WA Bar Association

2021 Bar Readers' Course– Jurisdiction & Procedure

Overview of the State Administrative Tribunal of Western Australia[1]

Judge David Parry, District Court of Western Australia,

Deputy President, State Administrative Tribunal of Western Australia

5 May 2021

Abstract

The State Administrative Tribunal of Western Australia was established on 1 January 2005 as a comprehensive and cohesive civil and administrative review tribunal for the State. The Tribunal replaced or took over work from approximately 50 courts, tribunals, boards, ministers and other adjudicators. The Tribunal exercises jurisdiction under approximately 160 Acts and Regulations, as well as under subsidiary legislation, such as planning schemes and local laws, in areas including building disputes, firearms licensing, strata titles, State tax, town planning, land compensation, land valuation, guardianship and administration, equal opportunity (anti-discrimination), and vocational regulation. This paper firstly describes the Tribunal's jurisdiction, its structure and its main statutory objectives, powers and procedures. It then discusses and explains the Tribunal's practices and procedures in relation to the management of proceedings, the identification of issues in dispute and relevant documents, the use of facilitative dispute resolution, expert evidence, conduct of hearings, determinations on documents, and costs.

[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* (ThomsonReuters, loose-leaf, updated 1 June 2015).

"A cohesive new jurisdiction"

When commending the legislation that established and conferred jurisdiction on the State Administrative Tribunal (SAT or Tribunal) 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]

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

[2] *Hansard*, 24 June 2003, p 9104.

- 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.

SAT's structure

The Tribunal has 21 full-time members[3] consisting of a President,[4] two Deputy Presidents,[5] four senior members[6] and 14 other members.[7] SAT is a multi-disciplinary tribunal and while most of its full-time members are lawyers (one of whom was also a town planner), the full-time members also include two social workers, a medical practitioner, two town planners and town planner / architect. 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 the *State Administrative Tribunal Act 2004* (WA) (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

[3] Two of the 21 full-time member positions are currently not occupied. In consequence of the significant increase over the last 15 years in SAT's workload in the guardianship and administration jurisdiction, funding has recently been made available for the appointment of two additional full-time members, one of whom will be a senior member, increasing the Tribunal's full-time membership to 23.
[4] The President must be a Judge of the Supreme Court of Western Australia: *State Administrative Tribunal Act 2004* (WA) (SAT Act) s 108(3).
[5] The Deputy Presidents must be Judges of the District Court of Western Australia: SAT Act s 112(3).
[6] 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).
[7] Other 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).

Act or the enabling Act, it is to be as the Tribunal determines".

At the commencement of Tribunal in January 2005, the inaugural President, Justice Michael Barker, determined that SAT's work is to be allocated to one of four "streams", namely:

- commercial and civil;
- development and resources;
- human rights; and
- vocational regulation.

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. In August 2011, when the Tribunal received its first major conferral of new jurisdiction, involving original building disputes, and with it an additional full-time senior member and three other full-time members, the new jurisdiction and members were allocated principally to the commercial and civil stream.

After trialling a restructure involving the allocation of work into 15 "lists" in 2015-2017, in 2018, the Tribunal re-established the original four "stream" structure. While the four streams remain, applications are currently divided into the following seven broad subject areas for listing purposes:

- building and commercial;
- commercial tenancy;
- development and resources;
- guardianship and administration;

- human rights;
- strata titles and civil; and
- vocational regulation.

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 parties; and
>
> (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".[8] 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:

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

- is bound by the rules of natural justice;[9]
- 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";[10]
- is to generally conduct hearings in public;[11]
- is to ensure that parties understand the nature of the assertions made in a proceeding and the legal implications of those assertions and explain to the parties, if requested to do so, any aspect of procedure or any decision;[12]
- may inform itself on any matter as it sees fit;[13]
- is to ensure that all relevant material is disclosed to it;[14]
- may give directions at any time in a proceeding and do whatever is necessary for the speedy and fair conduct of the proceeding;[15]
- may conduct all or part of a proceeding entirely on the basis of documents without an oral hearing;[16]

---

[9] Except to the extent that the enabling Act conferring jurisdiction in the matter authorises a departure from those rules: SAT Act s 32(1). See *Jetpoint Nominees Pty Ltd and Lee* [2021] WASAT 10 [40]-[43] (Judge Parry DP); see also *Engwirda and The Owners of Queens Riverside Strata Plan 55728* [2020] WASAT 91; (2020) 101 SR(WA) 74[27]-[29] (Judge Parry DP).
[10] SAT Act s 32(2).
[11] SAT Act s 61, other than a compulsory conference (SAT Act s 52(4)) or a mediation (SAT Act s 54(6)), which are conducted in private unless SAT determines otherwise.
[12] SAT Act s 32(6).
[13] SAT Act s 32(4).
[14] SAT Act s 32(7)(a).
[15] SAT Act s 34(1). This provision enables the Tribunal to make a direction allowing a party to uplift and test a document produced by a third party (under s 35 of the SAT Act) where the Tribunal considers that to be necessary for the fair conduct of the proceeding: *Khosa v Legal Profession Complaints Committee* [2021] WASCA 64 (Buss P and Mitchell and Vaughan JJA).
[16] SAT Act s 60(2).

