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Administrative review of state taxation decisions

by

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The aim of this paper

The aim of this paper is to explain the significant role the Western Australian State Administrative Tribunal (SAT) has played as a forum for taxpayers seeking review of state revenue decisions since its establishment on 1 January 2005.

The paper outlines the main processes the Tribunal uses to ensure state revenue matters are dealt with:

- quickly;
- informally;
- reliably; and
- in a way that minimizes costs to the parties.

The paper highlights the stark contrast between the revenue review processes pre-SAT and post-SAT.

Review forums pre-SAT

Before the Tribunal commenced operations 3½ years ago, on 1 January 2005:

- decisions of the Commissioner of State Revenue that involved the dismissal of a stamp duty or pay-roll tax assessment objection could be appealed to the Supreme Court of Western Australia;
- land tax disputes could be referred to the state Land Valuation Tribunal;
- decisions about first home owners grants (FHOGs) could be dealt with in the magistrates court; and
- the Commissioner could also be requested by a taxpayer to seek directions from an appeal body in respect of an objection proceeding

which had not been determined within the time limits prescribed by the *Taxation Administration Act 2003* (WA) (TAA).

Review forum post-SAT

On the establishment of SAT the jurisdiction to determine all state revenue matters was conferred upon the Tribunal, so that the Tribunal now deals with:

- all state revenue assessments including with respect to stamp duty and pay-roll tax;
- land tax issues;
- FHOGs; and
- applications for directions where an objection has not been determined by the Commissioner in the requisite statutory period.

Statistical account of the effect of SAT

Tables 1 and 2 summarise the pre-SAT and post-SAT position in relation to the volume and disposition of state revenue work. They tell a remarkable story.[*]

Table 1 - Pre- SAT statistics (1 July 2001 – 31 December 2004)

	Stamp Duty	Pay-roll	Land Tax	FHOG	Total
Applications	33	17	9	2	61
Settled or withdrawn	17	10	1	2	30
Matters heard	1	0	8	0	9
Applicant success	1	0	0	0	1
Appeals to Court of Appeal	0	0	0	0	0
Application for direction	0	0	0	0	0
Matters ongoing at 31/5/08	9	6	0	0	15

[*] I am most grateful to Mr Brad Prentice, Senior Assistant State Solicitor, State Solicitor's Office, WA, for his assistance in preparing these statistics.

Table 2 - Post SAT Statistics (1 January 2005 – 31 May 2008)

	Stamp Duty	Pay-roll	Land Tax	FHOG	Total
Transferred from SC	5	1	0	0	6
Applications	44	21	30	7	102
Mediations	22	7	18	2	49
Settled or withdrawn after mediation	14	5	12	2	33
Total withdrawn or settled	23	15	16	4	58
Matters heard	22	4	13	3	42
Matters ongoing at 31 May 2008	6	4	2	1	13
Applicant success at SAT	6	3	3	0	12
Commissioner success at SAT	14	1	9	3	27
Number of appeal to Court of Appeal by applicant	2	0	0	0	2
Number of appeal to court of appeal by Commissioner	3	3	1	0	7
Applicant taxpayer success in Appeal	5	1	1	0	7
Respondent Commissioner success in appeal	0	0	0	0	0

In the 3½ years before the Tribunal was established, some 50 state revenue matters (33 stamp duty and 17 pay-roll tax assessments) were the subject of appeal to the Supreme Court. Of these, only one (1) matter went to a hearing and was decided by the court (in favour of the taxpayer) in that 3½ year period.

By contrast, in the 3½ years (nearly) to 31 May 2008, 65 new applications were made to SAT in respect to stamp duty and pay-roll tax assessments, together with six such matters transferred to SAT from the Supreme Court - a total of 71 matters. In that 3½ year period, 26 matters were heard and determined by SAT. Table 3 makes the point and records the efficiency dividend!

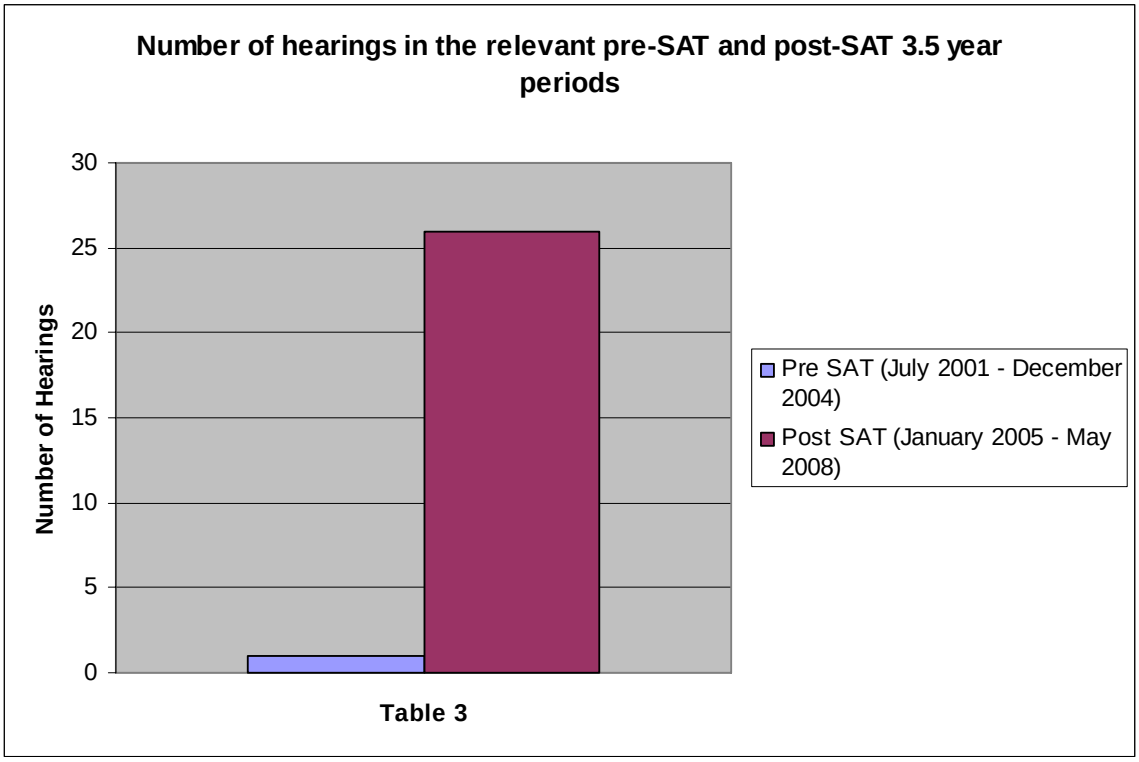

Table 3

Leaving aside every other statistic, the fact that 26 matters were heard by the Tribunal in the 3½ years after the establishment of SAT compared with one (1) matter heard in the Supreme Court in the 3½ years preceding SAT, speaks for itself.

