

DAF Benchmarking Key Indicators – Applicant Appeals

STAGE 4 OF THE PLANNING LIFECYCLE: APPEAL

A right of review should be by and Efficient and Independent Process

Leading Practice Nine: Applicant Appeals

An applicant should be able to seek a review of a discretionary decision.

A review of a decision should only be against the same policies and objective rules and tests as the first assessment

Where a decision is discretionary, fairness and transparency of process requires that an applicant should be able to seek a second evaluation of the application, but only against the same policies and objective rules and tests as the first assessment.

QUALITATIVE DATA:

	Context	SA	WA	VIC	ACT	NSW	QLD
1.	Does the jurisdiction have applicant appeal rights on planning merit in terms of: a) Decision by the relevant authority? b) Conditions of approval? c) Lack of decision within statutory time?	Yes. An applicant has an appeal right against: a) a refusal by the CDAP/DAC or delegated officer b) conditions of approval associated with an approval c) overdue decision after 14 days warning by the applicant	Yes: a) concerning discretionary decisions by the Western Australian Planning Commission (WAPC) [generally subdivision applications] or local government (LG) [generally development applications (DA)]; b) as above; c) applications may be deemed refused after: - 90 days for subdivision applications; (but prior notice of default required.) - 60 days for DAs; and - 30 days for some procedural matters	Yes. An applicant has an appeal right against: a) Decision by the relevant authority. b) Conditions of approval. c) Lack of decision within statutory time.	a) Yes b) Yes c) Yes	Yes. An applicant has an appeal right against: a) decision by consent authority b) conditions of development consent c) deemed refusal (40 or 60 days). <u>Note:</u> there are separate appeal provisions relating to determinations by the Minister for Planning for major projects.	Yes. Applicants may appeal against:- a) the refusal of the application, or any part of the application; b) a condition or identification of a relevant code; or c) the duration of a relevant time period but not the lack of a timely decision. (ss.4.1.27 and 4.2.9 of the <i>Integrated Planning Act 1997</i> [IPA])
2.	Does the jurisdiction have applicant appeal rights on planning merit in terms of: a) Requirements to give	Yes, the applicant can now appeal against all administrative procedures in regard to	No a) no equivalent WA provision; b) practice issue but could	Yes	Yes. Any decision of the Authority may be subject to review to the ACT	No, however judicial review proceedings exist under s123 of the Environmental Planning & Assessment	Yes. Applicants may appeal, either to the Planning and Environment Court

DAF Benchmarking Key Indicators – Applicant Appeals

	Context	SA	WA	VIC	ACT	NSW	QLD
	notification? b) Requirement for further information? c) Administration matters by the council?	a), b) and c) to the ERD Court rather than the Supreme Court.	give rise to deemed refusal (refer c above); c) N/A		Administrative Appeals Tribunal (AAT) under the terms of the operating legislation of the AAT.	Act 1979 (EP&A Act).	(P&E Court) or the Building and Development Tribunals (B&D Tribunals), against requirements stated in development approvals (ss.4.1.27(1)(b) and 4.2.9(1)(b) of IPA). There are no general appeal rights against administrative procedures.
3.	Where are the: a) Appeal rights; and b) Procedures prescribed?	a) the appeal rights are set out in the Development Act; and b) the appeal procedures are set out in the Environment, Resources and Development Court Act.	In WA appeal rights now described as "right of application for review": a) State Administrative Tribunal Act 2004 and Planning and Development Act 2005; b) State Administrative Tribunal (SAT) Regulations, Rules and Practice Directions.	a) <i>Planning and Environment Act 1987</i> b) <i>Victorian Civil and Administrative Tribunal Act 1998</i>	For development application decisions, appeal rights are set out in the <i>Land (Planning & Environment) Act 1991</i> . Procedures are set out in the AAT Act.	The appeal rights are set out in the EP&A Act. Other procedures are set out in the Land & Environment Court Act 1979, Environment Court Rules 1996 and Court Practice Notes.	The appeal rights and procedures for both the P&E Court and B&D Tribunals are set out in Chapter 4, Parts 1 and 2 of IPA.
4.	Who is the 'planning appeal' body/person hearing the applicant appeal?	Environment, Resources and Development Court	State Administrative Tribunal (SAT) – Development and Resources stream.	Victorian Civil and Administrative Tribunal	ACT Administrative Appeals Tribunal.	NSW Land & Environment Court.	Either the P&E Court or the B&D Tribunals
5.	Does an applicant have an appeal right for all forms of development assessment?	No, applicants have appeal rights for complying and merit applications. There are no appeal rights for non-complying development and Major Development (EIS) assessment paths.	No, a development application (including change of use) not involving an exercise of discretion does not give rise to a right of review. <i>NB: in WA, environment and planning legislation are separate and environment appeals are not integrated with the planning appeals system.</i>	Yes except for prohibited developments. (However prohibited development can seek a VCAT declaration that they are not prohibited. Declarations can be sort for any aspect of a planning decision.	Currently yes, although this will change under Planning and Development Act where appeal will be limited to Merit and Impact Track. Applicant appeal of Code applications will be restricted to conditions, which are administrative only.	No, there are no appeal rights for complying development and there is a separate appeal regime for major projects (Part 3A of EP&A Act).	Yes. The applicant can appeal against a refusal (or partial refusal), or the conditions of any assessment manager. Offences subject to an enforcement notice may also be appealed.

