

**EDO(SA) Submission regarding the Benefits of the Retention of the Environment,
Resources and Development Court for matters arising under planning legislation.
July 2014**

EDO(SA) **strongly** supports the retention of the Environment, Resources and Development Court (ERD Court).

Background

1. Prior to the 1990's, the system of development control in the states and territories suffered from complex development appeal systems and jurisdictional problems due to a multiplicity of appeal bodies in some states and territories leading to lengthy time delays and costs to the industry and community as a whole.
2. A Report for the Commonwealth Department of Industry Technology and Commerce (Hayes and Trenorden, 1990) on the potential for, and implications of, introducing a combined jurisdiction for land and building development appeals and associated enforcement procedures concluded (inter alia):

A combined and integrated appeal court structure must be part and parcel of an integrated development control system. The proposed Court with a combined jurisdiction to hear and determine development appeals and building appeals together with jurisdiction to enforce compliance with planning and building legislation and exercising a supervisory and declaratory jurisdiction is an important step towards achieving efficiency and cost effectiveness in the appeal process.
3. This approach was reflected in the recommendation of the 1991-1992 Planning Review (SA) to establish the ERD Court; a recommendation that was accepted by the government of the day and had bipartisan support.
4. The legislation for the establishment of the ERD Court was enacted in 1993 and the Court began operations in January 1994. Having been established at District Court level, with its judges having been appointed to the District Court, the ERD Court was enabled to hear and determine matters, including the following in relation to planning and development matters:
 - a. appeals (de novo) from decisions of a relevant decision-making authority;
 - b. applications for civil enforcement orders including compensation;
 - c. charges of offences
 - d. charges of contempt (for the alleged breach of or failure to comply with court orders)

The ERD Court Today

5. As a result of the breadth of its jurisdiction, in relation to the *Development Act* and other legislation, the ERD Court is truly a specialist court in relation to the matters that it is empowered to hear and determine and its members have specialist expertise.
6. The ERD Court has developed streamlined processes to enable matters to be directed towards the most appropriate option for efficient finalisation, with an emphasis on an agreed outcome, where appropriate, or proceeding to a hearing with each party having access to all relevant information, thus avoiding delays (and costs).
7. The reputation of the ERD Court within the community for the hearing and resolution of often complex matters in an unbiased and informal atmosphere has been built up over many years and should be valued.
8. The ERD Court is more efficient and finalises matters at a faster rate than other courts. How the evolution of the Court into a tribunal could result in an improvement on the speed and efficiency of the ERD Court is not obvious.

EDO response to 4 arguments for disbanding the ERD Court

Argument 1 - *the number of matters before the ERD Court has decreased over recent years and the members of the ERD Court could be more gainfully and fully employed in the SA Civil and Administrative Tribunal (SACAT) where they could sit in other streams or lists, in addition to involvement in planning/development appeals.*

EDO Response:

9. Argument 1 overlooks the existing deployment of the judges of the Court within the District Court. ERDC judges presently sit to hear and determine matters in the following additional jurisdictions:
 - a. Equal Opportunity Tribunal
 - b. Criminal jurisdiction of the District Court
 - c. Civil jurisdiction of the District Court
 - d. Administrative and Disciplinary Division of the District Court
10. Argument 1 overlooks the fact that the commissioners (non-legal members of the ERD Court) are already busy chairing conferences, mediating, and hearing and determining appeals (either alone or with a judge) including writing judgments. In addition, it is unlikely that the commissioners would be qualified to participate in the disposal of matters in other streams or lists of the SACAT.
11. Argument 1 overlooks the fact that lodgement numbers in the ERD Court have fluctuated over the years. The fluctuation tends to reflect the state of the economy. For example, in 1994-1995 the total number of lodgements was 373; in 1997-1998 it was 306; in 2001-2002 it was 429; in 2004-2005 it was 544; in 2010-2011 it was 400; in 2012-2013 it was 325. What is appreciated by developers, decision makers and third parties, is the existence of a Court that is able to deal quickly and expertly with matters that are lodged.

