

# ACCESSIBILITY TO THE LAW – THE CONTRIBUTION OF *SUPER-TRIBUNALS* TO FAIRNESS AND SIMPLICITY IN THE AUSTRALIAN LEGAL LANDSCAPE

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*If the SAT has the capacity for determining both merits and legality issues, it represents an attractive development in Australian, non-Commonwealth, tribunal jurisprudence. Peter Johnston (2005)*

## I INTRODUCTION

The Australian legal system, and in particular the way in which courts and tribunals operate, is undergoing major changes. These changes relate particularly to: the simplification of court procedures to assist self-represented litigants; the increased use of facilitative dispute resolution to settle disputes; a greater emphasis on the need for restorative justice; the way in which expert evidence is dealt with through expert conferrals and concurrent evidence; and more active involvement of the presiding member (the judge, magistrate or member) in the conduct of a hearing, including the examination of witnesses.

In this article, consideration is given to the way in which some of these changes are presenting themselves within the State Administrative Tribunal of Western Australia<sup>2</sup> (SAT) and the potential flow-on of SAT's experiences and how they may impact upon the dispensing of justice at other levels of the legal landscape. The central theme of this article is that some of the grass-root changes that are experienced by SAT and other super-tribunals will increasingly find their way into the higher echelons of the courts – a typical case of bottom-up reform. Peter Johnston was, in the view of the author, correct when he observed at the establishment of SAT as follows:

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<sup>2</sup> The SAT of Western Australia is a tribunal with a wide range of matters in its jurisdiction that would usually in common law jurisdictions fall within the ambit of civil courts, for example building, construction and commercial tenancy disputes; reviews of various state and local government decisions such as planning, building, firearms licences and driving licences; vocational disciplinary affairs; equal opportunity and anti-discrimination disputes; and guardianship and administration applications. For a general overview of the State Administrative Tribunal refers to D Parry and B De Villiers *Conducting proceedings in the Western Australia State Administrative Tribunal* (2012) ThompsonReuters, Sydney.

Many of the innovations and features referred to by Justice Barker [the inaugural President of SAT] represent the latest thinking and practice concerning tribunal administration. If, in addition, the SAT has the capacity for determining both merits and legality issues, it represents an attractive development in Australian, non-Commonwealth, tribunal jurisprudence.<sup>3</sup>

The reasons for the changes presenting themselves on the court and tribunal landscape are varied, but the most important factors are: the increase in persons seeking to represent themselves in litigation; the high cost of litigation; the limited budget for legal aid; the need to develop court procedures that are simple, efficient and cost effective; and the resolution of disputes by way of agreement rather than litigation.<sup>4</sup> Courts are generally slow to change, but Australia is currently experiencing a remarkable momentum for change in court practices and procedures. In fact, it is the contention of this article that this momentum has become unstoppable.<sup>5</sup>

Many of the changes that are knocking at the doors of courts are reflected in, and are being initiated and road-tested by various state governments with the introduction of the so-called *super-tribunals*, of which SAT is one. Australia, being a federal system, allows for state-based experimentation in a wide range of policy areas.<sup>6</sup> The establishment of super-tribunals has been, arguably, one of the most successful examples of creativity in the area of dispensing of justice that states have embarked upon. These super-tribunals, of which the first was established in 1998 and where decisions were made on a daily basis that affected the lives of millions of people, have now become a standard feature of the Australian justice system.<sup>7</sup>

<sup>3</sup> P Johnston, "State Administrative Tribunal (WA): Model Non-Adversarial Tribunal or Split Personalities" (2005) *ADR Bulletin* 8(3) 1-6 at 4.

<sup>4</sup> Refer for example to the analysis of challenges faced by the legal system as set out by W Martin (Chief Justice Western Australia) "Improving access to justice through the procedures, structures and administration of the courts" (2014) *The University of Notre Dame Law Review* (16) 1-21.

<sup>5</sup> The momentum for change is reflected in the request by the Federal Government for the Productivity Commission to investigate and produce a report about, amongst other, trends in regard to the cost of legal services; alternative mechanisms to resolve disputes; and reforms that may be considered to reduce the cost of legal services. The Commission published its recommendations on 5 September 2014. The Report can be accessed at <http://www.pc.gov.au/inquiries/completed/access-justice/report>.

<sup>6</sup> See B De Villiers "Experimenting in federal systems – the case of the SAT of Western Australia and accessibility to justice" (2013) *Heidelberg Journal of International Law* 73(3) 427-449

<sup>7</sup> There are currently super-tribunals in Victoria, Western Australia, Queensland, New South Wales, ACT and draft legislation under consideration in Tasmania. The first was launched in the state of Victoria on 1 July 1998.

The super-tribunals are unique creatures, for which, a proper definition or name is yet to be settled.<sup>8</sup> Some call them *super*-tribunals; others *chameleon*-tribunals, others *hybrid*-tribunals, and some even call them '*schizophrenic*' tribunals.<sup>9</sup> The super-tribunals have in some respects the appearance of courts, but the flexible way in which they deal with disputes, is more in tune with the modern day demands of informality, flexibility, simplicity, and alternative dispute resolution mechanisms. They are called 'tribunals' which may suggest that their powers are limited to administrative review. However, most of their powers are exercised in the civil and commercial areas.

The super-tribunals are, in effect, both a product and a catalyst of the major changes that characterise the Australian legal landscape.

Peter Johnston was closely involved with the debates leading to the establishment of SAT. He not only published about the importance of simplifying administrative review and consolidating review mechanisms, he also played an important public and educative role about the benefits that a super-tribunal such as SAT may bring. In this article a brief background sketch is given of the introduction of super-tribunals in Australia and then an assessment is done of key areas in which super-tribunals such as SAT contribute to the changes in the Australian court system, namely, the prevalence of self-represented parties; the investigative role of presiding members during hearings; the use of facilitative dispute resolution to resolve disputes; and simplified court processes.

## II THE ONSET OF SUPER-TRIBUNALS IN AUSTRALIA

The dynamic approach to tribunals in Australia has been evidenced in two developments: on the one hand, the country has seen an integration of a plethora of pure administrative review tribunals into a single, overarching tribunal (for example the Administrative Appeals Tribunal)<sup>10</sup>, and on the other hand, there has been a creation of super-tribunals (for example SAT of Western Australia) with powers that exceed the powers that are usually associated with administrative review tribunals. The super-tribunals, notably, have an expanded jurisdiction that includes civil and commercial matters that

<sup>8</sup> See B De Villiers "When is a tribunal a court – Comments on the hybrid nature of the SAT of Western Australia" (2006) *Brief* August 19-22.

<sup>9</sup> Johnston, 2005.

<sup>10</sup> For background see <http://www.aat.gov.au/>. The AAT is undergoing further change by expanding its jurisdiction through the inclusion of other Commonwealth tribunals, for example the Refugee Review Tribunal.

previously fell within the jurisdiction of the courts. In general, the administrative review jurisdiction of the super-tribunals is relatively small compared to the civil and commercial jurisdiction.<sup>11</sup>

The super-tribunals are therefore akin to courts – in their style and jurisdiction - more so than traditional tribunals ever were.

While traditional review tribunals are associated with the executive branch of government,<sup>12</sup> the super-tribunals are associated with the judicial branch of government.<sup>13</sup>

#### A *Tribunals as administrative review bodies*

The word 'tribunal' is in common law jurisdictions<sup>14</sup> usually associated with an administrative body that has the responsibility to review the merit of a government department decision – hence the concept of 'merits review'.<sup>15</sup> Tribunals, in their traditional sense, seek to give citizens an avenue to obtain review of the merit of an administrative decision, without the individual thereby challenging the legality of the decision. Judicial review (which falls within the jurisdiction of the courts) where the legality of a decision is challenged, is distinguished from administrative review (which falls within the jurisdiction of tribunals) where the appropriateness of a decision is challenged. The administrative review tribunal is therefore seen as part of the executive branch of government, since it does not proclaim justice, but makes an administrative decision and thereby substitutes the decision of the original

<sup>11</sup> In 2012-13 for example 6-9% of all matters dealt with by SAT fell within its “review” jurisdiction. [http://www.sat.justice.wa.gov.au/\\_files/SAT\\_Annual\\_Report\\_2012-2013.pdf](http://www.sat.justice.wa.gov.au/_files/SAT_Annual_Report_2012-2013.pdf)

<sup>12</sup> The courts are generally not as ‘equipped [in the same way as tribunals] to evaluate the policy considerations’ that underlie many administrative decisions: *Attorney-General (NSW) v Quinn* (1990) 170 CLR 1, 35–7.

<sup>13</sup> Refer for example to the State of Queensland Civil and Administrative Tribunal (QCAT), which is referred to as a ‘court of record’ in its enabling statute, *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 164(1) and has been found to be a ‘court’ in *Owen v Menzies & Ors; Bruce v Owen; Menzies v Owen* [2012] QCA 170 (22 June 2012). In *BGC Construction and Vagg & Anor* [2006] WASAT 367, it was also found that the Building Disputes Tribunal of Western Australia was a ‘court’ for purposes of *Supreme Court Act 1935* (WA) s 32 so as to award interest.

<sup>14</sup> The origin of tribunals back to the English Act of 1532 and the basis of the modern day tribunals to the nineteenth century when the review of decision by administrative decision-makers became more common.