DAF Benchmarking Key Indicators – Applicant Appeals

	Context	SA	WA	VIC	ACT	NSW	QLD
6.	Is the 'planning appeal' body/person a court, a tribunal or some form of ministerial/peer review?	The ERD Court forms part of the District Court.	Tribunal.	A tribunal	A tribunal.	A Court. It has jurisdiction over the following matters: Class 1 – environmental planning & protection appeals (merits review) Class 2 – local government, trees & misc. appeals (merits review) Class 3 – land tenure, valuation, rating and compensation matters (merits review) Class 4 – environmental planning & protection (civil enforcement & judicial review) Class 5 – environmental planning & protection (summary criminal enforcement) Class 6 & 7 – appeals against convictions or sentences relating to environmental offences	The P&E Court is an independent Court comprised of District Court judges. The B&D Tribunals are comprised of members appointed by the chief executive.
7.	Do members of the planning appeal body have legal or planning/development experience?	The ERD Court is constituted by judges with experience in the planning field as well as full and part time planning commissioners.	Yes: President of SAT has status of Justice of Supreme Court; Deputy Presidents have status of District Court Judges; Other members are classified as: Senior or Ordinary and include sessional members.	Members of the planning appeal body have legal, planning/development experience, and other professional expertise.	Yes; legal background.	The Land & Environment Court is constituted by Judges as well as Commissioners with relevant qualifications and experience in town planning, local government administration, environmental science, valuation, architecture, engineering, building construction, heritage, land rights and natural resources management.	The P&E Court is comprised of District Court judges. B&D Tribunal members are drawn from a pool of referees, most of whom have engineering, planning or building certification qualifications. Referees are appointed through a public merit selection process.

