



SAT

State
Administrative
Tribunal

Western Australia

Appearing in the State Administrative Tribunal

- Recent developments -

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Paper presented at the Law Society

5 October 2017



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LAY-OUT

- SAT (NOT SO) NEW JURISDICTION
- BURDEN OF PROOF AND STANDARD OF PROOF
- DEALING WITH EXPERT WITNESSES
- RECENT CASE LAW
- THE FUTURE



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SAT (NOT SO) NEW JURISDICTION

- Commenced in January 2005 – currently 158 statutes
- Review, original, vocational, guardianship/administration, equal opportunities
- Pigeon-hole application – different processes (who starts, onus of proof, standard of proof)
- Ongoing expansion – *Associations Incorporations Act* and *Public Health Act* (eg infectious diseases; serious public health incidents; public health emergencies; compensation)
- Rationale for jurisdiction – no statutory or parliamentary guide
- Considerations: pragmatism; speedy resolution; accessibility; matters affecting the person
- *Potential expansion*: Strata Titles once-stop-shop; Residential Tenancies; gender reassignment; consequences of SSM-vote in equal opportunities?
- Role of Law Society to identify potential areas for expansion (other states)?



BURDEN OF PROOF AND STANDARD OF PROOF

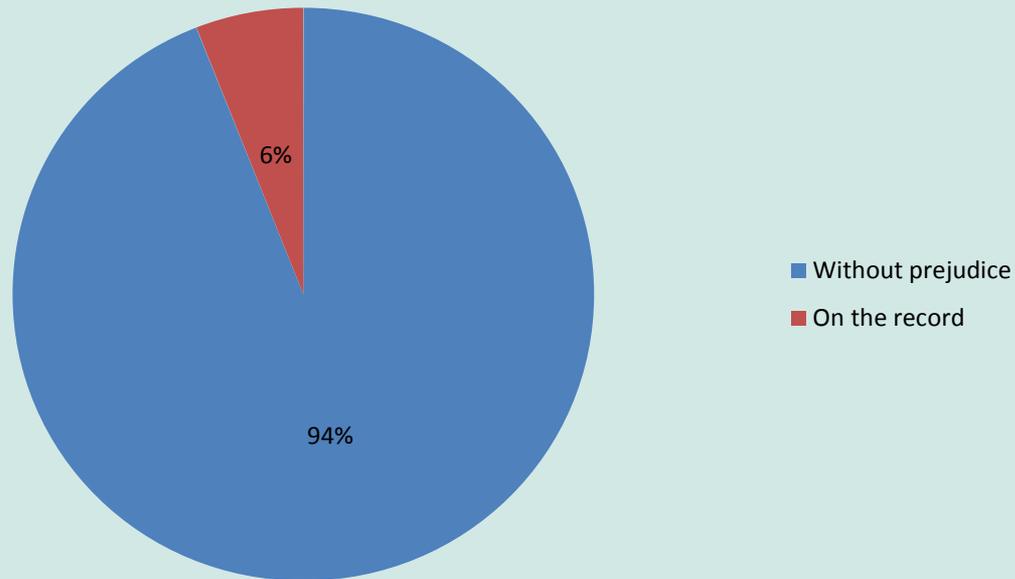
- Consistent principles, but different approach depending on jurisdiction - eg who leads
- **Civil and commercial:** burden on applicant and standard balance of probabilities (as per civil court system)
- **Vocational:** burden on vocational regulator; Briginshaw-test namely 'actual persuasion'. Tribunal "must feel an actual persuasion of the occurrence or existence of the relevant facts". (*Legal Practitioners Complaints Committee and Gandini* [2006] WASAT 163.)
- **Review:** no strict burden but practical on decision-maker; *de novo*; civil standard to prove a specific fact: (*Wignall and Commissioner of Police* [2006] WASAT 206)
- **Guardian and admin:** no strict burden since investigative; applicant explains rationale for application; protective jurisdiction; SAT takes carriage; SAT also conducts inquiries (In *S v SAT* [2012] WASC 306 at [101] Heenan J said the onus requires a 'degree of persuasion which the gravity of the allegation and the seriousness of its consequences required'.) and *GC and PC* [2017] WASAT 10: Because of significant consequences 'clear and cogent evidence' required to rebut presumption of capacity. Cognitive loss not in itself adequate to rebut presumption of capacity.



