suggest this recommendation should not be adopted. The Small Claims Tribunal was originally established in 1974 expressly to enable consumer/trader disputes to be resolved in a setting more informal than that available in the Local Court. The Taskforce understands that the Government is now considering a proposal to establish a Magistrates Court (which would essentially involve an amalgamation of the existing Local Court and Courts of Petty Sessions); such a Magistrates Court would include a Small Debts Division.

190. Assuming that the Small Debts Division of a new Magistrates Court will adopt alternative means of dispute resolution and adapt them to traditional court processes, and will be able flexibly to dispose of consumer/trader disputes, there is good reason to transfer the current jurisdiction of the Small Claims Tribunal to the proposed Small Debts Division of the Magistrates Court rather than to the SAT. Small Claims occur throughout the State and the ready availability of Local Courts in country and regional areas for resolving such disputes lends support to this recommendation. Moreover, the synergies between the proposed jurisdiction of the Magistrates Court and the Small Claims Tribunal suggest that this is a sensible outcome. The proposed Magistrates Court would thereby maintain a common civil jurisdiction for the resolution of like disputes. Again, the Government should review this decision after the SAT has been operating for two years.\footnote{Western Australian Civil and Administrative Review Tribunal Taskforce, Government of Western Australia, \textit{Western Australian Civil and Administrative Review Tribunal Taskforce Report on the Establishment of the State Administrative Tribunal}, May 2002, pp122-123.}

3.139 However, the DOTAG advised the Committee that this review has not occurred.\footnote{Letter from Hon Jim McGinty MLA, Attorney General, 29 May 2008, Enclosure 1, p26.}

3.140 Immediately prior to 1 May 2005, when the \textit{Small Claims Tribunals Act 1974} was repealed by the \textit{Courts Legislation Amendment and Repeal Act 2004}, the Small Claims Tribunal had a jurisdictional limit of $6,000.\footnote{Regulation 3A of the \textit{Small Claims Tribunals Regulations 1975}.} The Magistrates Court now has the jurisdiction to hear and determine consumer/trader disputes where the amount...
claimed is $75,000 or less. A consumer/trader dispute may be conducted according to the Magistrates Court’s minor cases procedures where the amount claimed is $10,000 or less and the claimant elects to have their claim dealt with under those procedures. These disputes are referred to as ‘minor consumer/trader disputes’ in this discussion.

3.141 The DOTAG provided the Committee with a summary of the background to the incorporation of the Small Claims Tribunal’s jurisdiction into the Magistrates Court:

As part of the considerations for the Court Reform Package that was introduced in 2005 and as a matter of policy, the jurisdiction previously exercised by the Small Claims Tribunal and the Small Debts Division of the Local Court of Western Australia were amalgamated. Within the Magistrates Court (Civil Proceedings) Act 2004 there is a dedicated procedure (primarily modelled on the Small Claims Tribunal procedure) to deal with this new class of minor case. The jurisdiction for this class of minor case was set at $7,500 with the limit to increase to $10,000 on 1 January 2009.

3.142 Some features of minor consumer/trader disputes which are common to all minor cases are discussed in paragraph 3.168 of this Report. Other shared features include the following:

- Generally, a party cannot be represented by another person during these proceedings. However, the Magistrates Court may give leave for a party to be represented by either a lawyer or an agent who is a non-lawyer. For example, the Magistrates Court may give leave to a party to a minor consumer/trader dispute to be legally represented if all parties agree or if the court is satisfied that none of the other parties will be unfairly disadvantaged as a result.

- The successful party is entitled to an order for any court fees and service fees paid by them and for any costs of enforcing the judgment. In particular circumstances, the Magistrates Court may also award the successful party other costs.
• If a party is dissatisfied with a judgment in a minor residential tenancy dispute, the party may, on certain jurisdictional or natural justice grounds, appeal against the judgment:

(a) where the Magistrates Court was constituted by a magistrate, to the District Court; or

(b) where the Magistrates Court was not constituted by a magistrate, to a magistrate.1399

3.143 As minor consumer/trader disputes and minor residential tenancy disputes share similar minor cases features, some of the discussion in paragraphs 3.166 to 3.188 in this Report is applicable to the issue of whether the minor consumer/trader dispute jurisdiction should be transferred from the Magistrates Court to the SAT.

3.144 Mr Steven Heath, Chief Magistrate, Magistrates Court, advised the Committee that, in his comments to the WACARTT, he had suggested the transfer of the Magistrates Court’s whole minor cases jurisdiction, of which minor consumer/trader disputes are only a part, to the SAT. Mr Heath argued that this transfer would be appropriate on the following bases:

• It would continue to allow minor cases to be dealt with informally and without reliance on the rules of evidence. However, these cases could then be determined away from a court setting.

• It would allow the Magistrates Court to operate as a court in its remaining civil jurisdiction; that is, by “applying the necessary rules of evidence and formal procedures similar to the Superior Courts.” Mr Heath argued that this would be useful in any future adoption of uniform rules of civil procedure for courts.

• It may result in sufficient work for the SAT in regional Western Australia to enable the appointment of part-time SAT members in all major regional centres where the Magistrates Court currently sits. This would be another way for the SAT to address the issue of providing its services across the entire State (Mr Heath’s comments on this issue, in relation to minor residential tenancy disputes, are discussed at paragraphs 3.173 to 3.175 in this Report).1400

1400 Letter from Mr Steven Heath, Chief Magistrate, Chief Magistrate’s Chambers, Magistrates Court of Western Australia, 17 March 2009, p1.
However, Mr Heath suggested that a decision to transfer the full minor cases jurisdiction to the SAT would involve determining whether the SAT should have a default judgment mechanism.\textsuperscript{1401} A default judgment is:

\begin{quote}
A discretionary judgment or verdict given in favour of a plaintiff by virtue of the defendant’s failure to comply with the procedural requirements of the court after having been served with an originating process ... . Failure to comply with procedural requirements may include failing to file a defence or to enter an appearance within the time stipulated in the originating process ... .\textsuperscript{1402}
\end{quote}

Mr Heath advised that many minor cases are of a debt collection nature and are resolved without a hearing, via default judgments, because of the defendants’ failure to respond to the claims.\textsuperscript{1403} It appeared that the SAT does not currently have a default judgment mechanism, although parties who fail to attend or be represented at compulsory conferences and hearings run the risk of having the compulsory conferences or hearings proceed without them, and possibly having a decision handed down in their absence.\textsuperscript{1404}

The SAT acknowledged that the approach to dispute resolution in the Magistrates Court in relation to minor cases is very similar to that of the SAT. However, the SAT was not in favour of receiving the minor consumer/trader disputes jurisdiction for the following reasons:

\begin{itemize}
\item The removal of this jurisdiction from the Magistrates Court would not relieve it of the balance of its minor cases jurisdiction. \textit{“Giving SAT the necessary resources to deal with minor consumer/trader disputes would probably result in some significant duplication of resources.”}\textsuperscript{1405}
\item Minor cases involving any jurisdiction conferred on the Magistrates Court by a Commonwealth law must be dealt with under the court’s general procedures, as opposed to its minor cases procedures.\textsuperscript{1406} The SAT presumed that these matters would need to remain with the Magistrates Court, possibly
\end{itemize}

\begin{flushright}
\textsuperscript{1401} \textit{Ibid.}
\textsuperscript{1403} Letter from Mr Steven Heath, Chief Magistrate, Chief Magistrate’s Chambers, Magistrates Court of Western Australia, 17 March 2009, p1.
\textsuperscript{1404} See sections 53, 63 and 84 of the \textit{State Administrative Tribunal Act 2004}.
\textsuperscript{1405} Letter from the Honourable Justice John Chaney, President, State Administrative Tribunal, 23 March 2009, p2.
\textsuperscript{1406} Section 28(2) of the \textit{Magistrates Court (Civil Proceedings) Act 2004}.
\end{flushright}
leading to confusion for consumers as to whether to commence proceedings in the court or the SAT.1407

- Under the minor cases procedures, the Magistrates Court may, under certain circumstances, order an otherwise minor case to be dealt with under the court’s general procedures. These circumstances are set out in sections 28(3) and (4) of the Magistrates Court (Civil Proceedings) Act 2004: where all the parties in the minor case so request; where the minor case involves an important principle of law or complex facts or issues; and where the minor case involves a counterclaim that is not a minor case. The SAT argued that, if these options remained, it would create inefficiencies whenever a matter commenced in the SAT was transferred to the Magistrates Court.1408 On this point, the Committee noted that judicial members of the SAT already have the power to strike out all or part of a proceeding if it considers that it would be more appropriately dealt with by another tribunal, court or any other person. Where this occurs, the SAT may also refer the matter to the relevant tribunal, court or person if it considers it appropriate to do so.1409

- Appeals from decisions in minor consumer/trader cases would be heard by the Supreme Court rather than the Magistrates Court, constituted by a magistrate, or the District Court. The SAT suggested that it might be possible to create internal review rights in the SAT which are applicable to minor consumer/trader disputes. However, this would still result in different appeal rights for these cases in comparison to the appeal rights applicable to other minor cases, and this inconsistency would be undesirable.1410

- The SAT is of the opinion that the current enforcement arrangements in the SAT are more difficult than those in the Magistrates Court because they involve the applicant filing certain prescribed documents in a court of competent jurisdiction, where the SAT’s order is a monetary order, or the Supreme Court, where the SAT’s order is a non-monetary order, before the SAT’s order can enforced as an order of the relevant court.1411 The enforcement of SAT orders is discussed at paragraphs 2.249 to 2.260 in this Report.

1407 Letter from the Honourable Justice John Chaney, President, State Administrative Tribunal, 23 March 2009, p2.
1408 Ibid.
1409 See section 50 of the State Administrative Tribunal Act 2004.
1410 Letter from the Honourable Justice John Chaney, President, State Administrative Tribunal, 23 March 2009, p2.
1411 Ibid. See sections 85 and 86 of the State Administrative Tribunal Act 2004.
The SAT does not have regional offices and, accordingly, does not have the same physical presence in regional locations as the Magistrates Court. The SAT was of the view that the difficulties associated with this are not insurmountable. However:

It must be appreciated ... that while much can be done utilising telephone and video link facilities, it is inevitable that, if minor consumer/trader disputes were transferred to SAT the Tribunal may need to significantly increase its travel to regional areas, with significant financial consequences.  

3.148 The SAT also emphasised that the transfer of the minor consumer/trader disputes jurisdiction, which is anticipated to have a very substantial volume of work, would be required to be adequately funded and resourced, timed and planned appropriately. For example, substantial additional space would be required and considerable time and effort would be expended to integrate the new jurisdiction into the SAT’s operations.

3.149 The Minister for Commerce supported the proposed transfer in principle, on the basis that:

- strict rules of evidence do not apply in the SAT;
- the SAT places an emphasis on the early resolution and settlement of matters;
- the SAT has the capacity to develop specialist expertise in fair trading matters; and
- the SAT publishes its reasons for decisions, giving greater guidance to claimants about the relevant principles and the interpretation of the applicable laws.

3.150 However, the Minister’s support was qualified by a concern about issues of the SAT’s accessibility in regional areas and the enforceability of non-monetary SAT orders:

- “While I am aware that video and telephone conferencing facilities may be utilised, these measures are not a substitute for conducting matters in person. Currently the Magistrates Courts are better placed to service parties living in regional areas. It may be possible for the existing Magistrate Court facilities

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1412 Letter from the Honourable Justice John Chaney, President, State Administrative Tribunal, 23 March 2009, p3.
1413 Ibid.
1414 Letter from Hon Troy Buswell BEc MLA, Minister for Commerce, 30 March 2009, p1.
to be used by the SAT, perhaps on a once per week basis depending on
demand.”

• “non-monetary orders made in the SAT ... [must be enforced] ...in the
Supreme Court and may therefore costly to pursue. Although I am advised
that the instances of non-monetary orders being made in relation to minor
consumer/trader claims is likely to be low, it would be worthwhile for the
Committee to inquire as to whether this issue is being considered by the
SAT.”

Committee Comment

3.151 The Committee agreed with the SAT and Mr Heath, Chief Magistrate, that the
approaches to dispute resolution and the conduct of hearings of the SAT and the
Magistrates Court (minor case) are similar. In that respect, it appeared to the
Committee appropriate for the minor consumer/trader disputes jurisdiction to be
transferred to the SAT. However, the Committee was concerned that the SAT, unlike
the Magistrates Court, lacks a physical presence in the regional areas of the State, and
was conscious of the need to maintain the level of accessibility to dispute resolution
forums which parties residing in these areas have become accustomed.

3.152 Further, the Committee noted the other concerns raised by the SAT and the Minister
for Commerce should the transfer in jurisdiction occur.

3.153 Accordingly, the Committee considered that the minor consumer/trader disputes
should continue to be heard by the Magistrates Court using its minor cases procedures.

Gaming and Wagering Appeals

3.154 The Gaming and Wagering Commission of Western Australia (GWC) was established
under section 4 of the Gaming and Wagering Commission Act 1987 and, among other
things, administers the law relating to gaming and, subject to the Betting Control
Act 1954 and the Racing and Wagering Western Australia Act 2003, wagering.

One of the GWC’s functions is to:

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1416 ‘Gaming’ is defined as “... unless the contrary intention appears ... subject to section 39(2)(d) and (e), ... the playing of a game of chance for winnings in money or money’s worth, whether any person playing the game is at risk of losing any money or money’s worth or not”: section 3(1) of the Gaming and Wagering Commission Act 1987.
1417 ‘Wagering’ “... unless the contrary intention appears ... includes the staking or hazarding of money or other value — (a) on some question to be decided; (b) in support of an assertion or on the issue of a forecast; or (c) on the outcome of an uncertain happening, or in the event of a doubtful issue, and the collection or payment of winnings on a wager”: ibid, section 3(1).
1418 Ibid, section 7(1)(a).
to cause licences, permits, approvals, authorisations and certificates, as appropriate, to be issued in relation to —

(i) persons;
(ii) premises;
(iii) casinos;
(iv) facilities;
(v) gaming and other equipment;
(vi) gambling operations; … 1419

3.155 A person who is aggrieved by a determination of the GWC:

- revoking, refusing to renew, or amending an approval, permit or certificate; 1420 and
- cancelling a supplier’s licence 1421 or refusing an application for a further supplier’s licence 1422 in relation to minor lotteries and amusements with prizes,

may appeal the determination by making a submission in writing in the prescribed manner to the Minister for Racing and Gaming. 1423 Decisions made by the Minister on these appeal are final and conclusive, are not subject to any further or other appeal, and are not to be questioned in any judicial proceedings. 1424

3.156 The GWC advised the Committee that it rarely makes the types of determinations which may be appealed to the Minister. 1425 The Committee noted that when the GWC revokes or amends an approval, permit or certificate, section 62 of the Gaming and Wagering Commission Act 1987, which governs the Ministerial appeal process in these cases, obliges the GWC to:

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1419 Ibid, section 7(1)(e).
1420 Under ibid, sections 56 and 60.
1421 Under ibid, section 104C.
1422 Under ibid, section 104B.
1423 Ibid, sections 62 and 104D.
1424 Ibid, section 62(4).
1425 Letter from Mr Barry Sargeant, Chairman, Gaming and Wagering Commission of Western Australia, 11 June 2008. A similar comment was made by the Department of Racing, Gaming and Liquor: letter from Mr Barry Sargeant, Director General, Department of Racing, Gaming and Liquor, 11 June 2008.
give the holder of the approval, permit or certificate the opportunity to make a submission in relation to the revocation or amendment;

- consider any submissions made; and

- report to and make recommendations to the Minister in order for the Minister to determine the matter,

irrespective of whether an appeal is made to the Minister. 1426 These obligations also apply when the GWC cancels a supplier’s licence or refuses an application for a further supplier’s licence in relation to minor lotteries and amusements with prizes, regardless of whether an appeal is lodged. 1427

3.157 The Committee consulted with the SAT, DOTAG, GWC, Department of Racing, Gaming and Liquor and Minister for Racing and Gaming on the issue of transferring the Minister’s appeal function to the SAT. The GWC, Department of Racing, Gaming and Liquor and Minister for Racing and Gaming were of the view that this appeal jurisdiction should remain with the Minister. 1428 The Chairman of the GWC advised the Committee that he was not aware of:

*any change in the circumstances since the State Administrative Tribunal Act 2004 came into operation that would warrant involving the SAT in reviewing decisions of the Gaming and Wagering Commission of Western Australia. In fact the new Division 7 of Part II of the Gaming and Wagering Commission Act\[1429\], that provides for the Commission to take into account confidential police information, has been inserted into the Act with the knowledge that the Commission’s decisions are not subject to review by the SAT.\[1430]*

3.158 The WACARTT found that the existing appeal process in this context should be retained because it was one of a number of Ministerial appeal processes which, in the WACARTT’s view, “require the exercise of policy or political judgment”. 1431 These

1427 See ibid, section 104D(1).
1428 Letter from Mr Barry Sargeant, Chairman, Gaming and Wagering Commission of Western Australia, 4 June 2008; Letter from Mr Barry Sargeant, Director General, Department of Racing, Gaming and Liquor, 4 June 2008; and Letter from Hon Ljiljanna Ravlich MLC, Minister for Racing and Gaming, 25 June 2008.
1430 Letter from Mr Barry Sargeant, Chairman, Gaming and Wagering Commission of Western Australia, 4 June 2008. A similar comment was made by the Department of Racing, Gaming and Liquor: letter from Mr Barry Sargeant, Director General, Department of Racing, Gaming and Liquor, 4 June 2008.
comments were made in relation to appeals from the determinations of the Gaming Commission of Western Australia prior to the amalgamation of the Gaming Commission of Western Australia and the Betting Control Board to form the GWC\textsuperscript{1432} on 30 January 2004. While the GWC has a wider set of functions than the Gaming Commission of Western Australia, for the purposes of this discussion, their respective roles are effectively the same.

3.159 The SAT and the DOTAG were more receptive to the proposal to transfer the Minister’s appeal function to the SAT:

- “Gaming and wagering is an issue of considerable public policy, importance and current interest throughout Australia. Whether or not the review of decisions under this Act should be conducted by the Minister without any further review or appeal, or by an independent and impartial body such as the SAT, is an open question.

The SAT would note, however, that it currently exercises a review function under the Betting Control Act 1954 (WA).\textsuperscript{1433}

There may be a proper contention that, given the Tribunal’s current jurisdiction in this regard, all gaming and wagering review proceedings should be conducted in the SAT.\textsuperscript{1434}

- “This is a jurisdiction that could warrant further discussion as to whether it should be transferred to SAT.”\textsuperscript{1435}

Committee Comment

3.160 In the interests of providing an independent merits review\textsuperscript{1436} process for people who are aggrieved by the GWC’s decisions to:

\textsuperscript{1432} See Explanatory Memorandum for the Racing and Gambling Legislation Amendment and Repeal Bill 2003, p1.

\textsuperscript{1433} A person aggrieved by the decision of the Minister for Racing and Gaming to refuse to give an approval, to impose one or more conditions on an approval or to amend, suspend or revoke an approval, may apply to the State Administrative Tribunal for a review of the decision: section 27F of the Betting Control Act 1954. For the purposes of section 27F, an ‘approval’ is the authority to publish, or otherwise make available, certain “WA race fields”; that is, “information that identifies, or is capable of identifying, the names or numbers of the horses or greyhounds — (a) that have been nominated for, or that will otherwise take part in, an intended race to be conducted in this State; or (b) that have been scratched or withdrawn from an intended race to be conducted in this State”: ibid, sections 27C and 27D.

\textsuperscript{1434} State Administrative Tribunal, Tribunal’s Responses to Committee’s List of Decision-Makers Currently Not Under State Administrative Tribunal’s Jurisdiction, 4 April 2008, pp15-16.


\textsuperscript{1436} Refer to paragraph 2.438 in this Report for a discussion about the features of merits review, as distinguished from the characteristics of judicial review.
• revoke, refuse to renew, or amend an approval, permit or certificate; and
• cancel a supplier’s licence or refuse an application for a further supplier’s licence in relation to minor lotteries and amusements with prizes,

the Committee considered that the Minister for Racing and Gaming’s appeal jurisdiction should be transferred to the SAT.