DAF Benchmarking Key Indicators – Applicant Appeals

	Procedures	SA	WA	VIC	ACT	NSW	QLD
1.	Can an applicant appeal against the “ advice or direction ” of a referral body?	Yes , appeal against the final decision	No	Yes , via the final decision with referral body giving evidence.	Yes , appeal against final decision for advice. Direction not applicable.	Yes , applicant can appeal the final decision	
2.	Is the mediation/conference stage a compulsory step or can it be avoided if one party does not wish to be involved?	The conference is compulsory with the role of the ERD Court Commissioner seeking compromise.	Not compulsory but strongly encouraged.	Mediation is not compulsory.	Generally mediation is ordered. However, if one party strongly objects then the step can be avoided, although this is rare.	At the call over, the matter maybe referred for a conciliation conference or mediation.	There is no requirement for the parties to confer or mediate before the appeal is heard by the Court or Tribunal. The P&E Court may order the parties to resolve the appeal through mediation (s.97 <i>District Court of Queensland Act 1967</i> [DCQA]).
3.	Is the role of the conference to see if a compromise exists or is the role of the conference to facilitate a compromise?	The role of the conference is to facilitate a compromise and the commissioner informs both parties of their likelihood of success if a compromise is not reached and the matter goes to a hearing.	Facilitation of compromise if appropriate.	Mediation brings together the parties to a dispute for a confidential meeting with an independent mediator to try and work out a practical resolution to the dispute. At a mediation, the parties in dispute attempt to work out their own practical solution between themselves, with the assistance of a mediator.	The role of the conference is to facilitate a compromise; or where agreement cannot be reached, a narrowing of issues.	Generally to facilitate a compromise.	The role of a mediation/conference is to “help [the parties] resolve their dispute by negotiated agreement without arbitration” (s.91 DCQA).
4.	Who undertakes the hearing?	A hearing can be conducted by a Judge or Commissioner sitting alone or by a Judge and two Commissioners	Class 1 matter: non-judicial member; Class 2 matters: judicial member sitting alone or panel including legal member. NB; Class1 matters relate to minor developments (less than \$500k or where the applicant, with the	VCAT members	The hearing is usually conducted by 3 members of the Tribunal.	Judge or Commissioner.	A P&E Court hearing may be conducted by a judge of the Court. B&D Tribunal hearings are undertaken by the full Tribunal, which may have between 1 and 5 members.

DAF Benchmarking Key Indicators – Applicant Appeals

	Procedures	SA	WA	VIC	ACT	NSW	QLD
			consent of the respondent, elects to have the appeal determined by a non-judicial (ordinary) member sitting alone				
5.	Are hearings focused on the issues in dispute or held de Novo?	Since 2007, the courts are to focus on the issue in dispute and only address a matter if the issues in dispute are fundamental to the full decision.	Held de Novo.	Held de Novo	The courts are to focus on the issue in dispute and only address a matter if the issues in dispute are fundamental to the full decision.	Held de novo.	The P&E Court hears appeals anew (s.4.1.52(1) IPA). The B&D Tribunals are under no obligation either way (s.4.2.25(1)(a) IPA).
6.	Can costs be awarded against an applicant if the hearing is lost?	Yes, but rarely if ever awarded.	No. Costs may only be awarded for vexatious or unreasonable conduct.	Occurs in rare circumstances.	No.	In Class 1 matters the practice of the Court is that an order for costs will only be made if it is 'fair and reasonable' to do so based on the circumstances of each case.	P&E Court costs may be awarded against an applicant for specific reasons set out in s.4.1.23(2) of IPA. Parties in B&D Tribunal matters bear their own costs.
7.	Are costs awarded against applicants of unsuccessful appeals?	No.	No. Costs may only be awarded for vexatious or unreasonable conduct.	Occurs in rare circumstances.	No.	As above.	Not automatically (see above). However, costs must be awarded against the relevant Minister or local government in the event that a P&E Court appeal is successful (s.4.1.23(4) IPA).
8.	Can an applicant appeal to a higher court?	Not on planning merit grounds. There is an appeal to the Supreme Court if the applicant is of the opinion that the ERD Court made an administrative error.	Further appeal (by either applicant or respondent) relates only to legal error. In relation to class 1 matters, review by SAT President may be sought. In relation to all matters, including where the President has conducted a review, further appeal may be directed to WA Supreme Court.	Not on planning merit grounds only matters of law.	Not on planning merit grounds. There is an appeal to the Supreme Court if the applicant is of the opinion that the AAT made an administrative error.	Decisions of the Court are final and binding and become that of the original decision-maker. Appeals from a decision of a Judge in Class 1 appeals are to the NSW Court of Appeal on a <u>question of law</u> . Appeals from a Commissioner in Class 1 appeals are to a Judge of the L&E Court on a <u>question of law</u> and any further appeal	B&D Tribunal decisions may be appealed to the P&E Court. Court decisions may be appealed to the Court of Appeal, but only for errors of law or in cases where the Court may have exceeded its authority, not on grounds of planning merit.