<sup>15</sup> Ordinary tribunals are tasked to produce the “correct and preferable decision” and thereby either affirming the decision of the original decision-maker, or making a new decision *as administrative decision-maker*. The tribunal is therefore placed in the shoes of the original decision-maker. Refer for example to the following observation by Kitto J in regard to a decision by the Taxation Board of Review: ‘The board’s decision was not, of course, an adjudication; it was administrative in character’: *WJ and F Barnes Pty Ltd v FCT* (1957) 96 CLR 294, 314.

decision-maker with the decision of the tribunal. Peter Johnston, in 1996, raised the question about where administrative review tribunals “lie on the constitutional spectrum” in regard to them being parts of the executive and yet also a check on the executive.<sup>16</sup>

Over time, a plethora of tribunals and boards have been created in Australia – each tribunal with its own jurisdiction, composition, powers and functions. Tribunals of various sorts are also found in other common law jurisdictions, such as the United Kingdom, New Zealand,<sup>17</sup> Canada and South Africa. Tribunals are often not the product of a 'grand design' or an underlying philosophy of public administration, but have been set up 'ad hoc to deal with particular classes of issues which it has been thought undesirable to confide either to the ordinary courts or to the organs of central or local government'.<sup>18</sup>

Administrative review tribunals generally have one characteristic in common – their power is non-judicial in nature, which means the tribunal exercises the *same* (administrative) powers as the original decision-maker. The tribunal is therefore placed in the shoes of the original decision-maker to determine what the 'correct and preferable'<sup>19</sup> decision is.<sup>20</sup> The tribunal 'reviews' the original decision, instead of a party making an 'appeal' against the decision. As a result, the proceeding before the tribunal is *de novo* (fresh) and all material that was before the original decision-maker and any additional materials that have since become available, may be taken into account to determine what the 'correct and preferable' decision is. The decision of the tribunal then becomes the decision of the original decision-maker.<sup>21</sup>

Although tribunals are not courts, they nevertheless exercise dispute resolution functions by determining disputes about the correctness of an administrative decision. However, the procedures that regulate tribunals differ from those of the courts. Tribunals in common law jurisdictions are, traditionally, more informal in many respects than the courts. For example: tribunals are not bound by the rules of evidence, but must adhere to the rules of

<sup>16</sup> P Johnston “Recent developments concerning tribunals in Australia” (1996) *Federal Law Review* 24(2) 323.

<sup>17</sup> R Creyke ed. *Tribunals in The Common Law World* (2008) Federation Press

<sup>18</sup> SA De Smith *Judicial review of administrative action* (1968) Stevens and sons: London: 14.

<sup>19</sup> See for example s27(2) SAT Act: “The purpose of the review is to produce the correct and preferable decision at the time of the decision under review.”

<sup>20</sup> Tribunals, in their ordinary sense, are therefore regarded as a “convenient public administration tool” for dealing with areas of administrative decision-making. M Barker “The emergence of the generalist administrative review tribunal in Australia and New Zealand” paper read at the Australian Institute of Judicial Administration 9-10 June 2005, Sydney, Australia, p7.

<sup>21</sup> s29(5)(a) *State Administrative Tribunal Act 2004* (WA) Act No 54 of 2004 (SAT Act).

procedural fairness and natural justice; the membership of a tribunal is not limited to persons who are legally trained but may include specialists from other disciplines; tribunals cannot enforce their own decisions;<sup>22</sup> tribunals cannot find that someone acted with contempt; the hearing procedures of tribunals are more informal than those of the courts; tribunal members may use their own knowledge and inform themselves on the topic matter the subject of the review.

As a result of the multitude of tribunals<sup>23</sup> that had been created over many decades in Australia and the confusion that this brought to members of the public,<sup>24</sup> the Federal Government of Australia and various States decided, within their respective jurisdictions, to create one-stop-tribunals whereby most or all administrative review matters could be determined. The purported benefits of these integrated tribunals was said to be: the stability of membership of full-time staff and members; consistency in practices and decisions; improved understanding and accessibility by the public; and the establishment of a single administrative review body.

Efforts to consolidate administrative review into a single review tribunal have now moved beyond the shores of Australia to New Zealand<sup>25</sup> and the United Kingdom.<sup>26</sup>

It is important to note that the amalgamated tribunals at Federal and State level in Australia sought to bring together existing review tribunals and boards into a single tribunal – refer for example to the federal Administrative Appeals

<sup>22</sup> See in *Withnell* the characterisation of the Western Australian Liquor Commission and the reasons why the Liquor Commission was found not to be a court: for example, it is not bound by the rules of evidence; it is an administrative body; it is not called a court; the members are not called judges; it cannot punish for contempt; and it cannot enforce its orders. *Withnell v The Liquor Commission* [2013] WASC 201 at [96]-[106]. Similar considerations apply to SAT being a tribunal and not a court, although in some instances, SAT may, as a result of enabling legislation, be regarded as a 'court'.

<sup>23</sup> In the state of Victoria, the Victoria Civil and Administrative Tribunal (VCAT) replaced 15 boards and tribunals and in Western Australia the SAT replaced 50 tribunals, boards, and courts.

<sup>24</sup> Refer for example to the following observation by the Taskforce that made recommendation for the establishment of the SAT: "It has been a long-standing policy concern in this State that, while citizens can turn to a large number of bodies to appeal against particular administrative decisions or apply for the resolution of disputes, there is no coherent, unified and relatively comprehensive system through which they can seek redress of their grievances." *Western Australian Civil and Administrative Review Tribunal Taskforce Report on the Establishment of the SAT* (May 2002) at ii.

<sup>25</sup> Regardless of the efforts to rationalise tribunals, New Zealand has 28 different tribunals, boards and committees where administrative decisions are reviewed. <http://www.justice.govt.nz/tribunals>

<sup>26</sup> Refer for example to the United Kingdom tribunal's service where it is said that "appeals to tribunals are generally against a decision made by a Government department or agency." <http://www.justice.gov.uk/about/hmcts/tribunals>. For an overview of the history of tribunal reforms in the United Kingdom refer to <http://www.justice.gov.uk/downloads/about/hmcts/tribunals/Tribunals-History.pdf>.

Tribunal. These newly integrated tribunals essentially continued to function, in character, as administrative review tribunals. Kirby HCJ described the advent of the amalgamated tribunals as follows:

'it is essential to appreciate the radical objectives that lay behind the enactment of the AAT Act (Administrative Appeals Tribunal). .... The proposal to create such a tribunal, with the power to make decisions 'on the merits', represented a bold departure from the pre-existing law, with its focus on constitutional and statutory 'prerogative' remedies of judicial review'.<sup>27</sup>

In summary, administrative review tribunals have long been part of common law jurisdictions; the tribunals fulfil an administrative function; the tribunals are part of the executive; and the processes and procedures of the tribunals are informal and flexible.

#### B *Advent of super-tribunals*

*Super-tribunals* are, however, much more than mere consolidated administrative review tribunals. *Super-tribunals*, of which the first was established by the State of Victoria in 1998,<sup>28</sup> have now been introduced in all of the Australian states.

*Super-tribunals* have a wide jurisdiction that encompasses many more functions than those of administrative review tribunals.<sup>29</sup> The jurisdiction of *super-tribunals* reaches into the heartland of the courts by including civil and commercial jurisdictions – and in many instances removes those jurisdictions from the sphere of the courts. Examples of the wide ranging civil and commercial jurisdictions of the *super-tribunals* are: residential tenancy disputes; retail and commercial tenancy disputes; strata and community title disputes; building disputes; construction contract disputes; retirement village and long-stay caravan disputes; and disputes about the sale and ownership of property.

In many instances, the courts have 'lost' jurisdiction, while the *super-tribunals* have 'gained' jurisdiction as a result of the establishment of *super-tribunals*.

<sup>27</sup> *Shi v Migration Agents Registration Authority* (2008) 248 ALR 390.

<sup>28</sup> For background about VCAT see <http://www.vcat.vic.gov.au/about-vcat/who-we-are-o>

<sup>29</sup> In contrast to the Commonwealth, the State governments are not restricted to assign civil and administrative functions to tribunals – hence the power of states to include in the jurisdiction of the *super-tribunals* a wide range of administrative review as well as civil and commercial jurisdictions.

Super-tribunals are, practically and legally speaking, much more than amalgamated administrative review tribunals. Super-tribunals, although not referred to as 'courts',<sup>30</sup> hear original disputes about civil and commercial issues; make final adjudications; can order costs; and the appeals against decisions of super-tribunals are generally made to the supreme courts of the relevant state.

