

State Administrative Tribunal (WA)

Law, Practice and Procedure

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[2-1185] 31. Tribunal may invite decision-maker to reconsider

- (1) At any stage of a proceeding for the review of a reviewable decision, the Tribunal may invite the decision-maker to reconsider the decision.
- (2) Upon being invited by the Tribunal to reconsider the reviewable decision, the decision-maker may —
 - (a) affirm the decision;
 - (b) vary the decision; or
 - (c) set aside the decision and substitute its new decision.
- (3) If the decision-maker varies the decision or sets it aside and substitutes a new decision, unless the proceeding for a review is withdrawn it is taken to be for the review of the decision as varied or the substituted decision.

[2-1190] Examples of invitations to reconsider. The Tribunal has invited a decision-maker to reconsider its decision in circumstances relating to where:

- An applicant sought review of a decision of the Building Disputes Tribunal (BDT) to allow the respondents to recover the cost of replacement of equipment that had failed on the grounds that the BDT's reasons for decision were inadequate and did not disclose the intellectual process by which it had arrived at the outcome relevant to each ground: *Honest Holdings Pty Ltd and Loly* [2007] WASAT 246.
- An applicant, who sought review of a decision by a Shire to refuse a planning application, submitted a modified proposal: *Allen and Shire of Augusta-Margaret River* [2007] WASAT 103.
- A City had not had an opportunity to assess a development application on its merits. The applicant commenced proceedings in the Tribunal against a deemed refusal. The City did not contest the review proceedings. The Tribunal invited the City to reconsider its decision: *Zadnik and City of Belmont* [2006] WASAT 284.

[2-1192] It is frequently the case that the Tribunal invites a decision-maker to review its decision as part of the mediation process, enabling the decision-maker to make a decision not otherwise available once the review process has commenced.

[2-1197] Failure by decision-maker to reconsider. In a planning context, if a decision-maker is invited to reconsider a decision but fails to do so and does not contest a review, this will be a relevant consideration in assessing the applicant's case for planning approval: *Zadnik and City of Belmont* [2006] WASAT 284 at [28].

Related materials: *Section 31 invitation by SAT for decision-maker to reconsider its decision* (SAT information sheet) (available at <www.sat.justice.wa.gov.au>).

Part 4-Tribunal's procedures

Division 1-Introduction

[2-1220] 32. Practice and procedure, generally

- (1) The Tribunal is bound by the rules of natural justice except to the extent that this Act or the enabling Act authorises, whether expressly or by implication, a departure from those rules.
- (2) The *Evidence Act 1906* does not apply to the Tribunal's proceedings and the Tribunal —
 - (a) is not bound by the rules of evidence or any practices or procedures applicable to courts of record, except to the extent that it adopts those rules, practices or procedures or the regulations or rules make them apply; and

- (b) is to act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms.
- (3) Without limiting subsection (2), the Tribunal may admit into evidence the contents of any document despite non-compliance with any time limit or other requirement specified in the rules in relation to that document or service of it.
- (4) The Tribunal may inform itself on any matter as it sees fit.
- (5) To the extent that the practice or procedure of the Tribunal is not prescribed by or under this Act or the enabling Act, it is to be as the Tribunal determines.
- (6) The Tribunal is to take measures that are reasonably practicable —
- (a) to ensure that the parties to the proceeding before it understand the nature of the assertions made in the proceeding and the legal implications of those assertions;
 - (b) to explain to the parties, if requested to do so, any aspect of the procedure of the Tribunal, or any decision or ruling made by the Tribunal, that relates to the proceeding; and
 - (c) to ensure that the parties have the opportunity in the proceeding —
 - (i) to call or give evidence;
 - (ii) to examine, cross-examine or re-examine witnesses; and
 - (iii) to be heard or otherwise have their submissions considered.
- (7) The Tribunal —
- (a) is 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;
 - (b) may require evidence or argument to be presented in writing and decide on the matters on which it will hear oral evidence or argument;
 - (c) may limit the time available for presenting the respective cases of parties before it at a hearing to an extent that it considers would not impede the fair and adequate presentation of the cases;
 - (d) may require a document to be served outside the State; and
 - (e) may adjourn a proceeding to any time and place (including for the purpose of enabling the parties to negotiate a settlement or for the purpose of reconsideration of a decision by the decision-maker under section 31).
- (8) The Tribunal's powers under subsection (7) are exercisable by —
- (a) a legally qualified member; or
 - (b) the presiding member if the Tribunal as constituted for a hearing does not consist of or include a legally qualified member.