DAF Benchmarking Key Indicators – Applicant Appeals

	Procedures	SA	WA	VIC	ACT	NSW	QLD
						from the Judge's decision is only by leave of the Court of Appeal.	
9.	Is the appeal body required to produce an annual report?	Yes, but it forms part of the general courts reports tabled by the Attorney General	Yes.	Yes	Yes. It is an annex to the Department of Justice and Community Safety's Annual Report	Yes.	The P&E Court contributes to the District Court of Queensland annual report. The B&D Tribunals are not standing bodies, and they are included in the Department's annual report.
10.	Does the planning appeal body provide data to the planning and development indicator provisions in the State?	Yes, the ERD Court provides quarterly data to the Minister on the number of appeals and the outcome of decisions made.	No.	Yes	No.	The Land & Environment Court publishes an Annual Review with various performance indicators. Data is collected directly by the Department of Planning from councils relating to the number of court cases against a council decision, and where the appeal was dismissed or upheld.	
11.	Are legal costs by councils recoded as part of the planning and development data collection indicators?	Yes, legal costs are recorded on a quarterly basis by council name	No (but legal costs are recorded in LG Annual Reports).	No	No.	Yes, legal expenditure is recorded as part of the Department of Planning <i>Local Development Performance Monitoring</i> and Department of Local Government <i>Comparative Information on NSW Local Government Councils</i> .	

QUANTATIVE DATA:

	Timelines	SA	WA	VIC	ACT	NSW	QLD
1.	What are the time limits within which a request for reconsideration can be made?	N/A	28 days.	None	28 days or as agreed.	An s82A review cannot occur after the time limit for making an appeal expires (12 months), if no such appeal is	The request must be made within the applicant's 20-day appeal period.

DAF Benchmarking Key Indicators – Applicant Appeals

						made against the determination or after an appeal is disposed of by the Court.	
2.	What are the time limits within which a planning authority can make a reconsidered decision?	N/A	60 days.	None	28 days or as agreed.	N/A	The assessment manger has 5 working days to reconsider their decision (s.3.5.17 (4) (a) IPA).
3.	Are there time limits within which an applicant appeal can be lodged in regard to: a) planning decision/condition? b) administrative matters? c) failure to make a decision?	a) 2 months from date of decision.	Yes: a) yes (generally 28 days); b) n.a.; c) yes (generally 28 days but notice of default must first be served on decision maker). NB: electronic lodgement is provided for.	a) Planning decision/condition – 21 days for objectors, 60 days for applicant. b) Administrative matters – No time limit c) Failure to make a decision - 60 days (excluding time for notification and further information requests)	a) 28 days b) No. c) Up to 6 months.	An applicant may appeal within 12 months after the date on which notice is received of the determination.	Yes. After any type of decision, the applicant has 20 business days to lodge an appeal with either the P&E Court or the B&D Tribunals. (ss.4.1.27(2) and 4.2.9(2) of IPA)
4.	What is the average time between an appeal being lodged and a mediation/conference meeting being held?	39.7 days between lodgement and first conference.	Approximately one month .	Not available	34 calendar days	Not available.	Not available
5.	What is the average time between a mediation/conference process and a hearing when issues are not resolved?	143.8 days	Approximately 6 weeks (42 days).	Not available	04/05 – 60 05/06 – 110 06/07 – 98 Avg: 89 calendar days	Not available.	Not available

	Indicators	SA	WA	VIC	ACT	NSW	QLD
1.	How many requests for development application reconsideration are lodged per annum?	N/A	n.a.	None	04/05 – 22 05/06 – 20 06/07 – 31 Avg: 24 per annum	State wide, the proportion of reported s82A reviews to total DAs determined was less than 1% for 2005-06.	This information is held at a local government level, and not by the Department.
2.	What is the Appeal application fee?	An initial fee of \$75. If the appeal goes to	Fees in relation to planning matters are set out in	Planning and Environment	\$276	A set fee of \$172	The fee for filing an originating process in Class 1
						The fee for filing an originating process in Class 1	The P&E Court charges a fixed fee of \$34.00