- in review proceedings, has functions and discretions corresponding to those exercisable by the original decision-maker in making the reviewable decision;[17]

- is required, in review proceedings, to produce "the correct and preferable decision at the time of the decision upon the review";[18]

- 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;[19] and

- if it reserves a decision, is required to give the decision within 90 days of the day on which it is reserved.[20]

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'".[21] The first rule of evidence, that is that evidence must be "relevant" or logically probative of a fact in issue, is observed in all SAT proceedings. Furthermore, given the importance of expert evidence in many areas of

[17] SAT Act s 29(1).
[18] SAT Act s 27(2).
[19] 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.
[20] SAT Act s 76. The President can grant an extension of this period under the same provision.
[21] *Medical Board of Australia and Woollard* [2012] WASAT 209; (2012) 82 SR(WA) 347 [85] (Judge Parry DP, Prof M Kamien SSessM, Dr M Levitt SSessM and Mr M Wiklund SSessM). See H Jackson, "Evidence in SAT – What to do when the rules of evidence don't apply" (2014) 41(11) *Brief* 35.

SAT's work, the rules of evidence in relation to expert witnesses are generally applied. Nevertheless, SAT aims to discourage technical objections and arguments about the admissibility of evidence. The discussion in SAT proceedings is generally more about the weight or value of evidence to the determination of the particular case than about its technical admissibility.

The Tribunal has consciously adopted practices and terminology that reflect its statutory objectives and character as a civil and administrative tribunal, rather than a court.

SAT decisions are cited as [Applicant] *and* [Respondent], rather than as [Applicant] *v* [Respondent], as in courts. The Tribunal has an "office" at which documents are filed, rather than a "registry", as in courts. 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. SAT members (including judicial members) have "offices", rather than "chambers", as in courts.

Out of respect for the administration of justice and to mark the commencement and conclusion of the process, people attending directions hearings and final hearings in SAT are expected to stand when the member or members enter and leave the hearing room. However, people attending hearings do not bow at the commencement or conclusion of a hearing or when entering or leaving the hearing room during a hearing, as in courts. Furthermore, and significantly, unlike the practice of courts, parties, legal practitioners and other representatives do not stand when examining or cross-examining a witness or when addressing the Tribunal.

The general character and conduct of SAT proceedings is fairly consistent

and relatively informal in comparison to courts, and is best described as a hybrid adversarial / investigative model of dispute resolution. Under this hybrid model, subject to the Tribunal's objectives in s 9 of the SAT Act and the practices and procedures that have been developed in light of those objectives, the parties to SAT proceedings are generally permitted to present their cases as they wish and the Tribunal adopts a more active and investigative approach to the resolution of the dispute than is the case in courts.

The nature of the jurisdiction being exercised, the issues for determination and sometimes whether the parties are legally represented affects the extent to which the character and conduct of a matter falls more on the adversarial, or more on the investigative, side of the hybrid model. For example, vocational disciplinary proceedings, which concern often serious allegations of misconduct or incompetence against a member of a regulated profession or other vocation, in which the vocational regulatory authority bears the legal burden of proof (to the civil standard and applying the *Briginshaw* principle[22]), and in which parties are mostly legally represented, are generally adversarial in character and conduct. In contrast, guardianship and administration proceedings, in which the Tribunal's "primary concern" is "the best interests of … a person in respect of whom an application is made"[23] and it exercises a "protective jurisdiction",[24] and in which neither the applicant nor any other party bears any legal burden of proof,[25] are

[22] *Legal Profession Complaints Committee and A Legal Practitioner* [2013] WASAT 37; (2013) 84 SR(WA) 158 [16] (Judge Parry DP, Mr J Mansveld M and Mr C Edmonds SSessM) referring to *Briginshaw v Briginshaw* (1938) 60 CLR 336, 361-362 (Dixon J).
[23] *Guardianship and Administration Act 1990* (WA) s 4(2).
[24] *S v State Administrative Tribunal (WA) (No 2)* [2012] WASC 306 [164] (EM Heenan J).
[25] *Re LP* [2020] WASAT 25; (2020) 99 SR(WA) 123 [88] (Judge Parry DP, Ms M Connor M and Dr H Hankey SSessM). However, the *Briginshaw* principle applies in relation to whether the presumption of capacity under s 4(3) of the *Guardianship and Administration Act 1990* (WA) is displaced on the evidence, as well as in relation to any allegation of fraud, criminal conduct or other serious misconduct (as in all SAT proceedings): *Re LP* [2020] WASAT 25; (2020) 99 SR(WA) 123 [99]-[110].