[2-1225] Overview. Section 32 provides that the Tribunal (Explanatory Notes, cl 32):

- is bound by rules of natural justice except to the extent that legislation otherwise authorises;
- is not bound by the *Evidence Act 1906* or rules of evidence or court rules, practices or procedures, except to the extent that the Tribunal adopts these matters;
- can inform itself on any matter as it sees fit;
- is to determine its own practice and procedures except where these matters are prescribed by legislation;
- is to assist the parties by, for example, explaining procedures and enabling them to have to have the fullest opportunity to give evidence and be heard; and
- must ensure that all relevant material is available to it and may require documents to be served outside of Western Australia.

Sec 32(1)

[2-1235] Appeals. Whether a denial of natural justice has been committed by the Tribunal is question of law permitting an appeal under s 105(2): *Rowell v Clark* [2006] WASC 159 at [32]-[34].

[2-1237] Right to be heard. No person should be deprived of his or her right and freedom to make decisions about their life without having had the opportunity to be heard. The right to be heard is a fundamental rule of natural justice, which the Tribunal is bound to accord to persons it hears: *G' v K'* [2007] WASC 319 at [77].

Sec 32(2)(a)

[2-1255] Evidence that may be considered. In exercising its task to make the correct and preferable decision under s 27(2), the Tribunal will consider all credible, relevant and significant information before it (*Kioa v West* [1985] HCA 81; (1985) 159 CLR 550 per Brennan J at 628-629). Relevant and credible evidence may be considered, notwithstanding that it may be indirect or hearsay evidence or information that does not or would not fully satisfy the “opinion rule” as it governs expert witnesses: *Wignall and Commissioner of Police* [2006] WASAT 206 at [280]-[281]. See also *C and Chief Executive Officer, Department for Community Development* [2007] WASAT 116 at [48] (appealed on other grounds in *Chief Executive Officer, Department for Child Protection v “C”* [2007] WASCA 172).

[2-1260] Evidential standards. Although not bound by the rules of evidence, the Tribunal must base its findings on material which is probative of the matter to be proved: *Grover v Commissioner of Police* [2005] WASC 263 at [26].

In the context of vocational or disciplinary inquiries where serious allegations of professional or occupational misconduct have been made and the reputation of a person or their capacity to engage in their registered livelihood is at stake, the Tribunal consistently applies what is commonly referred to as the Briginshaw approach in assessing evidence and making findings: *Medical Board of Western Australia and Valibhoy* [2008] WASAT 17 at [100]; see, eg, *Legal Practitioners Complaints Committee and Gandini* [2006] WASAT 163 at [64] and the other decisions referred to. The description of the approach is drawn from the decision of the High Court in *Briginshaw v Briginshaw* (1938) 60 CLR 336. In *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449, Mason CJ, Brennan, Deane and Gaudron JJ explained the approach where they observed (at 449-450):

The ordinary standard of proof required of a party who bears the onus in civil litigation in this country is proof on the balance of probabilities. That remains so even where the matter to be proved involves criminal conduct or fraud. On the other hand, the strength of the evidence necessary to establish a fact or facts on the balance of probabilities may vary according to the nature of what it is sought to prove. Thus, authoritative statements have often been made to the effect that clear or cogent or strict proof is necessary “where so serious a matter as fraud is to be found”. Statements to that effect should not, however, be understood as directed to the standard of proof. Rather, they should be understood as merely reflecting a conventional perception that members of our society do not ordinarily engage in fraudulent or criminal conduct and a judicial approach that a court should not lightly make a finding that, on the balance of probabilities, a party to civil litigation has been guilty of such conduct. (footnotes omitted)

[2-1265] Evidence from children. The Tribunal is bound to have regard to the fact that courts have always weighed the evidence of children with caution. A similar caution is required of the Tribunal, especially in light of the requirement that the Tribunal act with equity, good conscience and according to the substantial merits of the case: *C and Chief Executive Officer, Department for Community Development* [2007] WASAT 116 at [79] (appealed on other grounds in *Chief Executive Officer, Department for Child Protection v “C”* [2007] WASCA 172).

Cases

[2-1275] Letters. In a strata titles matter, four letters were submitted as evidence attesting to the existence of a nuisance. The purpose of the letters was to confirm that a unit owner had reason to complain about noise. Two of the letters were signed, one was unsigned and one was in the form of an email. The respondent objected to the letters being admitted into evidence. *Held:* As the Tribunal is not bound by the rules of evidence, the letters were admissible: *The Owners of Mill Point Strata Plan 11391 and Fownes* [2006] WASAT 30 at [26].

