

**Town planning law – past, present and future
Conference to mark 80 years of town planning law
in Western Australia**

**The rise of facilitative dispute resolution
in planning review proceedings**

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Introduction

The State Administrative Tribunal of Western Australia (SAT or Tribunal) was established on 1 January 2005 as a civil and administrative review tribunal with jurisdiction across a wide range of areas, including town planning review applications.¹ The Tribunal is authorised to carry out non-adjudicative processes that, in other tribunals and courts, are usually termed 'alternative dispute resolution' (ADR). The Tribunal may:

- 'give directions at any time in a proceeding and do whatever is necessary for the speedy and fair conduct of the proceeding';²
- 'refer the matter, or any aspect of it, for mediation by a person specified as mediator by the tribunal';³
- 'require the parties to the proceeding to attend a compulsory conference';⁴ and
- 'invite the [respondent] to reconsider the decision'.⁵

¹ *State Administrative Tribunal Act 2004* (WA), s 7. See Parry DR, 'Revolution in the West: The transformation of planning appeals in Western Australia' (2008) 14 LGLJ 119 at 125 – 127. In this paper, the expressions 'planning review applications' and 'planning cases' in the State Administrative Tribunal refer to applications for review of decisions of local and State government authorities to refuse to grant approval for, or to grant conditional approval for, development or subdivision applications or strategic planning proposals under planning schemes, and to give landowners and others directions or notices in relation to the carrying out of development or other activities. These proceedings are allocated to the State Administrative Tribunal's development and resources stream. In 2008-2009, 82% of the work of the development and resources stream (434 applications received; 439 applications finalised) involved development, subdivision or strategic planning proposals and 5% of the work of the stream (26 applications received; 29 applications finalised) involved local government directions or notices. The remainder of the work of the stream concerned land tax (3%), local government non-planning applications and land valuation (2% each), and rating, fisheries, water, regulation of local government councillors, appeals from non-legally qualified members to judicial members on matters involving a question of law and other matters (1% each). In total, in 2008-2009, the development and resources stream received 535 applications and finalised 538 applications. See *State Administrative Tribunal Annual Report 2009*, page 13, http://www.sat.justice.wa.gov.au/_files/annualreport/2009/Annual_Report_2009.pdf.

² *State Administrative Tribunal Act 2004* (WA), s 34(1).

³ *State Administrative Tribunal Act 2004* (WA), s 54(1).

⁴ *State Administrative Tribunal Act 2004* (WA), s 52(1).

The *State Administrative Tribunal Act 2004* (WA) (SAT Act) does not require the Tribunal to give preference to non-adjudicative over adjudicative methods of dispute resolution. However, from the outset, the Tribunal has regarded an emphasis on non-adjudicative dispute resolution as an important means by which to achieve its main objectives, which are:

- '(a) to achieve the resolution of questions, complaints or disputes, and to make or review decisions, fairly and according to the substantial merits of the case;
- (b) to act as speedily and with as little formality and technicality as is practicable, and to minimise the costs to the parties; and
- (c) to make appropriate use of the knowledge and experience of tribunal members.'⁶

Indeed, the approach and practice of the Tribunal to the resolution of many types of disputes, including planning cases,⁷ is that non-adjudicative processes are not alternative methods of dispute resolution, but rather are central to the Tribunal's function.

The Tribunal has adopted the term 'facilitative dispute resolution' (FDR) to refer to a suite of non-adjudicative dispute resolution processes that it employs. About 75% of planning review applications are fully resolved by FDR.⁸ In addition, FDR processes are used to reduce the scope of dispute in many of the remaining 25% of cases that require Tribunal adjudication.

In this paper I will describe and discuss the use of FDR processes in the Tribunal, explain why SAT has chosen this term, rather than ADR, to refer to these processes, compare SAT's performance in the resolution of planning cases by FDR with other major Australian planning jurisdictions, and discuss six important benefits of FDR, the 'six s's of success'.

⁵ *State Administrative Tribunal Act 2004* (WA), s 31(1).

⁶ *State Administrative Tribunal Act 2004* (WA), s 9.

⁷ In this paper, the expressions 'planning review applications' and 'planning cases' in the *State Administrative Tribunal* have the meaning referred to in note 1.

⁸ *State Administrative Tribunal Annual Report 2009*, note 1, page 13. Specifically, 76% (320 applications out of 422 applications finalised) in 2007-2008 and 74% (347 applications out of 468 applications finalised) in 2008-2009: author's statistics.

What is facilitative dispute resolution?

Facilitative dispute resolution involves the resolution of cases or issues, with the assistance of tribunal members, but without the parties having to engage in a final hearing or determination on documents, with a consequent win/loss Tribunal-imposed decision. Applying FDR processes, the tribunal member facilitates the outcome, rather than imposing it.

The National Alternative Dispute Resolution Advisory Council (NADRAC) has defined the term 'facilitative ADR processes' as follows:

'Processes in which an ADR practitioner assists the parties to a dispute to identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement about some issues or the whole dispute.'⁹

Specifically, in SAT, FDR processes involve:

- Directions hearings in which issues are identified, options are developed and, in certain types of applications referred to below, alternatives to the proposal are discussed;
- Mediations;
- Use of compulsory conferences; and
- Invitations by the Tribunal to respondents to reconsider their decisions under s 31 of SAT Act, often in light of further information or clarification provided, or modifications or amendments made, by applicants through the other FDR processes.

The Tribunal has developed two types of directions hearings for planning cases. Planning review applications involving developments with a value of less than \$250,000, or single houses with a value of less than \$500,000, and subdivisions to create not more than three lots (which are collectively known as 'class 1 planning applications'), are listed for a one-hour first directions hearing before a full-time ordinary member. The parties in these cases tend to be self-represented and unfamiliar with the planning review process. A class 1 directions hearing is, therefore, particularly informal, so as to put the

⁹ National Alternative Dispute Resolution Advisory Council, 'ADR Terminology: A discussion paper', 2002, [http://www.nadrac.gov.au/www/nadrac/rwpattach.nsf/VAP/\(960DF944D2AF105D4B7573C11018CFB4\)~DiscussionPaper16Web.doc/\\$file/DiscussionPaper16Web.doc](http://www.nadrac.gov.au/www/nadrac/rwpattach.nsf/VAP/(960DF944D2AF105D4B7573C11018CFB4)~DiscussionPaper16Web.doc/$file/DiscussionPaper16Web.doc).

participants at ease. The directions hearing takes place in a small, mediation-type room. While it is a public hearing, the proceeding is not recorded and there is no Tribunal officer present.

