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Structure and restructure, the rise of FDR and experts in hot tubs – Reflections on the first decade of the State Administrative Tribunal of Western Australia¹

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Abstract

The State Administrative Tribunal of Western Australia (commonly known as “SAT”) was established on 1 January 2005 as a “super-tribunal”, that is, a comprehensive and cohesive civil and administrative review tribunal, for the State. SAT replaced or took over work from approximately 50 courts, tribunals, boards, ministers and other adjudicators. SAT exercises jurisdiction under approximately 160 Acts and Regulations, as well as under subsidiary legislation, such as planning schemes and local laws, in a wide range of areas. This paper provides an overview of SAT, including its initial structure and recent restructure, funding model, the critical importance of facilitative dispute resolution (or “FDR”), and innovations in relation to expert evidence. The paper concludes with some thoughts on the inherent capacity of super-tribunals to “think outside the box”, drawing on the author’s experience as a senior member and subsequently as a Deputy President of SAT.

¹ See generally DR Parry and B De Villiers, *Guide to proceedings in the Western Australian State Administrative Tribunal* (Lawbook Co / Thomson Reuters, 2012) and a corresponding chapter in the *WA Lawyers’ Practice Manual* (Thomson Reuters, loose-leaf, updated 1 June 2015).

“A cohesive new jurisdiction”

When commending the legislation that established and conferred jurisdiction on the State Administrative Tribunal (commonly known as “SAT”) to the WA Parliament, the Attorney General Hon Jim McGinty MLA described SAT as “a cohesive new jurisdiction” and the fulfillment of an important commitment to the people of the State “to establish a modern, efficient and accessible system of [civil and] administrative law decision-making across a wide range of areas”.²

Over a period of more than 20 years, a number of reports and reviews had identified the critical need for reform of the disparate and fragmented system of administrative review in Western Australia and identified significant benefits for administrative justice which would result from a single, comprehensive, coherent, independent and specialist approach.³ Ultimately, the report of the taskforce chaired by Mr ML Barker QC (as his Honour, subsequently SAT’s inaugural President, then was) on the establishment of SAT identified a number of problems with the then existing ad hoc processes in administrative review (as well as in vocational regulation) decision-making and a number of benefits of the model which was subsequently implemented by the creation of SAT.

The Taskforce Report envisaged that the benefits from the establishment of SAT would include the following:

² *Hansard*, 24 June 2003, p 9104.

³ Law Reform Commission of Western Australian, *Report on Review of Administrative Decisions: Appeals*, Project No 26 (I), (1982); Parliament of Western Australia, Report of Royal Commission into Commercial Activities of Government and Other Matters *Part II* (1992); *Commission on Government, Report No 4* (July 1996); Commissioner Gotjamanos J and Merton G, *Report of Tribunal's Review to the Attorney General* (, August 1996); Western Australian Law Reform Commission, *Review of the Criminal and Civil Justice System*, Project No 92 (1999); *Western Australian Civil & Administrative Review Tribunal Taskforce Report on the Establishment of the State Administrative Tribunal* (May 2002).

- citizens would gain access to a single, one stop tribunal, in place of a variety of existing tribunals;
- as a result of access to a single tribunal, there would be an identifiable point of contact for all citizens in respect of most civil and administrative review decisions;
- more information would be provided to citizens about the making of applications, hearings and the reasons for decisions;
- a more flexible and user-friendly system of decision-making would be developed;
- SAT would have the capacity to keep abreast of innovation and developments in comparable tribunals elsewhere; and
- SAT would have the appropriate leadership, expertise, experience and independence from the Government of the day to ensure that citizens could have the fullest confidence in the administrative review system and its results.

SAT commenced on 1 January 2005 and replaced or took over work from approximately 50 courts, tribunals, boards, ministers and other adjudicators. SAT exercises broad review and original jurisdiction under approximately 160 State Acts and Regulations, as well as under subsidiary legislation, such as planning schemes and local laws. SAT's work involves:

- the review of the vast majority of administrative decisions made by State and local government authorities and officials in respect of which administrative review (formerly known

as “appeal”) rights are conferred, such as firearms, State tax, town planning, land valuation, and mental health matters;

- vocational regulation, involving disciplinary proceedings concerning allegations of misconduct or incompetence, and licensing disputes, in relation to most professions, occupations and trades which are licensed under State law; and
- original jurisdiction in relation to specialist civil matters, such as building disputes, commercial tenancy, strata titles, land compensation, guardianship and administration, and equal opportunity (anti-discrimination) proceedings.

In May 2009, the Legislative Council’s Standing Committee on Legislation published a lengthy report following its conduct of an inquiry into SAT’s jurisdiction and operation which was required to be undertaken by s 173 of the *State Administrative Tribunal Act 2004* (WA) (SAT Act).⁴ The Standing Committee on Legislation found “the SAT to be operating efficiently and effectively ... due to the considerable efforts and dedication of the members and staff of the SAT”.⁵ The Committee recommended that new or altered jurisdiction should be conferred on the Tribunal under 15 Acts, which would result in a substantial increase in SAT’s workload.⁶ On 29 August 2011, the Tribunal received original jurisdiction in relation to building disputes under the *Building Services*

⁴ Parliament of Western Australia, *Inquiry into the jurisdiction and operation of the State Administrative Tribunal*, Report 14 (May 2009) <http://www.sat.justice.wa.gov.au/_files/Report_14_on_SAT.pdf>

⁵ Parliament of Western Australia, *Inquiry into the jurisdiction and operation of the State Administrative Tribunal*, note 4, at [8].

⁶ Parliament of Western Australia, *Inquiry into the jurisdiction and operation of the State Administrative Tribunal*, note 4, Recommendations 42–54 and 57–59. The Committee also recommended that any increase in jurisdiction should be accompanied by a commensurate increase in resources: Recommendation 41.

(*Complaint Resolution and Administration*) Act 2011 (WA) which was the first major conferral of new jurisdiction since the establishment of SAT.⁷

SAT's structure and restructure

The Tribunal has 19 full-time members consisting of a President,⁸ two Deputy Presidents,⁹ three senior members¹⁰, two of whom are lawyers and the third is a social worker, and 13 other members, including nine lawyers, two town planners, an architect, and a social worker/lawyer.¹¹ The Tribunal also has more than 100 sessional members, including builders, architects, town planners, environmental scientists, engineers, surveyors, land valuers, social workers, medical practitioners, lawyers and members of other vocations regulated by SAT.

