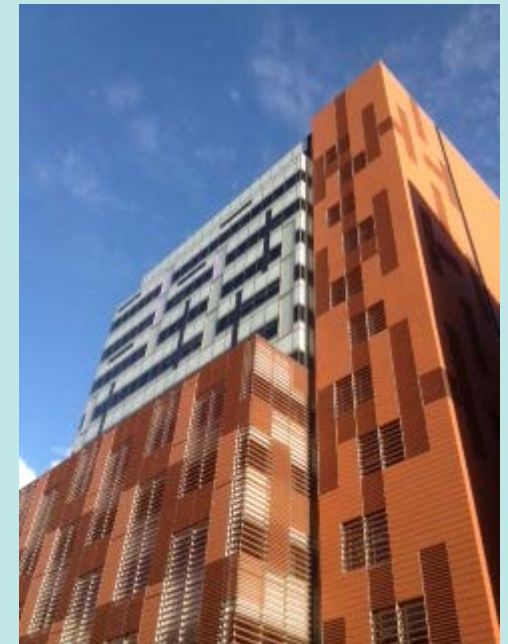


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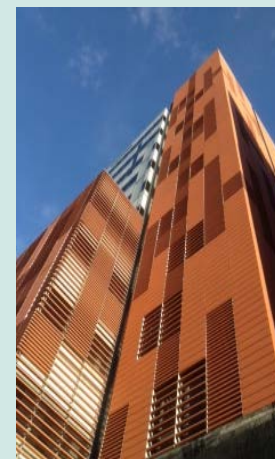
**Structure and restructure,
the rise of FDR and experts
in hot tubs – Reflections on
SAT's first decade**

Judge David Parry



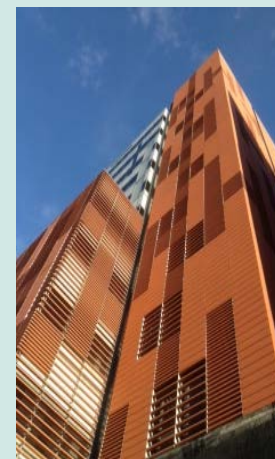
Structure and restructure, the rise of FDR and experts in hot tubs

- **“A cohesive new jurisdiction”**
- **SAT’s structure and restructure**
- **SAT’s funding model**
- SAT’s main statutory objectives, powers and procedures
- Commencement and management of proceedings
- Identification of issues in dispute and relevant documents



Structure and restructure, the rise of FDR and experts in hot tubs

- **Facilitative dispute resolution**
- **Expert evidence**
- Conduct of hearings
- Determinations on documents
- Costs
- **Concluding thoughts – Super-tribunals and “thinking outside the box”**





“A cohesive new jurisdiction”

- SAT was established in January 2005 as “*a cohesive new jurisdiction*” and the fulfilment of an important commitment to the people of WA “*to establish a modern, efficient and accessible system of [civil and] administrative law decision-making across a wide range of areas*” (AG Hon Jim McGinty MLA)
- SAT replaced a disparate and fragmented system comprising approximately 50 adjudicators, including courts, specialist tribunals, boards and ministers
- SAT exercises broad “review” and “original” jurisdiction under approximately 160 State Acts and Regulations, and under subsidiary legislation, such as planning schemes and local laws (“enabling Acts”)

- May 2009 – WA Legislative Council Standing Committee on Legislation published a lengthy Report on its *Inquiry into the Jurisdiction and Operation of the State Administrative Tribunal (SAT Act s 173)* which found “*the SAT to be operating efficiently and effectively ... due to the considerable efforts and dedication of the members and staff of the SAT.*”
- Report recommended that new or altered jurisdiction should be conferred on SAT under 15 Acts, which would result in a substantial increase in workload
- Report also recommended the development of a funding model for conferral of new jurisdiction
- August 2011 – first major conferral of new jurisdiction since commencement of SAT – original jurisdiction in relation to building disputes

