# A Discussion Paper on the Appeals System under the Environmental Protection Act

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Perth, Western Australia
Bulletin 540
June 1991

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ISBN: 0 7309 3494 2
ISSN: 1030 - 0120

## Foreword

Environmental impact assessment in Western Australia encourages a high level of public ownership of the process.

This paper deals with one of the main avenues for public involvement in environmental review — the appeals system under the Environmental Protection Act.

The Minister for the Environment asked that the paper be prepared and it was written by Mr Peter Johnston, former deputy chairman of the Environmental Protection Authority.

The paper reviews the major features of the appeals system as it stands, discusses some perceived and potential problems and offers some solutions.

For environmental impact assessment to remain effective, the appeals system attached to it must be easily understood and available to all affected people.

The appeals systems must allow all parties affected by a dispute to put forward their views.

It should pave the way for timely and correct decisions about responsible development while ensuring environmental protection.

Above all, it should safeguard the principles of natural justice.

To make this review as effective as possible, the Minister for the Environment invites your comment on the proposals contained in this paper.

Written submissions are welcome and should be addressed to the Minister for the Environment, 18th Floor Allendale Square, 77 Saint George's Terrace, PERTH WA 6000.

Closing date for submissions is August 30, 1991.

This discussion paper explains and supplements the summary report delivered to the Minister by letter dated 23 August, 1990.

The Environmental Protection Act 1986 came into operation on 20 February 1987. To a greater extent than is often appreciated, the Act represented a continuity from the processes of environmental assessment that had existed previously under the Environmental Protection Act 1971 and various State Agreement Acts. The 1986 Act was to give a formal legal basis for many of the procedures that had been previously carried out as a matter of administrative discretion.

One aspect of the present Act that was completely new was the provision of appeals in relation to various procedures and decisions made in the course of environmental impact assessment, pollution control and the imposition of Ministerial conditions. Because the appeal procedures were innovative, they were written into the legislation in a way that allowed a considerable degree of flexibility, informality and discretion in their operation. This was deliberately done so that after some time had passed, they could be reviewed in the light of experience. Since more than four years have now passed since the 1986 Act came into force this is an appropriate time to carry out that review. This will permit Government and if necessary Parliament to decide whether improvements can be made to the appeals system, either within the existing administrative framework of the Act, or if necessary by amendments to it.

This review has three principal objectives. In the first place, as already indicated, it looks to the existing procedures to assess whether a better process can be achieved in terms of efficiency (the administrative and managerial aspects) and effectiveness (in terms of achieving the various objectives behind the appeals process). Secondly, the review will be of some significance in terms of assessing the credibility of the appeals process. Sufficient statistical and other experience now exists to allow preliminary judgements to be made about the effectiveness of the system. This necessarily entails some assessment of the degree of public acceptance the system attracts. The credibility of the system is, of course, a factor in the effectiveness of the system. A system without credibility will either be ignored, or otherwise abused. In either case it would be failing to achieve its objectives. Thirdly, a review of the appeals mechanisms should provide a basis for assessing whether the appeals system is attended by procedural fairness. In legal terms, this is sometimes described as whether the system provides natural justice to persons and institutions whose interests are affected by relevant decisions. This aspect of the matter will be of prime concern to proponents, those with environmental concerns who seek to voice objections to proposals, and also to Government departments and agencies who have a stake in the decision making process.

## Background to the Existing Appeals System

For the most part, while particular decisions made pursuant to the present Act have excited controversy, its general operation seems to have gained wide acceptance. The matter of appeals, however, has from time to time generated some debate. Whilst there has been a degree of constancy and consistency about some of the criticisms of the appeals process, the statistical evidence analysed in this report puts in question any suggestion that there is widespread dissatisfaction with the appeals system. On analysis, the major criticisms of the appeals system are mostly of a philosophic nature rather than reflecting any empirically based objections.

The most fundamental objection to the existing appeals process is that it does not function in the same way as a tribunal.

The present system is essentially an administrative process whereby particular advice, recommendations and decisions are reviewed on their merits. Merits in this context refers to the actual substance of a decision and whether it is the best or preferable decision. It stands in contrast to judicial review which looks to the way a decision was made. In the latter a court can declare a decision was made in a way that was procedurally invalid but it cannot substitute its own decision as to what the correct decision should have been.

It is possible to confer upon a quasi-judicial body such as a tribunal powers of adjudication on the merits so that that body can, in a largely adversarial manner, proceed to determine the dispute as if it were a clash of rights. In fact, in place of the present appeals system under the Act some would prefer to see a statutorily entrenched mode of review that would place in the hands of an independent tribunal the power to hear and determine disputes arising from decisions made from the Act. It is the determinative nature of such a tribunal's jurisdiction that would be distinctive. It would entail in many instances moving final decision-making power from Government, where it resides presently under the Act, and giving it to a quasi-judicial body. This is a fundamental issue in so far as Government would lose its present ultimate control over environmental protection and the environmental approvals process. The prerogative of assessing what measures are appropriate to protecting the environment would pass to an unelected body which would then have to make judgements, often of a highly politicised nature.

That proposal has some plausibility insofar as it involves a well-known traditional process. There are a number of legislative examples that can be regarded as models, such as the Town Planning Appeals Tribunal. In order to test the validity of proposals to constitute such an appeals tribunal in respect of environmental matters, however, it is necessary to appreciate the basic premises that underpin the Environmental Protection Act, because the inclusion of an appeals mechanism in the Act, involving a statutory tribunal with *determinative* powers, would require a fundamental change to the basic philosophy on which the Act is founded.

## Philosophy behind 1986 Act

The predecessor to the 1986 Act did not spell out the environmental impact assessment process; rather it relied on administrative arrangements. The old Act was criticised by proponents and conservationists alike as being both secretive and arbitrary. Comprehensively, the new procedures for environmental assessment put in place by Part IV of the Act are directed to overcoming that criticism.