Recommendation 51: The Committee recommends that the Gaming and Wagering Commission Act 1987 be amended to empower the State Administrative Tribunal to review the Gaming and Wagering Commission of Western Australia’s decisions to:

(a) refuse to renew an approval, permit or certificate under section 56 of the Act;
(b) revoke or amend an approval, permit or certificate under section 60 of the Act;
(c) cancel a supplier’s licence in relation to minor lotteries and amusements with prizes under section 104C of the Act; and
(d) refuse an application for a further supplier’s licence in relation to minor lotteries and amusements with prizes under section 104B of the Act.

Racing Industry Appeals

3.161 The jurisdiction of the Racing Penalties Appeal Tribunal of Western Australia (RPAT) and the question of whether it should be conferred on the SAT was discussed in detail in Chapter 13 of the SAT Bills Report. In that report, the Previous Committee recommended that the RPAT remain outside of the SAT’s jurisdiction. In developing that recommendation, the Previous Committee analysed evidence that was raised in relation to the following concerns about racing appeals being heard by the SAT:

• The possible loss of flexibility and speed in the scheduling and conduct of hearings.

The duplication and delays caused by the requirement for the SAT to conduct review hearings *de novo*\(^\text{1438}\) while the RPAT generally determines appeals upon the evidence raised in the original hearing.

The loss of finality in decisions.

3.162 The bills establishing the SAT had originally been drafted to confer the functions of the RPAT on the SAT, in accordance with the WACARTT’s recommendation:

> 123. *As in the case of the other appeals tribunals there is no reason why the functions of the Racing Penalties Appeals Tribunal should not be assumed by the SAT. Suitable members familiar with the racing industry might be made sessional members of the SAT and sit on these types of appeals. The flexible procedures to be adopted by the SAT are designed to meet the needs of this type of jurisdiction and the SAT will be able to meet any special needs for out-of-business hours sittings.*\(^\text{1439}\)

3.163 During this inquiry, the DOTAG, Racing and Wagering Western Australia (RWWA), Department of Racing, Gaming and Liquor, WA Bookmakers Association, RPAT, and Minister for Racing and Gaming all opposed the transfer of jurisdiction.\(^\text{1440}\) Some of their comments are excerpted here:

> "I am not aware of any change in the circumstances since the State Administrative Tribunal Act 2004 came into operation that would warrant involving the SAT ... in the functions of the Racing Penalties Appeals Tribunal of Western Australia."\(^\text{1441}\)

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\(^\text{1438}\) See section 27 of the *State Administrative Tribunal Act 2004*. "A matter heard *de novo* is heard over again from the beginning. The body conducting the hearing *de novo* is not confined to the evidence or materials which were presented in the original hearing": The Honourable Dr PE Nygh and P Butt, General Editors, *Butterworths Australian Legal Dictionary*, Butterworths, Perth, 1997, p322.


\(^\text{1440}\) Letter from Hon Jim McGinty MLA, Attorney General, 29 May 2008, Enclosure 3, p36; Letter from Mr Ross Bowe, Chairman, Racing and Wagering Western Australia, 12 June 2008; Letter from Mr Barry Sargeant, Director General, Department of Racing, Gaming and Liquor, 4 June 2008; Letter from Mr Brian Brown, Secretary, WA Bookmakers Association (Inc), 12 June 2008; Letter from Mr Dan Mossenson, Chairperson, Racing Penalties Appeal Tribunal of Western Australia, 23 June 2008; and Letter from Hon Ljiljanna Ravlich MLC, Minister for Racing and Gaming, 25 June 2008.

\(^\text{1441}\) Letter from Mr Barry Sargeant, Director General, Department of Racing, Gaming and Liquor, 4 June 2008.
“the status quo should remain in place, as the current Racing Penalties Appeal Tribunal of Western Australia is functioning in an acceptable manner with people experience in the various codes.”\textsuperscript{1442}

“The ongoing operation of RPAT as a separate and discrete Tribunal is to the satisfaction of and in keeping with the requirements of the racing industry.

The reasons why it is desirable for the status quo to remain and the RPAT functions not be conferred on the SAT continue to be the same as stated to the ... [Previous Committee] ... in relation to the SAT Bill 2003 and the SAT (Conferral of Jurisdiction) Amendment and Repeal Bill 2003 as summarised in Chapter 13 ... [of the SAT Bills Report] ... . The operation of SAT in the interim has confirmed that the misgivings expressed to the Standing Committee, which are essentially summarised in the Report, remain unchanged.”\textsuperscript{1443}

“I am not aware of any change in the circumstances since the State Administrative Tribunal Act 2004 came into operation that would warrant involving the SAT ... in the functions of the Racing Penalties Appeals Tribunal of Western Australia.”\textsuperscript{1444}

RWWA’s views in relation to this issue have not changed since the SAT Bill Inquiry. It remains opposed to any transfer of the RPAT’s functions to the SAT for the following reasons:

- Very few of the 600-plus appeals which have been determined by the RPAT have been the subject of judicial review by the Supreme Court. The Previous Committee was advised by RWWA during the SAT Bills Inquiry that, at that time, only 18 cases had been reviewed by the Supreme Court. Two of those reviews were successful and a further three decisions were sent back to the RPAT for further consideration.\textsuperscript{1445} In the opinion of RWWA, this is an indication of the high quality of the RPAT’s decisions.\textsuperscript{1446}

- The RPAT has developed a great volume of precedent and a “vast depth of knowledge and appreciation for racing matters which benefits both participants and administrators in ensuring that high quality decisions are

\textsuperscript{1442} Letter from Mr Brian Brown, Secretary, WA Bookmakers Association (Inc), 12 June 2008.
\textsuperscript{1443} Letter from Mr Dan Mossenson, Chairperson, Racing Penalties Appeal Tribunal of Western Australia, 23 June 2008.
\textsuperscript{1444} Letter from Hon Ljiljanna Ravlich MLC, Minister for Racing and Gaming, 25 June 2008.
\textsuperscript{1446} Letter from Mr Ross Bowe, Chairman, Racing and Wagering Western Australia, 12 June 2008, p2.
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“delivered in all matters.” RWWA was concerned that this accumulated precedent base, knowledge and expertise may be lost in the transfer of jurisdiction. On this point, the Committee noted there is no reason the SAT could not appoint current RPAT members to serve on the SAT, thereby helping to preserve the accumulated knowledge and expertise of the RPAT. The Committee refers to paragraphs 2.101 to 2.116 and Finding 8 in this Report regarding the SAT’s use of the knowledge and experience of its members.

- The RPAT is industry-funded and deals almost exclusively with people associated with the racing industry, operating as a specialist appeals tribunal. Therefore, the RPAT “represents the most efficient and appropriate means by which to ensure the interests of those which use the Tribunal are maximised.” RWWA observed that this is in keeping with other sporting codes which fund their own tribunal systems.

- The SAT is required to hear matters on review de novo, which RWWA is concerned will increase the possibility of witnesses and parties being recalled and re-examined, and therefore, cause “extreme financial impost for the racing industry” and be disadvantageous for participants located outside of Perth:

  *Whilst it is recognised that the process of de novo [hearings] does not necessarily mean having to hear witnesses again, in practice in similar jurisdictions elsewhere this has often become the reality in matters such as those which arise in the racing context. While a transcript of the proceedings before the Stewards is always available at an appeal, much of the evidence given at a Stewards inquiry tends to be verbal … due to the nature of the business of racing.*

  The Committee agreed with RWWA’s observation that de novo reviews do not necessarily involve the full re-hearing of evidence.

- The RPAT is able to convene at short notice and deliver decisions very quickly, sometimes ‘on the spot’. This is paramount in the racing industry, where races are conducted virtually every day and the majority of appealed sanctions relate to suspensions between 14 to 28 days. RWWA was not confident that the SAT can display the same level of timeliness. On the

1447  Ibid, pp2 and 3-4.
1448  Ibid, p2.
1449  Ibid, pp2 and 4.
1451  Ibid, p3.
issue of the SAT’s timeliness in resolving matters, the Committee refers to its discussion in paragraphs 2.73 to 2.91 and Findings 6 in this Report. The SAT has also demonstrated that it can convene at short notice where necessary; for example:

Applications under the GA Act are listed as soon as possible after lodgement for a final hearing, within eight weeks or a shorter time if circumstances require. Urgent hearings can be convened at short notice where necessary.

The Tribunal has streamlined procedures for urgent hearings held out of office hours. These usually involve applications for the appointment of a guardian to consent to medical treatment, or to consent to a forensic procedure in cases of alleged sexual assault, where the person concerned is incapable of giving consent or is unconscious or in a coma. Urgent hearings are usually conducted by telephone and oral orders are made.1452

- The RPAT already enjoys the economies of scale resulting from the sharing of resources provided by the Department of Racing, Gaming and Liquor with six other agencies.1453

- In all of the other Australian jurisdictions, including the Australian Capital Territory, New South Wales and Victoria, in which generalist civil and administrative tribunals operate1454, racing appeals are similarly heard by a specialist tribunal or board. Accordingly, RWWA argued that “It remains accepted principle that racing appeals are considered to be of a specialist nature ...”1455 A table of the racing appeal bodies which operate in Australia is attached in Appendix 11.

3.165 The SAT did not have a strong view on this issue, but indicated that there is no reason on principle why it could not exercise the RPAT’s jurisdiction.1456

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1453 Letter from Mr Ross Bowe, Chairman, Racing and Wagering Western Australia, 12 June 2008.
1454 The Australian Capital Territory Civil and Administrative Tribunal, the Administrative Decisions Tribunal of New South Wales and the Victorian Civil and Administrative Tribunal.
1455 Letter from Mr Ross Bowe, Chairman, Racing and Wagering Western Australia, 12 June 2008, p4.
Recommendation 52: The Committee recommends that the *Racing Penalties (Appeals) Act 1990* be amended to transfer the functions exercised by the Racing Penalties Appeal Tribunal of Western Australia under the Act to the State Administrative Tribunal.

Residential Tenancy Disputes

3.166 Residential tenancy disputes between landlords and tenants for:

- disposal of bond claims for any amount; and
- any other claims not exceeding $10,000,

are currently exclusively heard and determined in the Magistrates Court. These are known as ‘prescribed disputes’. Claims for more than $10,000, other than disposal of bond claims, may be heard and determined by any court which “is competent to hear and determine a claim founded on contract for the amount of that claim”.

3.167 Residential tenancy disputes which are prescribed disputes are deemed to be ‘minor cases’ under the *Magistrates Court (Civil Proceedings) Act 2004* and must, therefore, be conducted in accordance with the Magistrates Court’s minor cases procedures prescribed in Part 4 of that Act. However, prescribed disputes are principally governed by the *Residential Tenancies Act 1987*. Prescribed disputes are referred to as ‘minor residential tenancy disputes’ in this discussion.

3.168 The features of a minor residential tenancy dispute which are common to all minor cases include the following:

- The primary objective of the Magistrates Court is to bring the parties to a settlement acceptable to all of them.
- The proceedings are to be held in private unless the Magistrates Court orders otherwise, although relatives and friends may be present.
- When conducting these sorts of proceedings, the Magistrates Court must act with as little formality as it thinks reasonable.

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1457 Sections 12 and 12A of the *Residential Tenancies Act 1987*.
1458 Ibid, sections 12, 12A and 13.
1459 Ibid, section 12A(2).
1460 Section 27 of the *Magistrates Court (Civil Proceedings) Act 2004*.
1461 Ibid, sections 29(1) and (2).
1462 Ibid, section 29(3).
In these proceedings, the Magistrates Court is not bound by rules or practice as to evidence but may inform itself on any matter in such manner as it thinks fit.\textsuperscript{1463}

3.169 In addition, minor residential tenancy disputes have the following unique features:

- When hearing such a dispute, the Magistrates Court must generally be constituted by a magistrate, although registrars may also be authorised to hear some disputes.\textsuperscript{1464}

- Wherever practicable, a claim must be heard and determined within 14 days after it is instituted. Where that is not practicable, it must be heard and determined as expeditiously as possible.\textsuperscript{1465}

- Generally, a party cannot be represented by another person or assisted by another person to present his or her case. However:

  (a) a party may be represented by lawyers, or represented or assisted by non-lawyers, in certain circumstances. For example, a party may be represented or assisted by a non-lawyer if the Magistrates Court is satisfied that the party is unable to appear personally or properly conduct the proceedings by himself or herself, and no other party will be unfairly disadvantaged by the fact that the agent is allowed to act;

  (b) a body corporate may be represented by one of its officers or employees who is not a lawyer and who is authorised to conduct the proceedings on behalf of the body corporate; and

  (c) a party may be assisted by an interpreter if the interpreter’s fee does not exceed an amount fixed by the Magistrates Court at the hearing.\textsuperscript{1466}

- With respect to costs orders, application fees may be recovered by the applicant where the application is successful. However, orders for other costs will not be awarded unless all parties were represented by legal practitioners or the Magistrates Court is of the opinion that there are special circumstances justifying the award of costs.\textsuperscript{1467}

\textsuperscript{1463} Section 21 of the \textit{Residential Tenancies Act 1987} and section 29(4) of the \textit{Magistrates Court (Civil Proceedings) Act 2004}.

\textsuperscript{1464} Section 13A of the \textit{Residential Tenancies Act 1987}.

\textsuperscript{1465} \textit{Ibid}, section 14.

\textsuperscript{1466} \textit{Ibid}, section 22.

\textsuperscript{1467} \textit{Ibid}, section 24.
With respect to appeals:

(a) a party who is dissatisfied with a decision of a registrar of the Magistrates Court may appeal the decision to a magistrate;\textsuperscript{1468} and

(b) a party who is dissatisfied with a decision of a magistrate has no right of appeal.\textsuperscript{1469}

However, a person who is aggrieved by any order or proceeding in the Magistrates Court under this jurisdiction may seek a Supreme Court review of that order or proceeding on the ground that the Magistrates Court had no jurisdiction conferred by the \textit{Residential Tenancies Act 1987} in respect of the proceeding or that a party to the proceedings has been denied natural justice.\textsuperscript{1470}

3.170 The WACARTT considered the possibility of conferring the jurisdiction of minor residential tenancy disputes on the SAT but concluded that it should remain with the then Local Court, keeping in mind that the Magistrates Court would soon replace the Local Court:

192. \textit{It is possible to see how Small Debts and Residential Tenancies dispute resolution, like that of Small Claims, might be characterised as amenable to a tribunal-like setting rather than to a court-like setting. However, in our view, unlike the other tribunals and tribunals whose functions we consider are appropriate for inclusion in the SAT, Small Debts, Residential Tenancies and Small Claims disputes are better dealt with in a court-like setting – though a modified one – because they involve the enforcement of existing rights.}

193. \textit{Additionally, Small Debts and Residential Tenancy disputes are currently dealt with in a division of the Local Court which has gained considerable experience in resolving them and which utilises informal means of dispute resolution.}

194. \textit{Moreover, Small Debts and Residential Tenancies disputes, like Small Claims, require reasonably frequent resolution in the country and regional parts of the large State of Western Australia where Local Court Magistrates are already resident.}

\textsuperscript{1468} \textit{Ibid}, section 13B.
\textsuperscript{1469} \textit{Ibid}, section 26(1).
\textsuperscript{1470} \textit{Ibid}, section 26(2); and section 36 of the Magistrates Court Act 2004.
195. As in the case of the Small Claims Tribunal, our recommendation assumes that with the creation of a new Magistrates Court that Court will engage in alternative means of dispute resolution and will flexibly dispose of Small Debts and Residential Tenancies disputes.

196. The submission of the Chief Stipendiary Magistrate suggesting that Small Debts and Residential Tenancy matters – and the functions of the Small Claims Tribunal – might be transferred to the SAT has been considered. However, for the various reasons set out above, we consider it appropriate to recommend that the Small Debts and Residential Tenancies jurisdictions of the Local Court remain with the Local Court. We are confident that upon the coming into operation of the new Magistrates Court the practices and procedures adopted by the Court will deal appropriately and consistently throughout the State with these jurisdictions.\(^\text{1471}\)

3.171 However, the SAT, DOTAG, Attorney General and Mr Steven Heath, Chief Magistrate, Magistrates Court, were supportive of the proposed transfer in jurisdiction.\(^\text{1472}\) In fact, the Attorney General and the DOTAG advised the Committee that discussions about carrying out the transfer, between officers at the DOTAG and the Department of Consumer and Employment Protection, now known as the Department of Commerce, had already commenced:

- “I consider that there are sound public policy grounds to support the transfer of the jurisdiction and that it is in the public interest for the transfer to occur as soon as practicable.

... The transfer of jurisdiction will bring with it a significant amount of work that has a financial and resource impact. The Department of the Attorney General is currently considering any additional costs associated with the delivery of service across Western Australia, including the appointment of members and support staff, the acquisition of additional accommodation and required upgrades to information technology systems.


\(^{1472}\) State Administrative Tribunal, *Tribunal’s Responses to Committee’s List of Decision-Makers Currently Not Under State Administrative Tribunal’s Jurisdiction*, 4 April 2008, p23; Letter from Mr Guy Bowra, Acting Director, Magistrates Court and Tribunals, Department of the Attorney General, 16 June 2008; Letter from Hon Jim McGinty MLA, Attorney General, 24 June 2008; and Letter from Mr Steven Heath, Chief Magistrate, Chief Magistrate’s Chambers, Magistrates Court of Western Australia, 12 June 2008.
... I ... have asked my department to liaise at officer level with the Department of Consumer Affairs to progress the matter."\textsuperscript{1473}

- "I consider that there are sound public policy grounds to support the transfer of the jurisdiction and that it is in the public interest for the transfer to occur as soon as practicable.

... I ... have asked my department to liaise at officer level with the Department of Consumer Affairs to progress the matter."\textsuperscript{1474}

3.172 Mr Steven Heath, Chief Magistrate, Magistrates Court, was of the view that the greatest advantage of transferring the minor residential tenancy disputes jurisdiction to the SAT would be the ability to provide greater uniformity in procedure:

\begin{quote}
Different Magistrates have exercised their discretion differently as to the amount of formality or the manner in which evidence is to be provided. There have been insufficient appeals from Magistrates’ decisions to provide any guidance and notwithstanding complaints the legislation has not been amended to provide for a more rigid procedure.
\end{quote}

... [the transfer] ... would allow for the development of a uniform procedure at a single registry. Guidance from the Judicial Members of the Tribunal would provide more uniformity and for information to assist those appearing before the Tribunal to be published.\textsuperscript{1475}

3.173 While Mr Heath believed that the nature of the hearings before the SAT would be similar to the minor residential tenancy disputes hearings currently conducted by the Magistrates Court, he considered that the SAT could deliver “a more efficient and timely service”, particularly in regional areas:

\begin{quote}
Whereas the Perth Magistrates Court is able to obtain some economies of scale by listing a number of matters on particular days this is more difficult in regional and suburban courts where the resident Magistrate is also responsible for a range of other matters. Often residential tenancy hearings must compete with criminal trials, restraining order applications, Childrens Court matters and other
\end{quote}

\textsuperscript{1473} Letter from Mr Guy Bowra, Acting Director, Magistrates Court and Tribunals, Department of the Attorney General, 16 June 2008.

\textsuperscript{1474} Letter from Hon Jim McGinty MLA, Attorney General, 24 June 2008.

\textsuperscript{1475} Letter from Mr Steven Heath, Chief Magistrate, Chief Magistrate’s Chambers, Magistrates Court of Western Australia, 12 June 2008, p1.
Mr Heath also identified possible disadvantages which may be associated with the transfer in jurisdiction. Unlike the Magistrates Court, the SAT does not:

- conduct pre-trial conferences. In the Magistrates Court, registrars preside over pre-trial conferences, which are more informal forums designed to achieve settlements between parties.

- have a physical presence in regional areas. The Magistrates Court provides civil registries at a range of locations while the SAT requires its parties to lodge documents at its central registry in Perth.

However, Mr Heath acknowledges that the SAT may be able to “achieve an equally high success rate in mediating matters before hearing” and that the SAT has “demonstrated its ability to operate a central Registry without criticism and it may be that this is no real disadvantage.” On these points, the Committee refers to the discussions in paragraphs 2.162 to 2.214 in this Report about the SAT’s mediation process and paragraphs 2.118 and 2.549 to 2.554 about the various methods of lodging documents with the SAT.

