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18 December 2020

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To whom it may concern,

**Waste Not, Want Not: Valuing Waste as a Resource Discussion Paper and Proposed Legislative Framework for Waste-Derived Materials - Submissions**

Set out below are the submissions made on behalf of the West Australian division of the National Environmental Law Association (**NELA(WA)**) regarding the discussion paper titled 'Waste Not, Want Not: Valuing Waste as a Resource' (**Discussion Paper**) and the proposed legislative framework for waste-derived materials (**proposed framework**).

We hosted a webinar with the Waste Management & Resource Recovery Association Australia on 7 October 2020 on "Construction and Demolition Products: Challenges and Opportunities in Western Australia". These submissions build on the discussions in this webinar.

**About NELA**

NELA is Australia's only national, multi-disciplinary, member-based association focused on environmental law and sustainability. NELA serves the needs of practitioners in law, planning, natural resources and environmental science and management. NELA obtains and exchanges information on issues relevant to environmental law and policy.

One of NELA's objectives is to provide a forum for and otherwise assist in the discussion, consideration and advancement of environmental law among the legal profession and the wider community.

**Executive Summary**

NELA(WA) submits that the proposed framework for waste-derived materials should:

1. Amend the definition of 'waste' to clarify that it includes waste-derived materials except where they are covered by a waste-derived material determination (**WDM determination**).
2. Address various issues with WDM determinations including:
  - a. the matters that the CEO must have regard to in making WDM determinations;
  - b. applicability of WDM determinations to recycled material fill;
  - c. use of construction and demolition materials;
  - d. guidance for trials of waste-derived materials; and
  - e. consequences of WDM determinations for clean fill waste.

3. Provide ‘interested persons’ with rights to appeal to the State Administrative Tribunal in relation to:
  - a. decisions of the CEO to grant, refuse, amend, suspend and revoke WDM determinations; and
  - b. conditions included in WDM determinations.

These submissions do not concern any aspect of the Discussion Paper which NELA(WA) agrees with or supports.

## **Background**

There is a strong appetite for increasing the recovery of materials and decreasing waste in Western Australia, for example through the increased uptake and acceptance of recycled construction and demolition products.

The Discussion Paper outlines the Department of Water and Environmental Regulation’s (**Department**) proposed framework for waste-derived materials to meet the objectives of the *Waste Avoidance and Resource Recovery Strategy 2030*. This includes various legislative reforms and improvements to the existing waste management and waste levy legislative frameworks. Feedback on the proposed framework is sought from the public.

## **Amend Definition of ‘Waste’**

The Discussion Paper and proposed amendments seek to amend the definition of ‘waste’ in the *Environmental Protection Act 1986 (WA) (EP Act)* and the *Waste Avoidance and Resource Recovery Act 2007 (WA) (WARR Act)* to clarify that waste-derived materials are waste unless they are used in accordance with all of the conditions of a relevant WDM determination made by the CEO. If material is considered to be ‘waste’ then this will trigger the application of licensing and potentially waste levy requirements to waste-derived materials.

NELA(WA) supports the amendment of the definition of waste to address waste-derived materials but submits that the definition could be improved by expressly excluding waste-derived material that is covered by a WDM determination from the definition of ‘waste’. In particular, NELA (WA) submits that the definition of ‘waste’ should be amended as follows (proposed amendments are bolded):

*waste* includes matter:

- a) whether liquid, solid, gaseous or radioactive and whether useful or useless, which is discharged into the environment; or
- b) prescribed by regulations to be waste,

*but does not include:*

*c) matter that is used in accordance with all of the conditions of either a relevant:*

*(i) general WDM determination made by the CEO; or*

*(ii) case-by-case WDM determination made by the CEO.*

## **Address Issues with WDM Determinations**

NELA(WA) submits that the proposed framework needs to address the following issues in relation to WDM determinations.

### ***Matters that the CEO must have regard to in making WDM determinations***

The Discussion Paper states that in deciding whether or not to issue a WDM determination, the CEO must consider whether “there is an established (genuine) market or use (or there is evidence supporting creation of a market or use) for the material and its diversion from landfill is not speculative”. NELA(WA) does not support this requirement as it may inhibit innovation in relation to the development and use of new waste-derived materials where no established market exists. It is also unclear what type of evidence is required to support the creation of a market or use for waste-derived materials.

### ***Applicability of WDM determinations to recycled material fill***

Table 1 of the Discussion Paper suggests that the CEO can make a general WDM determination for treated acid sulfate soils that will be used as fill. NELA(WA) submits that the proposed framework should clarify whether the CEO can make a general WDM determination for recycled material fill, such as recycled fill sand.

### ***Use of construction and demolition waste***

The Discussion Paper sets out some examples of commonly used waste-derived materials and their uses. NELA(WA) submits that the proposed framework should specify that the use of construction and demolition waste is not limited to road base and drainage rock, but could also include, where suitable:

- (a) fill or to contour land; and
- (b) recycling concrete into aggregate material included but not limited to foundations, pathways and bridges.

### ***Guidance for trials of waste-derived material***

The Discussion Paper also suggests that DWER will publish guidance on the evidence required to demonstrate that the proposed trial of waste-derived material addresses the matters the CEO must have regard to in making a WDM determination. NELA(WA) submits that it should be clarified how and when this guidance will be developed and published and if it will be the same as a general WDM determination.

### ***Consequences for clean fill premises***

NELA(WA) submits that the proposed framework should clarify when waste recycling facilities and development sites that use waste-derived materials or accept such materials on site (and no longer attract the waste levy or require a licence for those materials) will be considered ‘clean fill premises’.

This could be achieved through amendments of the definitions of ‘clean fill premises’ in the *Environmental Protection Regulations 1987 (WA)* and ‘clean fill’ and ‘uncontaminated fill’ in the *Landfill Waste Classification and Waste Definitions 1996 (Waste Definitions)* to recognise that materials that are covered by WDM determinations are no longer ‘waste’.

### **Appeal Rights**

The Discussion Paper proposes a process for ‘interested persons’ to appeal the CEO’s decision to amend, suspend or revoke general or case-by-case WDM determinations. NELA(WA) submits that these appeal rights should also be extended to decisions of the CEO to grant or refuse WDM determinations.

The Discussion Paper also provides that appeals may be made against conditions included in WDM determinations but does not specify whether these appeals can only be applicant or also by ‘interested persons’. NELA(WA) submits that the proposed framework should provide that ‘interested persons’ can appeal conditions included in WDM determinations, to be consistent with the EP Act.

Further, it is the view of NELA(WA) that appeals of decisions made under the EP Act, including in relation to WDM determinations, should be transferred to the State Administrative Tribunal, rather than the Minister for Environment (through the Appeals Convenor). This submission is made on the basis that transferring appeals of certain decisions to the SAT would:

- increase transparency and public confidence;
- develop environmental jurisprudence, resulting in more consistent and better quality decisions; and
- remove the multiplicity of roles currently played by the Minister for Environment in determining appeals.

Please see parts 2, 3 and 4 of the **enclosed** position paper for more detail on NELA(WA)’s submissions in relation to appeals.

Please contact me if you have any questions in relation to the above submissions.