A related criticism of the previous regime was that not only was it discretionary in terms of providing the public generally with an input into the assessment process; there was no avenue for objection once a decision was made. Proponents too urged that where assessments resulted in decisions adverse to their interests, they should have a right of appeal. Consequently, as a corollary to the provision in Part IV of an assessment process, provision was made in Part VI of the Act for appeals. The governing presumption is that the process of environmental impact assessment should be open to public input and scrutiny. The appeals system covers a range of recommendations, decisions and reports made under the Act. The following is a summary of the relevant provisions:

## The Appeal Provisions in the Act

Appeals can be lodged against the following decisions or matters:-

(1) the decision by the Environmental Protection Authority not to assess a proposal (ie, under Part IV of the Act S.40(1(a) S.100(1)(a));

(2) the level of assessment set by the Authority where proposals are being formally assessed S.39(1), S.100(1)(b). (The present levels of assessment are, from the lowest level: Consultative Environmental Review (CER), Public Environmental Review (PER), which is open for public submissions for eight weeks, and an Environmental Review and Management Programme (ERMP), which is open for a 10 week review period);

(3) the content of or the recommendations in the Authority's Report and Recommendations of a proposal S.44, S.100(2);

(4) [the proponent only] against the conditions or procedures set on a proposal by the Minister for the Environment S45(5), S.100(3);

- Appeals in the above categories must be lodged with the Minister for the Environment within 14 days of the decision.
- Appeals can also be lodged against other decisions, namely:

(5) [the proponent only] against orders or steps required by the Minister, to be undertaken by the proponent where conditions or procedures are not being complied with S.48(4)(a) or (b) and (c) or (d), S.100(4)(a) and (b);

(6) against the refusal, or requirements of an existing Works Approval or Licence S.54(3) and S.57(3), S.102(3);

(7) [the proponent only] against a refusal to grant a Works Approval or Licence, or a condition of transfer of a Works Approval or Licence S.54(3) and S.59(3), S.64(2), S.102(1);

(8) against a requirement or amendment to a Pollution Abatement Notice S.65, S.103;

(9) against a requirement on a person who manufactures, or sells vessels or vehicles to supply information on waste or emissions from such equipment S.96, S.104;

(10) against a requirement on an owner of a vessel or vehicle to make it available for testing to determine if it complies with requirements made under the Environmental Protection Act S.97, S.104.

## Purpose of Appeals

The appeals system is intended to function as a collective safeguard against faulty assessments, recommendations or decisions made on the basis of inadequate information, or resulting from flawed reasoning. A fundamental premise underlining the appeals system is that the report of the Authority under Section 44 of the Act, and the decision of the Minister under Section 45 to impose upon the proponent conditions upon the proponent subject to which the proposal may be implemented, should both be capable of being subjected to a process of scrutiny and justification. The appeals system is therefore designed to contribute to public, industry and government acceptability of, and confidence in, decisions made as a result of impact assessment. The appeals system also provides a means whereby the Environmental Protection Authority is publicly accountable for its advice to Government for decisions.

In the case of appeals from decisions made under Part V of the Act relating to pollution control, it is the adverse impact on persons directly affected by orders, revocations and refusals made under that part that the appeals system is intended to protect.

Because the phenomenon of environmental decision making in accordance with the new procedures was to a degree untested, it was thought necessary to avoid imposing a rigid appeals system upon the process. Accordingly, many aspects of the appeals system were left to administrative discretion in regard to such matters as the constitution of the appeals committee, its procedures, and the occasions on which an appeal committee would be set up. Whilst this had the disadvantage of being somewhat vague, it also left considerable scope for setting up appeals committees in different ways with functions appropriate to the particular matter under review. More importantly, it left open the possibility that existing appeal procedures, such as that provided by the Town Planning Appeals Tribunal might well be adapted, in an appropriate case, for environmental appeals. In retrospect, it probably should be conceded that one legitimate criticism of the appeals process as it has operated to date flows from its very vagueness and variability in the first few years. No sufficiently articulated and 'normal' model has emerged, particularly in relation to major controversies, for persons concerned with the process to become acquainted with it. Understandably, there is some uncertainty and hence disquiet about it.

## Some Key Features of the Appeals System

An important question that arose in setting up an appeals system under the Act was to determine *who should be given a right of appeal.* Unlike the situation under the town planning legislation, where rights of appeal are restricted to the parties directly affected by the town planning decision, rights of appeal were conferred in most instances provided under the Act upon members of the public at large, irrespective of whether they had a specific and special interest in the decision or not. This is consistent with the general intent of the Act to involve the public in the decision making process.

One thing the appeals system was not intended to provide, however, was a further opportunity to have a second bite at the assessment process in the sense that the whole process of assessment should be repeated a second time. Otherwise the initial input from concerned parties and members of the public could be perfunctory in the first instance if those persons considered that they would have a second chance, on appeal, to reopen the matter. The appeals process, as indicated above, was intended to provide an opportunity for presentation of *new* materials and for the raising of *reasoned* criticisms rather than objections resulting from the initial process.

Another feature of the appeals system provided by the Act already mentioned is that for the most part, appeals were not intended to result in decisions that have conclusive force.

This is especially true in the case of the majority of appeals which are against *recommendations* of the Authority. One can seriously question whether an adjudicative and definitive appeals system is appropriate in the case of recommendations which of necessity lack the quality of finality.

Consistent with the general thrust of the Act, final decision-making even after an appeal, is still for most purposes left in the hands of Government itself; the outcome of most appeals is recommendatory. An exception is found in Section 45(6)(a)(ii) in which case the decision by the Appeals Committee limits the Minister. This leaves open the opportunity for a response by the Minister allowing for further negotiation and decision.