Mr Heath also warned that any transfer of the minor residential tenancy disputes jurisdiction to the SAT would need to be properly resourced:

Given proper resources I believe that the advantages that I have outlined would outweigh any disadvantage. Poorly resourced the change is unlikely to produce any benefits.\(^{1478}\)

The Minister for Consumer Protection was more tentative in recommending that the SAT be conferred the minor residential tenancy disputes jurisdiction:

... [The Department of Consumer and Employment Protection, now known as the Department of Commerce] … has recently completed a far-reaching statutory review of the Residential Tenancies Act 1987 (the Act). The review contemplated a range of issues relating to the

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1476 The State Administrative Tribunal may also be able to utilise the services of magistrates, who are \textit{ex officio} members of the tribunal, who are located in regional areas. Refer to paragraphs 2.402 to 2.405 in this Report for a discussion about this mechanism.

1477 Letter from Mr Steven Heath, Chief Magistrate, Chief Magistrate’s Chambers, Magistrates Court of Western Australia, 12 June 2008, p2.

reform of dispute resolution processes under the Act, including whether a separate residential tenancy tribunal should be established or whether such matters should be transferred to the SAT.

... As part of ... [the process of developing a package of residential tenancy reforms] ... consultation has occurred with representatives from the SAT, the Real Estate Institute of WA and the Tenants Advice Service to obtain their input about jurisdiction for residential tenancy matters passing to the SAT.

There appears to be in principle support for the proposal. Key benefit are seen as including access to qualified mediators, consistency in procedure, ability for lay advocates to appear on behalf of parties[1479], and the publication of decisions.

... [However, two areas of concern were raised:]

- accessibility of the SAT for tenants and property owners in regional WA; and
- affordability of applications at SAT – currently, the fee to lodge an application at the Magistrates Court is $26.70 whereas an application to SAT is $270, plus an additional amount of $270 per hearing day or part thereof, other than the first hearing day.

... All of the above issues will require further consultation, however, stakeholders have indicated that they are prepared to work toward determining the feasibility of transferring jurisdiction for residential tenancy disputes to the SAT.1480

3.178 The Minister for Consumer Protection also observed that any conferral of the minor residential tenancy disputes jurisdiction on the SAT may raise “significant resource implications”.[1481]

3.179 The Tenants Advice Service was similarly tentative about the proposed transfer of jurisdiction. The service identified the following relative advantages of the SAT:

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1479 See section 39 of the State Administrative Tribunal Act 2004.
1481 Ibid, p2.
1. a more informal approach to the conducting of hearings;

2. rules of evidence not applied;

3. a willingness to allow representation by lay advocates; and

4. the publication of decisions.\(^{1482}\)

3.180 The Tenants Advice Service was also impressed with the SAT’s initiatives for engaging with the public and improving its services:

During the last two years there have been at least three approaches by representatives of the SAT to the Community Legal Centre sector to seek input on ways to improve access to justice in the SAT and/or provide education on how the SAT works. This suggests to me that the SAT has a genuine interest in improving its services.\(^{1483}\)

3.181 However:

TAS cannot fully recommend one forum over another ... [in] ... their present forms – however it is TAS’ view, at this point, that if issues of access (particularly in regional and remote areas), cost and simplification of the process for straightforward matters [such as payment of bond disputes], are addressed satisfactorily then the SAT may well be a suitable option.\(^{1484}\)

3.182 In respect of the SAT’s accessibility in areas outside of the metropolitan area, the Tenants Advice Service acknowledged that the SAT can utilise telephone conferencing.\(^{1485}\) As to its concerns about straightforward matters requiring “more steps to achieve a resolution” in the SAT, the Tenants Advice Service advised the Committee that the SAT would aim to conduct the directions hearing, mediation and final hearing for each dispute in one day.\(^{1486}\) The service was also unclear about whether the SAT’s orders are enforceable. From the discussions in paragraphs 2.249 to 2.260 in this Report, it is apparent that the SAT’s orders are enforceable.

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\(^{1482}\) Letter from Mr John Perrett, Executive Officer, Tenants Advice Service Inc, 16 June 2008, p2.

\(^{1483}\) Ibid.

\(^{1484}\) Ibid.

\(^{1485}\) Refer to paragraphs 2.558 to 2.568 in this Report for a discussion about the video and telephone conferencing services available at the State Administrative Tribunal. Refer also to paragraphs 2.402 to 2.405 for a discussion about the utilisation of magistrates as ex officio members of the State Administrative Tribunal.

\(^{1486}\) Letter from Mr John Perrett, Executive Officer, Tenants Advice Service Inc, 16 June 2008, p2.
The Property Owners Association of WA advised the Committee that the current cost of lodging a residential tenancy claim is $26.70\textsuperscript{1487} and the average time for an application to be heard in the Magistrates Court is three weeks.\textsuperscript{1488} The association indicated that it required more details about the operation of this jurisdiction, particularly the costs and procedures, in the SAT before it is in a position to comment on any possible transfer of the jurisdiction. However:

\begin{quote}
From my own experience in which I consider is more than average since the commencement of the Residential Tenancies Act being over 20 years, in general I have felt that the Magistrates’ Court to be satisfactory.\textsuperscript{1489}
\end{quote}

With respect to the $270 application fee which the Minister for Consumer Protection and the Tenants Advice Service suggested would apply in the SAT, the Committee noted that the figure only reflects the default application fee position as prescribed in regulations 26(1) and 9(3) of the SAT Regulations. This default fee was increased to $279 on 1 July 2008.\textsuperscript{1490} As the minor residential tenancy disputes jurisdiction is not yet with the SAT, the Committee was not aware of whether there have been any determinations as to the fees which may be applicable to such matters if they are heard by the SAT. Currently, the SAT Regulations, which prescribe the fees applicable to any SAT matter, do not contemplate residential tenancy matters; that is, the SAT Regulations are silent as to the Residential Tenancies Act 1987. As a result of this, regulation 26(1) and the default fees prescribed in regulation 9(3) of the SAT Regulations appear to be triggered.

If and when the SAT is conferred the minor residential tenancy disputes jurisdiction, and the SAT Regulations remain silent as to the Residential Tenancies Act 1987, regulation 26(1) and the default fees prescribed in regulation 9(3) of the SAT Regulations would be triggered. However, if and when this jurisdiction is transferred to the SAT, this fee position may be reconsidered and altered. For example, the Residential Tenancies Act 1987 may be listed in the same schedule of the SAT Regulations as the Commercial Tenancy (Retail Shops) Agreements Act 1985; that is, Schedule 6 of the SAT Regulations, which lists matters which attract an application fee of $62 and a hearing fee of $124 per hearing day other than the first hearing.

\begin{footnotes}
\item Regulation 17 and Schedule 3, Item 1(a) of the Residential Tenancies Regulations 1989 prescribe a general application fee of $26.50 and regulation 15 of the Suitors’ Fund Regulations 1965 prescribes a Suitors’ Fund fee of $0.20.
\item Letter from Mr Robert Baker, President, Property Owners Association of WA (Inc), 12 June 2008.
\item Letter from Mr Robert Baker, President, Property Owners Association of WA (Inc), 12 June 2008.
\item See State Administrative Tribunal Amendment Regulations 2008.
\end{footnotes}
day. Further, the *Residential Tenancies Act 1987* may also be listed in Schedule 7 of the SAT Regulations, which lists matters for which no fees are payable.

3.186 The SAT’s *Annual Report 2008* indicated that the Magistrates Court’s jurisdiction in residential tenancy disputes resolution is expected to be transferred to the SAT. The Honourable Justice John Chaney, President, SAT, indicated that the present Government is in favour of this transfer in principle. The SAT warned that if this transfer occurs, the capacity of the SAT to accept the on-line lodgment of documents will be a critical factor in the successful operation of the new jurisdiction. As discussed in paragraphs 2.549 to 2.554 of this Report, the SAT does not currently have this capability.

### Committee Comment

3.187 The Committee considered that the minor residential tenancy disputes jurisdiction should be transferred from the Magistrates Court to the SAT for the following reasons:

- Minor residential tenancy disputes would continue to be dealt with informally and without strict adherence to rules or practice as to evidence.
- The SAT and the Magistrates Court, operating with its minor cases procedures, have very similar approaches to dispute resolution.
- The SAT can offer parties to these disputes consistency in procedure.
- The SAT’s fees for these disputes can be comparable to the fees which are charged currently. The Committee noted that the Previous Committee was advised that the SAT would keep its fees in line with the fees which were charged by its predecessors. Although this position has changed a little since 1 July 2007, some proceedings, such as GA Act and mental health review matters, where no filing fees applied under the previous adjudicator,
continue to be lodged with the SAT at no cost.

- As is the case for minor residential tenancy disputes, parties to SAT proceedings may be represented by non-lawyers where they can provide reasons for not presenting their case personally.\(^\text{1498}\)

- In the SAT, legal representation is an entitlement but not a requirement. For minor residential tenancy disputes, legal representation is only allowed in certain circumstances.\(^\text{1499}\)

- Minor residential tenancy disputes have little in common with other minor cases heard in the Magistrates Court apart from the monetary limit of the jurisdictions and requirements as to informality, privacy and flexibility regarding rules of evidence.

- The transfer of this jurisdiction to the SAT will leave magistrates at regional and suburban Magistrates Courts, who, the Committee was advised, often deal with varying and competing matters in each day, with more time and resources to dedicate to other matters.

3.188 Should the transfer in jurisdiction occur, the Committee noted that consideration will need to be given to numerous issues, including the following:

- The accessibility of the SAT for parties residing in regional Western Australia. The Committee reiterates Recommendation 28 in this Report, regarding transforming the SAT into an e-Tribunal, and Recommendation 39 in this Report, relating to the planning and design of justice complexes.

- The appeal mechanisms available to the parties, given that the default position is for SAT decisions to be appealed to the Supreme Court on questions of law.

- The fees which will be imposed on the parties.

**Recommendation 53:** The Committee recommends that the *Residential Tenancies Act 1987* be amended to empower the State Administrative Tribunal to hear ‘prescribed disputes’, as defined in section 12 of the Act.

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\(^{1498}\) See section 39 of the *State Administrative Tribunal Act 2004* and section 22 of the *Residential Tenancies Act 1987*.

\(^{1499}\) See section 39 of the *State Administrative Tribunal Act 2004* and section 22 of the *Residential Tenancies Act 1987*. 

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Retirement Villages Disputes


3.190 The following excerpt from an issues paper for a recent Government review of retirement villages legislation summarises the general way in which retirement village disputes may be resolved:

The Code [Code of Fair Practice for Retirement Villages] recognises that disputes may occur in a retirement village and outlines the processes that may be used to resolve them. The administering body within a village must nominate a suitable person or body to deal with the dispute according to processes outlined in the Code. If the dispute cannot be solved using the village dispute resolution process, the Commissioner for Consumer Protection can provide conciliation services to either party, or refer the matter to an independent external mediator. If the dispute remains unresolved, either party to the dispute may apply to the State Administrative Tribunal if the dispute is one in which the Tribunal has jurisdiction. The State Administrative Tribunal has a number of powers under the Act which were formerly vested in the Retirement Villages Disputes Tribunal.

3.191 Mr Clement Allsworth and Mr Peter Boam, a committee member of the Western Australian Retirement Complexes Residents Association, Inc and former President of that association, observed that applications which may be lodged with the SAT under retirement villages legislation are confined to those which involve the residents and the administering bodies of retirement villages. The Committee observed that,

1501 Ibid, p66.
1502 ‘Resident’ is defined in section 3(1) of the Retirement Villages Act 1992 as follows: “... unless the contrary intention appears ... in relation to a retirement village, means a person who has been admitted to occupation of residential premises in accordance with a retirement village scheme and includes a spouse or de facto partner of such a person who — (a) is residing with that person; or (b) was residing with that person at the time of his or her death”.
1503 ‘Administering body’ is defined in section 3(1) of the Retirement Villages Act 1992 as follows: “... unless the contrary intention appears ... in relation to a retirement village, means the person by whom, or on whose behalf, the retirement village is administered and includes a person (other than a resident) who is the owner of land within the retirement village”.
1504 Submission No 8 from Mr Clement James Allsworth, 8 August 2007, p8; and Submission No 17A from Mr Peter Stamford Boam, 27 September 2007, pp6-7.
among other things, the SAT’s jurisdiction is triggered when disputes arise in relation to service contracts, which are made between a resident and the administering body, and residence contracts, which are made between a resident and the owner of the residential premises in which the resident presides. Applications for the SAT to make a determination may be made by either a resident or the administering body, depending on the issue in question.

3.192 Mr Allsworth and Mr Boam were concerned that retirement village residents’ disputes:

- over ‘advisory board’ decisions (advisory boards sometimes replace the role of residents’ committees, which represent the interests of residents, and operate as a means of communication between the administering body and residents. Residence contracts may specify the role and composition of advisory boards. Generally, advisory boards will consist of resident and administering body representatives);
- with residential village developers; and
- with ‘custodians’ (the functions of a custodian include ensuring that the contract documents are complied with. Custodians have the power to agree to, approve or oppose any application to a court or the SAT),

would not fall within the SAT’s jurisdiction because such entities are not ‘residents’ or ‘administering bodies’ as those terms are defined in the Retirement Villages Act 1992, nor are they parties to ‘service contracts’ or ‘residence contracts’, as defined under that Act. Mr Allsworth and Mr Boam advised the Committee that advisory boards and custodians are concepts which are introduced into residence contracts and/or service contracts by administering bodies and developers.

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1505 Unless the contrary intention appears, ‘service contract’ “means a contract between an administering body or former administering body of a retirement village and a resident for the provision to the resident of — (a) hostel care; (b) infirmary care; (c) medical or nursing services; (d) meals; (e) administrative and management services; (f) maintenance and repair services; (g) recreation services; or (h) any other services, and any collateral agreement or document relating to the provision of any such service”: section 3(1) of the Retirement Villages Act 1992.

1506 Unless the contrary intention appears, ‘residence contract’ “means a contract, agreement, scheme or arrangement which creates or gives rise to a right to occupy residential premises in a retirement village, and may take the form of a lease or licence”: ibid, section 3(1).


1508 Submission No 8 from Mr Clement James Allsworth, 8 August 2007, p9; and Submission No 17A from Mr Peter Stamford Boam, 27 September 2007, p7.

1509 Submission No 8 from Mr Clement James Allsworth, 8 August 2007, pp8-9; and Submission No 17A from Mr Peter Stamford Boam, 27 September 2007, pp7-8.
3.193 The SAT agreed with the above observations of Mr Allsworth and Mr Boam but noted that:

> It is expected that many of the disputes referred to would ultimately result in a dispute between a party to a service contract and at that point would be capable of resolution before the Tribunal.  

3.194 The SAT informed the Committee that a review of retirement villages legislation was underway and would be likely to identify any need for amendments.  

3.195 Mr Boam was of the view that the SAT’s procedures are “slow, ineffective and unwieldy.” Accordingly, he also suggested that the SAT’s jurisdiction under retirement villages legislation be transferred to another, independent organisation specialising in all retirement villages matters, including the regulation of the industry, the provision of legal advice to residents and the provision of inspection services: for example, a Retirement Villages Commission. Mr Boam further recommended that the head of that organisation could engage the SAT “as a last resource” when he or she determines that certain decisions are beyond the organisation’s “sphere of authority”.  

3.196 In response, the Minister for Consumer Protection advised the Committee that:

> In relation to the role of a Retirement Villages Commission, I note that a full review of existing retirement village legislation in Western Australia is near completion. This review has involved a wide range of public consultation throughout Western Australia.

> I am expecting to receive the report of that review for consideration by June 2008.

> Mr Boam has put forward his proposal for a Retirement Villages Commission to that review and it is being considered as part of the overall review. Because the regulation of retirement villages in Western Australia is a complex issue, with many varying points of view, I do not believe it would be of benefit to respond to Mr Boam’s suggestion in isolation.

> The Committee can be assured, however, that Mr Boam’s suggestion will be considered in developing the Government’s final policy.

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1510 Written answer from the State Administrative Tribunal to proposed question 56 for the hearing on 21 September 2007, p60.
1511 Ibid.
1512 Submission No 17 from Mr Peter Stamford Boam, received on 22 August 2007.
position in relation to the future regulation of the retirement villages industry in Western Australia.\textsuperscript{1513}

3.197 At the time of finalising this Report, the results of the Government review of retirement villages legislation had not yet been published.

### Committee Comment

3.198 The Committee noted that the above-mentioned issues will be considered in the Government’s review of retirement villages legislation.

### Training Accreditation Council Appeals

3.199 The Training Accreditation Council (TAC) is established under section 25 of the Vocational Education and Training Act 1996. Pursuant to section 27 of that Act, the TAC performs the following functions, amongst others:

- Registering and deregistering training providers.
- Accrediting, varying or cancelling the accreditation of courses, skills training programmes and the qualifications which can be gained from such courses and programmes.
- Recognising the skills and qualifications obtained by people in Western Australia, or elsewhere, in industry, the workplace or educational institutions.
- Determining the minimum competency to be provided by accredited courses and skills training programmes.

3.200 A person who is dissatisfied with a decision of the TAC in one of the above-mentioned areas, where the decision was made on the application of that person, may make a written appeal to the State Training Board (STB) against that decision. An appeal can only be brought on the ground that the TAC, in making the decision appealed against, erred in its application of, or failed to apply, criteria or procedures in the guidelines it was required to apply under section 13 of the Vocational Education and Training Act 1996.\textsuperscript{1514} These guidelines are issued by the Minister under section 13 of that Act after considering the policy advice of the STB relating to:

\begin{enumerate}
  \item [(i)] ... [improving] ... the links between specific industry developments and vocational education and training so as to gain optimum employment opportunities for people, and
\end{enumerate}


\textsuperscript{1514} Section 31 of the Vocational Education and Training Act 1996.
ensure the availability of appropriately skilled labour, in the State;

(ii) ... the accreditation of courses, skills training programmes and qualifications, the registration of training providers and the recognition of skills; and

(iii) ... the prescribing of vocations for the purposes of training schemes;\textsuperscript{1515}

3.201 The STB is established under section 18 of the Vocational Education and Training Act 1996. To assist it in determining an appeal from a TAC decision, the STB is to establish an independent review panel “of such number of persons as it considers appropriate, appointed for their expertise in the area of the subject matter of the appeal.” The review panel has the task of considering the appeal and submitting its written recommendation, to either allow or dismiss the appeal, to the STB.\textsuperscript{1516} Where the review panel recommends that the appeal be allowed, the STB must refer the matter back to the TAC for reconsideration, along with a copy the review panel’s recommendation. The TAC then has the option of either confirming its original decision or altering it.\textsuperscript{1517} If the TAC opts to:

- alter its original decision, the STB notifies the appellant that their appeal has been allowed; or

- confirm its original decision, the STB must decide whether to:

(a) accept the review panel’s recommendation and allow the appeal; or

(b) accept the TAC’s original decision and dismiss the appeal.\textsuperscript{1518}

3.202 If the review panel recommends the dismissal of the appeal, the STB must advise the appellant of this and give the appellant a copy of the review panel’s recommendation.\textsuperscript{1519}

3.203 The appeal decision is final in terms of merits review,\textsuperscript{1520} although it could still be subject to judicial review by the Supreme Court under its inherent jurisdiction to supervise inferior courts and tribunals.\textsuperscript{1521}

\textsuperscript{1515} Ibid, section 21(1)(c).
\textsuperscript{1516} Ibid, section 32.
\textsuperscript{1517} Ibid, section 33.
\textsuperscript{1518} Ibid, section 34.
\textsuperscript{1519} Ibid.
\textsuperscript{1520} Ibid. Refer to paragraph 2.438 in this Report for a discussion about the features of merits review, as distinguished from the characteristics of judicial review.
In essence, the STB, albeit with considerable, and sometimes determinative, assistance from the review panel, decides whether the TAC has complied with Ministerial guidelines which the STB has helped to develop. As explained by the Honourable Justice John Chaney, President, SAT, the *Vocational Education and Training Act 1996*:

... provides a mechanism for the creation and application of the guidelines [processes in which the STB is involved], and the resolution of questions of application of the guidelines by a specialist panel [the independent review panels] under the oversight of the ... [STB] ... .

When the Committee consulted the SAT on a possible transfer of the STB’s appeal function to the SAT, the SAT did not support the proposal. In the SAT’s view, decisions about the accreditation of training programmes and providers are “better left to the highly specialised bodies established under the Vocational Education and Training Act 1996 (WA)” because:

[This] ... area of decision-making undoubtedly involves a relatively detailed understanding of the nature and operation of vocational training.

