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A tale of two States – Civil enforcement of planning laws in Western Australia and Victoria

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Abstract

The effective civil enforcement of planning laws is a matter of significant public interest in terms of both access to justice and the protection of the environment. The State Administrative Tribunal of Western Australia (SAT) was established in 2005, in part, as a specialist planning tribunal. In SAT's Annual Reports commencing in 2006-2007, each of the first three Presidents of the Tribunal have suggested that s 216 of the *Planning and Development Act 2005* (WA), which permits a responsible authority to apply to the Supreme Court of Western Australia for an injunction to restrain a contravention of that Act, an interim development order, a planning scheme or a condition of development approval, should be amended to confer concurrent jurisdiction on SAT constituted by or including a judicial member. In SAT's Annual Reports commencing in 2007-2008, the Tribunal's Presidents have also suggested that jurisdiction should be conferred on SAT constituted by or including a judicial member to make declarations of right in relation to any right, obligation or duty imposed by or under planning, heritage and related laws. The Annual Reports have contrasted SAT's lack of jurisdiction in relation to civil enforcement of planning laws with equivalent jurisdictions in Australia, including the Victorian Civil and Administrative Tribunal (VCAT), which has jurisdiction to make enforcement orders on the application of a responsible authority or any other person to restrain and remedy breaches of planning laws.

This paper firstly outlines the suggestion for law reform in relation to civil enforcement of planning laws made in SAT's Annual Reports, the consideration of that suggestion in the Western Australian Legislative Council's Inquiry into SAT, and a concurrent suggestion made in SAT's Annual Reports for law reform in relation to civil enforcement of heritage laws which has, in effect, been taken up in terms of the draft *Heritage Bill 2015* (WA). The paper then provides an overview of the legislative provisions in relation to civil enforcement of planning laws in Western Australia and Victoria before surveying 15 VCAT decisions which usefully illustrate the types of matters in which civil enforcement of planning laws has been sought in Victoria and would presumably be sought in Western Australia if equivalent jurisdiction were conferred upon SAT. The paper concludes with several reasons why the conferral of this jurisdiction upon the Tribunal would aid effective and prompt enforcement of planning laws in this State and mitigate and remedy environmental harm.

I wish to gratefully acknowledge research undertaken by my Associate, Mr Ross Fletcher, for the purposes of this paper and to thank Ms Helen Gibson, Deputy President of VCAT's Planning and Environment List, for reviewing this paper and making helpful comments. Any errors in this paper are, of course, my own.

'It was the best of times, it was the worst of times, it was the age of wisdom, it was the age of foolishness, it was the epoch of belief, it was the epoch of incredulity, it was the season of Light, it was the season of Darkness, it was the spring of hope, it was the winter of despair, we had everything before us, we had nothing before us, we were all going direct to Heaven, we were all going direct the other way - in short, the period was so far like the present period, that some of its noisiest authorities insisted on its being received, for good or for evil, in the superlative degree of comparison only.'

(Charles Dickens, *A Tale of Two Cities* (1859))

A suggestion for law reform in relation to civil enforcement of planning laws in Western Australia

The State Administrative Tribunal of Western Australia (known as SAT) was established in 2005, in part, a specialist planning tribunal. SAT exercises review jurisdiction under Pt 14 of the *Planning and Development Act 2005* (WA) (PD Act) and under other written laws, such as planning schemes, in relation to a range of planning matters, including subdivision (s 251 of the PD Act), land use and development (s 252 of the PD Act) and directions given by responsible authorities under s 214 of the PD Act to restrain and remedy unlawful development (s 255 of the PD Act).

Section 150(5) of the *State Administrative Tribunal Act 2004* (WA) (SAT Act) authorises the President of the Tribunal to report to the Attorney General about SAT's jurisdiction and functions or any matter connected with the exercise of that jurisdiction or the carrying out of those functions. In SAT's Annual Reports commencing in 2006-2007, each of its first three Presidents have made suggestions to Government for law reform in relation to civil enforcement of planning laws in Western Australia. In particular, in the 2006-2007 and subsequent Annual Reports, it has been suggested that s 216 of the PD Act, which permits a responsible authority to apply to the Supreme Court of

Western Australia for an injunction to restrain a contravention of the PD Act, an interim development order, a planning scheme or a condition of development approval, should be amended to confer concurrent jurisdiction on SAT constituted by or including a judicial member.¹

As stated at page 17 of the 2013-2014 Annual Report²:

The reason for this suggestion is that the Tribunal has been established, in part, as a specialist planning tribunal which already has jurisdiction under section 255 of the PD Act, to review directions given by local governments under section 214 where development is undertaken in contravention of a planning scheme, an interim development order, a planning control area requirement or a condition of approval. The Tribunal undertakes a very similar enquiry under section 255 to the enquiry which would be undertaken in determining an application for civil enforcement under section 216. The only real difference is that section 255 applications are commenced by the recipient of a direction, whereas section 216 applications are commenced by the issuer of a direction.

The Tribunal has judicial members familiar with planning laws who will be able to effectively exercise this jurisdiction. Responsible authorities are familiar with the Tribunal. The practice and procedure of the Tribunal, including its statutory objectives to act as speedily as is practicable and to minimise costs to parties, would seem to make it attractive to responsible authorities seeking to enforce planning laws. The effective enforcement of planning laws is a matter of significant public interest.

The Tribunal's Annual Reports have contrasted SAT's lack of jurisdiction in relation to civil enforcement of planning laws with the availability of that jurisdiction in similar bodies elsewhere in Australia. These include the Victorian Civil and Administrative Tribunal (known as VCAT), the first State super-Tribunal and the model for SAT, which, as discussed later in this paper,

¹ Under s 3(1) of the *State Administrative Tribunal Act 2004* (WA) (SAT Act), a 'judicial member' means the President (who must be a judge of the Supreme Court: SAT Act s 108(3)) or a Deputy President (who must be a judge of the District Court: SAT Act s 112(3)).

² <http://www.sat.justice.wa.gov.au/files/SAT%20ARReport%202013-2014.pdf>

has jurisdiction to make enforcement orders to restrain and remedy breaches of planning laws in Victoria.

In SAT's Annual Reports since 2007-2008, each of the Tribunal's first three Presidents have also suggested that jurisdiction should be conferred on SAT constituted by or including a judicial member to make declarations of right in relation to any right, obligation or duty imposed by or under planning, heritage and related laws. The Annual Reports have noted that s 91 of the SAT Act enables a judicial member to make a declaration concerning any matter in a proceeding instead of or in addition to any other order the Tribunal makes in the proceeding. However, as stated at page 18 of the 2013-2014 Annual Report:

... this power is only exercisable when an enabling Act confers jurisdiction on the Tribunal. Where there is no enabling Act that confers jurisdiction on the Tribunal, citizens have no choice but to commence proceedings in the Supreme Court for a declaration. Supreme Court proceedings typically take longer and are more costly to conduct than the Tribunal proceedings. The Supreme Court is also generally not as familiar with planning, heritage and related laws and considerations as are the judicial members of the Tribunal.

