

Experimenting in Federal Systems – The Case of the *State Administrative Tribunal* of Western Australia and Accessibility to Justice

*Bertus de Villiers**

Abstract	427
I. Introduction	428
II. States in Federations – Mini-Laboratories	430
III. State Administrative Tribunal – Basic Framework	433
IV. SAT and Accessibility to Justice	435
1. Self-Representation	435
2. Facilitative Dispute Resolution	438
3. Flexible Procedures	441
4. Standard Orders, Pamphlets and Practice Notes	444
5. Expertise of Members	445
6. Speedy Decisions	447
7. No Costs Jurisdiction	448
V. Summary	449

Abstract

Access to justice is an objective that lies at the heart of any system of rule of law. Although procedural accessibility may be achieved with relative ease, it is often practical or substantial accessibility that brings about challenges. The realities of high cost, complex procedures, intimidating processes and the adversarial nature of court proceedings often combine to discourage ordinary citizens to bring their disputes to the judiciary. The State Administrative Tribunal of Western Australia illustrates how states in federations can experiment with their powers for the betterment of society. In

* Dr., BA Law, LL.B, LL.D, Member of the State Administrative Tribunal of Western Australia, Honorary Fellow of the Law Faculty of the University of Western Australia. He is admitted as a legal practitioner in Australia and South Africa. He was closely involved during the constitutional negotiations in South Africa from 1990-96. The author has travelled widely and has undertaken research on constitutional and political developments in various countries. He has published extensively on a wide range of constitutional issues, in particular topics dealing with federalism, protection of human rights, land reform and cultural diversity. He recently acted as the international constitutional expert in the Forum of Federation's projects in Ethiopia, Sudan and South Sudan on federalism, decentralisation and intergovernmental relations.

this article it is shown how the state of Western Australia has used its powers to establish a special tribunal, called the State Administrative Tribunal, where a wide range of civil, commercial, vocational and administrative review disputes are heard. The State Administrative Tribunal seeks to facilitate citizen access to legal proceedings in a manner where individuals may represent themselves; where mediation by trained mediators is actively pursued to resolve disputes; where presiding officers have an obligation to assist parties to properly present their case; and where the fear that citizens hold for legal processes is replaced with confidence to protect one's rights. This article gives insight into the unique ways in which the State Administrative Tribunal operates and the benefits it may bring by ensuring that access to justice is achieved.

I. Introduction

Complaints are often heard about the inaccessibility of the justice system, particularly in relation to it being difficult to access for ordinary people as a result of high costs, the complexity of the law, and the inability of complainants to represent themselves in courts, without the assistance of counsel. Access to justice is seen in many countries as a luxury reserved for the very wealthy. Although the justice process is, in theory, open and accessible, in practice, it is often a "closed shop". The practical exclusion of people from the courts contrasts with the principle of access to justice, which is one of the cornerstones of modern democratic society. It is by ensuring access to justice that harm is prevented and injury is remedied. *John Locke* put it as follows:

"Sec. 20. But when the actual force is over, the state of war ceases between those that are in society, and are equally on both sides subjected to the fair determination of the law; because then there lies open the remedy of appeal for the past injury, and to prevent future harm."¹

It is this very access to justice and fair determination of the law, so as to prevent harm or to seek redress, that is all too often inaccessible to ordinary people.

In recent years, Australia has experienced various initiatives within the respective federal states to simplify legal processes, to encourage self-representation by litigants, and to generally improve accessibility to justice.

¹ *J. Locke*, Second Treatise of Government, 1640, <<http://www.justiceharvard.org>>.

One of the experiments has been to: (a) simplify the review of administrative decisions by amalgamating and abolishing the multiplicity of previous tribunals and boards that were responsible for the review of administrative decisions and (b) to remove a wide range of civil and commercial jurisdictions from the courts to a super-tribunal where dispute resolution processes are more relaxed, informal and user-friendly.

One of the purported benefits of federal systems is the ability for states to experiment, to be small laboratories, and to be learning areas from which other states, or even the federal government, may draw lessons. The ability of federal states to experiment within the framework of their powers has been summarised as follows:

“The legitimacy of the state at the local level can only be strengthened if authorities are able to respond to the legitimate needs of the population.”²

The states in Australia have been experimenting in various ways to facilitate citizens’ access to justice by way of legal aid programmes; small claims courts; mediation and alternative dispute resolution; and integration and amalgamation of tribunals to simplify review of administrative decisions.

One such example of major law reform to facilitate access to justice, encourage self-representation and simplify legal processes, is that of the State Administrative Tribunal (SAT) of Western Australia.³ SAT is a combination of many jurisdictions into a single, integrated tribunal which, although not called a court,⁴ adjudicates disputes over a wide range of civil, commercial, vocational and administrative review matters. SAT presents to West Australians a one-stop-service for many issues that affect their lives in contrast to the previous arrangements where a multiplicity of tribunals and courts had to be navigated to resolve a dispute. SAT and other similar tribunals in other Australian states are commonly referred to as “super-tribunals” as a result of their wide and expanding jurisdiction.

The success of SAT has not only been recognised and lauded by the Parliament of Western Australia, it has also received international acclamation. *Barrie* describes SAT, as follows, in an assessment as to the potential value that SAT may hold for a common law jurisdiction such as South Africa:

² T. Fleiner/W. Kalin/W. Linder/C. Saunders, *Federalism, Decentralisation and Conflict Management in Multicultural Societies*, in: R. Blindenbacher/A. Koller (eds.), *Federalism in a Changing World – Learning from Each Other*, 2010, 110.

³ The State Administrative Tribunal followed in the wake of the Victoria Civil and Commercial Tribunal which was established in 1998.

⁴ S 7 of the State Administrative Tribunal Act (SAT Act) determines that “A tribunal called the State Administrative Tribunal is established”.