[2-1280] Hearsay. In an application to review a decision of the Commissioner of Police to refuse a firearms licence, the power of the Tribunal to consider evidence which would constitute hearsay and did not satisfy the “opinion rule” governing expert witnesses was in issue. The evidence was from a number of witnesses, including a Police Superintendent and people involved in ongoing criminal proceedings. *Held:* The Tribunal could properly regard the evidence because it was both relevant and credible: *Wignall and Commissioner of Police* [2006] WASAT 206 at [281].

[2-1285] Evidence from children. A delegate of the respondent CEO made a decision to issue a negative notice against the applicant under the *Working with Children (Criminal Record Checking) Act 2004* (WA). The decision was based on a conviction for indecent dealings that had been overturned due to inadequate inquiry by the trial judge into the capacity of the child complainant to give sworn evidence, as well as evidence given during hearings in respect of those charges. The DPP declined a retrial on the charges to avoid further distress to the complainant. The respondent CEO submitted that the child complainant’s evidence should be given substantial weight in the Tribunal as the trial judge would have been satisfied that complainant was competent to give sworn testimony if he had carried out the inquiry properly. *Held:* The submission was rejected. The residual doubt over the complainant’s evidence made reliance on it alone contrary to equity, good conscience and the substantial merits of the case. The negative notice was overturned: *C and Chief Executive Officer, Department for Community Development* [2007] WASAT 116 (application for stay of orders pending appeal dismissed in *Chief Executive Officer, Department for Child Protection v “C”* [2007] WASCA 172).

Sec 32(2)(b)

[2-1295] “Equity, good conscience and substantial merits”. The requirement to act according to equity and other matters relating to fairness is to do so within the bounds of the Tribunal’s jurisdiction. It does not permit the Tribunal to extend those bounds because to do so might be “fair” to a party. The Tribunal can determine whether a matter is within the limits of its jurisdiction; it cannot itself set those limits: *Winter and Commissioner of Western Australian Police Service* [2006] WASAT 87 at [38]. The requirement to act according to “equity, good conscience and the substantial merits of the case” is a “facilitative, not restricted” requirement: *Wignall and Commissioner of Police* [2006] WASAT 206 at [280]; *Minister for Immigration and Multicultural Affairs v Eshetu* [1999] HCA 21; (1999) 197 CLR 611 at [49] per Gleeson CJ and McHugh J. Residual doubt over a complainant’s evidence may make reliance on it alone contrary to equity, good conscience and the substantial merits of the case: *C and Chief Executive Officer, Department for Community Development* [2007] WASAT 116 (appealed on other grounds in *Chief Executive Officer, Department for Child Protection v “C”* [2007] WASCA 172) – see [2-1285].

Sec 32(4)

Cases

[2-1315] Medical report. The Tribunal ordered the applicant to provide a current medical report from a practitioner of her choice. Almost a year later, the applicant still had not filed a report. *Held:* Pursuant to s 32(4), the Tribunal sought to inform itself as it saw fit and prompted the applicant by letter for the medical evidence: *SMYM (also known as SMPM, SMY and MYM)* [2007] WASAT 131.

[2-1320] Non-party submissions. The applicant sought review of conditions of subdivision approval. Following discussions, culminating in a deed between the applicant, the local government and the respondent, the applicant sought the Tribunal’s leave to withdraw the proceedings. The respondent consented to the withdrawal. However, the proprietors and co-proprietors of a number of lots in the survey strata scheme concerning the application applied to the Tribunal to make submissions and opposed leave being granted to withdraw the proceedings. *Held:* Pursuant to the Tribunal’s power to “inform itself on any matter as it sees



Page 46 is not part of this book preview.

[2-1400] 34. Directions

- (1) The Tribunal may give directions at any time in a proceeding and do whatever is necessary for the speedy and fair conduct of the proceeding.
- (2) The Tribunal’s power to give directions is exercisable by —
 - (a) a legally qualified member; or
 - (b) the presiding member if the Tribunal as constituted for a hearing does not consist of or include a legally qualified member.
- (3) The Tribunal may give directions on its own initiative or at the request of a party.
- (4) A directions hearing conducted or presided over by a legally qualified member may be held for the purposes of this section before any other hearing in the proceeding.
- (5) The Tribunal may give a direction requiring a party to produce a document or other material, or provide information, to the Tribunal or another party despite any rule of law relating to privilege (other than legal professional privilege) or the public interest in relation to the production of documents.
- (6) However if the Tribunal considers that any document is or contains protected matter, the Tribunal cannot direct a party to produce it to another party.

