BURDEN OF PROOF AND STANDARD OF PROOF IN THE WA STATE ADMINISTRATIVE TRIBUNAL – A CASE OF HORSES FOR COURSES

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I INTRODUCTION

The burden of proof and the standard of proof applicable in proceedings in the State Administrative Tribunal (SAT) are often the subject of uncertainty to those who appear in SAT. The reason for the uncertainty arises from the dual nature of SAT with its administrative review and original jurisdictions. In some instances, the burden of proof rests on the applicant, while in other instances there is no strict burden of proof, although there may be a 'practical' burden of proof. Closely linked to the question of who carries the burden of proof, is the question as to what standard of proof must be met for SAT to make a finding of fact.

It is generally accepted that in administrative review proceedings, there is no burden of proof,² while, on the other hand, in civil and commercial disputes, the burden of proof rests on the applicant. As far as the required standard of proof is concerned, it is also accepted that the civil standard of proof, known as a 'balance of probabilities', is applicable to tribunal proceedings.

Hidden behind this generalisation is a picture that is more nuanced and perhaps more confusing than it may appear at a casual glance. As a result of the wide variety of enabling Acts³ that give jurisdiction to SAT, a slightly different emphasis is discernible in the Tribunal's conduct of proceedings in regard to the burden of proof and the standard of proof. It appears that in regard to both the burden of proof and the standard of proof, the SAT proceedings are varied and depend on the particular subject matter before SAT – be it a review of a decision; an original commercial or civil dispute; a vocational disciplinary matter; a guardianship and administration application; or a complaint of discrimination under equal opportunity legislation.

This article explores the State Administrative Act 2004 (WA) (SAT Act) and decisions of relevance to the SAT Act, so as to discern (a) who bears the burden of proof in SAT proceedings; and (b) what is the standard of proof for findings of fact to be made.

The article concludes that no simple response can be provided to answer these questions as to the burden and standard of proof in SAT and that, in essence, it is a case of the proverbial horses for courses depending under which enabling Act the proceeding is

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² Although ‘the concept of onus of proof is not appropriate to administrative inquiries and decision making’ (Yao-Jing v Minister for Immigration and Multicultural Affairs (1997) 74 FCR 275, 288), the relevant facts of the individual case will have to be supplied by the applicant himself or herself, in as much detail as is necessary to enable the examiner to establish the relevant facts.
³ An 'enabling Act' refers to any statute of Parliament under which jurisdiction is conferred to SAT; s 3 State Administrative Tribunal Act 2004 (WA).
conducted. For example, the answer to the question as to the burden and standard of proof in guardianship and administration proceedings may be different to the answer given in proceedings in the areas of civil and commercial or vocational regulation disputes. As a result of the wide jurisdiction of SAT, the respective streams in which SAT is organised, have adopted a slightly different approach as to who bears the burden of proof and what is the required standard of proof. These differences therefore, in turn, influence the case management practices within SAT.

This article commences by giving an overview of the appearance of super-tribunals such as SAT on the Australian scene; it then provides an overview of what is generally understood by the concepts of burden of proof and standard of proof; and concludes with an investigation of the decisions of SAT to demonstrate the nuances in a super-tribunal as to who bears the burden of proof and what standard of proof is required.

II ADVENT OF SUPER-TRIBUNALS

By far, the majority of research, publications and decisions about the burden and standard of proof in Australian tribunals, relate to the traditional, purely administrative review tribunals such as the Administrative Appeals Tribunal, the Refugee Review Tribunal and the Migration Review Tribunal. The administrative review tribunals are entirely focused on the review of administrative decisions of government departments, organs of government and/or local authorities and as a result, there is, strictly speaking, no burden of proof on an aggrieved party since the tribunal, being in the shoes of the original decision-maker, is usually required to make the correct and preferable decision in light of all of the information before it. The tribunal therefore, acts as an administrative decision-maker and not as a judicial body.4

An area which remains relatively fallow from exploration, from a scientific point of view, and which causes confusion for practitioners, is how the burden of proof and standard of proof apply in super-tribunals such as SAT, where administrative review is combined with civil and commercial; vocational regulation and other jurisdictions. The civil and commercial jurisdiction of the super-tribunals has been described as a 'court substitute'5 since the super-tribunals became the repository of jurisdictions that would ordinarily be dealt with by the courts. The mixed jurisdictions of the super-tribunals contrast with administrative review tribunals where the latter have historically been very limited to specific sectors, or even if their jurisdiction involved multiple sectors, the role of the tribunal was limited to the review of administrative decisions.