A class 1 directions hearing has two elements. First, the presiding member gives an overview of the planning review process and answers any questions that the parties may have in relation to it. Second, with the parties' assistance, the member identifies the key issues in dispute, develops options and discusses alternatives to the proposal. If the member considers that it would be desirable, in order to facilitate the progress of discussions, to convert the directions hearing into a mediation, and certainly if the member considers that a private session with one or both of the parties would be useful, then the member has authority to reconstitute the hearing from a directions hearing to a mediation.

All planning review proceedings that are not class 1 planning applications (known as 'class 2 planning applications') are listed for a first directions hearing before the senior member of the development and resources stream. The parties in these matters are usually familiar with or have representatives who are familiar with the planning review process. Consequently, three matters are usually listed per half hour. These directions hearings take place in an ordinary hearing room and are recorded.

Like class 1 directions hearings, the member conducting a class 2 directions hearing adopts a hands-on approach to identify the key issues in dispute and begins to develop options to achieve a resolution. However, unlike class 1 directions hearings, class 2 directions hearings do not usually proceed to a discussion of the merits of the application or alternatives to it. This is because class 2 applications tend to be more complex and often require preparation and the participation of a number of people in order to progress the resolution of the matter. In order to facilitate resolution of the application or of issues, there is a presumption that cases will be referred from a class 2 directions hearing for mediation or listed for a compulsory conference.

In the early part of the Tribunal's existence, the member conducting a directions hearing often had to actively encourage and, in some cases, even coerce the parties to participate in mediation or compulsory conference. However, over time, regular participants in planning review proceedings in SAT,

and even occasional participants, came to appreciate the benefits of FDR (discussed below) and parties now often jointly seek referral for mediation.¹⁰

The purpose of mediation is 'to achieve the resolution of matters by settlement between the parties'.¹¹ The purpose of a compulsory conference is 'to identify and clarify the issues in the proceeding and promote the resolution of the matters by settlement between the parties'.¹² Unless the presiding member directs otherwise, both a mediation and a compulsory conference is to be held in private.¹³ Evidence of anything said or done in the course of mediation or a compulsory conference is generally not admissible at any later stage of the proceeding.¹⁴

In practice, there is very little difference between the two processes. Most planning review applications are referred for mediation rather than listed for a compulsory conference. The Tribunal has the power to refer a matter for mediation without the consent of the parties.¹⁵ A proceeding is usually only listed for a compulsory conference, rather than referred for mediation, where one or other of the parties expresses strong opposition to engaging in a facilitative process, but the Tribunal considers that it is warranted in order to narrow and resolve issues.

All full-time SAT members and a number of sessional members¹⁶ have been trained in mediation by either Lawyers Engaged in Alternative Dispute Resolution (LEADR) or the Institute of Arbitrators and Mediators Australia (IAMA). A mediation or compulsory conference typically involves two or three sessions. However, significant and complex cases can require many sessions.

A mediation or compulsory conference is often the first time that an applicant really comes to appreciate the respondent's concerns, as there is an opportunity for the respondent's officers, representatives or councillors to

¹⁰ As an illustration of the extent to which mediation has become embraced by parties in planning cases, in answer to the question 'What decision do you want the SAT to make?' on the application form in a recent planning review application, the applicant simply wrote 'Referral for mediation'.

¹¹ *State Administrative Tribunal Act 2004* (WA), s 54(4).

¹² *State Administrative Tribunal Act 2004* (WA), s 52(3).

¹³ *State Administrative Tribunal Act 2004* (WA), s 54(6) and s 52(4).

¹⁴ *State Administrative Tribunal Act 2004* (WA), s 55. The exceptions to this rule are where all the parties agree to the admission of the evidence, it is evidence of directions given or orders made at the mediation or compulsory conference or the reasons for the directions or orders, or it is relevant to an offence in relation to the proceeding.

¹⁵ *State Administrative Tribunal Act 2004* (WA), s 54(3).

¹⁶ Including six sessional members allocated to the development and resources stream with qualifications and experience in town planning, architecture, engineering, surveying and environmental science.

explain those concerns and the member, often in private session, is able to conduct effective reality testing in light of those concerns. As a result, many applications are withdrawn. Furthermore, a mediation or compulsory conference provides an opportunity for the parties, with the assistance of the member, to discuss alternatives that can achieve the applicant's underlying objectives in a manner that is consistent with the respondent's expectations.

Section 31 of the SAT Act enables the Tribunal to invite the respondent to reconsider its decision at any time during a proceeding. Upon being invited by SAT to reconsider the decision, the respondent is authorised by the SAT Act to affirm the decision, vary the decision or set aside the decision and substitute a new decision.¹⁷ If the respondent affirms the decision, then the proceeding continues to resolution before the Tribunal. If the respondent varies the decision or sets aside the decision and substitutes a new decision, then, if the applicant is content with the varied or substituted decision and withdraws the proceeding, then the varied or substituted decision has effect. If the applicant is not content with the varied or substituted decision, then the proceeding is deemed to be for the review of the decision as varied or the substituted decision, and the matter proceeds to resolution on that basis.¹⁸

Importantly, all FDR processes in SAT are conducted by tribunal members, rather than by a tribunal officer, such as a registrar, or by another person, such as an external mediator. Tribunal members have – and are seen by the parties to have – independence, credibility, knowledge and experience. The parties know that the member assisting them to resolve their dispute might otherwise be adjudicating the dispute. Although FDR processes are generally consensual in character, the fact that they are conducted exclusively by tribunal members has undoubtedly increased their success in resolving disputes and in narrowing and resolving contested issues.¹⁹

Over a three-month period in mid-2008, the Tribunal carried out research in relation to the FDR process of mediation. A detailed questionnaire was handed to parties at the conclusion of the process and the parties were invited to complete and return it to the Tribunal.²⁰ Seventy-eight percent of respondents

¹⁷ *State Administrative Tribunal Act 2004* (WA), s 31(2). See the Tribunal's pamphlet *Section 31 invitation by SAT for decision-maker to reconsider its decision*,

http://www.sat.justice.wa.gov.au/_files/29054_SAT_Section_31_Brochure.pdf.

¹⁸ *State Administrative Tribunal Act 2004* (WA), s 31(3).

¹⁹ See note 36.