Argument 2 - there would be costs savings for the government should the ERD Court be abandoned and its work transferred to the SACAT.

EDO Response:

12. The costs to the government for the judges would remain the same, assuming the judges would continue to sit in the District Court or would sit in other lists of the SACAT (as deputy presidents).
13. If executive senior members of the SACAT were to do the work of a judge of the ERD Court, there would be a small cost saving given that the senior members are to be remunerated at a lower rate than a District Court judge¹ and will not have the expectation of a judicial pension.
14. The costs to the government for the current commissioners would remain the same if they were to be transferred to the SACAT. There would be a cost saving in the future if the work of commissioners was undertaken by ordinary members of the SACAT given that it is proposed that ordinary members be remunerated at a lesser rate than the present remuneration for commissioners and motor vehicles are not to be provided for ordinary members².
15. However, any saving in costs for the government has to be considered against the current reputation and value of the ERD Court, including its efficient operations and timely disposal of matters (thus minimising delays in the disposal of appeals and the consequent expense, for parties) and its true independence.

Argument 3 - the abandonment of the ERD Court would be beneficial to the District Court, in that it would free up space in the Sir Samuel Way Building for judges chambers and enable the District Court to use the courtrooms and conference rooms presently used by the ERD Court.

EDO Response:

16. Additional judges' chambers would only be required if additional judges (that is, additional to the existing DC complement) are to be appointed to the District Court – an additional cost to the government.
17. The ERD Court presently uses 3 courtrooms, one of which has been modified for the ERD Court for use for the dual purposes of conferences and less formal hearings. None of these courtrooms are suitable for District Court criminal hearings without modification, such as the provision of elevator access from the basement cells, with the associated expense.
18. In any event, if the kinds of matters within the ERD Court are to be moved into the SACAT, sufficient space for the specialist stream/list members' offices/chambers and hearing and conference rooms would have to be provided. Reducing the number/availability of hearing and conference rooms, in an effort to save money, would have negative outcomes with respect to the timely disposal of matters.

¹ *Terms and Conditions and Code of Conduct - Executive Senior Members* accessed at: <http://www.agd.sa.gov.au/initiatives/south-australian-civil-and-administrative-tribunal/careers-sacat>

² *Terms and Conditions and Code of Conduct - Fulltime and Part-Time Ordinary Members* accessed at: <http://www.agd.sa.gov.au/initiatives/south-australian-civil-and-administrative-tribunal/careers-sacat>

Argument 4 - the abandonment of the ERD Court in favour of a planning and environment stream/list in the SACAT, would result in the saving of ERD Court registry staff salaries and on costs.

EDO Response:

19. This argument overlooks the fact that the ERD Court registry staff have long been integrated with the District Court registry meaning that in many respects the ERD Court is served by staff who are essentially registry staff providing services to the District Court and encompassing the ERD Court. In any event, the SACAT would have to employ sufficient staff to handle the volume of matters presently in the ERD Court, in addition to lodgement for other lists/streams in the SACAT. Very little, if any, saving of costs would accrue.

Why the ERD Court should be retained:

20. The ERD Court has a well-documented record and reputation for the fair and efficient disposal of matters with an emphasis on disposal through agreement between the parties (ADR) without an extended and costly hearing.

21. The ERD Court is housed within the District Court complex and served by staff who also serve the District Court which has the following benefits:

- a. It is relatively inexpensive to operate (compared with a separate court);
- b. It is independent;
- c. It has the ability to develop its own rules and practice directions and the flexibility to modify these in response to changes in caseload volume and complexity; and
- d. The judicial members retain the opportunity for communication, case discussion, collegiality with peer generalist judges, the ability to serve in other jurisdictions while retaining their specialist knowledge, involvement and influence in improving the practices and procedures of courts and thus access to justice.

22. The ERD Court has been mindful of the needs of those for whom it provides access to justice and dispute resolution and has over the years:

- a. conducted several surveys of court users
- b. consulted with the community through community liaison committees
- c. sought the views of those lawyers who regularly appear in the Court
- d. made and implemented changes (or refrained from proposed change) as a result of the consultations and surveys.