## Principal Criticisms of the Appeal Process

Whilst the Environmental Protection Act 1986 introduced an appeal right, thereby creating more opportunities for appeal by applicants and other interested parties than was available in most comparable jurisdictions in Australia, several major criticisms were voiced at the outset and have been maintained persistently since. One submission made to the Authority at the time when the Bill was being drafted by Mr Michael Barker, made the following comments:

> 'It is clear that the appeal process is highly administrative and avoids any degree of formality usually associated with courts or tribunals. To some this may be considered a desirable feature of the appeal system. To others however such a system perpetuates the unsatisfactoriness of a system which may be criticised for its secrecy, political influence and inherent failure properly to test conflicting evidence in a forum open to public scrutiny.
>
> It is similar, of course, to the Ministerial appeal system which presently subsists under the Town Planning and Development Act 1928. Under the latter Act it is possible for a person to appeal either to the Minister or to a Town Planning Appeal Tribunal. Decisions in the tribunal are open to the public; the evidence and information presented to it is subject to testing by cross examination; and the decisions and principles evolved in a published by the Tribunal create a body of precedent useful to the future administration of the legislation in question.'

The suggestions made in that submission reflects a view that has often been repeated by those associated with town planning matters. It tends to assume that environmental concerns and the values entailed in environmental decision making, are sufficiently discreet and like those involved in the town planning process that appeals in relation to environmental decision making are capable of assimilation within the town planning appeal process. Of course it needs to be immediately appreciated that the town planning appeals process is directed to regulation of land use in defined localities and for the most part takes into account time frames with a fairly limited horizon. Basically they are concerned with the limited field of competition between building and of other developments on the one hand, and other rights, such as amenity on the other. Environmental decision making often has to accommodate a wider variety of competing values and considerations, often involving much wider communities than those immediately affected.

Also, the town planning appeals process is essentially one where in an adversarial context the dispute is pursued between land developers seeking to exercise rights which are essentially proprietorial, on the one hand, and regulatory bodies, either local government or government agencies such as the State Planning Commission, on the other. Third parties are generally denied access to the Town Planning Appeals System. Even so, town planning appeals involving basically the developer and the planning agency can take considerable time to be heard and determined. One instance which did turn on an issue that could be described as 'environmental' was the appeal in *Churchill Estates Pty Ltd v Town Planning Board* (1986) 24 APAD7.This commenced hearing on 9 December 1985 and the decision was handed down on 4 September 1986. It involved residential development at Warnbro Sound. The central issue was how far back the development should be set from the fore-shore.Extensive expert evidence was led on both sides. One can only speculate how long it would take to hear similar appeals in the case of say an alumina refinery or petrochemical project.

Another criticism of the appeals system under the 1986 Act has been expressed a number of times. Given the relationship of the Minister for the Environment to the admittedly autonomous Environmental Protection Authority the appeal right to the Minister is vulnerable to the criticism that it constitutes 'an appeal from Caesar to Caesar'. This view mistakenly proceeds on an assumption that the Authority and the Minister are essentially one and the same institution and focuses on the fact that the Minister can receive advice from the Authority or the Chief Executive Officer about appeals.

It is not unreasonable, in the first place, that the Minister should receive comment from the Environmental Protection Authority whose report and recommendations are put in question. Secondly, to the extent that there is input from other interested persons and agencies on appeal, the system provides an independent basis for testing the validity of those recommendations. It must also be appreciated that the Minister is not party to the Authority's report nor its deliberative process. The Minister is outside the assessment process up until the stage where he receives the report. Provided there is recourse to a wide range of inputs other than that of the Environmental Protection Authority and the Chief Executive Officer, the appeals system should not be seen to be biased. 'Bias' itself is a criticism that is properly addressed to a quasi-judicial process and is misplaced, in any event in the case of an administrative review process so long as it observes the rules of natural justice. The criticism that the process may not be impartial would be strengthened if the only source of input were from the Chief Executive Officer or the Environmental Protection Authority. If the measures outlined in the recommendations made in this paper are adopted the criticism of bias should have no foundation. This is because if the System set forth in the Diagram appended to this paper is adopted, it should accord natural justice to all parties.

The existing environmental appeals system or any proposal to establish an environmental appeals tribunal in its place is also put in question by the current trend to establish in Western Australia a single appellant body for all administrative appeals, possibly by way of creating an administrative division of the Supreme Court. This was recommended by the Law Reform Commission of Western Australia in a report on administrative appeals in 1979.

That report however, was addressing the problem of fragmentation created by the number of different bodies to which appeals of different kinds could be brought. A large number of State statutes provided rights of appeal, often in an unsystematic way. The environmental appeal system is however, a response to the need to provide a specialist mode of review in a highly complex area. In that respect it is similar to other specialist bodies like the Equal Opportunity Tribunal. The assumption here is that some matters, by their own nature, justify a special mode of administrative review. To judicialise such matters can be seen, on the one hand, to discourage legitimate appeals in many instances, whilst politicising the judicial process on the other. Environmental decision making and appeals in respect thereof are not easily equated with an adjudicative process based on the rights of individuals to the enjoyment of property or commercial opportunities. Submerging the environmental appeals system in an administrative division of the Supreme Court is prone to the criticisms already directed to the proposal to establish an environmental and planning tribunal. In addition, proponents of such a scheme must justify whether the time and cost of judicial proceedings would serve the interest of public accountability given the difficulties members of the public and community groups have in pursuing legal claims. That objection would be overcome of course if large amounts of public funding, such as through legal aid or a public environmental defender's office were established. The funding would have to cover the costs of expert witnesses and studies as well as substantial legal fees. Whether such costs can be justified is, of course, a matter of judgement for government.

One thing the proposal for an administrative law division of the Supreme Court does do is make it unlikely that any counter proposal to establish a new environmental tribunal will be countenanced by Government until the issue of more or fewer tribunals is settled.

Any proposal to establish a more formal tribunal or court-like appeal system must satisfy the condition that it is capable of dealing with complex issues involving significant elements of public interest, often of a highly subjectivised kind, pursued by a wide variety of interested parties, including not only those with interests immediately affected, such as developers, proponents and Government agencies, but also potentially large segments of the public. This raises the further question of whether a quasi-judicial process is adaptable to accommodate the expression of widely ranging views, often put forward by persons unable financially to afford legal representation in respect of matters which could entail lengthy and expensive proceedings.