SAT's structure and restructure

- SAT Act does not prescribe any particular structure, such as divisions, streams or lists, for the operation of SAT
- Rather, *“the President is responsible for organising the business of the Tribunal ...”* (s 146(2)) and *“[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”* (s 32(5))
- 2005 inaugural President Barker J established the “stream” structure – allocation of enabling Acts to and all non-judicial members to work principally in one of four “streams” – commercial and civil (“CC”); development and resources (“DR”); human rights (“HR”); and vocational regulation (“VR”)

- The term “stream”, rather than “division”, was adopted to emphasise the notion of SAT as a cohesive, super-tribunal, rather than a combination of former, separate jurisdictions and to more readily enable members to be listed to mediate and hear matters across different areas of SAT’s jurisdiction
- The stream structure worked well in the establishment and consolidation phases of the Tribunal
- However, SAT’s needs and circumstances changed over time, because of the acquisition of new jurisdictions (most significantly, original building disputes in 2011) and increase and variations in the amount of work within areas of jurisdiction (most significantly, doubling of G & A proceedings over the first decade)

- 2013 President Chaney J reallocated three full-time members to work equally in CC and HR streams, thereby enabling them (following training and professional development) to hear G & A matters
- However, the stream structure proved to be increasingly inflexible to enable SAT to efficiently acquit its changing and growing work
- Streams tended to operate as separate units and developed somewhat different processes
- Members were not able to be readily listed outside their streams, because of amount of work and structure
- Members' availability limited by directions hearings
- Some inefficiency in use of staff because of streams

- 2014 – SAT was restructured from four streams to 15 “lists” – for management and reporting purposes, all enabling Acts are allocated to one of the lists, but members are not allocated to work principally in any particular list or lists
- Each list is overseen by a judicial member (“List Judge”)
- Most directions hearings now conducted by List Judges
- All full-time members now available to be listed across SAT; all have had training in and hear some G & A matters
- Some members with specialist qualifications or experience continue to work mainly in a particular area of jurisdiction (eg, social workers mainly in G & A matters and architects or town planners mainly in planning and development matters)

- Qualitative and quantitative benefits have included:
 - 1) Greater flexibility in listing full-time members;
 - 2) Enabling SAT to respond to workload fluctuations;
 - 3) Increased efficiency and effectiveness of directions;
 - 4) Increased FDR resolutions – judicial members’ additional authority in expressing views; resolution of issues at directions; authority to list across SAT’s membership; and tailoring directions / suggestions;
 - 5) Freeing up senior members from administrative tasks to be able to hear and mediate complex cases;
 - 6) Professional development of members through new areas;
 - 7) Fresh ideas and different perspectives from members;
 - 8) Untapping substantial full-time member capacity with significant sessional member budgetary savings

SAT's funding model

- 2009 Inquiry rec 41 – Government and SAT “*develop a funding model for the Tribunal as soon as practicable.*”
- 2010 – Funding model developed by DoTAG, in consultation with the then Department of Treasury and Finance and SAT; endorsed in principle by Treasurer
- Based on estimated additional member and administrative resources (hours per lodgement) required when a new function is conferred on SAT
- Model has been applied to a number of new conferrals
- Model has been useful and important in discussions with relevant agencies and in informing submissions for appropriate funding for new conferrals

Facilitative dispute resolution

- SAT has adopted term “FDR” (rather than “ADR”) to refer to a suite of four non-adjudicative dispute resolution processes used to resolve or narrow disputes – terminology emphasises that these processes are not regarded as alternative or additional, but rather as central and core, methods of dispute resolution
- Significant emphasis on FDR since SAT’s commencement
- Across SAT (other than in G & A and some commercial tenancy matters), a high proportion of matters are resolved or narrowed by FDR avoiding or limiting hearing – eg in DR stream in 2013-14, 79% of matters fully resolved and 6% of matters partially resolved by FDR
- FDR skills also used in conduct of G & A hearings