[2-1405] Overview. Section 34 enables the Tribunal to give directions and do other things to enable the proceedings to be fair and expeditious. These directions can require the production of a document or material or provision of information notwithstanding any rules of law regarding privilege or public interest in relation to the production of documents. The Tribunal cannot direct a party to disclose “protected information” to another party (Explanatory Notes, cl 34).

[2-1410] Strata title disputes. In strata title disputes it is the practice of the Tribunal to review each matter to determine whether it is appropriate for it to be determined on the papers, or whether for any reason, it is more appropriate that a directions hearing be held: *Caputi and Pado* [2005] WASAT 146 at [28].

Related materials:

Standard Orders Made at Directions Hearings, SAT

Practice Note 2: Review Proceedings – covers issues including: initial directions hearings; matters that will be considered at directions hearings; identifying issues in dispute and relevant documents; orders usually made at directions hearings.

Practice Note 3: Original Proceedings – see under “What will the Tribunal consider at directions hearings?”

(The above materials are available at <www.sat.justice.wa.gov.au>)

[2-1430] 35. Obtaining information from third parties

- (1) On the application of a party to a proceeding, the Tribunal may order that a person —
 - (a) who is not a party to the proceeding; and
 - (b) who has, or is likely to have, in the person’s possession or under the person’s control a document or other material that is relevant to the proceeding,
 produce the document or material to the Tribunal or the party within the time specified in the order.
- (2) The Tribunal may order a person to produce a document or other material despite any rule of law relating to privilege (other than legal professional privilege) or the public interest in relation to the production of documents.
- (3) However if the Tribunal considers that any document is or contains protected matter, the Tribunal cannot order a person to produce it to a party.

[2-1435] Relationship with s 66. Although the SAT Act does not clearly indicate when s 35 should be used rather than s 66 for the production of documents, it would appear s 35 should be

used when the production of documents is required prior to the substantive hearing: *Douglas and Van May (WA) Pty Ltd* [2005] WASAT 318 at [13].

[2-1440] Determining application for production. In exercising its discretion under s 35, the Tribunal must look to the relevance of the documents in relation to the substantive issues it is required to consider. However, in exercising its discretion, the Tribunal should not embark on a preliminary enquiry into the evidence (*Apache Northwest Pty Ltd and Ors v Western Power Corporation* (1998) 19 WAR 350). A request for production of documents must be for the purpose of obtaining evidence to support the party's case, not to discover it. It is inappropriate to order production of the documents when they are required for a collateral purpose. It would be appropriate to refuse an order for production of documents when to grant it would be unnecessary and oppressive (*Attorney-General v Northern Metro Tramway Co* [1892] 3 CH 70 at 74). The primary question is whether the respondents have a "legitimate forensic purpose" in seeking production. Guiding principles to assist in determining this were confirmed in *Stanley v Layne Christensen Company* [2004] WASCA 50 as follows:

(1) A legitimate forensic purpose will be established if a document gives rise to a line of enquiry which is relevant to the issues before the trier of fact, including for the purpose of meeting the opposing case by way of cross-examination.

(2) In assessing whether a legitimate forensic purpose exists in relation to documents sought on an early return of subpoena, it must be borne in mind that the necessity for having a document to fairly dispose of the issues at trial might well not become apparent before trial. It may, for example, become apparent when a document is used in cross-examination to refute unforeseen evidence-in-chief. Thus, whether a document is 'necessary' to fairly dispose of proceedings is to be understood in the broad sense of embracing any document which has value, in the sense of at least apparent relevance, and fairly disposing of proceedings, even if it might not readily be seen, at the pre-inspection stage, necessarily to be admissible in evidence. Cases will be rare in which, prior to production of documents, a subpoena will be set aside as an abuse of process on the ground the documents by description are manifestly irrelevant to the subject proceedings, or are incapable of bearing upon matters of credit pertinent to the proceedings.

(3) At least one object of the rule permitting early return of subpoenas is to appraise the parties of the strengths and weaknesses of their case at an early stage. Hence, no narrow view as to the legitimate purposes of a subpoena ought to be taken.