Conversely, the DOTAG, STB and Minister for Education and Training approved of a transfer of this jurisdiction to the SAT. The STB made the following comment:

*The State Administrative Tribunal provides a well-established and resourced process, which is a significant improvement on current arrangements whereby the State Training Board is responsible for the conduct of appeals against decisions of the Training Accreditation Council. Features of the Tribunal undertaking this function include its capacity to resolve appeals independently, expeditiously and transparently by way of a highly credible standing review panel.*

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These aspects of the review process would be advantageous to the Board and, most importantly, to the appellant.\textsuperscript{1526}

3.207 The Minister for Education and Training had no objection in principle to the SAT replacing the STB’s functions as the appeal body for the TAC’s decisions, subject to the SAT being consulted on the proposal and the following issues being addressed by the SAT:

- Timeliness. The Minister stressed the need to ensure that appeals are resolved in a timely manner because:

  \emph{they have typically been lodged by training organisations that are already operating and whose application[s] ... have already been rejected by the TAC. Under these circumstances the organisation can continue to operate until such time as the appeal is settled. There is serious potential for poor outcomes for students arising during this period.}\textsuperscript{1527}

  The Committee refers to paragraphs 2.73 to 2.91 and Finding 6 in this Report regarding the SAT’s timeliness in resolving matters.

- Expertise. The vocational education and training sector sought assurance that the SAT can assemble panels with appropriate qualifications as “\emph{Merits reviews related to registration and [particularly] accreditation ... need to be heard by people who have a good deal of technical expertise.”}\textsuperscript{1528} The Committee noted there is no reason the SAT could not appoint current STB members and other appropriately qualified people to serve on the SAT for the purpose of these appeals. The Committee refers to paragraphs 2.101 to 2.116 and Finding 8 in this Report regarding the SAT’s use of the knowledge and experience of its members.

- Industrial matters:

  \emph{Accreditation of courses can sometimes become entwined with industrial issues. For example, the content of vocational education and training courses may be the subject of demarcation issues between certain trades (for industrial and safety reasons, a washing machines mechanic must be precluded from doing work that fits squarely in the ambit of the work of an electrician and a massage therapist must be precluded from doing work that fits squarely in the}

\textsuperscript{1526} Letter from Mr Keith Spence, Chair, State Training Board, 30 July 2008, p1.
\textsuperscript{1527} Letter from Hon Mark McGowan MLA, Minister for Education and Training, 4 August 2008, p2.
\textsuperscript{1528} \textit{Ibid.}
ambit of that of a physiotherapist). It is understood that the SAT normally distances itself from industrial matters.\[1529\]\[1530\]

The Committee was of the view that the Vocational Education and Training Act 1996 does not offer appeal rights which primarily concern industrial relations matters; rather, the appeals relate to ensuring that vocational education and training courses offer students appropriate and relevant training. Further, the Act restricts appeals to situations where the applicant alleges that the TAC has erred in its application of, or failed to apply the Ministerial guidelines. Demarcation issues which may arise in relation to the accreditation of courses and programmes could be dealt with at the point when the Ministerial guidelines are developed.

3.208 The Education and Training Legislation Amendment and Repeal Bill 2008 was to amend the Vocational Education and Training Act 1996, which was before the Legislative Council prior to the dissolution of the Parliament on 7 August 2008. Clauses 23 and 38 of the bill proposed to amend the functions of the TAC so as to effectively limit the TAC’s operations to the registration of training providers and the accreditation of courses. Proposed sections 58G to 58J were to replace section 31 and 34 and provide for appeals from the TAC’s decisions.\[1531\] The bill was re-introduced into the Legislative Council on 12 November 2008 as the Training Legislation Amendment and Repeal Bill 2008. This bill was passed and received the Royal Assent on 10 December 2008, but has not yet been proclaimed for commencement. Proposed sections 58G to 58J of the Vocational Education and Training Act 1996, which will be inserted by section 38 of the Training Legislation Amendment and Repeal Act 2008, will provide for TAC decisions to be appealed to the STB in much the same way as the current appeal provisions.

**Committee Comment**

3.209 The Committee considered that the appeal functions of the STB should be transferred to the SAT.

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1530 Letter from Hon Mark McGowan MLA, Minister for Education and Training, 4 August 2008, p2.

Recommendation 54: The Committee recommends that the *Vocational Education and Training Act 1996* be amended to empower the State Administrative Tribunal to review the Training Accreditation Council’s decisions:

(a) to register and deregister training providers;

(b) to accredit, vary or cancel the accreditation of courses, skills training programmes and the qualifications which can be gained from such courses and programmes;

(c) to recognise the skills and qualifications obtained by people in Western Australia, or elsewhere, in industry, the workplace or educational institutions; and

(d) establishing the minimum competency to be provided by accredited courses and skills training programmes.

**VOCATIONAL STREAM**

**Minor vs Serious Disciplinary Jurisdiction**

3.210 The SAT exercises original and review jurisdiction under various vocational Acts. Prior to the commencement of the SAT, these Acts invariably established vocational boards or committees, such as the Medical Board of Western Australia and the Hairdressers Registration Board of Western Australia, which had the task of regulating and disciplining practitioners in their particular vocations:

*For example, they licence people to carry on activities in designated professional, occupational and business areas. Additionally, they receive complaints about misconduct. Finally, they hear and determine the complaints and impose disciplinary penalties.*

3.211 The WACARTT was of the view that these disciplinary functions, which go beyond the “*mere regulation of persons in their calling*”\(^\text{1533}\), should be separated from the vocational boards’ regulatory and investigatory functions.\(^\text{1534}\)

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\(^{1533}\) *Ibid*, p69.

\(^{1534}\) See generally, *ibid*, pp68-78 and 113-119.
36. We consider a separation of regulatory functions from disciplinary/supervisory functions to be desirable in respect of all disciplinary boards. The work of the Gunning Inquiry and the Temby Royal Commission illustrates and emphasises the need for such a separation of functions. It is no less appropriate in relation to the wider range of disciplinary boards that currently deal with professional and occupational matters than it is in respect of the Consumer Affairs boards and committees.

37. The public today are entitled to expect that those responsible for investigating complaints of misconduct carry out their work with appropriate vigour and that those who have the responsibility to determine whether persons are guilty of misconduct are not predisposed in their decision making. Equally, those whose conduct is subject to a review which may result in the cancellation or suspension of their right to follow their calling or a substantial fine, are entitled to expect that the body which determines their guilt or innocence is not the same body as that which decided the review was necessary.\textsuperscript{1535}

3.212 As a result of the WACARTT’s recommendations, many vocational regulatory boards and committees had their disciplinary and supervisory functions transferred to the SAT, but they either retained or gained the following functions which were considered to be more regulatory in nature:

\begin{itemize}
    \item[a.] the licensing power;
    \item[b.] the setting of regulations that govern conduct of licensed persons;
    \item[c.] the publication of guidelines to govern desirable conduct;
    \item[d.] encouragement of good education and training practices;
    \item[e.] complaint handling and investigation [this includes deciding whether disciplinary or supervisory proceedings should be commenced];
    \item[f.] the exercise of the power, where it exists under existing statutes, to suspend a licence in urgent circumstances;
\end{itemize}

\footnote{\textit{Ibid}, p69.}
g. the exercise of conciliation powers, where it exists under existing statutes, in respect of complaints that result in no disciplinary action being required; and

h. the exercise of a summary disciplinary power similar to that which exists under section 28A of the Legal Practitioners Act, in the circumstances we have described above [this summary disciplinary function is discussed in this Report at paragraph 3.214 below]. (emphasis added)

although the functions ultimately retained by each vocational regulatory board or committee differed according to the nature, circumstances and resources to the body in question.\textsuperscript{1536} The hearing and determination of appeals against the boards’ or committees’ regulatory decisions, such as refusing licences, imposing certain conditions on licences or decisions made when exercising a summary disciplinary power, were also transferred to the SAT where they were previously the purview of courts or tribunals.\textsuperscript{1537}

3.213 Another perceived benefit of the transfer of the disciplinary or supervisory functions of vocational regulatory boards and committees to the SAT was the standardisation of the procedures and practices in disciplinary hearings. However, the WACARTT recommended that legislative requirements as to disciplinary hearing procedures and practices which were unique to certain vocations, such as confidentiality and the public or private status of hearings, should continue to apply in the SAT.\textsuperscript{1538}

3.214 Section 28A of the \textit{Legal Practitioners Act 1893}\textsuperscript{1539} represented the WACARTT’s preferred model for vocational regulatory boards’ and committees’ summary disciplinary function. The operation of the section was explained by the WACARTT as follows:

43. \ldots The Legal Practice Board with its Legal Practitioners Complaints Committee is responsible for licensing lawyers and investigating complaints of misconduct. The Legal Practitioners Complaints Committee considers complaints and refers those matters it believes have substance to the Legal Practitioners Disciplinary Tribunal for hearing and determination.

\textsuperscript{1536} \textit{Ibid}, p75.
\textsuperscript{1537} \textit{Ibid}, p115.
\textsuperscript{1538} \textit{Ibid}, p117.
\textsuperscript{1539} This Act was replaced by the \textit{Legal Practice Act 2003} on 1 January 2004. The \textit{Legal Practice Act 2003} was then repealed and replaced by the \textit{Legal Profession Act 2008} on 1 March 2009.
44. Where the Legal Practitioners Complaints Committee’s preliminary investigation suggests, however, that a matter involves only a minor breach of discipline, it may, rather than refer the matter to the Legal Practitioners Disciplinary Tribunal, hear and determine the complaint summarily, but only if the legal practitioner concerned agrees to this course of conduct (section 28A of the Legal Practitioners Act).[1540] Where the Legal Practitioners Complaints Committee takes this course of action with the consent of the legal practitioner, it is limited to reprimanding or counselling the practitioner or imposing a fine not exceeding $500.[1541]

45. This system of discipline under the Legal Practitioners Act means that the Legal Practitioners Complaints Committee is the primary statutory body responsible for the investigation of complaints of professional misconduct by lawyers. Where the Legal Practitioners Complaints Committee considers a complaint to have substance, it does not make the decision whether there has been professional misconduct, but refers the matter to the Legal Practitioners Disciplinary Tribunal which hears the evidence and makes the determination. If the charge of misconduct is proved, the Legal Practitioners Disciplinary Tribunal imposes penalties including those of [longer term] suspension or cancellation of the right to practise law, a substantial fine and/or other appropriate penalties.[1542]

46. The ability of the Legal Practitioners Complaints Committee to exercise a summary disciplinary power by imposing a small fine etc, enables the Committee, with the consent of the practitioner, to deal with what might be termed minor breaches of discipline in an effective and timely manner. In many respects, a summary disciplinary power is an aspect of the power to regulate the profession. The Legal Practitioners Complaints Committee is not required to deal with all minor matters and it may well decide that a matter, which appears minor at first blush, is something which should be referred to

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1540 This section was replaced by section 177 of the Legal Practice Act 2003. Section 177 of the Legal Practice Act 2003 was then replaced by section 426 of the Legal Profession Act 2008.

1541 The maximum fine has been increased to $2,500: section 177(2)(a) of the Legal Practice Act 2003 and now section 426(2)(b) of the Legal Profession Act 2008.

1542 The State Administrative Tribunal has now effectively assumed the role of the former Legal Practitioners Disciplinary Tribunal: sections 180, 185 and 187 of the Legal Practice Act 2003 and now section 428, 435, 436 and Part 10 of the Legal Profession Act 2008.
the Legal Practitioners Disciplinary Tribunal for detailed consideration. The summary disciplinary power created by section 28A of the Legal Practitioners Act is therefore an exceptional power to be used in cases where the imposition of a small fine, reprimand or further education and counselling appears to be sufficient to deal with the matter, and the legal practitioner concerned submits to the jurisdiction of the Legal Practitioners Complaints Committee.\textsuperscript{1543}

3.215 In general, and in the context of their own vocation, many vocational regulatory boards and committees now exercise a similar role to the Legal Practitioners Complaints Committee\textsuperscript{1544} and the SAT has assumed functions which are similar to the former Legal Practitioners Disciplinary Tribunal.

3.216 The Committee noted that the Previous Committee considered this issue during the SAT Bills Inquiry, making Recommendation 37, which reads as follows:

\textit{The Committee recommends that the Government undertake a review of the legislation for those vocational bodies whose disciplinary functions are to be transferred to the proposed State Administrative Tribunal in order to develop a summary jurisdiction within all of those bodies for minor disciplinary matters.}\textsuperscript{1545}

3.217 The Previous Committee also specifically recommended that the Dental Board of Western Australia and the Pharmaceutical Council of Western Australia retain a minor disciplinary jurisdiction.\textsuperscript{1546}

3.218 During this inquiry, the Committee received complaints from four submitters that, contrary to the WACARTT’s and the Previous Committee’s recommendations, their vocational regulatory bodies had had all or most of their disciplinary powers transferred to the SAT. The relevant vocational regulatory bodies were the Architects Board of Western Australia, Land Surveyors Licensing Board of Western Australia

\textsuperscript{1543} Western Australian Civil and Administrative Review Tribunal Taskforce, Government of Western Australia, \textit{Western Australian Civil and Administrative Review Tribunal Taskforce Report on the Establishment of the State Administrative Tribunal}, May 2002, pp70-72.

\textsuperscript{1544} Since 1 March 2009, this committee has been known as the Legal Professional Complaints Committee: see section 555 of the \textit{Legal Profession Act 2008}.


\textsuperscript{1546} See Recommendations 35 and 36: \textit{ibid}, pp223-227 and 237-238.
and the VSB. This transfer of disciplinary powers occurred despite the fact, when the bills establishing the SAT were being prepared, all vocational regulatory boards and committees were “in the same position … [to] … have their Minister promote amendments to their Act to provide [them with] interim suspension powers, a minor disciplinary function and appropriate investigative powers.” Each of these four submitters were of the view that their vocational regulatory body should be able to exercise a summary disciplinary function while the SAT retained its jurisdiction to hear and determine more serious disciplinary matters.

3.219 The Architects Board of Western Australia submitted that a possible consequence of the requirement to refer all disciplinary matters involving architects to the SAT is that minor misconduct issues are overlooked because the board cannot afford the time or cost involved in pursuing these matters through the SAT. The board suggested that the Architects Act 2004 should be amended to give it the power to caution and reprimand, order an architect to undertake education, training or professional development, practice under supervision or obtain advice from a person in relation to the practice of architecture.

3.220 In addition to seeking a wider minor disciplinary jurisdiction for the VSB, and indicating a willingness for the SAT to retain a disciplinary jurisdiction with regard to serious breaches by veterinarians, the VSB and the AVA acknowledged that the SAT should exercise an appeal function in relation to any summary disciplinary decisions made by the VSB. This stance is similar to that stated by the VSB and the AVA during the SAT Bills Inquiry. In this inquiry, the VSB put forth the following recommendations for altering the SAT’s disciplinary jurisdiction under the Veterinary Surgeon’s Act 1960:

1547 Submission No 45 from the Architects Board of Western Australia, 30 August 2007, p1; Submission No 64 from the Land Surveyors Licensing Board of Western Australia, 21 August 2007, pp1-2 and 4; Submission No 25 from the Veterinary Surgeons’ Board of Western Australia, 21 August 2007, pp11; and Submission No 95 from The Australian Veterinary Association Limited (Western Australian Division), received on 5 September 2007, pp1 and 2.

1548 Written answer from the State Administrative Tribunal to proposed question 58 for the hearing on 21 September 2007, p63.

1549 Submission No 45 from the Architects Board of Western Australia, 30 August 2007, p1; Submission No 64 from the Land Surveyors Licensing Board of Western Australia, 21 August 2007, pp1-2 and 4; Submission No 25 from the Veterinary Surgeons’ Board of Western Australia, 21 August 2007, pp11; and Submission No 95 from The Australian Veterinary Association Limited (Western Australian Division), received on 5 September 2007, p2.

1550 Submission No 45 from the Architects Board of Western Australia, 30 August 2007, p1.

1551 Submission No 25 from the Veterinary Surgeons’ Board of Western Australia, 21 August 2007, pp11; and Submission No 95 from The Australian Veterinary Association Limited (Western Australian Division), received on 5 September 2007, p2.

(a) return to the Board the jurisdiction the Board had, prior to the creation of the SAT, in relation to registration and to investigate and hear complaints against veterinarians and determine sanctions; and

(b) provide that a veterinarian aggrieved by a decision of the Board in relation to registration or the hearing by the Board of a complaint or the sanction applied by the Board, may appeal to the SAT.1553

3.221 If the above amendments were not supported by the Government, the VSB submitted the following alternative changes:

(a) return to the Board, the jurisdiction the Board had to deal with:

(i) the professional conduct of veterinarians for at least emergency matters; and

(ii) the registration of veterinarians and complaints about the professional conduct of veterinarians for all other matters not warranting suspension of termination of registration of a veterinarian; and

(b) provide that a veterinarian aggrieved by a decision of the Board in relation to registration or the hearing by the Board of a complaint or the sanction applied by the Board, may appeal to the SAT.1554

3.222 However, Mr Robert Ashby wrote to the Committee as a member of the public, opposing any increase of the VSB’s powers.1555

3.223 In May 2008, the VSB advised the Committee that the Veterinary Practice Bill was being drafted along the same lines as the Dental Bill 20051556 and Medical

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1553 Submission No 25 from the Veterinary Surgeons’ Board of Western Australia, 21 August 2007, p11.
1554 Ibid.
1555 Email from Mr Robert Ashby, 12 June 2008.
1556 The passage of this bill through the Legislative Council was terminated on 7 August 2008, when the Parliament was prorogued.
Practitioners Bill 2006\textsuperscript{1557} and “will include provision for the Board to hear matters, other than matters where the penalty would be suspension from registration.”\textsuperscript{1558}

3.224 The President of the SAT indicated to the Committee on several occasions that he is generally in favour of vocational regulatory boards retaining a summary disciplinary function.\textsuperscript{1559} For example:

\begin{quote}
In general terms, the President believes that a standard minor or summary jurisdiction should be conferred on all vocational bodies so that they are in a position to deal with minor transgressions by reprimanding a person, imposing a small fine, requiring further training and education, and the like. The minor jurisdiction in respect of disciplinary matters currently conferred on a range of health-related vocational bodies provides a model in this regard [for example, the Medical Practitioners Act 2008].\textsuperscript{1560}
\end{quote}

3.225 The DOTAG also agreed that there should be a consistent model for vocational regulatory bodies where the summary disciplinary function remains with these bodies and the SAT hears more serious disciplinary matters and reviews the regulatory decisions of those bodies. While the DOTAG indicated that the conferral of jurisdiction is a policy issue for the Government, it stated that:

\begin{quote}
The Department would support the recommendation that vocational regulatory bodies have a minor disciplinary function. SAT is currently in the process of writing to all vocational regulatory bodies recommending that they develop a clear set of drafting instructions for the amendment of their acts to incorporate summary powers to deal with minor complaints.\textsuperscript{1561} (emphasis added)
\end{quote}

3.226 The Committee noted the following positive comments of the Land Valuers Licensing Board in relation to the transfer of its disciplinary functions to the SAT:

\begin{quote}
the Board supported the establishment of an independent disciplinary tribunal to enable the Board’s professional members to become more
\end{quote}

\textsuperscript{1557} Now the Medical Practitioners Act 2008.

\textsuperscript{1558} Written answer from the Veterinary Surgeons’ Board of Western Australia to proposed question 6 for the hearing on 7 May 2008, p6.

\textsuperscript{1559} For example, see The Honourable Justice Michael Barker, President, State Administrative Tribunal, \textit{Transcript of Evidence}, 21 September 2007, pp27-32; The Honourable Justice Michael Barker, President, State Administrative Tribunal, \textit{Transcript of Evidence}, 15 February 2008, p18; and Written answer from the State Administrative Tribunal to proposed question 66 for the hearing on 15 February 2008, p39.

\textsuperscript{1560} Written answer from the State Administrative Tribunal to proposed question 70 for the hearing on 15 February 2008, p41.

directly involved in the complaint investigation process without fear of potentially compromising any subsequent disciplinary hearings. The Board notes that since the commencement of the SAT, the Board has indeed been able to bring its professional expertise more directly to bear in the investigation process. The Board believes that this has improved both the timeliness of investigations and the qualitative outcomes thereof.\(^{1562}\)

### Committee Comment

3.227 The Committee endorses the SAT’s initiative in prompting all vocational regulatory bodies to consider whether they require summary disciplinary functions and powers in relation to minor breaches of discipline by their practitioners.