DAF Benchmarking Key Indicators – Applicant Appeals

	Indicators	SA	WA	VIC	ACT	NSW	QLD
	Is it a fixed fee or graded in some way?	hearing stage another fixed fee of \$152 will apply.	schedule 18 of SAT Regulations, which provide for fixed fees by class of matter: Class 1 - \$325; Class 2 - \$600 NB: hearing fees are also applicable.	<div>Act 1987 except sections 39(1),79,81(b),87,89,93,114,120,121,123,149,149A,149B and 184 and if the project is valued at less than \$5,000,000</div> <div>P&E Act 1987 except sections 39(1),79,81(b),82,87,89,93,114,120,121,123,149,149A,149B and 184 and if the project is valued at \$5,000,000 or more</div> <div>P&E Act 1987 (sections 9(1),79,81(b),87,89,93,114,120,121,123,149,149A,149B and 184)</div>		of the Court's jurisdiction ranges from \$685 to \$5,200 depending on the value of the development and whether it is a standard or corporation fee.	(schedule 9, <i>Integrated Planning Regulation 1998</i> [IPR]). Appeal fees for the B&D Tribunals vary by the subject of the appeal. The fees are set out in s.10 of IPR.
3.	How many applicant appeals are lodged per annum?	308 applicant appeals (only 28 third party appeals) making a total of 336 .	SAT in Western Australia deals with a broad range of administrative, commercial and personal matters.	Applicants are likely to have lodged appeals against refusal (1133), failure	04/05 – 18 05/06 – 15 06/07 – 11 Avg: 15 per annum	See below.	In 2005-06, the P&E Court received 414 appeals, and

DAF Benchmarking Key Indicators – Applicant Appeals

	Indicators	SA	WA	VIC	ACT	NSW	QLD
			<p>These matters span 4 separate "streams": <u>human rights</u>, <u>vocational regulation</u>, <u>commercial and civil disputes</u>, and <u>development and resources</u></p> <p>In 2005-06: 339 applications for review to Development & Resources stream.</p>	to decide (483) and the larger portion of appeals against conditions (543). This total 2159 appeals (but would include a small portion of appeals against condition by objectors)			the B&D Tribunals received 92. Total of 506 .
4.	How many applications are lodged in the jurisdiction per annum?	55000	<p>Due to the division of responsibilities in WA between the WAPC at State government level and local government, this total number isn't known.</p> <p>During 2006/07, a total number of 5140 applications were dealt with by the WAPC, primarily subdivision applications of all forms. Most development applications are dealt with by local governments</p>	Between 50-55,000 applications lodged per year.	5, 000	Approx. 120,000.	
5.	What percentage of applicant appeals is resolved at the conference/mediation stage?	Average of 44% per quarter	Approximately half (including matters withdrawn or discontinued).	75% of 506 mediations were successful.	47% of the appeals referred to mediation are resolved at mediation	In 2006 there were 29 conciliation conferences for Class 1 appeals. In 2006 there were 15 mediations for Class 1 and 2 appeals (87% of these were finalised pre-hearing).	Not available
6.	How many appeals go to a hearing if mediation/conference has not been successful?	Average 38 per quarter Average = 43%	Estimated as about half of matters that are not successfully mediated go on to substantive hearing.	25%	04/05 – 13 05/06 – 17 06/07 – 7 Avg: 12 per annum Approximately 35% of all applicant appeals.	Caseload statistics for Class 1 appeals in 2006 were: Registration – 874 Restored – 131 Pre-trial disposals – 675 Disposed by hearing – 524	Not available

DAF Benchmarking Key Indicators – Applicant Appeals

	Indicators	SA	WA	VIC	ACT	NSW	QLD
						<p>Pending – 457</p> <p>66% of all Class 1 matters finalised were appeals under s97 of the EP&A Act relating to DAs.</p> <p>46% of Class 1 registrations were where councils had not determined the DA within the statutory time period.</p>	