The story, however, does not end there. It will be noticed that 29 stamp duty and pay-roll tax matters went to mediation or compulsory conference in the Tribunal and 19 were settled or withdrawn as a result of these processes. (The total number of matters settled or withdrawn without the need for a final hearing in both areas was 38, suggesting that another 9 matters were resolved without active SAT involvement.)

Of the 71 stamp duty and pay-roll tax matters assumed by SAT in its first 3½ years, as of 31 May 2008, only 10 were ongoing.

By contrast, in the Supreme Court pre-SAT there was little or no mediation or compulsory conference mechanism utilised in relation to state revenue matters. It seems that a total of 27 stamp duty or pay-roll tax matters were either settled or withdrawn in the pre-SAT period. The process by which matters were settled or withdrawn is not able to be simply equated with the process by which settlement and

withdrawal has occurred as a result of the involvement of the Tribunal. The process of settlement or withdrawal pre-SAT, having regard to anecdotal evidence, seems to have been attended by a degree of attrition.

It will also be noticed that pre-SAT there were 33 new stamp duty applications for review in the 3½ year period in question, and that as at 31 May 2008 - just 1½ months ago - nine of these were apparently still treated as "on-going". I am, however, not exactly sure what their on-going status is. One would have thought they would have been transferred to the Tribunal if they were still active as of 1 January 2005. They can perhaps be treated as being on life support in the critical care unit of a hospital but not yet transferred to the cold slab in the morgue.

Again, the critical point to be drawn from the 3½ year period pre-SAT in relation to stamp duty and pay-roll tax appeals is that, of the 50 matters in which taxpayers had requested review by the Supreme Court, only one matter was actually decided, 27 matters were settled or withdrawn, leaving 22 matters awaiting disposition. This compares with the 10 on-going matters in SAT after 3½ years, after 26 matters had gone to hearings. Table 4 illustrates the difference percentage wise, of this efficiency dividend, being 44% of applications pre-SAT remaining on-going at the end of the 3½ year period compared to 14% post-SAT.

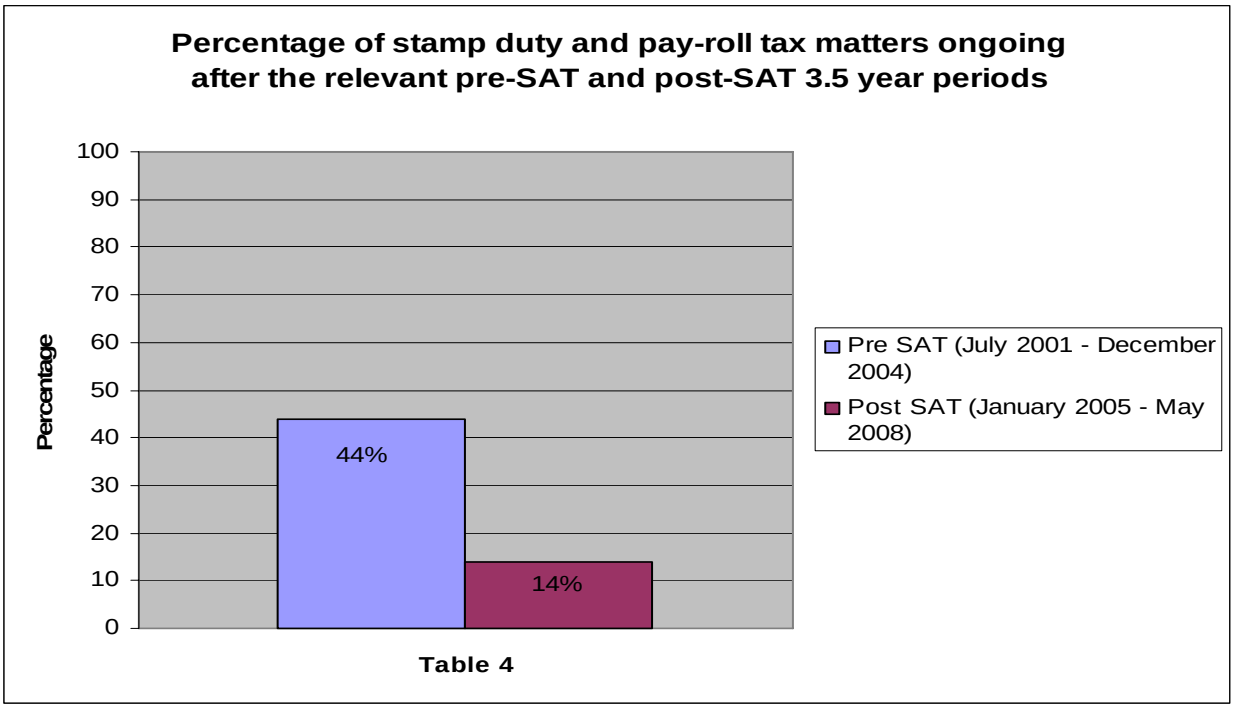

Table 4

The other interesting statistic to notice is that, taking into account all revenue matters in Tables 1 and 2, in the 3½ year period pre-SAT there was a total of 61 applications in all categories of state revenue compared with the 102 applications in total made to the Tribunal in the equivalent post-SAT period. As Table 5 illustrates, this involves a 67% increase in the number of applications.