(4) There is no requirement that to avoid the stigma of fishing, a party must already be in possession of some evidence before issuing a subpoena. Historically the concept of fishing was not concerned with the prior possession of evidence, but rather the prior pleading of issues for which the evidence sought would be relevant. In the interests of a fair trial, litigation should be conducted on the footing that all relevant documentary evidence is available. (citations omitted)

[2-1442] The above principles are relevant to deciding an application for production: *Kassa and Bitmead* [2006] WASAT 298 at [13]-[18].

[2-1444] While the Act does not clearly indicate when s 35 should be used rather than s 66 for the production of documents, it would appear that s 35 should be used when it is intended to have documents produced prior to the substantive hearing date: *Douglas and Van May (WA) Pty Ltd* [2005] WASAT 318 at [13].

[2-1450] Family Court documents. The Tribunal cannot order production under s 35 by the Family Court of Australia of its records as it is a federal body which stands outside the exercise of any power by the Tribunal: *Kassa and Bitmead* [2006] WASAT 298 at [38].

[2-1455] Magistrates Court documents. Section 33 of the *Magistrates Court Act 2004* (WA) in conjunction with rules 37- 40 of the *Magistrates Court (General) Rules 2005* (WA) restricts access to Magistrates Court records with respect to civil proceedings to those persons who are parties to those proceedings only. Therefore an applicant under s 35 who does not claim to be such a party cannot require the Tribunal to make an order under this section: *Kassa and Bitmead* [2006] WASAT 298 at [40].



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[2-1735] Granting leave. The SAT Act does not specify issues that must be considered by the Tribunal when exercising its discretion to grant leave to withdraw from a proceeding. Nor does it specify the reason why leave to withdraw is required (at [33]). Where all parties to a proceeding seek or consent to its withdrawal, the discretion in s 46(1) as to whether to grant leave should normally be exercised in favour of leave, unless the Tribunal considers, on its own initiative, that an order dismissing or striking out the proceedings is warranted or until an order for the payment of the costs of the proceedings is made under s 88(2), where appropriate (at [37]). Section 74(1) of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) is the equivalent provision of s 46(1) under the SAT Act. Factors which the Victorian Tribunal has taken into account in the exercise of discretion to grant leave include whether other parties have incurred costs in the proceedings (*Trajkovski and Wyndham CC* [2000] VCAT 1671) and whether other party or parties have consented to withdrawal (*Kameel Pty Ltd v Casey CC* [2006] VCAT 526) (at [35]): *Clark and Western Australian Planning Commission* [2007] WASAT 33.

[2-1740] Purpose of requiring leave. Section 46(2) suggests that one reason for the requirement to obtain leave is to enable another party to seek an order dismissing or striking out all, or any part, of a proceeding before withdrawal and to enable the Tribunal to make such an order on its own initiative under s 46(5). The dismissal or striking out of a proceeding is significant as s 49 requires leave of a judicial member to commence another proceeding of the same kind in relation to the same matter. Another likely reason why leave is required is to enable another party to make an application for costs against the applicant or a third party under s 87(2) and to enable the Tribunal to make an order that a party pay the costs of a proceeding under s 88(2). If a party could withdraw a proceeding without leave, it could arguably preclude a costs order from being made against it or another party in the proceeding: *Clark and Western Australian Planning Commission* [2007] WASAT 33 at [34].

Cases

[2-1750] Non-party opposing leave to withdraw. The applicant sought review of conditions of subdivision approval. Following discussions, culminating in a deed between the applicant, the local government and the respondent, the applicant sought the Tribunal's leave to withdraw the proceedings. The respondent consented to the withdrawal. However, the proprietors and co-proprietors of a number of lots in the survey strata scheme concerning the application applied to the Tribunal to make submissions and opposed leave being granted to withdraw the proceedings. *Held:* The non-parties opposed the grant of leave to withdraw in order to enable their private interests to be advanced. It would have been an inappropriate exercise of the discretion under s 46(1) to refuse leave to withdraw in these circumstances. Leave to withdraw was granted: *Clark and Western Australian Planning Commission* [2007] WASAT 33.

[2-1770] 47. Unjustified proceedings

- (1) This section applies if the Tribunal believes that a proceeding —
 - (a) is frivolous, vexatious, misconceived or lacking in substance;
 - (b) is being used for an improper purpose; or
 - (c) is otherwise an abuse of process.
- (2) If this section applies, the Tribunal may order that the proceeding be dismissed or struck out and make any appropriate orders.
- (3) The Tribunal's powers to act under subsection (2) are exercisable only by a legally qualified member.
- (4) The Tribunal may act under subsection (2) on the application of a party or on its own initiative.