generally investigative in character and conduct, even if parties are legally represented.[26] Review proceedings, in which the Tribunal is required "to produce the correct and preferable decision at the time of the decision upon the review"[27] and is not limited by "[t]he reasons for decision provided by the [original] decision-maker" for the reviewable decision or by "any grounds for review set out in the application,[28] and in which "the applicant for review does not bear any legal or practical onus of identifying error in the [original decision-maker's] decision, or showing that there should be some departure from that decision",[29] have both adversarial and investigative characteristics. Thus, while the parties in review cases initially identify the issues for determination (in their respective statements of issues, facts and contentions), present evidence and make submissions in support of their cases, the Tribunal ultimately distils the principal issues for determination (including by adding issues, subject to affording natural justice to the parties, where necessary and appropriate to be able to produce the correct and preferable decision), often leads questioning during concurrent expert evidence, and has as its essential "function … to consider the material before it and to form its own view as to the correct and preferable decision in the circumstances of the case".[30]

In consequence of the nature of the jurisdiction being exercised by the Tribunal, the provisions of the relevant enabling Act, and the provisions of the SAT Act and the *State Administrative Tribunal Rules 2004* (WA) (SAT Rules), SAT members "generally have greater latitude in the conduct of the proceeding, including by asking questions of, and seeking

[26] *Re LP* [2020] WASAT 25; (2020) 99 SR(WA) 123 [90] and see generally [84]-[98].
[27] SAT Act s 27(2).
[28] SAT Act s 27(3).
[29] *Ord Irrigation Cooperative Ltd v Department of Water* [2018] WASCA 83; (2018) 232 LGERA 331; (2018) 12 ARLR 135 [122] (Buss P and Murphy and Mitchell JJA).
[30] *Jetpoint Nominees Pty Ltd and Lee* [2021] WASAT 10 [67].

information from, parties and witnesses, to enable the speedy and fair resolution of the matter, according to its substantial merits, with as little formality and technicality as is practicable, and minimising the costs to parties, than would be accepted where a judge is sitting alone in civil proceedings in a court".[31] Moreover, the objective of the Tribunal stated in s 9(c) of the SAT Act ("to make appropriate use of the knowledge and experience of Tribunal members") and s 117(3)(b) and s 117(4)(b) of the SAT Act, which provide for the appointment of non-legally qualified members who have "extensive or special knowledge of, or experience with, any class of matter involved in the exercise of the Tribunal's jurisdiction", "clearly contemplate that SAT is a multi-disciplinary Tribunal comprising specialist jurisdictions and membership with knowledge and experience relevant to its specialist jurisdictions" and "[t]he SAT Act, therefore, also contemplates that the member or members constituting the Tribunal for a hearing in a specialist jurisdiction will have knowledge and experience relevant to that jurisdiction and that questions asked and information sought by the member or members from parties and witnesses during the hearing will be informed by their specialist knowledge and experience".[32] However, SAT members cannot use their specialist knowledge and experience in place of, or in preference to, qualified evidence given in the particular case. Furthermore, the greater latitude in questioning and comment contemplated by the SAT Act and the SAT Rules in the conduct of a proceeding does not qualify the application of the rules of natural justice.[33]

---

[31] *Jetpoint Nominees Pty Ltd and Lee* [2021] WASAT 10 [70]; see generally [66]-[71].
[32] *Jetpoint Nominees Pty Ltd and Lee* [2021] WASAT 10 [70].

[33] *Jetpoint Nominees Pty Ltd and Lee* [2021] WASAT 10 [71]. As also observed in *Jetpoint Nominees Pty Ltd and Lee* [2021] WASAT 10 at [65], "The greater latitude in questioning and comment that will generally be accepted in the conduct of SAT proceedings qualifies the application in SAT of the 'dust of conflict ground' identified by Kourakis CJ in *R v T, WA* [2014] SASCFC 3; (2013) 118 SASR 382; (2014) 238 A Crim R 205 at [38] as the third of the three grounds upon which excessive judicial intervention in a trial by judge alone may result in a

Management of proceedings

Other than in guardianship and administration proceedings, which are usually listed administratively and without a directions hearing for a final hearing within six to eight weeks of the filing of the application, and certain commercial tenancy proceedings, which are determined entirely on the documents without a directions hearing, all SAT proceedings are listed for a first directions hearing before a member (usually a senior member or a judicial member) within two to three weeks of the filing of the application and are then actively case managed by the member.