Yours sincerely

**Sarah Flynn and Ruby Hamilton**  
**Co-Secretaries**  
National Environmental Law Association (WA Chapter)



**NATIONAL ENVIRONMENTAL LAW  
ASSOCIATION OF WESTERN AUSTRALIA**

**POSITION PAPER: REFORMING APPEAL  
RIGHTS IN PLANNING AND ENVIRONMENTAL  
LAW**



## TABLE OF CONTENTS

<b>1. <u>THIRD PARTY APPEAL RIGHTS UNDER THE PD ACT</u></b> .....	<b>4</b>
1.1 BACKGROUND.....	4
1.2 CURRENT THIRD PARTY APPEAL RIGHTS OF PLANNING DECISIONS IN AUSTRALIA.....	5
1.3 FIGURE 1: THIRD PARTY APPEAL RIGHTS THROUGHOUT AUSTRALIA.....	5
1.4 THE WESTERN AUSTRALIAN CONTEXT .....	7
1.5 ARGUMENTS FOR THIRD PARTY APPEAL RIGHTS.....	7
1.6 ARGUMENTS AGAINST THIRD PARTY APPEAL RIGHTS .....	8
1.7 CONCLUSION .....	9
<b>2. <u>MINISTERIAL APPEALS UNDER THE EP ACT</u></b> .....	<b>9</b>
2.1 <b>PART V: ENVIRONMENTAL REGULATION</b> .....	<b>10</b>
2.1.1 DETERMINATIONS OF APPEALS IN RELATION TO PART V DECISIONS.....	11
2.1.2 CONTEMPORARY CRITICISM OF THE MINISTERIAL APPEALS SYSTEM .....	12
2.1.3 ARGUMENTS FOR REFORM UNDER PART V .....	12
2.1.4 ARGUMENTS AGAINST REFORM UNDER PART V .....	13
2.2 <b>PART IV: ENVIRONMENTAL IMPACT ASSESSMENT</b> .....	<b>14</b>
2.2.1 SCRUTINY OF THE EIA PROCESS AND APPEALS UNDER PART IV .....	15
2.2.2 ARGUMENTS FOR REFORM UNDER PART IV .....	16
2.2.3 ARGUMENTS AGAINST REFORM UNDER PART IV .....	17
2.3 <b>CONCLUSION</b> .....	<b>18</b>
<b>3. <u>THE CALL FOR AN ENVIRONMENTAL COURT OR TRIBUNAL</u></b> .....	<b>18</b>
3.1 <b>EXISTING ENVIRONMENTAL COURTS IN AUSTRALIA</b> .....	<b>19</b>
3.1.1 NEW SOUTH WALES: LAND AND ENVIRONMENT COURT .....	19
3.1.2 SOUTH AUSTRALIA: ENVIRONMENT RESOURCES AND DEVELOPMENT COURT.....	19
3.1.3 QUEENSLAND: PLANNING AND ENVIRONMENT COURT AND LAND COURT .....	19
3.2 <b>EXISTING ENVIRONMENTAL TRIBUNALS IN AUSTRALIA</b> .....	<b>20</b>
3.2.1 VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL .....	20
3.2.2 AUSTRALIAN CAPITAL TERRITORY CIVIL AND ADMINISTRATIVE TRIBUNAL .....	21
3.2.3 RESOURCE MANAGEMENT AND PLANNING APPEAL TRIBUNAL OF TASMANIA.....	21
3.3 <b>MODELS AND CHARACTERISTICS OF ECTs</b> .....	<b>21</b>
3.3.1 IDEAL CHARACTERISTICS OF ECTs .....	21
3.3.2 MODELS OF ECTs.....	22
3.4 <b>KEY ARGUMENTS FOR A SPECIALIST ENVIRONMENTAL COURT</b> .....	<b>23</b>
3.5 <b>KEY ARGUMENTS AGAINST A SPECIALIST ENVIRONMENTAL COURT</b> .....	<b>24</b>
3.6 <b>IDEAL VERSUS REALISTIC: EXPANDING THE SAT'S JURISDICTION</b> .....	<b>24</b>
3.7 <b>CONCLUSION</b> .....	<b>25</b>
<b>4. <u>RECOMMENDATIONS</u></b> .....	<b>25</b>
4.1 <b>THIRD PARTY APPEAL RIGHTS UNDER THE PD ACT</b> .....	<b>25</b>
4.2 <b>APPEALS UNDER THE EP ACT</b> .....	<b>26</b>
4.3 <b>THE CALL FOR AN ENVIRONMENTAL COURT OR TRIBUNAL</b> .....	<b>26</b>



## GLOSSARY OF TERMS

<b>CEO</b>	Chief Executive Officer of the DWER
<b>DAF Guidelines</b>	Development Assessment Forum Guidelines
<b>DAP</b>	Development Assessment Panel
<b>DWER</b>	Department of Water and Environmental Regulation
<b>ECTs</b>	Environmental Courts and Tribunals
<b>EIA</b>	Environmental Impact Assessment
<b>EP Act</b>	<i>Environmental Protection Act 1986 (WA)</i>
<b>EPA</b>	Environmental Protection Authority
<b>Ministerial Appeal System</b>	System of review of decisions under Parts IV and V of the EP Act
<b>NELAWA</b>	National Environmental Law Association of Western Australia
<b>PD Act</b>	<i>Planning and Development Act 2005 (WA)</i>
<b>SAT</b>	State Administrative Tribunal
<b>SAT Act</b>	<i>State Administrative Tribunal Act 2004 (WA)</i>
<b>VCAT</b>	Victorian Civil and Administrative Tribunal
<b>WAPC</b>	Western Australian Planning Commission



## EXECUTIVE SUMMARY

This paper responds to feedback received from members of the National Environmental Law Association of Western Australia (**NELAWA**) following the NELAWA State Conference 2017. A number of members expressed interest in NELAWA preparing a discussion paper further examining the issues raised at that conference regarding appeal rights in Western Australia's planning and environmental laws, specifically:

1. third party appeal rights under the *Planning and Development Act 2005* (WA) (**PD Act**);
2. Ministerial appeals under the *Environmental Protection Act 1986* (WA) (**EP Act**); and
3. the call for a specialist environmental court or tribunal in WA.

This paper presents a background to each of these topics and considers arguments for and against reform. The paper concludes that reform of appeal rights in WA's planning and environmental laws is necessary, appropriate and long overdue. In summary, NELAWA makes the following recommendations for reform:

1. the PD Act should be amended to give third parties the right to initiate review proceedings and to apply to be joined as parties to existing review proceedings; and
2. appeals of decisions made under Parts IV and V of the EP Act should be heard and determined by the State Administrative Tribunal (**SAT**), except for appeals in relation to conditions or procedures in a Ministerial Statement.

These recommendations are set out in further detail in Part 4 of this paper.

## 1. THIRD PARTY APPEAL RIGHTS UNDER THE PD ACT

### 1.1 Background

There are no third party appeal rights under the PD Act. This is a unique feature of WA's planning system. In the past, some local governments allowed for third party appeals through provisions in their planning schemes. The last local government to allow third party appeal rights was the City of Albany, which removed the relevant provisions from its town planning scheme in 2014 pursuant to a requirement of the then Minister for Planning.<sup>1</sup>

The SAT provides limited opportunities for third party participation in planning matters. These opportunities include: (1) being called as a witness; (2) making submissions under section 242 of the PD Act; (3) intervening under section 37(3) of the *State Administrative Tribunal Act 2004* (WA) (**SAT Act**); and (4) possible participation in mediation.<sup>2</sup> The limited rights of third party participation set out above cannot be properly characterised as third party appeal rights, particularly given the restriction on third parties to initiate a review of a planning decision.

The last decade has seen the following significant changes to the State's planning system:

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<sup>1</sup> The removal of third party appeal rights was required to gain approval from the Minister for Planning to advertise amendments to the City of Albany's local planning scheme. See meeting minutes from 12 February 2012.

<sup>2</sup> State Administrative Tribunal, *Info Sheet 6 - Third party participation in planning matters*, 1.



- the establishment of the Metropolitan Redevelopment Authority;
- changes to structure planning processes and the legislative status of structure plans;
- changes to section 76 of the PD Act to give the Minister for Planning the power to require a local government to prepare or adopt an amendment to a local planning scheme;
- the introduction of Development Assessment Panels (**DAPs**); and
- the introduction of ‘Deemed Provisions’ for local planning schemes in the *Planning and Development (Local Planning Schemes) Regulations 2015*.

The cumulative effect of these changes is an increasing centralisation of planning decision-making and the shifting of power away from local government. Consequently, there has been a renewed focus on the rights of third parties in planning decision-making and a re-agitation of the arguments for third party appeal rights.

### 1.2 Current third party appeal rights of planning decisions in Australia

Third party appeal rights of planning decisions in Australia vary from jurisdiction to jurisdiction. In 1998, the Development Assessment Forum (**DAF**) was established to serve as an advisory body to the Federal Government. In March 2005, the DAF published its *Leading Practice Model for Development Assessment*, which outlines 10 ‘practices’ for an effective and simple approach to development assessment in Australia.<sup>3</sup>

Practice number 10, which relates to third party appeals, provides that ‘opportunities for third-party appeals should not be provided where applications are wholly assessed against objective rules and tests’, but goes on to state that ‘opportunities for third-party appeals may be provided in limited other cases’.<sup>4</sup> This practice attempts to limit reviews where an objective criteria has been set and opportunity for participation has been provided with respect to those criteria. The authors understand an assessment against objective rules and tests does not include circumstances where the decision maker is required to exercise discretion. In circumstances where objective rules and tests are not established, third party appeal rights may be appropriate.

The table below outlines the status of third party appeal rights in different jurisdictions around Australia.

### 1.3 Figure 1: Third party appeal rights throughout Australia

State	Scope of third party appeal rights	Impact and limitations
NSW	Third parties can appeal the grant of development consent for a ‘designated development’ (.) <sup>5</sup> Designated developments are those with high impacts, e.g. cement works and coalmines.	Limited to individuals / organisations who lodged submissions objecting to development during exhibition period. Must be within 28 days of approval.
VIC	Third parties must lodge objection within advertised period. Anyone can lodge objection, do	For 2014/2015 4% (2,292) of development application had a review

<sup>3</sup> Development Assessment Forum, *A Leading Practice Model for Development Assessment in Australia* (Practice Model, Planning Institute Australia, March 2005).

<sup>4</sup> Ibid, 3.

<sup>5</sup> A development listed under the relevant regulations: New South Wales Department of Planning and Environment, *Fact Sheet: Appeal Rights* (January 2016) 3-4.