Super-tribunals are unique in character. In many respects, they are akin to 'courts' of a special kind<sup>31</sup> albeit that, consistent with the common law tradition, they are called tribunals. Super-tribunals have now become a particular part of the justice system of Australia, something that ordinary administrative review tribunals never were, since those ordinary tribunals were, in essence, part of the executive branch of government.<sup>32</sup>

The widening of jurisdiction of super-tribunals to include civil and commercial areas has been by stealth and *ad hoc*, rather than by grand design. It is remarkable how the jurisdiction of the respective super-tribunals in the various states differ. In fact, it is not entirely clear why the jurisdiction of the civil courts has been reduced by moving so many areas to the super-tribunals. For example, the parliamentary debates of Western Australia where in the lead up to the establishment of SAT, elaborate mention was made of the rationale and benefits of a consolidated *administrative review* tribunal, but scant, if any, justification was given for the inclusion of civil and commercial matters within the scope of the newly established tribunal.<sup>33</sup> Even in the more recent

<sup>30</sup> In regard to the "court"-like status of a super-tribunal, refer to the Queensland Civil and Administrative Tribunal (QCAT), which is referred to as a 'court of record' in its enabling statute, *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 164(1). QCAT has also been found to be a 'court' in *Owen v Menzies & Ors; Bruce v Owen; Menzies v Owen* [2012] QCA 170 (22 June 2012). In *BGC Construction and Vagg & Anor* [2006] WASAT 367, it was also found that the Building Disputes Tribunal of Western Australia was a 'court' for purposes of *Supreme Court Act 1935* (WA) s 32 so as to award interest to a payment.

<sup>31</sup> Refer to Barrie who compares the super-tribunals to some of the specialist courts in South Africa. GN Barrie "The SAT of Western Australia – an example to follow?" (2010) *Southern African Public Law* (25) 644.

<sup>32</sup> For a discussion why super-tribunals should be seen as part of the judicial rather than executive arm of government, refer to B De Villiers "The SAT of Western Australia – time to end the inquisitorial/accusatorial conundrum about Australia's super-tribunals?" (2014) *University of Western Australia Law Review* 37(2) 182-214 at 199-200.

<sup>33</sup> 'Real benefits can be gained from establishing an *administrative appeals tribunal*. A simple tribunal with quick, easy access could be established. It could operate in a user-friendly manner and be simple and effective. It could coordinate the hundreds of separate laws, rules and regulations applying throughout every facet of government and give them a degree of uniformity.' CL Edwardes, *Hansard* 12 August 2006 at pp 9683-4. (Author emphasis) No mention is made of the non-administrative review functions of SAT.



recommendations by the Parliament of Western Australia for the civil and commercial jurisdiction of SAT to be expanded,<sup>34</sup> there is no reference to a grand design or a comprehensive explanation as to why the civil and commercial jurisdiction of the courts is being diminished by the transfer of these functions to SAT.

Most notably, there is an absence of a coherent rationale in all federal states of Australia as to why certain commercial and civil matters are included in the jurisdiction of super-tribunals, while other civil and commercial matters remain with the courts. As a result of the absence of a general philosophical plan or guiding principle as to what jurisdictions should be transferred to super-tribunals, the super-tribunals of the respective States resemble a smorgasbord of jurisdictions with little intra-state consistency.<sup>35</sup>

Even more inexplicable, is the rationale for creating a civil and commercial jurisdiction within tribunals, rather than expanding the capacity of the court services and encouraging the development of a new culture within the court services. A cynic may say that the creation of the super-tribunals is, in effect, a collective motion of no confidence in the ability of the lower courts to adjust their cultures and to become more user-friendly in the modern milieu. Hence, a new type of 'court', based on the more user-friendly style of tribunals, albeit with an expanded jurisdiction, had to be created.

The reasons for the rapid growth in civil and commercial jurisdictions of the super-tribunals are open for debate, but from the perspective of the author, the following are some of the key motivators for the relocation of functions from courts to tribunals:

- quicker, more efficient and effective resolution of disputes;<sup>36</sup>
- more cost-effective resolution of disputes;<sup>37</sup>

<sup>34</sup> Parliament of Western Australia, *Inquiry into the jurisdiction and operation of the SAT*, Report 14 (May 2009).

<sup>35</sup> The lack of inter-state consistency may be typical of federal systems, but it does pose challenges to members of the public who move between states where the jurisdiction of super-tribunals varies quite a lot.

<sup>36</sup> In SAT, for example, the average benchmark to conclude a new application varies between 8 weeks for 80% new applications (guardianship and administration matters) to 28 weeks for 80% new applications (commercial matters). Few, if any courts, can produce final decisions in such a short timeframe. State Administrative Tribunal *Annual Report 2013-2014* accessible at [www.sat.justice.wa.gov.au](http://www.sat.justice.wa.gov.au) pp9-16.

<sup>37</sup> The emphasis in SAT is on self-representation, with around 80% of litigants representing themselves. In some jurisdictions, such as guardian and administration proceedings, the percentage of self-representation is around 98%. Other common law jurisdictions have also explored ways to assist self-represented litigants in their conduct. Refer for example to the United Kingdom's recommendations in Civil Justice Council Working Group (UK) 'Access to justice for litigants in

- greater access for self-represented litigants;
- specialisation is available to tribunals through the interdisciplinary background of their members;<sup>38</sup>
- extensive use of facilitative dispute resolution to resolve disputes by way of agreement;<sup>39</sup> and
- more flexible and informal procedures during the hearing.<sup>40</sup>

In summary, super-tribunals such as SAT have a commercial, civil, review and vocational jurisdiction; they form part of the judicial system of Australia albeit that they are not called “courts”; and the processes and procedures are of similar informal nature as traditional review tribunals.

The advent of super-tribunals in Australia has changed the face of the Australian justice system. The changes brought about by the super-tribunals are permeating the higher courts and it would not be surprising if, in time, self-represented litigants will demand that the procedures of the higher courts also be relaxed so as to facilitate greater flexibility; less formality; less emphasis on the rules of evidence; greater access to self-representation; and greater use of facilitative dispute resolution.

### III THE CHANGES THAT SUPER-TRIBUNALS HAVE BROUGHT TO THE LEGAL LANDSCAPE

Given that administrative tribunals have been around for so many years, why is the advent of super-tribunals anything special?

The answer is simple: the character and powers of the super-tribunals are entirely different from those of traditional tribunals.

person (or self-represented litigants)' November 2011 <http://www.judiciary.gov.uk/wp-content/uploads/2014/05/report-on-access-to-justice-for-litigants-in-person-nov2011.pdf>

<sup>38</sup> Members of Tribunals are attracted from a wide range of disciplines – the majority being lawyers but other disciplines such as accountants; planners; architects and medical professionals are also found amongst full time and part time (sessional) members.

<sup>39</sup> Although alternative dispute resolution is pursued by all courts in Australia, in tribunals, it is the members themselves, rather than staff or private persons, who often conduct mediation and conciliation. This means that persons with high seniority, as well as a very good understanding of tribunal case law, practices and procedures, get to undertake alternative dispute resolution. It is estimated that in SAT, around 80% of matters that are referred to mediation, settle.

<sup>40</sup> Although super-tribunals function within the legal tradition that characterises adversarial systems, the procedures of tribunals have been adjusted to be more user-friendly; to provide for a greater role of the member to participate in the hearing; and there is a great obligation on the member to assist parties in presenting their case. See B De Villiers, 2014: 182-214.

Traditional tribunals were an extension of the executive branch of government and the decisions that those tribunals made were not 'judicial' but rather administrative – hence the requirement of traditional tribunals to provide the 'correct and preferable' (administrative) decision. Super-tribunals on the other hand are an extension of the judicial system and they perform a judicial function whereby a dispute (including civil and commercial disputes) between two opposing parties is determined on the basis of legal principles within the context of the adversarial system. The approach adopted in super-tribunals to the resolution of disputes is therefore more relevant to the wider court system than the practices of ordinary tribunals ever were. Super-tribunals are often the first point of contact between members of the public and the justice system and it can be expected that those same members of the public (including legal practitioners) would expect similar procedures and practices in higher courts as their cases progress through appeals.

The processes adopted by super-tribunals are demonstrating to the public that: self-representation in complex legal proceedings is feasible; a user-friendly courtroom atmosphere is not an idle wish; alternative dispute resolution is a real possibility rather than protracted litigation; processes to deal with expert evidence can be simplified; and that user-friendly legal processes and practices can be a reality. At the same time, it is acknowledged by the author that self-representation and informal procedures in lower courts are often easier to achieve than in higher courts, where the issues may be very complex and a far greater degree of formality, knowledge and skill are required.

Courts have often been criticised for 'de-humanising'<sup>41</sup> the process of dispute resolution because of the strict compliance with formalities; the emphasis on legal training; and the rigours of court procedures.<sup>42</sup> Super-tribunals have shown that this can change by giving parties an opportunity to take greater control over their matter.

The outcome of the change that has been initiated by the super-tribunals cannot be predicted, but one can identify certain trends that may characterise a new scenario. For example:

<sup>41</sup> M King, A Freiberg, B Batagol and R Hyamns *Non-adversarial justice* (2009) Federation Press: Sydney, 210.

<sup>42</sup> It has been acknowledged by a judge of the federal circuit court of Australia that self-represented litigants find that a courtroom is a "confusing, alien environment" as a result of its "arcane rules and practices." SH Scarlett "Litigants in person: Guidelines for the Federal Circuit Court" (2014) *Journal of Judicial Administration* 24: 4-17 at 10.