²⁰ The research included planning cases and also other types of administrative review and original proceedings. Over the three month period from May 2008 to July 2008, 61 completed survey forms were returned; 31 from

reported that the mediation in their case was wholly or partly successful in finalising the matter.²¹ The following findings from the research in relation to these cases are particularly instructive:

- 72% of respondents agreed or strongly agreed that the factor that 'the mediator was a tribunal member' assisted the successful outcome; 17% neither agreed nor disagreed; only one respondent disagreed or strongly disagreed that this factor assisted the outcome;
- 93% of respondents agreed or strongly agreed that the factor that 'the mediator had knowledge of the topic' assisted the successful outcome; 7% of respondents neither agreed nor disagreed;
- 100% of respondents agreed or strongly agreed that the factor that 'the mediator understood the issues in dispute' assisted the successful outcome;
- 83% of respondents agreed or strongly agreed that the factor that 'the venue was neutral to both parties' assisted the successful outcome; 15% neither agreed nor disagreed; only one respondent disagreed that this factor assisted the outcome; and
- 93% of respondents agreed or strongly agreed that the factor that 'the mediator assisted the process' assisted the successful outcome; 7% of respondents neither agreed nor disagreed.

In reflecting on the results of the research and experience gained in conducting mediations in the Tribunal, Member Maurice Spillane has made the following pertinent observations:

'[B]ecause of the knowledge and experience of the mediators [as tribunal members], the identification and narrowing of issues is usually achieved quickly and effectively. As a result, parties can move to problem-solving faster than would normally be the case if a mediator had no knowledge of the topic in dispute.

Tribunal members also engage in what is referred to as 'reality testing' which can be particularly useful in private sessions. It may often have a

applicants and 30 from respondents. See Spillane M, 'Mediation in the State Administrative Tribunal from alternative to mainstream a success story', 9th National Mediation Conference, Perth, 11 September 2008.

²¹ 55% (33/60) wholly successful; 23% (14/60) partially successful; 22% (13/60) not at all successful; one respondent had no response to this question.

rigorous edge to it, as the parties are aware that the member conducting the mediation could be hearing the matter if it had been listed before them for hearing rather than for mediation. There is, therefore, a high credibility in the presence of the member, the questions they pose and the issues they raise.

It is also not uncommon for parties in private sessions to seek the mediator's evaluation of their case. Such a request, particularly in the situation of self-represented parties, must be approached with great caution. Tribunal members cannot give legal advice but they can, through well constructed questions, raise issues that may assist a party to consider an application in a more objective light.²²

FDR not ADR

In other tribunals and courts, the processes that are referred to in SAT as 'facilitative dispute resolution', if available, are usually called 'alternative dispute resolution'. The choice of different terminology by the Tribunal was quite deliberate for several reasons.

First, the reference to FDR, rather than ADR, reflects the fact that these processes are not considered to be alternative forms of dispute resolution, but rather are central methods by which the Tribunal carries out its dispute resolution function.

Second, FDR processes are applied in the Tribunal not only to achieve the resolution of disputes, but also to identify and narrow the scope of disputes. Importantly, the research undertaken by the Tribunal in 2008 revealed that, even where the FDR process was not at all successful in finalising the matter, 50% of respondents found it 'beneficial' and 50% found it 'of limited benefit'. None of the respondents considered the process to be 'of no benefit'. When asked why respondents found the process to be beneficial or of limited benefit in such cases, 19% said that it was because it narrowed the issues, 38% said that it was because it allowed the respondent to air their views, and 43% said that it was because it allowed the respondent to see or better understand the other parties' views.²³ Therefore, in circumstances where FDR does not result

²² Spillane, note 20, pages 8 – 10.

²³ Spillane, note 20, page 11.

in the resolution of an application, it is often an important case management tool to reduce the length and costs of the proceeding.

Third, FDR and adjudicative processes can be used in tandem to achieve the efficient resolution of a dispute. For example, the Tribunal or the parties may identify a preliminary issue at a directions hearing, the determination of which by the Tribunal may inform the resolution of the matter through mediation, compulsory conference or reconsideration by the respondent.²⁴ Furthermore, although not commonly done, the Tribunal can both refer a matter for mediation or compulsory conference and list the case for adjudication. In this way, the parties are given both an end date for the resolution of the dispute and an opportunity (as well as an incentive) to resolve the matter through FDR before they need to incur any significant preparation costs for adjudication.

Fourth, whereas tribunal- or court-annexed ADR typically involves a single process, usually mediation or conciliation, which, if unsuccessful, leaves adjudication as the only option for resolution of the matter by the tribunal or court, FDR in SAT involves a suite of processes. Moreover, the FDR processes are applied in SAT in a co-ordinated and determined fashion, one leading to another, in order to achieve a non-adjudicative result, if at all possible. Thus, a planning case in SAT is typically resolved through the combination and progression of:

- a directions hearing; leading to
- two or three mediation sessions; leading to
- withdrawal of the application; or
- an invitation by SAT to the respondent to reconsider its decision; leading, if necessary²⁵, to
- a further directions hearing or mediation session to resolve any outstanding aspect of the varied or substituted decision, such as a disputed condition of approval.

²⁴ For example, whether certain parts of a proposed building are included in the calculation of 'plot ratio' under the applicable planning scheme: *Broadway and City of Subiaco* [2009] WASAT 40. Once the Tribunal made a decision on this preliminary issue, the application was resolved through mediation and reconsideration by the respondent.

²⁵ The Tribunal's practice is to schedule a directions hearing shortly after the date by which the respondent has been invited to reconsider its decision. However, applicants usually write to the Tribunal following reconsideration seeking leave to withdraw the application and respondents usually write to the Tribunal consenting to leave being granted to withdraw the application. The Tribunal then vacates the directions hearing and issues an order allowing the withdrawal without attendance by either party. The Tribunal's leave to withdraw an application is required by s 46(1) of the *State Administrative Tribunal Act 2004* (WA).

Planning cases resolved by FDR in SAT in comparison with other jurisdictions

SAT has had tremendous success in resolving planning cases by FDR processes. **Figure 1** shows the percentage of planning review applications resolved by FDR processes in SAT over the past four years and the estimated percentage of appeals resolved by these processes in the former Town Planning Appeal Tribunal during its final year of operation.²⁶ **Figure 2** shows the number of planning applications and all development and resources applications finalised over this period.²⁷ Between 2004 and 2008-2009, the number of planning applications in Western Australia increased by 44%, from 324 to 468 a year. During this period, the proportion of planning applications finalised by FDR processes increased by 150%, from an estimated 30% of applications in 2004²⁸ to 66% of applications in 2005-2006 and 2006-2007, and to approximately 75% of applications in 2007-2008 and 2008-2009.