This is not to say that the present appeals system should be arbitrary, secretive, highly subjectivised, and irregular in its procedures. Before the actual coming into operation of the 1986 Act, members of the Authority met with representatives of the Law Society of Western Australia and there was broad agreement that the appeals system should, amongst other things, accord with the principles of natural justice. The appeals system should provide that all parties having an interest in the dispute are given a chance to put forward their views and support them with relevant evidence and materials. Such a system should operate to ensure so far as possible objective and dispassionate consideration of the merits of the appeal. Whilst the current Act allows for this, there is disquiet in the legal and wider community that the Act fails to set out sufficiently precisely how appeals should be determined, nor does it prescribe the constitution of appeal bodies, and how an appeal should be conducted. The principal recommendations in my Report to you sought to allay the objection that the present system may not always ensure natural justice. They emphasised that there should be a more detailed prescription of these matters, if possible in regulations made under the Act, of these matters. This need not lead to an unacceptable rigidity in the process, however. This is an important thing to bear in mind, having regard to the point explored further below, that the appeals process itself should provide and encourage reasonable scope for negotiation, mediation and the settlement of disputes arising under the Act.

## Empirical Data on Operation of Appeals System to Date

Criticisms of the kind discussed earlier are essentially based in principle and are debatable in rather general terms. The question arises, however, whether in terms of the actual operation of the appeals system since the inception of the Act, any conclusions can be drawn on a statistical basis that points to widespread dissatisfaction with the system and any lack of public confidence in it. An analysis of the process to date also allows lessons to be drawn in terms of specific problems that can be identified in the working of the system.

In the year 1987/88, not counting 236 pro-forma appeals on a single project (the Knightsbridge Development at Stephenson Avenue, City Beach) there were 100 appeals lodged. In 1988/89, this had increased to 186 and in the year 1989/90, there was a further increase to 273.

By way of analysing a breakdown of the 1989/90, the 273 appeals were made up of 53 appeals against Environmental Protection Authority Report and Recommendations, 200 appeals against the level of assessment or against a project not being assessed formally under Part IV of the Act, and 20 appeals in respect of Works Approvals, Pollution Abatement Notices and Licence Conditions under Part V of the Act. In respect of the figure of 200 appeals against the level of assessment or not being assessed formally under Part IV, it should be noted that 140 of these were appeals in respect of the assessment of mining tenements in Conservation Through Reserves Committee recommended areas.

An analysis of the 53 appeals against the Environmental Protection Authority Reports and Recommendations in 1989/90, reveals that appeals related to only 9 of the 36 reports released; i.e. only 25% of the projects reported on were appealed against.

For comparison the appeal rate for previous years is as follows:

| | |
|---|---|
| 1987/88 | 38% from a total of 42 reports |
| 1988/89 | 43% from a total of 43 reports |

Of the nine projects which were appealed against in 1989/90, three were upheld in full or in part, four dismissed, and two were still to be determined at the time of writing my report to you in July 1990.

In 1987/88 and 1988/89 about 40% of Environmental Protection Authority Reports were appealed against. In 1989/90 about 25% were appealed against. This would not indicate that the process is in need of radical surgery.

From this analysis it is also arguable that a high percentage of Environmental Protection Authority reports were accepted by the community (including proponents, decision makers, consultants, conservation groups and other members of the public). This can be taken to indicate that in large measure, the environmental impact assessment process allowing for public input and consultation over the various phases has resulted in reports which are accepted by the parties concerned in a significantly large number of cases.

However, regard should be had to the caution mentioned earlier. Informal discussions would suggest there are, notwithstanding, perceptions entertained by some that the system is not working. Further, others would argue that the comparatively low rate of appeals could be due to the fact that some community groups do not have the resources to appeal more often. If the measures proposed in my report are put in place the sources of the disquiet should be reduced. It needs to be stressed that the major concern arises from the fact that, as it presently operates, there is nothing like a definite model with which industry and the community is familiar. Provision of a more articulated process should overcome that objection.

Given that in the latter part of 1989, the environmental impact assessment process was refined further, allowing for more effective consultation with the parties concerned including the public, it may be that there will be a diminution in the number of Environmental Protection Authority reports and decisions appealed against.

## Appeals Against Levels of Assessment

In 1987/88 the Environmental Protection Authority set the level of assessment of 855 referrals, and 3% of those levels were appealed against. In 1988/89 the Environmental Protection Authority received 963 Referrals, and 1% of those levels were appealed against. In 1989/90, 1081 referrals were assessed and 3% of those were appealed against. These figures would indicate that there is a high public acceptance of levels of assessment set by the Environmental Protection Authority.

It should be noted that bodies such as the Conservation Council of Western Australia and other public groups still regard the level of assessment as a significant indicator of the level of importance the Environmental Protection Authority attaches to a particular project. The Authority, however, does not necessarily equate level of formal assessment with the sensitivity of the environmental issue. A project for example may be extremely large in quantitative terms and impact upon a large area but it may otherwise be a fairly straightforward and uncomplicated proposal. Likewise, a difference in assessment may reflect whether the proposal is the first of its kind or one where, by virtue of prior assessment, the problems associated with it are well understood. The real question arises whether the time spent dealing with appeals against the level of assessment is justified insofar as rarely have such appeals been upheld.

Further, apart from the period of time during which a proposal is open to public submissions and comment, the quality of assessment is not necessarily proportionate to the level of assessment. A matter which for particular reasons may be assessed at the Consultative Environmental Review level because it affects only a small portion of the community might nevertheless, because of technical complexity, attract quite intensive assessment by the Environmental Protection Authority.