The SAT legislation does not specify any particular structure, such as divisions, streams or lists, for the operation of the Tribunal. Rather, s 146(2) of SAT Act states that “the President is responsible for organising the business of the Tribunal ...” and s 32(5) of the SAT Act states that “[t]o the extent that the practice or procedure of the Tribunal is not prescribed by or under this Act or the enabling Act, it is to be as the Tribunal determines.”

At the commencement of Tribunal in January 2005, the inaugural President, Hon Justice Michael Barker, determined that SAT's work was

⁷ The Tribunal has jurisdiction in relation to original building disputes on referral by the Building Commissioner under ss 38 and 43 of the *Building Services (Complaint Resolution and Administration) Act 2011* (WA).

⁸ The President must be a Judge of the Supreme Court of WA: *State Administrative Tribunal Act 2004* (WA) (SAT Act) s 108(3).

⁹ The Deputy Presidents must be Judges of the District Court of WA: SAT Act s 112(3).

¹⁰ Senior members must have at least eight years' legal experience or extensive knowledge of, or experience with, any class of matter involved in the exercise of the Tribunal's jurisdiction: SAT Act s 117(4).

¹¹ Ordinary members must have at least five years' legal experience or extensive knowledge of, or experience with, any class of matter involved in the exercise of the Tribunal's jurisdiction: SAT Act s 117(3).

to be allocated to one of four “streams”, namely:

- commercial and civil (known as “CC”);
- development and resources (known as “DR”);
- human rights (known as “HR”); and
- vocational regulation (known as “VR”).

The term “stream”, rather than “division”, was adopted to emphasise the notion that SAT is a cohesive, super-tribunal, rather than a combination of former, separate jurisdictions.

The President also allocated each of the 12 inaugural full-time non-judicial members and the sessional members to work principally in a particular stream. As the number of full-time non-judicial members increased to 17, the new full-time members were also allocated to work principally in a particular stream.

Although SAT’s initial steam structure enabled the Tribunal to acquit its work and to make appropriate use of its specialist membership in its establishment and consolidation phases, the Tribunal’s needs and circumstances changed over time. In particular, the Tribunal acquired new jurisdictions (the most significant being original building disputes in 2011) and the amount of work within areas of jurisdiction changed (the most significant change being the doubling of guardianship and administration proceedings over the first decade). In consequence of the increase in guardianship and administration work, in early 2013, the Tribunal’s second President, Hon Justice John Chaney, reallocated three full-time members to work equally in two streams, thereby enabling them to spend half their time hearing guardianship and administration cases.

However, the stream structure of the Tribunal proved to be increasingly inflexible to enable the Tribunal to efficiently acquit its changing and growing work. Although the streams were originally envisaged as a flexible administrative arrangement, with the intention that members would be free to mediate and hear matters in different streams, where appropriate, as the workload particularly in certain areas grew, the stream structure increasingly operated as divisions and precluded the efficient listing of members across different areas of SAT's jurisdiction. Furthermore, as each of the streams (other than vocational regulation) was headed by a full-time senior member and had other full-time and sessional members allocated to work principally in that stream, the streams tended to operate as separate units and developed somewhat different processes.

The stream structure also resulted in some inefficient use of staff, for example by the publication of separate decisions bulletins in each stream.

In addition, as under the stream structure, not only the President (who headed the vocational regulation stream) and the senior members (who headed the other streams), but also most other full-time members, conducted directions hearings, the full-time members were often listed for directions hearings for part of a day, thereby precluding those members from being listed for mediations or final hearings for half or full days.

Following the appointment of the Tribunal's third President, Hon Justice Jeremy Curthoys, the judicial members reviewed the way in which the business of the Tribunal is organised. The judicial members considered that the allocation of the Tribunal's work and members to streams no longer reflected or enabled optimum allocation of SAT's resources.

In mid-2014, the President therefore restructured the Tribunal from four

streams to 15 “lists”, with all enabling Acts allocated to one of the lists, but without members being allocated to work principally in any particular area of the Tribunal’s jurisdiction. Each list is overseen by a nominated judicial member who is the relevant List Judge. Whereas, under the former stream structure, most full-time members conducted some directions hearings, most directions hearings are now consolidated and conducted by the judicial members on nominated directions days, with directions hearings across the Tribunal conducted more efficiently.

Although some members with specialist qualifications or experience continue to work mainly in a particular area of jurisdiction (for example, members with social work qualifications working mainly in guardianship and administration matters and members with architecture or town planning qualifications working mainly in planning and development matters), members are otherwise generally available to mediate and hear cases across the breadth of the Tribunal’s jurisdiction.

The restructure is consistent with the nature of SAT as a cohesive civil and administrative tribunal for the State. Particular benefits of the restructure have included:

- providing greater flexibility in listing full-time members;
- enabling SAT to respond more readily to workload fluctuations in different areas;
- utilising the skills and capacity of judicial members to oversee the work of the Tribunal and to conduct directions hearings;
- increased efficiency and effectiveness of directions hearings;

- freeing up senior members from administrative tasks to be able to hear and mediate complex cases;
- professional development of members through being exposed to new areas of work; and
- members bringing fresh ideas and different perspectives to areas of work in which they had not previously been involved, with consequent benefits for practice and procedure and the development of the substantive areas.

Although the restructure was driven primarily by considerations of efficiency and capacity, and was not intended as a cost saving exercise, it has untapped substantial full-time member capacity which has enabled significant budgetary savings in terms of sessional member usage. In particular, whereas the former need to accommodate a doubling of guardianship and administration applications since the commencement of SAT within the confines of the human rights stream resulted in 40% - 45% of guardianship and administration hearings being before sessional members, all guardianship and administration hearings now take place before full-time members, following training and professional development of the full-time members who were not allocated to the former human rights stream. Members who did not previously do guardianship and administration work were “phased in” to that work, by initially hearing more simple statutory reviews of guardianship and administration orders, rather than original applications.

Apart from increased efficiency and freeing up other members to mediate and hear cases, another benefit of the restructure in terms of the consolidation and conduct of most directions hearings by judicial members appears (according to my perception, but subject to empirical

confirmation once the restructure has been in operation for a period) to be that more matters are being resolved without the need for a final hearing or determination on documents. This seems to be, in part, because of the additional authority of judicial members in expressing views about procedural or substantive issues, in part, because judicial members are able to resolve certain disputes effectively within the directions hearing itself, and, in part, because the judicial members have authority to look across the breadth of the Tribunal’s membership in determining to which member a matter should be referred for mediation and are able to effectively tailor directions and make suggestions to parties to maximise the prospect of success of mediation.