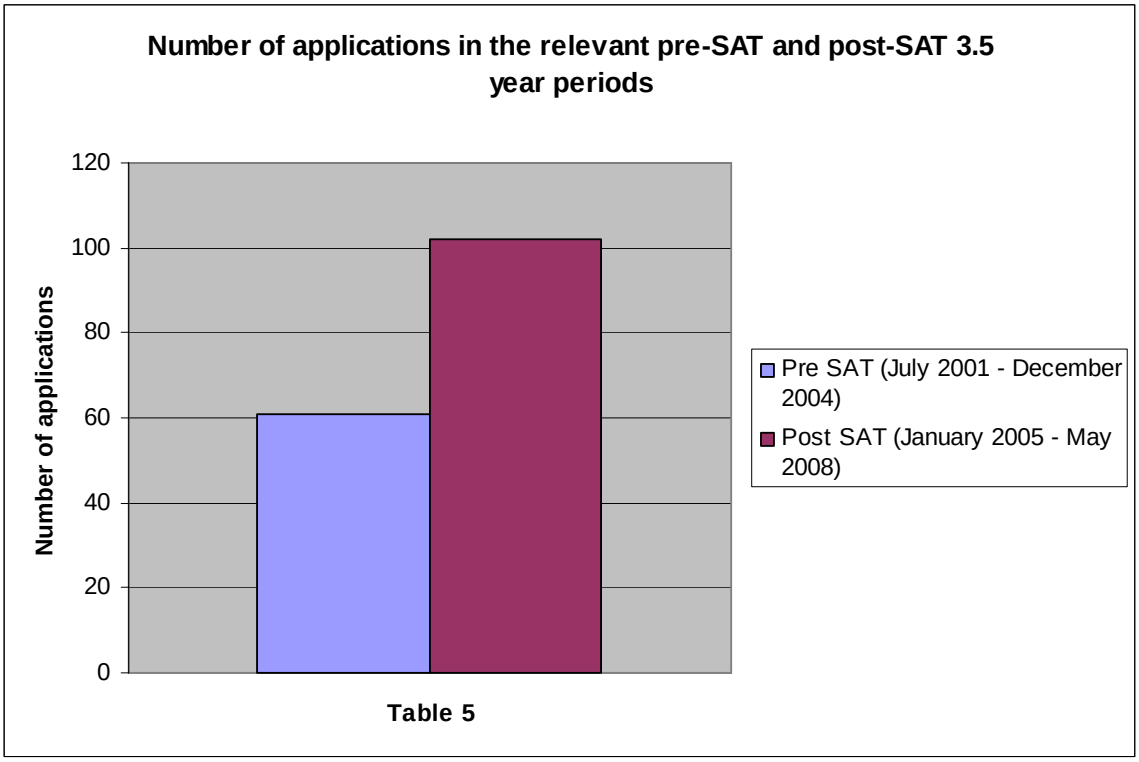

Table 5

The other important statistic to notice is that, since the commencement of SAT there has been a total of 6 applications under s 38(4) of the TAA in stamp duty or pay-roll tax objection proceedings for directions to achieve a timely determination of the objection proceedings by the Commissioner of State Revenue. As shown in Table 6, all these applications have been resolved in a timely manner so that none were ongoing as of 31 May 2008. By comparison, even though the equivalent to the current s 38(4) of the TAA was in place from 2003, no applications for directions were apparently ever made to the Supreme Court.

Table 6 - Application for Directions

	Stamp Duty	Pay-roll	Land Tax	FHOG	Total
Applications for directions	2	4	0	0	6
Directions matters resolved	2	4	0	0	6

As Table 2 shows, taxpayers have had a degree of success in review applications. For example, in finally decided stamp duty matters the taxpayer was successful on 6 occasions and the Commission on 14 in SAT. However, taking into account the five (5) appeals made to the WA Court of Appeal (2 by taxpayers and 3 by the Commissioner), which have all gone against the Commissioner, taxpayers have overall succeeded on 8 occasions and the Commissioner on 12.

Table 7 - Applicant Success Rate

	Stamp Duty	Pay-roll	Land Tax	FHOG	Total
Applicant success at SAT	6	3	3	0	12
Commissioner success at SAT	14	1	9	3	27
Applicant success in overturning SAT decision in the Court of Appeal	2 (of 2)	0 (of 0)	0 (of 0)	0 (of 0)	2
Commissioner success in overturning SAT decision in the Court of Appeal	0 (of 3)	0 (of 1)	0 (of 1)	0 (of 0)	0
Total number of revenue review successes of applicant	8	3	3	0	14
Total number of revenue review matters successfully resisted by Commissioner	12	1	9	3	25

It is well understood by tax practitioners in Western Australia that the pre-SAT procedures governing revenue reviews by a court or tribunal were significantly affected by the steps taken by the Office of State Revenue and the State Solicitor's Office to progress a review. The proceedings generally were characterised by their:

- slowness;
- formality;
- cumbersome procedures;

- expense, especially the obligation to pay costs order if a taxpayer was unsuccessful; and
- uncertainty of outcome.

By contrast, proceedings in SAT are today characterised by:

- their general expedition;
- reduced formality;
- the fact that the rules of evidence do not apply;
- new practices and procedures, particularly through the use of statements of issues, facts and contentions and early exchange of documents, and mediation;
- the fact that by and large the Tribunal is a costs free jurisdiction and cost orders are not usually made against an unsuccessful party; and
- the fact that taxpayers thus far have not been entirely unsuccessful in proceedings in the Tribunal and on appeal to the WA Court of Appeal.

Nature of the State Administrative Tribunal

The State Administrative Tribunal was established as a generalist tribunal with the intent of centralising the functions previously exercised by a myriad of administrative review decision-makers and original decision-makers whether known as tribunals, referees, boards or nominated public officials and, in some instances, exercised by courts, as in the case of some state revenue decisions.

In relation to state revenue decisions, the creation of the State Administrative Tribunal more or less created a "one stop shop", in that the jurisdictions formally exercised by the Supreme Court of Western Australia, the Magistrates Court and the Land Valuation Tribunal were all conferred on the Tribunal.

In relation to the exercise of state revenue jurisdiction, the SAT Act and the TAA require that most state revenue decisions be decided by a Tribunal constituted by one of the judicial members. In that regard the judicial members of the Tribunal comprise the President (a Supreme Court Judge) and two Deputy Presidents (both District Court Judges).

The result is that, under the SAT Act, appeals against decisions of the Tribunal in most state revenue matters go directly to the Western Australian Court of Appeal.

Accordingly, practitioners in the revenue area, so far as Western Australian decisions are concerned, will usually find themselves consulting either a decision of one of the judicial members of the State Administrative Tribunal or a decision of the Court of Appeal.

The reasons for establishing a generalist Tribunal like the SAT have been well rehearsed (Barker ML, 2005). SAT followed in the footsteps of VCAT (the Victorian Civil and Administrative Tribunal) which, in general terms, emulated the Commonwealth AAT (Administrative Appeals Tribunal). The Australian Capital Territory also now has its own ACT AAT. These State based tribunals all determine state revenue matters. The Queensland government has recently announced that it will move to establish QCAT (Queensland Civil and Administrative Tribunal), following the model of SAT and VCAT. One assumes it too will deal with state revenue matters. While New South Wales has its ADT (Administrative Decisions Tribunal) it is not really in the model of VCAT and SAT, however it also has state revenue jurisdiction.