A directions hearing in SAT 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 (FDR) 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

---

miscarriage of justice, that is that 'the questioning is such an egregious departure from the role of a Judge presiding over an adversarial trial that it unduly compromises the judge's advantage in objectively evaluating the evidence from a detached distance'. … However, the greater latitude in questioning and comment that is generally available to a member of the Tribunal does not qualify the application in SAT proceedings of either of the other two grounds identified by Kourakis CJ in *R v T, WA* at [38] upon which excessive judicial intervention in a trial by judge alone may result in a miscarriage of justice, namely the 'disruption ground', that is that 'the questioning unfairly undermines the proper presentation of a party's case', and the 'bias ground', that is that 'the questioning gives an appearance of bias', because the Tribunal is bound by the rules of natural justice (unless the enabling Act authorises a departure from those rules). In the same way as a judge conducting civil proceedings in court, a SAT member may not, by questioning or comment, unfairly undermine the proper presentation of a party's case or give the appearance of bias."

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 mediation or compulsory conference. The member conducting the directions hearing also considers and determines 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. In planning and development, building disputes, strata titles and residential parks matters, mediations are often held onsite or include an onsite meeting. The member conducting the directions hearing may require the parties' expert witnesses to attend the mediation or compulsory conference. In addition, the member considers whether any non-parties (sometimes referred to as "third parties") should be invited to attend the mediation or compulsory conference, and may permit attendance by a person over the opposition of one or more parties. For example, in planning and development cases, the Tribunal may invite affected neighbours to attend at the commencement of the mediation to explain their concerns to the member and the parties and may invite the Mayor or President of a local government respondent to attend and / or to nominate one or more councillors to attend, or officers of another government authority to attend, the mediation. As indicated earlier, these decisions are made by the member conducting the directions hearing in order to maximise the value of the mediation or compulsory conference process.

Identification of issues in dispute and relevant documents

Where a matter is referred for mediation or compulsory conference, the Tribunal usually orders the parties to produce points for mediation or, in 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, other than in guardianship and administration proceedings, 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.[34]

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.

These documents are commonly referred to as "the s 24 documents". The SAT Rules specify that the respondent must provide the s 24 documents to the Tribunal in accordance with any order made by the Tribunal.[35] The

[34] *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.
[35] *State Administrative Tribunal Rules 2004* (WA) (SAT Rules) r 12.

SAT Rules also enable the Tribunal to order the respondent to provide a copy of these documents to the applicant or any other party.[36] 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.[37] As discussed below, across the Tribunal, other than in guardianship and administration proceedings, the overwhelming majority of proceedings are resolved by FDR, 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" (FDR) to refer to a suite of non-adjudicative dispute resolution processes that it employs to resolve or narrow disputes. This choice of this terminology, as opposed to the more commonly used terms of "alternative dispute resolution" or "additional dispute resolution" (ADR), is quite deliberate, because these processes are *not* regarded as *alternative or additional*, but rather as *central and core*, methods of dispute resolution. Across the breadth of the Tribunal's work, other than in guardianship and

[36] SAT Rules r 12.
[37] *Standard procedural orders*, note 34, standard order 9(b).

administration and commercial tenancy proceedings, the overwhelming majority of matters are resolved by FDR, 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 ultimately require Tribunal adjudication.[38]

Specifically, in SAT, FDR processes involve:

- directions hearings in which issues are identified, options are developed and, in certain types of proceedings, alternatives to the proposal are discussed;[39]
- mediations "to achieve the resolution of matters by settlement between the parties";[40]
- compulsory conferences "to identify and clarify the issues in the proceeding and promote the resolution of the matters by settlement between the parties";[41] and
- in review proceedings, invitations by the Tribunal to respondents to reconsider their decisions under s 31 of the SAT Act, often as an adjunct process following further information or clarification provided, or modifications or

[38] For example, in the 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.
[39] 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) one hour is allocated and in building disputes and strata titles matters half an hour is allocated for an initial directions hearing to enable this to occur. Other types of matters are typically referred for mediation to enable this to occur.
[40] SAT Act s 54(4).
[41] SAT Act s 52(3).

amendments made, by applicants through the other FDR processes.[42]

All of these processes are conducted by SAT members. Mediation is the most significantly utilised FDR process.[43] As indicated earlier, in some areas of work, mediations are often held onsite or include an onsite component.[44] As also indicated earlier, in its programming orders, the Tribunal may invite relevant non-parties, such as objecting neighbours to development applications, officers of government departments or local government councillors, 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 conducting the mediation.[45] In review proceedings, invitations for reconsideration under s 31 of the SAT Act are also used extensively to facilitate resolution of disputes and to narrow contested issues, as indicated earlier, often as an adjunct process to the other FDR processes.[46]

The FDR processes are applied in SAT in a coordinated and determined fashion, one leading to another, in order to achieve a non-adjudicative result, if at all possible. As Justice Brian Preston, Chief Judge of the

[42] 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.
[43] For example, in the 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.
[44] For example, in the development and resources stream in 2013-2014, in 49% of mediations at least one mediation session was held onsite: *State Administrative Tribunal Annual Report 2013-2014* p 12.
[45] *Standard procedural orders*, note 34, standard orders 23-26.
[46] For example, in the 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.