“The SAT clearly complements other courts. The SAT can be seen as a specialised version of the ordinary courts similar to the South African experience with special income tax courts, water courts, expropriation compensation courts, the commissioner of patents and the industrial court. In the SAT, a tribunal has been created with members having a greater degree of specialisation that would normally be expected from judges. The SAT has achieved speed, cheapness and efficiency, and functions much more informally than the ordinary courts.”⁵

All Australian states have now established or are in the process of establishing similar super-tribunals.

In this article, an assessment is done of the way in which SAT has contributed to accessibility of justice in Western Australia by allowing and encouraging self-representation by litigants. It is shown how federalism allows, as part of its “self-rule” principle, for states in federations to engage in experimentation such as Western Australia has done, and how those experiences may be considered by other states in the federation. The SAT-experience demonstrates how a state in a federation could, through the proper exercise of its powers, function as a mini-laboratory for the common good of its own citizens and ultimately, for those of the wider nation.

II. States in Federations – Mini-Laboratories

Federalism is, in theory as it is in practice, a many-faced phenomenon.⁶ As *Elazar* has observed – “... the essence of federalism is not found in a particular set of institutions, but in the institutionalization of a particular kind of relationship among the participants in political life”.⁷ One of the key elements of federations is the constitutional right of constituent units that make up the federation, to make autonomous decisions about the matters for which the units are responsible. This principle originates from the fact that in federations, the powers and functions of the federal and state governments are set out and guaranteed by the federal constitution. The units, be they called states, provinces, regions, cantons, or *laender*, may use those constitutionally guaranteed powers to experiment, to improvise and to be

⁵ *G. N. Barrie*, *The State Administrative Tribunal of Western Australia: An Example to Follow?*, *Southern African Public Law* 25 (2010), 644.

⁶ *Kalin* succinctly observes – “What is more difficult to define is the notion of ‘federalism’”. *W. Kalin*, *Federalism and the Resolution of Minority Conflicts*, in: *G. Bachler* (ed.), *Federalism against Ethnicity?*, 2001, 170.

⁷ *D. J. Elazar*, *Federalism and Political Integration*, 1979, 2.

creative provided that state laws comply with the provisions of the federal constitution.⁸

The Latin term “*foedus*”, from which federalism derives its origin, signifies a covenant according to which the relationship between the federal and state governments is akin to a partnership, thus emphasising that the individual units retain elements of their own identity and with the right to pursue their own objectives. Federalism is therefore, about nation building and maintaining a common purpose, without diminishing the identity of the constituting units, regions or groups.⁹ The two levels within a federation, federal and state levels, make decisions over the same people and land and each one has responsibility in which it is autonomous and can act without interference (unless sanctioned by the Constitution) by the other.¹⁰

Elazar referred to the covenant that forms the basis of federalism, as a combination of “shared-rule” and “self-rule”.¹¹

Shared-rule refers to the common power-sharing mechanisms found in federations, of which, the most common is a bicameral, national parliament in which the states are represented; and self-rule refers to the autonomy of the federal and state governments to make and implement decisions, within the limits set by the constitution. Generally, no level of government can therefore interfere with the constitutional powers and functions of another level of government without the oversight of the judiciary.

States in federations are often associated with innovation, experimentation and competition. In one of the most often referred to expositions of the ability of federal states to experiment, Justice *Louis D. Brandeis* observed in a judgment in 1932 the following:

“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”¹²

⁸ See in general *W. Riker*, *Federalism: Origin, Operation, Significance*, 1964; *D. J. Elazar*, *Exploring Federalism*, 1987; *R. Watts*, *Comparing Federal Systems*, 1999; *B. de Villiers* (ed.), *Evaluating Federal Systems*, 1994; *J. Kincaid/G. A. Tarr* (eds.), *Constitutional Origins, Structure and Change in Federal Countries*, 2005; *A. L. Griffiths* (ed.), *Handbook of Federal Countries*, 2005; *A. Majeed/R. L. Watts/D. M. Brown*, *Distribution of Powers and Responsibilities in Federal Countries*, 2006; *R. F. Williams/J. Marko* (eds.), *Federalism, Subnational Constitutions, and Minority Rights*, 2004, and *B. de Villiers*, *Federations: Shared Rule and Self Rule in the Search for Stable Governance*, *Politikon* 39 (2012), 391 et seq.

⁹ For a general discussion on the use of federalism to manage potential ethnic conflict refer to *D. L. Horowitz*, *The Many Uses of Federalism*, *Drake L. Rev.* 55 (2007), 960.

¹⁰ *R. Paddison*, *The Fragmented State* Oxford, 1985, 98.

¹¹ *Elazar* “coined” the concepts of “self-rule” and “shared-rule” to describe the essence of federalism in *D. J. Elazar* (note 8).

¹² *New State Ice Co. v. Liebmann* (1932), 285 U.S. 262, 311.

Bednar, in a recent paper, speaks about how a federal system can nudge states toward “productive experimentation”, where they explore their powers to maximise benefits for their population. *Bednar* considers a variety of inducements that may encourage experimentation; for example, shifting public attention to focus on issues that the governing party may perceive as beneficial to its own interest, to offering party-based rewards that seek to encourage the interests of individual states, such that, they align with those of the national polity.¹³

Centralisation is often seen as standing in contrast with the flexibility that decentralisation offers. This is because, in centralised systems, there is often one rule for all, while in federal systems, it is possible to devise many rules. *Callander* and *Harstad* observe that, in federal and decentralised systems, “once centralized, an issue becomes relatively stagnant with minimal experimentation If states [in a federation] are too similar, they are plagued by free riding and inefficiency and low levels of experimentation.”¹⁴

The reasons for federal states being regarded as laboratories for experimentation are that the states serve a different population, which in itself, brings about some diversity of needs and demands; states may experience different challenges, be it social, political or economic; states may have access to different resources in comparison to other states; and states may have different priorities. Whether state-based experimentation is successful or not, states in federations are often mini-laboratories where policy ventures are initiated and tried-out.