The objectives of a generalist tribunal like the SAT are familiar ones for an administrative tribunal and well stated by s 9 of the SAT Act in these terms:

> "**9. Main objectives of the Tribunal**
>
> The main objectives of the Tribunal in dealing with matters within its jurisdiction are -
>
> (a) to achieve the resolution of questions, complaints or disputes, and make or review decisions, fairly and according to the substantial merits of the case;
>
> (b) to act as speedily and with as little formality and technicality as is practicable, and minimise the costs to parties; and
>
> (c) to make appropriate use of the knowledge and experience of Tribunal members."

In the experience of the SAT during its first three and a half years, the realisation of these objectives is more likely to be achieved through a generalist tribunal which has appropriate resources available to enhance its decision-making procedures, keep practices and procedures under critical review and ensure the high standard of

professional development of its members, especially the full time complement that makes such a tribunal effective.

A feature of the tribunal sector in the past, certainly in WA but I suspect elsewhere as well, was that most tribunals and similar bodies were set up with a part-time membership or largely a part-time membership with a relatively small staffing support, and limited budgets. They tended to operate to a degree in isolation and independent of other similar bodies. These factors tended to operate, in many circumstances, against the development of best tribunal practice.

Additionally, when compared with the prior court adjudicators, the generalist tribunal model offers the prospect of a faster, more informal and cheaper forum without a loss of quality decision-making. It is not hard to see why politicians think such tribunals will improve access to justice for the average citizen. The Table 1 and 2 statistics concerning the performance of the SAT obviously are relevant to this issue.

Directions hearings

All proceedings in the Tribunal are commenced by 'application'.

Applications in the Tribunal's review jurisdiction, relative to state revenue matters, are listed for a first 'directions hearing' within 14 to 21 days. This directions hearing is typically held before the President in a busy Tuesday morning directions list.

The purpose of the directions hearing is to quickly assess:

- the issues likely to be raised in the proceeding;
- the complexity of the proceeding;
- what particular types of directions are required to ensure the application is ready for final hearing in a timely fashion; and
- whether the matter is one that should be referred to mediation, whether for the purpose of attempting to resolve the matter finally or to narrow the issues in dispute, or to some extent for case management purposes.

When the Tribunal commenced exercising functions in relation to state revenue matters, the tendency of solicitors for the Commissioner and the taxpayer, where

parties had instructed legal representatives, was to highlight the perceived conceptual, intellectual and fact finding challenges raised by the proceedings. The virtual joint submission of the parties - at least that is how they often appeared to be cast - was that they would need a very long time to do the difficult and complex things required of them before the Tribunal could seriously consider setting a hearing date, and even then the case was likely to be one requiring many days sitting time. The President, for one, didn't buy this then and still doesn't! The Tribunal has endeavoured, mostly with success, to resist these calls to inaction or playing dead or feigning a comatose or paralysed state! No doubt all this simply reflected the prior practice and procedure affecting the conduct of an appeal in the Supreme Court prior to SAT!

But not all parties are represented in revenue proceedings. Mostly the Commissioner is, and, in revenue matters involving a significant quantum, applicants seeking review are also usually legally represented. However, in a number of cases the taxpayer is represented by an accountant. In a reasonable number of cases the taxpayer is self-represented. Table 8, for example, shows there have been 24 stamp duty cases in the 3½ years post-SAT period where the taxpayer has not been legally represented. Overall 43 persons have been self-represented and 16 by non-legal (usually accountant) representatives.

Table 8 - Non-legal representation in SAT

	Stamp Duty	Pay-roll	Land Tax	FHOG	Total
Applicant self-represented	13	1	22	7	43
Non-legal representation	11	3	2	0	16

This latter phenomenon perhaps illustrates, as much as any other factor, the significance of having a tribunal such as the State Administrative Tribunal dealing with state revenue matters. The Tribunal is set up in all respects to ensure that self-represented parties are not disadvantaged in the conduct of proceedings in the Tribunal. The Tribunal takes seriously its s 9 objectives which confirm it is a tribunal, not a court.

Mediation

An important feature of the practice and procedure of the Tribunal is the use of mediation. This is emphasised in relation to all proceedings in the Tribunal. Save for a range of matters which are listed for an early, final hearing and determination, most matters are assessed as to whether mediation may assist in their early resolution or in narrowing issues.

Initially, in many areas, including state revenue, official decision-makers were reluctant to participate in mediation. Their reluctance was usually borne of a view that it was not appropriate for an official decision-maker to ‘compromise’ an issue which had a public interest component to it or had to be decided ‘according to law’. It was also affected by unfamiliarity with what mediation was or could be - namely, a voluntary process by which the parties themselves can explore the possibility of settlement or identifying the real issues between them.

However, experience soon illustrated the value of mediation to all parties involved in the process. Sometimes mediation enables the official decision-maker, such as the Commissioner's representative or officers, to explain the decision-making process to a taxpayer in an informal setting. This can often result in the taxpayer realising that their case is hopeless and agreeing to withdraw it. Sometimes it may assist the taxpayer in accepting that further information needs to be supplied to the Commissioner for a proper reconsideration to occur. These are valuable outcomes when they occur because they mean the Tribunal's resources, and the time and costs of parties, are saved. It also often means a substantially quicker resolution time.

Mediation, even if it is not likely to finally resolve a matter in dispute, often serves to narrow the issues or to achieve some agreement between the parties as to what the facts are; what is not in contention. This also serves the objectives of the Tribunal in that it helps to shorten the length of hearing and it saves the parties costs.

As Table 9 shows, mediation has played an important role in Tribunal decision-making.