NSW Land and Environment Court, has observed in relation to SAT's (and his Honour's Court's) process of FDR:[47]

> "… 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."

Thus, a proceeding in SAT is typically resolved through the combination and progression of:

- a directions hearing; leading to
- one or two 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 withdrawal of the proceeding, or, if the applicant is not content with the decision upon reconsideration, to
- a further directions hearing[48] or mediation session to resolve any outstanding aspect of the substituted or varied decision, such as a disputed condition of approval.

[47] BJ Preston, "The use of alternative dispute resolution in administrative disputes" (2011) 22 ADRJ 144 at 149.

[48] 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

Expert evidence

As the Tribunal has said in its pamphlet *A guide for experts giving evidence in the State Administrative Tribunal*:[49]

> "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."

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' duties to the Tribunal.
- Written statements of expert witnesses' evidence.
- Pre-hearing conferral and joint statements of expert witnesses.
- Concurrent evidence of expert witnesses at the final hearing.[50]

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

---

vacates the directions hearing and issues an order granting leave for 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.

[49] *A guide for experts giving evidence in the State Administrative Tribunal* (Info Sheet 11) http://www.sat.justice.wa.gov.au/_files/Expert_Evidence_Brochure.pdf.

[50] 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, 6th Edition, 2019) Ch 6.20 421-438 and T Cockburn and B Madden, "Adapting to concurrent expert evidence in medical litigation" (2015) 22 JLM 610.

- "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 misunderstand the area of expertise;
- The traditional approach to receiving expert evidence can become a forensic battle between counsel and expert witness and this may discourage some experts from being prepared to give expert evidence; 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 great assistance. When expert witnesses are not objective, and assume the role of advocate for a party, their credibility suffers."

In light of these observations, the SAT Rules provide that an expert witness at a hearing or pre-hearing conferral has the following paramount duties as to matters within their expertise:[51]

> "(a) to be impartial and independent;
>
> (b) to assist the Tribunal; [and]
>
> (c) not to be an advocate for the party that has engaged them."

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 duties 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;[52] and
- 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 duties stated in that document.[53]

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.[54] Except in cases where the expense involved would be

[51] SAT Rules r 39A.
[52] *Standard procedural orders*, note 34, standard order 42.
[53] *Standard procedural orders*, note 34, standard order 43.
[54] *Standard procedural orders*, note 34, standard order 44.

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*[55] 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.[56]

The Tribunal's guidance pamphlet contains a format for the joint statement for the expert witnesses to follow.

As was explained by the New South Wales Supreme Court in a medical negligence case:[57]

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

[55] Rule 39B(2) of the SAT Rules provides that "Unless the Tribunal orders otherwise, the experts must confer in the absence of the parties and the parties' representatives".
[56] *Standard procedural orders*, note 34, 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 [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 [39] (Gleeson CJ, Gummow, Hayne and Heydon JJ). 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 50, 621 and cases discussed there.
[57] *John v Henderson (No 1)* [2013] NSWSC 1435 [12] (Garling J).

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 issues[58] or another member who is a subject specialist) acts as a facilitator for the experts' conferral,[59] 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 as possible at the final hearing, especially in explaining the reasons for any disagreement. As the NSW Supreme Court has observed:[60]

> "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."

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."

The SAT pamphlet also states that:

---

[58] This requires the consent of the parties under s 54(10) of the SAT Act.
[59] Cf T Cockburn and B Madden, note 50, 616 – 617.
[60] *KF v Royal Alexandra Hospital for Children* [2011] NSWSC 399 [12] (Johnson J).

> "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."

Indeed, the SAT Rules provide that an expert witness who is required to confer must not, before the joint statement is filed, discuss any matter raised in the conference of experts with, or disclose any such matter to, any person who is not part of the conference.[61]

Furthermore, evidence of anything said or done in the course of the conference of experts, other than the joint statement, is not admissible at any later stage of the proceedings without the Tribunal's leave.[62]

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"[63] and therefore "[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".[64]

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

---

[61] SAT Rules r 39B(3).
[62] SAT Rules r 39B(4).
[63] *X v Sydney Children's Hospitals Speciality Network (No 6)* [2011] NSWSC 1353 [3] (Adamson J) (conferral involving paediatricians, paediatric neurologists and paediatric endocrinologists).
[64] *Porter v Le* [2014] NSWSC 883 [29] (Harrison J).

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.[65] In another case, SAT directed expert conferral and heard concurrent expert evidence in relation to air quality 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.[66]

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".[67] 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. In consultation with the parties, the Tribunal can also 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).