State	Scope of third party appeal rights	Impact and limitations
	not need a personal right affected. May object on public interest grounds. If no objection, the VCAT has discretion to allow / dismiss application. Party must seek leave for their application to be heard as to why no objection was lodged. <sup>6</sup>	lodged with VCAT. <sup>7</sup> Third party appeals accounted for 19% of VCAT cases. <sup>8</sup> Application must be lodged within 21 days of decision.
SA	The right of appeal against the decision by a relevant authority is available only to third parties who made a representation to the relevant authority on a Category 3 development. <sup>9</sup> Appeals must be lodged within 15 days of the relevant decision. No late appeals except by leave of the court in exceptional circumstances.	Approximately 200 appeals are lodged per year with the ERD Court, of which 78% are resolved without going to a full hearing. <sup>10</sup>
QLD	Modelled on DAF guidelines. Limited to development applications that require public notification. Third party must have made submission during notification period. <sup>11</sup>	In 2016/2017, 95% cases were finalised without going to hearing. <sup>12</sup>
TAS	Requires the third party to have lodged an objection within the 14 day advertising period. Appeal must be lodged within 14 days from the relevant decision. Only applies to 'discretionary' applications. <sup>13</sup> Applications which trigger public notification and indicate more significant development are 'discretionary'.	Planning appeals higher than other jurisdictions of the tribunal: 150 of 176 in 2012/13, 117 of 135 in 2013/14 and 101 of 118 in 2014/15. Number of appeals brought by third parties is unknown.
NT	Third parties to make submissions during 14-day exhibition period. Usually limited to land in residential zone / adjacent to / opposite residential zone. <sup>14</sup>	No information available.
ACT	Modelled on DAF guidelines. Only available for 'merit' or 'impact track' <sup>15</sup> applications which went through major notification process unless exempt by regulation.	Third parties must lodge appeals within 4-weeks of relevant decision.

<sup>6</sup> Environmental Justice Australia, *Appeals Kit: A guide to running a case in the Planning and Environment List of the Victorian Civil and Administrative Tribunal* (July 2007) 8.

<sup>7</sup> WALGA, 'Third Party Appeal Rights in Planning' (Discussion Paper, May 2017) 7.

<sup>8</sup> Joe Hurley, N Cook and E Taylor, 'Examining three planning pathways in the mediation of resident opposition to compact city' (Paper presented at State of Australian Cities National Conference, Sydney, November 2013) 4.

<sup>9</sup> WALGA, above n 7, 7: Category 3 developments must be advertised to the general public, notice must be given to adjacent land owners and occupiers and it must be considered by the relevant authority.

<sup>10</sup> Ibid, 6.

<sup>11</sup> Queensland Department of Infrastructure, *An overview of the Development Assessment Rules* (October 2016).

<sup>12</sup> Christine Trenorden, 'Access to Justice for ESD in Western Australia: Whether 'tis nobler to establish an Environment Court' (Paper presented at NELAWA Annual Conference, Perth, September 2017) 6.

<sup>13</sup> WALGA, above n 7, 6.

<sup>14</sup> Northern Territory Government, *Review of planning decisions - Development One Stop Shop: applications and processes* (28 November 2017).

<sup>15</sup> Applications which can be assessed using objective rules and test rules, specifically the criteria in the code that applies to the proposal or relevant environmental impact statements: WALGA, above n 7, 7.



## 1.4 The Western Australian Context

Third parties in WA have historically lacked the ability to challenge a planning decision on its merits with the consequence that affected parties are required to seek recourse through the Supreme Court as a matter of judicial review. Since coming into power in 2017, the current State Government has not published any policy confirming its position with respect to third party appeal rights. However, in November 2017, the Minister for Planning announced a broader review of WA's planning system that will respond to, among other things, community concerns about the transparency and accountability of DAPs and the need for community participation.

The following arguments are most relevant to the discussion of third party appeals of planning decisions in WA. They are not listed in order of importance or priority.

### 1.5 Arguments for third party appeal rights

#### (a) Public participation and improved decision making

Decision making, particularly in the land use and planning context, is improved by increased public input and participation. Third party appeal rights will improve the planning process by increasing scrutiny of decision-makers and providing opportunity for decision-makers to incorporate local knowledge.<sup>16</sup>

#### (b) Incentive for increased consultation

Third party appeal rights can also increase the incentive for developers to engage with affected communities and make reasonable efforts to incorporate feedback into the development design.<sup>17</sup> This is particularly important for planning proposals determined by DAPs, where local government representatives do not have the power to determine applications.

#### (c) Increased scrutiny and improved transparency

The ability for third parties to seek review by an independent body helps ensure decisions are consistent. Expanding appeal rights to third parties increases the scrutiny of decision-makers, the decision-making process and the decision itself. This improves transparency and discourages corrupt behaviour.<sup>18</sup>

#### (d) Engaging with impacted parties with legitimate interests

Third party appeal rights enable impacted neighbouring landowners, occupiers and affected members of the community to engage with decisions impacting the amenity, infrastructure and property values of their neighbourhood. The right to appeal afforded to applicants should also extend to third parties as a matter of maintaining equity and ensuring all stakeholders are treated on an equal footing.<sup>19</sup>

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<sup>16</sup> Ellis, Geraint, 'Third Party Appeals: Pragmatism and principle' (2006) 7(3) *Planning Theory and Practice* 330, 337-338.

<sup>17</sup> Willey, Stephen, 'Planning Appeals: Are Third Party Rights Legitimate? The Case Study of Victoria, Australia' (2006) 24(3) *Urban Policy and Research* 369, 383.

<sup>18</sup> Ibid, 384; Trenorden, above n 12, 12-13.

<sup>19</sup> Ibid, 382 - 383; Ellis, above n 16, 340-341; Trenorden, above n 12, 12-13.



## 1.6 Arguments against third party appeal rights

### (a) Increased cost and delays

Perhaps the most commonly cited concern is that the introduction of third party appeal rights will lead to increased cost and delays to the planning assessment process. A related concern is the prospect that some third parties may lodge appeals for an ulterior purpose rather than because of objections on planning grounds. This may include seeking review on the basis of commercial interests or commencing vexatious proceedings. Delays are said to result in uncertainty, increased cost and may act to hinder investment and economic activity.<sup>20</sup>

However, it is important to acknowledge that third party appeals of planning decisions are limited to judicial review proceedings in WA's current system. The cost and delays associated with judicial review proceedings are significant and generally exceed merits review proceedings by a large margin. One function of third party appeal rights is the reduced need for third parties to pursue the judicial review option. This suggests the impacts of third party appeal rights on time and costs, when weighed against the present system, may be overstated.

### (b) Further limiting the role of local government

The appeal process in general has been said to limit the role of local government by allowing the decisions of locally elected representatives to be overturned. This would be exacerbated by the introduction of third party appeal rights, which would broaden the ability to challenge local government decisions.

### (c) Legitimate interests and the traditional view of appeal rights

The traditional view of appeal rights is that only those persons with a direct interest in a planning proposal, specifically proponents and landowners, should be given the right to appeal. The basis for this view is that landowners should not be inhibited in the lawful use of their land. It follows that third parties, without this direct interest, should not be given the ability to frustrate the planning process, particularly if those parties are opposed to a particular development on non-planning grounds.<sup>21</sup>

This perspective has arguably been supplanted by more contemporary perspectives which recognise the public interest implications of planning decisions and acknowledge that planning is a public system which serves a wider range of interests than just direct proprietary interests.<sup>22</sup>

### (d) Sufficient existing opportunities to participate

It is argued that proactive public engagement in policy formation is preferable to challenging individual decisions as this can focus citizens on higher order engagement and provide greater certainty in process

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<sup>20</sup> Willey, above n 17, 380; Ellis, above n 16, 340.

<sup>21</sup> Willey, above n 17, 379.

<sup>22</sup> See discussion around utilitarianism and public interest in Willey, above n 17, 371-373.



and outcome. Further, early engagement in policy and strategic planning is said to be more collaborative compared to the adversarial nature of third party appeals.<sup>23</sup>

## 1.7 Conclusion

NELAWA makes the following recommendations regarding third party appeal rights under the PD Act.

### (a) The right for third parties to initiate proceedings<sup>24</sup>

(1) The PD Act should be amended to give third parties, who have previously made submissions about or objected to a planning proposal, a right to initiate an application for a SAT review of a decision to: (a) approve the planning proposal; (b) impose conditions on the approval of the planning proposal; (c) refuse the planning proposal; and (d) amend, revoke or suspend an existing approved planning proposal.

(2) The PD Act should be amended to specify that the rights of third parties to initiate review proceedings are limited to a planning proposal that: (a) directly affects the third party which made the submissions or objection; or (b) is a matter of public interest.