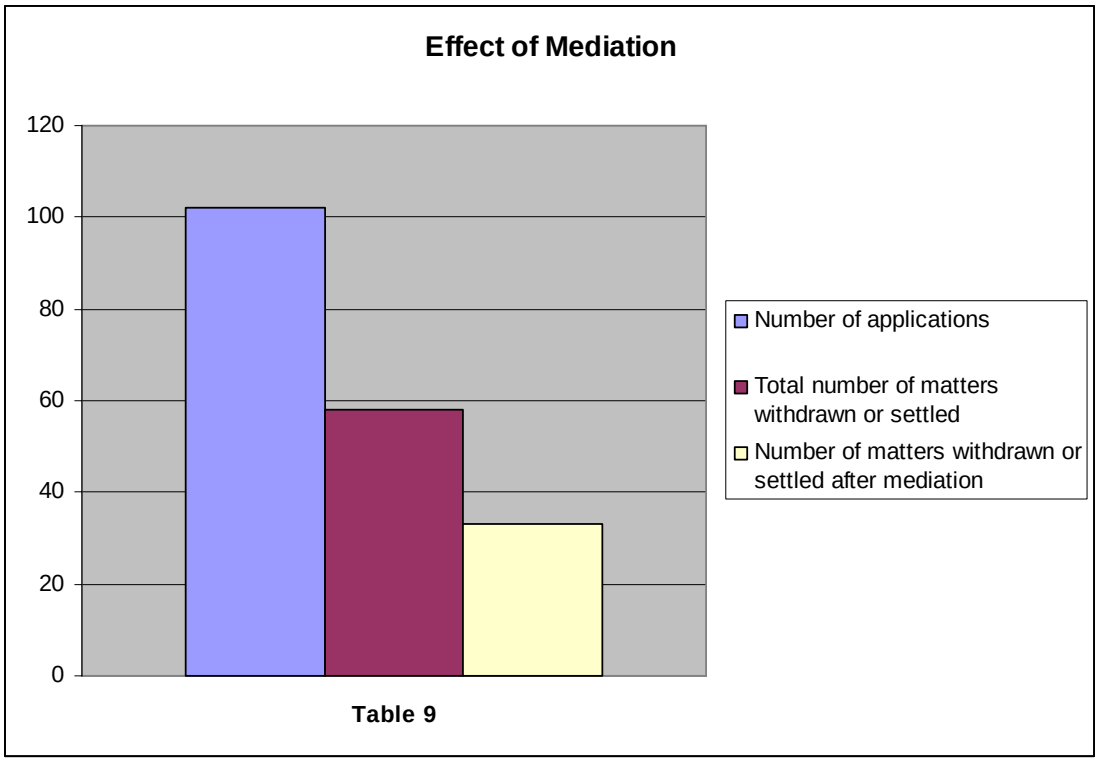

Table 9

Programming orders through to final hearing

Where a matter needs proceed to a final hearing, the Tribunal makes directions in the nature of programming orders designed to enable the parties to get the proceedings ready for hearing.

In that regard, the Tribunal, from the outset in 2005, adopted the practice of usually requiring the decision-maker in review matters to "go first", both in filing documents and in presenting their case at the preliminary and final hearings. The reality is the decision-maker made the decision and the lodging of a review application is a response to the Commissioners' decision. The decision-maker is just about always in the best position to advise the Tribunal what the case is all about.

Accordingly, the Tribunal also, from the outset, took the view that an application, whether in the Tribunal's review jurisdiction or original jurisdiction, did not need to be a lengthy or overly complex document in the nature of a statement of claim or the like that one encounters in traditional civil proceedings in a superior court. Rather, the Tribunal is concerned to get the application before a Tribunal member for preliminary assessment as soon as possible and then give directions as to what should be done by the parties. The cloth is thereby cut to suit the case at hand.

The typical directions by way of programming orders that the Tribunal makes in a state revenue matter are along the following lines:

- the Commissioner of State Revenue is to file a statement of issues, facts and contentions within an agreed time (default period 2 weeks);
- the Commissioner is to file all documents that relate to the decision under review pursuant to s 24 of the State Administrative Tribunal Act 2004 (WA) (SAT Act) at the same time;
- the taxpayer is to file a responding statement of issues, facts and contentions within an agreed time (default period 2 weeks); and
- the taxpayer is to file any documents that it intends to rely on at the final hearing at the same time.

Mediation, where it is ordered, will often take place after the Commissioner's documents are filed, but sometimes after both sets of statements and documents are exchanged.

In a relatively simple state revenue matter, the Tribunal will further order, at an early stage, perhaps even at the first directions hearing, that:

- the matter be listed for a final hearing on an agreed date; and
- statements of witnesses intended to be called at the hearing be filed at least 14 days before the hearing.

Alternatively, it will list the matter for final hearing at a later directions hearing when more is known about the nature of the case and evidence to be adduced.

Sometimes the Tribunal may order that a matter be determined on the documents without a hearing.

Where there are expert witnesses to be called, the Tribunal requires the exchange of expert reports and the meeting of the experts prior to the final hearing. Additionally, as explained in more detail below, the Tribunal requires the experts to file a report following their conferral setting out those matters upon which they agree and do not agree, and reasons why they do not agree. The Tribunal also usually orders that the experts will give their evidence concurrently.

In more complex state revenue proceedings, the Tribunal will often make the order for the exchange of statements and documents but then adjourn the directions hearing to a later date to review progress in the matter in the light of the information supplied. That gives the Tribunal and the parties the opportunity to consider in more detail what particular subsequent orders should be made. This enables the parties to make a better assessment of just what witnesses, if any, will be required at the final hearing and the likely length of the hearing.

In some cases, such as pay-roll tax matters, this process facilitates a process which allows the Commissioner to obtain additional information from relevant persons not obtained during the objection process. This has the advantage of avoiding an unnecessarily long hearing during which the same sort of information is sought; and it also helps to avoid adjournments.

In many cases, consistent with former practice on appeals in the Supreme Court, the parties suggest that it should be possible, or at least is desirable for them to agree the facts. However, the experience of the Tribunal is such that it prefers the parties to file their statements of issues, facts and contentions, and then in the light of that process, consider what facts have been agreed and what the prospects are of agreeing other facts. Experience suggests that, if parties are left to their own devices in relation to agreeing facts, it can take a very long time and, sometimes, unnecessarily strain professional relationships, all of which does not assist the Tribunal in the exercise of its responsibilities in the long run. The Tribunal prefers to remain actively involved or at least to be kept informed as to progress on this front. If necessary the Tribunal will take an active case management position in regard to pre-hearing preparation, bringing the matter back before the Tribunal frequently to see if timelines have been honoured and to keep under review the appropriateness of the existing programming orders.

Nonetheless, the agreement of facts can be an important ingredient to the successful and timely advancement of a complex state revenue proceeding. There are indeed many situations where facts ought to be agreed before a matter goes to a hearing. There are many circumstances in which experienced counsel readily advise the parties, for example, that there is no point in disputing certain facts or requiring the

other party to prove those facts, especially on a Tribunal where the rules of evidence do not apply.