²⁶ *State Administrative Tribunal Annual Report 2009*, note 1, page 14. On 1 January 2005, SAT replaced the Town Planning Appeal Tribunal (TPAT) and a number of other adjudicators. In 2004, TPAT finalised 57% of appeals by adjudication: *State Administrative Tribunal Annual Report 2006*, page 29, http://www.sat.justice.wa.gov.au/_files/annualreport/2006/2006.pdf. However, not all of the remaining 43% of appeals finalised by TPAT in 2004 were resolved by FDR processes. Although TPAT conducted directions hearings and had a tribunal-annexed mediation programme, its FDR processes were not as developed or rigorous as the processes employed by SAT. The parties had greater liberty to seek adjournments, to obtain lengthy adjournments, even adjournments *sine die*, and to conduct discussions between themselves and with third parties without TPAT's involvement, than they do in SAT. Furthermore, unlike SAT, TPAT did not have power to refer a matter for mediation without the consent of the parties, to require parties to attend a compulsory conference, or to invite a respondent to reconsider its decision. Consequently, the estimate in **Figure 1** that, in TPAT in 2004, 30% of appeals were finalised by FDR processes, may be too high.

²⁷ *State Administrative Tribunal Annual Report 2009*, note 1, page 13 and *State Administrative Tribunal Annual Report 2008*, pages 36 and 37,

http://www.sat.justice.wa.gov.au/_files/annualreport/2008/SAT_Annual_Report_2008.pdf.

²⁸ See note 26.

Figure 1 – Percentage of planning review applications resolved by FDR in the Town Planning Appeal Tribunal (TPAT) in 2004 (approximate) and by the State Administrative Tribunal (SAT) in 2005-2006, 2006-2007, 2007-2008 and 2008-2009

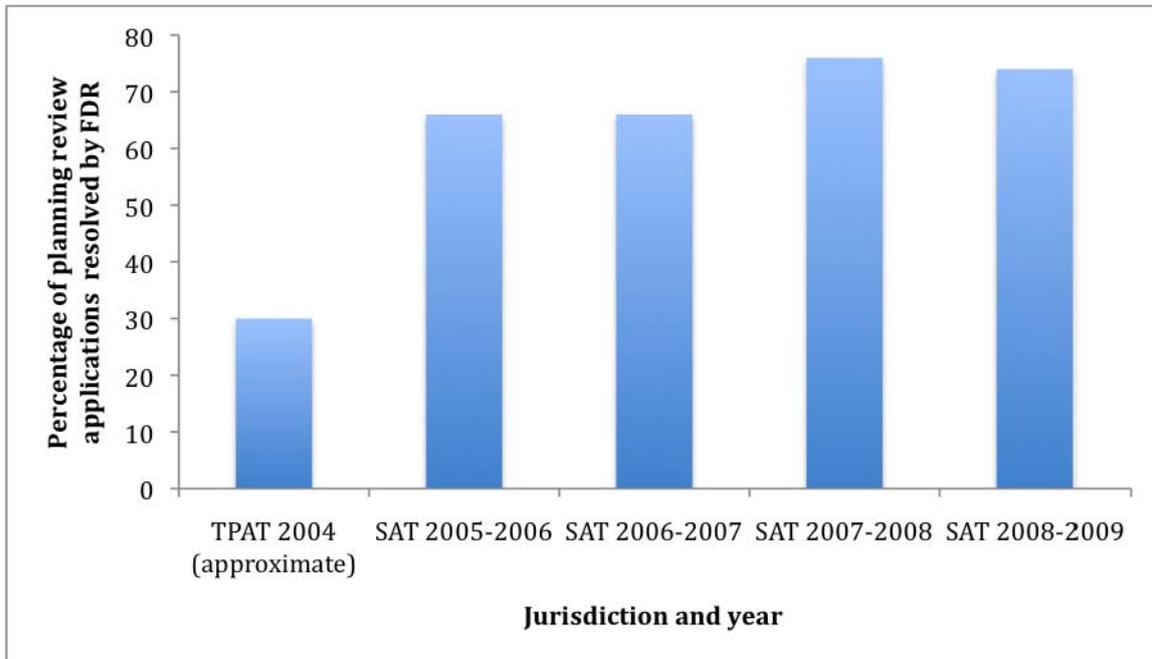
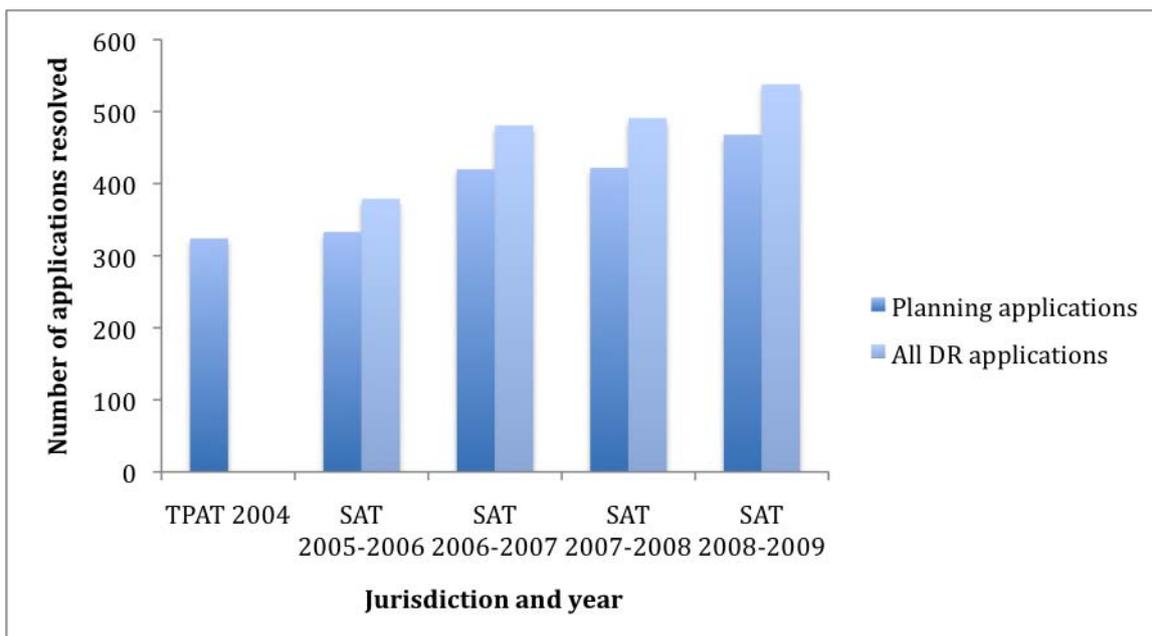