23. The ERD Court has endeavoured to operate in a manner so as to minimise, for the parties, the costs of court proceedings and the delays associated with court proceedings. To that end, over the years the Court has amended its procedures and, for the past 5 years, has brought all appeals to an early (preliminary) conference conducted about 3-4 weeks from lodgement, to assess the most appropriate course for the matter; the relevant decision making authority having by then filed and provided to each party all relevant documentation, in accordance with the Court directions. The Court directs the matter into one of three tracks: conference; hearing; or pending (the last to enable, for example, extra-Court negotiation or amendment of the proposed development).

24. A significant majority of all planning appeals lodged are resolved without the need for a hearing (overall 88% appeals in 2011-2012; overall 70% appeals in 2012-2013), saving time and expense for the parties. This is a reflection of the emphasis by the ERD Court and its members on fair and timely resolution of matters consistent with the law and relevant policy.
25. The ERD Court is not costly for parties, in comparison with other Courts (leaving aside the expenses of legal representation), in regard to filing and hearing fees. The fees are significantly less expensive than in all comparable specialist courts and tribunals around Australia, excepting the Resource Management and Planning Appeal Tribunal in Tasmania. This reflects an informed and enlightened approach by successive governments, supported by the ERD Court, and is of benefit to all appellants and applicants, including developers and third parties (in relation to appeals) and relevant decision making authorities (in relation to enforcement matters).
26. The ERD Court is comprised of experts - judges with specialist knowledge and experience and commissioners with relevant expertise and experience; and it is an integrated court and a court of record, able to hear and determine all matters under the *Development Act 1993* (and other legislation) including planning appeals, civil enforcement applications and charges of offences, as well as charges of contempt in respect of breaches of or failure to comply with court orders. As a consequence, the Court is able to embrace an integrated approach to matters before it regarding the same parcel of land, saving time and expense for the parties.
27. The ERD Court is independent; its members are not reliant on being reappointed by government after an initial appointment period of 3-5 years, as is the position under the legislation creating the SACAT. It is independent of the legislative and executive branches of government. It is publicly visible and thus facilitates access to justice in planning and environmental matters and the other fields within its jurisdiction.
28. The SACAT is neither a court of record, nor is it able to hear and determine charges of an offence or of contempt in respect of breaches of its orders/determinations. These kinds of matters would have to be lodged and heard in the courts. The integrated approach to land use would be lost. What is the rationale for abandoning a valued institution that is working well?
29. The ERD Court is a success story. It is working well (acknowledging that there will always be detractors regardless of how well an institution performs). Its processes produce better results for its users and the community 20 years after its commencement than at its outset. If it is seen to be working well for those who use it and the community at reasonable cost, why abandon it?

Summary

30. The only perceived benefit in abandoning the ERD Court in favour of planning and other matters being addressed in the SACAT, is some saving of costs for the government, most of which are likely to be realised only after the current commissioners have retired. It is difficult to see what other real savings might ensue, given the current efficient operations of the ERD Court.
31. On the other hand, if the ERD Court is abandoned in favour of a stream in the SACAT:
 - a. the State will lose a specialist, integrated court that is suitably flexible in its practices, has honed its processes and practices over 20 years, and is well regarded and respected, not least for its early triaging of matters, its emphasis on dispute resolution without a formal hearing and the timely disposal of matters between parties including the de novo hearing of appeals; and
 - b. planning and environmental appeals will be addressed, not by members who are truly independent of government, but by members appointed by the Governor (upon the advice of the Executive Council) for a limited tenure of 3-5 years.
32. EDO(SA) notes that, in the Queensland and NSW jurisdictions, civil and administrative tribunals have been established, into which numerous tribunals have been amalgamated. However, in each of those jurisdictions, planning/development and environment issues remain within the jurisdiction of independent specialist courts, namely the Planning and Environment Court (in Queensland) and the Land and Environment Court (in NSW).