SAT’s 15 lists (and relevant List Judge for each list) are as follows:

| List | List Judge |
|--|-------------------|
| Agriculture and fisheries (AF) | Justice Curthoys |
| Building and construction (BC) | Judge Sharp |
| Commercial (C) | Justice Curthoys |
| Domestic animals (DA) | Judge Parry |
| Firearms (F) | Judge Sharp |
| Guardianship and administration (GA) | Judge Parry |
| Health and safety (HS) | Justice Curthoys |
| Human rights (HR) | Judge Sharp |
| Licenses (L) | Judge Sharp |
| Planning and development (PD) | Judge Parry |
| Strata titles (ST) | Judge Sharp |
| Taxation (T) | Judge Sharp |
| Valuation and compensation (VC) | Judge Parry |
| Vocational regulation (VR) | Justice Curthoys |
| Residential parks and retirement villages (RP) | Judge Sharp |

SAT’s funding model

In its report in May 2009 on the jurisdiction and operation of SAT, the Legislative Council’s Standing Committee on Legislation recommended

that the Government and SAT “develop a funding model for the Tribunal as soon as practicable.”¹² In accordance with this recommendation, a funding model was developed in 2010 by the Department of the Attorney General, in consultation with the then Department of Treasury and Finance and the Tribunal, and was endorsed in principle by the Treasurer, contingent on the priorities of Government and the State Budget position.

The funding model is based on estimated additional judicial and member resources, and administrative resources, in terms of hours per lodgement, that will be required when a new function is conferred on SAT. The funding model has been applied to a number of new conferrals in recent years, although only two of those conferrals have been significant enough to result in the Tribunal receiving additional resources, namely original building dispute proceedings and teachers’ disciplinary proceedings.

The funding model has proven to be useful and important in discussions with relevant agencies and in informing submissions for appropriate funding for the conferral of new jurisdictions on SAT.

SAT’s main statutory objectives, powers and procedures

Section 9 of the SAT Act sets out the Tribunal’s main objectives as follows:

- “(a) to achieve the resolution of questions, complaints or disputes, and to make or review decisions, fairly and according to the substantial merits of the case;
- (b) to act as speedily and with as little formality and technicality as is practicable, and to minimise the costs to the parties; and

¹² Parliament of Western Australia, *Inquiry into the jurisdiction and operation of the State Administrative Tribunal*, note 4, Recommendation 41.

- (c) to make appropriate use of the knowledge and experience of Tribunal members.”

The Supreme Court of Western Australia has recognised that the Tribunal has “specialist expertise in the areas of jurisdiction which it administers and ... by s 9 of the SAT Act is required to discharge that jurisdiction by reference to the objectives that are specified”.¹³ The Court observed that it would be “hazardous to the achievement of those objectives if the Supreme Court were to be too ready to impose its view on SAT as to the procedures of SAT and as to case management decisions that are made by SAT within its specialist areas of jurisdiction and which are taken for the achievement of the objectives set out in s 9 of the SAT Act”.

Consistently with its s 9 objectives, the Tribunal:

- is bound by the rules of natural justice;¹⁴
- is not bound by the rules of evidence and is to act “according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms”;¹⁵
- is to generally conduct hearings in public;¹⁶
- is to ensure that parties understand the nature of the assertions made in the proceeding and the legal implications

¹³ *Dalton v Commissioner of Police* [2009] WASC 9 at [28] *per* Martin CJ. See also, to the same effect, *Commissioner of State Revenue v Artistic Pty Ltd* 2008] WASC 24; 2008 ATC ¶20-004; (2008) 70 ATR 818 at [16] (Martin CJ with whom Buss JA and Newnes AJA agreed).

¹⁴ Except to the extent that the enabling Act conferring jurisdiction in the matter authorises a departure from those rules: SAT Act s 32(1).

¹⁵ SAT Act s 32(2).

¹⁶ SAT Act s 61, other than a compulsory conference (s 52(4)) or a mediation (s 54(6)) which are conducted in private unless SAT determines otherwise.

of those assertions and explain to the parties, if requested to do so, any aspect of procedure or any decision;¹⁷

- may inform itself on any matter as it sees fit;¹⁸
- is to ensure that all relevant material is disclosed to it;¹⁹
- in administrative review proceedings, has all functions and discretions corresponding to the original decision-maker in making the reviewable decision;²⁰
- may conduct all or part of a proceeding entirely on the basis of documents without an oral hearing;²¹
- is required, in administrative review proceedings, to produce “the correct and preferable decision at the time of the decision upon the review”;²²
- is required to give reasons for final decisions including findings on material questions of fact, referring to the evidence or other material on which those findings are based;²³ and
- if it reserves a decision, is required to give the decision within 90 days of the day on which it is reserved.²⁴

¹⁷ SAT Act s 32(6).

¹⁸ SAT Act s 32(4).

¹⁹ SAT Act s 32(7)(a).

²⁰ SAT Act s 29(1).

²¹ SAT Act s 60(2).

²² SAT Act s 27(2).

²³ SAT Act s 77. Reasons for final decisions can be oral although a party may request written reasons for any decision which must be provided within 90 days of the request or within an extension of that period given by the President: SAT Act s 78.

²⁴ SAT Act s 76. The President can grant an extension of this period: *ibid.*

Although the Tribunal “is not bound by the rules of evidence” and is to act “according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms”, “as was observed in the decision of the Commonwealth Administrative Appeals Tribunal in *Re Baini and Commissioner of Taxation* [2012] AATA 440; (2012) 57 AAR 452 at [119], ‘[t]here is, though, a difference between not being bound by the rules of evidence and not having regard to them’.”²⁵ Nevertheless, SAT aims to discourage technical objections and arguments about the admissibility of evidence. Rather, the discussion is more often about the weight or value of the evidence to the determination of the particular case.

The Tribunal has adopted practices and terminology that reflect its statutory objectives and character as a civil and administrative tribunal, rather than a court. Parties, legal practitioners and agents do not stand when examining or cross-examining a witness or when addressing the Tribunal. The Tribunal has an “executive officer”, who performs functions under the SAT Act and assists in the administration of the Act, rather than a “registrar”, as in courts. The Tribunal has an “office” at which documents are filed, rather than a “registry”, as in courts. SAT decisions are cited as [Applicant] and [Respondent], rather than as [Applicant] v [Respondent], as in courts.

The nature of SAT proceedings and their general character is fairly consistent and relatively informal, in comparison to courts and some tribunals, and could be described as a hybrid adversarial / investigative approach to dispute resolution, under which the parties may generally (subject to the Tribunal’s objectives in s 9 of the SAT Act and the

²⁵ *Medical Board of Australia and Woollard* [2012] WASAT 209; (2012) 82 SR (WA) 347 at [85]. See H Jackson, “Evidence in SAT – What to do when the rules of evidence don’t apply” (2014) 41(11) *Brief* 35.

practices and procedures which have been developed in light of those objectives) present their cases as they wish, but in which SAT adopts a more active and investigative approach to the resolution of the dispute than would occur in a court.