These considerations might suggest that appeals against the level of assessment be abolished. On the other hand, to the extent it is evident that various groups maintain a belief that the level of assessment might materially affect the outcome, it is recommended *that appeals in this respect be retained.* It is reasonable to expect that, with better understanding of the process and wider opportunities for community consultation, those presently in favour of continuing appeals in this area will be more selective about invoking the appeal process.

## Time Spent on Appeals

Another matter of concern about the appeal system is the *time* actually spent upon handling appeals in relation to proposals assessed under Part IV of the Act

An indication of the time spent on the overall assessment process emerges from the following survey relating to the 1989/90 year in which times are as follows:

| | No of Projects | EPA | Proponent | Total |
|---|---|---|---|---|
| CER | 25 | 15 weeks | 11 weeks | 26 weeks |
| PER | 9 | 32 weeks | 23 weeks | 55 weeks |
| ERMP | 2 | 32 weeks | 68 weeks | 100 weeks |

By way of comparison, one can look to the time spent on the appeal process. It needs to be appreciated that, in the first place, an appeal period of 14 days is applicable to all Environmental Protection Authority Reports and Recommendations. Taking that into account, for the last 3 years the following periods are the average time taken on determinations of appeals.

| | | |
|---|---|---|
| 1987/88 | (132 appeals) | 4.4 weeks |
| 1988/89 | (186 appeals) | 4.4 weeks |
| 1989/90 | (273 appeals) | 11.2 weeks |

It is evident that, based on the above figures, of the total time from commencement of the assessment process to final approval, the time spent on appeals is significant and varies from 10% to 14% (as between ERMPs and CERs). The proportion of time spent on appeals at present could be further reduced in many instances if stream-lining is undertaken. By contrast, submission to a tribunal mode of appeal would substantially extend the appeal time factor, probably provoking further criticism from proponents and industry.

## Administration of Appeals System

An analysis of the time spent in dealing with appeals indicates that it takes the Chief Executive Officer 20 days to provide advice on an appeal and a further 36 days for the Minister to process the appeal.

It seems reasonable to postulate that given the increasing prominence and interest in environmental matters the administrative dealing with appeals in the Minister's office has come under stress. This stress would be alleviated if, as suggested below, administratively the office of a Convenor of Appeals were established.

## General Conclusions in Relation to Statistical Analysis

In general, it could be said that the necessity for an appeals system has been demonstrated by the significant access to it. About 10% of Environmental Protection Authority reports and recommendations are appealed against by proponents and about 25% of reports are appealed against by community groups. Looked at empirically, it can be said that throughout the community and industry there has been a high level of acceptance of assessments made by the Environmental Protection Authority.

It is also important that in each year analysed, there have been certain significantly large or contentious proposals which have resulted in appeals of one kind or another. This kind of appeal is the one which probably causes most unease about the adequacy of the present system.

If the recommendations made below are adopted they should reduce time delays and contribute to meeting the objectives that the system should be fairer, faster, and reasonably free of complications. In passing, one should ask whether any alternative system such as adopting a tribunal mode would better achieve these objectives.

It is essential that in regard to large-scale proposals especially the appeals process must be capable of functioning effectively. For this to happen the appeals process must be capable of providing a high level of expert review within acceptable time frames. Given that some of the projects which will be subject to appeals in future are likely to require detailed and effective expert scrutiny, it is instructive to look at one project in particular where, for the first time an appeals committee was established. This provides a basis for asking what lessons can be learned from appeals in such a situation. It is instructive to bear these in mind since it is quite likely that in future appeals committees will have to be established with greater frequency.

## Port Kennedy Development

The Environmental Protection Authority Report on Port Kennedy was released in September 1989 and an appeal committee was established in November 1989. There were 9 appeals in all. The Committee was comprised of Mr K McKenna, Dr Ric Howe and Dr Bruce Phillips. They met in late November and December. They reviewed all aspects of the material associated with the project and separately called upon representatives of the involved parties to make submissions. The Committee lodged its report on 27 February 1990, some 20 weeks after the release of the Environmental Protection Authority's report and recommendations.

With the recommendations of the Committee before him the Minister was able to enter into discussion with proponents and decision-makers prior to settling the conditions resulting from the determination of the appeal.

This illustrates the way in which the assessment process and its extension into the appeals process is essentially managerial rather than adjudicative. It was also of relevance that in the end the Recommendations of the Appeals Committee did not depart substantially from advice given by the Chief Executive Officer.

The Port Kennedy appeal can be seen as vindicating the appeal process insofar as, through the appeal, a number of problems which had not otherwise been evident from the original submissions made to the Environmental Protection Authority were disclosed. This is quite likely to be the case where a difficult and complex project is proposed. It also permits quite specific targeting of issues which might not have been fully appreciated in the first instance.

## The Constitution and Servicing of Appeals Committees

One problem that was disclosed arising from the appeal process in that instance, however, was the fact that without the benefit of prior experience, the appeals committee made recommendations which were difficult to adapt to the condition-setting process. This raises an issue as to the desirability of ensuring that continuity of appeals experience is maintained since there are likely to be several appeals of some significance every year. In the light of the Port Kennedy experience, it is desirable that an experienced person with suitable skills and particularly with knowledge of the way in which recommendations can be converted into conditions should be available to guide the committee's deliberations. The Convenor would fulfil that role.The problem of continuity would further be addressed if these were a standing panel of about half a dozen experts with prior experience of dealings with the Environmental Protection Authority. From these, an appeal committee could be constituted in any instance, depending upon the specific areas of expertise required for the particular case. If necessary, a specialist member can be appointed for a single appeal if the standing members lack appropriate expertise.

It would be consistent with this proposal that as long as the appeals panel is in existence, a standing president should be included in that panel. That person might well have legal expertise.

In order to give effect to these proposals, they should be stipulated in regulations, if that be legally possible.These regulations should for the most part be permissive or facultative, e.g. 'The Minister may appoint 6 members to a panel from which an appeals committee may from time to time be drawn'.