DEALING WITH EXPERT WITNESSES

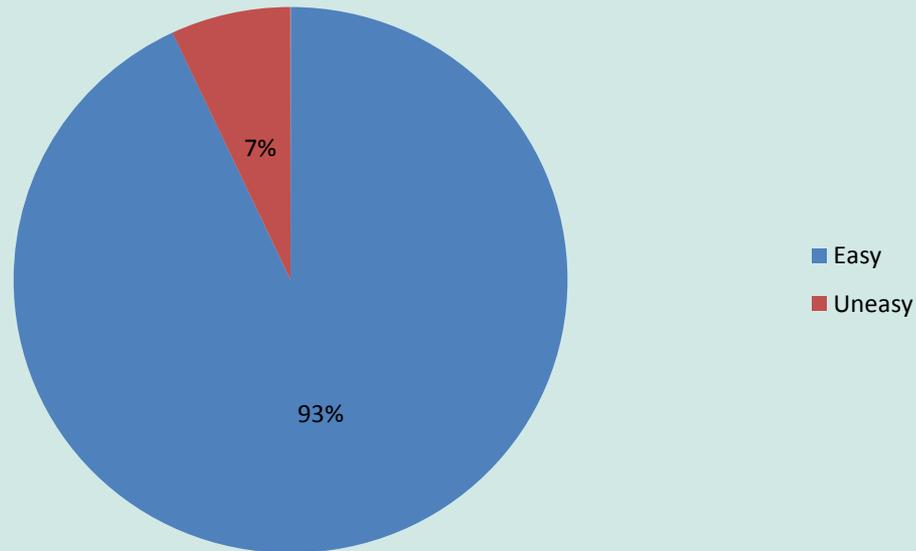
- Experts in areas such as planning, building, valuation, vocational
- Traditional approach to expert evidence: adversarial, ‘hired gun’, sometimes cynicism
- 1999: 35% judges concerned about lack of objectivity of experts; 35% judges considered testing of expert evidence as ‘serious problem’.
- New approach to expert evidence: investigative / collegiate
- Joint report: agree, disagree, reasons for disagree
- *Conferral of experts* – experts meet on their own or with Member and produce joint report
- *Concurrent expert evidence* – evidence together, comment, ask questions
- Research: high support for process
- See [http://www.sat.justice.wa.gov.au/files/Expert Evidence Brochure.pdf](http://www.sat.justice.wa.gov.au/files/Expert_Evidence_Brochure.pdf)
- B De Villiers (2015) “From advocacy to collegiality – the view of experts of ‘concurrent evidence’ and ‘expert conferral’ in the State Administrative Tribunal” *Journal of Judicial Administration* 25: 11-27

Do you view the discussions that took place during Expert Conferral to be “without prejudice” or “on the record”?

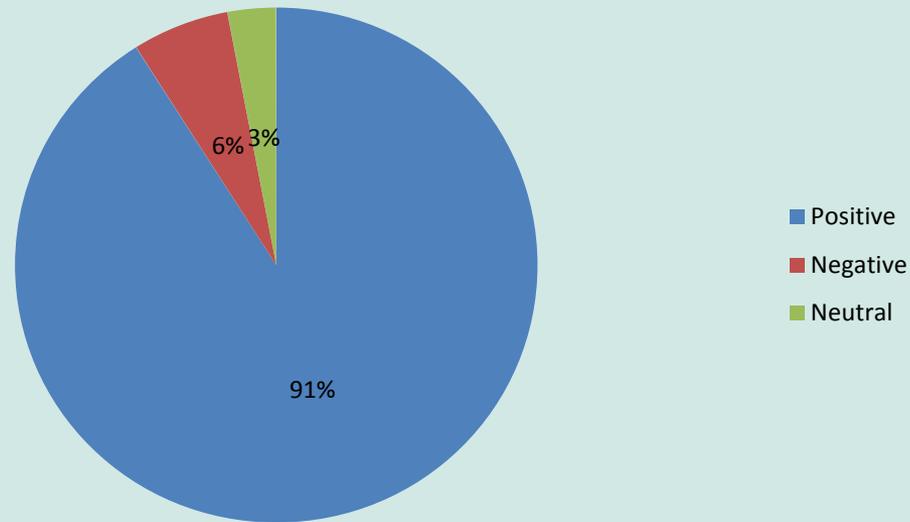


Questions to experts who regularly participate in conferral and concurrent processes