Consideration of suggestion for law reform by Legislative Council Inquiry

Under s 173 of the SAT Act, a committee of the Western Australian Legislative Council was required to conduct an inquiry into SAT's jurisdiction and operation as soon as practicable after the end of a period of two years from the commencement of the Tribunal. On 7 June 2007, the Legislative Council charged the Standing Committee on Legislation with the task of undertaking this inquiry. In May 2009, the Standing Committee on Legislation published a lengthy report in relation to its inquiry³.

³ Report 14 Standing Committee on Legislation Inquiry into the Jurisdiction and Operation of the State Administrative Tribunal (May 2009) http://www.sat.justice.wa.gov.au/files/Report_14_on_SAT.pdf

At [2.326] and [2.327] of its report, the Standing Committee on Legislation noted SAT's suggestion in the 2006-2007 and 2007-2008 Annual Reports that s 216 of the PD Act should be amended to confer concurrent jurisdiction on the Tribunal constituted by or including a judicial member. At [2.328] of its report, the Committee noted that 'the SAT is able to grant interim injunctions under section 90 of the SAT Act, but that this power is only exercisable by the SAT in matters which are within its jurisdiction' and that '[c]urrently, applications pursuant to section 216 of the PD Act cannot be considered by the SAT.' The report then states as follows at [2.329] - [2.330]:

[2.329] The Committee also noted that, since the English *Judicature Acts* of 1873 and 1875 were re-enacted in Australian jurisdictions, the administration of equitable principles, including the granting of remedies of an equitable nature, such as injunctions, has been traditionally regarded as the special purview of the Supreme Court, although limited jurisdiction has been granted by statute to the District Court, Magistrates Court and other inferior adjudicative bodies such as SAT. This fundamental legal convention was acknowledged by the President of the SAT:

There is a great reluctance, I think, by superior courts around Australia, including the Supreme Court of Western Australia, to see inferior courts and tribunals like ours exercising equitable powers. For lawyers, putting it lightly, equity is something that should only be held at the highest levels by very careful hands, and there is insufficient trust for it to be handled lower down the chain, ... The same issues apply to the Magistrates Court and even the District Court.

[2.330] The [Department of the Attorney General] did not express a view on the SAT's suggestion, instead referring the Committee to the [former Department for Planning and Infrastructure, now the Department of Planning], the department administering the PD Act and the President of the SAT. The [Department] agreed with the suggested amendment. In fact, the [Department] supported the amendment of section 216 of the PD Act so that applications for injunction under that section could only be dealt with by the SAT, rather than giving a responsible

authority the option of applying to either the Supreme Court or the SAT.

At [2.331] of its report, the Committee stated that it 'did not support widening the scope of SAT's powers to grant injunctions'. However, the Committee did not provide any reasons for this view and did not provide any further discussion or analysis of this issue. As the report did not support the suggestion for the conferral of jurisdiction on SAT in relation to civil enforcement of planning laws, the WA Government's response to the report did not make reference to this issue.

Notwithstanding the support expressed by the former Department for Planning and Infrastructure to the Legislative Council Inquiry for the conferral of exclusive jurisdiction in relation to civil enforcement of planning laws upon SAT, the Tribunal's suggestions for law reform in this area have not been taken up by Government.

A suggestion for law reform in relation to civil enforcement of heritage laws in Western Australia

However, interestingly, a concurrent suggestion made in SAT's Annual Reports commencing in 2006-2007 for law reform in relation to civil enforcement of heritage laws in Western Australia has, in effect, been taken up in the draft *Heritage Bill 2015* (WA) (Heritage Bill) which was released for public comment on 12 August 2015. The Heritage Bill is intended to replace the *Heritage of Western Australia Act 1990* (WA) (HWA Act).

In SAT's Annual Reports, its Presidents have suggested that consideration should be given to amending s 69 of HWA Act, which enables the Minister, the Heritage Council or any other person to bring proceedings for an injunction to restrain a breach of a conservation order in the Supreme Court or the

District Court, to confer concurrent jurisdiction on SAT constituted by or including a judicial member.

Clause 122(1) of the Heritage Bill, if enacted, would confer jurisdiction on SAT, concurrently with the Supreme Court and the District Court, on the application of the Minister for Heritage or the Heritage Council, to 'make such order or orders as the ... Tribunal thinks fit for the purpose of securing compliance with this Act or [another] written law [by operation of the Act] and giving effect to the objectives of this Act, including an injunction or other order directing a person to do or refrain from doing a specified act, and any ancillary order deemed to be desirable in consequence'. Clause 122(2) of the Heritage Bill, if enacted, would confer jurisdiction on SAT, concurrently with the Supreme Court and the District Court, to 'grant an interim injunction ex parte pending final determination of an application under this section'.

The Heritage Bill does not require that SAT is to be constituted by or is to include a judicial member in order to exercise jurisdiction under cl 122, leaving the constitution of the Tribunal to be as specified by the President under s 11(1) of the SAT Act. However, it is likely that such an application would be listed for determination by a judicial member or by a panel with a judicial member presiding.

Legislation for civil enforcement of planning laws in Western Australia

Section 216 of the PD Act states as follows:

Breach of Act etc. or development approval, injunctions as to

- (1) Without prejudice to any proceeding for an offence against this Act, if -
 - (a) a person contravenes a provision of this Act, an interim development order or a planning scheme; or
 - (b) a responsible authority grants an application for approval of development subject to conditions and the development is commenced, continued or completed contrary to or otherwise than in accordance with

any condition imposed by the responsible authority with respect to the development

the Supreme Court may, on application by the responsible authority, grant an injunction -

- (c) if the application is with respect to a contravention of the Act, an interim development order or a planning scheme, restraining the person from engaging in any conduct or doing any act, that constitutes or is likely to constitute a contravention of this Act, the interim development order or the planning scheme;
- (d) if the application is with respect to the commencement, continuation or completion of a development contrary to or otherwise than in accordance with any -
 - (i) in the case condition imposed by the responsible authority with respect to the development where the development is commenced but not carried out, restraining the continuation or completion of the development or any use of the development; or
 - (ii) in the case where the development is completed, restraining the use of the development,

until the condition is complied with.

- (2) An injunction granted under subsection (1) -
 - (a) has effect for the period specified in the injunction or until further order of the Court; and
 - (b) may be varied or rescinded by the Court.

It appears that, since the commencement of the PD Act on 9 April 2006, no local government or other responsible authority has sought an injunction from the Supreme Court under s 216 of the PD Act to restrain any breach of planning law. Certainly, there is no published decision of the Supreme Court in relation to any such application.

One might speculate that this is due to the time and cost involved in Supreme Court proceedings. However, another reason may be suggested by the survey of Victorian civil enforcement cases below, namely that the type of matters in which civil enforcement of planning laws is typically sought before VCAT, while significant in terms of effective civil enforcement of planning laws and protection of the environment, largely involve routine, run-of-the-mill

planning matters which may not be seen as sufficiently complex or significant to warrant Supreme Court proceedings.

