



SAT

State
Administrative
Tribunal

Western Australia

Conferral of Experts: chaired conferral of experts and other relevant considerations when appearing before the State Administrative Tribunal

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22 August 2013



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Introduction - The use of expert evidence in SAT

- **SAT –**
 - **reviews (hears administrative appeals against)** the vast majority of **administrative decisions** made by State and local government authorities and officials, in respect of which review (appeal) rights are conferred
 - **exercises original jurisdiction** in specialist statutory areas, such as guardianship and administration, building disputes, strata titles, land compensation and commercial tenancy matters



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- **determines review and disciplinary proceedings** in relation to vocations licensed under State law
- **Expert evidence** is a **feature** in **many areas** of SAT's broad jurisdiction, such as **vocational regulation, guardianship and administration, town planning, building disputes, natural resources and land valuation proceedings**



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- **SAT's main objectives are -**
 - to achieve the resolution of questions, complaints or disputes, and make or review decisions, **fairly and according to the substantial merits** of the case
 - to **act as speedily and with as little formality and technicality** as is practicable, and **minimise the costs** to the parties
 - to make **appropriate use** of the **knowledge and experience** of Tribunal members

(State Administrative Tribunal Act 2004 (WA) s 9)



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- Consistently with these objectives and in order to maximise the value of expert evidence given to the Tribunal, SAT has adopted a **model for expert evidence** which includes -
 - articulation of **expert witness' obligations** to Tribunal
 - written **statement of expert witness' evidence**
 - **conferral and joint statement** of expert witnesses
 - **concurrent evidence** of expert witnesses at final hearing



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Conferral and joint statement of expert witnesses

- **Expert evidence in chief** is generally by **written statement** filed and exchanged usually two weeks before final hearing
- In most types of proceedings, **expert witnesses in each field** are generally required to **confer with one another** before final hearing, in the absence of the parties or their representatives (either on their own or before a SAT member), and to **prepare and file a joint statement of -**



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- the **issues** arising in the proceeding which are **within their expertise**
- the **matters upon which they agree** in relation to those issues
- the **matters upon which they disagree** in relation to those issues
- the **reasons for any disagreement**
- **Conferral** may be ‘**chaired**’ or ‘**unchaired**’ by SAT
- A **party** will **not be permitted** to present **any evidence inconsistent with any agreement in the joint statement** unless the Tribunal grants leave



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Experts in the 'hot tub' – Concurrent expert evidence

‘Concurrent expert evidence ... reflects **an important change in practice**. In New South Wales, in particular, as well in many administrative tribunals, it is becoming increasingly common for **expert evidence** to be taken **from a number of experts at the same time ("in the hot tub")**, thereby allowing experts to engage in **debate** with one another, **issues** more effectively to be **crystallised** for the court and new forms of cross-examination to make **experts accountable** for their views.’

(Ian Freckelton SC and Hugh Selby *Expert Evidence Law, Practice, Procedure and Advocacy* (Lawbook Co., Sydney, 4th Edition, 2009) page xxii)



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- **Concurrent expert evidence is significantly different to the traditional method** of placing expert opinion evidence before a decision-maker and is **a response to ‘the apparent escalating disillusionment’ with that model** (*Freckelton and Selby*, page 497, note 1) -
 - **Delay between experts** in the same field
 - **Lack of direct interaction and response** between experts
 - Evidence only given through the **medium of parties’ questions**
 - Expert may **not initiate discussion**
 - **Cross-examination – forensic battle**
 - Encourages adoption of a **partisan and defensive** position



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- **Concurrent evidence involves the witnesses -**
 - **sitting together in the witness box**
 - **being asked questions by the Tribunal**, generally on the basis of the joint statement
 - **being given the opportunity and encouraged by the Tribunal to respond directly to each other's evidence**
 - **being given an opportunity to ask each other any questions** they think might assist the Tribunal
 - **being asked questions by the parties or representatives**



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- The **Tribunal** sets the **order** in which topics are addressed, but may first discuss this with the parties or representatives
- The **Tribunal** leads ‘a structured professional discussion between peers in the relevant field.’ (New South Wales Law Reform Commission, *Expert Witnesses*, NSWLRC Report 109 (NSWLRC, Sydney, 2005))



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Benefits

- **Emphasises** that experts are there to **assist the Tribunal to resolve the matter** - the ‘symbolic and practical importance of removing the experts from their positions in the camp of the party who called them’
- **Enables and encourages** expert witnesses to maintain their **role as experts** and **not** become **advocates** for a cause or participants in a forensic contest
- **Facilitates** the **identification of points of professional agreement** as early as possible and enables **focus on the real areas of professional disagreement** and the reasons for it



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- **All evidence** in relation to a topic is **given at the same time** and **expert witnesses** are able to **directly question and respond** to their colleagues' evidence
- **Improves the quality of the expert evidence**
- **Improves the quality and utility of questions** asked by parties and their representatives
- **Saves considerable time and costs**
- **Encourages experts** who might be unwilling to subject themselves to the traditional approach **to be expert witnesses**
- **Greatly assists prompt and reliable decision-making**