### (b) The right for third parties to be joined as parties to existing proceedings<sup>25</sup>

(3) The PD Act should be amended to give third parties, who have previously made submissions about or objected to a planning proposal, a right to apply to join as parties to any existing review proceedings regarding a decision in relation to the relevant planning proposal.

(4) The PD Act should be amended to specify that the rights of third parties to be joined as parties to existing review proceedings are limited to a planning proposal that: (a) directly affects the third party which made the submissions or objection; or (b) is a matter of public interest.

(5) Statutory guidelines should be published setting out the procedures for third party participation in proceedings and the extent of their involvement.

## 2. MINISTERIAL APPEALS UNDER THE EP ACT

This part will outline the operation of the appeal provisions in relation to Parts IV and V of the EP Act and consider the key arguments for and against the current system. Certain decisions made under Parts IV and V of the EP Act are subject to a right of review and appeals of these decisions are ultimately determined by the Minister for Environment (**Ministerial Appeals System**). The Ministerial Appeals System is distinct from other jurisdictions in Australia and has been criticised due to concerns that it

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<sup>23</sup> Willey, above n 17, 379; Ellis, above n 16, 341; Hurley et al, above n 8, 4-5.

<sup>24</sup> The authors acknowledge that this suggestion reflects Recommendation 18 made in the Parliament of Western Australia, Standing Committee on Legislation, Report 14, *Inquiry into the Jurisdiction and Operation of the State Administrative Tribunal*, (**Parliament Standing Committee SAT Report**) May 2009, 227.

<sup>25</sup> The authors acknowledge that this suggestion reflects Recommendation 19 made in the Parliament Standing Committee SAT Report, May 2009, 227.



lacks transparency,<sup>26</sup> does not afford natural justice and inhibits the development of jurisprudence to guide future decision-making.<sup>27</sup>

Differences in the Part IV and V processes mean that there may be greater preference for reform to Part V than Part IV. Acknowledging the potential for this outcome, this paper considers appeals of decisions under Parts IV and V separately.

## 2.1 Part V: Environmental Regulation

The CEO of the Department of Water and Environmental Regulation (**DWER**) may make a number of regulatory decisions under Part V of the EP Act, including a decision to:

- permit or refuse to permit the clearing of native vegetation;<sup>28</sup>
- grant or refuse to grant a works approval,<sup>29</sup> or grant a conditional works approval;<sup>30</sup>
- grant or refuse to grant a licence in respect of a prescribed premises;<sup>31</sup>
- amend, revoke or suspend a works approval or a licence;<sup>32</sup>
- issue an environmental protection notice,<sup>33</sup> a closure notice,<sup>34</sup> a vegetation conservation notice,<sup>35</sup> or a prevention notice.<sup>36</sup>

The Minister hears appeals of the decisions outline above under Part VII of the EP Act, specifically appeals against decisions relating to:

- permits to clear native vegetation;<sup>37</sup>
- works approvals and licences;<sup>38</sup> and
- environmental protection notices, closure notices, vegetation conservation notices and prevention notices.<sup>39</sup>

The Appeals Convenor is a statutory position whose purpose is advising the Minister on appeals.<sup>40</sup> In considering an appeal of a Part V decision, the Appeals Convenor will consult with the CEO, the appellant and any person who the Appeals Convenor deems necessary.<sup>41</sup> Following the consultation

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<sup>26</sup> Parliament Standing Committee SAT Report, May 2009, 341.

<sup>27</sup> Glen McLeod, 'Environment and planning issues in Western Australia pre- and post- the 2017 state election' (2017) 32(4) *Australian Environment Review* 112.

<sup>28</sup> *Environmental Protection Act 1986* (WA), s 51E.

<sup>29</sup> *Environmental Protection Act 1986* (WA), s 54(3).

<sup>30</sup> *Environmental Protection Act 1986* (WA), s 62(1).

<sup>31</sup> *Environmental Protection Act 1986* (WA), s 57(3).

<sup>32</sup> *Environmental Protection Act 1986* (WA), s 59A(1).

<sup>33</sup> *Environmental Protection Act 1986* (WA), s 65(1).

<sup>34</sup> *Environmental Protection Act 1986* (WA), s 68A(2).

<sup>35</sup> *Environmental Protection Act 1986* (WA), s 70(2).

<sup>36</sup> *Environmental Protection Act 1986* (WA), s 73A(1).

<sup>37</sup> *Environmental Protection Act 1986* (WA), s 101A.

<sup>38</sup> *Environmental Protection Act 1986* (WA), s 102.

<sup>39</sup> *Environmental Protection Act 1986* (WA), s 103.

<sup>40</sup> The Appeals Convenor is appointed in accordance with section 107A of the EP Act. Its functions are set out at section 107B of the EP Act.

<sup>41</sup> *Environmental Protection Act 1986* (WA), ss 109(1)(a)(i), 109(1)(a)(iii), 109(1)(aa).



process, the Appeals Convenor will provide the Minister with a report which details the findings made during the appeal and the Appeals Convenor's recommendation as to its determination.<sup>42</sup>

The Minister has the ultimate responsibility for determining an appeal of a Part V decision. Following receipt of the Appeals Convenor's findings and recommendations, the Minister, having regard to those recommendations, will allow or dismiss the appeal.<sup>43</sup> The CEO will then give effect to the Minister's decision.<sup>44</sup>

Appeals of Part V decisions are merits appeals so the Minister, in re-making the CEO's decision, may consider evidence additional to that which was considered by the CEO. In making its report and recommendation, the Appeals Convenor, in accordance with section 109(1)(b), is required to:

*'act according to equity, good conscience and the substantial merits of the case, without regard to the technicalities or legal forms, shall not be bound by any rules of evidence and may conduct its enquiries in whatever manner is considers appropriate'*

This requirement might be summarised as a requirement to act 'fairly'. However, in practice, the Appeals Convenor's obligations to consult in section 109(1)(a) and (aa) is exercised behind closed doors. It might reasonably be said that such an approach is inconsistent with the obligation to act 'fairly', even if such an approach may not, depending on the circumstances, breach the strict rules of procedural fairness.

### **2.1.1 Determinations of appeals in relation to Part V decisions**

In practice, the Appeals Convenor in most cases recommends that the original decision of the CEO be upheld and the Minister does not part from this recommendation. This observation is supported by the following data relating to appeals lodged between 2015 and 2018.

#### **(a) Clearing permit appeals: section 101A**

Between 2015 and 2018, there were 38 appeals brought under section 101A. None of these appeal proceedings resulted in the original decision being overturned. However, in 13 cases, the appeal resulted in variations to the original decision.

#### **(b) Works approvals and licences appeals: section 102**

Between 2015 and 2018, there were 21 appeals brought under section 102. None of these appeal proceedings resulted in the original decision being overturned. However, in 13 cases, the appeal resulted in variations to the original decision.

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<sup>42</sup> *Environmental Protection Act 1986* (WA), s 109(3).

<sup>43</sup> *Environmental Protection Act 1986* (WA), s 109(3).

<sup>44</sup> *Environmental Protection Act 1986* (WA), s 110(1).



(c) Environmental protection notices appeals: section 103

Between 2015 and 2018, there were six appeals brought under section 103. None of the appeal proceedings resulted in the original decision being overturned. However, in two cases, the appeal resulted in variations to the original decision.

### 2.1.2 Contemporary criticism of the Ministerial Appeals System

Recently, the ministerial appeal of a Part V decision was considered by the Supreme Court in *Erujin v Jacob (Erujin)*.<sup>45</sup> As far as the authors are aware, it is the only judicial review case which directly considers the appeal process in relation to a decision under Part V. The case was primarily concerned with procedural fairness. Tottle J held that the environmental appeal system is of an ‘administrative character’ and made the following comment in the context of property rights:<sup>46</sup>

*While it may be accepted that an appeal against a refusal of a clearing permit deals with valuable property rights, when regard is had to the legislative scheme governing clearing permits and appeals arising from the grant or refusal of clearing permits, the decision made by the Minister is administrative in character rather than judicial.*

Tottle J held that ‘the Minister is not entitled to determine an appeal until both the CEO’s report and the Appeals Convenor’s report are before him or her.’<sup>47</sup> Further, although it was ultimately found that the system as it applied in that case did not create a breach in procedural fairness, his Honour questioned why the CEO’s reports were not routinely made available to affected parties.<sup>48</sup> Such a practice would enhance the transparency of the appeals process, even if not alter its substantive form. The *Erujin* decision was the subject of an appeal, which was dismissed by the Court of Appeal.

### 2.1.3 Arguments for reform under Part V

Reform in this context means the transfer of appeals under Part V of the EP Act to the SAT. Further consideration as to what reform may look like is in Part 3.