Figure 2 – Number of planning review applications and other development and resources (DR) applications finalised by the Town Planning Appeal Tribunal (TPAT) in 2004 and by the State Administrative Tribunal (SAT) in 2005-2006, 2006-2007, 2007-2008 and 2008-2009



SAT has been considerably more successful than any other Australian planning jurisdiction in resolving cases by FDR processes. In New South Wales in 2008, only two appeals in class 1 of the Land and Environment Court's jurisdiction²⁹ were resolved by mediation and 14%³⁰ of class 1 appeals were resolved by settlement reached through conciliation conferences.³¹ In Queensland in 2007-2008, 7% of appeals in the Planning and Environment Court were resolved by mediation.³² In South Australia in 2007-2008, 31% of matters in the Environment, Resources and Development Court were resolved by conferences.³³ In Victoria in 2007-2008, 6% or 7% of appeals in the planning and environment list of the Victorian Civil and Administrative Tribunal (VCAT) were resolved by or prior to mediation.³⁴ **Figure 3** shows the proportion of planning review applications/appeals resolved by FDR processes in major Australian planning jurisdictions in 2007-2008.³⁵

²⁹ Class 1 of the Land and Environment Court's jurisdiction involves environmental planning and protection appeals. *The Land and Environment Court of NSW Annual Review 2008* ([http://www.lawlink.nsw.gov.au/lawlink/lec/ll_lec.nsf/vwFiles/982_LEC_AnnRev-08_post_web.pdf/\\$file/982_LEC_AnnRev-08_post_web.pdf](http://www.lawlink.nsw.gov.au/lawlink/lec/ll_lec.nsf/vwFiles/982_LEC_AnnRev-08_post_web.pdf/$file/982_LEC_AnnRev-08_post_web.pdf)) only reports on the total number of matters resolved by conciliation in classes 1, 2 (local government, trees and miscellaneous appeals) and 3 (land tenure, valuation, rating and compensation matters) of the court's jurisdiction and does not provide an individual number for each of these classes of jurisdiction. Ms Joanne Gray, Acting Registrar of the court, has kindly provided the specific statistics for class 1 appeals in 2008 which are used in this paper.

³⁰ 123 appeals out of 909 appeals finalised. In addition, 65 appeals (7%) were resolved by court decision in circumstances where an agreement between the parties was not reached through a conciliation conference, but the parties consented under s 34(4)(b) of the *Land and Environment Court Act 1979* (NSW) to the conciliation conference proceeding to an arbitration and the commissioner disposing of the proceeding based on the evidence and submissions presented at the arbitration. In 32 of these cases the commissioner gave an oral decision at the conclusion of the arbitration and in 33 cases the commissioner reserved the decision.

³¹ In a conciliation conference, '[t]he conciliator facilitates negotiation between the parties with a view to achieving agreement as to the resolution of the dispute': Preston BJ, 'Operating an Environment Court: The experience of the Land and Environment Court of New South Wales' (2008) 25 EPLJ 385 at 392. This is similar to mediation and use of compulsory conferences in SAT.

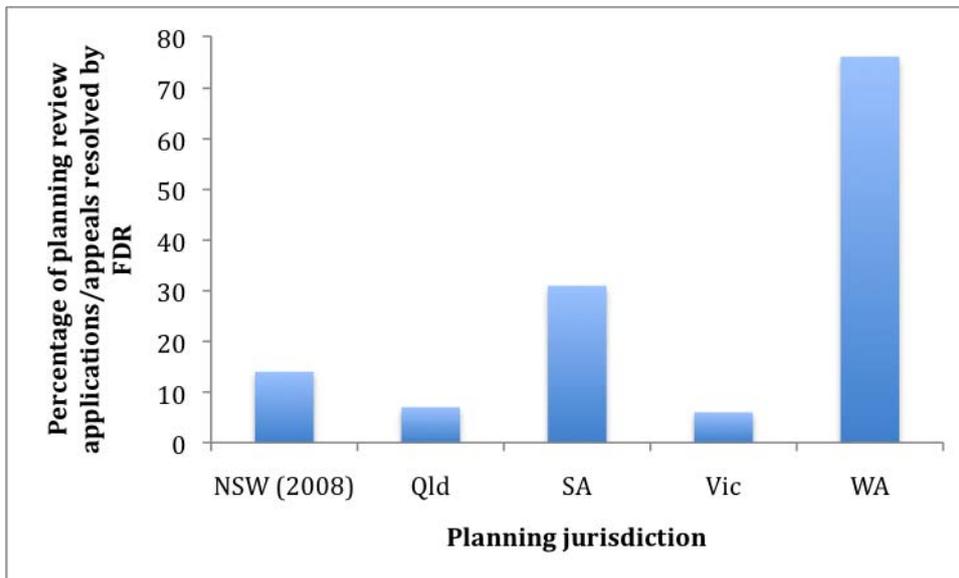
³² 51 appeals out of 772 appeals finalised: *District Court of Queensland Annual Report 2007-2008*, pages 7, 29-30, <http://www.courts.qld.gov.au/DistrictCourt/DC-AR-2007-08.pdf>.

³³ 136 matters out of 432 matters finalised: *Courts Administration Authority Annual Report 2007-08*, page 29, http://www.courts.sa.gov.au/pdf/annual_reports/areport_07-08.pdf. Pursuant to s 16 of the *Environment, Resources and Development Court Act 1993* (SA), a conference must be held in all matters other than criminal proceedings (of which there were only 13 matters commenced in 2007-2008), unless dispensed with by the court. The purpose of a conference 'is to enable the member of the Court presiding at the conference ... to assist the parties to explore any possible resolution of the matters in dispute without resorting to a formal hearing': *Environment, Resources and Development Court Act 1993* (SA), s 16(2). This is similar to mediation and use of compulsory conferences in SAT.

³⁴ Either 190 appeals or 239 appeals out of 3,324 appeals finalised: *Victorian Civil and Administrative Tribunal Annual Report 2007-2008*, [http://www.vcat.vic.gov.au/CA256902000FE154/Lookup/annual_report_vcat/\\$file/2007-08_complete_annual_report.pdf](http://www.vcat.vic.gov.au/CA256902000FE154/Lookup/annual_report_vcat/$file/2007-08_complete_annual_report.pdf), pages 30 and 43. There is a discrepancy in the Annual Report on this aspect; page 30 says that 239 cases were resolved by mediation whereas page 43 says that 190 cases were resolved at or prior to mediation.