The range of matters in the Victorian cases will be familiar to Western Australian planning lawyers. The same types of allegations of unlawful development routinely arise in this State as well. However, in the absence of equivalent civil enforcement jurisdiction in SAT as in VCAT, it is likely that local governments and other responsible authorities faced with similar cases would give a direction seeking to restrain and remedy an alleged breach of planning laws under s 214 of the PD Act and/or prosecute the developer before the Magistrates Court under s 218 of the PD Act, rather than seek an injunction from the Supreme Court under s 216 of the PD Act.

Although a failure to comply with a direction constitutes an offence under s 214(7) of the PD Act, the recipient of the direction may not comply with it, or may seek review of the direction by SAT under s 255 of the PD Act and a stay of the direction under s 25(2) of the SAT Act until the determination of the review proceeding. The Magistrates Court is not a specialist planning jurisdiction with experience in planning law, policy and practice. Furthermore, a successful prosecution will not directly and promptly remedy a breach of planning law and any associated environmental harm or restrain an ongoing or future breach.

Section 214(2) and (3) of the PD Act authorises local governments and other responsible authority to give directions to restrain and remedy unlawful development in the following terms:

- (2) If a development, or any part of a development, is undertaken in contravention of a planning scheme or an interim development order or in contravention of planning control area requirements, the responsible authority may give a written direction to the owner or any other person undertaking that development to stop, and not recommence, the development or that part of the

development that is undertaken in contravention of the planning scheme, interim development order or planning control area requirements.

- (3) If a development has been undertaken in contravention of a planning scheme or interim development order or in contravention of planning control area requirements, the responsible authority may give a written direction to the owner or any other person who undertook the development -
 - (a) to remove, pull down, take up, or alter the development; and
 - (b) to restore the land as nearly as practicable to its condition immediately before the development started, to the satisfaction of the responsible authority.

Section 255(1) of the PD Act confers jurisdiction on SAT to review a s 214 direction in the following terms:

A person to whom a direction is given under section 214 may apply to the State Administrative Tribunal for a review, in accordance with this Part, of the decision to give the direction.

As observed in SAT's Annual Reports, the Tribunal undertakes 'a very similar inquiry' in an application for review under s 255 of the PD Act to the inquiry which would be undertaken in determining an application for civil enforcement under s 216. Indeed, proceedings under s 255 of the PD Act, in effect, involve civil enforcement of planning laws although, somewhat curiously, only on the application to SAT of the alleged unlawful developer, and not on the application to SAT of the responsible authority seeking to restrain and remedy a breach of planning laws. The nature of applications under s 255 of the PD Act being, in effect, civil enforcement proceedings, is recognised by the terms of s 255(2) which states as follows:

If the State Administrative Tribunal confirms or varies the direction, it may, by written notice served on the person to whom the direction was given, direct the owner to comply with the direction as so confirmed or varied, within a period of not less than 40 days after service of the notice, as is specified in the notice.

In *Morea Architects and Town of Vincent* [2006] WASAT 263; (2006) 44 SR (WA) 301 at [61] - [63], the Tribunal identified five non-exhaustive 'important matters for consideration' in the exercise of discretion

under s 214 of the PD Act which guide the Tribunal's consideration of applications under s 255 of the PD Act. Significantly, the survey of Victorian Civil enforcement cases later in this paper indicates that essentially the same matters for consideration apply in civil enforcement proceedings in VCAT. The five matters for consideration as stated in *Morea Architects and Town of Vincent* at [63] are as follows:

- it is in the public interest of orderly and proper development (including use) of land that planning laws should generally be complied with. It is expected that, normally, those who use or physically develop land should comply with the planning legislation and any applicable approval in relation to that activity;
- the impact of the contravention of the scheme on the affected locality and environment;
- the factual circumstances in which the contravention of the scheme took place;
- the time which has elapsed since the development was undertaken in contravention of the scheme; and
- the expense and inconvenience which would be involved in remedying the contravention of the scheme.

(See also *Drake and City of South Perth & Anor* [2005] WASAT 271 at [93] - [97].)

Finally, in relation to legislation for civil enforcement of planning laws in Western Australia, it is to be noted that SAT, when constituted by a judicial member, has power under s 90(1) of the SAT Act to 'grant an interim injunction in any proceeding if it is just and convenient to do so' and under s 91(1) of the SAT Act to 'make a declaration concerning any matter in any proceeding instead of any orders it could make, or in addition to any orders it makes, in the proceeding.'

Section 90(1) and s 91(1) of the SAT Act do not confer jurisdiction upon the Tribunal, but rather confer power to grant an interim injunction and to make a declaration in a proceeding commenced under an enabling Act that confers jurisdiction upon the Tribunal, such as s 251 of the PD Act in relation to

subdivision, s 252 of the PD Act in relation to land use and development and s 255 of the PD Act in relation to a direction to restrain or remedy unlawful development. However, when the Tribunal has jurisdiction in relation to a matter under one of these enabling Acts, it can also, in effect, undertake a form of civil enforcement of planning laws under s 90(1) and s 91(1) of the SAT Act when constituted by a judicial member.

A recent planning case in which the Tribunal granted an interim injunction is *Franco and City of Nedlands* [2015] WASAT 39. Mr Mario Franco sought review by the Tribunal under s 252(1) of the PD Act of the deemed refusals by the City of Nedlands of three development applications for single houses on adjoining properties at Jutland Parade, Dalkeith. Following six mediation sessions, culminating in modified development proposals, the City of Nedlands was invited by the Tribunal to reconsider its decisions pursuant to s 31(1) of the SAT Act. In accordance with its invitation, the Council granted conditional development approval for each of the proposed developments. The following day, the Chief Executive Officer of the City received a rescission motion proposing the revocation of the Council's decisions and reconsideration of reports in relation to the development applications. The City arranged for a Special Meeting of the Council to consider the rescission motion the next evening. Mr Franco then sought an interim injunction under s 90 of the SAT Act to restrain the Council from revoking its decisions made upon reconsideration and from making any further decisions in relation to the development applications until further order.

At [13] - [14] of the decision in *Franco and City of Nedlands*, the Tribunal referred to the applicable principles in relation to an application for an interim injunction as follows:

[13] As noted earlier, s 90(1) of the SAT Act confers a power on the Tribunal constituted by a judicial member to grant an interim injunction in any proceeding 'if it is just and convenient to do so'.

[14] In *Madden and Shire of Broome* [2007] WASAT 117; (2007) 54 SR (WA) 1 (*Madden*), the Tribunal's inaugural President, Barker J, considered the principles which are applicable in relation to an application for an interim injunction and said the following at [26] - [27]:

[26] It is usual to say when an interlocutory injunction is sought in court proceedings, as in *Castlemaine Tooheys Ltd v South Australia* (1986) 161 CLR 148, that there are a number of principles that normally have to be established to get the injunction. The first is that there is a serious question to be tried or that the plaintiff has made out a *prima facie* case, in the sense that if the evidence remains as it is, there is a probability at the trial of the action that the plaintiff will be entitled to relief; secondly that the plaintiff will suffer irreparable injury for which damages will not be an adequate compensation unless an injunction is granted; and thirdly that the balance of convenience favours the granting of an injunction.

[27] Those principles were laid down in the context of the principles governing the grant or refusal of interlocutory injunctions in private law litigation. They have also been applied in constitutional cases. Those principles are not entirely relevant in an administrative review context where the Tribunal has a statutory power to grant an interim injunction. However, they provide some guidance to the exercise of the statutory power in an administrative review context.