The SAT Rules provide that, "[u]nless the Tribunal orders otherwise, it will admit the joint statement filed by the experts into evidence at the hearing of the proceeding".[68] The SAT Rules also provide that "[i]f the

[65] *Moore River Company Pty Ltd and Western Australian Planning Commission* [2007] WASAT 98 [96] (Judge Chaney DP, Mr DR Parry SM and Ms M Connor M).
[66] *Wattleup Road Development Company Pty Ltd and Western Australian Planning Commission* [2014] WASAT 159 [22] (Judge Parry DP, Mr P Curry SSessM and Mr B Hunt SSessM).
[67] *Standard procedural orders*, note 34, standard orders 47 and 48.
[68] SAT Rules r 39B(5).

joint statement is admitted into evidence, no party can adduce any evidence inconsistent with any matters on which the statement says the experts agree, without the Tribunal's leave".[69]

Expert witnesses with a common or overlapping expertise are generally required to give evidence concurrently at the final hearing.[70] 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;
- 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.[71]

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 "a structured professional discussion between peers in the relevant field"[72] in what Justice Peter McClellan, who as Chief Judge of the NSW Land and Environment Court and later as Chief Judge at Common Law in the NSW Supreme Court had an instrumental role in the development and

[69] SAT Rules r 39B(6).
[70] SAT Rules r 39C(1).
[71] See Rule 39C(2) of the SAT Rules and *Standard procedural orders*, note 34, standard order 50.
[72] 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].

mainstream adoption of concurrent expert evidence, describes as a "cooperative endeavour to identify the issues and arrive where possible at a common resolution of them".[73] The process of concurrent expert evidence is akin to the way in which issues involving expertise are analysed and resolved in the "real world".[74]

These characterisations of concurrent expert evidence were echoed and endorsed by expert witnesses themselves in groundbreaking research conducted by Member Dr Bertus De Villiers in 2015. This research involved 63 interviewees, mostly experts who had regularly given expert evidence in SAT proceedings and some lawyers who regularly appeared in SAT proceedings, "in a series of small group interviews to canvass their views, experiences and opinions about expert conferral and concurrent evidence processes".[75] This research was, "to the author's knowledge, the first time in Australia that the opinions of experts who participate in conferrals and concurrent proceedings have been canvassed in such a detailed way".[76] The research revealed the following:[77]

- 96% of interviewees considered that conferral was "extremely helpful" (53%) or "helpful" (43%) "to identify areas of agreement between experts";
- 90% of interviewees considered that conferral was "extremely helpful" (45%) or "helpful" (55%) "to reduce issues in disputes"; and

[73] P McClellan, "New Method with Experts – Concurrent Evidence" (2010) 3 Journal of Court Innovation 259, 264 http://www.courts.state.ny.us/court-innovation/Winter-2010/jciMcClellan.pdf
[74] See DR Parry, "Concurrent Expert Evidence", (2010) 37(7) *Brief* 9 – 12.
[75] B De Villiers, "From advocacy to collegiality: The view of experts of "concurrent evidence" and "expert conferral" in the State Administrative Tribunal" (2015) 25 JJA 11, 13.
[76] B De Villiers, note 75, 13-14.
[77] B De Villiers, note 75, 20 and B De Villiers, "Conferral of exerts and concurrent evidence – what do the experts think of it?" (2015) 44(7) *Brief* 30, 32.

- 91% of interviewees considered that conferral and concurrent evidence reduced time required for a hearing.

Several interviewees commented that the process of Tribunal-led examination created an atmosphere of "professionalism" and "scientific discourse".[78] As the author observed:

> "An overwhelming response by interviewees was that they do not find questioning by the Tribunal concerning or intimidating; that they do not see the type of questions asked by the Tribunal as indicative of potential bias on the part of the Tribunal; and that being questioned by the Tribunal enhances their sense of being an expert witness of the Tribunal by engaging directly with the Tribunal. The general view of interviewees was that the immediacy of concurrent evidence allows a full exploration of each topic and that reduces the risk of experts obfuscating issues with their replies. In general, interviewees said that the leading role the Tribunal plays in examination enhances, rather than erodes, their trust and confidence in the process."[79]

Freckelton and Selby make the following observations in relation to concurrent expert evidence:[80]

> "Thus far, concurrent evidence has been confined principally to civil litigation in the 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. Concurrent evidence is becoming significant for many forms of contemporary litigation and is likely to become more so."

These observations are also borne out by the research conducted by Dr De Villiers. Dr De Villiers's conclusion to his article in the Journal of

[78] B De Villiers, note 75, 23 (note 75).
[79] B De Villiers, note 75, 23, footnotes omitted.
[80] I Freckelton SC and H Selby, note 50, [6.20.01].