3.228 To complement that initiative, the Committee was of the view that the Government should:

- take note of any drafting instructions it receives from vocational regulatory bodies in response to the SAT’s letter; and
- review the legislation for the vocational regulatory bodies which have had, or will have, their disciplinary functions transferred to the SAT,

in order to develop a standard set of summary disciplinary functions and powers for all of these bodies in relation to minor disciplinary matters.

3.229 Where a vocational regulatory body has had, or will have, its disciplinary functions transferred to the SAT, but retains or is conferred an original jurisdiction to make minor disciplinary decisions, the Committee considered that the SAT should be the body which reviews these decisions.

\(^{1562}\) Submission No 10 from the Land Valuers Licensing Board, 9 August 2007, p1.
Recommendation 55: The Committee recommends that the Government:

(a) takes note of any drafting instructions it receives from vocational regulatory bodies in relation to their disciplinary functions and powers; and

(b) undertake a review of the legislation for the vocational regulatory bodies which have had, or will have, their disciplinary functions transferred to the State Administrative Tribunal,

in order to develop a standard set of summary disciplinary functions and powers for all of these bodies in relation to minor disciplinary matters.

Recommendation 56: The Committee recommends that, where a vocational regulatory body has had, or will have, its disciplinary functions transferred to the State Administrative Tribunal, but retains or is conferred an original jurisdiction to make minor disciplinary decisions, the Tribunal be empowered to review these decisions.

Referral to the SAT if Board takes No Action

3.230 During the course of the inquiry, a private correspondent wrote to the Committee with concerns about:

- a vocational regulatory board’s decision not to take any action with regard to a complaint about a practitioner; and

- the complainant’s inability to seek a SAT review of the board’s decision.\(^{1563}\)

3.231 The WACARTT recommended that complainants in vocational disciplinary matters should be able to refer these matters to the SAT if they are not satisfied with the relevant vocational regulatory board’s decision to take no further action with a complaint:

\[\text{Where a complainant remains aggrieved by a decision of a board not to refer a matter to the SAT or exercise its summary disciplinary power, he or she should be able to refer the matter to the SAT [as was provided for in section 28C(2) of the Legal Practitioners Act 1893, save where findings have been made by the board that the complaint}}\]

\(^{1563}\) Letter from Private Correspondent, 8 January 2008.
The Committee noted that this WACARTT recommendation did not appear to have been implemented. For example, section 181 of the *Legal Practice Act 2003*, the equivalent section to repealed sections 28C(2) and (3) of the *Legal Practitioners Act 1893*, was amended by section 620 of the *State Administrative Tribunal (Conferral of Jurisdiction) Amendment and Repeal Act 2004* so as to remove the ability for complainants to refer matters to the Legal Practitioners Disciplinary Tribunal in these circumstances. As at 31 December 2004, immediately prior to its amendment, section 181 of the *Legal Practice Act 2003* read as follows:

181. Complainant may refer complaint to Disciplinary Tribunal

(1) If the Complaints Committee, after inquiry, determines that a complaint should neither be dealt with summarily under section 177 nor referred to the Disciplinary Tribunal, the Committee must cause the Law Complaints Officer to give, in writing to the complainant and to the legal practitioner concerned, notice of that determination together with short particulars of the reasons for the determination.

(2) A complainant aggrieved by a determination under subsection (1) may refer the complaint to the Disciplinary Tribunal.

(3) The referral must be made in the manner prescribed by the rules.

(4) If the Complaints Committee, in its reasons for determination, specifically finds the complaint —

(a) to be trivial, unreasonable, vexatious or frivolous;

(b) to relate to conduct or events too remote in time to justify investigation; or

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1564 Sections 28C(2) and (3) of the *Legal Practitioners Act 1893* were replaced by section 181 of the *Legal Practice Act 2003*. Section 181 was then effectively replaced by sections 415, 425, 432 and 435 of the *Legal Profession Act 2008* on 1 March 2009.


1566 The *Legal Practice Act 2003* was repealed and replaced by the *Legal Profession Act 2008* on 1 March 2009.

1567 This tribunal was subsumed into the State Administrative Tribunal.
(c) to be a matter in which the complainant does not have a sufficient interest to justify the complaint,

the complaint cannot be referred under subsection (2) without the consent of the Attorney General. (emphasis added)

3.233 The DOTAG confirmed the Committee’s observation and provided the following explanation for the Government’s decision not to implement the WACARTT’s recommendation:

The Legal Practice Act was the only Act that provided for a complainant to take their matter to the former Legal Practitioners Disciplinary Tribunal if the Complaints Committee decided not to prosecute their complaint. No other vocational area which was to be transferred to SAT allowed this.

When a person makes a complaint to a vocational board, the board takes over the complaint and investigates it. **Parliament has entrusted to the vocational boards the function of deciding, after an investigation, whether to refer the matter to SAT for disciplinary proceedings.** When the SAT legislation was prepared it was decided that it would go against sensible public policy for a complainant to then have a right to ignore the decision of the vocational board and prosecute their complaint before SAT. Complainants have neither the resources nor the necessary powers to conduct a proper investigation of the allegations made by them. SAT is not an investigative body. It would therefore be likely that public resources would need to be expended, where a vocational board had already made a decision not to prosecute, so that SAT could be properly informed and so that it could make a sensible and proper decision about the complaint before it. **It was thought at the time that to allow a member of the public the right to prosecute a vocational matter before the SAT after it had been dismissed by a board would be akin to allowing victims of alleged crimes to prosecute their allegations before the criminal courts after the DPP had made an informed decision not to prosecute an alleged criminal act.**

It was also decided when the SAT legislation was prepared that **if complainants were entitled to prosecute dismissed complaints a greater amount of resources would need to be provided to SAT to allow it to deal with what was estimated to be a substantial amount of additional disciplinary matters.** These resources would include staff costs as well as substantial costs for sessional members, as a panel of 3 or 4 is always required to sit in vocational matters.
Vocational boards were therefore entrusted with the role of making appropriate decisions in the public interest, which is a relevant factor in deciding whether to prosecute a disciplinary matter. A complainant is unlikely to be able to objectively take into account the public interest when making a decision to proceed.

The view was also taken that SAT was not the appropriate place to determine what would essentially amount to civil proceedings between the licensee and their former client or other person aggrieved by their actions. If complainants could bring matters before SAT then they would be able to ‘forum shop’ between SAT and the various courts for the cheapest or most suitable place for determination of their ‘dispute’. It is well settled law that the purpose of disciplinary proceedings is to protect the public and the industry or profession to which the licensee belongs (see for example NSW Bar Association v Evatt (1968) 117 CLR 177). It would therefore be inappropriate to allow individual complainants to usurp that public function and prosecute their own complaints before SAT. The tribunal would still be bound to consider the proceedings in terms of protection of the public and not the satisfaction of the individual’s grievance. It is for this fundamental reason that vocational boards are entrusted with the investigation and prosecution of disciplinary complaints.

The decision was therefore made to remove the ability of complainants in legal disciplinary matters to bring their own prosecutions, so that it was consistent with all other vocational matters to be included in SAT’s jurisdiction. The decision was based on public policy grounds, including consideration of the nature of disciplinary proceedings, with a view to achieving the most effective system of disciplinary proceedings for the people of Western Australia.1568 (emphases added)

3.234 The President of the SAT was of the view that the above-mentioned policy is appropriate.1569

3.235 The Committee noted that the Legal Profession Act 2008, which repealed the Legal Practice Act 2003, commenced operation on 1 March 2009. Despite the above advice from the DOTAG, section 435 of the Legal Profession Act 2008 provides a complainant who is aggrieved by a decision of the Legal Profession Complaints

Committee to dismiss his or her complaint with a right to apply to the SAT for a review of the decision. This right of review is limited by the requirement to seek leave from the SAT where the Legal Profession Complaints Committee had dismissed the complaint specifically because:

- it found the complaint to be trivial, unreasonable, vexatious or frivolous; or
- where the complainant purported to make the complaint as a person who has or had a direct personal interest in the matters alleged in the complaint, it found that the complainant does not or did not have the requisite direct personal interest.

3.236 The Committee understood that the Legal Profession Act 2008 is uniform legislation in that it was drafted in accordance with the National Model Bill on the Legal Profession and brings Western Australia in-line with the rest of Australia in relation to the regulation of lawyers. However, it appeared that section 435 of the Act was not derived from a provision of the national model bill.

**Committee Comment**

3.237 The Committee noted that the Legal Profession Act 2008 is an exception to the general public policy that vocational regulatory bodies have the function of determining whether, after an investigation, disciplinary proceedings against a practitioner should continue.

**Child Care Services Licensing**

3.238 The Department for Communities (DFC) advised the Committee that it has had responsibility, under the Child Care Services Act 2007, for the licensing of child care services in Western Australia since 10 August 2007. Previously, this responsibility lay with the Child Care Services Board, from 1989 to 2003, and the Department for Child Development, formally known as the Department for Community Development, from 2003 to 2007.

3.239 The SAT has both an original and a review jurisdiction under the Child Care Services Act 2007: under section 29, the SAT may cancel a child care services licence at the referral of the Chief Executive Officer of the DFC; and under section 30, a person

1570 This committee was previously known as Legal Practitioners Complaints Committee.
1571 Complaints against legal practitioners may be dismissed by the Legal Profession Complaints Committee either summarily or after an investigation: sections 415 and 425 of the Legal Profession Act 2008.
1572 Pursuant to section 410(1)(e) of the Legal Profession Act 2008.
1573 Section 435(2) of the Legal Profession Act 2008.
1574 Explanatory Memorandum for the Legal Profession Bill 2007, pp1 and 56.
1575 Submission No 97 from the Department for Communities, 31 August 2007, p1 and 3.
aggrieved by a licensing decision of the Chief Executive Officer may apply for that
decision to be reviewed by the SAT.

3.240 For isolated breaches of licensees’ obligations prescribed in the *Child Care Services*
(*Child Care*) *Regulations 2006*, which attract fines, the DFC advised that it must
conduct prosecutions in the criminal jurisdiction of the Magistrates Court.\(^{1576}\) The
DFC considered that the SAT’s procedures and relative informality would make it a
far better forum for disciplinary action against child care licensees than the
Magistrates Court:

> The Tribunal’s experience in vocational licensing matters would be
likely to result in more appropriate outcomes for both the licensees
and the regulator.\(^{1577}\)

3.241 The DFC also observed that the regulations prescribing licensees’ obligations were
originally drafted to be enforced by the Child Care Services Board and it was not until
2001 that a breach of the regulations became criminal offences. The DFC made the
comment that, because the regulations were not drafted with prosecution in mind, it
has been virtually impossible to meet the criminal standard of proof for some of the
offences which have been created.\(^{1578}\)

3.242 Consequently, the DFC intended to seek amendments to section 29 of the *Child Care
Services Act 2007* to provide the SAT with a broader disciplinary jurisdiction.

3.243 The SAT and the DOTAG supported the DFC’s suggestion.\(^{1579}\) The SAT noted that
this conferral of jurisdiction would be appropriate on the basis that:

- it already exercises a significant vocational regulatory function pursuant to
numerous enabling Acts;\(^{1580}\) and

- it appears to be consistent with the SAT’s existing functions under the *Child
Care Services Act 2007*.\(^{1581}\)

3.244 The WACARTT did not consider this jurisdiction due to the fact that, at the time of its
inquiry, the governing Act was under review.\(^{1582}\)

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\(1576\) Submission No 97 from the Department for Communities, 31 August 2007, p3.

\(1577\) Ibid.


\(1579\) Written answer from the State Administrative Tribunal to proposed question 77 for the hearing on 15
February 2008, p44; and Letter from Hon Jim McGinty MLA, Attorney General, 29 May 2008,
Enclosure 1, p26.

\(1580\) As at 15 February 2008, there were 38 enabling Acts conferring this function.

\(1581\) Written answer from the State Administrative Tribunal to proposed question 77 for the hearing on 15
February 2008, p44.
Committee Comment

3.245 The Committee considered that it would be appropriate for the SAT to hear and determine allegations of breaches of the regulations by child care service licensees, in place of the Magistrates Court.

3.246 With respect to the DFC’s comments concerning the ease of prosecuting breaches of the regulations, the Committee noted that the SAT is not bound by the rules of evidence which are applicable to courts, including rules as to the burden and standard of proof. However, the Committee is confident that the SAT will assess and balance the evidence in each proceeding before it, particularly in the case of disciplinary proceedings, which have the potential to significantly affect the reputation and livelihood of the practitioner or licensee who is involved.

Recommendation 57: The Committee recommends that the Child Care Services Act 2007 be amended to empower the State Administrative Tribunal to hear and determine allegations of breaches of the regulations by child care service licensees.

Local Government Building Surveyors

3.247 Under the Local Government (Qualification of Municipal Officers) Regulations 1984, the Municipal Building Surveyors Qualifications Committee (MBSQC) had the function of certifying persons who have qualified as local government building surveyors. Section 30 of those regulations provided that decisions of the MBSQC to either cancel a certificate or refuse to issue a new certificate after cancellation could be appealed to the Magistrates Court.

3.248 The Committee consulted several interested parties on the possible transfer of the Magistrates Court’s appeal jurisdiction to the SAT and noted that this transfer was already well underway. On 1 July 2008, the Local Government (Qualification of Municipal Officers) Regulations 1984 were repealed and replaced by the Local Government (Building Surveyors) Regulations 2008. As a result, the MBSQC was replaced by the Building Surveyors Qualifications Committee (BSQC).1583 The Minister for Housing and Works, MBSQC and Department of Housing and Works, now split into the Department of Housing and the Building Management and Works division of the Department of Treasury and Finance, confirmed that the new BSQC’s only disciplinary power in relation to local government building surveyors is to cancel

1582 Western Australian Civil and Administrative Review Tribunal Taskforce, Government of Western Australia, Western Australian Civil and Administrative Review Tribunal Taskforce Report on the Establishment of the State Administrative Tribunal, May 2002, pp16-17.

Regulation 27 of the new regulations provides the SAT with a regulatory review function, as follows:

A person whose —

(a) application for a certificate of qualification is refused by the Committee; or

(b) certificate of qualification is cancelled by the Committee,

may apply to the State Administrative Tribunal for a review of that refusal or cancellation.

The Australian Institute of Building Surveyors was of the view that neither the Magistrates Court nor the SAT should have the review function. The institute suggested that:

the MBSQC Committee appoint an industry based technical committee to review unsuccessful applicants. This committee may also deal with ethical and disciplinary matters.  

However, the SAT, DOTAG and WALGA, “subject to the SAT members being appropriately qualified”, agreed with the transfer of the Magistrates Court appeal jurisdiction to the SAT. The SAT made the following comment:

The Tribunal already deals with a range of vocational matters and building control matters and it would appear to be an anomaly that this review function remains in the Magistrates Court.

The Minister for Housing and Works, MBSQC and Department of Housing and Works advised the Committee of the gazetted and operation of the new regulations.
The Department of Housing and Works also advised the Committee that it had provided $10,000 in funding to the SAT to undertake administrative changes as preparation for its role of reviewing the BSQC’s regulatory decisions.1591

3.252 In addition to the above changes, the proposed Certifiers Act, associated with the proposed Building Act, will supersede the Local Government (Building Surveyors) Regulations 2008 in due course. Among other things, it is anticipated that this proposed Act will provide the SAT with an original decision-making role with respect to disciplinary proceedings against local government building surveyors: for example, the SAT will have the power to cancel the certificates of local government building surveyors who are found to have breached their obligations under the proposed Act.1592 The Department of Housing and Works confirmed that the proposed Certifiers Act will result in the SAT exercising disciplinary functions in relation to local government building surveyors which are very similar to the disciplinary and supervisory roles already exercised by the SAT in relation to many other vocations where the relevant regulatory body maintains both a regulatory and a summary disciplinary function.1593 Refer to paragraphs 3.210 to 3.229 in this Report for a discussion about the SAT’s role in vocational disciplinary matters.

Committee Comment

3.253 The Committee noted that the Magistrates Court’s review jurisdiction in relation to local government building surveyors was transferred to the SAT on 1 July 2008.

3.254 In relation to the anticipated conferral on the SAT of the BSQC’s original decision-making powers regarding the discipline of local government building surveyors, the Committee reiterates Recommendations 55 and 56 in this Report.

Teachers

3.255 The Western Australian College of Teaching (WACOT) is established under section 5 of the Western Australian College of Teaching Act 2004. The WACOT is essentially a vocational regulatory body, with functions which include regulating and disciplining teachers. For example, the WACOT is responsible for:

1590 Letter from Hon Michelle Roberts MLA, Minister for Housing and Works, 13 June 2008; Letter from Mr Nabil Yazdani, for and on behalf of the Municipal Building Surveyors Qualifications Committee, 16 June 2008, p1; and Letter from Mr John Coles, Acting Director General, Department of Housing and Works, 18 June 2008, p1.

1591 Letter from Mr John Coles, Acting Director General, Department of Housing and Works, 18 June 2008, p1.

1592 Letter from Hon Michelle Roberts MLA, Minister for Housing and Works, 13 June 2008; Letter from Mr Nabil Yazdani, for and on behalf of the Municipal Building Surveyors Qualifications Committee, 16 June 2008, p1; and Letter from Mr John Coles, Acting Director General, Department of Housing and Works, 18 June 2008, p1.

1593 Letter from Mr John Coles, Acting Director General, Department of Housing and Works, 18 June 2008, p1.
enhancing the status of the teaching profession by helping the professional growth and development of teachers throughout their careers;

• promoting and encouraging the continuing education of teachers in the practice of teaching;

• administering the registration of teachers; and

• performing the disciplinary and other functions conferred on the WACOT by the Western Australian College of Teaching Act 2004.

A person who wishes to teach in a school in Western Australia must be registered or hold a ‘limited authority to teach’ under the Western Australian College of Teaching Act 2004. Interestingly, the Act does not contain an express requirement for teachers to become members of the WACOT; it merely stipulates that a person may apply for membership. However, a teacher who wishes to maintain his or her registration or limited authority to teach must also maintain his or her membership with the WACOT as a cancellation of the membership will also result in the teacher’s name being removed from the register.

Section 81 of the Western Australian College of Teaching Act 2004 provides that a person who is aggrieved by certain prescribed decisions made by the WACOT under this Act may apply to the District Court for a review of the decision. These prescribed decisions are regulatory and/or disciplinary in nature, and include:

• a decision to refuse an application under Part 4 of the Act, which includes an application to be registered as a teacher and an application to be a WACOT member;

• a decision to grant an application to be a WACOT member subject to conditions imposed under section 43(1) of the Act;

• an order, made under section 62 of the Act, for disciplinary action for unprofessional conduct. Disciplinary action includes the cancellation or

1594 See Part 7 of the Western Australian College of Teaching Act 2004.
1595 Ibid, section 16.
1596 Ibid, section 30.
1597 Ibid, section 40.
1598 Ibid, section 58.
1599 Ibid, section 81(a).
1600 Ibid, section 81(b).
suspension of a teacher’s WACOT membership and the imposition of a fine.\textsuperscript{1601,1602}

- a decision to cancel a person’s membership with the WACOT under sections 46(2) (for non-payment of the annual membership fee), 55 (for sexual offences involving a child), 56 (for non-compliance with certain registration requirements) or 57 (for failing to give consent for a criminal record check) of the Act.\textsuperscript{1603}

3.258 The Department of Education and Training submitted that the current review process for teachers aggrieved by the above decisions of the WACOT:

\begin{quote}

\emph{appears to be inconsistent with the approach taken for most, if not all, other statutory professional regulatory bodies, that are subject to the jurisdiction of SAT.} \textsuperscript{1604}
\end{quote}

3.259 The Department also noted the Previous Committee’s understanding that there was a possibility that disciplinary matters involving the teaching profession would be included within the jurisdiction of the SAT some time in the future.\textsuperscript{1605} This was confirmed in the Legislative Council’s debate on the Western Australian College of Teaching Bill 2003:

- “\emph{The Western Australian College of Teaching will set up a fair and just process. ... The honourable member regarded the District Court review as being too expensive and time consuming. I am advised that the board discussed this matter, took advice on it and came to the conclusion that it was the appropriate appeal mechanism, although I note that it may be overtaken by the State Administrative Tribunal, whenever that sees the light of day. Other teacher registration authorities use the District Court as the review mechanism.}”\textsuperscript{1606}

- “\emph{With regard to the question Hon Christine Sharp raised about whether in these situations it is intended that the applicant could appeal to the State Administrative Tribunal rather than to the District Court, the Government believes that it would be more appropriate to do that. In the event that the}”

\textsuperscript{1601} Ibid, section 64.
\textsuperscript{1602} Ibid, section 81(c).
\textsuperscript{1603} Ibid, section 81(d).
\textsuperscript{1604} Submission No 92 from the Department of Education and Training, 17 September 2007, p2.
\textsuperscript{1605} Ibid. See Parliament of Western Australia, Legislative Council, Standing Committee on Legislation (2001-2005), Report 24, State Administrative Tribunal Bill 2003 and the State Administrative Tribunal (Conferral of Jurisdiction) Amendment and Repeal Bill 2003, October 2004, p115.
\textsuperscript{1606} Hon Graham Giffard, Parliamentary Secretary to the Minister for Education and Training, Western Australia, Legislative Council, Parliamentary Debates (Hansard), 2 April 2004, p1621.
State Administrative Tribunal is established, the Government considers appeals would be more appropriately dealt with by the tribunal.”

