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Our Ref: SAT final sub 7 Sep 07  
Your Ref:

Hon Graham Giffard MLC  
Chair  
Standing Committee on Legislation  
Legislative Council  
Parliament House  
PERTH WA 6000

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7 September 2007

Dear Committee

**Inquiry into the Jurisdiction and Operation of the SAT**  
**Joint submission by the EDO and the Conservation Council**

I write, on behalf of both the Environmental Defender's Office (EDO) and the Conservation Council of WA, concerning your inquiry into the jurisdiction and operation of the State Administrative Tribunal (SAT). We thank you for the opportunity to make a submission, and apologise for its relative brevity, but both organisations are currently thinly stretched across a variety of issues of importance to our respective constituencies.

Thank you also for the short extension to the submission due date.

### *Trial use of SAT for EP Act Part V appeals*

We submit that, as originally recommended by the taskforce headed by Michael Barker QC (as he then was) before the introduction of the SAT<sup>1</sup> (“the Barker taskforce”), appeals under Part V of the *Environmental Protection Act 1986* (EP Act) (see the types of decisions below) should be dealt with by the SAT rather than the Minister for the Environment (via the Appeals Convenor), as is currently the process.

For clarity, all of the following Part V decisions are currently the subject of appeals to the Minister, and we submit that all should instead be dealt with by the SAT on a trial basis:

- the grant or refusal of clearing permits;<sup>2</sup>
- the conditions of clearing permits;<sup>3</sup>
- the amendment, revocation or suspension of a clearing permit;<sup>4</sup>
- the grant or refusal of a works approval or pollution licence;<sup>5</sup>
- the conditions of a works approval or pollution licence;<sup>6</sup>
- the amendment, revocation or suspension of a works approval or pollution licence;<sup>7</sup>  
and
- the refusal to transfer a works approval or pollution licence.<sup>8</sup>

The rights accorded to different parties about the above decisions are currently inappropriately varied, however; see further below.

We make this submission having conducted some preliminary discussions with our respective constituent groups, and in particular key people we know to be regular participants in Part V appeals. As we do not consider that we have fully canvassed the views of our respective memberships (and the broader conservation sector) about such a change, however, and in view of the significance of such a change from the point of view of the conservation sector, we recommend that the SAT adopt this additional jurisdiction on a trial basis for an initial period of two years.

We consider that the SAT should be trialled in this area for the following key reasons:

- independent, impartial review is necessary to ensure good decision-making, and therefore the SAT model should be preferred unless there is a compelling reason not to adopt that approach;<sup>9</sup>

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<sup>1</sup> *Western Australian Civil and Administrative Review Taskforce Report on the Establishment of the State Administrative Tribunal* (2002), in particular at 66 [23] and 111 [147].

<sup>2</sup> Section 101A of the EP Act.

<sup>3</sup> Section 101A of the EP Act.

<sup>4</sup> Section 101A of the EP Act.

<sup>5</sup> Section 102 of the EP Act.

<sup>6</sup> Section 102 of the EP Act.

<sup>7</sup> Section 102 of the EP Act.

<sup>8</sup> Section 102 of the EP Act.

- respectfully adopting the view of the Barker taskforce. “there is no sufficient reason why the Ministerial appeal system in relation to pollution control matters under Part V of the [EP 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,”<sup>10</sup> and
- it has subsequently been observed, and with respect we also adopt the view, that there “does not seem to be any reason” to treat clearing permits (which did not exist when the Barker taskforce reported) differently to other Part V matters.<sup>11</sup>

Part IV matters however were recommended by the Barker taskforce to remain with the Minister for the Environment, on the basis that such decisions “require the exercise of political or policy judgment by the Government of the day”,<sup>12</sup> and we respectfully support that view.

We would very much wish to be consulted as to the precise form a trial should take, if the Committee was to recommend it, but for now have the following thoughts about the proposed process and operation of the SAT in this area:

- the application form should be as simple and user-friendly as possible;
- the appellant should only be required to provide the identification number of the relevant permit, works approval or licence, and no other supporting documentation, as supporting documentation will be readily available from the Department of Environment and Conservation, who currently provide that information to the Appeals Convenor;
- the appellant should not need to file their application in triplicate;<sup>13</sup>
- the appellant should be able to lodge the form with the SAT and notify the DEC by way of a single postal address, physical location, fax number<sup>14</sup> or email address<sup>15</sup> (i.e. the applicant should not be required to separately serve the document on the DEC after lodging it with the SAT<sup>16</sup>);

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<sup>9</sup> *Western Australian Civil and Administrative Review Taskforce Report on the Establishment of the State Administrative Tribunal* (2002), at 66 [25].