### A *Increased self-representation in courts*

Self-representation, where parties prepare and argue their own cases, is forcing its way into the Australian legal system on a scale not previously seen.<sup>43</sup> Although lower courts have for many years become used to some degree of self-representation, the higher courts up to the High Court of Australia itself, is now becoming the stomping ground of litigants in person.<sup>44</sup> This phenomenon may be welcomed by some and despised or dreaded by others,<sup>45</sup> but the trend is set and the tempo is likely to increase.<sup>46</sup> The courts at large, and the higher courts in particular, will have to adapt and adjust to un-robed civilians occupying the corridors of legal power.<sup>47</sup> Not all self-represented persons are “querulous” or “vexatious”, on the contrary, by far the majority of self-represented persons have a bona fide desire to resolve the dispute with the minimum cost but according to its merits.

While lawyers are trained in the complex procedures and timelines of the courts, staff and judges will increasingly be under pressure to explain court processes to self-represented litigants; to be flexible when documents or submissions do not comply with strict requirements;<sup>48</sup> and to deal with

<sup>43</sup> In the matter of *In Marriage of Johnson* (1997) 139 FLR 384 at 206; 22 Fam LR 141 the court set out detailed guidelines as to what it saw as the obligation on presiding officers to assist self-represented persons. Some of the guidelines set by the court are: to inform the parties about the general procedure of a hearing; to assist parties when inadmissible evidence is tendered; to ensure the “playing field is level” at all times; to assist parties to identify all relevant submissions so ensure that substantive issues are dealt with.

<sup>44</sup> Allsop CJ observed after having dealt with self-represented litigants: “Dealing with litigants in person is difficult.” *SZRUR v Minister of Immigration and Border Protection* (2013) 216 FCR 445; [2013] FCAFC 146 at [53]. Some would say this is an understatement.

<sup>45</sup> Davies J has made the following observation about the challenges faced when dealing with self-represented litigants: “The question of how to cope with [self-represented litigants] is the greatest single challenge to the civil justice system at the present time....cases in which one or more of the litigants is self-represented generally take much longer both in preparation and court time and require considerable patience and interpersonal skills from registry staff and judges.” GL Davies “The reality of civil justice reform: why we must abandon the essential elements of our system” (2003) *Journal of Judicial Administration* 12: 155.

<sup>46</sup> See Institute for Judicial Administration *Litigants in person: Management plans – Issues for courts and tribunals* (2001) AIJA: Victoria. Note in particular the Possible Guidelines for dealing with self-represented litigants from pages 28-29. An observation is made at page 18 that – “There is an underlying tension in the relationship between court staff and litigants in person, caused by the fact that litigants in person often have a pressing need for the very information which court staff are unable to provide, namely competent legal advice. Court staff have to tread a fine line between providing a proper explanation, and giving advice on the merits of the claim. This distinction is regarded by some as legally and practically unworkable.”

<sup>47</sup> See for example *Re F: Litigants in person Guidelines* (2001) 161 FLR 189; 27 Fam LR 517; [2001] FamCA 348 at [178].

<sup>48</sup> The High Court commented in 1994 on the challenge that self-represented litigants face to properly identify the issue/s in their case. The Court said: “a frequent consequence of self-representation is that

hearings where submissions and evidence are mixed.<sup>49</sup> The super-tribunals have already adopted informal practices where self-represented litigants are allowed to speak and tell their story without unnecessary interruptions about admissibility or relevancy of evidence, with the presiding officer separating evidence from submission, and determining the weight that is to be given to evidence.<sup>50</sup> Dealing with self-represented parties within the court system already requires judges to be flexible and very pragmatic about the way in which a hearing is managed and it will become even more so.<sup>51</sup>

Litigation in future may see the role of lawyers limited to specific aspects of a proceeding, rather than managing the proceeding in its entirety. For example: lawyers may be called upon to draft submissions or review witness statements, or to assess the evidence of the opposing side, while the oral presentations and examination of witnesses are undertaken by litigants in person. There is already evidence of this happening where lawyers provide only a limited service in case preparation or settling documents.<sup>52</sup> The courts would have to adjust accordingly. Judges may also have to be more active in their examination of witnesses; assisting a person to properly identify the issues in dispute; or highlighting aspects of the evidence that may be of relevance to a particular proposition.<sup>53</sup> Although the traditional adversarial approach in Australia is for

the court must assume the burden of endeavouring to ascertain the rights of parties which are obfuscated by their own advocacy." *Neil v Nott* (1994) 121 ALR 148; 68 ALJR 509; [1994] HCA 23 at [5].

<sup>49</sup> Refer for example to confusion that may arise when a self-represented person fails to draw a distinction between "submissions" and "evidence". The Court may then direct the person to move to the witness box to be sworn and to give evidence, where after the person may return to the bar table and make submissions. *SZRUR v Minister of Immigration and Border Protection* (2013) 216 FCR 445; [2013] FCAFC 146 at [40]. The same confusion can arise when affidavits are drawn, where fact, submission, contention and allegation may all mixed up to present a concoction of uncertainty. Having a person move between the witness box and the bar table for purposes of "evidence" and "submission" can, however, in the view of the author, be very mechanical, disruptive and confusing.

<sup>50</sup> See Nicholson, J "Australian experience with self-represented litigants" (2003) *Australian Law Journal* 77: 820 for examples of the challenges that are faced by the courts in dealing with self-represented litigants.

<sup>51</sup> It has been recognised by the Department of the Attorney General in Western Australia that self-represented litigants face several hurdles such as lack of preparation; lack of knowledge about process and content; lack of advocacy skills; lack of objectivity to assess the weaknesses of their own case; and prone to lodge irrelevant material. Department of the Attorney General *Quality before the law bench book (WA)* (2009) Perth.

<sup>52</sup> I McCowie "Self-represented parties and court rules in the Queensland courts" (2014) *Journal of Judicial Administration* (24) 18-29 at 23.

<sup>53</sup> Refer for example to the SAT Act (s32(6) and (7) which places an obligation on the Tribunal to explain to the parties the nature and implications of assertions; to explain procedures to parties; and to ensure that all relevant material is disclosed.

the judge to listen with little, if any, interventions, the experience of super-tribunals is that self-represented parties require assistance to examine witnesses and it is often left to the tribunal to conduct a thorough examination of a witness to ensure that all relevant evidence is before the Tribunal and potential inconsistencies are explored. It is particularly in the case when experts are called, that the tribunals generally take an active approach in examination.

Case management, and assistance rendered by the courts, will need to increase to serve self-represented litigants. This would come at a cost for courts in terms of training, educative material and time. Currently, for understandable reasons, the court system in general with its complex procedures and stringent requirements does not sit well with self-represented litigants. The volume and complexity of cases in higher courts often do not allow for the informality and flexibility of the lower courts and tribunals. On the other hand, dealing with self-represented litigants is demanding. It requires skills for which judges may not always be trained and it often requires higher levels of judicial involvement and commitment.<sup>54</sup>

The reasons for the increase self-representation in courts and tribunals are varied. Cost of litigation is no doubt a major factor,<sup>55</sup> but other factors may be: the self-help, do-it-yourself culture of the contemporary society; the availability of 'Senior Counsel Google' and other self-help internet-based schemes; dissatisfaction or negative experiences with the legal profession; the demands by politicians for the courts to become more accessible; and higher levels of education in the general public which reduces the fear of appearing in one's own case.<sup>56</sup>

Empirical data in Australia about the experiences of self-represented persons and their perception of the court process is virtually non-existent. Although self-representation is on the increase, the subjective experiences of those persons are, largely, under-researched.

The author recently undertook quantitative research on behalf of SAT, of

<sup>54</sup> E Richardson *Self-represented parties: a trial management guide for the judiciary* (2004) County Court of Victoria, Melbourne.

<sup>55</sup> The President of the Supreme Court of Appeal of the State of Queensland recently observed that the "numbers of self-represented litigants are likely to increase, not decrease, as the cost of access to justice rises and legal aid budgets shrink." M McMurdo "The self-represented litigant in the Court of Appeal, Supreme Court of Queensland" (2014) *Journal of Judicial Administration* 24: 13-17 at 16.

<sup>56</sup> These reasons for self-representation are not unique to Australia. Similar reasons have been identified in Canada – see J McFarlane (2013) *National Research Study – Self-represented Litigant Project*

[http://www.lsuc.on.ca/uploadedFiles/For\\_the\\_Public/About\\_the\\_Law\\_Society/Convocation\\_Decisions/2014/Self-represented\\_project.pdf](http://www.lsuc.on.ca/uploadedFiles/For_the_Public/About_the_Law_Society/Convocation_Decisions/2014/Self-represented_project.pdf)

the experience of litigants in person, in strata title disputes (community living). This is a jurisdiction where a large number of persons are self-represented; where conflict is often intense; and where the statutory framework is quite complex. It can therefore be challenging to navigate one's way through the Strata Titles Act; to lodge an application; and to collect and present the evidence to support a finding. The research covered more than five years of cases and persons were invited to reply to a questionnaire with detailed questions about their experiences during the different phases of a hearing, – starting with the lodgement of an application, to mediation, or to a hearing. The findings showed that 59% of self-represented litigants prepared on their own for the hearing by way of the SAT on-line information; 70% prepared written submissions without any legal assistance and/or submitted written statements of evidence prepared without the assistance of a lawyer. A very high 89% of self-represented parties said, following their experience of the proceeding, that the decision to represent themselves was the proper decision.<sup>57</sup> These results are encouraging and illustrate how relatively complex processes can be simplified to suit self-represented litigants.