The creativity-ability of federal states is clearly demonstrated in the establishment of the State Administrative Tribunal (SAT). SAT shows how a state can utilise its constitutional powers to improve the quality of life and the access to justice to its inhabitants, even if other states in the federation are not willing to take the same steps. While, on the one hand, experimentation of this kind may be confusing to persons who travel between states, and who wish to commence legal proceedings in different states, on the other hand, the creation of SAT provides insight into how new institutions could be developed by a state to serve the needs of its people. It is therefore not surprising that, with the exception of Tasmania, all the Australian states now have a super-tribunal in place, or are in discussions to establish one.

¹³ *J. Bednar*, Nudging Federalism towards Productive Experimentation, *Regional and Federal Studies* 21 (2011), 503 et seq.

¹⁴ *S. Callander/B. Harstad*, Experimentation in Federal Systems, Paper prepared for Nemmers Conference, Northwestern University, Evanston, May 2012, at <<http://www.econ.northwestern.edu>>.

III. State Administrative Tribunal – Basic Framework

SAT was established on 1.1.2005 as a result of efforts, over a period of more than 20 years, to bring order to the disparate and fragmented system of administrative review in Western Australia. SAT replaced almost 50 courts, tribunals, boards and other adjudicators. It brought clarity and certainty to the inhabitants of Western Australia and has become a one-stop service, where a wide range of jurisdictions that impact upon the daily lives of individuals are heard. SAT has over 900 sources of jurisdiction under about 150 State Acts and regulations authorised by Acts.

Prior to the enactment of SAT, administrative review of state and local government decisions was scattered, inconsistent and most critically, inaccessible to the wide public. Most of the tribunals that undertook reviews of administrative decisions operated in a self-contained way, each being quite separate and distinct from the others, with little, if any, consistency of procedures and decision-making. Some administrative review decisions were made by courts, which generally dealt with litigation that was quite different in character to what is expected of administrative review. Other administrative review decisions were made by the same minister whose departmental decision was being reviewed. This gave rise to concerns about transparency and independence of decision-making. The result was not really a “system” of administrative review at all.¹⁵

A Taskforce¹⁶ which was requested to investigate and report on the improvement of the West Australian system of administrative review and access to justice, identified the following benefits that could result from a single, integrated super-tribunal:

- citizens would gain access to a single, one-stop tribunal, in place of a variety of existing tribunals and courts;

¹⁵ *D. R. Parry/B. de Villiers*, Guide to Proceedings in the Western Australian State Administrative Tribunal Lawbook, 2012, 10. In relation to administrative appeals, SAT's single, comprehensive and coherent structure has replaced a “system” comprised of no less than six formal tribunals, a State government authority, a review board, the Supreme Court (in relation to decisions under 33 Acts), the District Court (in relation to decisions under 22 Acts), the Local Court (in relation to decisions under 31 Acts), the Courts of Petty Sessions (in relation to decisions under 15 Acts), various ministers (in relation to decisions under 63 Acts) and other public officials (in relation to five types of decisions under three Acts). In relation to vocational regulation, SAT has replaced a “system” under which disciplinary matters in relation to regulated vocations were determined by no less than 22 separate boards established under a corresponding number of statutes.

¹⁶ Western Australian Civil & Administrative Review Tribunal Taskforce Report on the Establishment of the State Administrative Tribunal, *M. L. Barker QC* (Taskforce Chair), May 2002.

- as a result of access to a single tribunal, there would be an identifiable point of contact for all citizens in respect of most civil and administrative review decisions;
- more information would be provided to citizens about the making of applications, hearings and the reasons for decisions;
- a more flexible and user-friendly system of decision-making would be developed;
- SAT would have the capacity to keep abreast of innovation and developments in comparable tribunals elsewhere; and
- SAT would have the appropriate leadership, expertise, experience and independence from the Government of the day to ensure that citizens could have the fullest confidence in the administrative review system and its results.

The *State Administrative Tribunal Act 2004* (WA) which took effect on 1.1.2005 sets out the jurisdiction of the new super-tribunal as follows:

- the review of the vast majority of administrative decisions made by State and local government authorities and officials, in respect of which administrative review (formerly known as “appeal”) rights are conferred, such as firearms, State revenue, town planning, land valuation, and mental health matters;
- vocational regulation, involving disciplinary proceedings concerning allegations of misconduct or incompetence, and licensing disputes, in relation to most professions, occupations and trades which are licensed under State law; and
- original jurisdiction in relation to specialist civil matters, such as commercial tenancies, building disputes, strata titles, land compensation, guardianship and administration, and equal opportunity proceedings.

SAT’s jurisdiction is, therefore, a mixed bag that includes a wide range of matters that affect the daily lives of the inhabitants of Western Australia. Those inhabitants now have the benefit of accessing a forum which is informal, cheap, and quick to have their disputes resolved.

SAT has been in existence for nearly 9 years. It has 20 full-time members; three judicial members and 112 sessional members.¹⁷ The success of its operations has been widely lauded. In a review of SAT that took place in 2009, the Parliament of Western Australia published a report which is over 500 pages in length entitled *Inquiry into the Jurisdiction and Operation of the*

¹⁷ The term “member” was used to denote the tribunal-character of SAT – to be distinguished therefore from magistrates or judges. “Judicial members” refers to the president and two deputy presidents of SAT. The president of SAT must be a judge from the Supreme Court of Western Australia and the two deputy presidents must be judges of the District Court of Western Australia. ss108(3); 112(3) and 117 of the *State Administrative Tribunal Act 2004* (WA).

State Administrative Tribunal.¹⁸ The Report found “the SAT to be operating efficiently and effectively ... due to the considerable efforts and dedication of the members and staff of the SAT”¹⁹ and recommended that new or altered jurisdiction should be conferred on the Tribunal under 15 other Acts, which would result in a substantial increase in SAT’s workload.