Commencement and management of proceedings

Proceedings are commenced by filing a simple document, known as an “application”, which is generated on the SAT web site²⁶ using the “SAT Wizard” program. This program has a drop down menu with each of over 900 enabling provisions that confer jurisdiction on the Tribunal. When an applicant selects the relevant enabling provision, the program creates the application form and identifies the documents that must accompany the application.

Other than in guardianship and administration proceedings (which are usually listed for a final hearing within six to eight weeks) and certain commercial tenancy proceedings (which are determined on the documents), all proceedings are listed for a first directions hearing before a member (usually a judicial member) within two to three weeks of the filing of the application and are then actively case managed by the member.

There are two types of directions hearings in SAT. The judicial members conduct directions lists on a particular directions day,²⁷ generally with two or more matters listed together on the half hour or hour. In building disputes and “Class 1 planning applications”,²⁸ non-judicial members

²⁶ <http://www.sat.justice.wa.gov.au>.

²⁷ Justice Curthoys on Tuesdays, Judge Sharp on Wednesdays and Judge Parry on Fridays.

²⁸ “Class 1 planning applications” involve development (other than a single house on a single lot) with a value of less than \$250,000, a single house on a single lot with a value of less than \$500,000, and subdivision of a lot into not more than three lots.

generally conduct initial directions hearings listed for half an hour or one hour per matter.

In both cases, a directions hearing is not simply a case management tool. Rather, it involves a proactive and interactive process conducted by a member to identify the key issues in dispute and to begin developing options to achieve the resolution of the matter. Proceedings are often resolved through facilitative dispute resolution at the directions hearing itself. Otherwise, there is a presumption that cases will be referred from the directions hearing for mediation or listed for a compulsory conference.

The member conducting the directions hearing tailors directions to maximise the prospects of success of the mediation or compulsory conference. The member conducting the directions hearing considers which member or members should be listed to conduct the mediation or compulsory conference, having regard to the issues in dispute and the qualifications and experience of members. Where appropriate, the parties are told the professional background of the member or members who will conduct the process. The member also considers the location where the mediation or compulsory conference should most appropriately be held, having regard to the issues in dispute and the convenience of the participants. Mediations are often held on-site or include an on-site meeting. In addition, the member considers whether any third parties should be invited to attend the mediation or compulsory conference. For example in town planning cases, the Tribunal may invite the mayor or president of the local government respondent to attend and/or to nominate one or more councillors to attend the mediation or compulsory conference.

Identification of issues in dispute and relevant documents

Where a matter is referred to mediation or a compulsory conference, the Tribunal usually orders the parties to produce points for mediation or in administrative review cases requires the respondent to produce a statement of issues for mediation or, in some complex cases, a statement of issues, facts and contentions. This document usually provides the agenda for the mediation or compulsory conference.

Where a matter is listed for final hearing or determination on documents, the Tribunal usually orders:

- the applicant in original proceedings and the respondent in review proceedings to produce a statement of issues, facts and contentions; and
- the other parties to produce their own responsive statements of issues, facts and contentions, setting out whether the party accepts or rejects each issue, fact or contention and any other issues, facts and contentions it says are relevant.²⁹

Section 24 of the SAT Act requires the original decision-maker in review cases (the respondent) to provide to the Tribunal, in accordance with the SAT Rules:

- a statement of the reasons for the decision; and
- other documents and other material in its possession or under its control which are relevant to the Tribunal's review of the decision.

²⁹ *Standard procedural orders* standard orders 13(a) and 14 (original proceedings) and 9(a) and 11 (review proceedings), http://www.sat.justice.wa.gov.au/_files/standard_orders.pdf.

These documents are commonly referred to as “the s 24 documents”. The rules specify that the respondent must provide the s 24 documents to the Tribunal in accordance with any order made by the Tribunal.³⁰ The rules also enable the Tribunal to order the respondent to provide a copy of these documents to the applicant or any other party.³¹ In order to minimise costs, the Tribunal’s usual practice is to only order the respondent to file and provide the s 24 documents to the other parties if the proceeding is listed for final hearing or determination on documents.³² As discussed below, across the Tribunal, other than in guardianship and administration and commercial tenancy proceedings, approximately two-thirds to three-quarters of proceedings are resolved by facilitative dispute resolution, without the need for a final hearing or determination on documents. The s 24 documents (and the applicant’s bundle of documents) are not generally required to be produced in those cases.

In original proceedings, when a matter is listed for final hearing, the applicant is usually required to file and serve a bundle of documents, followed by the respondent.

The Tribunal also has power under s 35 of the SAT Act to order third parties to produce documents and may issue summonses under s 66 of the SAT Act.

Facilitative dispute resolution

The Tribunal has adopted the term “facilitative dispute resolution” (or “FDR”) to refer to a suite of non-adjudicative dispute resolution processes that it employs to resolve or narrow disputes. The choice of this terminology, as opposed to the more commonly used terms of

³⁰ *State Administrative Tribunal Rules 2004* (WA) (SAT Rules) r 12.

³¹ SAT Rules r 12.

³² *Standard procedural orders*, note 29, standard order 9(b).

“alternative dispute resolution” or “additional dispute resolution” (“ADR”), was quite deliberate, in order to emphasise that in the SAT context these processes are not regarded as alternative or additional, but rather as central and core, methods of dispute resolution.

As Chaney J has observed, FDR processes have “been found by the Tribunal to be of enormous value in achieving the correct and preferable decision in many areas of ... the Tribunal's review jurisdiction, and reliable and constructive decisions in its original jurisdiction” and in “[a]chievement of the objectives set out in s 9 of the SAT Act”.³³ Across the breadth of the Tribunal’s work, other than in guardianship and administration and commercial tenancy proceedings, approximately two-thirds to three-quarters of matters are resolved by facilitative dispute resolution, without the time, expense, uncertainty and “win / loss” nature of an adjudicated outcome imposed through a final hearing or determination on documents. In addition, FDR processes are regularly used to reduce the scope of the dispute in cases that require Tribunal adjudication.³⁴

Specifically, in SAT, FDR processes involve:

- directions hearings in which issues are identified, options are developed and, in certain types of applications, alternatives to the proposal are discussed;³⁵

³³ *Jacobs & Anor and City of Subiaco* [2007] WASAT 84 at [9] and [10].

³⁴ For example, in the former development and resources stream in 2013-2014, 79% of applications were fully resolved by FDR processes and a further 6% of applications were partially resolved by FDR processes: *State Administrative Tribunal Annual Report 2013-2014* p 12.