In *Franco and City of Nedlands* at [38], the Tribunal noted the suggestion of Beech J in *Dengold Holdings Pty Ltd v Real Quality* [2014] WASC 108 at [18] that '[t]here are questions as to whether the inadequacy of damages is a separate requirement for a consideration.' At [40], the Tribunal held that the considerations set out by Barker J in *Madden and Shire of Broome* [2007] WASAT 117; (2007) 54 SR WA 1 at [26] - [27] 'are not closed' and that other considerations may be relevant in relation to whether an interim injunction should be granted in the exercise of discretion.

At [15], the Tribunal found that it is 'just and convenient' to grant an interim injunction until there is an opportunity for a determination of a foreshadowed

application for a declaration under s 91 of the SAT Act that the City of Nedlands may not lawfully revoke its substituted decisions made pursuant to s 31 of the SAT Act to grant conditional development approval to the proposed developments and cannot lawfully set aside the substituted decisions and substitute new decisions unless one of the circumstances set out in paragraphs (c), (d) or (e) of s 26 of the SAT Act applies. The Tribunal found at [21] that there was 'a serious question to be tried and a *prima facie* case ... that, under s 26 of the SAT Act, the Council is now expressly precluded from varying the substituted decision, or setting aside the substituted decision and substituting another decision, unless one of the circumstances set out in paragraphs (c), (d) or (e) of s 26 of the SAT Act applies.' (Section 26 of the SAT Act provides that, after the commencement of a proceeding for the review of a decision, the original decision-maker cannot vary the decision or set aside the decision and substitute its new decision unless 'that is permitted by the enabling Act' (paragraph (c)), or 'the parties to the proceeding consent' (paragraph (d)), or 'the decision-maker is invited under s 31 to reconsider the decision' (paragraph (e)).)

The Tribunal also found that 'the balance of convenience lies firmly in favour of granting an injunction to restrain the City from revoking its decisions' (at [30]), because there was potentially significant detriment to Mr Franco if the revocation motion were considered and if the decisions to grant development approval were revoked, because, pursuant to s 31 of the SAT Act, he had the benefit of development approvals granted to him by the City, following significant litigation, and although he maintained a right of review by the Tribunal of any substituted decision by the City, 'that merit assessment [by SAT] may come to a different conclusion from that conclusion reached by the City' (at [34]). In contrast, the Tribunal found that there was 'no injustice or prejudice to the City in enjoining it from considering the revocation proposal

and from making a fresh determination in relation to the development applications' (at [36]).

However, s 90(1) of the SAT Act does not authorise the Tribunal to grant a final injunction to restrain a breach of planning laws and that provision and s 91(1) of the SAT Act do not authorise the Tribunal to grant an injunction or to make a declaration for the civil enforcement of planning laws unless, again somewhat curiously, a review proceeding is commenced by a person alleged to have undertaken development in breach of planning laws.

The relevant local government or other authority responsible for enforcement of planning laws has no independent standing to commence a proceeding in the Tribunal for an injunction or a declaration for the effective civil enforcement of those laws.

Legislation for civil enforcement of planning laws in Victoria

VCAT was the first State super-tribunal in Australia. SAT, which was the second State super-tribunal in Australia, was largely modelled on VCAT. Although there are differences between VCAT and SAT in terms of jurisdiction, both are, in part, a specialist planning tribunal, and both have judicial and other members with specialist experience in relation to planning law, policy and practice.

Section 114 of the *Planning and Environment Act 1987* (Vic) (PE Act) confers jurisdiction on VCAT to grant enforcement orders for the civil enforcement of planning laws in Victoria. Section 114 of the PE Act states as follows:

Application for enforcement order

- (1) A responsible authority or any person may apply to the Tribunal for an enforcement order against any person specified in subsection (3) if a use or development of land contravenes or has contravened, or, unless prevented by the enforcement order, will contravene this Act, a planning scheme, a condition of a permit or an agreement under section 173.

[Sub-section (2) was repealed by Act No. 52/1998, s 188(1)(b)]

- (3) An enforcement order may be made against one or more of the following persons -
- (a) the owner of the land;
 - (b) the occupiers of the land;
 - (c) any other person who has an interest in the land;
 - (d) any other person by whom or on whose behalf the use or development was, is being, or is to be carried out.

Applications to VCAT for enforcement orders under s 114 of the PE Act are made regularly by local governments and others. VCAT's Annual Reports during the period 2004-2005 to 2010-2011 and subsequent data provided by VCAT's Principal Registrar, Mr Jim Nelms, indicates that, during the decade from 2004-2005 to 2013-2014, an average of about 165 applications for enforcement orders were made to VCAT each year.

Section 119 of the PE Act prescribes what an enforcement order can provide for in the following terms:

What can an enforcement order provide for?

An enforcement order made by the Tribunal -

- (a) must specify -
- (i) the use or development which contravenes or has contravened or will contravene this Act or the planning scheme, permit condition or agreement; and
 - (ii) any other prescribed information; and
- (b) may direct any person against whom it is made to do any one or more of the following -
- (i) to stop the use or development within a specified period; or
 - (ii) not to start the use or development; or
 - (iii) to maintain a building in accordance with the order; or
 - (iv) to do specified things within a specified period -
 - (A) to restore the land as nearly as practicable to its condition immediately before the use or development started or to any condition specified in the order or to any other condition to the satisfaction of the responsible authority, a Minister, public

authority, municipal council, referral authority or other person or body specified in the Order; or

- (B) to otherwise ensure compliance with this Act, or the planning scheme, permit condition or agreement under section 173.

Section 120 of the PE Act confers power on VCAT to grant 'an interim enforcement order' in 'an urgent case' where a responsible authority or other person has applied under s 114 of the PE Act for an enforcement order. As will be seen from the discussion of *Metroll Victoria Pty Ltd v Wyndham CC* [2007] VCAT 748 below, the principles applied by VCAT in relation to an application for an interim enforcement order are essentially the same as the principles applied by SAT in relation to an application for an interim injunction under s 90(1) of the SAT Act.

Section 121 of the PE Act enables VCAT to cancel or amend an enforcement order or an interim enforcement order.

Section 124 of the PE Act makes any enforcement order or interim enforcement order served on an owner or occupier of land 'binding on every subsequent owner or occupier to the same extent as if the order had been served on that subsequent owner or occupier.'

Although, like SAT, VCAT is under judicial leadership of a President who is a Justice of the Supreme Court and Vice Presidents who are County Court (the equivalent of the Western Australian District Court) Judges, the exercise of its jurisdiction in relation to applications for enforcement orders is not restricted to judicial members. Indeed, none of the published decisions of VCAT that I have readily found involve decisions of judicial members, but rather are decisions of ordinary members or senior members of the Planning and Environment List who otherwise routinely determine planning review applications of the nature also routinely heard by ordinary members and senior members of SAT.