(a) Transparency and public confidence

The informal administrative processes by which the Appeals Convenor operates has raised concerns in relation to transparency and access to information. This is particularly the case when parties to an appeal have not been provided with written responses or reports from other appellants or stakeholders and must instead rely on the content of that correspondence being relayed by the Appeals Convenor at a meeting.<sup>49</sup> Such an approach denies an appellant the opportunity to test evidence and prepare a

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<sup>45</sup> [2017] WASC 35.

<sup>46</sup> *Erujin* [2017] WASC 35 [145].

<sup>47</sup> *Erujin* [2017] WASC 35 [18].

<sup>48</sup> *Erujin* [2017] WASC 35 [102].

<sup>49</sup> Peter Jones, ‘Review of Approval Processes in Western Australia’ (Report, Industry Working Group, April 2009) 55.



response to any comments before the meeting (compared to if the response was circulated to all parties as part of a pre-trial process).<sup>50</sup>

The authors note that, since the *Erujin* decision, appellants are more frequently given the opportunity to review written responses or reports as part of the appeals process. While this is encouraging, further transparency in the decision-making process is required to instil a greater level of confidence in the process by the community and industry.<sup>51</sup>

(b) Development of environmental jurisprudence

The Appeals Convenor, in preparing the report and recommendation, is under no obligation to consider the relevance or applicability of previous reports and the Minister is under no statutory obligation to give reasons for their decision. This means that there is essentially no environmental jurisprudence with respect to the resolution of appeals of Part V decisions. Developing environmental jurisprudence can help to ensure the consistency and quality of decision-making and consequently increase public and industry confidence in the system through the increased certainty that is provided. Further, a larger body of precedent will likely result in the submission of more informed and higher quality applications for determination by the DWER which would likely lead to a reduction in the number of appeals.

(c) Multiple roles

The Minister is responsible for the DWER. The Appeals Convenor is usually appointed from within the public service and often from within the DWER. Although the Appeals Convenor is appointed by the Governor, the Minister participates in the appointment. The decision under appeal is a decision made by the CEO of the DWER, which is the Minister's own department. This multiplicity of roles is the 'Caesar to Caesar' phenomenon.<sup>52</sup> Further criticism concerns the loss of public confidence in the appeals system given there is no independent third party to review decisions outside of the Minister's influence.<sup>53</sup>

#### **2.1.4 Arguments against reform under Part V**

(a) Time, cost and accessibility

It has been suggested that the SAT would be slower and more costly than the Appeals Convenor in determining appeals given the current system avoids overly formal or legalistic proceedings. Further, its low cost is said to make it more accessible to the public.<sup>54</sup> The authors are not aware of any evidence that has been presented in support of this contention.

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<sup>50</sup> Declan Doherty, 'Caesar to Caesar: The Merits of Western Australia's Environmental Appeals Regime' (2010) 29(1) *Australian Resources and Energy Law Journal* 110, 120-121.

<sup>51</sup> Parliament Standing Committee SAT Report, May 2009, 341.

<sup>52</sup> Michael L Barker, 'The Politics of Environmental Dispute Resolution' (1994) 4 *Australian Environmental Law News* 61, 70; Jones, above n 49, 55.

<sup>53</sup> Doherty, above n 50, 118.

<sup>54</sup> Parliament Standing Committee SAT Report, May 2009, 27



(b) Adversarial nature of courts and tribunals

The traditionally complex procedure and adverbial nature of courts and tribunals is not suited to the review of environmental decision-making as it has been suggested that parties would become entrenched in extreme positions rather than reaching agreement through conciliation or mediation.<sup>55</sup> In this regard, the authors note that it is necessary to acknowledge the role and success of mediation of disputes in the SAT.<sup>56</sup>

(c) Departments and agencies have necessary expertise

Due to the complex scientific issues that routinely arise in environmental cases, appeals are best left with experts in agencies, not tribunals or courts who lack the necessary knowledge to understand and manage technical issues. However, this argument fails to acknowledge that the SAT is an expert tribunal. In this regard, the authors note that one of the SAT's main objectives is to make appropriate use of the knowledge and experience of its members.<sup>57</sup> The composition of the SAT includes non-judicial and sessional members with specialist experience. In order to be a non-judicial or sessional member of the SAT, a person must have extensive or special knowledge of, or experience with, any class of matter involved in the exercise of the Tribunal's jurisdiction.<sup>58</sup>

Further, any doubts as to the knowledge and experience of a SAT member presiding over a complex environmental case could be alleviated by enshrining the qualifications required of those SAT members in the EP Act. The authors note this process would be similar to what is set out for planning and development matters heard by the SAT under section 238 of the PD Act.

## 2.2 Part IV: Environmental Impact Assessment

This section focuses on appeals relating to the Environmental Impact Assessment (EIA) process under Divisions 1 and 2 of Part IV of the EP Act. 'Proposals' which are likely, if implemented, to have a significant effect on the environment in WA must go through the EIA process set out in Part IV of the EP Act.<sup>59</sup>

There are three points in the EIA process at which an appeal may be lodged:

1. After the EPA's decision that a proposal does not require assessment under Part IV of the EP Act;<sup>60</sup>
2. In relation to the content of, or any recommendation in, the EPA's report to the Minister on a proposal;<sup>61</sup> and

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<sup>55</sup> Barry Rabe, 'The Politics of Environmental Dispute Resolution', PCMA Working Paper 17 and CSIRO Working Paper 380, January 1989, 8.

<sup>56</sup> In 2017, SAT resolved 32% of applications across all lists through facilitative dispute resolution and 44% across the Planning and Development list: SAT Annual Report 2016-2017, 7.

<sup>57</sup> *State Administrative Tribunal Act 2004* (WA), s 9(c).

<sup>58</sup> *State Administrative Tribunal Act 2004* (WA), s 117(3).

<sup>59</sup> For an overview of the EIA process, see *Conservation Council of Western Australia (Inc) v Dawson* [2018] WASC 34 at [15]-[35] (Martin CJ).

<sup>60</sup> *Environmental Protection Act 1986* (WA) s100(1)(a).

<sup>61</sup> *Environmental Protection Act 1986* (WA) s100(1)(d).



### 3. In relation to conditions or procedures in a Ministerial Statement (proponent only).<sup>62</sup>

Where an appeal is lodged against a decision of the EPA or the EPA's report to the Minister, the Appeals Convenor requests the EPA to report to the Minister on the appeal.<sup>63</sup> The Appeals Convenor *may* consult with the appellant and any other appropriate person to determine whether the appeal can be resolved.<sup>64</sup> In considering appeals, the Appeals Convenor *must* consult the EPA and the appellant and *may* consult any other person considered necessary. The Appeals Convenor reports to the Minister.<sup>65</sup> The Minister, *having regard to* the Appeals Convenor's report, can then allow or dismiss the appeal.

Where the appeal is against a decision of the Minister (i.e., an appeal by a proponent against conditions in a Ministerial Statement), the Minister must appoint an Appeals Committee.<sup>66</sup> The Appeals Committee *must* consult the EPA and the appellant, and *may* consult any other person it considers necessary, and then reports to the Minister in respect of the appeal.<sup>67</sup> The Minister must decide the appeal *in accordance with* the Appeals Committee's report.<sup>68</sup>

The EP Act provides broad discretion as to the manner in which appeals are conducted by the Appeals Convenor.<sup>69</sup> The Appeals Convenor must act according to equity, good conscience and the substantial merits of the case, but otherwise has discretion as to how appeals are managed and heard and may conduct enquiries in whatever manner it considers appropriate.<sup>70</sup> The EP Act provides that the Appeals Convenor, with the approval of the Minister, may draw up and gazette administrative procedures as to the conduct of appeals and the appointment, composition and duties of an appeals panel.<sup>71</sup> Currently, there are no gazetted administrative procedures, although 'appeal information sheets' on different types of appeals have been published on the Appeals Convenor's website.<sup>72</sup>

The EP Act explicitly states that there is no further right of review against the Minister's decision on an appeal.<sup>73</sup> There is also no right of appeal against the Minister's decision to approve, or refuse approval of, a proposal. Consequently, the only avenue of review of a Minister's decision on an appeal or in respect of a proposal is judicial review.

#### 2.2.1 Scrutiny of the EIA process and appeals under Part IV

The EIA process has been subject to significant scrutiny over a number of years. Recently, in 2015, the Save Beelihar Wetlands Group succeeded at first instance in judicial review proceedings challenging the EPA's environmental assessment report to the Minister on the proposed Roe 8 highway extension.<sup>74</sup>

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<sup>62</sup> *Environmental Protection Act 1986* (WA) s100(3).

<sup>63</sup> *Environmental Protection Act 1986* (WA) s106(1)(a).

<sup>64</sup> *Environmental Protection Act 1986* (WA) s106(1)(c).

<sup>65</sup> *Environmental Protection Act 1986* (WA) s106(1)(a).

<sup>66</sup> *Environmental Protection Act 1986* (WA) s106(2)(b).

<sup>67</sup> *Environmental Protection Act 1986* (WA) s109(1).