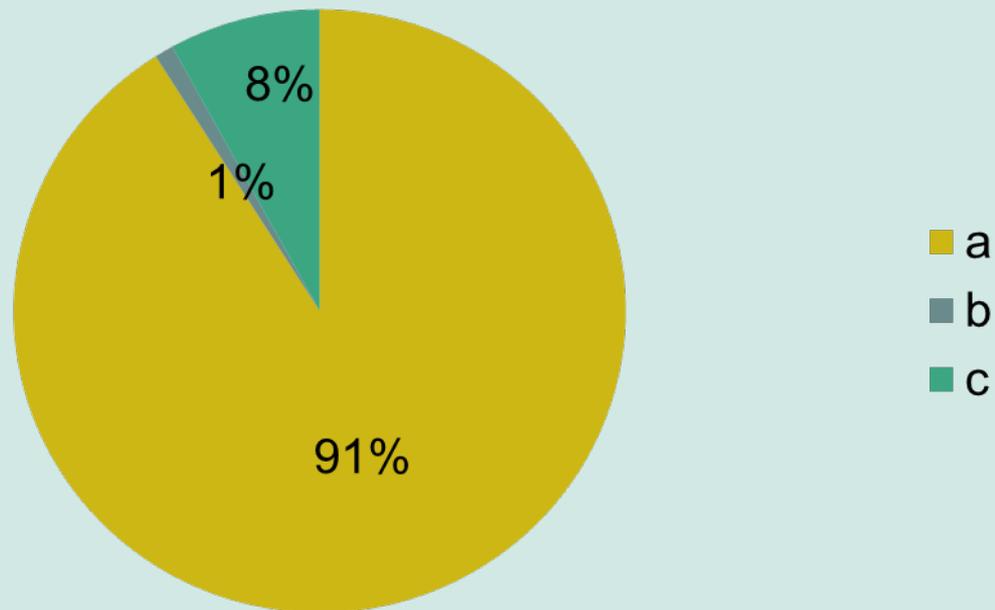
Did you feel “easy” or “uneasy” about the process of giving evidence concurrently with other experts?



Did you find it positive, negative or neutral that a member of the Tribunal who is an expert in the subject field, participated as a member during the hearing?



Overall, in your view, do the techniques of expert conferral and concurrent expert evidence (a) reduce time required for a hearing, (b) add to time required for a hearing or (c) make no difference in time required for a hearing?





RECENT CASE LAW

- **Disruptive technologies (AirBnbB):** *Byrne -v- The Owners of Ceresa River Apartments Strata Plan 55597* [2017] WASCA 104.
- **Termination of tenancy** without reason: *Lawrence v Cooperative Bulk Handling Ltd* [2017] 24 (Corboy J)
- **Evidence under oath:** *Lawrence v Cooperative Bulk Handling Ltd* [2017] 24 Corboy J: 87....The touchstone for receiving evidence in the Tribunal should be relevance and fairness. Further, the procedure by which evidence is to be received will depend primarily on the nature of the evidence sought to be presented, the issues to be determined and provisions of s 32 of the SAT Act.'
- **Is a café a retail shop?:** *Dacheva and Superflash Pty Ltd* [2017] WASAT 77
- **Does Rule Brown v Dunn apply:** *Re Minister for Immigration and Multicultural Affairs* [2003] HCA 60 (8 October 2003) at 57 but *Centex Australasia Pty Ltd -v- Commissioner for Consumer Protection* [2017] WASCA 79 at [82] and [84] where the failure of the Tribunal to put a proposition to a party was criticised.
- **Tribunal informing itself:** *Singh and Director General of the Department of Transport* [2013] WASAT 87: The members, as part of preparations, did research about character references. Some information seemed inconsistent and this was put to the referees.
- **Reasons must address all essential facts:** *Centex Australasia Pty Ltd -v- Commissioner for Consumer Protection* [2017] WASCA 79 and *Polizzi v Commissioner of Police [No2]* [2017] WASC 166
- **Using expertise:** *Dekker v Medical Board of Australia* [2014] WASCA 216: put knowledge to party so finding of fact based on evidence before Tribunal otherwise error in law



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The Future

- Expanding jurisdiction
- Increase on-line dispute resolution
- New techniques, eg Early Neutral Assessment and Judicial Initiated Proposal (B De Villiers (2017) “Getting to settlement quicker and cheaper – Early Neutral Assessment and Judicial Initiated Proposal” February *Brief* 45-47.)
- Integral part of WA judiciary