IV. SAT and Accessibility to Justice

The way in which SAT has contributed to accessibility to justice will be considered under the following headings:

- self-representation
- facilitative dispute resolution
- flexible procedures
- standard orders and practice notes
- expertise of Members
- speedy decisions
- no costs

1. Self-Representation

Parties who appear in SAT can represent themselves, or they can be represented by an agent who has knowledge of the matter, or they can be represented by a legal practitioner.²⁰ There is no requirement, regardless of the nature or monetary value of a dispute or the complexity of a dispute, for a party to be represented by a lawyer. Even if one party is legally represented, there is no requirement for the other party to also be legally represented. The ability to choose and encouragement of parties towards self-representation, in itself, facilitates access to justice, since the pressure on individuals to exert their rights only by way of legal representation is removed. SAT proceedings are geared towards self-representation and informality which in turn, puts individuals at ease, since proceedings are geared towards them presenting their own cases.

In contrast with the often passive role of judicial officers in accusatorial proceedings within common law systems, the members of SAT are required

¹⁸ <<http://www.parliament.wa.gov.au>>.

¹⁹ Inquiry into the Jurisdiction and Operation of the State Administrative Tribunal (note 18), 8.

²⁰ S 39 of the *State Administrative Tribunal Act 2004* (WA).

to take an active role during hearings to adopt measures to ensure that parties understand the nature of the assertions made in the proceeding and the legal implications of those assertions. This places an obligation on the presiding member to be actively involved in the management of the hearing, to explain to parties the legal principles and processes, and to draw to their attention, the implications of their assertions. SAT must also explain to parties the nature of the proceedings; and ensure that parties are given the opportunity to call witnesses and to cross-examine witnesses. Finally, SAT is required to ensure that all relevant material is disclosed so as to enable it to determine all the relevant facts at issue in a dispute.²¹

The “atmosphere” of a SAT hearing is therefore often quite relaxed; informal and is similar to an inquiry, but is respectful and non-threatening.

The role of the Member, as the presiding officer, is markedly different from the traditional accusatorial processes where the judge or magistrate presiding officer takes mainly a passive position, with opposing parties putting forward their respective cases for a determination. In SAT, the presiding officer is actively involved in all respects and in all aspects of a claim, particularly when parties are self-represented, so as to ensure that all relevant information is before the Tribunal. The Member would therefore be active in examination of witnesses and may undertake forensic examination of evidence, more in-depth than a self-represented person would.

Most of the proceedings in SAT commence with a directions hearing. This is, in essence, an early case management hearing which is called within two weeks of an application being lodged. The directions hearing does not deal principally with the merit of the claim, but rather, seeks to assist self-represented parties to clarify what the dispute is about; to ensure that the application is brought under the correct section of the relevant Act; to assist parties to identify material that may be of relevance to the proceeding; to discuss with parties the possibility of the dispute settling by way of mediation; and, if necessary, to set the matter down for a hearing.

The directions hearing process is often used with great success to put self-represented parties at ease, to reduce issues in dispute, and to facilitate an agreed outcome, without the need for the dispute to go to a hearing. The directions hearings are much more than the standard case management conferences found in many courts. The directions hearings are active management and dispute resolution proceedings in which the presiding Member takes an active role to assist the parties. In some instances, for example in building disputes, a directions hearing is set down for 50 minutes, so as to allow sufficient time for possible settlement or reduction of issues.

²¹ S 32 (6)-(7) of the *State Administrative Tribunal Act 2004* (WA).

The value of the dispute resolution approach taken by SAT “is evidenced by the large number of applications that are settled or withdrawn as a result of the directions hearing”.²² It is estimated that in some SAT jurisdictions, for example building disputes, up to 50 % disputes are resolved in directions hearings. If account is to be taken that by far the most parties in building disputes are self-represented and that directions hearings take place within 14 days from an application being received, the impact on access to justice is obvious – quick resolution of a dispute by way of self-representation, and at minimal cost.

The ability of SAT to encourage and harness self-representation has had a major positive impact on private persons who want to protect their rights in the judicial system. Interviews of persons who had been involved in SAT proceedings found as follows:

“The majority of respondents (79 %) indicated that they would recommend SAT to others in the future if they were having a similar dispute or question to resolve. The comments indicated that the main reason respondents would recommend SAT was due to the confidence they have in SAT’s outcomes.”²³

Another way in which self-representation is encouraged, is that all written decisions of SAT are accompanied by a brief summary in plain English in which the facts and legal principles are set out. These summaries are published via the internet on a monthly or quarterly basis.²⁴ This enables self-represented parties to use the summaries to prepare for hearings; to be aware of decisions of SAT on a particular subject matter; and to make submissions to SAT with previous decisions in mind. SAT often finds that self-represented persons are able to make extensive reference to previous decisions of relevance to their matter, all without the help of a lawyer.

Self-representation is the norm rather than the exception in SAT. In some areas, such as guardianship and administration proceedings, up to 95 % of parties are self-represented. On average, self-represented parties constitute at least 70 – 80 % of Tribunal proceedings and this enhances access to justice.

²² *D. R. Parry/B. de Villiers* (note 15), 112.

²³ Data Analysis Australia, *State Administrative Tribunal 2007 Party Survey*, November 2007, 20.

²⁴ <<http://www.sat.justice.wa.gov.au>>.

2. Facilitative Dispute Resolution

Facilitative dispute resolution refers to the resolution of a dispute with the assistance of SAT, but without a decision being handed down. The dispute settles by way of consent orders or a withdrawal of the proceeding. Facilitative dispute resolution includes mediation and compulsory conferences and also refers to directions hearings where, through active involvement of a member, many disputes are resolved.

Facilitative dispute resolution is a core element of SAT proceedings and by far the majority of cases undergo some form of attempted facilitative dispute resolution, before they are set down for a hearing. On average between 60 – 70 % of all disputes are resolved by way of agreement rather than a hearing,²⁵ while it is estimated that around 80 % of matters that are referred for mediation, settle.²⁶

Even if a dispute does not settle, facilitative dispute resolution often contributes to reduce or clarify issues in dispute and to assist parties to identify matters on which they are in agreement. Reducing or clarifying the issues, assists self-represented parties to better understand what is expected of them, and that in turn, improves the quality of preparation for a hearing. The time required for a hearing is thereby reduced.