Finally, Ms Helen Gibson, Deputy President of VCAT's Planning and Environment List, has advised that VCAT has adopted the practice of referring most enforcement proceeding to a compulsory conference (which have taken over from mediations as VCAT's preferred method of facilitative dispute resolution). Ms Gibson observes that:

In many cases, there is little or no dispute that a breach of the planning scheme or planning permit has occurred. It is more a matter of negotiating how it will be remedied and adopting realistic time frames for compliance. Of course, a hearing is still required if the breach is disputed.

It is interesting to note that SAT's experience in another area of alleged civil 'wrongdoing', namely vocational disciplinary proceedings, is precisely the same – in most vocational disciplinary matters referred for mediation, there is no dispute that the alleged misconduct occurred (although there is likely to be if the matter were adjudicated) and the focus is on the appropriate disciplinary consequence of the conduct, an equivalent discussion to how a breach of planning of law will be remedied and adopting realistic time frames for compliance.

Survey of Victorian civil enforcement cases

I have selected 15 published VCAT decisions which usefully illustrate the types of matters in which civil enforcement of planning laws has been sought in Victoria and would presumably be sought in Western Australia if SAT were conferred civil enforcement jurisdiction under s 216 of the PD Act or under a similar suite of provisions as s 114 to s 124 of the PE Act.

With a few exceptions, the surveyed cases do not establish or even apply any significant planning law or principle. The cases also, on the whole, do not involve any complex factual disputes. In fact, the surveyed cases largely involve routine, run-of-the-mill planning matters in circumstances with which delegates at this conference would be familiar from their own experience.

While no doubt each of the surveyed cases was of significance to the parties before VCAT and some were of wider public interest to the affected local community and beyond, their key importance is that they reflect the availability of a jurisdiction for the effective civil enforcement of planning laws in a similar tribunal setting to SAT which is also, in part, a specialist planning tribunal where, like in SAT, the emphasis is on speed, minimisation of formality and technicality, minimisation of costs to parties, focus on the substantial merits of cases, and proportionality.

Mornington Peninsula SC v Impe (No 1999/98542, 9 March 2001, Mr RC Horsfall, Deputy President)

The Tribunal found that the respondent had breached the provisions of the applicable planning scheme by clearing vegetation from a large portion of the site in Portsea on the Mornington Peninsula, by excavations of more than one metre on the site and by commencing the construction of a building and other works without necessary planning permits. The Tribunal made an enforcement order requiring (i) the building and works to be removed within 14 days; (ii) the land to be reinstated 'as far as possible to its natural state prior to the commencement of the building and works' to the satisfaction of the Council within 14 days; (iii) 'Landscaping with trees, shrubs and groundcovers indigenous to the locality of varieties, numbers and locations to the satisfaction of the Responsible Authority must be established on the subject land to the satisfaction of the Responsible Authority' within 14 days; (iv) 'Landscaping re-established in accordance with this order must be maintained to the satisfaction of the Responsible Authority; and (v) 'No use or development is to be carried out on the subject land without a planning permit as required by the Mornington Peninsula Planning Scheme.'

Mildura Rural CC v Crisera & Ors (No 2000/94609, 15 March 2001, Mr RC Horsfall, Deputy President)

The Tribunal found that the owners and occupiers of land in a country town were in breach of a condition of a planning permit permitting the use of the site for the compressing and storage of waste paper which required that the permitted use 'not cause injury to or prejudicially affect the amenity of the locality ... by reason of the appearance of any ... materials or by reason of the emission of ... waste products ...'. The Tribunal found a breach of this condition by reason of the untidy appearance on the site of materials, namely waste paper and other waste products, and by reason of the emission of waste paper and other waste products from the site. The applicant Council had received complaints and the owners and occupiers of the site had done little to clean it up. The Tribunal made an enforcement order requiring that the site 'must be tidied up and all waste paper neatly stacked and tied in a manner which ceases to cause an adverse effect [sic] on the amenity of the area to the satisfaction of the Responsible Authority' within 21 days or such further time as is allowed by the Tribunal or the Council.

Casey CC v Verduci & Ors [2002] VCAT 595

The Tribunal found that the retail use of the site, which was zoned Rural under the applicable planning scheme, was in breach of conditions of the planning permit which only enabled the sale of 'primary produce'. Following the review of evidence and a view of the site, the Tribunal characterised the use as a 'shop' (and more particularly a 'green grocers') which was a prohibited use in the zone, given that, as well as equally large quantities of fruit and vegetables, other food items were being sold, the majority of which could not be characterised as ancillary to primary produce. The Tribunal made an enforcement order requiring the respondents to cease the use of the site 'for any purposes other than for the permitted use of primary produce sales' within 14 days.

Mornington Peninsula SC v Voller [2002] VCAT 758

The respondents filled an area of approximately 600m² without a planning permit as required by the planning scheme. They sought retrospective planning approval from the Council. The Council applied to VCAT for an enforcement order requiring the removing of the fill and the restoration of the site to its original state. The respondents sought review by VCAT of the refusal of their application for a planning permit. The two applications were heard together in the same way as applications for review of the refusal of a development application (under s 252(1) of the PD Act) and for review of a direction to restrain or remedy unlawful development (under s 255 of the PD Act) are heard together in SAT. The Tribunal heard engineering evidence called by the respondents, which was not contested by the Council, that the fill would not have any adverse impacts in terms of stormwater seepage to an adjoining property, environmental damage or effect on drainage patterns, in part because of a proposal to revegetate. Although the Council argued that the change to the topography of the site created a viewing platform that overlooked the neighbouring property and interrupted the natural character of the area, the Tribunal determined that the development application warranted approval in the exercise of planning discretion, given that it was not dissimilar to the flat areas on the neighbouring property and that the impacts were generally consistent with the character of the area.

This case usefully highlights the utility of having both planning review and civil enforcement of planning law matters dealt with concurrently by a specialist planning tribunal. In another case before VCAT where this occurred, although the Tribunal considered that most of an existing development warranted retrospective planning approval, it was able to make a limited enforcement order to require cessation of the part of the development that it did not consider

warranted approval: *The Club Cape Shank Resort v Mornington Peninsula SC* [2001] VCAT 1260 at [99] - [101].

***Bowen v KFT Investments Pty Ltd & Ors* [2003] VCAT 797**

The applicants operated a dairy farm with an ice cream factory and milk depot on their rural property downstream from an aerodrome. The applicants alleged that as a result of contaminated fill material used on the aerodrome site and changes to engineering plans, run-off from that site had exceeded the levels specified in a planning permit and had resulted in increased turbidity and salinity levels in the applicants' dam, making the water unusable for cleaning dairy equipment, ice cream manufacturing equipment and domestic uses on their property. The Tribunal was not satisfied on a balance of probabilities that fill placed on the aerodrome site had resulted in increased turbidity and salinity levels in the applicants' dam, given that the sediment ponds on the site had only overflowed twice, there were other local factors which may well have resulted in increased turbidity in the applicants' dam, and the large size of the dam. Although the Tribunal was satisfied that there was 'some tardiness' in testing of water quality as required by a planning permit, it determined in the exercise of discretion that this was 'not a sufficient basis for the making of an enforcement order' (at [87]). The application for an enforcement order was therefore dismissed.