<sup>68</sup> *Environmental Protection Act 1986* (WA) s109(3).

<sup>69</sup> References to the Appeals Convenor in this section can be taken to also be references to the Appeals Committee.

<sup>70</sup> *Environmental Protection Act 1986* (WA) s109(1).

<sup>71</sup> *Environmental Protection Act 1986* (WA) s107D.

<sup>72</sup> See <http://portal.appealsconvenor.wa.gov.au>

<sup>73</sup> *Environmental Protection Act 1986* (WA) ss 107(2), 109(3).

<sup>74</sup> *Save Beelihar Wetlands (Inc) v Jacob* [2015] WASC 482.



Although that decision was subsequently overturned on appeal,<sup>75</sup> the Group's success at first instance prompted a wide-ranging review into the EPA's policies and guidelines underlying the EIA process.<sup>76</sup>

The EIA and appeals processes have also come under scrutiny in the lead up to, and following, two recent decisions on proposals seeking approval to mine Banded Iron Formation landforms. The EPA's reports on Sinosteel's Blue Hills Mungada East Expansion Proposal and Mineral Resources' Jackson 5 and Bungalbin East Iron Ore Proposal received 45 appeals and 9 appeals respectively, which were considered by the Appeals Convenor and determined by the Minister. Appeals were lodged by a broad spectrum of individuals and organisations, including the proponents of the proposals, industry representative bodies, environment conservation groups, local government, local Members and private individuals.

The Mungada East Expansion Proposal in particular had an extended history through the EIA process, as the EPA originally decided to assess the proposal at a level of assessment of Assessment on Proponent Information – Category B (environmentally unacceptable). Following an appeal, the Minister remitted the proposal back to the EPA to be assessed at the level of Public Environmental Review (**PER**). Following assessment, the EPA concluded that both proposals were environmentally unacceptable. The Minister for Environment approved Sinosteel's Proposal, but rejected Mineral Resources' Proposal.

### **2.2.2 Arguments for reform under Part IV**

Reform in this part refers to the transfer of existing appeals under Part IV of the EP Act to the SAT. This paper does not address whether there should be a new right of appeal in respect of the Minister's ultimate decision to approve, or refuse to approve, a proposal. The authors consider a proposal to create a new appeal right of this nature would be unlikely to attract sufficient support from government and industry and the preferable approach is to focus on reforming the existing Part IV appeals process.

The EP Act Part IV appeals regime has been considered and reported on by various Parliamentary Committees, Stakeholder Working Groups and commentators. A summary of the key advantages and disadvantages of the existing appeals regime taken from these sources is set out below. Where necessary, the authors also comment on the merits of particular arguments.

#### **(a) Transparency, public confidence and better decision-making**

As noted above, the involvement of a court or tribunal would lead to more transparency in decision-making regarding appeals, which instils a greater level of public confidence in the appeals process.<sup>77</sup> This feature is particularly important with regard to proposals assessed under Part IV due to their substantial social, environmental and economic impacts. Accordingly, these proposals often attract significant attention from the public, so it is important that the process for considering and, where appropriate, adjudicating disputes relating to them, be ventilated in a transparent forum which maintains the public's confidence.

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<sup>75</sup> *Jacob v Save Beelihar Wetlands (Inc)* (2016) 50 WAR 313.

<sup>76</sup> Independent Legal and Governance Review into Policies and Guidelines for Environmental Impact Assessments under the *Environmental Protection Act 1986 (WA)* 6 May 2016.

<sup>77</sup> Parliament Standing Committee SAT Report, May 2009, 341.



(b) The Minister's multiple roles

Whilst this point was raised in paragraph 2.1.3(c) above with respect to appeals under Part V, it is slightly different as it applies to Part IV. The Minister has multiple roles in the EIA process, deciding appeals and then determining the outcome of the EIA process, but also determining the composition of the Appeals Committee, appointing the EPA and overseeing the DWER.

The Minister does not technically determine an appeal against his or her own decision, however, the Minister's multiple roles mean that this distinction is muddled and may give rise to questions in relation to the integrity of the EIA process.<sup>78</sup>

(c) Development of environmental jurisprudence

As outlined in relation to Part V appeals at paragraph 2.1.3(b) above, because appeals are not heard and determined by a court of record, decisions on appeal do not create precedent by which to guide future decisions. This results in less consistent decision-making and reduced certainty for industry and the public.<sup>79</sup>

### **2.2.3 Arguments against reform under Part IV**

(a) Political nature of the decision

Given WA's economic dependence on large scale resource projects there is an argument that the Minister and Government of the day should maintain decision-making sovereignty in relation to those projects.<sup>80</sup> Put another way, the EIA process involves questions of public interest, which are best resolved by the elected government as part of the political process.<sup>81</sup> This is reflected in the structure of the EP Act, which provides for the Minister to make the final decision to approve or reject a proposal in consultation with other relevant Ministers or decision-making authorities. This structure provides the opportunity to take into account competing considerations and weigh up the social and economic factors relevant to the decision.

(b) EIA Appeals are not 'true' appeals

Appeals against the decisions in the EIA process are not 'true' appeals as they are more in the nature of submissions to the Minister on the EIA carried out by the EPA, than objections against actual decisions.<sup>82</sup> Through this process, the appeals provide the Minister with further information with which to make a final decision, so it is appropriate that the Minister determines appeals as this, in effect, allows the Minister to decide whether he or she has sufficient information to make a final decision.<sup>83</sup>

In this regard, the authors note that the EPA is an expert body while the Minister is not. If the point of an appeal is simply to provide more information, then that information should go to the expert decision

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<sup>78</sup> Doherty, above n 50, 118.

<sup>79</sup> Doherty, above n 50, 121-122.

<sup>80</sup> 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 at [143].

<sup>81</sup> *Ibid* at [137].

<sup>82</sup> Parliament Standing Committee SAT Report, May 2009, 340; Environmental Stakeholder Advisory Group, *The Appeals Process*, Report to the Minister for Environment, 21 September 2009, 3.

<sup>83</sup> Environmental Stakeholder Advisory Group, above n 81, 6-8.



maker. Accordingly, the suggestion that ‘appeals’ are actually just submissions to the Minister and not ‘true’ appeals somewhat misses the point.

(c) Expertise

As with Part V appeals, there is an argument that complex scientific issues that routinely arise in environmental cases are best left with technical experts, not tribunals or courts who lack the necessary knowledge to understand and manage those issues. This is particularly relevant in relation to appeals under Part IV as EIA is, by its nature, a complex analysis of scientific issues.

As set out at paragraph 2.1.4(c) above, the suggestion that the SAT lacks expertise is wrong. The SAT is by its statute, an expert tribunal.

(d) Time and cost

A court or tribunal would be slower and more costly than the EPA and Appeals Convenor in determining appeals.<sup>84</sup> The current system avoids overly formal or legalistic proceedings and its low cost makes it more accessible to the public. As the Minister's decisions in relation to a proposal and on appeal are final, there is certainty and finality in the process. There is no evidence to support a contention that an appeal to a court or tribunal would be a slower, more costly or overly formal or legalistic exercise than appealing to the Appeals Convenor.

### 2.3 Conclusion

NELAWA makes the following recommendations regarding appeals under the EP Act.

- (1) Appeals of decisions made under Part V of the EP Act should be transferred to the SAT.
- (2) The EP Act should be amended to give third parties the right to: (a) initiate review of decisions regarding licences, works approvals and permits under Part V; and (b) apply to join as parties to an existing review of environmental regulation decisions under Part V.<sup>85</sup>
- (3) Appeals of decisions made by the EPA that a proposal does not require assessment under Part IV of the EP Act should be transferred to the SAT.
- (4) Appeals in relation to the content of, or any recommendation in, the EPA's report to the Minister on a proposal, should be transferred to the SAT.

## 3. THE CALL FOR AN ENVIRONMENTAL COURT OR TRIBUNAL

The preceding parts of this paper have discussed reform to appeal rights for planning decisions under the PD Act and environment decisions under Parts IV and V of the EP Act. The ultimate goal of a system attempting to resolve disputes is to do so as justly, quickly and cheaply as possible. This is particularly important for resolving planning and environmental disputes, because the proposals in dispute can be significant in scale and impact, often affect the interests of many people and invariably involve complex

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<sup>84</sup> Parliament Standing Committee SAT Report, May 2009, 340.

<sup>85</sup> The authors acknowledge that this suggestion reflects Recommendation 20, 22 & 23 made in the Parliament Standing Committee SAT Report, May 2009, 231-232.



technical and legal questions. This part provides an analysis of appeal systems in other Australian jurisdictions, outlines the key characteristics of a specialist environment court or tribunal (**ECT**), describes the theoretical models of ECTs and considers the key arguments for and against establishing a specialist ECT in WA.

### **3.1 Existing environmental courts in Australia**

There are presently three specialist environment courts in Australia. They are located in New South Wales, South Australia and Queensland.