Self-representation is, from a practical perspective, a major challenge to the courts, the legal profession, governments, and the public. Regardless of the progress that has been made in Australia to accommodate self-represented parties, there remains a distinct lack of adequacy, especially as matters progress to the higher courts.<sup>58</sup> The challenge to accommodate this phenomenon requires an integrated response from all levels of government and the legal profession. This has been summarised well by the Civil Justice Council Working Group (UK) when it said:

'Self-represented litigants are users of the civil justice system, and the system exists for its users.... Everything must be done to simplify and demystify the law and the system, including its language. This includes Court forms, procedures and hearings'.<sup>59</sup>

<sup>57</sup> This outcome is remarkable because it means that even those parties who had been unsuccessful, felt that it was the right decision to represent themselves. B De Villiers "Self-represented litigants and strata title disputes in the SAT - an experiment in accessible justice" (2014) *Journal of Judicial Administration* 24: 30-45.

<sup>58</sup> T Sourdin and N Wallace "The dilemmas posed by self-represented litigants: the dark side" (2014) *Journal of Judicial Administration* 24: 61-70.

<sup>59</sup> <http://www.judiciary.gov.uk/wp-content/uploads/2014/05/report-on-access-to-justice-for-litigants-in-person-nov2011.pdf> at 9.

### B *Facilitative dispute resolution – the certainty of settlement*

Courts across Australia (and in many other parts of the world) increasingly encourage parties to participate in mediation and conciliation as a way to resolve a dispute through agreement rather than litigation.<sup>60</sup> The benefits of agreed outcomes are obvious. For example: saving costs to parties and courts; restoring relationships between parties; bringing certainty and reducing appeals; closer involvement of parties in the outcome; and a generally less-litigious approach to dispute resolution. The non-litigated resolution of disputes is often referred to as 'alternative dispute resolution' (ADR).

SAT uses what it calls '*facilitative* dispute resolution' to encourage and assist parties to settle disputes by way of agreement.<sup>61</sup> The concept 'facilitative dispute resolution' is preferred to 'alternative dispute resolution' because 'facilitative' emphasises that agreed outcomes is part of the core business of the Tribunal and not an 'alternative' process to dispute resolution. Parties who litigate in the Tribunal can expect, with rare exception, that concerted efforts will be made by the Tribunal to facilitate an agreement between the parties. The default position of the Tribunal when case managing a matter, is to explore resolution of the dispute during all phases of a proceeding – from lodgement to an ultimate hearing. The Tribunal is therefore as focused on agreed settlements as it is on litigated outcomes.

Facilitative dispute resolution does not take place outside the scope of services offered by the Tribunal. It is part of the services that SAT offers. In contrast to the traditional notion of a court being a place where disputes are determined by a judge after a hearing, parties in SAT know that mediation, conciliation and other forms of facilitation, are inherently part of the Tribunal's operating culture.<sup>62</sup> The Members of the Tribunal are experienced and accredited mediators,<sup>63</sup> and they actively participate in the facilitated dispute resolution process. Parties are therefore not left to their own devices or reliant on private mediators to attempt to resolve a dispute by agreement. SAT offers

<sup>60</sup> It has been suggested that despite the increase in the Australian population, the overall workload of court and tribunals have been decreasing – possibly as a result of alternative dispute resolution that plays such a significant role in dispute resolution in Australia. For a useful overview refer to T Sourdon *Alternative dispute resolution* (2012) Thompson Reuters Sydney at 252.

<sup>61</sup> See Parry and De Villiers, 2012: 111-121 at 112: "Facilitative dispute resolution by the Tribunal is therefore a part of its core functions."

<sup>62</sup> Refer to the SAT brochure about "mediation":

[http://www.sat.justice.wa.gov.au/\\_files/Mediation\\_Pamphlet\\_July\\_2014.pdf](http://www.sat.justice.wa.gov.au/_files/Mediation_Pamphlet_July_2014.pdf)

<sup>63</sup> Tribunal members are accredited in accordance with the Australian National Mediation Standards: See <http://www.msb.org.au/sites/default/files/documents/Practice%20Standards.pdf>



the mediation services for free to the parties.

The facilitative dispute resolution commences at the first directions hearing where the member generally would enquire from parties what the dispute is about, whether settlement options have been explored, and so on.<sup>64</sup> Facilitative dispute resolution continues during subsequent mediation or compulsory conferences, and it may even continue during the hearing.<sup>65</sup> In contrast to the courts, where mediation is generally conducted by staff of the courts or by external mediators (with some courts not even offering mediation to self-represented litigants), in SAT, the same members who preside in hearings also undertake mediation (albeit that a member may not hear a matter if the member has mediated it). In the view of the author, the benefits of member-mediation as conducted by SAT are twofold: firstly, member-mediators are up to date with the recent decisions of the Tribunal and can therefore direct parties to relevant case law for consideration. The mediator is therefore not merely the chairperson of a discussion, but actively participates with parties by exploring options to settle; secondly, member-mediators often have added credibility because they also preside at hearings where disputes are determined. The benefit of a judge-mediator adds to the weight that parties may attach to the interventions of the mediator during joint and separate mediation sessions.

It is therefore not surprising that such a high percentage matters in SAT resolve by way of facilitative dispute resolution. The mediation process, in general, is very informal and it offers to self-represented litigants particularly, an opportunity to explore settlement in a more relaxed atmosphere. Self-represented litigants also feel more empowered in the facilitative dispute resolution process because the emphasis is often on outcome rather than on the litigious aspects of merits and circumstances of the dispute.

In recent research done by SAT about the way in which self-represented litigants experienced the mediation process, the following was found:

- 93% understood the mediation process very well
- only 20% said it was *not* 'ok' to be self-represented

<sup>64</sup> The first directions hearing is usually within 2-3 weeks after a matter had been lodged. This enhances a sense that SAT endeavours to “speedily” (s9(b)SAT Act) to resolve claims and it gives self-represented parties in particular to explain in lay-person terms what their claim is about.

<sup>65</sup> After the first directions hearing, the presiding Member may adjourn the dispute for formal mediation. It is estimated by the author that around 30% of contested matters settle as a result of the “facilitation” that takes place during directions hearings.

- only 12% said they were *not* assisted by the mediator<sup>66</sup>

The entirety of the Tribunal's proceedings is aimed to assist parties to resolve disputes by way of agreement rather than through a determination. It is only when all avenues to reach agreement have been exhausted, that the Tribunal will determine the outcome by way of a hearing.

The Tribunal also uses facilitative dispute resolution to assist parties to reduce the issues on which they disagree; settle the facts of a dispute so as to limit time required in a hearing on matters of fact; or properly assess the expert evidence that is available. All of these efforts substantially reduce the time spent in litigation and, as a result, reduce the likelihood of decisions being appealed. A matter may be adjourned for mediation at any time during a proceeding.<sup>67</sup> Even if the hearing has started, there may be good reason to adjourn a matter to enable parties to take the evidence they have heard into account.

Member-mediators often use sessional (part time) members of the Tribunal who are experts in a particular field (for example builders, medical specialists, engineers, or urban planners) in facilitative dispute resolution.<sup>68</sup> The presence of experts enhances the process of dispute resolution and parties often refer to the expert as a source for information. Even if a matter does not settle, an expert can assist to clarify the issues that are in dispute or to highlight areas in which specialised evidence is required. In this way, self-represented litigants are assisted to better prepare their case.

A useful case management service that SAT offers to parties, and particularly to self-represented litigants, is what is called 'expert conferral'.<sup>69</sup> Expert conferral is not mediation, but it forms part of facilitated dispute resolution where experts are provided a forum to exchange their views prior to the commencement of a hearing. The Tribunal makes available one of its members or an expert sessional member, to meet with the expert witnesses of

<sup>66</sup> De Villiers, 2014: 44.

<sup>67</sup> s54(1) SAT Act.

<sup>68</sup> The principle of making available an expert to assist in mediation is recognised by National Mediation Accreditation Standards which provides as follows: "6. Some mediation processes may involve participants seeking expert information from a mediator which will not infringe upon participant self-determination. Such information is deemed to be consistent with a mediation process if that information is couched in general and non-prescriptive terms, and presented at a stage of the process which enables participants to integrate it into their decision making."

<http://www.msb.org.au/sites/default/files/documents/Practice%20Standards.pdf>.

<sup>69</sup> This is also referred to in some jurisdictions as a "conclave". Refer to the following explanatory note about expert conferral: [http://www.sat.justice.wa.gov.au/\\_apps/news/detail.aspx?ID=972&uid=5546-3309-5234-4199](http://www.sat.justice.wa.gov.au/_apps/news/detail.aspx?ID=972&uid=5546-3309-5234-4199)

the parties, prior to a hearing, to assist them to draw up a list of matters on which they agree; matters on which they disagree and the reason for the disagreement. This facilitation takes place without the parties being present since the experts have, in effect, a duty to assist the Tribunal and not to be an advocate for their instructor's position.<sup>70</sup> The expert conferral not only encourages the development of common ground between the experts, the report prepared by the experts can also provide the parties with a clear idea of the areas that are in dispute and therefore, time spent in hearings is drastically reduced.