- SAT's four FDR processes are:
 - 1) Directions hearings in which issues are identified, options are developed and, in certain types of applications, alternatives are discussed;
 - 2) Mediations *“to achieve the resolution of matters by settlement between the parties”* (s 54(4));
 - 3) Compulsory conferences *“to identify and clarify the issues in the proceeding and promote the resolution of the matters by settlement between the parties”* (s 52(3)); and
 - 4) Invitations for reconsideration to respondents (s 31), often in light of further information or clarification provided, or modifications or amendments made, by applicants through the other FDR processes

- *“... 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.”*

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

Expert evidence

- *“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.”*

(A guide for experts giving evidence in the State Administrative Tribunal, 2007; 2013)

- SAT has adopted and refined a model for expert evidence to maximise its value and minimise its cost and to address recognised problems with the traditional approach to receiving expert evidence in tribunals and courts, namely:

- 1) “Adversarial bias” – the “gun for hire” expert witness or, at least, the adoption of a partisan or defensive position;
- 2) Delay between evidence of experts in the same field;
- 3) Lack of direct interaction and response between expert witnesses;
- 4) 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;
- 5) Traditional approach can become a forensic battle between counsel and expert witness; and
- 6) Traditional approach is dispute-focussed, rather than solution-focussed

- SAT model for expert evidence has four parts, namely:
 - 1) Articulation of expert witnesses' obligations to the Tribunal (impartiality; paramount duty to SAT; no advocacy) and requirement for adherence to these;
 - 2) Written statements of expert witnesses' evidence;
 - 3) Pre-hearing conferral of experts in the same field of expertise (either "chaired" / facilitated by a member - usually the former mediating member - or "unchaired") *in the absence of the parties and their representatives* and production of a joint statement;
 - 4) Concurrent evidence of expert witnesses in the same field of expertise at the final hearing (sometimes referred to as giving evidence in the "hot tub")

- 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 – there may be “*considerable overlap between [different] areas of expertise and the boundaries between them [may not be] clearly drawn*” (Adamson J)
- Eg, SAT has heard evidence on ecologically sustainable development from a panel of seven expert witnesses with expertise including planning, development economics, social sustainability, and economic impact analysis; and on air quality from a panel of eight witnesses with expertise in meteorology, environmental science, chemistry, air quality monitoring, measurement and impact assessment, toxicology, and environmental engineering

- The purpose of the experts' conferral (sometimes referred to as a "conclave") is to produce a joint statement of:
 - 1) the issues arising in the proceeding which are within their expertise;
 - 2) the matters upon which they agree in relation to those issues;
 - 3) the matters upon which they disagree in relation to those issues; and
 - 4) the reasons for any disagreement between them.

(SAT standard procedural orders 47 – 49)

- *“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.”*

(A guide for experts giving evidence in the State Administrative Tribunal, 2007; 2013)

- Concurrent expert evidence involves a “structured professional discussion between peers in the relevant field” (NSW LRC) lead by SAT with the witnesses:
 - 1) sitting together in the witness box as an expert panel;
 - 2) being asked questions by the Tribunal, generally on the basis of the joint statement;
 - 3) being encouraged to respond directly to each other’s evidence;
 - 4) being given an opportunity to ask each other any questions they think might assist the Tribunal; and
 - 5) being asked questions by the parties or their representatives, either topic by topic or in one go



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

- Super-tribunals are inherently suited for creativity and innovation in dispute resolution processes and in management of their work (they are able to readily “think outside the box”)
- Such creativity and innovation can be of tremendous benefit for the administration of justice
- SAT’s recent restructure, use of and emphasis upon FDR, and model for expert evidence, are examples of such innovation
- There are several reasons why super-tribunals are particularly suited to “think outside the box”:

- 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 – capacity and desire to be creative and to innovate forms part of a super-tribunal’s “DNA”
- 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
- Greater resources to develop and implement creative and innovative practices than separate tribunals
- Opportunity for cross-pollination of good ideas between different areas of a super-tribunal’s jurisdiction

- 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
- 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
- Establishment of a community of super-tribunals in recent years and exchange and development of ideas through COAT and this conference greatly assists in “thinking outside the box”, thereby benefiting the administration of justice