3.260 The SAT advised the Committee that, when the disciplinary jurisdiction for teachers was created in the Western Australian College of Teaching Act 2004, “it was anticipated that it would be a large jurisdiction and appropriately dealt with by a separate body of specialists.”

3.261 The Minister for Education and Training was circumspect in relation to the proposal to transfer the District Court’s review jurisdiction to the SAT:

This is a matter that obviously requires both a suitable level of consultation and legislative amendment if necessary. In this context, please note that a review of the operation and effectiveness of the Western Australian College of Teaching Act 2004 (under s 90 of that Act) is scheduled to commence later in 2008.

3.262 The proposal to transfer the review jurisdiction to the SAT was supported by the SAT, “So long as adequate funding is provided”, DOTAG, “Subject to adequate resources being provided”, Association of Independent Schools of Western Australia, Catholic Education Commission of Western Australia, WACOT, Independent Education Union of Western Australia, Union of Employees and Her Honour Judge Antoinette Kennedy, Chief Judge, District Court.

3.263 Her Honour Judge Antoinette Kennedy, Chief Judge, District Court, acknowledged that the proposed transfer of jurisdiction would be consistent with the SAT’s role in many other vocations:

1607  Hon Graham Giffard, Parliamentary Secretary to the Minister for Education and Training, Western Australia, Legislative Council, Parliamentary Debates (Hansard), 11 May 2004, p2594.
1608  Written answer from the State Administrative Tribunal to proposed question 74 for the hearing on 15 February 2008, p42.
1610  Written answer from the State Administrative Tribunal to proposed question 74 for the hearing on 15 February 2008, p42.
1611  Written answer from the Department of the Attorney General to proposed question 45 for the hearing on 25 March 2008, p25.
1612  Written answer from the State Administrative Tribunal to proposed question 74 for the hearing on 15 February 2008, pp42-43; The Honourable Justice Michael Barker, President, State Administrative Tribunal, Transcript of Evidence, 15 February 2008, pp31-32; Written answer from the Department of the Attorney General to proposed question 45 for the hearing on 25 March 2008, p25; Letter from Mrs Audrey Jackson, Executive Director, Association of Independent Schools of Western Australia (Inc), 5 June 2008; Letter from Mr Ron Dullard, Director, Catholic Education Office of Western Australia, Catholic Education Commission of Western Australia, 6 June 2008; Letter from Ms Jacqueline Varris, Deputy Chair, Catholic Education Office of Western Australia, Catholic Education Commission of Western Australia, 13 June 2008; Letter from Ms Theresa Howe, Secretary, Independent Education Union of Western Australia, Union of Employees, 16 June 2008; and Letter from Her Honour Judge Antoinette Kennedy, Chief Judge, District Court of Western Australia, 18 July 2008.

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I am of the opinion that SAT is the pre-eminent body to hear reviews of decisions made under the Act. SAT’s procedures are less technical than the Court’s procedures, and more cost effective for both appellant and respondent. That the review process under the Act rests with the District Court sits uneasily with the function of SAT to absorb all vocational matters, and to review administrative decisions.

I would support the suggestion that SAT conducts merit reviews of decisions under the Act in place of review by my Court.1613

3.264 The WACOT supported the proposed transfer on the basis that the SAT would:

• improve the quality of decision-making through its merits reviews1614;
• improve the accountability of decision-making through its merits reviews;
• correct a greater range of regulatory errors through its merits reviews;
• improve the transparency of regulatory processes through its merits reviews;
• increase confidence in the regulatory process through its merits reviews; and
• provide “a forum for review at a comparatively lower cost than may be the case should appeals lie to the District Court.”1615

3.265 However, the WACOT suggested that the SAT should consider strategies to manage the evidence of children and to protect the interests of child witnesses in SAT proceedings because:

In reviewing decisions made by the College under Part 7 of the WACOT Act, SAT may find itself in the position where children may be required to appear as witnesses, providing evidence relating to matters involving alleged serious misconduct by teachers, including but not limited to matters such as sexual harassment or other forms of related misconduct.1616

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1613 Letter from Her Honour Judge Antoinette Kennedy, Chief Judge, District Court of Western Australia, 18 July 2008, p2.
1614 Refer to paragraph 2.438 in this Report for a discussion about the features of merits review, as distinguished from the characteristics of judicial review.
1615 Letter from Ms Jacqueline Varris, Deputy Chair, Western Australian College of Teaching, 13 June 2008, p1.
1616 Ibid, p2.
3.266 In this respect, the WACOT, which is also not bound by rules of evidence and is required to proceed with as little formality and technicality as possible,\textsuperscript{1617} advised that it has found it useful to refer to the Evidence Act 1906\textsuperscript{1618} in developing its own practices and procedures.\textsuperscript{1619}

\textbf{Committee Comment}

3.267 The Committee considered that the SAT should assume the review jurisdiction which is currently exercised by the District Court in relation to the regulatory decisions of the WACOT.

3.268 In addition, the Committee was of the view that the SAT should assume original jurisdiction in relation to disciplinary proceedings against teachers. As with many other vocations, the SAT should hear and determine more serious disciplinary matters while the WACOT retains a minor disciplinary jurisdiction. In this respect, the Committee reiterates Recommendations 55 and 56 in this Report.

\begin{table}[h]
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\textbf{Recommendation 58}: The Committee recommends that the \textit{Western Australian College of Teaching Act 2004} be amended to empower the State Administrative Tribunal to review Western Australian College of Teaching decisions in relation to the regulation of teachers. \\
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\hline
\textbf{Recommendation 59}: The Committee recommends that the \textit{Western Australian College of Teaching Act 2004} be amended to provide the State Administrative Tribunal with original jurisdiction in relation to serious disciplinary proceedings against teachers. \\
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\begin{footnotesize}
\textsuperscript{1617} Section 68 of the \textit{Western Australian College of Teaching Act 2004}. \\
\textsuperscript{1618} Sections 106A to 106T of this Act deal with evidence given by children and people with mental impairment. \\
\textsuperscript{1619} Letter from Ms Jacqueline Varris, Deputy Chair, Western Australian College of Teaching, 13 June 2008, p2.
\end{footnotesize}
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CHAPTER 4
OTHER MATTERS RAISED

FEEDBACK ABOUT THE PUBLIC ADVOCATE

4.1 The office of Public Advocate was created under section 91 of the GA Act. Its functions are prescribed in section 97 of the Act, which provides as follows:

(l) The functions of the Public Advocate are as follows —

(a) to make applications under this Act and to attend hearings of the State Administrative Tribunal when he thinks fit and when required to do so by the Tribunal;

(aa) subject to sections 44(5) and 68(5), to act as a guardian or administrator either solely or jointly with another person;

(b) at hearings before the State Administrative Tribunal commenced under this Act, or where appropriate at hearings under Division 3 of Part 3 [Appeals to the Supreme Court from a SAT decision in a GA Act matter] —

(i) to seek to advance the best interests of the represented person or person to whom the proceedings relate;

(ii) to present to the Tribunal, Judge or Court any information in his possession that is relevant to the hearing; and

(iii) to investigate and report to the Tribunal, Judge or Court on any matter or question referred by a court or by the Tribunal, Judge or Court;

(c) to investigate any complaint or allegation that a person is in need of a guardian or administrator, or is under an inappropriate guardianship or administration order, or any matter referred to him by a court or under section 98;
(d) to seek assistance for any represented person or
person in respect of whom an application has been
made from any government department, institution,
welfare organization or the provider of any service
and, where appropriate, to arrange legal
representation for any represented person or
persons in respect of whom an application has been
made;

(e) to provide information and advice —

(i) to a proposed guardian or administrator, as
to the functions of guardians and
administrators; and

(ii) to any person, as to the operation of Part 4;

(f) to promote public awareness and understanding by
the dissemination of information concerning —

(i) the provisions of this Act, including those
relating to the functions of the State
Administrative Tribunal conferred under this
Act, the Public Advocate and guardians and
administrators; and

(ii) the protection of the rights of represented
persons and persons who may become
subject to guardianship or administration
orders, and the protection of such persons
from abuse and exploitation;

(g) to promote family and community responsibility for
guardianship and for that purpose to undertake, co-
ordinate and support community education projects;

(h) to encourage the involvement of government and
private bodies and individuals in achieving the
objects described in paragraphs (f) and (g);

(i) any other function conferred on the Public Advocate
by a written law.
(2) The Public Advocate may do all things necessary or convenient to be done for or in connection with the performance of his functions. (emphasis added)

4.2 The President of the SAT explained the link between the SAT and the OPA with regard to GA Act matters before the SAT:

*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. ... 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.*  

4.3 As the President indicated, and as prescribed in section 97(1)(b)(iii) of the GA Act, the SAT may refer any matter or question arising in a GA Act application to the OPA for investigation and reporting. In practice, these referrals involve the following processes:

*The Public Advocate Liaison Officer, who is located at the Tribunal's premises, conducts an initial assessment of matters referred to her prior to a formal referral by the Tribunal. This has proved to be a valuable means of case management. Generally the Public Advocate provides a written report of her investigation but, where time is limited, for instance, where an application is urgent, an oral report may be provided. Reports are an extremely useful way to gather information that might not be readily obtained at a hearing. For the most part referrals to the Public Advocate for investigation occurred were [sic] the matters were complex or where there was conflict between the parties.*  

4.4 The Committee was advised by the SAT and the OPA that the two organisations, while remaining distinct and independent, consulted effectively and regularly with

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The President offered the following example of the consultation which occurs in this working relationship:

*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 [for final hearing] 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.*

4.5 In 2007/2008, 309 matters, the majority of which were applications for guardianship, were referred by the SAT to the Public Advocate for investigation. The SAT’s *Annual Report 2008* stated that an increase in GA Act applications has resulted in an increase in referrals to the OPA and appointments of the Public Advocate as guardian. In many cases, this additional workload has made it difficult for the OPA to complete investigations and provide written reports within the SAT’s timeframe targets.

4.6 Mrs Deborah Lawrence suggested to the Committee that, in her experience, representatives of the OPA are aggressive, intimidating and adversarial. Two private submitters who had also had dealings with the OPA made similar statements to the Committee. In response, the Public Advocate was concerned that these submitters had had unsatisfactory interactions with her office, but offered the following information about how her office may be perceived in the context of its interaction with the SAT:

*The role of the Public Advocate is to protect and promote the rights of people with decision-making disabilities, and to reduce the risk of neglect, exploitation and abuse. This is not always an easy task but the staff at OPA must carry out their functions having total regard for the best interests of the person with the decision-making disability to*

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1625 Submission No 7 from Mrs Deborah Lawrence, received on 10 August 2007.

1626 Submission No 48 from Private Submitter, 29 August 2007; and Submission No 68 from Private Submitter, received on 31 August 2007, p3.

1627 For example, see Ms Pauline Bagdonavicius, Public Advocate, and Ms Denise Fallon, Manager, Advocacy, Investigation and Legal, Office of the Public Advocate, *Transcript of Evidence*, 7 May 2008, p2.
ensure their needs are being appropriately met. At times OPA’s recommendations to the Tribunal, or decisions made as the legal guardian, are unacceptable to this person’s family members and/or service providers.

There may be a lack of understanding that the Public Advocate has a very specific role as legislated by the Guardianship and Administration Act 1990. When the Public Advocate is appointed guardian by SAT, the role is to make decisions in the represented person’s best interest in relation to the specific authorities of the guardianship order. The guardian does not have a case management or a service provision role, and relies on other agencies to provide information on which decision making is based.

Service providers in the health and disability fields can be disappointed when they discover the limitations of the Public Advocate’s role as a person’s guardian, in particular that it does not provide a substitute for their ongoing role. This may then become a source of friction and grievance. There are times when the Public Advocate has a different view to a professional in relation to what is in a person’s best interests and this causes tension in relationships with service providers.1628

4.7 When the negative comments about the OPA were raised with the SAT, the President assured the Committee that the Public Advocate and the OPA act “with all due professionalism”1629:

- “I would be very slow ever to criticise the work that the Public Advocate has to do. By its nature, it will produce very testing circumstances. … We have not had formal complaints about the Public Advocate.”1630

- “Proceedings under the GA Act are very personal and confidential and the progress of a matter to a final decision can be stressful, in particular for the nearest relatives and persons of significance. The work of the Public Advocate in investigating family circumstances by its very nature might be seen by the P/RP’s [proposed represented person’s/represented person’s] relatives and friends, in some cases, as an unwelcome interference in private affairs. This may also be the case where the Public Advocate is appointed as Guardian of the P/RP and has to make difficult decisions. It is therefore to be

1628 Written answer from the Office of the Public Advocate to proposed question 1(a) for the hearing on 7 May 2008, pp1-2.
1629 The Honourable Justice Michael Barker, President, State Administrative Tribunal, Transcript of Evidence, 21 September 2007, p37.
1630 Ibid.
expected that in some cases, some persons may express some dissatisfaction as a result of their involvement in these difficult proceedings. 1631

4.8 In an effort to combat misconceptions about the Public Advocate’s role, the OPA, through its Community Education team, offers the following educational and information products and services about itself, the GA Act, the Public Trustee and the SAT:

- Brochures, information sheets, position statements and information kits. These may be accessed on the OPA’s website, www.publicadvocate.wa.gov.au, or they may be sent out by the OPA upon request. The publications are also available in alternative formats when requested.

- The Telephone Advisory Service, which operates throughout the State during office hours. The OPA advised that this service receives a number of calls from people seeking advice and information on the guardianship and administration system.

- Training seminars. The OPA’s annual training calendar is circulated to the aged care, disability and mental health care, financial and legal sectors. The calendar is also available on-line. In the 2007/2008 financial year, there was an emphasis on presentations in regional areas. The OPA also provides free community education presentations to community organisations or as part of special focus weeks, such as Law Week. 1632

4.9 The OPA advised that the client satisfaction survey for 2006/2007, the results of which were reported in the Public Advocate’s Annual Report 2006-2007, revealed that 97 per cent of its clients were satisfied with the information and advice provided by the OPA. 1633

4.10 The Bentley Health Service submitted that while its working relationship with the SAT and the OPA are “essentially good” and the help and support afforded by the SAT and the OPA to the service’s most vulnerable clients are valued, it believed that “communication could be improved especially, at times, with the OPA.” The service also suggested that, currently:

- the OPA can sometimes have a “somewhat dictatorial and disrespectful attitude” and it would like to have a more collaborative relationship with the OPA; and

1631 Written answer from the State Administrative Tribunal to proposed question 26 for the hearing on 21 September 2007, p29.

1632 Written answer from the Office of the Public Advocate to proposed question 1(b) for the hearing on 7 May 2008, pp2-4.

4.11 These concerns of the Bentley Health Service were relayed by the OPA’s management to the guardians through regular staff meetings. Staff were reminded of the importance of being mindful at all times about their “communication with colleagues and their approaches to explaining OPA’s role and acknowledgment of their assistance and support.”  

4.12 The OPA assured the Committee that its staff seek to “develop and maintain collaborative working relationships” with all interested parties, whether it be during SAT-referred investigations or when the Public Advocate has been appointed as a person’s guardian:

> In conducting their work, staff are required to gather information from all interested parties, who at times may be in conflict. At times the investigation and decision making processes may feel confronting to the involved interested parties but every care is taken to explain OPA’s requirements and to work respectfully and collaboratively with all parties.  

4.13 The OPA advised that all interested parties are informed of the Public Advocate’s decisions, either orally or in writing. They are also advised of the OPA’s formal complaints process and how reviews of decisions may be sought. It was noted by the OPA that its 2006/2007 client satisfaction survey revealed that 88 per cent of the respondents were satisfied with the overall level of the OPA’s guardianship services and 83 per cent of the respondents were either satisfied or very satisfied with the level of the investigation services.  

### Committee Comment

4.14 The Committee acknowledged that GA Act matters are a complex area and noted that the SAT and the OPA, while remaining a distinct and independent office, are consulting with each other regularly in order to achieve the best possible outcome for the represented person.
THE PUBLIC TRUSTEE’S POTENTIAL CONFLICT OF INTEREST

4.15  Amongst its other roles, the Public Trustee is often appointed by the SAT as either a plenary or limited administrator of the financial affairs of people who do not have the mental capacity to manage their own affairs.\textsuperscript{1638} The appointment of the Public Trustee, made under the GA Act, may be considered to be the appointment of ‘last resort’; that is, the Public Trustee is appointed when other options, private administrators, are not available or desirable.\textsuperscript{1639}

4.16  Clause 443 of the \textit{State Administrative Tribunal (Conferral of Jurisdiction) Amendment and Repeal Act 2004} amended section 80 of the GA Act so that the accounts of private administrators are required to be submitted to the Public Trustee for examination, rather than the previous Guardianship and Administration Board. Further, while private administrators are subject to requirements to submit accounts to the Public Trustee, the Public Trustee does not have similar obligations.\textsuperscript{1640}

4.17  The Previous Committee considered that there appeared to be a conflict of interest where the Public Trustee assumes a regulatory role with respect to private administrators.\textsuperscript{1641} Recommendation 42 of the SAT Bills Report stated that:

\begin{quote}
The Committee recommends that as part of the deliberations of the Legislative Council committee of review established under the Committee’s Recommendation 7, the review committee should consider the issue of the potential conflict of interest in the Public Trustee supervising other administrators.\textsuperscript{1642}
\end{quote}

4.18  Recommendation 7 of the SAT Bills Report resulted in the enactment of section 173 of the SAT Act and the Committee, as the committee appointed under section 173 to conduct this inquiry, is the Legislative Council committee of review which was referred to in Recommendation 42 of the SAT Bills Report. However, the Committee was of the view that the issue of the Public Trustee’s potential conflict of interest falls outside of the scope of this inquiry, the purpose of which is to review the jurisdiction and operation of the SAT.

4.19  Nevertheless, the Committee also noted Recommendation 41 of the SAT Bills Report, which stated that:

\textsuperscript{1638} Submission No 66 from the Public Trustee, 11 September 2007, p1.
\textsuperscript{1640} Section 80(7) of the \textit{Guardianship and Administration Act 1990}.
The Committee recommends that the Government undertake a re-examination of the structure of the Public Trustee’s supervision of alternate administrators. 1643

Committee Comment

4.20 The Committee noted that a working party has been established to review the GA Act. 1644 The Committee recommends that this working party undertake the re-examination which is contemplated in Recommendation 41 of the SAT Bills Report and, in that process, consider the issue of the Public Trustee’s potential conflict of interest in supervising private administrators.

Recommendation 60: The Committee recommends that the Government instruct the working party which was established to review the Guardianship and Administration Act 1990 to undertake a re-examination of the structure of the Public Trustee’s supervision of alternate administrators and to consider the issue of the Public Trustee’s potential conflict of interest in supervising these alternate administrators.

1642 Ibid.
1643 Ibid.
1644 Refer to paragraphs 2.301 to 2.307 of this Report for further details about this working party.
CHAPTER 5
CONCLUSION

5.1 The Committee found the SAT to be operating efficiently and effectively and was of the view that this positive result has been due to the considerable efforts and dedication of the members and staff of the SAT. In particular, the Committee acknowledged the initiatives, work and leadership of the Honourable Justice Michael Barker, who served as the inaugural President of the SAT from 24 November 2004 to 6 February 2009.