³⁵ In “Class 1 planning applications” (involving development, other than a single house on a single lot, with a value of less than \$250,000, a single house on a single lot with a value of less than \$500,000, or subdivision of a lot into not more than three lots) and building dispute proceedings, up to one hour is allocated for an initial directions hearing for this to occur. Other types of matters are typically referred for mediation for this to occur.

- mediations “to achieve the resolution of matters by settlement between the parties”;³⁶
- compulsory conferences “to identify and clarify the issues in the proceeding and promote the resolution of the matters by settlement between the parties”;³⁷ and
- in review proceedings, invitations by the Tribunal to respondents to reconsider their decisions under s 31 of the SAT Act, often in light of further information or clarification provided, or modifications or amendments made, by applicants through the other FDR processes.³⁸

All of these processes are conducted by SAT members. Mediation is the most significantly utilised FDR process.³⁹ Mediations are often held on site or include an on-site meeting.⁴⁰ In its programming orders, the Tribunal may invite relevant third parties, such as officers of government departments, local government councillors and objectors to development applications, who could usefully contribute to the discussion of issues, to attend the mediation and participate in the mediation subject to the discretion of the member.⁴¹ In review proceedings, invitations for

³⁶ SAT Act s 54(4).

³⁷ SAT Act s 52(3).

³⁸ See DR Parry, “The use of facilitative dispute resolution in the State Administrative Tribunal of Western Australia – Central rather than alternative dispute resolution in planning cases” (2010) 27 EPLJ 113.

³⁹ For example, in the former development and resources stream in 2013-2014, 70% of applications that were finalised were referred for mediation: *State Administrative Tribunal Annual Report 2013-2014* p 12.

⁴⁰ For example, in the former development and resources stream in 2013-2014, in 49% of mediations at least one mediation session was held on site: *State Administrative Tribunal Annual Report 2013-2014* p 12.

⁴¹ *Standard procedural orders*, note 29, standard orders 23-26.

reconsideration under s 31 of the SAT Act are also extensively used to facilitate resolution of disputes and to narrow contested issues.⁴²

The FDR processes are applied in SAT in a co-ordinated and determined fashion, one leading to another, in order to achieve a non-adjudicative result, if at all possible. As Preston J has observed:

“... the system of dispute resolution ... is sequential and iterative. It involves early and proactive intervention by the [Tribunal] to facilitate resolution of the dispute; diagnosis of the dispute so as to match the appropriate dispute resolution process to the particular dispute and referral to that process; monitoring of the progress of the dispute resolution process in resolving the dispute; and, if timely and complete resolution is not able to be achieved, adaptive management by re-referral to a different dispute resolution process.”⁴³

Thus, a proceeding in SAT (other than in guardianship and administration and commercial tenancy proceedings) is typically resolved through the combination and progression of:

- a directions hearing; leading to
- one, two or three mediation sessions; leading to
- consent orders or the withdrawal of the proceeding; or
- in a review proceeding, an invitation by SAT to the respondent to reconsider its decision; leading, if the applicant is content with the decision upon reconsideration, to

⁴² For example, in the former development and resources stream in 2013-2014, 48% of applications that were finalised involved an invitation for reconsideration and, in matters where the result of the reconsideration was known to SAT, the original decision-maker chose to affirm its decision in only 13% of cases and made a different decision (a substituted decision, generally a conditional approval in place of a refusal, or a varied decision, generally deletion or amendment of conditions) in 87% of cases: *State Administrative Tribunal Annual Report 2013-2014* p 13.

⁴³ BJ Preston, “The use of alternative dispute resolution in administrative disputes” (2011) 22 ADRJ 144 at 149.

withdrawal of the proceeding, or, if the applicant is not content with the decision upon reconsideration, to

- a further directions hearing⁴⁴ or mediation session to resolve any outstanding aspect of the substituted or varied decision, such as a disputed condition of approval.

Expert evidence

As stated in SAT's pamphlet *A guide for experts giving evidence in the State Administrative Tribunal* first published in 2007:

“The quality and presentation of expert evidence is important in assisting the Tribunal to make reliable and correct decisions in the many areas of its jurisdiction.”⁴⁵

Consistently with its main objectives set out in s 9 of the SAT Act, and in particular in order to maximise the value and to minimise the cost of evidence given by expert witnesses to the Tribunal, SAT has adopted a model for expert evidence comprising the following four principal elements:

- Articulation of expert witnesses' obligations to the Tribunal.
- Written statements of expert witnesses' evidence.
- Conferral and joint statement of expert witnesses.
- Concurrent evidence of expert witnesses at the final hearing.⁴⁶

⁴⁴ The Tribunal's practice is to schedule a directions hearing shortly after the date by which the respondent has been invited to reconsider its decision. However, applicants usually write to the Tribunal following reconsideration seeking leave to withdraw the application and respondents usually write to the Tribunal consenting to leave being granted to withdraw the application. The Tribunal then vacates the directions hearing and issues an order allowing the withdrawal without attendance by either party. The Tribunal's leave to withdraw an application is required by s 46(1) of the SAT Act.

⁴⁵ *A guide for experts giving evidence in the State Administrative Tribunal*
http://www.sat.justice.wa.gov.au/_files/Expert_Evidence_Brochure.pdf.

This model is a response to recognised problems with the traditional approach to receiving expert evidence in tribunals and courts, in particular:

- “Adversarial bias” – the “gun for hire” expert witness or, at least, adoption of a partisan or defensive position;
- Delay between the evidence of expert witnesses in the same field;
- The lack of direct interaction and response between expert witnesses;
- The inability of expert witnesses to initiate discussion with the decision-maker, even when they consider that the decision-maker and other participants have misunderstood the area of expertise;
- The traditional approach to receiving expert evidence can become a forensic battle between counsel and expert witness; and
- The traditional approach to receiving expert evidence is dispute-focussed, rather than solution-focussed.

The pamphlet *A guide for experts giving evidence in the State Administrative Tribunal* states:

“Experience shows that, when expert witnesses understand and observe their obligation to bring to proceedings an objective assessment of the issues within their expertise, their evidence is of

⁴⁶ In relation to conferral and concurrent evidence of expert witnesses see I Freckelton SC “Concurrent expert evidence” in I Freckelton SC and H Selby, *Expert Evidence Law, Practice, Procedure and Advocacy* (Lawbook Co / Thomson Reuters, 5th Edition, 2013) Ch 6.15 (pp 391 – 407) and T Cockburn and B Madden, “Adapting to concurrent expert evidence in medical litigation” (2015) 22 JLM 610.

great assistance. When expert witnesses are not objective, and assume the role of advocate for a party, their credibility suffers.”