***Campaspe SC v Wright* [2004] VCAT 991**

The Tribunal found that the respondent, a licensed plumber, was using his property in a predominantly residential part of a small rural settlement, for the recycling, storage and sale of plumbing supplies. Although the respondent sought a retrospective planning permit, he did not seek review of the Council's refusal of his application. The Council, supported by local residents, contended that the use of the site was inappropriate in the zone and compromised the visual environment. The Tribunal found that the visual impact of the use

remained significant and unacceptable, and had an adverse impact on the amenity of the locality, even though the respondent had taken steps to remove materials from the site and to take care when parking vehicles on the site. The Tribunal made an enforcement order requiring the respondent to cease use of the site 'for the purpose of the collection, storage, recycling and/or selling of scrap metals' within two months and to remove those materials from the site within three months, which was one month longer than sought by the Council as the Tribunal was 'mindful of the practical realities in removing materials' (at [21]).

Greater Geelong CC v Falls [2007] VCAT 291

The applicant City sought an enforcement order requiring a landowner to modify a first floor bedroom window to be of obscure glazing or externally screened to the satisfaction of the City. When the City granted the planning permit for the construction of the dwelling, it required the first floor windows to be obscure glazed. It did so following an objection from a neighbour who was concerned about visual privacy. However, the City subsequently endorsed building plans which showed the relevant window to have clear glass and the building was subsequently built in accordance with the building plans and then sold to the current owner. The City was prepared to meet the cost of the modification. However, the landowner objected on the basis that the window was the only window to the bedroom for her two children.

The Tribunal sought to mediate the matter and the member who conducted the hearing even sought to resolve the matter through facilitative dispute resolution during the hearing, but ultimately observed that 'no settlement has been possible' (at [11]). The Tribunal found that 'what is now built does not, actually or in spirit, accord with [the condition requiring obscure glazing]' (at [17]). The Tribunal determined that the City's request for an enforcement order 'is appropriate so as to rectify a valid concern' (at [18]). However, the Tribunal

was keenly aware of the 'understandable' concern of the landowner of having the only window to her children's bedroom being entirely opaque glazed.

The Tribunal, therefore, being a specialist planning tribunal, fashioned a creative planning solution requiring the landowner to affix a solid or louvered external screen or fin 'so that views into the rear open space of [the adjoining property] are restricted or prevented while still allowing occupants of the bedroom to gain longer range views from the window as well as morning sunlight and good daylight' (at [20]). The Tribunal required the external screen to be fitted within 45 days. This case highlights the utility of civil enforcement proceedings in relation to planning matters being dealt with by a specialist planning tribunal familiar with development assessment and approval and able to fashion creative and sensible outcomes in terms of both development assessment and civil enforcement of planning laws.

Metroll Victoria Pty Ltd v Wyndham CC [2007] VCAT 748

The applicant, which manufactured building products and employed 70 people in its industrial premises at Laverton North, sought an enforcement order to restrain the respondent from operating a recently constructed gas fired power station from premises across the road. The locality was zoned Industrial under the applicable planning scheme. The applicant alleged that the gas fired power station was being operated in breach of a condition of the planning permit which required the use, in the opinion of the responsible authority, to not 'adversely affect the amenity of the locality by reason of the processes carried on ...'. There was strong and uncontested evidence that, since the power station commenced to operate about four months prior to the hearing, it caused significant vibration and noise levels within the applicant's building and that this caused adverse health impacts, including headache, earache, nausea and dizziness for a large number of the applicant's employees.

The applicant sought an interim enforcement order under s 120 of the PE Act to restrain the gas fired power station from operating until the final determination of the proceeding for the enforcement order. The Tribunal observed that the purpose of an interim enforcement order 'is to halt some harm on an interim basis until the full hearing can occur and all [the factual issues] can be resolved' (at [30]). In an application for interim relief, the Tribunal's task 'is not to make final findings about whether a breach of condition 3 of the permit has occurred and is continuing to occur, [but] rather ... [to] consider whether there is a serious question to be tried and the likelihood (or probability) of the applicant's success' (at [29]). Relevantly, the determination of whether there was a serious question to be tried and the probability of the applicant's success at the final hearing involved an assessment of 'whether there is a prima facie breach of the permit and the probability of the application for enforcement order ultimately being successful' (at [57]). The Tribunal also observed that, in deciding whether there is a serious question to be tried, 'I need to be satisfied that there is a prima facie breach of the permit conditions and that the breach is real, not spurious or fanciful' (at [64], citing *Marson Constructions Australia Pty Ltd v Hillcrest Manor Pty Ltd* [2000] VCAT 29 at [11]). The Tribunal held that a second principal matter for consideration in determining whether to grant an interim enforcement order is 'where the balance of convenience lies' (at [58]). In this context, the Tribunal also referred to the statement of principle by the former President, Justice Stuart Morris, in *Stonnington City Council v Blue Emporium Pty Ltd* [2003] VCAT 1954; (2003) 15 VPR 267 at [7] that 'the [T]ribunal should take the course which appears to carry the lower risk of injustice'.

It is to be noted that the principles applied by VCAT in relation to an application for an interim enforcement order are essentially the same as applied by SAT in relation to an application for an interim injunction under s 90(1) of

the SAT Act in cases such as *Franco and City of Nedlands* [2015] WASAT 39 discussed earlier.

Applying these principles, the Tribunal found that, on the basis of the uncontested evidence, that the power station was adversely affecting the health and wellbeing of the applicant's employees and interfering with their ability to work by reason of the emission of noise and vibration and the fact that the applicant's development and use of its land was not an unusual or 'super sensitive' use and pre-dated the power station use, there was a serious question to be tried at the hearing of the enforcement order application in the sense that there was a prima facie breach of the condition of the permit in terms of adverse affect on the amenity of the locality. The Tribunal also found that the balance of convenience favoured the making of an interim enforcement order restraining the power station from operating during the normal business hours of the applicant, namely 8.00 am to 5.00 pm Monday to Friday (except on public holidays or in the event of an emergency), which effectively addressed the concerns of the applicant but did not preclude operation of the power station when the applicant's business was not generally operating.

In an impressive decision, both in terms of the analysis of the principles and issues and the promptness of its determination, the Tribunal ultimately balanced the competing considerations at [107] of its reasons as follows:

It seems to me that the most important competing interests that I must weigh up are those of financial loss compared to human health. I consider it is more important to protect the human health of Metroll employees even though this may result in some financial loss to Snowy Hydro. The adverse health effects are not trivial or easily put up with. They are not theoretical or potential. Rather, they have occurred; they are continuing to occur; and they are likely to continue until the present levels of noise and vibration stop.

South Gippsland SC v Dimopoulos [2008] VCAT 2172

The Tribunal found that the respondents were using their Farming zoned property for Intensive Animal Husbandry, and in particular as a piggery, without a planning permit, in breach of the applicable planning scheme. The Tribunal found that this use gave rise to significant offsite odour impacts, environmental harm in terms of effluent and high nutrient runoff, which had contaminated or had potential to contaminate gullies and waterways, the escape of pigs onto neighbouring land which had caused damage to pasture, and the escape of pigs onto nearby roadways which had caused risk to drivers' safety. Although the use was capable of approval by a planning permit, the Tribunal noted that 'it is far from certain that a permit will issue for the use of this land for Intensive Animal Husbandry (piggery)' and that, even if a permit were granted, 'there is no certainty that the permit holders would act on the permit to comply with its requirements which are likely to be onerous and involve the provision of additional infrastructure on the land' (at [17]). The Tribunal, therefore, determined that there was 'no logic in deferring an Enforcement Order until such time as a permit application may be made and determined' (at [18]), particularly given the evidence of ongoing and potential harm to the amenity and environment of the locality.