The directions hearing process, as may be appreciated from what I have stated, probably goes under different names in different courts and tribunals and in different jurisdictions. It involves direct judicial case management. In the Federal Court of Australia it is called "docket management". That is, the judge before whom an application is listed stays in charge of the matter and makes all preliminary decisions concerning the matter before it goes to hearing. The same judge ordinarily can be expected to hear the matter when it goes to final hearing. The advantages of judicial case management of this nature are, in my opinion, undoubted (Law Reform Commission of Western Australia, 1999). Primarily, it ensures that proceedings remain in the control of the Tribunal and not in the hands of the parties, each of whom for one reason or another seem to be forgiving of the delays of the other. As I noted earlier, there seems culturally for some time to have been a belief, at least amongst lawyers and perhaps amongst tax accountants and some taxpayers, that state revenue proceedings cannot be conducted quickly, relatively informally, and cheaply, while at the same time produce a reliable decision. The State Administrative Tribunal does not share this cultural outlook!

Electronic hearings

The Tribunal is keen to use electronic hearing processes as far as possible and increasingly. While the technology has been available for some time now it has tended to be used only in complex court and tribunal proceedings. Familiarity with e-tribunal processes will begin to show the extent to which such technology is helpful in the disposition of revenue proceedings. The Tribunal will be hearing a large 'land rich' proceeding in December of this year which will be conducted over three weeks nearly completely by electronic means.

The Tribunal's practises and procedures, however, already encourage parties to proceedings to exchange all documents by electronic processes. The President particularly has a belief that the proliferation of paper in proceedings is not necessarily a good thing.

Expert evidence

The taking of expert evidence has long presented a major challenge for courts and tribunals in the common law world. Much has been written on this topic (McClellan Justice P, 2004; Administrative Appeal Tribunal, 2005). Sometimes expert witnesses are seen in a highly negative light by courts and opposing parties. This has sometimes led to expert witnesses being called "saxophones", on the basis that the lawyer hums the tune that the expert witness then plays! In any event traditional processes of taking the evidence of experts can add significantly to the time and the costs of a proceeding. They do not always actually engage on the same important points.

The traditional approach in a superior court in civil litigation to the taking of expert witnesses is to treat them no differently, in effect, from an the ordinary lay witness. Accordingly, the plaintiff or the defendant, or the applicant or respondent, whatever the party may be called, is obliged to call their expert witness in the usual sequence of witnesses in the course of proving their case or responding to the other's case. The result is that, in a complex hearing, the expert witnesses are separately examined, cross examined and re-examined. They are also often called days, sometimes weeks, apart. This is a hopeless system. The experts are like ships passing in the night! If a tribunal is called upon to make a reliable decision, particularly having regard to critical expert evidence, then the tribunal needs to have the expert evidence presented in a way that addresses the real issues, where the relevant experts can address the same critical issues at the same time and where the experts do not need to be recalled to address anything of importance that has apparently fallen from the lips of an expert called later in the proceedings.

For all these reasons and more (McClellan Justice P, 2004), the State Administrative Tribunal has adopted the practice of taking the evidence of experts concurrently, that is to say the experts give their evidence in the Tribunal at the same time. The standard orders that the Tribunal now makes in respect of experts as a matter of course, are set out in Appendix 1 to this paper. In short, the experts:

- must file and exchange their expert reports;
- must acknowledge that they are called as experts - accordingly not as ‘advocates’ for a party;
- must confer before the final hearing;

- must produce a joint report in which they identify the matters they agree on and those on which they disagree;
- as to the matters on which they disagree they must state the reasons why they disagree;
- at the hearing they must give their evidence concurrently, that is, sitting together in the witness box;
- the concurrent evidence is usually taken in a "symposium" environment in which the presiding member of the Tribunal will usually lead a discussion with the experts that uses the joint report as the agenda for discussion;
- at the end of that process at the invitation of the presiding member the expert witnesses may ask each other questions; and
- following that process the representatives of the parties may proceed to ask the expert witnesses questions.

The Tribunal now adopts the concurrent evidence approach in relation to experts in all of its major decision-making. A good example is the relatively recent proceeding in the Tribunal in Origin Energy (***Origin Energy Power Ltd and Commissioner of State Revenue***). This case involved the land rich provisions of the *Stamp Act 1921* (WA) and three highly qualified expert witnesses were called to deal with valuation questions, and particularly in relation to the question of goodwill on the sale of an interest in an electricity co-generation plant. The three witnesses, two for the taxpayer and one for the Commissioner, gave their evidence concurrently.

From the Tribunal's point of view the great advantage of the concurrent evidence methodology is:

- the experts display their independent expertise and are uninclined to act as advocates for the party and certainly not as "saxophones";
- the expert evidence is much more comprehensible to the Tribunal, if not for the representatives of the parties and the parties themselves;
- the taking of expert evidence is reduced from many days to a day or two, particularly because of their jointly authored report following conferral;

- as a result, proceedings in state revenue matters in the Tribunal (as in other matters) are considerably reduced in length thereby saving the parties and the Tribunal expense; and
- the decision making of the Tribunal is much more likely to be much more reliable.

In my opinion, not only is the practice of taking the evidence of expert witnesses concurrently here to stay, but it needs to be expanded right through the system of judicial administration, to all courts and tribunals.

Interaction of the tribunal system with the decision-making process during the assessment and objection stage.

Section 38(4) of the TAA enables a taxpayer to request the Commissioner to apply to the Tribunal for directions in relation to an objection proceeding where the Commissioner has exceeded the time laid down for making a decision on an objection. Section 38(4) provides as follows:

> "If the Commissioner fails to determine an objection within 120 days of the day that the objection was lodged with the Commissioner, the taxpayer may, by written notice to the Commissioner, require the Commissioner to apply to the State Administrative Tribunal for directions as to any or all of the matters referred to in this section, including but not limited to -
> (a) the length of the decision period;
> (b) the time for a taxpayer to comply with a request for information;
> (c) the information to be provided by the taxpayer;
> (d) the time for the Commissioner to seek advice and assistance from an external agency."

The TAA in this regard endeavours to balance the rights of a taxpayer to a timely decision with the interests of the public in seeing careful revenue decision-making.