All SAT members are trained and accredited mediators. This means that the members have attended formal mediation training and undergo regular professional development, so as to develop and enhance their mediation skills. Mediation is therefore not “outsourced” to private mediators outside SAT’s structure. SAT members themselves undertake the mediation. The benefit of members doing facilitative dispute resolution is that they are often experts in the field of the dispute, they may have handed down decisions in the particular area, and they are well aware of previous decisions of SAT in the field. The member-mediators therefore participate in the facilitative dispute resolution with high credibility and legitimacy, and this, in turn, reflects on the high success rate of matters settling as a result of mediation.

There are three main platforms from where facilitative dispute resolution occurs, namely mediation, compulsory conference and directions hearings.²⁷

Mediation is a formal referral by SAT and it attracts all the protections offered by the SAT Act.²⁸ A matter may be referred for mediation with or

²⁵ Refer to the 2011/12 Annual Report of SAT, <<http://www.sat.justice.wa.gov.au>>.

²⁶ *D. R. Parry/B. de Villiers* (note 15), 112.

²⁷ For a detailed discussion about these processes refer to *D. R. Parry/B. de Villiers* (note 15), 112 et seq.

without the consent of a party.²⁹ Mediation takes place in private and the discussions are without prejudice. This means, that all that is said, done or exchanged during the process of mediation, is privileged, and cannot be relied upon or referred to in the hearing, if the matter does not settle. Parties may be legally represented in mediation but even if they are, SAT will often require the clients themselves to be present in person, so as to participate directly in the mediation. The mediation is the ideal forum where self-represented persons can explain their case, without fear of court-like procedures or protocols. Mediation processes are very informal; they take place around a table, and parties often have the sense of it being a business meeting rather than a court process. The atmosphere is therefore conducive to discussion and settlement. A mediator may also meet with the parties separately in private, and this is often where some form of “reality testing” occurs, with the mediator putting critical questions to the respective parties about the strengths and weaknesses of their claim, possible options for settlement, and the likelihood of success should the matter proceed to a hearing. When a settlement is reached, the mediator may make binding orders to give effect to the settlement.³⁰ If a settlement is not reached, none of the discussions or concessions made during mediation may be relied on in later proceedings.³¹

A *compulsory conference* is, in essence, the same as a mediation but with the difference that in a compulsory conference, the parties are obliged to attend in person.³² In general, the same protections and protocols apply in a compulsory conference as those in a mediation. An important exception is, however, that in a compulsory conference, the mediator may make final orders, if a party fails to participate in the proceeding.³³ Although making orders in the absence of a party is a very powerful sanction to ensure participation in a compulsory conference, the rules of natural justice and procedural fairness would inhibit a mediator from making substantial orders without a matter being in a hearing.

Parties in compulsory conferences can be legally represented; they can be self-represented; or they can be represented by an agent. The structure of the compulsory conferences is to encourage self-representation so as to save parties costs and to enable them to speak for themselves.

²⁸ S 54 SAT Act.

²⁹ S 54 (3) SAT Act.

³⁰ S 54 (8) SAT Act. Matters agreed upon cannot be reopened during a later hearing, see *Snook and Western Australian Planning Commission*, [2012] WASAT 38, 43 et seq.

³¹ *Fabray Pty Ltd v. City of Stirling*, [2011] WASAT 187, 43.

³² S 52 (1) SAT Act.

³³ S 53 SAT Act.

Facilitative dispute resolution also takes place during *directions hearings*. This process is more constrained than a mediation, since the directions hearing is “on the record” and the presiding member cannot engage parties on the merit of their respective cases or be too active in “reality testing” their respective positions. The member may, however, require parties to clarify aspects of their case, highlight to parties what is required to be successful, and explain the benefits of agreed outcomes.

An important factor that contributes to the high success rate in mediations in SAT, is the wide range of part-time sessional member experts SAT has available to participate in hearings and mediations. SAT has 112 sessional members and these persons come from wide backgrounds such as builders, valuers, medical professionals, travel agents, planners,³⁴ engineers, painters, lawyers, dentists and nurses. SAT often uses the services of these experts during mediation, so as to make available to parties the knowledge and experience of those persons, when settlement options are considered.³⁵ For example, it is common for mediation about building disputes to include a registered builder as a mediator; or a dispute about commercial valuation would include an expert valuer sessional member as mediator.

The mediation and compulsory conference processes of SAT encourage access to justice in the following ways:

- parties may be self-represented during the mediation. In fact, even if a party is legally represented, SAT often requires the client to be in attendance in addition to the legal representative, so as to allow party-to-party discussions to occur;
- parties may speak for themselves without fear of being recorded or cross-examined. The process of mediation is aimed at resolution of issues, not an assessment of evidence. Parties can therefore participate during the mediation without the stress of giving evidence or being cross-examined;
- parties may make without prejudice proposals during the mediation as to how a dispute may be settled or they may make non-binding concessions. If the dispute does not settle, a party is not bound by such a proposal or concession;
- parties have a sense that the outcome of the dispute is in their hands, rather than leaving it to a judicial officer to make a decision for them. The mediation therefore offers a win-win opportunity in contrast to a hearing, where there is a win-lose risk, plus the added uncertainty of an appeal;

³⁴ D. R. Parry, Revolution in the West – The Transformation of Planning Appeals in Western Australia, *Local Government Law Journal* 14 (2008), 119.

³⁵ D. R. Parry, The Use of Facilitative Dispute Resolution in the State Administrative Tribunal of Western Australia – Central Rather than Alternative Dispute Resolution in Planning Cases, *Environmental Planning Law Journal* 27 (2010), 113.

- the mediation process is often much cheaper and speedier than a hearing. Even if a party is legally represented, the costs of preparation for a mediation is generally far less than the cost of preparation and running of a hearing; and
- mediation and compulsory conferences give parties a sense of ownership of the process. This, in turn, increases their sense of satisfaction with the outcome and the restorative justice³⁶ experience they take from the litigation process.