The Tribunal, therefore, made an enforcement order and carefully fashioned its terms to address the risks posed by the development. The Tribunal required the respondents, (i) within 10 days, to install diversion drains in areas identified by the Council in conjunction with the Environment Protection Authority to prevent runoff and effluent from entering gullies and waterways; (ii) within three weeks, to remove all pigs and dogs from the land to the satisfaction of the Council; (iii) within three weeks, to remove all waste, fencing, materials and structures associated with the use of the piggery from the land; and, (iv) during

a nominated two week period in approximately two months, to use farm machinery to plough all excrement from all areas where pigs had been kept and to re-sow all ploughed areas with a suitable species of grass, to the satisfaction of the Council.

Alpine SC v De Pasquale [2010] VCAT 1782

The applicant Council alleged that an existing residence had been unlawfully converted to four dwellings and sought an enforcement order requiring works to revert the residence to its pre-conversion state. Following the commencement of the proceeding, the respondents carried out some works to the building in order to address the Council's concern that the single residence had become four dwellings. With the benefit of plans, photographs, expert evidence and a view, the Tribunal undertook a detailed assessment of the characteristics of each of the four parts of the building, including areas capable of being used as kitchens, bathrooms, lockable doors and post boxes. The Tribunal found that 'objectively, the building has ... been converted from a single dwelling (in its original form, in accordance with the building permit) to a different form of accommodation, being two dwellings (on the first floor) and two accommodation units (other than dwellings) (on the ground floor)' (at [30]).

The Tribunal therefore made an enforcement order (i) requiring the removal of three deadlocks on internal doors and the replacement of the deadlocks with unlockable door handles; (ii) restraining the respondents from carrying out or causing to be carried out any further building works that would enable any of the relevant doors from being locked from either side; and (iii) restraining the respondents from re-installing either or both of the kitchen sinks in the two kitchens on the ground floor (which had been removed following the commencement of the proceeding and which the Tribunal found from its inspection during the view 'could be returned with little difficulty, having regard

to the temporary installation of the cut-outs and the existing nearby capped plumbing facilities' (at [23])).

***Casey CC v Robinson* [2011] VCAT 2123**

The Tribunal found that the respondent was using her rural property for the keeping of more than five animals without a current planning permit for 'animal keeping' as required by the applicable planning scheme. There was a history of VCAT litigation in relation to this use, with the most recent planning permit having been cancelled at the direction of the Tribunal only three months earlier. The respondent sought six to nine months to remove the animals, while the Council sought the removal within two months. The Tribunal made an enforcement order requiring the removal of all but five animals from the property within three months.

***Yarra Ranges SC v Nicholas & Anor* [2011] VCAT 2150**

The Tribunal found that the storage of two shipping containers and miscellaneous building materials on Green Wedge zoned land involved the use of the land for 'storage' which was prohibited under the applicable planning scheme. The Tribunal made an enforcement order requiring the removal of the shipping containers and the building materials and the making tidy of the land to the satisfaction of the Council by a specified date within approximately three months.

***Casey CC v Ploudias* [2012] VCAT 95**

The Tribunal found that the storage of unregistered motor vehicles and motor vehicle parts and boats on Green Wedge zoned land was properly characterised as 'materials recycling' which was a prohibited use unless the land was used in conjunction with a refuse disposal or transfer station (which was not the case) under the applicable planning scheme. The Tribunal made an enforcement

order requiring the cessation of the use of the land for materials recycling and removal of all unregistered vehicles and motor vehicle parts and boats to the satisfaction of the Council within three months.

Whittlesea CC v Tenovski [2012] VCAT 102

The Tribunal found that the respondent had constructed sheds and was keeping chickens on a semi-rural property on the northern outskirts of Melbourne without having obtained a planning permit and in circumstances where the planning scheme regarded the area as having been inappropriately subdivided and, therefore, only enabled the granting of a permit on land that had first been 'restructured', usually by consolidating it with a number of adjoining properties. The Tribunal rejected the respondent's arguments that he had been 'victimised' by the Council and that he did not have the capacity to comply with an order. The Tribunal observed that other buildings in the locality shown in the respondent's photographs may have been approved with a permit or may have pre-dated the current planning framework. The Tribunal also found that removing the rudimentary buildings and works would not involve a major expense. The Tribunal, therefore, made an enforcement order requiring the removal of all structures (other than boundary fencing) from the site, cessation of the use of the site for storage of building materials and restoration of the site as nearly as practical to its pre-development condition, to the satisfaction of the Council within two months.

Vandermeer v Mornington Peninsula SC [2013] VCAT 1914

The applicant, who owned a property in a harbour residential development on Port Phillip Bay, known as Martha Cove, and who was also a member of the management committee which managed the common property including the waterways, jetties and pontoons within the development, opposed what he contended to be the unauthorised use and development of the common property

for berthing personal watercraft such as jet skis and boat tenders. He contended that the berthing of these watercraft in the waterways on the common property gave rise to various safety, security and environmental concerns. Having had little success in persuading the local government to bring enforcement proceedings about the personal watercraft moorings, the applicant applied to VCAT for an enforcement order to, in effect, require cessation of the use of the common property for mooring personal watercraft and removal of the floating pontoons in these moorings. The Owners Corporation applied to the local government to amend a condition of the permit to allow the 22 'small vessel moorings' in the common property and the Council issued a notice of decision amending the condition to authorise 21 'pontoon moorings' in the common property. The applicant then commenced a third party appeal against that decision which was scheduled for hearing three months after the Tribunal's decision in relation to the enforcement order proceeding.

The Tribunal undertook a careful assessment of the number of moorings in the common property in comparison to the conditions of the planning permit and found that 14 personal watercraft moorings within the common property constituted a use and development of that land which was not authorised by the permit. Although the appeal in relation to the approval of the 21 additional 'pontoon moorings' was pending, the Tribunal determined that the longstanding contravention of the planning permit should be remedied. The Tribunal, therefore, required 'as stage 1, the Corporation to take whatever steps are required to promptly stop the use of the personal watercraft moorings' (at [46]). As 'stage 2' to its order, the Tribunal also required the removal of the floating pontoons in the 14 personal watercraft moorings if, in the planning review proceeding, the Tribunal ultimately refused to amend the permit. The Tribunal's ability to fashion this order also highlights the practical utility of having both

planning review and civil enforcement of planning law matters before the same specialist planning tribunal.