Judicial Administration summarising the results of the research is as follows:[81]

> "Much has been written about the pros and cons of conferral of expert witnesses and concurrent expert evidence. This research shows that both processes are welcomed and strongly endorsed by experts who have appeared in SAT since its inception. The majority of literature discussing these techniques is from the eye of the judiciary and the legal profession. This research considered those techniques from the perspective of experts who have appeared in SAT in conferral and concurrent processes during the past 10 years. Although several areas are highlighted in the article where improvements can be made by SAT, overall the assessment by interviewees is that the two processes are working 'remarkably well'; that the processes are 'close to perfect'; and experts feel 'entirely comfortable' with the processes. A senior legal practitioner who regularly appears in SAT and other courts concluded that the SAT-process 'is a much better informed' hearing and the 'quality and depth of evidence is enhanced' as a result of the way in which proceedings are conducted. The views of the experts support a conclusion that both techniques contribute to the fulfilment of the section 9 objectives of the SAT Act. The interviewees were in agreement that the two processes contribute to a less adversarial and a more collegiate atmosphere in SAT.
>
> In general the following conclusions can be drawn in light of the responses received from the experts:
>
> - Expert conferral and concurrent evidence are preferred to the traditional (adversarial one-expert-at-a-time) way of hearing expert evidence because the two techniques enhance the role of the expert as a witness of the Tribunal; encourage an atmosphere of collegiality; and allow a greater opportunity for experts to explain their opinions and any nuances that may arise from their opinion even though they may be in disagreement with each other.
> - Both techniques contribute, in general, to the saving of costs and time spent in hearings, and provide greater clarity as to what issues are to be determined by the Tribunal. It is therefore clear to parties, representatives, experts and the

[81] B De Villiers, note 75, 26-27, footnotes omitted.

Tribunal what the real issues are to be determined and this contributes to greater focus and clarity during hearings.

- The 'immediacy' of peer review is one of the greatest assets of concurrent evidence since it enables the Tribunal to weigh the competing opinions of experts in regard to a specific issue in real time. There is effectively a discourse between experts and each, generally, has enough opportunity to explain why they do not agree with another expert's opinion.
- The two techniques are not a proverbial magic wand that simplify cases and always save time and costs. Experts may be locked hard into their respective positions or a matter may be extraordinarily complex where experts cannot even agree on what they disagree about. As a general default, however, interviewees support the use of these techniques as a point of departure by SAT when it does case management, unless circumstances demand that the traditional approach to expert evidence be taken.
- No process of examining expert evidence is entirely without shortcomings. However, the two techniques employed by SAT are, seen by interviewees as a major improvement of the way in which expert evidence is dealt with and they feel, in general, strongly positive about the process."

Conduct of hearings

Due to the Tribunal's success in the use of FDR processes, in most areas of the Tribunal's jurisdiction, only a small percentage of cases resolved by SAT need to be listed for a final hearing or determination on documents. When a matter is listed for final hearing or determination on documents the member usually makes programming orders based on the standard orders in relation to:

- identification of issues in dispute and relevant documents;[82]
- requirements for the presentation of documents;[83]
- expert evidence;[84]

[82] *Standard procedural orders*, note 34, standard orders 9 – 12.
[83] *Standard procedural orders*, note 34, standard orders 40 and 41.

- filing and exchange of witness statements;[85]
- conferral and joint statement of expert witnesses;[86]
- concurrent evidence of expert witnesses;[87] and
- filing and exchange of draft "without prejudice" conditions of approval in refusal and deemed refusal review cases.[88]

The member may also schedule a further directions hearing to review preparation for the final hearing at an appropriate point in the process.[89]

Oral hearings are flexible and relatively informal. As indicated earlier, people attending hearings are expected to stand at the commencement and conclusion of a sitting, when the member or members enter and leave the hearing room, but do not bow at the commencement or conclusion of hearings or when entering or leaving the hearing room during hearings. As also indicated earlier, parties, legal practitioners and other representatives do not stand when examining or cross-examining a witness or when addressing the Tribunal.

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

---

[84] *Standard procedural orders*, note 34, standard orders 42 and 43.
[85] *Standard procedural orders*, note 34, standard orders 44 and 45.
[86] *Standard procedural orders*, note 34, standard orders 47 – 49.
[87] *Standard procedural orders*, note 34, standard order 50.
[88] *Standard procedural orders*, note 34, standard orders 51 and 52.
[89] *Standard procedural orders*, note 34, standard order 57.

asks questions of witnesses and the other parties are entitled to cross-examine any witness.

Despite the relative informality of SAT hearings, evidence is generally required to be given on affirmation or oath.

Most final hearings take one day or less.[90] The length of hearings is minimised by the use of FDR processes to reduce the scope of disputes and by the expert evidence processes of pre-hearing conferral and joint statements and concurrent expert evidence.