[2-1778] Criteria for dismissal or striking out. The power to summarily terminate an action must be used sparingly and exercised with extreme caution. The test is not whether the

applicant, on the Tribunal hearing both sides of the argument, would succeed; nor is it a test of whether or not the claim has merit, but whether the applicant fails to disclose a reasonable cause of action: *Turner and Maunsell Australia Pty Ltd* [2006] WASAT 52 at [44]-[47]. The mere fact that an application fails does not automatically bring it within the scope of s 47 of the SAT Act: *Stock and Shire of Victoria Plains* [2007] WASAT 231 at [115].

Sec 47(1)(a)

[2-1793] **“Misconceived”**. The Tribunal is bound to satisfy itself that it has jurisdiction to hear a proceeding, whether or not the question of jurisdiction is raised by the parties. An application is misconceived if it is brought without jurisdiction and must be dismissed: *Grant and The Owners of Rosneath Farm Strata Plan 35452* [2006] WASAT 162 at [21]; *Pearson and City of Gosnells* [2006] WASAT 228 at [37].

[2-1801] **“Lacking in substance”**. The decision to dismiss an application as lacking in substance is one that should only be taken after very careful consideration of the case and where it is clear that there is no realistic prospect of success of an application: *Ambrus and Churches of Christ Homes & Community Services Inc* [2006] WASAT 141 at [44]. While the exercise of the Tribunal of its function to reach the correct preferable administrative decisions may incidentally affect or vindicate reputations or individual interests, proceedings will be lacking in substance where such an outcome is their sole purpose rather than, for example, to obtain a substantive outcome serving a practical or legal purpose: *Dunbar and Commissioner of Police* [2007] WASAT 90 at [29].

[2-1804] Where a matter fails on a preliminary issue of jurisdiction it does not necessarily mean that the proceedings are unjustified within the meaning of s 47 as they may not be proceedings that are untenable or which no reasonable person would believe could be successful: *Blunt and Pal* [2007] WASAT 264 at [17].

Cases

[2-1819] **Misconceived or lacking in substance**. The male applicant claimed that his employer had dismissed him on the basis of his gender. Despite a well-motivated desire to right perceived wrongs, the applicant made broad-ranging allegations that would have created a very substantial prejudice to the respondent. *Held*: The allegations could not have provided a foundation for relief under the enabling Act and, consequently, were misconceived or lacking in substance. The proceedings were dismissed: *Ambrus and Churches of Christ Homes Community Services Inc* [2006] WASAT 141.

[2-1822] The applicant sought a review of a Shire’s decision to issue notices for structures to be pulled down and removed. The Shire opposed the applications and sought an order for the proceedings to be dismissed on grounds that they were unjustified. *Held*: The applicant’s application was not unwarranted for various reasons, including:

- In view of his experience in the building industry, he could have been expected to have had a good understanding of licensing requirements, particularly as these were made clear to him on various occasions by Shire staff.
- His evidence was lacking substance. He merely relied on personal interaction he had had with the Shire and his belief that staff were intent on defrauding him. He failed to call any persons with whom he had dealings as witnesses.
- His referral to the buildings as a “cubby house”, “games room” and “builders hut” in the belief this would result in a finding that they were not “buildings” for purposes of the relevant Act was an abuse of the legal process.
- He made unsubstantiated accusations and allegations against officers of the Shire, after he had been cautioned by the Supreme Court against doing this.

- He failed to produce any witnesses or expert evidence to support his application, despite ample opportunity to do so.

[2-1825] The application was unjustified, misconceived, lacked substance and was an abuse of process and was dismissed: *Stock and Shire of Victoria Plains* [2007] WASAT 231.

[2-1832] **Appeal without statutory basis.** An appeal under the *Local Government Act 1995* (WA) that was without statutory basis was “misconceived” and struck out as incompetent: *Citygate Properties Pty Ltd and City of Bunbury* [2005] WASAT 53.

[2-1840] **Subject matter no longer in existence.** The applicant sought review of the respondent City’s decision to refuse retrospective planning approval for a fence. By the date of the hearing, the fence had been removed. The respondent claimed that the proceedings should be struck out or dismissed because the subject matter of the appeal no longer existed. *Held:* The Tribunal noted that the contravention of a town planning scheme is an offence. Theoretically speaking, the applicant could have been prosecuted for the contravention unless retrospective approval issued. The Tribunal did not consider the proceedings to be frivolous, vexatious or lacking and did not strike out the proceeding: *Saunders and City of Nedlands* [2005] WASAT 125.