<sup>10</sup> *Western Australian Civil and Administrative Review Taskforce Report on the Establishment of the State Administrative Tribunal* (2002), at 66 [23].

<sup>11</sup> Parry D, *Reform of Community / Third Party Rights to the Courts in Environmental Matters: The State Administrative Tribunal Model*, (2005), presentation for an EDO seminar as part of Law Week, at page 2 (footnote 1).

<sup>12</sup> *Western Australian Civil and Administrative Review Taskforce Report on the Establishment of the State Administrative Tribunal* (2002), at 67 [27] (see also 67 [28] and 106 [137]).

<sup>13</sup> Unless the lodgment is by email (see further note 15), this will require a change to Rule 4(4) of the State Administrative Tribunal Rules (SAT Rules).

<sup>14</sup> To ensure fax lodgment is one of the available options currently requires the prior approval of the executive officer (SAT Rules 4(2) and 5), which presumably could be done on a general basis for all Part V appeals.

<sup>15</sup> To ensure email lodgment is one of the available options currently requires the prior approval of the executive officer (SAT Rules 4(3) and 6), which presumably could be done on a general basis for all Part V appeals.

<sup>16</sup> This would seem not to require a change to section 45(1) of the *State Administrative Tribunal Act 2004* (SAT Act), because either the executive officer could make a standing undertaking to notify other parties (as would be permissible under section 45(2)(a) of the SAT Act) or the SAT could exempt Part V proceedings from such a requirement (see section 45(2)(c) of the SAT Act). SAT Rules 4(6) and 26 would need to be amended (although note the Rule 27 exemption the SAT Act section 45(2)(c) approach was taken, however).

- all such appeals should be subject to standard, ‘default’ directions, whereby there is no requirement for the applicant to attend directions hearings<sup>17</sup> and where the appellant may, but need not, make oral (as distinct from written) submissions;
- appeals should cost no more than they do currently (i.e. free in the case of appeals relating to clearing permits, and \$50 for appeals relating to works approvals and pollution licences); and
- further to the above, and in keeping with current SAT practice, the SAT should not be able to make costs orders against the appellant unless the appeal was frivolous or vexatious, the proceedings were used for an improper purpose, or the proceedings were otherwise an abuse of process.<sup>18</sup>

We note regarding the above that the main objectives of the SAT include “to act as speedily and with as little formality and technicality as is practicable, and minimise the costs to the parties.”<sup>19</sup> One such way of achieving this in the context of relatively minor clearing, works approvals or pollution licence matters, will be the opportunity for the appellant to elect to have the matter dealt with solely on the basis of documents tendered, and without the need for witnesses.<sup>20</sup>

#### *Legislative changes as part of the trial*

As part of the move to a trial SAT system with the above attributes, the Government should take the opportunity to address some inequities in the current approach to many of the Part V decisions, a problem we alluded to above. Specifically, we strongly submit:

- any person should be able to appeal against the grant of a works approval, not just the conditions of that approval; and
- any person should be able to appeal against the grant of a pollution licence, not just the conditions of that licence.

We note, in relation the above, the lack of logic in the current EP Act where, for example, any person can appeal a refusal by the EPA to assess a proposal under Part IV, but such persons (i.e. persons other than applicants) are only able to appeal either the refusal to grant, or the conditions of, a works approval, but cannot appeal the grant of a works approval.<sup>21</sup> Further, this approach is inexplicably different to the way Part V deals with clearing permits, in which context any person can generally appeal the grant of a permit.<sup>22</sup>

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<sup>17</sup> We acknowledge that this proposal may require a change to section 48(1)(f) of the SAT Act.

<sup>18</sup> See sections 47, 48, 87 and 88 of the SAT Act.

<sup>19</sup> Section 9 of the SAT Act 2004.

<sup>20</sup> See sections 60(2) and 93(4) of the SAT Act.

<sup>21</sup> Section 102(3) of the EP Act.

<sup>22</sup> Section 101A(4) of the EP Act. Note however that persons other than the applicant cannot appeal the grant of a clearing permit after an undertaking by the applicant, which is an anomaly that should also be removed; see section 101A(5).