#### **3.1.1 New South Wales: Land and Environment Court**

The Land and Environment Court (**LEC**) was established in 1980 and was the first specialist environmental superior court in the world.<sup>86</sup> The LEC has an appellate and a review jurisdiction in relation to planning, building, environmental, mining and ancillary matters. The LEC also has summary criminal jurisdiction and appellate criminal jurisdiction in relation to environmental offences.<sup>87</sup>

The LEC's members include judges and commissioners each with expertise in one or more of the fields specified in the legislation. Matters may be heard by a judge alone, a judge with a commissioner assisting, or a commissioner alone. There is a right of appeal from a commissioner's decision to a judge of the court.<sup>88</sup>

#### **3.1.2 South Australia: Environment Resources and Development Court**

The Environment, Resources and Development Court (**ERD**) is a specialist court dealing with disputes, and enforcement of laws relating to the development and management of land, the natural and built environment and natural resources.<sup>89</sup> The ERD was established in 1993 and is a court of record with its judicial members being judges of the South Australian District Court. Its jurisdiction includes environmental regulation, native vegetation conservation, natural resources management, heritage places, marine parks, and planning and infrastructure development.

Similar to the LEC, the ERD members include both judges and non-judicial commissioners. The ERD shares its criminal jurisdiction with the Magistrates Court. A single or full court of the South Australian Supreme Court hears appeals on a commissioner and the ERD's Judges decisions respectively.

#### **3.1.3 Queensland: Planning and Environment Court and Land Court**

##### **(a) Planning and Environment Court**

Queensland's Planning and Environment Court functions as a division of the District Court of Queensland. Unlike the LEC and ERD it only appoints judicial members, but may appoint assessors with particular technical expertise to assist in a matter. Decisions are made by judges alone. Its

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<sup>86</sup> See <http://www.lec.justice.nsw.gov.au/Pages/about/history.aspx>.

<sup>87</sup> See <http://www.lec.justice.nsw.gov.au/Pages/about/history.aspx>.

<sup>88</sup> Trenorden, above n 12, 4.

<sup>89</sup> See <http://www.courts.sa.gov.au/OurCourts/ERDCourt/Pages/default.aspx>.



jurisdiction covers environment and planning both in relation to appeals and civil enforcement. It does not have a criminal jurisdiction and is not able to hear applications for judicial review.<sup>90</sup>

(b) Land Court

The Land Court hears and determines matters relating to land and natural resources. This includes claims for compensation for the resumption of land, making recommendations for the grant of mining tenures and environmental authorities for resource projects, determining compensation for mining activities and land access and dealing with indigenous land and cultural heritage issues, including the grant of injunctions and approval of cultural heritage management plans.<sup>91</sup> It has no criminal jurisdiction and appeals from a decision of its members go to the Land Appeal Court, which is comprised of a judge of the Supreme Court and two judges of the Land Court.

### 3.2 Existing environmental tribunals in Australia

There are presently three tribunals in Australia with jurisdiction to hear reviews of environmental decisions. These are located in Victoria, ACT and Tasmania. The authors note that the Northern Territory has recently undertaken an extensive review of its environmental law framework. The review included consideration of whether the Northern Territory Civil and Administrative Tribunal (**NTCAT**) should be given jurisdiction to hear environmental reviews.<sup>92</sup>

#### 3.2.1 Victorian Civil and Administrative Tribunal

The Victorian Civil and Administrative Tribunal (**VCAT**) hears and decides applications by permit applicants, permit holders, objectors and responsible authorities involving disputes over the use and/or development of land. Most matters heard within the planning and environment list fall under the *Planning and Environment Act 1987* (VIC). In 2016-17 there were 2,758 applications of this nature.<sup>93</sup>

The VCAT also has jurisdiction to hear applications in relation to works approvals, licenses, pollution abatement notices and permits under the relevant provisions of the *Environment Protection Act 1970* (VIC).<sup>94</sup> In 2016-17 there were 18 applications of this nature.<sup>95</sup> In addition, the VCAT hears and determines disputes relating to the management and use of water and mineral resources such as ores, rocks and sands.

The VCAT has the power to make declarations in specific circumstances, under a number of planning and environment enactments. Relevantly, a declaration may be applied for in respect of any matter which may be the subject of an application to the VCAT under the *Environment Protection Act 1970* (VIC).

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<sup>90</sup> See <http://www.courts.qld.gov.au/courts/planning-and-environment-court/about-planning-and-environment-court>.

<sup>91</sup> See <http://www.courts.qld.gov.au/courts/land-court>.

<sup>92</sup> see [https://denr.nt.gov.au/\\_\\_data/assets/pdf\\_file/0007/448630/Environmental-Regulatory-Reform-Feedback-Summary-Paper.pdf](https://denr.nt.gov.au/__data/assets/pdf_file/0007/448630/Environmental-Regulatory-Reform-Feedback-Summary-Paper.pdf).

<sup>93</sup> VCAT Annual Report 2016-17.

<sup>94</sup> The Authors note that the *Environment Protection Act 1970* (VIC) will be superseded by the *Environment Protection Act 2017* (VIC) and the *Environment Protection Amendment Act 2018* (VIC), which is scheduled to come into force on 1 July 2020.

<sup>95</sup> VCAT Annual Report 2016-17.



The VCAT has the ability to issue a civil enforcement order in respect of planning decisions. Briefly, these enforcement powers allow a responsible authority or a person to apply for an enforcement order against a person who contravenes the legislation, a planning scheme or a condition of a permit. These enforcement powers do not extend to criminal matters. The VCAT does not have the power to issue enforcement orders in respect of environment decisions under the *Environment Protection Act 1970* (VIC).

### **3.2.2 Australian Capital Territory Civil and Administrative Tribunal**

The Australian Capital Territory Civil and Administrative Tribunal (**ACAT**) hears and decides review applications of environmental decisions made under the *Environment Protection Act 1997* (ACT) as well as decisions made under enabling legislation, relevantly relating to planning, heritage, land acquisition, water resources and waste management.

### **3.2.3 Resource Management and Planning Appeal Tribunal of Tasmania**

The Resource Management and Planning Appeal Tribunal of Tasmania (**RMPAT**) hears appeals from a wide range of administrative acts and decisions. The RMPAT can also make orders protecting environmental or planning rights and values.

## **3.3 Models and characteristics of ECTs**

This section draws from the above examples to outline the common characteristics of ECTs. It will then present several models of ECTs to assist in considering what may be appropriate in Western Australia.

### **3.3.1 Ideal characteristics of ECTs**

From a review of the jurisdictions above and internationally, there are several commonly cited ideal characteristics of environmental courts:

1. Status and authority to enable recognition by government, stakeholders and the community.
2. Independence from government and decision-maker impartiality.
3. Comprehensive jurisdiction includes planning and environment and may also include mining, aboriginal heritage and associated land access matters.
4. Courts of record possessing civil, administrative and criminal enforcement powers.
5. Comprises specialist judges or members, being environmentally literate and competent, and with multidisciplinary backgrounds.
6. Cases are managed by a member or judge.
7. Innovative methods of alternative dispute resolution.
8. Appointment of scientific and technical experts where necessary.
9. Not bound by the rules of evidence but receive evidence on a 'fairness' basis.
10. Conducted with a minimum of formality and technicality to achieve just, quick and inexpensive disposition of disputes.



## 11. Development of environmental jurisprudence.<sup>96</sup>

Some, but not all, of these characteristics are shared by the SAT. The most notable exceptions are: (1) reduced status and authority; (2) no jurisdiction over environmental and other related matters, for example, mining related matters;<sup>97</sup> (3) a lack of civil enforcement applications; and (4) not a court of record.

### 3.3.2 Models of ECTs

There are various different categories of models for ECTs. For the purposes of relating the models to the WA context, they may be most usefully grouped and described as follows.

#### (a) Operationally independent court or tribunal

These are separate, fully or largely independent courts or tribunals. They typically have the widest jurisdiction (merits appeals, judicial review, civil and criminal enforcement), which generally includes land use planning.

The best example is the NSW LEC (as discussed above), which is viewed as one of the very best operationally independent environmental courts.<sup>98</sup> The New Zealand Environment Court, although not considered in this paper, is another example that operates successfully in a similar jurisdiction.

The VCAT is an operationally independent tribunal, in that it has a wide jurisdiction in planning and environment matters, reviews cases on their merits and has some civil enforcement powers in respect of planning decisions. It can also issue declarations on specific environment and planning matters that fall within its jurisdiction. The VCAT has specialist members that sit on subject matter specific disputes, which is widely recognised as a significant benefit for planning and environment disputes, given their technical nature.