With these observations in mind, SAT has articulated expert witnesses’ obligations to the Tribunal in identical or similar terms to other tribunals and courts, as follows:

- An expert witness has an overriding duty to assist the Tribunal impartially on matters relevant to the expert’s area of expertise.
- An expert witness’ paramount duty is to the Tribunal and not to the party engaging the expert.
- An expert witness is not an advocate for a party.⁴⁷

The SAT pamphlet recognises that an expert may have been engaged by a party before the proceeding was commenced or may have been engaged by a party in another capacity, for example, as an advocate, in addition to being engaged to give expert evidence. Nevertheless, as stated in the pamphlet:

“When the expert is giving evidence in the Tribunal, he or she must appreciate and acknowledge the obligations set out above.”

Where a matter that is likely to involve expert evidence is listed for final hearing or determination on documents, the Tribunal usually orders:

- each party to give any expert witness it retains a copy of the pamphlet and a copy of the programming orders;⁴⁸ and

⁴⁷ The obligations are stated in *A guide for experts giving evidence in the State Administrative Tribunal* and are based on expert witness’ general obligations articulated by the New South Wales Land and Environment Court in its *Practice Direction: Expert Witnesses*, Sch 1.

⁴⁸ *Standard procedural orders*, note 29, standard order 42.

- each expert witness to acknowledge in his or her statement of evidence that he or she has read the pamphlet and agrees to be bound by the expert’s obligations stated in that document.⁴⁹

Parties in SAT proceedings are generally required to file and exchange experts’ witness statements by a specified date, usually two weeks before the final hearing.⁵⁰ Except in cases where the expense involved would be disproportionate to the subject matter of the proceeding, or where it would not be productive, the Tribunal usually orders the expert witnesses *in each field of expertise* to confer with one another *in the absence of the parties and their representatives* and to prepare a joint statement of:

- (a) the issues arising in the proceeding which are within their expertise;
- (b) the matters upon which they agree in relation to those issues;
- (c) the matters upon which they disagree in relation to those issues; and
- (d) the reasons for any disagreement.⁵¹

As was explained by the New South Wales Supreme Court in a medical negligence case:

“It is ordinarily to be expected that the process of joint conferencing will reduce the number of issues in dispute between

⁴⁹ *Standard procedural orders*, note 29, standard order 43.

⁵⁰ *Standard procedural orders*, note 29, standard order 44.

⁵¹ *Standard procedural orders*, note 29, standard orders 47 - 49. The immunity of expert witnesses from civil suit in respect of what is said or done in tribunal or court proceedings extends to preparatory steps including expert conferral: *Young v Hones* [2014] NSWCA 337 at [40] (Bathurst CJ); [261], [271], [274] – [275] (Ward JA); and [315] (Emmett JA agreeing with Ward JA); see also *D’Orta Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at [39]. However, where an expert witness purports to give expert evidence beyond his or her area of competence, he or she may be subject to disciplinary proceedings: T Cockburn and B Madden, note 46, 621 and cases discussed there.

the parties and will have the consequential effect of reducing the time spent by the experts in court and accordingly, the costs to the parties.”⁵²

Pre-hearing conferral of expert witnesses in SAT proceedings is either “chaired”, in which a SAT member (often the member who mediated the matter, given his or her familiarity with the issues⁵³) acts as a facilitator for the experts’ conferral,⁵⁴ or “unchaired”, in which the expert witnesses meet without a SAT member present. In a chaired conferral, the role of the facilitating member is to explain to the experts the nature of their task and to guide them through the process, ensuring that the experts address all of the key issues falling within their area of expertise and that their joint statement is as fulsome and helpful at the final hearing as possible, especially in explaining the reasons for any disagreement. As the NSW Supreme Court has observed:

“It is, of course, no part of the facilitator’s function to engage in debate with the experts. Rather, the task will be confined to the orderly working through of the [issues addressed in the joint statement] so that [the joint statement] is completed to the satisfaction of the conferring experts.”⁵⁵

The SAT pamphlet explains that:

“A conferral between expert witnesses, whether on their own or before a SAT member, is not a mediation and its purpose is not to settle the matter or compromise on issues by negotiation. Rather, the purpose of an experts’ conferral is to assist the Tribunal to resolve the matter correctly, quickly and with minimum costs to the parties. It is expected that the experts will make a genuine attempt to identify the matters of agreement between them and to clearly state their respective reasons for any disagreement. This enables the Tribunal and the parties at the hearing to focus their attention on the key matters of expert evidence that require resolution.”

⁵² *John v Henderson (No 1)* [2013] NSWSC 1435 at [12] (Garling J).

⁵³ This requires the consent of the parties under s 54(10) of the SAT Act.

⁵⁴ Cf T Cockburn and B Madden, note 46, 616 – 617.

⁵⁵ *KF v Royal Alexandra Hospital for Children* [2011] NSWSC 399 at [6] (Johnson J).

The SAT pamphlet also states that:

“An expert must exercise his or her independent professional judgment in relation to the conferral and joint statement and must not act on any instructions or request by a party, representative or other person to withhold or avoid agreement.”

What constitutes the same “field of expertise” for the purposes of conferral and concurrent evidence of expert witnesses depends on the circumstances of each case and the expert or technical issues to be addressed. As has been recognised in medical negligence cases in New South Wales, there may be “considerable overlap between [different] areas of expertise and the boundaries between them [may not be] clearly drawn”⁵⁶ and “[t]he fact that all experts in a joint conference are neither similarly qualified nor similarly specialised is a fact of life in all litigation that depends on the assessment of technical issues.”⁵⁷

Thus, for example, in one case, SAT directed expert conferral and heard concurrent expert evidence in relation to ecologically sustainable development from a panel of seven expert witnesses with expertise variously in urban and regional studies, development economics and social sustainability, environmental assessments and environmental sustainability, town planning sustainability principles and their application, town planning and statutory planning processes, economic sustainability and cost benefit analysis, and economic impact analysis and economic policy analysis.⁵⁸ In another case, SAT directed expert conferral and heard concurrent expert evidence in relation to air quality

⁵⁶ *X v Sydney Children’s Hospitals Speciality Network (No 6)* [2011] NSWSC 1353 at [3] (Adamson J) (conferral involving paediatricians, paediatric neurologists and paediatric endocrinologists).

⁵⁷ *Porter v Le* [2014] NSWSC 883 at [29] (Harrison J).