This raises the question of whether the procedures of the appeals committees should be more strictly formalised. As indicated above, there must be a real question whether, and to what extent, environmental appeals are capable of disposition by way of a judicial-like process. What is essentially involved is an exercise of administrative and executive decision-making and recommending rather than an adjudication on the rights of parties.

Again, it bears repetition that the appeals process is an extension of the assessment regime and is part of an on-going process. This process remains open to the development of revised or new solutions rather than being an arbitration of fixed rights.

## Ensuring Natural Justice

In respect of the latter it must always be recognised that defects in the procedure of the Environmental Protection Authority when conducting environmental assessments, and in turn of the Minister, are always subject to the supervision of the Supreme Court by way of *judicial review*. Nothing in the Environmental Protection Act precludes that oversight. It should be remembered that appeals against the Environmental Protection Authority recommendations are not appeals against *decisions*. Natural justice must still be given to the affected parties (In re Pergarmon Press. (1971) Ch 388) though what suffices to satisfy the requirements of natural justice may well be less in the case of recommendations given that there are usually later occasions for an aggrieved party to persuade the decision-maker that the recommendations

should not be adopted. Under the Act there are further opportunities for input before a governmental decision embracing all relevant considerations is made. The appeals system is therefore an extension of the environmental review process and should not be confused with other quasi-judicial systems of appeals against actual decisions. It is therefore difficult to draw parallels between appeals against the Environmental Protection Authority recommendations and the planning system where actual decisions are subject to quasi-judicial appeal.

### The Aim of The Proposed Procedures

Returning to the matter of the procedures adopted by appeal committees, it is imperative that consistent with the requirements of natural justice, those seeking to raise objections through the appeals process be given a proper and adequate opportunity to present their arguments and material supporting their contentions. The extent to which that opportunity should be afforded depends, of course, on the nature of the particular appeal.

### The Convenor of Appeals

The essential role of the Convenor would be to manage the appeals process in a manner consistent with the requirements of the Act whilst achieving the objectives that the process should be fair, fast and free from complexity. The situation of the Convenor outside the Minister's Office is paramount in meeting these objectives: if the Convenor is located in the Minister's office there is likely to be too much pressure and distractions from other things for him or her to keep up with managing the steady flow of appeals.

The Convenor should be able to recommend to the Minister an appropriate method of dealing with individual appeals depending upon their substance, complexity and sensitivity. It is however the Minister who at all times should control the process and with the exceptions of appeals against his decision it should be the Minister who will make ultimate determinations.

The Convenor in the first instance, would be in a position to present to the Minister all relevant documents, information and advice in a format to facilitate an early decision.

In many cases, negotiations between the appellant(s), the proponent, and other interested persons could be undertaken through the agency of the Convenor. These might make it unnecessary to proceed to the second stage of establishing an appeal committee.

It also needs to be understood that the Convenor is not simply a replacement for the old office of Registrar of Appeals.

### The Revised Appeals Process

So far as *appeals against the levels of assessment* are concerned there is no reason why this should not be done simply on a documentary basis. It would be sufficient if submissions were made shortly to the Minister in that respect, and the Minister determined the matter after receiving input from the Chief Executive Officer and the Convenor of Appeals. The Minister should continue to be the person to whom appeals are made in this respect. Even though he or she will in most instances be guided by the Chief Executive Officer and the Convenor, he or she nevertheless would still stand apart from the original decision of the Authority and, as a Minister of the Crown, be aware of the broader suite of public and political concerns that often lie at the foundation of such appeals.

The central proposal is essentially a mechanical one: the provision of a Convenor of Appeals to oversee the disposition of appeals in a way designed to ensure that there is maximum input of information and views from all parties involved in or affected by an appeal.

It is mainly in respect of the half a dozen or so *significant* appeals against Environmental Protection Authority *reports* each year that the system requires further development. One essential improvement is that where appeals are lodged by a certain party against a

recommendation of the Environmental Protection Authority, the proponent and any Government agency involved (principally decision-making authorities) should have furnished to it a summary of those grounds of appeals, and in the first instance, be given an opportunity to make written submissions in relation to them. If, as recommended, a Convenor of Appeals is instituted, the Convenor can make recommendations to the Minister as to the appropriate way in which the appeal should proceed. Subject to the Minister's concurrence the Convenor can then organise for the appeal to be forwarded to the person selected from the panel who is chosen to preside over the appeal. That person can then in consultation with the Chief Executive Officer, and the Minister decide whether the appeal can be dealt with shortly by the presiding person himself or herself, or whether a committee consisting of other experts either from the standing panel or, if appropriate involving some other person, should be constituted.

It is further recommended that the system should allow for a two-tiered approach. In the first instance the presiding member of an appeals committee should endeavour to attempt some reconciliation between the views of the appellant and the recommendations made in the Environmental Protection Authority's report. This is in line with contemporary legal practice which emphasises and encourages alternative dispute resolution by way of mediation rather than adversarial contest in a hearing.

In this respect Section 106 of the Act could prove to be crucial. Section 106 on one view, is under-utilised at the moment as a mode of reaching a satisfactory settlement of a dispute. The latitude permitted by Section 106 to the Chief Executive Officer when reporting on an appeal to the Minister would seem to permit the Chief Executive Officer, after consultation with the Minister, to engage in further discussions and investigations with the appellants, possibly in liaison with the Convenor, and (if not the appellant) the proponent and other affected Government agencies. This would be with a view to ascertaining, in the light of further evidence or arguments not previously put forward, whether an agreed modification to the proposal is possible that is satisfactory to all. These could be conveyed to the Minister in the form of comments by the Chief Executive Officer. Those comments could include recommendations for amendments to the recommendations made in the Environmental Protection Authority's report.

Should this not be effective in resolving the dispute, the second or formal stage of an appeal could be instituted. A formal appeal committee could then be formally established and proceed to hear the appeal. At this stage, it is recommended that appeals should occur largely in public subject to confidentiality of commercial or industrial information. But in the first instance it could still rely on documentary materials presented to the committee, expanded through oral presentations by relevant experts, and oral submissions made by the affected parties.