Hon Ken Baston MLC
Chairman
20 May 2009
APPENDIX 1

LIST OF STAKEHOLDERS
# APPENDIX 1

## LIST OF STAKEHOLDERS

<table>
<thead>
<tr>
<th>Name</th>
<th>Title</th>
<th>Organisation</th>
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<tbody>
<tr>
<td>Mr Dennis Eggington</td>
<td>Chief Executive Officer</td>
<td>Aboriginal Legal Service of Western Australia</td>
</tr>
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<td>Mr Brad Williamson</td>
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<td>Mr Michael Hall</td>
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<td>Armadale Redevelopment Authority</td>
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<td>Mr Earl Louis</td>
<td>President</td>
<td>Australasian Podiatry Association (WA)</td>
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<td>Mrs Sandy Kevill</td>
<td>President</td>
<td>Australian Association of Occupational Therapists (WA) Inc</td>
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<td>Dr Stuart Gaimis</td>
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<td>Mr Des Wood</td>
<td>President</td>
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<td>Mr Carl Buerckner</td>
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<td>Ms Caroline Stone</td>
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<td>Mr Alan Plumb</td>
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<td>Ms Sharyn O'Neill</td>
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<td>Mr Richard Strickland</td>
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<tr>
<td>Mr Keiran McNamara</td>
<td>Director General</td>
<td>Department of Environment and Conservation</td>
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### APPENDIX 1: List of Stakeholders

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<tr>
<td>Mr Peter Millington</td>
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<td>Department of Fisheries</td>
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<td>A/Director General</td>
<td>Department of Indigenous Affairs</td>
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<td>Department of Industry and Resources</td>
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<td>Department of Racing, Gaming and Liquor</td>
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<td>Mr Edward Hurbuz</td>
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<td>Gold Corporation</td>
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<td>Mr Robert Hicks</td>
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<td>Ms Michele Dolin</td>
<td>Executive Director</td>
<td>Government Employees Superannuation Board of WA</td>
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<td>Mr Kevin Skipworth</td>
<td>Official Secretary</td>
<td>Governor's Establishment</td>
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<td>Mr Bruce Manning</td>
<td>Director</td>
<td>Great Southern Development Commission</td>
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<td>Ms Lidia Rozlapa</td>
<td>Managing Director</td>
<td>Great Southern TAFE</td>
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<tr>
<td>Mr Joe Bullock</td>
<td>Secretary</td>
<td>Hairdressers' and Wigmakers' Employees' Union Of Workers (WA Branch)</td>
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<td>Ms Jackie McKiernan</td>
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<td>Ms Michele Kosky</td>
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<td>Executive Director</td>
<td>Health Promotion Foundation WA</td>
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<td>Heritage Council of Western Australia</td>
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<td>Horizon Power</td>
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<td>Ms Anne Nolan</td>
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<td>Mr Con Abbott FCA</td>
<td>Regional Manager</td>
<td>The Institute of Chartered Accountants in Australia</td>
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<td>Chairperson</td>
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<td>Ms Gillian Braddock SC</td>
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<td>Law Reform Commission of Western Australia</td>
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<td>Mrs Jan Stewart</td>
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<td>Mr John Klarich</td>
<td>Director</td>
<td>Magistrates Court of Western Australia</td>
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FOURTEENTH REPORT

APPENDIX 1: List of Stakeholders

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<tr>
<th>Name</th>
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<td>Mr Michael McLean</td>
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<td>Master Builders Association of Western Australia</td>
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<tr>
<td>Mr Murray Thomas</td>
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<td>Medical Board of Western Australia</td>
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<tr>
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<tr>
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<tr>
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<td>Mr Murray Allen</td>
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<tr>
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<tr>
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<td>Executive Officer</td>
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<td>Mr Mike Johnson</td>
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<td>Professor Gabriel A Moens</td>
<td>Dean of Law</td>
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<td>Mr Adrian Warner</td>
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<td>WorkCover Western Australia Authority</td>
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<tr>
<td>Ms Susan Hunt</td>
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Private Submitters from the Inquiry into the State Administrative Tribunal Bill 2003 and State Administrative Tribunal (Conferral of Jurisdiction) Amendment and Repeal Bill 2003
APPENDIX 2

WRITTEN SUBMISSIONS RECEIVED
## APPENDIX 2

**WRITTEN SUBMISSIONS RECEIVED**

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<td>1</td>
<td>Mr Stuart B Cairns</td>
<td>Australian Dental Association (WA Branch) Inc</td>
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<td>2</td>
<td>Mr Dennis Eggington</td>
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<td>20/07/07</td>
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<td>Mr Wayne Collyer</td>
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<td>25/07/07</td>
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<td>Mr Ian Baxter</td>
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<td>29/07/07</td>
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<td>Mr Kim Fare</td>
<td>Builders' Registration Board, Painters' Registration Board and Building Disputes Tribunal of Western Australia</td>
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<td>Mr Ian Johnson</td>
<td>Department of Corrective Services</td>
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<td>Ms Kirsty Snelgrove</td>
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<td>93</td>
<td>Mr Moshe Gilovitz</td>
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<td>Mr Stephen Moir</td>
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<td>Ms DA Woekey</td>
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<td>97</td>
<td>Mr Brad Jolly</td>
<td>Department for Communities</td>
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<td>98</td>
<td>Mr Michael Hardy</td>
<td>Hardy Bowen, Lawyers</td>
<td>06/11/07</td>
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APPENDIX 3

WITNESSES WHO APPEARED BEFORE THE COMMITTEE
APPENDIX 3
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<tr>
<th>Name</th>
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<td>The Honourable Justice Michael Barker</td>
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<tr>
<td>Mr Gavan Jones</td>
<td>Director Higher Courts, Court and Tribunal Services, Department of the Attorney General</td>
<td>25/03/08</td>
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<td>Mr Michael Johnson</td>
<td>Director Magistrates Court and Tribunals, Court and Tribunal Services, Department of the Attorney General</td>
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<tr>
<td>Mr Robert Atkins</td>
<td>Acting Deputy Director General, Department of Environment and Conservation</td>
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<tr>
<td>Mr Colin Murray</td>
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<td>Mr Garry Middle</td>
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<td>Dr David Neck</td>
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<td>Dr Peter Punch</td>
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<td>Dr Sue Godkin</td>
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<td>Ms Denise Fallon</td>
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<td>Ms Margaret Halsmith</td>
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<td>Mr Graham Castledine</td>
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<tr>
<td>Mr Moshe Gilovitz</td>
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<tr>
<td>Mr Malcolm Logan</td>
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<td>Dr Ronald Chalmers</td>
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<td>Ms Francine Holder</td>
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APPENDIX 4

SUBMITTERS AND CORRESPONDENTS SUPPORTIVE OF THE SAT

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<td>Mr Kim Fare</td>
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<td>Mr Graeme Cantelo</td>
<td>Plumbers Licensing Board</td>
<td>31/08/07</td>
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<td>76</td>
<td>Mr PJ Millington</td>
<td>Department of Fisheries</td>
<td>31/08/07</td>
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<td>77</td>
<td>Ms Jeanette Achurch</td>
<td>Aged Care Bentley Health Service</td>
<td>rec 31/08/07</td>
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<td>79</td>
<td>Mr Arthur Hgaurere</td>
<td>Member of the Public</td>
<td>30/08/07</td>
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<td>84</td>
<td>Ms Cheryl Gwilliam</td>
<td>Department of the Attorney General</td>
<td>07/09/07</td>
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<td>87</td>
<td>Mr Scott Grimley</td>
<td>Ernst &amp; Young</td>
<td>rec 14/09/07</td>
</tr>
<tr>
<td>88</td>
<td>Ms Celia Searle</td>
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<td>91</td>
<td>Ms Leonie Coxon</td>
<td>The Australian Psychological Society Ltd, Perth Branch</td>
<td>14/09/07</td>
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<td>93</td>
<td>Mr Moshe Gilovitz</td>
<td>Western Australian Planning Commission</td>
<td>05/10/07</td>
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<td>97</td>
<td>Mr Brad Jolly</td>
<td>Department for Communities</td>
<td>30/08/07</td>
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<td>Mr Michael Hardy</td>
<td>Hardy Bowen, Lawyers</td>
<td>06/11/07</td>
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<tr>
<td>*</td>
<td>Mr Peter Monks</td>
<td>City of Perth</td>
<td>26/07/07</td>
</tr>
<tr>
<td></td>
<td>*(Correspondent)</td>
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APPENDIX 5
SAT PRACTICE NOTE 2

PRACTICE NOTE 2
Review Proceedings

What is this document?

1. This document is a practice note issued by the Rules Committee of the Tribunal under section 33 of the State Administrative Tribunal Act 2004 (WA).

2. This document describes important aspects of the Tribunal's practice and procedure in "review" proceedings. "Review" proceedings involve the review by the Tribunal of a decision of an original decision-maker. However, this document does not apply to:

   (a) review by the President of decisions of the Tribunal under section 244 of the Planning and Development Act 2005 (WA) (see Practice Note 4 – Review of Decisions of the Tribunal Under Section 244 of the Planning and Development Act 2005);

   (b) review of decisions of the Mental Health Review Board under the Mental Health Act 1996 (WA) (see Practice Note 7 – Review of Decisions of the Mental Health Review Board Under the Mental Health Act 1996);

   (c) review of decisions of the Building Disputes Tribunal under the Builders Registration Act 1978 (WA) (see Practice Note 8 – Review of Decisions of the Building Disputes Tribunal Under the Builders Registration Act 1978);

   (d) review by the Full Tribunal of decisions made by a single member under section 17A of the Guardianship and Administration Act 1990 (WA) (see Practice Note 9 – Proceedings Under the Guardianship and Administration Act 1990).

3. If you need help in understanding this document please contact the Tribunal on (08) 9219 3111 or 1300 305 017 (STD callers) or email the Tribunal at info@sat.justice.wa.gov.au

Initial directions hearing

4. When an application is tried it is listed for an initial directions hearing before a member of the Tribunal in approximately two to three weeks. The Tribunal will give written notice to the parties of the time, date and place of the directions hearing.

5. Parties may attend the initial directions hearing and any other directions hearing by telephone if they live outside the Perth metropolitan region or have difficulty in attending in person. In order to arrange for attendance at a directions hearing
by telephone, parties should contact the Tribunal on the telephone number or email address set out in paragraph 3 as soon as possible after receiving notice of the directions hearing.

6. At any directions hearing the presiding member will make directions for the speedy and fair conduct of the proceedings.

7. At any directions hearing each party or its representative must have sufficient familiarity with the proceedings and in the case of a representative sufficient instructions from the party to be able tell the Tribunal the party's position as to each of the matters set out in paragraphs 8 and 9.

What will the Tribunal consider at directions hearings?

8. At a directions hearing the Tribunal will consider:

   (a) whether the proceedings should be referred to mediation (see paragraphs 16 – 21);

   (b) whether the proceedings should be referred to a compulsory conference (see paragraphs 22 – 24);

   (c) whether the proceedings should be subject to special case management;

   (d) whether any question of law, mixed question of law and fact or question of fact should be decided as a preliminary issue;

   (e) whether the proceedings should be listed for a final hearing; and

   (f) whether the proceedings should be determined entirely on the documents.

9. If the Tribunal considers that the proceedings should be listed for a final hearing the parties or their representatives must advise the Tribunal as to:

   (a) the number, nature and expertise (where relevant) of the witnesses whose evidence will be relied on at the hearing;

   (b) the likely length of the hearing;

   (c) any dates which are unavailable to any party or witness;

   (d) whether telephone, video link or any other system or method of communication will be required at the hearing;

   (e) whether an interpreter will be required at the hearing;

   (f) whether a view or inspection by the Tribunal of the land or thing in question will be required; and

   (g) where the hearing should most conveniently take place.
Identification of issues in dispute and relevant documents

10. At the initial directions hearing the Tribunal will usually make orders requiring:

(a) within 14 days the respondent to file with the Tribunal and give to the applicant a statement of the issues, facts and contentions it says arise in relation to the decision under review and the documents which are relevant to the Tribunal’s review of the decision; and

(b) within 14 days of being given the respondent’s statement and documents the applicant to file with the Tribunal and give to the respondent its own statement of issues, facts and contentions responding to the respondent’s statement and the documents on which it proposes to rely in the proceedings.

What orders will the Tribunal usually make at directions hearings?

11. The orders that the Tribunal will usually make at directions hearings are in the SAT Standard Orders Made at Directions Hearings document which is available on the SAT website (www.sat.justice.wa.gov.au) and in the directions hearing room.

What happens when proceedings are listed for a final hearing?

12. When proceedings are listed for a final hearing the Tribunal will usually make orders requiring:

(a) at least 14 days before the hearing the parties to file with the Tribunal and give to each other a written statement of the evidence of each witness a party proposes to call at the hearing;

(b) at least 14 days before the hearing where the proceedings involve the review of a refusal or deemed refusal of an application for development or subdivision of land the respondent to file with the Tribunal and give to the applicant a set of draft, “without prejudice” conditions of approval that the respondent says should be imposed if after hearing the evidence and submissions of the parties the Tribunal considers that approval subject to conditions is appropriate; and

(c) at least 7 days before the hearing any experts on whose evidence the parties propose to rely to confer with each other in each field and at least 5 days before the hearing to file with the Tribunal a joint statement of all matters agreed between them, matters not agreed and the reasons for any disagreement.

13. The Tribunal will specify in its orders the number of copies of documents that the parties or the expert witnesses will be required to file.

14. If a party does not wish to cross-examine a witness whose witness statement has been given to the party it must advise the Tribunal and the party that gave the witness statement at least two days before the hearing. Where that occurs
the witness does not need to attend the hearing unless required to do so by the Tribunal.

What happens at a final hearing?

15. Any witness statement which is filed with the Tribunal and given to the other party in accordance with the Tribunal’s order will usually be admitted into evidence by the Tribunal as the evidence of the witness. The presiding member may permit the witness to give any additional evidence. The other party is permitted to cross-examine the witness.

16. Any experts’ joint statement referred to in paragraph 12(c) will be admitted into evidence by the Tribunal at the hearing and expert evidence inconsistent with any agreement in the joint statement will be allowed only if the Tribunal permits.

17. The expert witnesses in each field will usually give evidence at the hearing concurrently. They will be:
   (a) called to give evidence together;
   (b) asked questions by the Tribunal;
   (c) given an opportunity by the Tribunal to ask each other any questions which they consider might assist the Tribunal; and
   (d) asked questions by the parties or their representatives.

What is mediation?

18. Mediation is a structured negotiation between parties facilitated by a trained mediator. Its purpose is to achieve a mutually acceptable settlement of a dispute or to narrow the issues in dispute. Mediation often allows for a creative solution.

19. Mediation in the Tribunal is conducted by a member who is also a mediator. If a mediation does not result in settlement the member who conducted the mediation cannot take any further part in the proceedings unless all of the parties agree.

20. The Tribunal may order the parties to attend a mediation without their consent.

What is a compulsory conference?

21. The purpose of a compulsory conference is to identify and clarify the issues and to promote resolution by settlement.

22. If the compulsory conference does not result in settlement the member who conducted the conference cannot take any further part in the proceedings.

23. Attendance at a compulsory conference is compulsory.
Who attends a mediation or compulsory conference?

24. The parties must attend the mediation or compulsory conference in person. Where a party is a corporation or government body a senior officer must attend. A lawyer or other person permitted by the State Administrative Tribunal Act, Regulations or Rules to represent a party may also attend. If a party wishes to bring along another person it must advise the presiding member and the other party at the directions hearing at which the matter is referred to mediation or compulsory conference.

25. An officer who attends on behalf of a party must be able to identify, clarify and narrow the issues and must have authority to settle the proceedings. It is recognised, however, that officers of some respondents may not be able to settle a matter without further consideration by the respondent.

What happens if proceedings are settled between the parties?

26. Where proceedings are settled between the parties section 26(d) of the State Administrative Tribunal Act allows the decision-maker to vary the decision or set aside the decision and substitute a new decision.

27. Where orders are sought by consent from the Tribunal to give effect to a settlement a document recording the consent orders must be filed with the Tribunal in hard copy signed by each of the parties or their representatives and in electronic form. If plans, photographs or maps are to be attached to the consent orders, sufficient copies of these documents, namely one plus the number of parties, must be filed.

28. The Tribunal will make an order by consent only if it is satisfied that it has power and that it is appropriate to do so.

29. The applicant requires the leave of the Tribunal to withdraw the proceedings.

[Issued by Rules Committee on 14 November 2006]
APPENDIX 6
SAT PRACTICE NOTE 3
APPENDIX 6
SAT PRACTICE NOTE 3

PRACTICE NOTE 3
Original Proceedings

What is this document?
1. This document is a practice note issued by the Rules Committee of the Tribunal under section 33 of the State Administrative Tribunal Act 2004 (WA).

2. This document describes important aspects of the Tribunal's practice and procedure in "original" proceedings. "Original" proceedings are all matters which do not involve the review by the Tribunal of a decision of an original decision-maker. However, this document does not apply to proceedings under:

   (a) the Strata Titles Act 1985 (WA) (see Practice Note 5 – Proceedings Under the Strata Titles Act 1985);

   (b) the Retirement Villages Act 1992 (WA) (see Practice Note 6 – Proceedings Under the Retirement Villages Act 1992); or

   (c) the Guardianship and Administration Act 1990 (WA) (see Practice Note 9 – Proceedings Under the Guardianship and Administration Act 1990).

3. If you need help in understanding this document please contact the Tribunal on (08) 9210 5111 or 1300 306 017 (STD callers) or email the Tribunal at info@sat.justice.wa.gov.au

What happens after an application is filed?
4. After an application is filed the Tribunal will consider whether the proceedings should be listed for an initial directions hearing or be determined entirely on the documents which have been filed and which will be filed in accordance with orders made by notice to the parties.

5. Whether the proceedings are listed for an initial directions hearing or not, where appropriate, the Tribunal will make directions for the speedy and fair conduct of the proceedings.

Initial directions hearing

6. If the proceedings are listed for an initial directions hearing the Tribunal will give written notice to the parties of the time, date and place of the directions hearing.

7. Parties may attend the initial directions hearing and any other directions hearing by telephone if they live outside the Perth metropolitan region or have difficulty in attending in person. In order to arrange for attendance at a directions hearing
by telephone, parties should contact the Tribunal on the telephone number or email address set out in paragraph 3 as soon as possible after receiving notice of the directions hearing.

8. At any directions hearing each party or its representative must have sufficient familiarity with the proceedings and in the case of a representative sufficient instructions from the party to be able tell the Tribunal the party's position as to each of the matters set out in paragraphs 9 and 10.

What will the Tribunal consider at directions hearings?

9. At a directions hearing the Tribunal will consider:

(a) whether the proceedings should be referred to mediation (see paragraphs 19 – 22);

(b) whether the proceedings should be referred to a compulsory conference (see paragraphs 23 – 25);

(c) whether the proceedings should be subject to special case management;

(d) whether any question of law, mixed question of law and fact or question of fact should be decided as a preliminary issue;

(e) whether the proceedings should be listed for a final hearing; and

(f) whether the proceedings should be determined entirely on the documents.

10. If the Tribunal considers that the proceedings should be listed for a final hearing the parties or their representatives must advise the Tribunal as to:

(a) the number, nature and expertise (where relevant) of the witnesses whose evidence will be relied on at the hearing;

(b) the likely length of the hearing;

(c) any dates which are unavailable to any party or witness;

(d) whether telephone, video link or any other system or method of communication will be required at the hearing;

(e) whether an interpreter will be required at the hearing;

(f) whether a view or inspection by the Tribunal of the land or thing in question will be required; and

(g) where the hearing should most conveniently take place.
Identification of issues in dispute and relevant documents

11. At the initial directions hearing the Tribunal will usually make orders requiring:

   (a) within 14 days the applicant to file with the Tribunal and give to the respondent a statement of the issues, facts and contentions it says arise and the documents on which it proposes to rely in the proceedings; and

   (b) within 14 days of being given the applicant’s statement and documents the respondent to file with the Tribunal and give to the applicant its own statement of issues, facts and contentions responding to the applicant’s statement and the documents on which it proposes to rely in the proceedings.

What orders will the Tribunal usually make at directions hearings?

12. The orders that the Tribunal will usually make at directions hearings are in the SAT Standard Orders Made at Directions Hearings document which is available on the SAT website (www.sawestjustice.wa.gov.au) and in the directions hearing room.

What happens when proceedings are listed for a final hearing?