3. Flexible Procedures

One of the strong hallmarks of SAT is the informal and flexible procedures it has adopted, in comparison to those that apply in the traditional courts.³⁷ Any person who walks into a SAT hearing would have a sense of it being different, and less intimidating, than the ordinary courts. Even legal practitioners who appear in SAT for the first time, are often surprised at the informal yet respectful processes. Self-represented parties are often surprisingly relaxed when they appear in SAT, since the atmosphere is so conducive for self-representation and the procedures are so relaxed and flexible.

The main objectives of SAT include the objective to “act as speedily and with as little formality and technicality as is practicable ...”³⁸ and that SAT may determine its own procedures.

The relative informality of SAT should, however, not be confused with a licence for persons to act uninhibited or uncontrolled, or that any information can be presented to and relied on by SAT. In matters that are complex, or where expert evidence is heard, or where parties are legally represented, the proceedings are less informal and often resemble a hearing in a court. SAT therefore encourages a certain level of informality, but at the same time, ensures that its procedures are structured, formal and respectful.

The Supreme Court has, on an appeal of a decision by SAT, been accommodating of this unique SAT-style and SAT’s case management procedures. Chief Justice *Martin* has observed that:

³⁶ Restorative justice “... seeks the restoration of victims, offenders and communities primarily through mediated outcomes between victims and offenders – and in some cases their supporters – where they discuss what happened, in relation to harmful behaviour, and why it happened, and determine what offenders will do to make amends”. *M. King/A. Freiberg/B. Batagol/R.Hyams*, *Non-Adversarial Justice*, 2009, 39.

³⁷ “The character of proceedings in SAT is intended to be generally less formal, adversarial and court-like than proceedings in the courts and some other tribunals.” *D. R. Parry/B. de Villiers* (note 15), 30.

³⁸ S 9 (b) SAT Act.

“It would be hazardous to the achievement of those objectives if the Supreme Court were to be too ready to impose its view on SAT as to the procedures of SAT and as to case management decisions that are made by SAT within its specialist areas of jurisdiction and which are taken for the achievement of the objectives set out in s 9 of the SAT Act.”³⁹

The following are some of the important examples of steps taken by SAT to create a relaxed atmosphere and adopt flexible procedures in its hearings:

The *attire* worn by SAT Members, and members of the public, is not formal. Although Members dress in formal office-type attire, they do not wear wigs or gowns. Members of the public may wear what they choose and they are not bound by any dress code.

The *design of the hearing rooms* is done in such a way as to encourage a sense of intimacy and closeness. For example, the hearing rooms are relatively small; the walls have modern artwork, the desk where the parties sit is as the same level as the desk where the Tribunal Members sit, and the lighting is soft.

The *hearing process* is characterised by a relatively informal atmosphere which is achieved by: parties not standing when the Member enters the hearing room; there is no bowing towards the Tribunal when one enters or leaves the hearing room; when parties or witnesses speak they remain seated; the member is not addressed by any court-like title, but simply as “Mr./Ms.” or “Member”; and witnesses are often not sworn in but are reminded that it is an offence to give false or misleading evidence to the Tribunal.⁴⁰

SAT is not bound by the *rules of evidence*⁴¹ which means that parties are given the opportunity to tell their story without being unnecessarily interrupted as is so common in adversarial jurisdiction for failing to comply with the rules of evidence. Being able to speak without interruption brings great comfort to self-represented parties. They feel less intimidated and more confident to give their version of an event. Although SAT is not bound by the rules of evidence, it does not mean that those rules, which have developed over centuries in common law systems, can be merely discarded when it comes to considering and weighing evidence.⁴² The proverbial net with

³⁹ *Dalton v. Commissioner of Police*, [2009] WASC 9, 28. Also refer to *Commissioner of State Revenue v. Artistic Pty Ltd*, (2008) 70 ATR 818, 16 (C. J. Martin with whom J. A. Buss [at 37] and A. J. A. Newnes [at 38] agreed).

⁴⁰ S 98 SAT Act.

⁴¹ S 32 (2) (a) SAT Act.

⁴² The decision of the Tribunal must be based on evidence that is logically probative of a fact in issue even if the rules of evidence do not apply. *Re Pochi and Minister of Immigration*

which evidence is caught up in SAT is wide, but the rules of evidence assist so as to determine the weight that is ultimately attached to evidence for purposes of a determination. Although proceedings in SAT are therefore not interrupted with objections to the admissibility of evidence, when it comes to submissions, the Tribunal is often requested to attach less weight to certain evidence with reference to the rules of evidence. The Federal Court of Australia has said, as follows, in regard to the relevance of the rules of evidence to tribunals such as SAT:

“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.”⁴³

SAT is bound by the *rules of natural justice* and *procedural fairness*.⁴⁴ In essence, SAT must ensure: that parties understand the nature of assertions made and the implications thereof; that all evidence of relevance is made available and considered; that parties have sufficient time to consider the evidence and to make submissions; that parties can address SAT on any matter of relevance; and that parties may give evidence and examine evidence and witnesses.⁴⁵ Complying with the rules of natural justice goes to the heart of any legal system. SAT therefore takes steps to ensure that self-represented parties are assisted in how to properly express themselves, to explain their position and to be aware of the implications of assertions made by them or other parties.⁴⁶ Refer, for example, to the observation of *J. Kirby* in *Allesch v. Maunz*:⁴⁷

“The principle [of natural justice] lies deep in the common law. It has long been expressed as one of the maxims which the common law observes as ‘an indispensable requirement of justice’. It is a rule of natural justice or ‘procedural

and Ethnic Affairs, (1979) 36 FLR 482; 26 ALR 247; 2 ALD 33, at 41 (ALD), 256 (ALR), 492 (FLR).

⁴³ *Rodriguez v. Telstra Corporation*, [2002] FCA 30.

⁴⁴ S 32(1) SAT Act.