The key element of the recommended appeals process is that appeals should be more actively managed in an appropriate manner and through all stages.Thus simple, non substantial or vexatious appeals should be dealt with quickly. Moderately complex matters should be able to receive more attention, consultation and mediation to resolve the issues. Complex and substantive matters should receive detailed attention and examination through an appeal committee commensurate with their significance. In all cases, issues such as natural justice, Government policy and objectives, and the requirements of the Act must be met.

In essence the revised appeals process would be as follows:

On receipt of an appeal, the Convenor would examine it in the context of the recommendations or the decision to which it relates. As required, preliminary discussion would be held with involved parties and as a result a recommendation made to the Minister on one of 3 courses of action.

1. Where matters are simple, non substantial or not relevant, subject to receipt of the Chief Executive Officer's report, the Convenor would prepare a report for the Minister's immediate decision. This entire process need not take longer than a few days.

2. Where matters are more complex and require more detailed examination, the Convenor would undertake the necessary investigations and consultations with involved parties, including decision-making authorities, obtain the Chief Executive Officer's report, allow the Chief Executive Officer to mediate by resorting to his powers implicit in S.106, and either the Convenor or a panel member report to the Minister that he or she determine the appeals or if consultations indicate that it is necessary, proceed to the setting up of an appeals committee. This entire process could be undertaken within 2 weeks.

3. Where, as a result of preliminary investigations, or because of the nature, complexity, significance or sensitivity of the proposal or appeals, the Convenor would recommend to the Minister that an Appeals Committee be established. If agreed to by the Minister, the Convenor would then, subject to the Minister's approval arrange for the establishment of, and manage the progress and reporting of the appeals committee and assist the Minister, in conjunction with the presiding member of the appeals committee in determining the appeals following receipt of the committee's report. Since procedure will remain the discretion of the committee, the presiding member would have the primary responsibility for controlling the appeal once it has reached the committee stage. The Convenor would basically provide management, liaison with the Minister, and advice on matters such as the appropriate way to frame recommendations so that they can be readily converted into conditions. This element of total management is essential to reducing problems, delays and achieving reduction in the time currently taken.

The Appendix represents a flow chart depicting the recommended appeals process.

This suggested process should not require changes to the Act but aspects of it could be prescribed by regulations. The extent would depend on advice from the Crown Law Department. Those regulations would also in due course come before the Joint Standing Committee on Delegated Legislation which would provide some degree of Parliamentary scrutiny

## Use of Alternative Procedure

The Minister can also , at any time after the Authority has reported (S.43) or as a result of an appeal (S.101)(1)(v)(ii), require the Authority to further assess or reassess and and report again on the project . As an alternative to an appeal this mechanism may be particularly suited to circumstances where new information becomes available after the assessment had been undertaken by the Authority. To date this facility has not been used by the Minister. One other advantage of this approach is the public being kept informed and involved in the reassessment while maintaining and having appeal rights against the Environmental Protection Authority's report. A disadvantage however is that it would probably take longer than simply determining the appeal.

## Whether Assimilation with Tribunal Mode is Desirable, and if so, Possible

It is a basic premise of the above proposals that, in general, they should *not* take a form akin to that normally encountered in a tribunal situation. Interchange of expert views normally does not require a formalised 'court' setting nor involve swearing of oaths and the examination and cross-examination of evidence. The appeals committee should be able to function in an adequate inquisitorial mode without the trappings of a judicial process. This could entail allowing those holding opposed views to ask questions or submit written questions, to any experts who may give evidence or furnish a report. Again there should be no need for any coercive process such as the power to subpoena documents or witnesses.

In this respect it is important to distinguish between technical issues, where although expert opinions may strongly differ between specialists, there is an element of objectivity and scientific methodology involved and wider considerations, where the values are much more diffuse and more difficult to comprehend. In the latter case, an appeal committee must rely on its experience and common sense, all the time being sensitive to issues of a political or policy

kind which are best left to ministerial, or if necessary Cabinet, decision. In the category of diffuse and non-quantifiable values one can include features such as the amenity of a particular area, its recreational functions in respect to the community at large, conservation values, risk factors, international and national responsibilities, and visual beauty. In these instances the appeals committee can only act on its own appreciation in making recommendations or in determining the appeal. Even on issues such as these it may be possible to seek advice from experts or consultants (such as through community surveys).

In none of this should there be a need either to require legal representation or to prohibit it. Lawyers properly versed in the matters of environmental advocacy should be able, along with any other expert consultants, to make presentations to an appeal committee on behalf of clients who may seek their assistance in pursuing environmental appeals. These, should be approached without undue adversity. Such an approach should in fact be helpful to the appeal committee.

In some cases, however, part at least of an appeal hearing might be conducted, at the discretion of the Committee, in a way not dissimilar to a tribunal. Without amendment to the Act it is doubtful that there could be any formal prescription of procedures such as giving oaths, but since the reputations of experts would be on the line, that should be a sufficient safeguard of their integrity. Strict adherence to the laws of evidence would also be out of place in such a modified exchange of opinion. Hence that lack of such formal requirements would be no disadvantage: if anything, arguably the converse is the case.

### Follow-up Action

If the proposals in my report, as explained in this paper, are acceptable, a small committee should be convened to work out the details of how they should be implemented.

## CONCLUSIONS

The following conclusions follow from what is said above:

1. The appeals process presently provided in the Act, including appeals against the level of assessment, should be continued, subject to some minor modifications, largely intact.

2. More *definition* should be given to the procedures available within the appeals system, ie, way of making regulations, if possible;

   [a] providing for the constitution of a standing appeals committee, with power given to the Minister to make additional appointments to any committee if justified by the nature of the appeal and including the power to appoint presidential members to chair the committee's deliberations;

   [b] providing for the establishment of a Convenor of Appeals, separate from the Minister's office, who will be responsible for dealing with the carriage of appeals;

   [c] requiring the grounds of appeal to be disclosed to interested and affected parties, including the proponent (if not the appellant), and other Government agencies, and permitting those affected persons to make responses if they see fit to do so.