13. When proceedings are listed for a final hearing the Tribunal will usually make orders requiring:

   (a) at least 14 days before the hearing the parties to file with the Tribunal and give to each other a written statement of the evidence of each witness a party proposes to call at the hearing; and

   (b) at least 7 days before the hearing any experts on whose evidence the parties propose to rely to confer with each other in each field and at least 5 days before the hearing to file with the Tribunal a joint statement of all matters agreed between them, matters not agreed and the reasons for any disagreement.

14. The Tribunal will specify in its orders the number of copies of documents that the parties or the expert witnesses will be required to file.

15. If a party does not wish to cross-examine a witness whose witness statement has been given to the party it must advise the Tribunal and the party that gave the witness statement at least two days before the hearing. Where that occurs the witness does not need to attend the hearing unless required to do so by the Tribunal.

What happens at a final hearing?

16. Any witness statement which is filed with the Tribunal and given to the other party in accordance with the Tribunal’s order will usually be admitted into evidence by the Tribunal at the hearing as the evidence of the witness. The
presiding member may permit the witness to give any additional evidence. The
other party is permitted to cross-examine the witness.

17. Any experts' joint statement referred to in paragraph 13(b) will be admitted into
evidence by the Tribunal at the hearing and expert evidence inconsistent with
any agreement in the joint statement will be allowed only if the Tribunal permits.

18. The expert witnesses in each field will usually give evidence at the hearing
concurrently. They will be:
   
   (a) called to give evidence together;
   
   (b) asked questions by the Tribunal;
   
   (c) given an opportunity by the Tribunal to ask each other any questions
       which they consider might assist the Tribunal; and
   
   (d) asked questions by the parties or their representatives.

What is mediation?

19. Mediation is a structured negotiation between parties facilitated by a trained
mediator. Its purpose is to achieve a mutually acceptable settlement of a
dispute or to narrow the issues in dispute. Mediation often allows for a creative
solution.

20. Mediation in the Tribunal is conducted by a member who is also a mediator. If a
mediation does not result in settlement the member who conducted the
mediation cannot take any further part in the proceedings unless all of the
parties agree.

21. The Tribunal may order the parties to attend a mediation without their consent.

What is a compulsory conference?

22. The purpose of a compulsory conference is to identify and clarify the issues and
to promote resolution by settlement.

23. If the compulsory conference does not result in settlement the member who
conducted the conference cannot take any further part in the proceedings.

24. Attendance at a compulsory conference is compulsory.

Who attends a mediation or compulsory conference?

25. The parties must attend the mediation or compulsory conference in person.
Where a party is a corporation or government body a senior officer must attend.
A lawyer or other person permitted by the *State Administrative Tribunal Act,*
Regulations or Rules to represent a party may also attend. If a party wishes to
bring along another person it must advise the presiding member and the other
party at the directions hearing at which the matter is referred to mediation or
compulsory conference.
26. An officer who attends on behalf of a party must be able to identify, clarify and narrow the issues and must have authority to settle the proceedings. It is recognised, however, that officers of some respondents may not be able to settle a matter without further consideration by the respondent.

What happens if proceedings are settled between the parties?

27. Where proceedings are settled between the parties a document recording the orders sought by consent from the Tribunal must be filed with the Tribunal in hard copy signed by each of the parties or their representatives and in electronic form if possible. If plans, photographs or maps are to be attached to the consent orders sufficient copies of these documents, namely one plus the number of parties, must be filed.

28. The Tribunal will make an order by consent only if it is satisfied that it has power to do so.

29. The applicant requires the leave of the Tribunal to withdraw the proceedings.

[Issued by Rules Committee on 14 November 2006]
APPENDIX 7

MEDIATION AND COMPULSORY CONFERENCE IN THE SAT
APPENDIX 7

MEDIATION AND COMPULSORY CONFERENCE IN THE SAT

Mediation and Compulsory Conference in the State Administrative Tribunal

The Tribunal encourages parties to use mediation and compulsory conference in resolving applications in the Tribunal. A successful mediation or conference may result in the parties avoiding a formal, final hearing and determination of an application. This means in turn that proceedings can be decided more quickly and at lesser cost.

Mediation and conferences are now used in many tribunal and courts. Experience shows that by actively involving the parties in proceedings in discussions and negotiations prior to a formal hearing, the proceedings can either be wholly resolved or the issues narrowed.

In the State Administrative Tribunal mediation and compulsory conferences are used regularly and with considerable success. The mediation and conferences are held on a confidential basis. The mediator or conference convener is a member of the Tribunal who is trained to act in this role and usually brings special knowledge and experience to the proceedings. The mediator or convener is independent of the parties and works hard to assist them in finding a solution to their problem. The mediator or convener will have no further involvement in a proceeding if the matter is not finally resolved, unless the parties agree otherwise and the mediator or convener consider it appropriate to do so.

The procedure in a mediation or compulsory conference is flexible, but the usual steps are:

- Step 1 - Opening by the Tribunal member
- Step 2 - Parties’ opening statements
- Step 3 - Summarising and agenda setting
- Step 4 - Exploration of issues
- Step 5 - Private sessions between the member and the parties if required
- Step 6 - Joint negotiation sessions
- Step 7 - Further private sessions, if required
- Step 8 - Agreement/orders/decisions of Tribunal

Parties to a mediation or conference are not obliged to agree to an outcome. However, where an application is resolved wholly or partly at a mediation, the outcome is reduced to writing to express the agreement reached and, if possible, orders will then be made by the member of the Tribunal to reflect the agreed outcome.

At a mediation or compulsory conference the parties themselves are expected to be actively involved in the mediation or conference, with full authority to negotiate and settle issues. If the authority to settle is restricted the restriction and the procedure for obtaining authority should be disclosed at the first opportunity.

Parties may attend with their legal representatives or other professional representatives. However, it must be borne in mind at all times that the mediation or conference is intended to be a relatively informal meeting between the parties and not an occasion with lawyers or other professional representatives to act as advocates or participate in an adversarial courtroom-style contest with each other or the other party.

The role of lawyers and other professional advisors in a mediation or compulsory conference are essentially three:

- To advise and assist their clients in the course of the proceeding.
- To discuss with the mediator or convener, with each other and with respective clients such legal, evidentiary and practical matters as the mediator or convener might suggest or their clients might suggest.
- To prepare the terms of settlement or heads of agreement or proposed order that the Tribunal might make as a result of the mediation or conference.

Parties should bring to a mediation or compulsory conference all documents or other materials they would like to refer to. In some cases where the advice of experts may be important to the resolution of an issue, a party should bring their expert to the mediation or conference or arrange for the expert to be available by telephone. If you intend to bring an expert you should tell the Tribunal at the directions hearing when the matter is referred to mediation or compulsory conference. If you have not done that, the other party should be advised of your intention in advance of the conference or mediation.

Please contact the SAT if further information is required when preparing for a mediation or compulsory conference.
APPENDIX 8

COMPLYING WITH ORDERS MADE BY THE SAT
APPENDIX 8
COMPLYING WITH ORDERS MADE BY THE SAT

Complying with Orders made by the State Administrative Tribunal

At the conclusion of a proceeding in the Tribunal the Tribunal makes final orders. These orders usually require a party to take some particular action to comply with the order or to refrain from acting in a particular way. Sometimes the Tribunal may also make an interim order of this nature. Orders made by the Tribunal must be complied with and are enforceable as if made by a Court.

In the course of a proceeding the Tribunal often makes orders of a procedural kind. The Tribunal has powers to deal with a party's failure to comply with procedural orders in various ways.

Enforcing Orders made by the State Administrative Tribunal

Once a final order or an interim order of the type referred to above has been made the functions of the Tribunal are complete and the Tribunal does not undertake the function of enforcing the order. The party having the benefit of the order is responsible for the enforcement of a final order. There are three measures a party can take to have the other party(ies) comply with a final order:

• first, the Tribunal's orders can be enforced under civil procedures in the ordinary courts of the State.
• secondly, a criminal prosecution may possibly be instituted against a person who fails to comply with an order of the Tribunal.
• thirdly, final orders made by the Tribunal in its review jurisdiction are subject to review jurisdiction procedures.

A more detailed outline of each of the above three measures is given on the following pages.

Enforcement by civil proceedings

Orders requiring the payment of money

A party to whom payment is to be made under a monetary order may enforce the order in a court of competent jurisdiction by filing –

• a copy of the order that the Executive Officer of the Tribunal has certified to be a true copy;
• and the party's affidavit as to the amount not paid under the order and, if the order is to take effect on any default, as to the making of that default.

Under s 85(2) of the State Administrative Tribunal Act 2004 (WA), no charge is to be made for filing a copy of an order or an affidavit in the court of competent jurisdiction. Once the order is filed it is taken to be an order of the court and may be enforced in accordance with the procedures applying in that court. As to the procedures applying in that court the party should seek advice from staff of the court or a legal practitioner.
The court of competent jurisdiction to enforce the order will be the Magistrates Court if the outstanding amounts due under the order is $50 000 or less; or the District Court if it is more than $50,000 and not more than $500 000. (Those limits will increase as of 1 January 2009 to $750 000 and $750 000 respectively.) The jurisdiction of the Supreme Court is unlimited.

Orders other than for a sum of money

A non-monetary order - which is usually an order requiring another party to do or refrain from doing some act may be enforced in the Supreme Court. This involves enforcement under civil procedures. It does not usually involve the court in finding an offence has been committed or a fine imposed. If that is what is required, the party should consider a criminal prosecution, as described below.

However, before a party can achieve enforcement in the Supreme Court, the party must do the following things:

- Request the Tribunal in writing to provide a certificate of a judicial member of the Tribunal stating that the decision (which includes an order) is appropriate for filing in the Supreme Court. The judicial member will give consideration to the nature of the decision in determining whether it is appropriate to issue a certificate.
- At the time of making the request, file an affidavit as to the non-compliance with the decision.
- If a judicial member of the Tribunal issues the required certificate, that certificate, together with a copy of the decision that a judicial member or the Executive Officer has certified to be a true copy, and the person’s affidavit as to non-compliance with the decision, must be filed in the Supreme Court.

Under s 86 of the State Administrative Tribunal Act 2004 (WA) no charge is to be made for filing a copy of a decision, an affidavit or the required certificate in the Supreme Court and, on filing the decision is taken to be a decision of the Supreme Court and may be enforced in accordance with the practices and procedures of the Supreme Court. As to the procedures applying in the Supreme Court, the party should seek advice from the staff of the Court or a legal practitioner.

Criminal Prosecution (non monetary Orders)

If there is reason to believe that there is an appreciable risk that a person against whom an order is sought, (other than a monetary order), may deliberately not comply with the order, the Tribunal may be asked to make an additional order under s 95 of the State Administrative Tribunal Act 2004. The effect of a s 95 order is that a person who fails to comply with the first order commits an offence for which a penalty of up to $10 000 may be imposed. The actual penalty imposed will depend upon the circumstances of the case.

A criminal prosecution under s 95 deals with the punishment of a person for failure to comply and does not necessarily mean that the other party will take steps to remedy their defaults. If this is what is required, the party should consider instituting enforcement under the civil procedures discussed above.

If a s 95 order was not made at the same time as the initial order, and the person against whom the order was made does not comply with it, a separate application may be made to the Tribunal for a s 95 order to be made. If the failure to comply continues after notice of the making of the s 95 order is served, the continued failure constitutes an offence for which a penalty of up to $10 000 may be imposed.

The procedure for prosecuting and dealing with offences is set out in the Criminal Procedure Act 2004 (WA). A police officer is one of the persons authorised to commence a prosecution in a court of summary jurisdiction. It will therefore be necessary to take these steps to enforce an order in this way:

- attend at a police station;
- produce to the Police a certified copy of the Tribunal’s order;
- make a complaint in accordance with usual police procedures.
Whether any prosecution should be commenced is a matter within the discretion of the police officer receiving the complaint.

The State Administrative Tribunal is also authorised to commence a prosecution for an offence, but does not ordinarily undertake criminal prosecutions on behalf of a party.

**Review Jurisdiction**

In review proceedings the Tribunal considers decisions made by official decision makers. Depending on the outcome of the final hearing, the Tribunal may affirm the original decision, or vary or set aside the original decision. If the Tribunal sets aside the decision, it may choose to substitute its own decision or send the matter back to the decision-maker for reconsideration in accordance with any directions or recommendations that the Tribunal considers appropriate.

If the Tribunal affirms or varies the decision or sets it aside and substitutes its own decision for that of the decision-maker, s 29(5) of the State Administrative Tribunal Act 2004 (WA), provides that the Tribunal’s decision is to be regarded as, and given effect, as a decision of the decision-maker. Once made the decision of the Tribunal then has the same effect as that made by the original decision under the enabling Act under which it was made and may be enforced by any relevant party as permitted under that enabling Act. Accordingly, it will be necessary to consider the enabling Act under which the review decision was made to determine the procedure to be followed for enforcement of the Tribunal’s decision and you should consider obtaining independent advice if this applies to your situation.

**Enforcing Procedural Orders**

If a party to a proceeding fails to comply with procedural orders made by the Tribunal leading up to a final hearing or the making of final orders the party aggrieved by the default of the other party may apply to the Tribunal to deal with the default. Amongst other things the Tribunal can consider striking out the proceeding under s 46 of the State Administrative Tribunal Act 2004 (WA), making a costs order against the defaulting party, initiating proceedings for contempt against the defaulting party under s 100 of the Act, or the making of a s 95 order which may lead to a criminal prosecution, if the circumstances require such an order.

**General advice**

As explained above, it is not a function of the Tribunal ordinarily to take enforcement action in relation to its orders. The Tribunal also is not in a position to give a party advice about what particular type of enforcement action they should choose to take. If a party requires further information about how they should go about enforcing an order of the Tribunal they should seek independent advice from a legal practitioner.
APPENDIX 9

THIRD PARTY RIGHTS OF PLANNING APPEAL
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<th>Western Australia</th>
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<th>South Australia</th>
<th>Tasmania</th>
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<th>Queensland</th>
<th>Northern Territory</th>
<th>Australian Capital Territory</th>
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<tr>
<td>Third Party Planning Appeal Rights Available?</td>
<td>No - unless the right is specifically provided for by a planning scheme: section 252; see also Schedule 7, clause 14 of the Act which contemplating planning schemes possibly providing third party rights.</td>
<td>Yes - an 'objector' may appeal the planning consent granted for a 'designated development'. Clauses 4 and Schedule 3 of the Environmental Planning and Assessment Regulation 2000 define those.</td>
<td>Yes - an appeal may be made on a 'Category 2 development' by a person who has made a representation in relation to the development. Category 2 developments are defined as those.</td>
<td>Yes - any person who, or relevant authority which, made a representation regarding a 'discretionary permit' application may appeal the granting of the permit.</td>
<td>Yes - a 'submitter' may appeal against the giving of approval, and any provision of the approval, regarding particular matters. For particular aquaculture developments, a person who, or local authority which, made a submission in relation to the development application may appeal the decision to consent to the application in certain, limited circumstances.</td>
<td>Yes - an 'eligible entity' may apply for a review of a 'reviewable decision'. In some cases, in relation to certain 'reviewable decisions', third parties are prescribed as</td>
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<td>Western Australia</td>
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<td>party planning appeal rights.</td>
<td>'designated development'; eg coal mines and cement works.</td>
<td>developments which are not assigned by subsidiary legislation to either Category 1 or Category 2; section 38(2)(b) of the Act.</td>
<td>Additionally, a non-objector who is nonetheless affected may apply for leave to appeal where the responsible authority received a written objection to the granting of the permit; section 82B</td>
<td>the 'submitter' may appeal the 'referral agency' response.</td>
<td>Part 4 of the Planning Regulations prescribes land in relation to which there can be no third party planning appeal rights; eg where the planning application relates to the subdivision or consolidation of land within the Northern Territory Planning Scheme.</td>
<td>'eligible entities' if the third party made a representation about the development proposal (or had a reasonable excuse for not doing so) and approval of the development application may cause the third party to suffer 'material detriment'; Schedule 1, clause 4.</td>
<td></td>
</tr>
</tbody>
</table>

**Who Heats the Appeal?**
- Stare Administrative Tribunal
- Land and Environment Court
- Environment, Resources and Development Court
- Resource Management and Planning Appeal Tribunal
- Victorian Civil and Administrative Tribunal
- Generally the Planning and Environment Court (the Court). In some cases (eg 2
- Lands, Planning and Mining Tribunal
- Australian Capital Territory Civil and Administrative Tribunal (commenced on
<table>
<thead>
<tr>
<th>Western Australia</th>
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<td>2 February 2009</td>
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</table>

**Comments**

- Under proposed changes, an 'objector' may also appeal to a regional planning panel or the Planning Assessment Commission in relation to certain classes of development prescribed in the regulations: proposed section A review of the planning system is currently underway: see Development (Planning and Development Review) Amendment Bill 2009.

- The Government recently completed a review of the planning system. The steering committee conducting the review recommended that third party planning appeal rights remain unchanged.

- Generally considered to have broad third party planning appeal rights.

- An extensive reform of the planning system and the Act is currently underway. The jurisdiction of the Tribunal will be expanded to lessen reliance on the Court.

- The person or local authority must not appeal for reasons of commercial competition: section 117(3) of the Act.

- The bulk of the Act, including Chapter 13 and Schedule 1, commenced operation on 31 March 2008.
<table>
<thead>
<tr>
<th>Western Australia</th>
<th>New South Wales</th>
<th>South Australia</th>
<th>Tasmania</th>
<th>Victoria</th>
<th>Queensland</th>
<th>Northern Territory</th>
<th>Australian Capital Territory</th>
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</thead>
<tbody>
<tr>
<td>96E of the Act to be inserted by clause 36, Schedule 2.1 of the <em>Environmental Planning and Assessment Amendment Act 2008</em>, which has not yet commenced. Existing third party planning appeals to the Land and Environment Court will not be affected.</td>
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APPENDIX 10
POTENTIAL ADDITIONAL SAT JURISDICTIONS
APPENDIX 10
POTENTIAL ADDITIONAL SAT JURISDICTIONS

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<th>No</th>
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<tr>
<td>1</td>
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<tr>
<td>2</td>
<td>Appeal Costs Board</td>
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<tr>
<td>3</td>
<td>Board of Examiners (Mine Managers and Underground Supervisors)</td>
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</tr>
<tr>
<td>4</td>
<td>Board of Examiners (Quarry Managers)</td>
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</tr>
<tr>
<td>5</td>
<td>Board of Examiners (Winding Engine Drivers)</td>
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</tr>
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<td>6</td>
<td>Board of Valuers</td>
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<td>7</td>
<td>Building and Construction Industry Training Board</td>
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<tr>
<td>8</td>
<td>Burswood Park Board</td>
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<tr>
<td>9</td>
<td>Coal Industry Superannuation Board</td>
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<tr>
<td>11</td>
<td>Construction Industry Long Service Leave Payments Board</td>
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<tr>
<td>12</td>
<td>Disability Services Commission Board</td>
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<tr>
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<td>Fire and Emergency Services Superannuation Board</td>
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<td>Mentally Impaired Accused Review Board</td>
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<td>16</td>
<td>Mines Survey Board</td>
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<td>Occupational Safety and Health Tribunal (within the WAIRC)</td>
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<td>Parliamentary Superannuation Board</td>
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<td>Police Appeal Board</td>
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<td>Prison Officers Appeals Tribunal</td>
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<td>24</td>
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<td>Railway Appeal Board</td>
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<td>Railways Classification Board (within the Western Australian Industrial Relations Tribunal)</td>
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<td>28</td>
<td>Supervised Release Review Board</td>
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<td>Western Australian Gas Review Board</td>
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<td>31</td>
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<tr>
<td>32</td>
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<td>33</td>
<td>Information Commissioner</td>
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<tr>
<td>37</td>
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<tr>
<td>38</td>
<td>Contaminated Sites Committee</td>
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<tr>
<td>39</td>
<td>Corruption and Crime Commission</td>
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<td>41</td>
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APPENDIX 11

RACING APPEAL BODIES IN AUSTRALIAN JURISDICTIONS
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<td>Racing Appeals Tribunal</td>
<td>Tasmanian Racing Appeal Board</td>
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**Establishing Legislation**

- **Racing Penalties (Appeals) Act 1990; section 4**
- **Racing and Betting Act: section 145F**
- **Racing Act 1958: section 83G**
- **Racing Appeals Tribunal Act 1983: section 5**
- **Racing Act 2002: section 150**
- **Racing Act 1995: section 38**