Conclusion

The effective civil enforcement of planning laws is a matter of significant public interest in terms of both access to justice and the protection of the environment. SAT was established, in part, as a specialist planning tribunal. It comprises judicial and other members with experience in planning law, policy and practice. In its Annual Reports over the last seven to eight years, each of SAT's first three Presidents have suggested the need for law reform in relation to civil enforcement of planning laws in Western Australia. In particular, it has been suggested that concurrent jurisdiction should be conferred upon the Tribunal, when constituted by or so as to include a judicial member, to grant injunctions under s 216 of the PD Act and that jurisdiction should be conferred upon the Tribunal, when constituted by or so as to include a judicial member, to make declarations of right in relation to any right, obligation or duty imposed by or under planning, heritage and related laws.

SAT already, in effect, carries out civil enforcement of planning laws when, under s 255 of the PD Act, it reviews directions given by local governments and other responsible authorities to restrain and remedy alleged unlawful use and development of land. When constituted by a judicial member, SAT also, in effect, undertakes a form of civil enforcement of planning laws when, under s 90(1) of the SAT Act, it considers whether to grant an interim injunction in a review proceeding concerning development for which development approval is sought or concerning alleged unlawful development. Similarly, when constituted by a judicial member, SAT also, in effect, undertakes a form of civil enforcement of planning laws when, under s 91(1) of the SAT Act, it considers whether to make a declaration concerning a matter in a proceeding instead of

any orders that it could make, or in addition to any orders that it makes, in the proceeding, when the proceeding involves the review of a decision concerning development for which development approval is sought or concerning alleged unlawful development.

However, unlike VCAT, which is a similar body to SAT and which also includes a specialist planning jurisdiction, SAT does not have express and direct civil enforcement jurisdiction in relation to planning laws and, somewhat curiously, SAT can only undertake a form of civil enforcement of planning laws in review proceedings brought by developers. Local governments and other authorities responsible for the enforcement of planning laws do not have standing to seek orders from SAT for the civil enforcement of those laws.

It is not for me as a serving Judge to advocate for law reform, even in relation to the effective civil enforcement of planning laws, a topic that has been near and dear to my heart for most of my professional career. I will leave it to NELA and its members and delegates to connect the dots and to consider whether law reform in this area is warranted.

However, having reviewed the Victorian provisions in relation to enforcement order applications and provided a survey of some illustrative cases showing the application of those provisions by VCAT, I would observe that if the suggestion of successive Presidents of SAT for conferral of injunctive and declaratory jurisdiction upon the Tribunal is considered to be 'a bridge too far' for a civil and administrative tribunal (even if that jurisdiction were exercised only by Judges), a practical solution for effective civil enforcement of planning laws in Western Australia would be the adoption of the Victorian model of conferring jurisdiction to make enforcement orders and interim enforcement orders on SAT.

Indeed, there would appear to be a number of benefits in adopting the Victorian model of enforcement order applications in Western Australia over the conferral of concurrent jurisdiction under s 216 of the PD Act and declaratory jurisdiction on SAT constituted by or including a judicial member.

First, the adoption of the Victorian model would enable all SAT members with appropriate experience in planning law, principle and practice, and not just judicial members, to exercise this jurisdiction. This is consistent with the s 255 of the PD Act and cl 122 of the Heritage Bill which do not restrict the exercise of review jurisdiction in relation to directions given by responsible authorities under s 214 of the PD Act and the exercise of enforcement jurisdiction in relation to heritage laws to judicial members of SAT.

Secondly, for this reason, it would more readily enable concurrent determination of applications for retrospective development approval and enforcement applications concerning the same development.

Thirdly, although SAT has power under s 73(1) of the SAT Act 'to make any ancillary order or direction the Tribunal considers appropriate for achieving the purpose for which it may exercise the primary power', which may authorise orders to remedy the consequences of development of land in breach of planning laws (if the Tribunal were conferred with jurisdiction to grant injunctions to restrain breaches of planning laws), it would be preferable for there to be express statutory authorisation for SAT to make orders for the removal of unlawful development and the restoration of land such as is prescribed in the case of VCAT by s 119(b) of the PE Act.

Fourthly, the Victorian model provides for more effective enforcement of planning laws, because it confers open standing on any person to seek an enforcement order, and does not restrict standing to local governments and other

responsible authorities. *Vandermeer v Mornington Peninsula SC* [2013] VCAT 1914 provides an example of a case in which the responsible authority refused to commence enforcement proceedings and enforcement proceedings were successfully brought by a third party to restrain a longstanding breach of a planning permit.

Finally, given the critical role of facilitative dispute resolution and in particular mediation in most types of proceedings in SAT, including planning proceedings, the option of the Victorian model, as opposed to a suggestion to restrict civil enforcement to judicial members, would more readily and efficiently enable the resolution of planning enforcement matters by consent orders made by non-judicial members following resolution through mediation.

As I said, it is not my role to advocate for law reform. However, having studied the Victorian legislation and VCAT's decisions surveyed above, in my view, the conferral of jurisdiction along the lines of the Victorian model upon SAT is likely to result in more effective and prompt enforcement of planning laws and mitigation of harm to the environment and to amenity associated with breaches of planning laws. I have formed this view for the following eight reasons.

First, SAT and in particular its planning jurisdiction is well known to local governments and other responsible authorities. If responsible authorities had standing to seek enforcement orders from SAT, then they are likely to do so, as they regularly do in VCAT.

Secondly, SAT's main objectives (set out in s 9 of the SAT Act) and general approach to its work emphasises speed, minimisation of formality and technicality, minimisation of costs to parties, focus on the substantial merits of cases, proportionality, facilitative dispute resolution rather than adjudication, and use of the specialist knowledge and experience of its members.

Thirdly, SAT's membership comprises judicial and other members with specialist experience in planning law, principle and practice, including interpretation and application of planning laws and development assessment.

Fourthly, SAT's full-time and sessional membership includes subject matter experts in fields such as planning, architecture, engineering, surveying and environmental science.

Fifthly, as the Victorian cases show, there are great benefits in related applications for retrospective development approval and for enforcement of planning laws to be resolved concurrently in the same specialist forum, both in terms of speed, efficiency and minimisation of public and private costs, and also in terms of the range of planning outcomes and solutions that can occur.

Sixthly, as also borne out by VCAT's experience, SAT's emphasis upon and success in facilitative dispute resolution and in particular mediation is likely to result in more prompt, creative and lasting solutions, because parties are able to fully address underlying environmental planning issues, without fear that what they say or concede will harm their interests in the proceeding or otherwise, and because they are able to create their own planning solutions, with the assistance of a SAT member who is an independent subject matter expert.

Seventhly, and in consequence of the foregoing reasons (and as demonstrated by the Victorian cases), civil enforcement proceedings in SAT would readily be able to result in creative and detailed planning solutions to enforcement cases which are not available in civil injunction or criminal prosecution proceedings.

Finally, although external enforcement of SAT decisions is available through filing in the Supreme Court under s 86 of the SAT Act, criminal prosecution under s 95 of the SAT Act and even possible contempt proceedings following a report by the President to the Supreme Court under s 100 of the SAT Act,

external enforcement is unlikely to be required, both because most enforcement proceedings are likely to be resolved by the parties fashioning their own solutions, with the assistance of SAT members, through facilitative dispute resolution, and because even those matters that require adjudication would be resolved by an independent specialist tribunal after affording natural justice to the parties.