The directions application procedure was little used in pre-SAT days. In fact, I understand the Commissioner was never asked to make an application before the Tribunal commenced operation on 1 January 2005. As noted earlier in Table 6, there have now been 6 applications for directions to SAT. Under this procedure the Tribunal can ultimately specify when a decision should be made.

The way the Tribunal has tended to approach these applications is to hear from the parties as to the nature of the delay and the apparent reasons for it. Taxpayers usually feel aggrieved because they think the Commissioner's people are simply taking too long to be decisive and seem to be exhibiting an insufficient interest in finalising the matter. They ritually say they have given the Commissioner everything, and more, to help make the decision. On the Commissioner's side, it seems the difficulty often is the complexity of the issue and the need for more information. This, when coupled with the fact that the Commissioner's practice on complex objections, particularly since the introduction of the SAT, of involving a senior officer who was not directly involved in the initial assessment, tends to add some time to the deliberative process.

The Tribunal's indicative way of handling these types of applications for directions is to try to avoid holding a hearing as to the rights and wrongs of the delay, and to seek guidance from the Commissioner's representative, which it expects to be provided in good faith, as to exactly what the reasons for the delay are, and when reasonably the decision can be expected. Sometimes the cooperation of the taxpayer in providing further information may also be required.

The Tribunal has expressed understanding of the change the new SAT review process has in a sense forced on the Commissioner in relation to the objection process. In the pre-SAT days few matters went to a hearing. Now many do. At the SAT hearing process issues that were sometimes not fully explored or even raised before the Commissioner in the objection process, can surface. It is important that the Commissioner has the proper opportunity in the objection process to call for all relevant information and to consider the matter in a professional, not a cursory, way. This can add time to the objection process but it can significantly reduce time later if the matter proceeds to the Tribunal.

This process of inquiry and evaluation by the Tribunal on a directions application is often conducted over a number of adjourned directions hearings. The Tribunal usually eventually orders that a decision on the objection be made at a point where the Tribunal believes it can reasonably be complied with.

To date, in the Tribunal's estimation, this process has produced acceptable outcomes. Though most taxpayers would probably still like to have had the objection decision made 'yesterday' and the Commissioner's people might prefer to have been given another six months to make the decision, the Tribunal plays something of the role that King Solomon apparently played when obliged to decide the ownership of the infant child which was contested by two women! So far the system seems to have worked, in the sense that decisions have been forthcoming, and the Tribunal hasn't really been forced to bring down the sword. In the process, from the point of view of the public interest and the taxpayer's interest, the Commissioner's conduct of the objection process is made appropriately accountable.

The 'onus' in decision-making

The question of whether any party bears something called an onus of proof in review proceedings relating to state revenue decisions in the SAT is apparently something of a contentious issue.

When the Tribunal was established the general position was adopted, consistent with most administrative review regimes, that no party to review proceedings carries any formal onus to prove anything. This is consistent with the concept of an administrative review proceeding; namely, that it provides a citizen or person with an opportunity to have a primary decision looked at afresh. In that sense it is not an 'appeal' where a person needs to prove that the primary decision-maker made an error. Consequently the responsibility of the review body is to make the 'correct or preferable' decision on review. The review body thus stands in the shoes of the original decision-maker, and the hearing is a de novo hearing. On the face of it, even though the primary decision-maker did not make some legal or factual error, their decision may be set aside because the review body doesn't consider it to be the correct and preferable decision.

This was all well understood when the *Administrative Appeals Tribunal Act 1975* (Cth) was initially applied and interpreted. The 'correct or preferable' test did not and does not appear in that Act, but was soon enough introduced by the Tribunal. When the SAT was established the same test was introduced in the SAT Act to cover review decision-making by s 27(2) of the SAT Act.

The result is that in ordinary administrative review proceedings no party carries a formal onus to prove anything; however a party may carry a practical onus to do so if they want to convince the Tribunal to their way of thinking. This point was made early on in the AAT decision of ***McDonald v Director-General of Social Security*** where it was said…

> "… a tribunal will still have to determine practical problems such as the sequence of receiving evidence and what to do if it is unable to reach a clear conclusion on an issue, but it is more likely to find the answer to such questions in the statutes under which it is operating, or in considerations of natural justice or common sense, than in the technical rules relating to onus of proof developed by the courts. However, these may be of assistance in some cases where the legislation is silent."

The SAT has adopted the same approach to its decision making. It also applies the same approach to state revenue reviews. The SAT must, like the Commissioner ultimately be satisfied about the matters set out in a revenue statute that attract a revenue obligation. (see ***Pinesales Pty Ltd and Commissioner of State Revenue*** at [437 - 471]).

While the Commissioner has proposed that the applicant in state revenue review proceedings should bear the onus, as in some other jurisdictions, the Tribunal thus far has not considered such a provision would make any material difference to its decision making processes or responsibilities.

Remedies and the treatment of costs in tribunals

If a taxpayer is unsuccessful in review proceedings in the tribunal, the review application is dismissed and the Commissioner's decision affirmed. It is unusual for costs to be ordered in any review proceedings against an unsuccessful applicant.

If the applicant is successful, the review application is upheld and either the Tribunal orders the correct revenue outcome, or more usually remits the matter back to the Commissioner to substitute the correct assessment. In such cases it is also unusual for the Tribunal to award costs in favour of the successful party.

The costs position is dictated by the terms of the SAT Act s 87. By s 87(1), the starting point with respect to costs is that the Tribunal is a 'costs free zone'. However,

s 87(2) gives the Tribunal a broad discretion to award costs. The real point is there is no presumption that the winner gets costs, as applies in civil court proceedings.

Section 87(4) suggests though that costs may be awarded for what effectively amounts to recalcitrant conduct by one or other of the parties, by making the following factors relevant to the exercise of the costs discretion in a review proceeding:

> "(4) Without limiting anything else that may be considered in making an order for the payment by a party of the costs of another party where the matter that is the subject of the proceeding comes within the Tribunal's review jurisdiction, the Tribunal is to have regard to -
>
> (a) whether the party (in bringing or conducting the proceeding before the decision-maker in which the decision under review was made) genuinely attempted to enable and assist the decision-maker to make a decision on its merits;
>
> (b) whether the party (being the decision-maker) genuinely attempted to make a decision on its merits."