Determinations on documents

The Tribunal may conduct all or part of a proceeding entirely on the basis of documents without an oral hearing.[91] 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;
- 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; and

[90] For example, in the 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.
[91] SAT Act s 60(2). *Standard procedural orders*, note 34, standard orders 36 – 39.

- Whether it would be more cost effective to deal with the matter on the documents.

Costs[92]

Section 87(1) of the SAT Act provides that, "[u]nless otherwise specified in this Act, the enabling Act, or an order of the Tribunal under this section, parties bear their own costs in a proceeding of the Tribunal." It is apparent from its terms that "the presumptive position or starting point under s 87(1) of the SAT Act [is] that each party is to bear its own costs".[93] However, s 87(2) of the SAT Act confers a broad 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 the relevant enabling Act that confers jurisdiction on the Tribunal in the particular case indicates otherwise.[94] 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.[95] SAT is therefore a generally "no costs" or "costs-neutral" jurisdiction, in contrast to courts, where the "usual order as to costs" is that costs follow the result with the "losing" party having to pay (usually a proportion of) the "wining" party's costs of the proceeding.[96]

---

[92] See DR Parry and B De Villiers, note 1, chapter 17.
[93] *Western Australian Planning Commission v Questdale Holdings Pty Ltd* [2016] WASCA 32; (2016) 213 LGERA 81 [50] (Murphy JA, Martin CJ [1] and Corboy J [75] agreeing).
[94] *Citygate Properties Pty Ltd and City of Bunbury* [2005] WASAT 53; (2005) 38 SR(WA) 247 [28] (Mr DR Parry SM); see also *Springmist Pty Ltd and Shire of Augusta-Margaret River* [2005] WASAT 143 (S); (2005) 41 SR(WA) 219 [32] (Judge Chaney DP, Mr DR Parry SM and Ms M Connor M) and *Uniting Church Homes (Inc) and City of Stirling* [2005] WASAT 341 [12] (Justice Barker P).
[95] *Pearce & Anor and Germain* [2007] WASAT 291 (S) [17] (Judge Chaney DP).
[96] *Clifford and Shire of Busselton* [2007] WASAT 89 (S); (2007) 44 SR(WA) 174 [39] (Justice Barker P); see also *Chew and Director-General of the Department of Education and Training* [2006] WASAT 248; (2006) 44 SR(WA) 174 (Judge Eckert DP, Ms J Toohey SM and Prof C Mulvey SessM); *Summerville and Department of Education and Training* [2006] WASAT 368 (S) (Justice Barker P).

Where an application for costs is made, '[t]he onus is on the party seeking an order [for costs] in its favour'.[97] In exercising its discretion as to costs under s 87(2) of the SAT Act:[98]

> "… generally speaking, the question is whether, in the particular circumstances of the case, it is fair and reasonable that a party should be reimbursed for the costs it incurred."

The determination of whether it is fair and reasonable that a party should be reimbursed for the costs it incurred in a proceeding is informed by considerations relevant to the particular jurisdiction that is being exercised.

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 proceeding.[99] As President Justice Barker observed in an early costs decision, 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.[100] An applicant should not be discouraged from seeking administrative justice by the prospect of having to pay the original decision-maker's costs if they do not succeed. Conversely, an applicant is not entitled to award of costs if they succeed.

---

[97] *Western Australian Planning Commission v Questdale Holdings Pty Ltd* [2016] WASCA 32; (2016) 213 LGERA 81 [51].
[98] *Western Australian Planning Commission v Questdale Holdings Pty Ltd* [2016] WASCA 32; (2016) 213 LGERA 81 [51].
[99] *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 (Justice Barker P); *Aydogan and Town of Cambridge* [2007] WASAT 19; (2007) 48 SR(WA) 239 (Mr DR Parry SM and Ms M Connor M).
[100] *Shark Bay Tuna Farms Pty Ltd and Executive Director, Department of Fisheries* [2005] WASAT 206 [36].

In contrast, in vocational disciplinary proceedings, the Tribunal's established practice in relation to costs is that a successful application by a vocational regulatory body will usually result in an order for costs being made in favour of the vocational regulatory body.[101] 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 the allegations against the practitioner concerned are properly and thoroughly presented".[102]

[101] *Medical Board of Western Australia and Roberman* [2005] WASAT 81 (S); (2005) 39 SR(WA) 47 [30] (Judge Chaney DP, Dr K McKenna SSessM, Dr P Quatermass SSessM and Brig AG Warner SSessM), referred to with approval in *Paridis v Settlement Agents Supervisory Board* [2007] WASCA 97; (2007) 33 WAR 361 [35] (Wheeler, Pullin and Buss JJA).
[102] *Medical Board of Western Australia and Roberman* [2005] WASAT 81 (S); (2005) 39 SR(WA) 47 [30].