⁵⁸ *Moore River Company Pty Ltd and Western Australian Planning Commission* [2007] WASAT 98 at [96].

from a panel of eight expert witnesses with expertise variously in meteorology, environmental science, chemistry, air quality monitoring, measurement and impact assessment, toxicology, and environmental engineering.⁵⁹

The standard orders adopted by the Tribunal require the expert witnesses to include in their joint statement a statement of “the issues arising in the proceeding which are within their expertise”.⁶⁰ This wording was chosen to enable the experts, where they consider it to be appropriate to do so, to reformulate or refine issues of an expert or technical nature stated by the parties in their respective statements of issues, facts and contentions, so that the experts’ responses to the issues will be most helpful to the resolution of the proceeding. The Tribunal and the parties do not usually formulate specific questions for the experts to address in their conferral (beyond the statements of issues in the parties’ statements of issues, facts and contentions).⁶¹ However, where appropriate, the Tribunal can order the experts to answer specific questions formulated by the parties or by the Tribunal in consultation with the parties.

Expert witnesses in each field of expertise are generally required to give evidence concurrently (or, as it is sometimes referred to, “in the hot tub”) at the final hearing in a proceeding. Concurrent evidence involves the witnesses:

- sitting together in the witness box as an expert panel;
- being asked questions by the Tribunal, generally on the basis of the joint statement;

⁵⁹ *Wattleup Road Development Company Pty Ltd and Western Australian Planning Commission* [2014] WASAT 159 at [22].

⁶⁰ *Standard procedural orders*, note 29, standard orders 47 and 48.

⁶¹ Cf T Cockburn and B Madden, note 46, 622 – 623.

- being encouraged to respond directly to each other's evidence;
- being given an opportunity to ask each other any questions they think might assist the Tribunal; and
- being asked questions by the parties or their representatives.⁶²

The Tribunal nominates the topics to be addressed by the expert witnesses in the concurrent evidence process, usually after discussion with the parties or their representatives, and then leads what has been aptly described by the New South Wales Law Reform Commission as “a structured professional discussion between peers in the relevant field.”⁶³

The process is akin to the way in which issues involving expertise are analysed and resolved in the “real world”.⁶⁴

In the most recent edition of their book on expert evidence, Freckelton and Selby make the following observations in relation to concurrent expert evidence:

“Thus far, concurrent evidence has been confined principally to civil litigation in courts and hearings before tribunals. It constitutes an alternative to the traditional adversarial method by which expert evidence is given serially by experts for one side and then the other, in the course of which they are examined-in-chief and cross-examined by the legal representatives for each side. ... There are increasing indications that it is not a passing fad, it is becoming significant for many forms of contemporary litigation and is likely to become more so.”⁶⁵

⁶² *Standard procedural orders*, note 29, standard order 50.

⁶³ New South Wales Law Reform Commission, *Expert Witnesses*, NSWLRC Report 109 (NSWLRC, Sydney, 2005) http://www.lawlink.nsw.gov.au/lawlink/lrc/ll_lrc.nsf/pages/LRC_r109toc [6.56].

⁶⁴ See DR Parry, “Concurrent Expert Evidence”, (2010) 37(7) *Brief* 9 – 12.

⁶⁵ I Freckelton SC and H Selby, note 46, [6.15.01].

Conduct of hearings

When a matter is listed for final hearing or determination on documents the member usually makes programming orders based on the standard procedural orders in relation to:

- identification of issues in dispute and relevant documents;⁶⁶
- requirements for the presentation of documents;⁶⁷
- expert evidence;⁶⁸
- filing and exchange of witness statements;⁶⁹
- conferral and joint statement of expert witnesses;⁷⁰
- concurrent evidence of expert witnesses;⁷¹ and
- filing and exchange of draft “without prejudice” conditions of approval in refusal and deemed refusal review cases.⁷²

The member may also schedule a further directions hearing to review preparation for the final hearing at an appropriate point in the process.⁷³

Oral hearings are flexible and relatively informal. Other than in guardianship and administration proceedings, the primary evidence of both lay and expert witnesses is in the form of written witness statements that are filed and exchanged prior to the hearing. If leave is sought, the

⁶⁶ *Standard procedural orders*, note 29, standard orders 9 – 12.

⁶⁷ *Standard procedural orders*, note 29, standard orders 40 and 41.

⁶⁸ *Standard procedural orders*, note 29, standard orders 42 and 43.

⁶⁹ *Standard procedural orders*, note 29, standard orders 44 and 45.

⁷⁰ *Standard procedural orders*, note 29, standard orders 47 – 49.

⁷¹ *Standard procedural orders*, note 29, standard order 50.

⁷² *Standard procedural orders*, note 29, standard orders 51 and 52.

⁷³ *Standard procedural orders*, note 29, standard order 57.

Tribunal usually allows the party calling a witness to ask the witness questions to explain key evidence or in response to other evidence in the proceeding. The Tribunal also often asks questions of witnesses and the other parties are entitled to cross-examine any witness.

Other than in disciplinary proceedings, in order to minimise the formality of hearings, evidence is generally not given on oath or affirmation, unless there is a material dispute as to fact or credit.⁷⁴ Also, for this reason, Tribunal hearings are conducted with all the participants seated.

Most final hearings take one day or less.⁷⁵ The length of hearings is minimised by the use of FDR to reduce the scope of disputes and by the conferral and joint statements and concurrent evidence of expert witnesses.

Determinations on documents

The Tribunal may conduct all or part of a proceeding entirely on the basis of documents without an oral hearing.⁷⁶ Determinations on documents minimise costs to the parties and may therefore appear attractive.

However, an unrepresented party may have greater difficulty in presenting their case in writing. In deciding whether to list a matter for determination on documents, the member would usually consider:

- Whether any party may be disadvantaged by not having an oral hearing.
- Whether the issues for determination are sufficiently limited and/or identified for determination on the documents.

⁷⁴ However, witnesses of fact are reminded that knowingly giving false or misleading information to the Tribunal is an offence: SAT Act s 98.

⁷⁵ For example, in the former development and resources stream in 2013-2014, 71% one day or less, 90% two days or less and 96% three days or less: *State Administrative Tribunal Annual Report 2013-2014* p 11.

⁷⁶ SAT Act s 60(2). *Standard procedural orders*, note 29, standard orders 36– 39.

- Whether there is likely to be a material dispute as to facts.
- Whether any difference of expert opinion can be resolved satisfactorily without oral evidence.
- Whether it would be more cost effective to deal with the matter on the documents.