⁴⁵ “The requirements of natural justice or procedural fairness are flexible and proceedings before the Tribunal may be organised to ensure fairness having regard to the nature and circumstances of a case ...”, *D. R. Parry/B. de Villiers* (note 15), 15.

⁴⁶ If these obligations are not complied with, an error in law is made and a decision may be set aside on appeal. Refer for example to the matter of *S v. State Administrative Tribunal of Western Australia [No 2]*, [2012] WASc 306 in which the Supreme Court was very critical of the case management practices of SAT in that particular matter. The Court observed as follows: “What did occur reveals many serious shortcomings in the procedure adopted by SAT both in preparation for and in the conduct of the several hearings. ... the combined effect of this was to lead to the making of decisions which must be set aside.”, at para. 217.

⁴⁷ (2000) 203 CLR 172, at 35.

fairness'. It will usually be imputed into statutes creating courts and adjudicative tribunals. Indeed, it long preceded the common and statute law. Even the Almighty reportedly afforded Adam such an opportunity before his banishment from Eden.”

SAT adopts an *investigative* albeit not an inquisitorial style.⁴⁸ The Tribunal often actively participates in the questioning of witnesses, but it does not conduct the investigation in a manner consistent with inquisitorial systems. SAT therefore functions within the traditional accusatorial culture of Australia's common law tradition, but with the members being more interactive and involved in the development of a hearing, as would normally be associated with the court system.

The flexible procedures adopted by SAT have contributed to self-represented parties finding their way with ease in the Tribunal.

4. Standard Orders, Pamphlets and Practice Notes

Three of the most useful tools that have been developed by SAT to assist self-represented parties in preparing and managing their case, are (a) standard orders, (b) explanatory pamphlets and (c) practice notes.

The standard orders⁴⁹ are those orders that a party could expect would be made at the first directions hearing. Any party can therefore access the standard orders, in hard or electronic form, and prepare itself or propose what type of orders it would want the Tribunal to make. Self-represented parties are therefore aware of the legal terms that are used and know what the Tribunal would expect of them when orders are made. Parties can also meet before a hearing and use the standard orders to reach agreement as to what must be done in their case, and by when. This removes the uncertainty that often accompanies directions hearings for self-represented litigants when: they do not understand the process; the legal language is foreign to them, since it is so specialised; and the opportunity to make inputs is often lost because of stress and unfamiliarity with processes.

⁴⁸ Although there is reference from time to time to the SAT processes being “inquisitorial” in nature, this is not appropriate since the Tribunal operates within the confines of the accusatorial, common law tradition although its statutory powers may enable it to take a more investigative role during hearings. This does not, however, equate with the European inquisitorial systems or traditions. *B. de Villiers, The State Administrative Tribunal of Western Australia – Time to End the Inquisitorial/Accusatorial Conundrum about Australia's Super-Tribunals?*, University of Western Australia Law Review (2013), forthcoming.

⁴⁹ <<http://www.sat.justice.wa.gov.au>>.

The SAT explanatory pamphlets⁵⁰ provide very basic and brief descriptions in plain English about the way in which SAT functions. There is a wide range of pamphlets that is available in electronic and hard copy. Examples of pamphlets include: basic information about SAT and how it operates; a guide to mediation and how the process works; and a guide on how to submit and manage expert evidence. These pamphlets are essential to self-represented parties because they provide them with a step by step guide to prepare and present their case. It also enables them to envisage the hearings process and to understand what happens at each step.

The practice notes⁵¹ are authorised by the SAT Act.⁵² They cover a very wide range of topics such as how to lodge and application, how to seek a review of an administrative decision, and how to appeal a decision of SAT. The practice notes offer a high level of detail and self-represented parties can follow the notes step by step so pursue their application.

The standard orders, pamphlets and practice notes combined, facilitate self-representation, since the documents unlock the complexities of commencing and running a case.

5. Expertise of Members

A unique aspect of the SAT Act is that it allows the Tribunal to “inform itself on any matter it seems fit”⁵³ and the Tribunal may “make appropriate use of the knowledge and experience” of the members.⁵⁴ These provisions are novel to the typical accusatorial common law judiciary where the judge is limited to the evidence presented to the court when determining a matter.

The 20 full time members and 112 part-time sessional members of SAT therefore bring to a proceeding, a vast body of knowledge to assist parties to make a decision, according to the “substantial merits of the case”.⁵⁵ Parties who appear before SAT, especially in specialist areas such as building disputes; valuation disputes and town planning disputes, often draw comfort from the fact that the Tribunal has experience and expertise in the area of the dispute. This does not mean the Tribunal may make a decision on the basis of its own knowledge without the necessary evidence to support a

⁵⁰ <<http://www.sat.justice.wa.gov.au>>.

⁵¹ <<http://www.sat.justice.wa.gov.au>>.

⁵² S 33 SAT Act.

⁵³ S 32 (4) SAT Act.

⁵⁴ S 9 (c) SAT Act.

⁵⁵ S 9 (a) SAT Act.

finding. But it does mean that the Tribunal can use its knowledge to assess the evidence before it, to put questions to the parties, and to effectively guide the proceeding. These powers of SAT also do not mean that members conduct investigations on their own,⁵⁶ 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.⁵⁷

The question arises as to what is the scope of this power, and what restrictions apply, when the Tribunal “informs itself as it sees fit”. A tribunal is not under a duty to inquire and it is not the tribunal’s role to run a party’s case.⁵⁸ SAT is, however, under a duty to “ensure that all relevant material is disclosed to the Tribunal so as to enable it to determine all of the relevant facts in issue in a proceeding”.⁵⁹ SAT is therefore under an obligation to ensure that information is readily available and (of relevance to the proceeding) is procured, or at least, that efforts are made to procure 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. The common law “bias rule”, recognises the right of a person to have their case determined by a tribunal which is not actually biased,⁶⁰ or appears to be biased.⁶¹

The precise requirements of natural justice or procedural fairness are flexible and proceedings before SAT may be organised to ensure fairness, having regard to the nature and circumstances of the case, including relevant

⁵⁶ 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.