³⁵ It should be noted that, in contrast to other Australian jurisdictions, at present, there are generally no third party appeal rights in planning matters in Western Australia, although third parties can still participate in planning cases in SAT in a number of ways: see the Tribunal's pamphlet *Third party participation in planning matters* http://www.sat.justice.wa.gov.au/_files/Third_Party_Pamphlet_DL.pdf. A recent Parliamentary Inquiry has recommended that that third parties who have previously made submissions in relation to a planning

Figure 3 – Percentage of planning review applications/appeals resolved by FDR in Australian planning jurisdiction in 2007-2008



The Tribunal’s significant success, in comparison to other jurisdictions, in resolving planning cases by FDR processes is arguably due both to its distinctive approach and practice and to the range and nature of FDR methods that it has at its disposal. In particular, as discussed earlier, in SAT, FDR processes are regarded as central, rather than alternative, methods of dispute resolution, are conducted exclusively by members³⁶, and are applied in a co-ordinated and determined fashion to achieve a non-adjudicative result, if at all possible. In terms of the FDR processes available to the Tribunal, while the same or similar methods as mediation and use of compulsory conferences are available in other planning jurisdictions, the Tribunal’s use of directions hearings as a

proposal should have a right to seek review of the determination of the proposal before SAT if they are directly affected by the proposal or the proposal is a matter of public or environmental interest: Legislative Council Western Australia Standing Committee on Legislation, *Inquiry into the Jurisdiction and Operation of the State Administrative Tribunal* (Report 14), May 2009, Recommendation 18, see pages 197 – 227, [http://www.parliament.wa.gov.au/parliament/commit.nsf/\(Report+Lookup+by+Com+ID\)/A0BA5F7E0AD6041EC82575BC002027CD/\\$file/ls.str.090520.rpf.014.xx.a.pdf](http://www.parliament.wa.gov.au/parliament/commit.nsf/(Report+Lookup+by+Com+ID)/A0BA5F7E0AD6041EC82575BC002027CD/$file/ls.str.090520.rpf.014.xx.a.pdf). It would seem that SAT’s approach and practice in relation to the use of FDR processes to resolve planning review applications and issues could be adapted and applied in third party appeals. However, it is unclear to what extent the fact that there are third party appeal rights in other jurisdictions has affected their success in resolving matters by FDR processes.

³⁶Conciliation conferences are conducted by commissioners (who hold similar positions to members in SAT) in the Land and Environment Court and in the Environment, Resources and Development Court. In contrast, mediations are not conducted by members, but rather by officers, such as a registrar, in the Planning and Environment Court and in VCAT. It is noteworthy that the jurisdictions in which FDR processes are conducted by members are more successful in the resolution of matters by these means (NSW 14%, SA 31%, WA 76%) than the jurisdictions in which these processes are conducted by officers (Queensland 7%, Victoria 6% or 7%). The greater success in Western Australia than in New South Wales and South Australia appears to be due to the other distinctive aspects of SAT’s approach and practice and to the range and nature of the FDR methods that SAT has at its disposal.

facilitative dispute resolution process, as distinct from a case management process, appears to be unusual, if not unique, and the important legislative facility of having authority to invite respondents to reconsider their decisions is not available in other jurisdictions.³⁷

The consequence of the Tribunal's success, relative to other jurisdictions, in resolving planning cases by FDR processes is that a significantly lesser proportion of parties engaged in planning review applications in Western Australia need to incur the time and expense of participating in, or at least preparing for, an adjudication, than is the case in other States. In 2008, 39% of appeals in class 1 of the Land and Environment Court's jurisdiction were resolved by hearing³⁸ and an additional 7% of appeals were resolved by court decision in circumstances where an agreement between the parties was not reached at a conciliation conference and the parties consented to the conciliation conference proceeding to an arbitration.³⁹ In contrast, in SAT, only 24% of planning review applications in 2007–2008 and 26% in 2008–2009 required resolution by final hearing or determination on documents. Furthermore, while, in 2008, 39% of appeals⁴⁰ in class 1 of the Land and Environment Court's jurisdiction were discontinued or resolved by consent orders (not through mediation or a conciliation conference), experience indicates that such resolutions often occur at a late stage of a proceeding ('on the steps of the court').⁴¹ In South Australia in 2007-2008, although 51% of matters were withdrawn or settled between the parties (not through a conference), 'many settlements occurred close to the scheduled hearing date [which] is reflected in the statistic that hearings did not proceed on 60% of allocated days'.⁴² In contrast, FDR processes are applied in SAT at the outset of

³⁷ The Tribunal's power to invite the respondent to reconsider its decision at any stage of a proceeding under s 31 of the *State Administrative Tribunal Act 2004* (WA) appears to be modelled on the power of the Administrative Appeals Tribunal to 'remit the decision to the person who made it for reconsideration' under s 42D(1) of the *Administrative Appeals Tribunal Act 1975* (Cth). The Tribunal's power to invite the respondent to reconsider its decision is distinct from its power to set aside a reviewable decision and, rather than substituting its own decision, send the matter back to the respondent for reconsideration in accordance with any directions or recommendations that the Tribunal considers appropriate under s 29(3) of the *State Administrative Tribunal Act 2004* (WA) (which is also available to VCAT: *Victorian Civil and Administrative Tribunal Act 1998* (Vic), s 51(2)(d)).

³⁸ 356 appeals out of 909 appeals finalised. 75 of these matters were determined by on-site hearings. However, even with on-site hearings, parties must incur the time and expense of preparation for and participation in the hearing, and are subject to a court-imposed, win/loss result.

³⁹ 65 appeals. See note 31.

⁴⁰ 356 appeals out of 909 appeals finalised (coincidentally the same number as finalised by hearing). 259 appeals were discontinued and 97 appeals were resolved by consent orders.

⁴¹ Between 1991 and 2004, the author was a legal practitioner in New South Wales appearing extensively before the Land and Environment Court.

⁴² *Courts Administration Authority Annual Report 2007-08*, note 33, page 29.

proceedings, to ensure that applications are resolved, or at least that the scope of disputes are narrowed, as early as possible, so as to save time and costs.⁴³

Benefits of FDR – The 'six s's of success'

Experience gained over almost five years of the Tribunal's operation indicates that the FDR processes discussed in this paper have tremendous benefits in achieving quick, just and proportionate dispute resolution in planning cases with minimum costs to the parties and to the State. These benefits can be distilled into the 'six s's of success', namely:

- satisfaction;
- speed and cost;
- superior outcome;
- super resolution;
- scope of dispute; and
- sustainability of the planning review system.

