

LEGISLATION COMMITTEE

INQUIRY INTO THE JURISDICTION AND OPERATION OF THE STATE ADMINISTRATIVE TRIBUNAL
HEARING WITH THE ENVIRONMENTAL PROTECTION AUTHORITY
7 MAY 2008

ABBREVIATIONS

EPA = Environmental Protection Authority

SAT = State Administrative Tribunal

SAT Act = *State Administrative Tribunal Act 2004*

SAT Regulations = *State Administrative Tribunal Regulations 2004*

SAT Rules = *State Administrative Tribunal Rules 2004*

Proposed Questions regarding the Operation of the SAT

1. In its Annual Report for 2006, the SAT recommends amending section 41 of the *Environmental Protection Act 1986*. The following is an excerpt from the Annual Report 2006, pp42-43:

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 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, 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, 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) 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. Even if the parties were in agreement, it would not be possible for the Tribunal to list proceedings for final hearing, but limited to determining whether the application should be refused. 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.

...

A possible solution to the problem is the New South Wales position, which was referred to in passing in *Burns and Commissioner of Soil and Land Conservation at [42]*, under which the Land and Environment Court is authorised to determine an appeal against the decision of a council or consent authority whether or not any concurrence or approval required before the council or consent authority could determine the application has been granted.

A variation on this theme would be to amend section 41 of the Environmental Protection Act 1986 to permit the Tribunal to

	<p><i>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 section 45(5)(b) should not be implemented.</i></p> <p>What are the EPA's views on this recommendation and what action is being proposed or undertaken?</p>
2.	<p>In its Annual Report 2006 at p43, the SAT made the following observations regarding section 37 of the SAT Act:</p> <p><i>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.</i></p> <p>Does the EPA agree with the suggestion? Why/why not?</p>
<p>Proposed Questions regarding the Jurisdiction of the SAT</p>	
3.	<p>What is the EPA's view on the suggestion that the SAT's jurisdiction be expanded to include a merits review of decisions made under Parts IV [environmental impact assessment] and V [environmental regulation] of the <i>Environmental Protection Act 1986</i>?</p>
4.	<p>The Committee notes that the <i>Western Australian Civil and Administrative Review Tribunal Taskforce Report on the Establishment of the State Administrative Tribunal</i> (May 2002) recommended, for reasons set out at pages 66 and 110 to 112, that pollution control matters under Part V of the <i>Environmental Protection Act 1986</i> should be determined by SAT and that all other matters under that Act should remain subject to Ministerial appeal. In particular, the Taskforce said at page 111 that it is "appropriate for an independent and impartial review mechanism to be available in respect of Part V pollution control matters".</p>

	What is the EPA's view on transferring Ministerial appeals under only Part V of the <i>Environmental Protection Act 1986</i> to the SAT?
5.	If the SAT's jurisdiction is expanded to include appeals under the <i>Environmental Protection Act 1986</i> , what views would the EPA have with regard to third party rights of appeal? Specifically, please identify any changes that may occur to current rights of appeal with the transfer of jurisdiction to the SAT.
6.	Are there any other issues/matters relevant to this inquiry which EPA wishes to address? If so, please provide additional comment.