[2-1843] The applicant sought to have a decision to revoke its licences reviewed. By the time the application was heard, the licences had expired through the effluxion of time. However, the applicant wanted the matter heard in order to clear his name and sought a declaration that the decision to revoke the licences should not have been made. *Held:* Any declaration conferred under s 91 of the SAT Act would have been lacking in substance. As the licences were no longer in existence by the effluxion of time (and not the revocation), the principal relief sought in the application was lacking in substance. The proceedings were dismissed: *Dunbar and Commissioner of Police* [2007] WASAT 90.

Sec 47(1)(c)

[2-1860] **Unfair delay.** A long delay in bringing complaints may be an abuse of process as it reduces the possibility of a fair hearing - memories fade; relevant evidence becomes lost; even where written records are kept, long delay will frequently create prejudice which can never be proved affirmatively (*Herron v McGregor* (1986) 6 NSWLR 246 at 254). In *Jago v District Court of New South Wales* [1989] HCA 46; (1989) 168 CLR 23 at 60-61, Deane J identified five main heads of relevant circumstances and considerations for a court in deciding whether proceedings should be stayed on the grounds of delay. They were: (i) the length of delay; (ii) reasons given by the prosecution to explain or justify the delay; (iii) the accused responsibility for and past attitude to the delay; (iv) proven or likely prejudice to the accused; (v) the public interests in the disposition of charges of serious offences and in the conviction of those guilty of crime. While other factors may influence a decision whether to stay proceedings, these are convenient reference points to determine whether proceeding with the case may lead to unfairness (at [16]). The jurisdiction of the Tribunal under s 47 to stay or strike out proceedings on the basis that delay will prevent a fair hearing is an exceptional jurisdiction. It is only those cases where a fair hearing cannot be provided that the public interest in having complaints properly disposed of outweighs the public interest in ensuring that litigants receive a fair hearing (at [31]): *Medical Board of Western Australia and Petros* [2007] WASAT 42.

[2-1868] In the context of assessing costs against a vocational body, the Tribunal has indicated that the fact that a complaint may be delayed, or “stale”, does not necessarily and automatically mean that a matter should not be brought before the Tribunal and, if it is, that there is no reasonable basis for proceeding with the matter. Further, the fact that a practitioner is not practicing at the time of the making of the complaint does not mean that a complaint should not be brought. However, in cases of undue or lengthy delay in the making of complaint, a vocational regulator should very carefully scrutinise the available evidence, looking for, if possible, some independent corroboration of the complaint. In making a decision whether to proceed against a practitioner by filing an application in the Tribunal, the merits of such



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[2-2625] 86. Enforcement of decision other than monetary order

- (1) If, or to the extent that, a decision of the Tribunal is not a monetary order, it may be enforced under this section.
- (2) A person seeking to enforce a decision under this section may file in the Supreme Court —
 - (a) a copy of the decision that a judicial member or the executive officer has certified to be a true copy;
 - (b) the person's affidavit as to the non-compliance with the decision; and
 - (c) a certificate from a judicial member stating that the decision is appropriate for filing in the Supreme Court.
- (3) No charge is to be made for filing a copy of a decision, an affidavit, or a certificate under this section.
- (4) On filing, the decision is taken to be a decision of the Supreme Court, and may be enforced accordingly.

Division 5-Costs**[2-2630] 87. Costs of parties and others**

- (1) Unless otherwise specified in this Act, the enabling Act, or an order of the Tribunal under this section, parties bear their own costs in a proceeding of the Tribunal.
- (2) Unless otherwise specified in the enabling Act, the Tribunal may make an order for the payment by a party of all or any of the costs of another party or of a person required to produce a document or other material on the application of the party under section 35.
- (3) The power of the Tribunal to make an order for the payment by a party of the costs of another party includes the power to make an order for the payment of an amount to compensate the other party for any expenses, loss, inconvenience, or embarrassment resulting from the proceeding or the matter because of which the proceeding was brought.
- (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.
- (5) The rules may deal with the effect of certain offers to settle, and responses, if any, to the offer, on the making of an order for the payment by a party of the costs of another party.
- (6) The Tribunal may order that the representative of a party, rather than the party, in the representative's own capacity compensate that or any other party for costs incurred because the representative acted in, or delayed, the proceeding in a way that resulted in unnecessary costs.