Mediation is already widely practiced in the Australian courts and tribunal system. The contributions the super-tribunals may make to promote a greater use of facilitative dispute resolution in the higher courts are:

- An increase in the prominence of mediation and other dispute resolution and dispute minimisation techniques as being a practical default position after a matter had been lodged with a court.
- The use of judges to assist in facilitative dispute resolution, including the mediation of complex issues and chairing expert conferral prior to hearings.
- The widening of the scope of mediation so as to consider all possible options for facilitative dispute resolution. Mediation, in its traditional form, is often too restrictive and should be supplemented by other forms of facilitative dispute resolution.
- The encouragement and rewarding of parties participating in facilitative dispute resolution by providing them with court resources, expert mediators, on-site mediation and access to court facilities to assist in discussions and thereby achieving shorter deadlines to bring a matter to a close. The use of expert conferral to develop common ground between experts can also assist to properly identify and reduce the issues in dispute and reducing time that is required for hearings.
- The use of facilitative dispute resolution not only to settle a matter, but also to assess expert evidence, to reduce the scope or number of issues, and to settle the facts on which there is agreement.
- The pursuit of facilitative dispute resolution during all stages of a proceeding. If it appears that parties may reach agreement even after a hearing had commenced, the hearing can be adjourned and the parties

<sup>70</sup> [http://www.sat.justice.wa.gov.au/\\_files/Expert\\_Evidence\\_Brochure.pdf](http://www.sat.justice.wa.gov.au/_files/Expert_Evidence_Brochure.pdf)

are allowed an opportunity to reflect on the evidence and submissions heard. It is generally preferred that parties reach an agreement rather than receive a court-determined outcome.

The Tribunal's approach to facilitative dispute resolution and mediation in particular, does justice to the following observation by the Mediator Civil Justice Council Working Group of the United Kingdom (2011) in regard to the valuable role of mediation to assist self-represented litigants in hearings:

The role of the mediator is an important one, and mediation needs to be better understood by all participants in the civil justice system. The prospects of success, and fairness in success, may be increased if a party has early advice, if the issues have been defined, and if it is still clear that the court is available to the self-represented litigant.<sup>71</sup>

### C *Simplified legal processes and procedures*

The complexity of court procedures is arguably the most important reason why ordinary people are reluctant, unable or unwilling to represent themselves in hearings. The fear of being at a disadvantage if the other party is represented, probably also contributes to a reluctance to self-represent. The atmosphere of the court room is intimidating; the conflictual nature of proceedings is scary; the procedures and protocols are complex and user-unfriendly; and the interaction between counsel for the respective parties can be frightening. All of these factors contribute to making the courtroom a place where ordinary people find themselves lost, often frustrated, and with a distinct sense of being out of control. This feeling of hopelessness is ironic, because ideally, a courtroom should be *the* place where individuals feel at ease, equal, protected and respected.

The presence of self-represented litigants places additional burdens on the presiding judge to ensure that all relevant facts are raised, issues are properly explored and justice is seen to be done. Justice TH Smith identified several guidelines to assist judges when dealing with self-represented persons. For example:

- explain the role of the judge, particularly, that the judge may need to ask more questions than in the case where both parties are represented;

<sup>71</sup> <http://www.judiciary.gov.uk/wp-content/uploads/2014/05/report-on-access-to-justice-for-litigants-in-person-nov2011.pdf> at 11.

- engage in genuine questioning of witnesses to ensure all relevant facts are known;
- refrain from asking leading questions;
- ensure that the pleadings are clear as to what the issues are to be tried;
- alert parties of their procedural and evidentiary rights; and
- ensure that counsel for the represented parties complies strictly with his/her professional obligations; and does not abuse the unrepresented status of the other party<sup>72</sup>

Although court procedures and practices have developed in the way they did over centuries and for good reasons, there is no reason why processes should not be simplified and demystified so as to ensure greater transparency, increased accessibility, and ultimately greater credibility and legitimacy.

SAT has been designed to create a less onerous process for preparing and conducting hearings. The main objectives of SAT are to deal with questions according to their substantial merits; to act speedily and as informally as possible; to minimise the cost to parties; and to make appropriate use of the knowledge of members.<sup>73</sup> These objectives are inherently sound and could also be applied to superior courts. Although the multidisciplinary background of the Tribunal's members may mean that not all members are trained in the nuances of court room procedures and practices, the non-legally trained members often bring a different style and informality to the hearing room that resonate closely with self-represented parties.

#### D *Investigative but not inquisitorial*

SAT-members have a statutory obligation to play an active role during proceedings, particularly in the case of self-represented litigants. This role may be unfamiliar to adversarial-prone processes where the role of the judge is akin to a silent onlooker with minimal intervention in the conduct of a case. The more active involvement of members in super-tribunals, has caused some observers to label the tribunal practices as 'inquisitorial'<sup>74</sup> and more akin to the European tradition of court practices. This author proposes that the hearing-management practices of SAT as a super-tribunal are, in essence, a

<sup>72</sup> Institute for Judicial Administration *Litigants in person: Management plans – Issues for courts and tribunals* (2001) AIJA: Victoria: 28-29.

<sup>73</sup> s9 SAT Act.

<sup>74</sup> H Katzen, 'Procedural fairness and specialist members of the Administrative Appeals Tribunal' (1995) 2 *Australian Journal of Administrative Law* 170; J Segal, R Creyke, M Sloss et al, 'Inquisitorial practice in Australian tribunals' (2006) 57 *Administrative Review* 17, 17.

continuation of the adversarial traditions of the common law of Australia, but that there has been an evolution in process and procedure to allow for a more investigative judge in proceedings.<sup>75</sup> Although some authors suggest that the distinction between accusatorial and inquisitorial has become superfluous,<sup>76</sup> this author observed that SAT has an investigative rather than an inquisitorial approach and that the former is entirely consistent with evolution in the accusatorial tradition:

Although SAT Act does not refer to SAT as 'inquisitorial' or 'accusatorial', the way in which SAT operates; its case management practices; its wide jurisdiction; its placing in the judicial framework of Western Australia; and the interpretation that has been given to the SAT Act, show that SAT is not a new creature that is founded in the European civil law and traditions. The use of civil law terms and characteristics to describe SAT processes as "inquisitorial" are therefore not helpful. Reference to SAT as an 'inquisitorial tribunal', as is understood in the civil law, is therefore misplaced and should be averted.<sup>77</sup>

SAT-members are obligated by law to take measures that are 'reasonably practicable' to ensure that the parties understand the nature of assertions made and the legal implications of the assertions; to explain to parties the procedures of the Tribunal; to ensure that parties have adequate opportunity to give evidence, call witnesses and cross-examine witnesses; and to ensure that all relevant material is disclosed.<sup>78</sup> These are not "inquisitorial principles" but rather common sense guidelines to ensure that procedural fairness and natural justice are adhered to.

SAT members use the directions hearings (the first appearance soon after an application has been received) and the commencement of hearings, to explain to self-represented litigants the general process of a hearing, the rules and procedures according to which the hearing will be conducted, the role of the member to ask questions, to seek clarification, and to assist parties to fully present their case. The commencement of a hearing is often an educative exercise where processes are explained and parties, especially self-represented

<sup>75</sup> De Villiers, 2014: 182-214.

<sup>76</sup> See for example C Mantziaris, 'Client privilege in administrative proceedings: killing off the adversarial/inquisitorial distinction' (2008) 82 *Australian Law Journal* 397 where Mantziaris states that the 'troubled distinction between adversarial and investigate proceedings no longer serves any purpose.'

<sup>77</sup> De Villiers, 2014: 214.

<sup>78</sup> s32(6)-(7) SAT Act.

litigants, can ask questions about procedures. The time spent on explaining basic procedures contributes to less time being spent on dealing with interruptions during the hearing.

In quantitative research done by SAT in 2014 about the experiences of self-represented litigants, only 17% of interviewees said they found the directions hearing complex and only 16% of interviewees said they found the hearing to be complex.<sup>79</sup> This is a very small percentage and can in large, be attributed to the time spent by members to explain hearing processes. It is therefore not surprising that in response to the question whether it was the right decision to self-represent, 89% of interviewees responded 'yes'.<sup>80</sup>

The formality in which SAT hearings are conducted is generally influenced by the attendance of self-represented litigants. The extent of involvement of the Member is also influenced by the attendance of one or more self-represented litigants. Although the courts may be, by nature, more formal than SAT, the following are some of the processes followed by SAT that may, in due course, become more pertinent in the higher courts when dealing with self-represented litigants:

- Adopt a positive approach to self-represented litigants. Self-represented litigants are not all 'troublemakers' or querulous. In fact, most self-represented litigants are ordinary members of society simply attempting to enforce or defend their rights.
- Taking time at the commencement of the hearing to explain processes and procedures and allow opportunity for questions to be asked; and also allowing opportunity during the hearing to find out if the self-represented litigant understands what is happening; whether they wish to ask any questions or whether they wish to adjourn to collect their thoughts.
- Providing on the webpage of the courts, video material in which the conduct of a hearing is demonstrated and the basic rules are explained.
- Ensuring that the issue/s the subject of the dispute, is clearly articulated. If several issues are raised, set out with the parties a process whereby each can be dealt with separately so as to prevent confusion and repetition. The hearing may benefit by setting an agenda and explaining to the parties how the hearing will be conducted. It is not

<sup>79</sup> B De Villiers "Self-represented litigants and strata title disputes in the SAT - an experiment in accessible justice" (2014) *Journal of Judicial Administration* 24: 30-45 at 44-45.