Satisfaction

The FDR processes developed and employed by the Tribunal, and in particular mediation, enable parties to create their own solution to a dispute, with the assistance of a tribunal member, rather than have a win/loss Tribunal decision imposed upon them. Both parties are likely to be satisfied with the resolution, and be committed to it, where it is their creation. In contrast, one or both parties may not be satisfied with a Tribunal decision.

Furthermore, the process of inviting the respondent to reconsider its decision under s 31 of the SAT Act, having regard to further information or clarification provided, or modifications or amendments made, by the applicant through other FDR processes, allows the respondent to exercise an element of control that has otherwise been taken away from it through the planning review process. This element of control creates satisfaction on the part of the respondent.

⁴³ The *Victorian Civil and Administrative Tribunal Annual Report 2007-2008* and the *District Court of Queensland Annual Report 2007-2008* do not reveal the number of appeals that were adjudicated and the number of appeals that were discontinued/withdrawn or resolved by consent orders (not through mediation) in VCAT and the Planning and Environment Court.

An additional element of satisfaction provided by FDR processes for all participants is that relationships, between the applicant and the respondent and between the parties and third parties, such as resident objectors, are more likely to be positively maintained without a contested hearing in which one side 'wins' and the other side 'loses'.

Speed and cost

If a planning application can be resolved through FDR processes, the parties obviously do not have to incur the time and expense of a final hearing or determination on documents. As noted earlier, in comparison with New South Wales, a significantly lesser proportion of parties in planning cases in Western Australia need to incur the time and expense of participating in an adjudication. Furthermore, as also discussed earlier, while 39% of appeals in New South Wales in 2008 were resolved by discontinuance or consent orders (not through mediation or a conciliation conference), many of these resolutions are likely to have occurred after parties had already incurred considerable time and expense. It is considered preferable to apply the FDR processes at the very commencement of planning review proceedings to increase the speed and reduce the costs of dispute resolution.

As shown in **Figure 2**, the number of planning review applications in Western Australia increased by 44% between 2004 and 2008 – 2009. The use of FDR processes to resolve planning cases has enabled the Tribunal to absorb this increase in workload while maintaining or reducing the time taken to finalise planning review applications. **Table 1** indicates the speed of finalisation in weeks of planning review applications and all development and resources applications each year between 2005 – 2006 and 2008 – 2009.

Table 1 – Speed of finalisation in weeks of planning review applications and all development and resources (DR) applications by SAT in 2005-2006, 2006-2007, 2007-2008 and 2008-2009⁴⁴

	2005-2006			2006-2007			2007-2008			2008-2009		
Percent of cases	30%	50%	80%	30%	50%	80%	30%	50%	80%	30%	50%	80%
SAT benchmark	12	20	30	12	20	30	12	20	30	12	20	30
Development	12	20	30	14	19	32	12	18	32	12	18	30
Subdivision	15	23	31	16	25	49	8	13	29	7	14	30
LG notices	12	18	49	19	42	63	3	12	20	9	11	17
All DR	n/a	n/a	n/a	14	19	36	11	18	34	11	17	30

Superior outcome

As Justice Chaney said in *Jacobs and City of Subiaco* [2007] WASAT 84 at [10]:

'[C]onstructive discussion through the mediation process often gives rise to preferable planning outcomes ...'

If a planning review application requires adjudication, the Tribunal's options are, essentially, approval or refusal of the proposal, with the only flexibility afforded by the ability to condition an approval. In contrast, FDR processes enable a significantly expanded range of options to resolve a dispute. While the resolution may be a conditional approval, it may also be withdrawal of the application, either because the proposal is abandoned or to enable a fresh and considered application to be lodged, or a modified or amended proposal. The increased range of options often enables a superior community planning outcome to be achieved.

⁴⁴ *State Administrative Tribunal Annual Report 2009*, note 1, page 8. 'Development' includes strategic planning proposals under planning schemes. The Annual Report does not indicate performance against benchmarks for planning cases as a whole, as defined for the purposes of this paper (see note 1). However, having regard to the proportion of all development and resources applications that are planning cases, the performance for planning cases as a whole is likely to generally accord with the performance for all development and resources applications.

Super resolution

FDR can involve discussion and resolution of broader issues than those which are strictly the subject of the planning review application. The Tribunal has taken the view that, where it is within the capacity of its resources, it is in the public interest to facilitate broader dispute resolution and avoid further disputation. For example, the Tribunal has enabled discussion and resolution of strategic planning issues in circumstances where the planning review application related only to a planning assessment (development or subdivision) application.

Scope of dispute

In addition to enabling the resolution of about three-quarters of planning review applications in their entirety, FDR processes are used in most other planning review applications in the Tribunal as a case management tool. Cases are rarely listed for final adjudication without some form of the facilitative process to identify, narrow and resolve issues. As mentioned earlier, the research undertaken by the Tribunal in 2008 showed that all participants found mediations to be at least of some benefit, even where it was not at all successful in finalising the matter. One of the reported reasons for this was because the process narrowed the issues. Interestingly, the experience of the Queensland Planning and Environment Court is similar.⁴⁵ The consequence is that, in many of the planning review applications that require Tribunal adjudication, the hearing or determination on documents is quicker and cheaper than would be the case if the parties were left to identify and debate the issues.

Sustainability of the planning review system

In the late 1990s, there was considerable criticism in New South Wales, particularly by some local governments, of the planning appeal process in the

⁴⁵ '[I]n many [of the 52] cases [that were referred for mediation but were not finalised in 2007-2008] ... issues in dispute were reduced or narrowed' (*District Court of Queensland Annual Report 2007-2008*, note 32, page 29).