Costs⁷⁷

Section 87(1) of the SAT Act provides that, unless otherwise specified in that Act, the enabling Act or an order of the Tribunal under s 87, parties bear their own costs in Tribunal proceedings. It is apparent from the terms of this section that the starting proposition in the Tribunal is that parties bear their own costs in proceedings. However, s 87(2) of the SAT Act confers discretion on the Tribunal to make an order for the payment by a party of all or any of the costs of another party unless otherwise specified in an enabling Act.⁷⁸ Sections 87(1) and 87(2) of the SAT Act together indicate that there is a presumption that there will not be an award of costs in the Tribunal except in special circumstances. This presumption is desirable, because it promotes access to civil and administrative justice through the Tribunal.⁷⁹ SAT can therefore be characterised as a generally “no costs” or “costs-neutral” jurisdiction.⁸⁰

In exercising its discretion as to costs under s 87(2) of the SAT Act, the Tribunal has regard to policy considerations relevant to the particular type of proceedings in question. The Tribunal has developed and established

⁷⁷ See DR Parry and B De Villiers, note 1, chapter 17.

⁷⁸ *Citygate Properties Pty Ltd and City of Bunbury* [2005] WASAT 53; (2005) 38 SR (WA) 247 at [28]; see also *Springmist Pty Ltd and Shire of Augusta-Margaret River* [2005] WASAT 143 (S); (2005) 41 SR (WA) 219 at [32] and *Uniting Church Homes (Inc) and City of Stirling* [2005] WASAT 341 at [12].

⁷⁹ *Pearce & Anor and Germain* [2007] WASAT 291 (S) at [17].

⁸⁰ *Clifford and Shire of Busselton* [2007] WASAT 89 (S); (2007) 44 SR (WA) 174 at [39]; see also *Chew and Director-General of the Department of Education and Training* [2006] WASAT 248; (2006) 44 SR (WA) 174; *Summerville and Department of Education and Training* [2006] WASAT 368 (S).

practices in relation to the exercise of its discretion as to costs in various areas of its jurisdiction.

In review and most other areas of jurisdiction, the Tribunal's established practice is that normally each party should bear its own costs of the proceedings.⁸¹ As Barker J observed, SAT was established with its review jurisdiction as part of the system of public administration of the State to ensure that citizens and other entities may seek administrative justice in relation to decisions that affect their personal, proprietary and financial interests.⁸² An applicant should not be discouraged from seeking administrative justice by the prospect of having to pay the decision-maker's costs if they do not succeed. Conversely, an applicant is not entitled to award of costs if they succeed.

In contrast, in vocational disciplinary proceedings, the Tribunal's established practice in relation to the exercise of its discretion as to costs is that a successful application by a vocational regulatory body, such as the Medical Board of Australia or the Legal Profession Complaints Committee, will usually result in an order for costs being made in favour of the vocational regulatory body.⁸³ The policy basis behind this practice is that vocational regulatory bodies “perform a function which promotes the public interest, and usually with limited resources” and “[t]he financial burden of bringing disciplinary action if the body had no capacity to recover some or all of its costs may be such as to provide a disincentive to bring disciplinary action, or when brought, to ensure that

⁸¹ *Citygate Properties Pty Ltd and City of Bunbury* [2005] WASAT 53; (2005) 38 SR (WA) 246; *Shark Bay Tuna Farms Pty Ltd and Executive Director, Department of Fisheries* [2005] WASAT 206; *Aydogan and Town of Cambridge* [2007] WASAT 19; (2007) 48 SR (WA) 239.

⁸² *Shark Bay Tuna Farms Pty Ltd and Executive Director, Department of Fisheries* [2005] WASAT 206 at [36].

⁸³ *Medical Board of Western Australia and Roberman* [2005] WASAT 81 (S); (2005) 39 SR (WA) 47 at [30], referred to with approval in *Paridis v Settlement Agents Supervisory Board* [2007] WASCA 97; (2007) 33 WAR 361 at [35].

the allegations against the practitioner concerned are properly and thoroughly presented.”⁸⁴

Concluding thoughts – Super-tribunals and “thinking outside the box”

It is my experience that super-tribunals are inherently suited for creativity and innovation in dispute resolution processes and management of their work and that such creativity and innovation can be of tremendous benefit for the administration of justice. (SAT’s recent restructure, use and emphasis of FDR, and model for expert evidence, are examples of such innovation.) In short, super-tribunals have an innate capacity to “think outside the box”. There are a number of reasons for this.

First, super-tribunals (and previously, separate, specialist tribunals) were created as an alternative to traditional dispute resolution forums (i.e., the courts) and were intended to be different and to operate differently to courts. This is not to say that courts do not innovate. For example, expert conferral and concurrent evidence was “brought into the mainstream” and championed by the Land and Environment Court of New South Wales in 2003 and 2004, prior to the establishment of SAT. However, because super-tribunals are intended to be different and to operate differently to traditional dispute resolution forums, capacity and desire to be creative and to innovate forms part of a super-tribunal’s “DNA”.

Secondly, the achievement of the statutory objectives of super-tribunals – in particular, flexibility, minimising formality, focus on the substantial merits of disputes, acting as speedily as is practicable, and minimising costs to parties – encourages creativity and innovation.

⁸⁴ *Medical Board of Western Australia and Roberman* [2005] WASAT 81 (S); (2005) 39 SR (WA) 47 at [30].

Thirdly, a super-tribunal is likely to have greater resources to develop and implement creative and innovative practices than, for example, separate, specialist tribunals.

Fourthly, a super-tribunal has the opportunity for cross-pollination of good ideas between different areas of its jurisdiction. For example, expert conferral and concurrent evidence was first adopted in SAT in the planning and development jurisdiction, following experience in New South Wales, and was then applied in relation to expert evidence in other areas, such as vocational disciplinary proceedings and building disputes. Similarly, facilitative dispute resolution processes were first developed in SAT in the commercial and civil and planning and development jurisdictions and were then applied in different areas, such as vocational disciplinary matters and even in some guardianship and administration proceedings involving significant family conflict.

Fifthly, the multi-disciplinary composition of super-tribunals also encourages creativity and innovation, because members with varied professional backgrounds and experiences contribute to the development and refinement of practices and procedures.

Sixthly, judicial leadership (although not a feature of all super-tribunals) can assist in driving innovation within a super-tribunal and in driving acceptance of innovation by parties, members of professions and others involved in tribunal proceedings. Certainly, in my experience, the championing of FDR and reform of expert evidence by the inaugural judicial members of SAT was tremendously important in the establishment and consolidation of those innovations in dispute resolution processes.

Finally, as the Taskforce Report that led to the establishment of SAT accurately envisaged, super-tribunals have the capacity to keep abreast of innovations and developments in comparable tribunals elsewhere. The establishment of a community of super-tribunals in recent years, and the exchange and development of ideas through COAT and this conference, greatly assists in “thinking outside the box”, thereby benefiting the administration of justice.