⁵⁷ Refer for example to the decision in *Ego Pharmaceuticals Pty Ltd and Minister of Health and Aging*, 2012 [AATA] 113, at paras. 34-37 in which the role of sessional members and their expertise play in tribunal proceedings and to *Twinbrook Pty Ltd and WMP Pty Ltd*, [2008] WASAT 279, 48 referring to *Monaco & Anor v Arnedo Pty Ltd & Anor* WASC (Full Court) Lib. No. 940481 (6.9.1994).

⁵⁸ *Prasad v. Minister for Immigration and Ethnic Affairs*, (1985) 6 FCR 155, at 169.

⁵⁹ S 32 (7) (a) SAT Act.

⁶⁰ *Chin v. Legal Practice Board of Western Australia*, [2011] WASCA 110, [5] (J. A. Newnes) referring to *Minister for Immigration and Multicultural Affairs v. Jia Legeng*, (2001) 205 CLR 507.

⁶¹ *Chin v Legal Practice Board of Western Australia* (note 60), 3 (J. A. Newnes) referring to *Johnson v. Johnson*, (2000) 201 CLR 488.

facts, the statutory context, the matters in dispute, the circumstances of the parties, and whether the proceeding is in the Tribunal's original or review jurisdiction.⁶²

The expertise of the Tribunal, as well as the right of the Tribunal to inform itself, assists self-represented parties who often do not have the resources to run complex claims or to afford extensive expert witnesses. The fact that the Tribunal comprises a person (or persons) who understands the technical aspects of a specific field, for example engineering, can enhance the sense of comfort and confidence of self-represented parties in the litigation process.

6. Speedy Decisions

The SAT Act requires that disputes are resolved “speedily and with as little formality and technicality as is practicable ...”.⁶³ This statutory imperative has directed many of the procedures of SAT towards being user friendly, encouraging self-representation, and handing down decisions as quickly as possible after a hearing.

The SAT Act provides that no decision may be handed down later than 90 days after a hearing had concluded.⁶⁴ In practice, however, very few decisions take 90 days to be finalised. In areas such as civil and commercial disputes and guardianship and administration applications, an estimated 90 % decisions are handed down orally on the day of the hearing, or soon thereafter. The delay between hearing and decision is therefore minimised as far as is possible.

The Tribunal has also adopted internal benchmarks to bring as many matters to a close, as soon as possible after lodgement of an application.

The first benchmark is to set each new application down within 14 days after lodgement for a directions hearing. This means that parties experience immediate action and progress after lodgement. As discussed above, at the first directions hearing: the parties are assisted to clarify any aspect of their claim; settlement options are considered; a matter may be referred for mediation; and other programming orders are made.

The second benchmark is to bring all matters to a final decision within an allotted time. In civil and commercial disputes, for example, 80 % of appli-

⁶² *Mijatovic v. Legal Practitioners Complaints Committee*, (2008) 37 WAR 149, 55 et seq. (*J. A. Buss*).

⁶³ S 9 (a) SAT Act.

⁶⁴ S 76 SAT Act.

cations are finalised within 18 weeks of lodgement, while in the area of guardianship and administration of individuals, 80 % matters are completed within 8 weeks of lodgement.⁶⁵

These benchmarks contribute to disputes being resolved quickly, effectively and with as little cost or delay as possible. Self-represented parties find the process easy to understand; they don't become frustrated by unnecessary delays; and they know they can expect a decision very soon after a matter has been lodged.

7. No Costs Jurisdiction

One of the most important factors that inhibit and restrict access to justice is the costs of legal proceedings. It is perhaps the most important, single reason that prevents individuals from seeking redress in the courts.

One of the key objectives of SAT is to "minimise the costs to parties".⁶⁶ Minimising costs is a key requirement to facilitate access to justice and to encourage self-representation. The default position in SAT is therefore, that "parties bear their own costs".⁶⁷ It is therefore each party's choice as to whether it retains legal counsel, but in doing so, the party is made aware that even if it is successful, it may have to bear its own costs.

In exceptional circumstances, costs may be awarded.⁶⁸ If justified, a cost order may be made to compensate a party for any expenses, loss, inconvenience or embarrassment it has suffered as a result of a legal proceeding. SAT has, in several decisions, clarified the circumstances in which costs may be awarded. For example, such circumstances include: when a party conducts itself unreasonably, thereby causing unnecessary costs to the other party; where a case is obviously unmeritorious; and when a party embarks on the proceeding to vindicate its clear entitlements.⁶⁹

The "no cost" approach of SAT is arguably the greatest step towards encouraging self-representation and accessibility to justice. Self-represented parties know that, if their case is meritorious, and if it does not amount to an abuse of process, the likelihood of a cost order against them, if they are unsuccessful, is slim.

⁶⁵ State Administrative Tribunal Annual Report 2011/12, 7, <<http://www.sat.justice.wa.gov.au>>.

⁶⁶ S 9 (b) SAT Act.

⁶⁷ S 87 (1) SAT Act.

⁶⁸ S 87 (3) SAT Act.

⁶⁹ *Pearce and Anor and Germain*, [2007] WASAT 291 (S).

V. Summary

Federations are known to allow for and encourage experimentation and creativity at a state level. States are often referred to as laboratories of public policy. States can learn from one another and the federal government learns from the experiences of the states. The relationships within a federation are therefore akin to a living organism with constant changes and adaptations.

The experiences of the SAT in the state of Western Australia illustrate how the public good can be served by state-initiated creativity. Super-tribunals are now the norm in Australia, where previously, they were the exception. Similar administrative integration of tribunals has taken place in New Zealand and in the United Kingdom. Harmonisation of administrative review, coupled with an expanding civil and commercial jurisdiction, has made super-tribunals essential for accessibility of justice in Australia. It has been shown in this article how self-representation in SAT has become the norm, rather than the exception. This is illustrative of the accessibility of justice, where ordinary people feel confident to appear in legal process, so as to protect or defend their rights.