Sec 87(1)

[2-2638] Costs-neutrality. The starting proposition in the Tribunal is that, in the absence of any legislative direction, parties bear their own costs in a proceeding: see, eg, *Citygate Properties Pty Ltd and City of Bunbury* [2005] WASAT 53 at [28]; *Lai and Costa* [2006] WASAT 117 (S); *Springmist Pty Ltd and Shire of Augusta-Margaret River* [2005] WASAT 143 (S) at [32]; *Quah and AMP Life Limited* [2005] WASAT 169 at [14]; *Shark Bay Tuna Farms Pty Ltd and Department of Fisheries* [2005] WASAT 206 at [36]. It is commonplace to describe the Tribunal as a costs-neutral tribunal: see, eg, *Clifford and Shire of Busselton* [2007]

WASAT 89 (S) at [39]; *Chew and Director General of the Department of Education and Training* [2006] WASAT 248; *Summerville and Department of Education and Training* [2006] WASAT 368 (S). It is important that parties take steps before and during a hearing to minimise their costs as far as possible. Parties choosing to approach proceedings in a way that substantially increases costs will rarely obtain a favourable costs order in relation to those increases. In the event that an order for costs is made, the Tribunal’s obligation to minimise the costs to parties under s 9(b) will be reflected in the costs assessed by the Tribunal as recoverable: *J & P Metals Pty Ltd and Shire of Dandanup* [2006] WASAT 282 (S) at [38]; *Blunt and Pal* [2007] WASAT 264 at [20]. The Tribunal will be vigilant to cause steps to be taken that may result in the minimisation of costs: *Legal Practitioners Complaints Committee and Benari* [2005] WASAT 213 at [33].

[2-2646] Alteration of position by enabling Acts. The intent reflected in s 87(1) appears to be that if an enabling Act provides for costs to be awarded, the presumption that each party should bear their own costs does not apply. Section 87(1) does not appear to remove that presumption if the enabling Act has been amended so as to no longer specify otherwise in relation to costs. The discretion under s 87(2) is sufficiently broad to enable the Tribunal to take into account the practice which was followed in the exercise of the applicable jurisdiction prior to the coming into effect of the SAT Act: *Bilek and Vata Investments Pty Ltd* [2005] WASAT 153 at [6]-[11].

[2-2654] Ministerial referral proceedings. The policy reasons or similar policy reasons to those which underlie the Tribunal’s established practice in review proceedings that each party should usually bear its own costs also apply in Ministerial referral proceedings: *Drake and City of South Perth* [2005] WASAT 271 (S) at [20].

Sec 87(2)

[2-2669] Discretion to award costs. The approach taken by the Tribunal to the award of costs in its review jurisdiction is that there must be some exceptional reason for ordering that one party pay the costs of another. Usually, an exceptional reason will be in the nature of the matters referred to in s 87(4) or that one party has conducted itself unreasonably in some respect so that the other party has been put to unnecessary expense. If there is no such unreasonable conduct, costs will generally not be awarded. If there is no such unreasonable conduct, costs will generally not be awarded: *Firestar Enterprises Pty Ltd and Town of Vincent* [2007] WASAT 100 at [15]; *Godenzi and City of Joondalup* [2007] WASAT 189 at [24].

[2-2672] The VCAT, which has a largely similar costs regime, has held that great care should be taken in exercising a power to award costs in order to ensure that the Tribunal remains readily accessible to the public at relatively low cost, particularly having regard to the Tribunal’s obligations to act fairly and according to the substantial merits of the dispute and to conduct proceedings with as little formality and technicality, and to determine such proceedings with as much speed as the applicable legislation permitted (*Re Cooper and Boroondara CC* [2001] VCAT 2429). These are obligations also enshrined in s 9 of the SAT Act. The award of costs in proceedings involving less affluent sectors of the public might effectively deny access to the justice system: *Bilek and Vata Investments Pty Ltd* [2005] WASAT 153 at [15].

[2-2675] If proceedings should not have been brought against a party because there was really no case to answer the Tribunal may take this into account in deciding whether to award costs against the unsuccessful party who brought the action: *Summerville and Department of Education & Training* [2006] WASAT 368 (S) at [37] (see [38]-[44] for an overview of case law regarding various factors that have been taken into account when making costs orders, including whether the unsuccessful party has pursued frivolous or untenable claims, acted in malice or subjected the other party to rigorous and embarrassing cross examination).

[2-2678] Section 87(4) identifies certain matters to which the Tribunal is to have regard in exercising its discretion to award costs under s 87(2) but does not limit the matters which might



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