Land and Environment Court.⁴⁶ In response to this criticism, on 7 April 2000, the New South Wales Attorney-General, the Hon JW Shaw QC MLC, announced the establishment of a Working Party chaired by the Hon JS Cripps QC⁴⁷ 'to review the way development applications are dealt with by the Land and Environment Court, and to examine the scope for the greater use of alternative dispute resolution'.⁴⁸

In submissions made to the Working Party, local governments opposed the merits appeal system and expressed concerns about the high cost of defending their decisions in the Court. The Working Party rejected the contentions of some councils that planning appeals should be abolished, restricted or removed from the court. The Working Party considered that the availability of merits review in planning cases, by an independent body such as the Court, promotes the public interest by providing access to administrative justice.⁴⁹

However, the Working Party also said the following:

'Notwithstanding the Working Party's recommendations that the present system be retained, it was concerned that appeals to the Land and Environment Court were too costly. It must be remembered that although some people speak of developers in a pejorative sense, the term applies to anyone who needs permission to carry out activities on his or her land. A large number of applications lodged with councils and later the subject of an appeal to the Land and Environment Court are for building additions to houses and small business and/or the use of land for small commercial ventures. **A significant number of applications heard in the Land and Environment Court extend over a period of two days.** Although the information given to the Working Party varied, it took the view that **the average cost of a 2 day hearing** (including lawyers and experts) **was between \$20,000 and \$25,000 for each party.** The Working Party was of the opinion that the costs were excessive. As

⁴⁶ See Editorial Commentary (2004) 21 EPLJ 415 at 417 - 418.

⁴⁷ Formerly Chief Judge of the Land and Environment Court and a Judge of Appeal in New South Wales.

⁴⁸ Cripps JS, *Report of the Land and Environment Court Working Party*, (New South Wales Attorney General's Department, 2001), page iii, http://www.lawlink.nsw.gov.au/report/lpd_reports.nsf/pages/lec-working-index.

⁴⁹ Cripps, note 48, pages iii and 48 – 50.

mentioned above, it recommends that ADR should be used more frequently. ...⁵⁰

The Working Party's recommendation in relation to the use of ADR referred to in the quotation was as follows:

'The Working Party was of the opinion that greater use should be made of alternative dispute resolution (ADR) for the settling of development disputes and that the mechanism should be considered at every stage of the development application and review process.'⁵¹

Recently, there has been criticism of the planning appeal system in Victoria, also based on the time and costs involved in planning cases.⁵² The president of VCAT, Justice Kevin Bell, identified 'serious issues' with the operation of VCAT in terms of the 'blowout of hearing times', consequent increased intervention by the Minister for Planning to fast-track projects, and the practice of proponents of developments 'to engage a big legal team and a big experts team'.

The New South Wales Working Party was correct in its consideration that the availability of merits review by an independent planning review court or tribunal promotes the public interest by providing access to administrative justice. An independent planning review system also promotes the public interest in three other respects. First, it improves the quality of decision-making by planning consent authorities, because they know that their decisions can be appealed. Second, it enables the development of planning law and principle. Third, it provides guidance to both applicants and consent authorities as to the appropriate determination of similar applications, thereby reducing future disputes. However, these benefits of the planning review system are significantly compromised if applicants cannot afford to exercise rights to seek review and if respondents cannot afford to properly participate in planning cases.

The FDR processes discussed in this paper facilitate a more sustainable planning review system by addressing the two legitimate and related concerns endorsed by the New South Wales Working Party, namely, the length and

⁵⁰ Cripps, note 48, page iv. Emphasis in bold added.

⁵¹ Cripps, note 48, page iii.

⁵² Dobbin M, 'VCAT Chief admits faults, orders overhaul', *The Age*, 12 August 2009, page 3.

costs, or at least the average costs, of planning review applications. Whereas the Working Party found that a significant number of planning appeals in the Land and Environment Court extended over a period of two days, two-day or longer hearings in planning cases are the exception in SAT. In 2008 – 2009, 121 planning review applications were resolved by Tribunal adjudication. Twenty-seven of these (22%) were determined entirely on the documents or on the documents with a view. Of the 94 planning review applications determined by hearing, 73 (78%) involved a hearing of one day or less.⁵³ This was due, in part, to the capacity to limit the scope of disputes through FDR processes.⁵⁴

Furthermore, whereas the average cost, in 2000–2001, of a two-day hearing in the Land and Environment Court was between \$20,000 and \$25,000 for each party, the average cost of planning review proceedings for parties in SAT is likely to be considerably less. This is because three-quarters of planning review applications are resolved by FDR processes at an early stage of proceedings and the scope of dispute in many of the cases that require adjudication is reduced by these means, with only 22% of hearings taking more than one day.⁵⁵

It is noteworthy that FDR processes of the type envisaged by the Working Party 'for the settling of development disputes ... at every stage of the ... review process' have had the results in Western Australia that the Working Party envisaged. It is also noteworthy that the 'serious issues' recently identified by the president of VCAT have been experienced in a planning jurisdiction in which only a small percentage of appeals are resolved by FDR processes.

Conclusion

The last five years have witnessed the rise of facilitative dispute resolution in planning review proceedings in Western Australia. SAT has had tremendous success in resolving planning cases and reducing the scope of planning disputes by FDR processes.

⁵³ Author's statistics. The remaining matters were heard over two days (13 applications), three days (4 applications), four days (3 applications) or five days (1 application).

⁵⁴ Another important factor limiting the length of hearings is the Tribunal's practice of requiring expert witnesses in each field of expertise to confer with one another prior to the hearing, file a joint statement of matters upon which they agree, the matters upon which they disagree and the reasons for any disagreement, and give evidence concurrently at the hearing: see Parry, note 1, pages 133-134.

⁵⁵ According to a local newspaper article in May 2009, the cost of planning review applications for a metropolitan local government, which had eight of its decisions appealed to SAT in 2008–2009, was less than \$2,250: Watts R, 'Development Clash', *Southern Gazette*, 5 May 2009. The article reported that a mediated outcome was achieved in four cases, the local government was successful in a fifth case, and three applications were pending.

The Tribunal's success is arguably due both to its distinctive approach and practice and to the range and nature of FDR methods that it has at its disposal. In particular, FDR processes are regarded as central, rather than alternative, methods of dispute resolution; all FDR processes are conducted by tribunal members, who combine independence, credibility, knowledge and experience as members, with mediation training and skills; and the processes are applied in a co-ordinated and determined fashion to achieve a non-adjudicative result, if at all possible. In terms of the FDR processes available to the Tribunal, the use of directions hearings as a facilitative dispute resolution process, as distinct from a case management process, appears to be unusual, if not unique, and the facility of inviting respondents to reconsider their decisions under s 31 of the SAT Act is not available in other Australian planning jurisdictions.

FDR processes result in satisfaction with the resolution, increase speed and reduce costs of planning review applications, often give rise to a superior planning outcome, enable broader dispute resolution, reduce the scope of disputes requiring adjudication and create a more sustainable planning review system.