The Tribunal has been at pains to emphasise in many review proceeding contexts that the award of costs, while always open, will be a rare thing. A good example of this, in the revenue context is the Tribunal's ruling on costs following the hard fought proceedings in ***Mortgage Force Services Pty Ltd and Commissioner of State Revenue*** (currently on appeal to WA Court of Appeal on the pay-roll tax determination issue, not cost directly). In this case the Tribunal upheld the review application of the taxpayer and found their 'consultants' were not persons to whom 'wages' were paid for the purposes of the *Pay-Roll Tax Assessment Act 2002* (WA). While the Tribunal was critical of the failure of the parties to agree facts and of the manner in which the Commissioner approached the hearing process, the Tribunal dismissed the consequent application for costs against the Commissioner made by the aggrieved taxpayer. In doing so the President observed, at [34] - [37]:

> "34 The Tribunal was set up with the very clear legislative policy in mind, as reflected in s 87 of the Act, that it is a costs-free jurisdiction. There have been some variations, I suppose, on that theme, as Mr McCusker [counsel for the taxpayer] mentioned in relation to vocational regulation proceedings in the Tribunal. The Tribunal has expressed its reasons why there ought to be costs when a professional regulatory body succeeds in an action, but otherwise I think the primary position of the Tribunal should be maintained. It would in fact be difficult to distinguish

in principle a State revenue review proceeding from other review proceedings, if a special costs rule applied for successful applicants in State revenue matters. If successful taxpayer applicants could get costs orders, why should not every successful applicant in a complex matter? Mr McCusker suggested some reasons why not, but I must say for my part I think the Tribunal would be under great pressure in making the distinction generally.

35 The result is that the State, through the [SAT] Act and related legislation, provides taxpayers with the opportunity to have administrative review of State revenue decisions in the Tribunal. The [SAT] Act contemplates that these proceedings will be without costs orders. We have the power in appropriate cases, in effect, to make costs orders. I do not see any particular reason to adopt the view, for example, that costs orders will ordinarily be made when the issues are complex or parties are professionally represented. That would not be in accordance with the objectives of the Act. I do not think that ordinarily the mere complexity of the matter should result in a costs order being made either. In any event, that was not the submission that was put to me in this case by the applicants.

36 Finally, then, dealing with the case on the basis it was put forward, I am not satisfied either by reference to the genuineness of the decision-making processes of the Commissioner, or the manner in which the case was got up or conducted, that the discretion that the Tribunal has to award costs has been enlivened. At the same time, I hope it is clear from what I have said today that I was far from satisfied with the manner in which the case was got up or the direction in which it was heading when it commenced and I think I made my views in this regard very clear at the time.

37 There are times, I suppose, when a judge sitting in the position that I am sitting in, can be so disgruntled about something that if you were to ask for a costs order at the time, you might just get it; but on reflection, I do not think the costs basis is made out. But having ruled that way, as I have suggested, it is not to say that either the Commissioner or

> applicants should expect in the future to make their own arrangements about the way in which proceedings are to be conducted in the Tribunal. They are not to be conducted at their own leisure, according to their own rules. It is going to be important for the Tribunal to closely manage some of these cases so that we can develop an agreed process in the future."

The Mortgage Force proceeding was conducted reasonably early on in the Tribunal's history of state revenue decision making. The way the proceedings were conducted seemed to owe something to the way appeals used to be conducted in the Supreme Court in the pre-SAT days. The Tribunal went out of its way to emphasise many of the points made earlier in this paper, that a new day had arrived, that proceedings need to be conducted expeditiously, that parties cannot make there own arrangements about what practice and procedure the Tribunal will apply, that the Tribunal may need rigorously to case manage cases to achieve the s 9 SAT Act objectives, and that it may be that in the future the Commissioner will need to consider obtaining more information during objection proceedings rather than treating the proceedings before the Tribunal as some sort of roving inquiry.

The Tribunal has therefore made it clear that applications for costs orders will always be considered in the light of the circumstances of each case, but also that revenue review proceedings are no different from any other type of review proceeding and will not be the subject of some special set of rules for 'big players'.

The result is that, while revenue proceedings in the SAT are not entirely costs neutral, because parties will often retain professional advisers and incur other transactions costs, they will not usually be the subject of costs orders, orders that have the capacity to inhibit either access to administrative justice by aggrieved taxpayers or good decision making on the part of official decision-makers.

Conclusion

The creation of the State Administrative Tribunal and the conferral of a state revenue jurisdiction on the Tribunal, together with the approaches to decision-making adopted by the Tribunal, has significantly altered the way state revenue review decisions are made in Western Australia with the result that there are:

- more reviews;
- more timely decisions; and, ultimately,
- greater administrative justice for taxpayers.

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Cases

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Mortgage Force Services Pt Ltd and Commissioner of State Revenue [2007] WASAT 53 (currently on appeal to WA Court of Appeal)

Origin Energy Power Ltd and Commissioner of State Revenue [2007] WASAT 302

Pinesales Pty Ltd and Commissioner of State Revenue [2006] WASAT 202

Appendix 1

Expert evidence

(1) If a party engages an expert to attend a mediation or compulsory conference or to give evidence in the proceedings the party must give the expert within 7 days of this order or of the engagement (whichever is the latter):

(a) the Tribunal's pamphlet entitled *A guide for experts giving evidence in the State Administrative Tribunal*, unless the party has already given the expert a copy of the pamphlet; and

(b) a copy of these orders.

(2) An expert witness must acknowledge in his or her statement of evidence that he or she has read the Tribunal's pamphlet entitled A guide for experts giving evidence in the State Administrative Tribunal and agrees to be bound by the expert's obligations stated in that document.

Final hearing – conferral and joint statement of expert witnesses

(3) No less than 7 days before the hearing date the expert witnesses in each field of expertise must confer with one another in the absence of the parties and their representatives and must prepare a joint statement of:

(a) the issues arising in the proceedings which are within their expertise;

(b) the matters upon which they agree in relation to those issues;

(c) the matters upon which they disagree in relation to those issues; and

(d) the reasons for any disagreement.

(4) The expert witnesses must each sign the joint statement at the conclusion of their conference. If the statement is in handwriting the expert witnesses must appoint one of them to generate a typed version of it and each must sign the typed document. The expert witnesses must file the joint statement with the Tribunal and give copies of it to the parties no less than 5 days before the hearing.

Final hearing – concurrent evidence of expert witnesses

(5) Subject to any further order the evidence of expert witnesses must be given concurrently at the hearing in each field of expertise. They will be:

(a) called to give evidence together;

(b) asked questions by the Tribunal;

(c) given an opportunity by the Tribunal to ask each other any questions which they consider might assist the Tribunal; and

(d) asked questions by the parties or their representatives.