<sup>80</sup> *Supra* page 45.

uncommon for SAT to use a whiteboard to list the issues and to structure the hearing to deal with each issue.

- Explaining basic terms and steps to self-represented litigants such as: making an opening and closing statement; the difference between a 'submission' and 'evidence'; and when an opportunity will be given to cross-examine witnesses.
- Shielding the self-represented litigant against unnecessary interruptions from the opposing counsel, but at the same time giving counsel the assurance that submissions will be heard and the weight that should be given to evidence.
- Actively questioning witnesses to ensure all information of relevance to the proceeding is made known to the court. The judge may even commence with cross-examination so as to save time and to ensure that time is not wasted on irrelevant questions.
- Interrupting a hearing if necessary to explain to a self-represented litigant a particular procedural point.
- In general, adopting an atmosphere in which the law serves the parties rather than the parties serving the law. Attempting to remove or lessen the burden that a courtroom brings and create a sense of fairness where the merit of the dispute is heard, even if articulated by a lay person.
- Finally, the line between being the judge and being an advocate should for obvious reasons not be crossed. This is a key difference between an adversarial and an inquisitorial approach. The member in SAT does not collect evidence; build a case; does not advocate a particular view; and remains impartial even when questions are put.

#### *E Use own knowledge and expertise*

Traditional, administrative review tribunals allow the members of a tribunal to use their own knowledge about a subject matter to reach the correct and preferable decision. An administrative review tribunal may also inform itself in a manner that it sees fit. This is because, as explained above, review tribunals are associated with line-function departments where decisions of a specific department, for example, in regard to refugees or the issuing of firearms



licenses, are reviewed.<sup>81</sup> In those instances, the tribunal may have to conduct its own investigations into the merit of a decision<sup>82</sup> since the tribunal is, in effect, part of the executive branch of government.<sup>83</sup> Those review tribunals are, as already pointed out, responsible for an administrative rather than a judicial function.<sup>84</sup>

The power for SAT Members to use their own knowledge and to inform themselves has been transferred from the review tribunals, to the super-tribunals.<sup>85</sup> This is an interesting development because it means that super-tribunals, which exercise judicial and not only review functions, are clothed with 'investigative' powers that used to be associated only with traditional, review tribunals. In practical terms, it means that commercial or civil disputes that used to be determined in accordance with certain rules and procedures by the courts, are now determined by rules and procedures that are more relaxed and more akin to administrative review processes.

What do these powers mean in practical terms?

The power for a Member to use his/her knowledge, inevitably raises questions about how the knowledge and experience of the members are put to use, how the rules of natural justice and procedural fairness are complied with, and how perceptions of bias can be averted.<sup>86</sup> In traditional administrative

<sup>81</sup> The classical adversarial approach as it originated in common law as a contest between parties, pre-dates modern day administrative review where decisions are reviewed *within* the executive by a tribunal and where the objective is the best and preferable decision: Mantziaris, 2008: 413. The courts are therefore not as 'equipped [in the same way as tribunals] to evaluate the policy considerations' that underlie many administrative decisions: *Attorney-General (NSW) v Quinn* (1990) 170 CLR 1, 35–7.

<sup>82</sup> See, eg, the Migration Review Tribunal. The immigration tribunals 'have close links to the Immigration Department and Minister in terms of the legislative and administrative framework... Thus the immigration jurisdiction is closely controlled by the Executive for both the immigration tribunals and the AAT in its migration jurisdiction.' Y Ng, 'Tribunal independence in an age of migration control' (2012) 19 *Australian Journal of Administrative Law* 203, 204.

<sup>83</sup> Bedford and Creyke, above n 38, 5–6. Refer also to D G Jarvis, 'Procedural fairness as it applies in the Administrative Appeals Tribunal' (2007) 81 *Australian Law Journal* 465.

<sup>84</sup> D Farquhar, 'Beginner's guide to tribunals in the Northern Territory' (2008) 1 *Northern Territory Law Journal* 79.

<sup>85</sup> See for example s 9(c) and s 32(4) SAT Act. s 9(c) SAT Act empowers the Tribunal to make "appropriate use of the knowledge and experience" of its members, and s 32(4) SAT Act empowers the Tribunal to "inform itself on any matter it seems fit."

<sup>86</sup> Refer to the test for 'reasonable apprehension' from *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70, [100]. Also note the following observation of the High Court in the matter *Re Minister for Immigration and Multicultural Affairs; Ex Parte Epeabaka* (2001) 206 CLR 128, 138:

The kind of conduct on the part of the Tribunal that might give rise to a reasonable apprehension of bias needs to be considered in the light of the Tribunal's statutory functions and procedures. Conduct which, on the part of a judge in adversarial litigation, might result in such an apprehension, might not have the same result when engaged in by the Tribunal.

review tribunals, this power is associated with the Member's knowledge of the functioning of a government department and the decision-maker can therefore 'act on its own view, and to do so without disclosing those views to a person appearing before it'<sup>87</sup> In commercial and civil disputes, however, the power must be exercised with circumspect since those proceedings are more adversarial in nature and the outcome rests on a contest of evidence. The rules of natural justice and procedural fairness require that tribunal members use their knowledge and expertise to *assess* evidence, not to *substitute* it.<sup>88</sup> The involvement of an expert in a Tribunal panel (for example an engineer in a complex building dispute) not only adds to the confidence of parties in the tribunal process, but also enables SAT to fulfil its objectives effectively when conducting a hearing, putting questions to the parties and considering the contentions made and the evidence given. These powers of SAT do not mean that Members conduct investigations on their own<sup>89</sup> or that members come to conclusions based on their own knowledge without giving the parties an opportunity to respond to a proposition. It is accepted, however, that specialist members bring to SAT the benefit of their specialist background to resolve disputes as envisaged by Parliament.<sup>90</sup> Any specialist view or opinion that is held by a member must, therefore, to the extent that it bears on the evidence before the Tribunal in a specific proceeding, be put to the parties to enable them to reply to it.<sup>91</sup> This is consistent with the right of a person to present their case and to know and to be given an opportunity to respond to the

<sup>87</sup> *Minister of Health v Thompson* (1985) 8 FCR 213, 217.

<sup>88</sup>In *J v Lieschke* (1986) 162 CLR 447, 456-7, it was emphasised that the principles of natural justice take into account the nature of the jurisdiction, the nature of the proceedings, the powers to be exercised and the rules of procedure.

<sup>89</sup>Even in guardianship and administration proceedings which are very informal and flexible, SAT staff may make inquiries and obtain medical reports or SAT may request the Office of the Public Advocate or the Public Trustee to undertake an investigation, but:

(a) The SAT member does not conduct or lead the investigation in a manner as understood in the inquisitorial systems;

(b) The rules of natural justice and procedural fairness apply at the hearing; and

(c) In contested applications or appeals of decisions, the SAT processes are akin to the general accusatorial approach.

<sup>90</sup> Refer for example to the decision in *Ego Pharmaceuticals Pty Ltd and Minister of Health and Aging* 2012 [AATA] 113 at para 34-37 in which the role of sessional members and their expertise play in tribunal proceedings.

<sup>91</sup> It was emphasised by the Court of Appeal in the matter of *Dekker v Medical Board of Australia* [2014] WASCA 216 that the Tribunal, regardless of utilising the expertise of its members, must ensure that the rules of natural justice are complied with and in the case where a specific, rather than a general, medical duty was said to exist, a finding of fact to that effect must be made based on the evidence before the Tribunal. See [71-74].

arguments presented against them.

The power of a Member to inform himself is intriguing because the SAT Act does not set out the confines within which the power is to be exercised. The power must be discharged in a manner consistent with other common law principle as complying with the rules and natural justice and procedural fairness. The power to inform is therefore not as wide in scope as it may seem at first glance. It is, arguably, the power that is most often construed as being 'inquisitorial' in nature.<sup>92</sup> In essence, SAT is not under a duty to inquire; it *may* inform itself, including through the use of the expertise available to it;<sup>93</sup> it is not SAT's role to run a party's case; and it does not act as the 'protagonist' in a manner as associated with civil law inquisitor-judges.<sup>94</sup> This is consistent with the view expressed in *Battenberg v The Union Club*,<sup>95</sup> namely, that the tribunal's powers do not 'impose on it an obligation to inquire into every matter a party asserts might be relevant to the facts in issue'. The authority to seek information therefore does not translate into a duty to seek information. If, however, the Member informs itself by way of research, it is under a duty to disclose its research, views or opinions to parties so they can respond to it. When 'informing itself', SAT must guard against being perceived as biased against a party or that it comes to a conclusion independent from the evidence submitted to it. This again highlights the fundamental difference between the SAT-common law approach and inquisitorial systems, where the magistrate-inquisitor conducts the investigation. The common law 'bias rule' recognises the right of a person to have their case determined by a tribunal which is not

<sup>92</sup> It has been held that a tribunal panel may, for example, 'inform itself' by using Google to check on the background and expertise of an expert called to give evidence. In *Weinstein v Medical Practitioners Board of Victoria* [2008] VSCA 193 (30 September 2008), 25, the Court observed the following about the potential scope of the right of a tribunal to inform itself:

The words 'may inform itself ...' were plainly intended to have work to do. They have a meaning and a purpose quite distinct from the meaning and purpose of the words 'not bound by rules of evidence'. Far from the phrase 'may inform itself' being negated or neutralised by other provisions, these words play a necessary part in defining the character of the formal hearing which the panel conducts. For the purposes of 'determining the matter before it', the panel is authorised to 'inform itself in any way it thinks fit' subject always to the overriding obligation to accord procedural fairness.