The SAT falls within the category of a decisionally independent tribunal as it has independence from government and therefore its decision makers are impartial. It has specialist members with broad backgrounds in relevant areas of expertise and the ability to appoint experts with scientific and other expertise. It lacks several ideal characteristics such as a comprehensive jurisdiction, civil enforcement powers and as a result, potentially lacks status and authority in the eyes of the community.

#### (b) Decisionally independent court or tribunal

These are courts that are part of the general court system and operate under its budget, staff and management, however they are substantially independent and make their own rules, procedures and decisions. Such courts benefit from lower administrative expenses whilst still providing expertise through specialist judges and procedures relevant to their operating jurisdiction.

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<sup>96</sup> Trenorden, above n 12, 7; Guidone and Jonas, *Environmental Courts and Tribunals: An introduction to national experiences, lessons learned and good practice examples*. Legal Innovation Working Paper No. 1 (2016) Forever Sabah: Malaysia, citing Preston CJ.

<sup>97</sup> At present disputes under the *Mining Act 1978* (WA) fall within the jurisdiction of the Wardens Court. See <http://www.dmp.wa.gov.au/Minerals/Warden-s-Court-1533.aspx>.

<sup>98</sup> George Pring and Catherine Pring, *Environmental Courts and Tribunals: A Guide for Policy Makers* (UN Environment Programme 2016); *Greening Justice: Creating and Improving Environmental Courts and Tribunals* (The Access Initiative 2009).



For example, they often provide recommendations on the grant of mining tenures and environmental authorities for resource projects compared to final decisions which are arguable desirable characteristics of a court operating in a project and resource driven State where the executive wish to retain final decision making on projects of state importance. The Queensland Planning and Environment Court falls within this category.

(c) General court designated judges

Under this model, judges in a general court are assigned to environmental cases in addition to their regular docket. This can be either through informal processes or through orders of the superior court. Such a process provides reduced visibility to the public and so may suffer a perception that the government does not consider environmental protection a priority. This system also fails to provide judges with the flexibility of more informal systems in relation to the rules of evidence and the conduct of hearings. Overly formal and inflexible procedures can reduce the accessibility of a system on account of increased cost and complexity.

(d) Captive environmental tribunal

These tribunals operate under the administrative, fiscal and policy control of an agency whose decisions are the subject of review by the environmental tribunal and may be viewed as 'lacking independence and, consequently, impartiality'.<sup>99</sup> It is often presumed that the operational and decision-making functions of tribunals which adhere to this model are not independent of the policies, judgements and political agendas of the tribunal's parent agency.

The closest example of this model is the Ministerial Appeals System in WA. Further, the Ministerial Appeals System is not a designated court or tribunal and is not a court of record, being an interdisciplinary body composed of both judicial and technical members nor having jurisdiction on a range of related matters compared to solely considering environmental matters in isolation.

Some of the main arguments for and against the establishment of a specialist environmental court are outlined below. The following focusses on points not already identified in Part 2.

### **3.4 Key arguments for a specialist environmental court**

(a) Integrated jurisdiction means better remedies

Integrated jurisdictions (civil, criminal and administrative) can result in more effective decisions as decision-makers are able to integrated remedies or ones which specifically acknowledge the nature of environmental issues.<sup>100</sup>

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<sup>99</sup> Preston CJ, *Characteristics of Successful Environmental Courts and Tribunals* (2014) 26(3) *Journal of Environmental Law* 365

<sup>100</sup> Pring and Pring, above n 98; Greening Justice, above n 98, 44-58.



(b) Visibility and public confidence

The mere existence of a specialised environmental court has been argued to increase public confidence on account of the court being a public, easily identifiable and separate forum from a general court.<sup>101</sup>

(c) Flexibility, formality and cost

Specialist courts often adopt flexible and informal rules and procedures in relation to initiating proceedings, engaging experts or presenting evidence. This can reduce the time and costs while continuing to facilitate a fair hearing.<sup>102</sup>

### 3.5 Key arguments against a specialist environmental court

(a) Set-up costs

One key consideration is the significant cost to set up and establish a specialist court. Fiscal constraints on government expenditure requires these costs to be weighed against directing spending to other areas of the justice system which are also deserving of attention.<sup>103</sup>

(b) Insufficient demand

Another argument against establishing an environment court is that there is an insufficient environmental specific caseload to justify the cost establishing an environmental court. For this reason it would be preferable to have a court that at least considers both planning and environment matters.<sup>104</sup>

(c) Preference for generalised judges

Trenorden notes that one argument against an environment court and specialised judges is that generalist judges with broader perspectives and legal experience will decide cases better than specialised judges.<sup>105</sup>

### 3.6 Ideal versus realistic: Expanding the SAT's jurisdiction

It is apparent from the literature considered in this discussion paper that the ideal model for resolving environmental disputes is a specialist environmental court which satisfies all of the characteristics identified at 3.3.1 above. However, the ideal outcome may not be feasible in the WA context, given historic and present political realities. It may also not be suitable or even preferable, depending on how the key arguments for and against are weighed.

The authors consider a more realistic approach is to expand the jurisdiction of the SAT to hear environmental disputes arising from decisions made under the EP Act. As noted at 3.3.2(a) above, the SAT has many of the characteristics of an ideal ECT. While it lacks a complete integration of civil, administrative and criminal jurisdictions, the introduction of an environmental jurisdiction would be complementary to the SAT's broad planning jurisdiction. Expanding the SAT's jurisdiction to hear environmental disputes may present an opportunity to also confer upon it summary jurisdiction for

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<sup>101</sup> Trenorden, above n 12, 13.

<sup>102</sup> Pring and Pring, above n 98; Greening Justice, above n 98, 13-14.

<sup>103</sup> Pring and Pring, above n 98; Greening Justice, above n 98, 15-16.

<sup>104</sup> Pring and Pring, above n 98; Greening Justice, above n 98, 15-16.

<sup>105</sup> Trenorden, above n 12, 15-16.



specific matters, such as clearing and pollution offences. In addition, similar civil enforcement powers that are enjoyed by the VCAT in respect of planning matters could be conferred upon the SAT in respect of environment matters.

A significant benefit in expanding the SAT's jurisdiction is reduced set-up costs, compared with a specialised and separate environmental court. This is particularly relevant at a time where the State's finances are under pressure from many competing demands.

A more feasible approach to reforming environmental dispute resolution in WA is by expanding the SAT's jurisdiction and conferring on it some or all of the additional powers described above. This would realise many of the benefits associated with a specialist court, without the likely significant expense and political unpopularity. This would likely increase the SAT's visibility and authority and arguably the public confidence in it to determine a fuller ambit of disputes relating to planning, land and the environment.

### **3.7 Conclusion**

NELAWA makes the following recommendation regarding an environmental court or tribunal in WA.

(1) Appeals under the EP Act should be heard and determined by the SAT, except for appeals in relation to conditions or procedures in a Ministerial Statement.

## **4. RECOMMENDATIONS**

The previous parts of this paper have outlined the arguments for and against reforming appeal rights under both the PD Act and EP Act as well as the theory underpinning a call for the establishment of a specialist environmental court in Western Australia. This section summarises NELAWA's recommendations with respect to those matters.

### **4.1 Third party appeal rights under the PD Act**

(1) The PD Act should be amended to give third parties, who have previously made submissions about or objected to a planning proposal, a right to initiate an application for a SAT review of a decision to: (a) approve the planning proposal; (b) impose conditions on the approval of the planning proposal; (c) refuse the planning proposal; and (d) amend, revoke or suspend an existing approved planning proposal.

(2) The PD Act should be amended to specify that the rights of third parties to initiate review proceedings are limited to a planning proposal that: (a) directly affects the third party which made the submissions or objection; or (b) is a matter of public interest.

(3) The PD Act should be amended to give third parties, who have previously made submissions about or objected to a planning proposal, a right to apply to join as parties to any existing review proceedings regarding a decision in relation to the relevant planning proposal.

(4) The PD Act should be amended to specify that the rights of third parties to be joined as parties to existing review proceedings are limited to a planning proposal that: (a) directly affects the third party which made the submissions or objection; or (b) is a matter of public interest.

(5) Statutory guidelines should be published setting out the procedures for third party participation in proceedings and the extent of their involvement.



#### **4.2 Appeals under the EP Act**

(1) Appeals of decisions made under Part V of the EP Act should be transferred to the SAT.

(2) The EP Act should be amended to give third parties the right to: (a) initiate review of decisions regarding licences, works approvals and permits under Part V; and (b) apply to join as parties to an existing review of environmental regulation decisions under Part V.

(3) Appeals of decisions made by the EPA that a proposal does not require assessment under Part IV of the EP Act should be transferred to the SAT.

(4) Appeals in relation to the content of, or any recommendation in, the EPA's report to the Minister on a proposal under Part V should be transferred to the SAT.

#### **4.3 The call for an environmental court or tribunal**

(1) Appeals under the EP Act should be heard and determined by the SAT, except for appeals in relation to conditions or procedures in a Ministerial Statement.



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