### *The operation of the SAT in planning appeals*

#### *Informality etc*

We note, and strongly support, the fact that the SAT:

- is generally subject to the requirement to afford parties natural justice;<sup>23</sup>
- is not bound by the rules of evidence;<sup>24</sup>
- may inform itself on any matter as it sees fit;<sup>25</sup> and
- is to act according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms.<sup>26</sup>

#### *Planning matters*

In applications for review other than planning matters,<sup>27</sup> the SAT can order the joinder of a party if it 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.<sup>28</sup>

It is illogical that the SAT should not have the above powers for planning matters. We acknowledge that the SAT has the power to allow third parties, such as neighbours and residents' groups, to intervene,<sup>29</sup> but such an approach has the effect of not putting the input of those third parties on an equal footing with the interests of the developer and the local government. Although still technically a party,<sup>30</sup> 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 position contended for by one or other of the parties to the proceedings and will not be permitted to expand the issues to be decided: ***Hocking v The Southern Greyhound Racing Club Inc*** (1993) 61 SASR 213 at 216 per King CJ (who also provides a useful history of the concept of intervention) and at 221 per Debelle J; ***News Ltd*** at [9] per Gleeson CJ and [135] per Kirby J;<sup>31</sup> and

<sup>23</sup> Section 32(1) of the SAT Act.

<sup>24</sup> Sections 32(2)(a) and 32(3) of the SAT Act.

<sup>25</sup> Section 32(4) of the SAT Act.

<sup>26</sup> Section 32(2)(b) of the SAT Act.

<sup>27</sup> See section 243 of the *Planning and Development Act 2005* (PD Act).

<sup>28</sup> Section 38(1) of the SAT Act.

<sup>29</sup> Section 37(3) of the SAT Act.

<sup>30</sup> Section 36(1)(c) of the SAT Act.

<sup>31</sup> *Re the State Administrative Tribunal; ex parte McCourt* [2007] WASCA 125, per Steytler P, and Wheeler and McClure JJA, in a joint judgment, at 21 [41].

- “unlike the case of 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”.”<sup>32</sup>

We would further observe that even the terminology – ‘intervener’ – suggests that the interests of third parties are in fact “second class”.

We note that the SAT has the power to hear submissions from third parties about planning matters, but that power is subject to the third party demonstrating a “sufficient interest”.<sup>33</sup> We strongly submit that the requirement to show that one’s interest is ‘sufficient’ will be unnecessarily restrictive and intimidating, especially for unrepresented litigants.

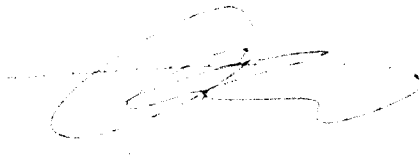
An alternative approach would be to allow the SAT an unrestricted capacity to hear from any third parties that apply for the opportunity to make a submission.<sup>34</sup> If third parties accepted in this way were then defined as ‘parties’ under the SAT Act,<sup>35</sup> any ‘misuse’ of that opportunity could be more than adequately dealt with by the SAT’s broad powers to deal with ‘misbehaving’ parties.<sup>36</sup> If necessary, as with the power to accept interveners, the SAT Act could be amended to clarify that submitters could be accepted “on conditions, if any, that the Tribunal thinks fit.”<sup>37</sup>

As with the suggested EP Act changes, however, the suggested SAT trial presents the opportunity for broader reforms. Taking Part V appeals into the SAT puts into stark relief the difference between most of the EP Act appeal rights (where any person can appeal) and planning appeal rights in all but one local government authority of WA<sup>38</sup> (where only the developer can appeal). We would strongly submit that third party planning appeal rights be introduced in WA, as we are the only jurisdiction in Australia without them.<sup>39</sup>

#### ***Further comment***

It has been suggested by one of our constituents, and we recommend, that the State Government might minimise the matters that get to SAT in the first place if local government councillors were trained in planning law and the role of the SAT.

Yours sincerely



For: Cameron Poustie, Principal Solicitor, EDO and  
Chris Tallentire, Director, Conservation Council

<sup>32</sup> *Re the State Administrative Tribunal; ex parte McCourt* [2007] WASCA 125, per Steytler P, and Wheeler and McClure JJA, in a joint judgment, at 22 [43].

<sup>33</sup> Section 242 of the PD Act.

<sup>34</sup> Which would require a change to section 242 of the PD Act.

<sup>35</sup> Which, it would seem, require both a change to section 242 of the PD Act, and a change to either section 237 of the PD Act or section 36(1) of the SAT Act.

<sup>36</sup> See sections 46, 47, 48, 87 and 88 of the SAT Act.

<sup>37</sup> See section 37(3) of the SAT Act.

<sup>38</sup> Namely, the former Shire of Albany’s TPS 3, administered along with the former Town of Albany’s TPS 1A by the City of Albany.

<sup>39</sup> See <http://www.edowa.org.au/newsletters/200706Newsletter.pdf> at page 1.