<sup>93</sup> See *Ego Pharmaceuticals Pty Ltd and Minister of Health and Aging* 2012 [AATA] 113 at para 34-37 where the important role of specialist members and the expertise they bring to a tribunal was considered and it was held that the expertise of an expert sessional member did not constitute apprehended bias for the reason that the tribunal relied on such knowledge for purposes of its decision-making.

<sup>94</sup> *Prasad v Minister for Immigration and Ethnic Affairs* (1985) 6 FCR 155, 169.

<sup>95</sup> [2004] NSWADT 285, para 23-4.

actually biased,<sup>96</sup> or appears to be biased.<sup>97</sup>

#### F *Tribunal is not bound by rules of evidence*

One of the most challenging aspects of legal procedure for self-represented litigants is to comply with the rules of evidence as contained in the *Evidence Act 1906* (WA). Failure to comply with the rules of evidence can, in the last, give rise to objections during the hearing and in the worst, that evidence is rejected. The desire of many self-represented litigants to 'tell their story' without being interrupted is often torpedoed as a result of the application of the rules of evidence about what is admissible and what is not. In review tribunals, however, the rules of evidence traditionally do not apply. This reflects the common law as expressed by Lord Denning when he observed:

Tribunals are entitled to act on any material which is logically probative, even though it is not evidence in a court of law.<sup>98</sup>

The super-tribunals have adopted the approach of the review tribunals in regard to the rules of evidence. In essence, the rules of evidence do not apply to SAT<sup>99</sup> except if SAT adopts those rules, practices or procedures. SAT must, however, act according to 'equity, good conscience and the substantial merits of the case'.<sup>100</sup> That does not mean the rules of evidence can simply be disregarded. The rules continue to play an important role when the Tribunal weighs evidence before it. The rules of evidence provide essential guidance as to what type of evidence should be admitted to determine the outcome of a proceeding or what weight should be given to evidence.<sup>101</sup> The Federal Court has summarised the approach to be taken by super-tribunals to the rules of evidence as follows:

<sup>96</sup> *Chin v Legal Practice Board of Western Australia* [2011] WASCA 110, [5] (Newnes JA) referring to *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507.

<sup>97</sup> *Chin v Legal Practice Board of Western Australia* [2011] WASCA 110, [3] (Newnes JA) referring to *Johnson v Johnson* (2000) 201 CLR 488.

<sup>98</sup> *TA Miller Ltd v Minister of Housing and Local Government* [1968] 1 WLR 992, [995]. See, eg, *Collector of Customs (Tasmania) v Flinders Island Community Association* (1985) 7 FCR 205, [210]–[211] in which it was found that the AAT had erred in law by drawing conclusions on its own understanding of aspects of Aboriginal people's culture and not on the evidence before it. Such a conclusion was therefore not based on evidence that was logically probative.

<sup>99</sup> SAT Act s 32.

<sup>100</sup> SAT Act s 32(2). The practical meaning, application and scope of acting in accordance to 'equity and good conscience' requires further clarification and development.

<sup>101</sup> *Gardiner v Land Agents Board* (1976) 12 SASR 458, 474–5; *Re Pochi and Minister of Immigration and Ethnic Affairs* (1979) 36 FLR 482.

The tribunal is not bound by the rules of evidence ... This does not mean that the rules of evidence are to be ignored. The more flexible procedure provided for does not justify decisions made without a basis in evidence having probative force.<sup>102</sup>

The apparently broad power of SAT to admit evidence into a proceeding, is tempered by the obligation of the Tribunal to adhere to the rules of natural justice,<sup>103</sup> to ensure that evidence is relevant, and that evidence being relied upon is logically probative of a fact in issue.<sup>104</sup>

The benefit, from the perspective of self-represented litigants, is that SAT hearings are, generally speaking, not interrupted with objections to the admissibility of evidence. However, when it comes to the making of submissions by parties, the Tribunal is often invited to attach less weight to certain evidence with reference to the rules of evidence.<sup>105</sup> The Tribunal would also, in its reasons for its decisions, refer to and rely on the rules of evidence and other relevant principles of common law, to explain why particular evidence is accorded more weight than other evidence.<sup>106</sup>

The atmosphere in which self-represented litigants present their case is therefore more relaxed and conducive to the involvement of lay persons, than

<sup>102</sup> *Rodriguez v Telstra Corporation* [2002] FCA 30, [25].

<sup>103</sup> See, eg, although a tribunal such as SAT may not, when it puts questions to a witness, be subject to the rule in *Brown v Dunn* (1893) 6 R 67 (HL) as per *Re Minister for Immigration and Multicultural Affairs* [2003] HCA 60 (8 October 2003), 57, the Tribunal may nevertheless have to comply with the essential elements of the rule so as to ensure procedural fairness to the parties.

<sup>104</sup> See, eg, the way in which SAT dealt with a case of unlawfully obtained evidence, by applying the factors stated by the High Court of Australia in *Bunning v Cross* (1978) 141 CLR 54 to guide the exercise of judicial discretion as to whether to exclude the evidence, before having regard to the statutory framework in the SAT Act that: 'militates ... against the exclusion of ... illegally obtained material, by reason of the obligation imposed on the Tribunal by s 32(2)(b) to act according to equity, good conscience and the substantial merits of the case': *Department for Consumer and Employment Protection and Chequecash Pty Ltd* [2008] WASAT 168 (S), [8], [39]; see also [42].

<sup>105</sup> See, eg, *A and Commissioner of Police* [2005] WASAT 121 where the Tribunal relied on the evidentiary rule of 'relevance' to determine if information about outstanding criminal charges could be taken into account in the licensing of a person for vocational purposes. In this regard the Tribunal adopted an approach consistent with the ss 55, 56 of the *Evidence Act 1995* (Cth) which provides that in order for evidence to be admissible, it must be 'relevant' to the proceeding. On appeal, Johnson J affirmed the decision of the Tribunal and said the following about the use of the test of 'relevancy':

In the absence of any binding or compelling authority that evidence of unresolved criminal charges is irrelevant to satisfaction as to good character on a licence application and such evidence is therefore inadmissible, I consider that the pending charges, evidenced by tendering the Statement of Material Facts, are relevant and admissible and cast sufficient doubt to make a conclusion of good character something that cannot be reached. See *Grover v Commissioner of Police* [2005] WASC 263, [49].

<sup>106</sup> See, eg, the matter of *Legal Practitioners Complaint Committee and Trowell* [2009] WASAT 42 where SAT considered the application of the common law rule of *Jones v Dunkel* (1959) 101 CLR 298 (failure to call a witness) to the proceedings to give evidence before the tribunal.

the case would be in the courts.

In conclusion, in SAT hearings, the Tribunal is not bound by the rules of evidence, but those rules still provide a useful guide to weigh evidence and to direct and manage a hearing.

Evidence that ordinarily may not be admissible in the courts,<sup>107</sup> may therefore be allowed and relied upon in the Tribunal.

#### IV SUMMARY

The court and tribunal-system in Australia is undergoing major change. A key driver to the change is to create greater access to courts and tribunals to self-represented litigants, to simplify court procedures and to make greater use of facilitative dispute resolution. The super-tribunals, which in many respects have the powers and functions of courts, have shown how creative and flexible rules and procedures can be employed to facilitate self-representation. As has been demonstrated in this article, a super-tribunal such as SAT has shown how fairness and simplicity can be achieved within the context of the Australian legal traditions. The experiences of SAT may in particular contribute to greater accessibility to justice in the following ways:

- Increased self-representation, which in turn, requires more educative materials to be made available by courts; training of judges and staff to deal with self-represented litigants; more effective case management during the early stages of an application; and relaxed and informal procedures.
- Greater reliance on facilitative dispute resolution to bring proceedings to a settlement, to reduce the issues in dispute, to clarify the issues in dispute or to assess expert evidence. Facilitative dispute resolution should be pursued at all stages of a proceeding (eg during initial case management, at formal mediation, and during the hearing).
- Increased investigative involvement of presiding officers whereby the judge or member as passive onlooker is replaced, when the case so requires, to the active participant who explains legal principles; examines witnesses; and facilitates agreement.
- Relaxing (but not discarding) the rules of evidence to create an atmosphere more conducive for self-represented litigants to tell their story without being unnecessarily interrupted. The rules of evidence

<sup>107</sup> *Wignall and Commissioner of Police* [2006] WASAT 206, [280].

therefore becoming less important as a 'gatekeeper' and more important as a 'weighting scale' for evidence.

It seems as if Peter Johnston was correct when in 2005 he predicted the following about the challenges that SAT may face:

As regards the schizophrenic problems associated with the vesting of different jurisdictions in a single adjudicative body, the SAT can be expected to adapt its procedures to accommodate the varying needs of litigants within its distinct divisions.<sup>108</sup>

<sup>108</sup> Johnston, 2005: 4.