3. There is no need to formalise the appeals committee process further at this stage by way of establishing a tribunal, and in particular there is no need for there to be substantial amendments made to the Act. In particular a tribunal would:

   (a) require amendments to the Act;
   (b) remove decision-making authority from Government, changing the whole philosophy of the 1986 Act;
   (c) increase time and expense spent on appeals;

(d) discourage many legitimate appeals;
(e) open the way for 'stalling' appeals;
(f) possibly politicise the quasi judicial process;
(g) invoke value-making judgements inappropriate for an unelected body;
(h) substitute an adversarial for an inquisitorial mode.
(i) be contrary to proposals to reduce the number of tribunals and subsume them within an administrative law division of the Supreme Court.

4. Such changes or improvements that should be made to the present in order to improve the process and clarify appeal rights and secure natural justice are outlined in this paper and indicated in the Appendix. These provide for greater input from all interested parties, greater scope for mediation and on-going negotiation in lieu of proceeding to a full appeal hearing if not warranted, whilst retaining considerable scope for the presiding member to fashion proceedings of an appeal in the way most suitable to its disposition.

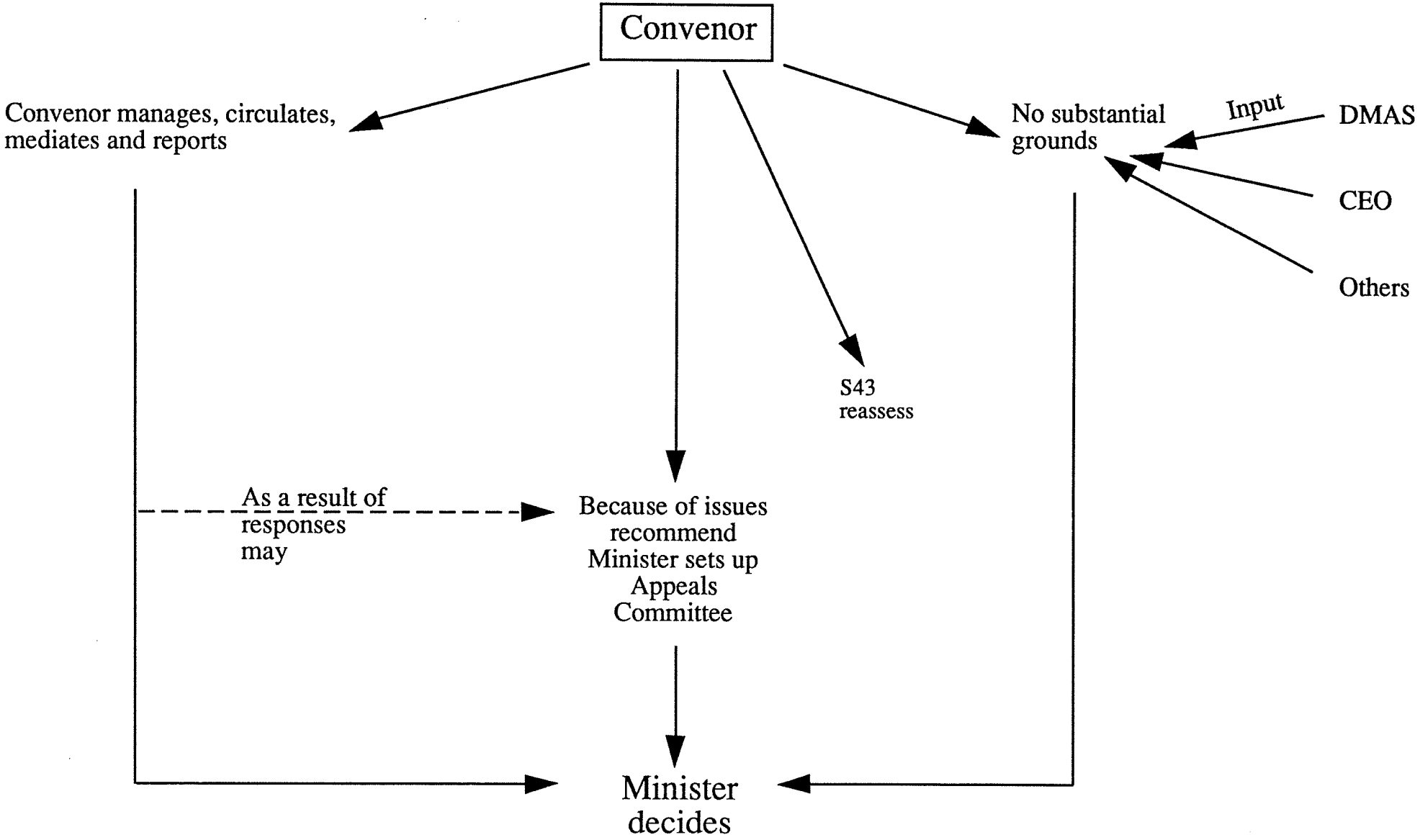
5. Greater resort to S.106 of the Act would permit the Minister to make greater use of the Chief Executive Officer in a mediation role.

6. Amendments to the system, particularly where they would involve amendment of the Act, should be left until the five-year review of the Act is undertaken: in the meantime improvements suggested herein should advance the operation of the existing system to a better managed, more standardised approach which would also become better known to those seeking a more consistent approach to appeals.

7. A small committee be convened to make specific recommendations as to how these proposals should be best implemented.

P W Johnston

# Appeals


Convenor
Convenor manages, circulates, mediates and reports
No substantial grounds
Input
DMAS
CEO
Others
S43 reassess
As a result of responses may
Because of issues recommend Minister sets up Appeals Committee
Minister decides