SAT is one of several super-tribunals that has been established by Australian states in the past decade or so.6 The super-tribunals have a much wider jurisdiction than the traditional merit-review tribunals. The jurisdiction of the super-tribunals reaches into the

4 Refer for example to the following observation by Kitto J in regard to a decision by the Taxation Board of Review: ‘The board’s decision was not, of course, an adjudication; it was administrative in character’: WJ and F Barnes Pty Ltd v FCT (1957) 96 CLR 294, 314.
6 The other super-tribunals are the Victorian Civil and Commercial Tribunal (VCAT); the Queensland Civil and Administrative Tribunal (QCAT) and the New South Wales Administrative Decisions Tribunal (ADT). A proposal is being considered for the establishment of a South Australian Civil and Administrative Tribunal (SACAT).
heartland of civil and commercial, vocational, guardian and administration and other disputes. The super-tribunals are often clothed with an ever expanding jurisdiction of matters that previously fell within the responsibilities of the courts. It is therefore the underlying theme of this article that, the burden of proof and the standard of proof of super-tribunals that apply in super-tribunals are more nuanced than the standards applicable to the purely administrative review tribunals.

This distinction between purely administrative review tribunals and super-tribunals is often not adequately acknowledged. Refer, for example, to the following comment by the Taskforce that gave rise to the establishment of SAT and the way in which the Taskforce Report papered over the distinction between a merit review tribunal and a tribunal which also deals with original disputes:

The Taskforce recommends the establishment of a civil and administrative review tribunal to be called the State Administrative Tribunal (SAT)… In the final analysis the body (SAT) is an administrative tribunal exercising administrative, not judicial, power and is best so described.\(^7\)

An analysis of the SAT Act, and the enabling legislation under which it functions, shows that SAT is more than a traditional 'administrative' tribunal. Although SAT is not called a 'court', it is also not limited to the traditional structures, powers and functions of administrative tribunals – SAT is indeed \textit{sui generis}, a unique species. The jurisdiction of SAT, like the other super-tribunals, is not limited to review of administrative decisions. The jurisdiction of the super-tribunals also covers, in addition to administrative review, a diverse range of civil and commercial matters; extensive vocational regulation and disciplinary proceedings; equal opportunity disputes; and guardianship and administration matters. The combination of 'civil adjudicative and administrative law functions' presents unique challenges to the super-tribunals as well as to practitioners and members of the public who appear in those tribunals.\(^8\)

The use of the term 'administrative' in the titles of the super-tribunals (eg Western Australian State Administrative Tribunal and Victorian Civil and Administrative Tribunal) often leaves casual observers with the (wrong) impression that the predominant jurisdiction of the super-tribunals is limited to reviews of administrative decisions. In the case of SAT, a deliberate decision was made by the Taskforce not to include the word 'civil' in the name of the Tribunal. It was recognised in the process leading to the establishment of SAT that, 'lawyers may appreciate the finer distinctions between "civil" and "administrative review" functions', but that, for the sake of public understanding and simplicity, the term 'civil' does not appear in the name of SAT.\(^9\) The absence of the word 'civil' in the name of SAT may, ironically, have contributed to a perception that SAT is predominantly an administrative review tribunal. In practice, however, the administrative review case load of SAT is much smaller than its combined civil, commercial, vocational, guardianship and administration case load.\(^10\)

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\(^9\) Barker et al, above n 7, 59-60.

\(^10\) In 2011/12 the statistical breakdown of the case load of the respective streams was follows: Human Rights 4616 (60%); Civil and Commercial 2334 (30%); Development and Resources 511
The 'kaleidoscope' jurisdiction of super-tribunals and the challenges that are brought about by their wide jurisdiction have been described as follows by Creyke with specific reference to the Administrative Decisions Tribunal (ADT) of NSW:

It has a kaleidoscope jurisdiction comprising original, review and appellate decision-making, in contrast to the simpler, earlier, administrative review only model. The combined civil (often primary) and administrative (generally review) jurisdiction exemplifies this complexity. The combination sees members hearing anything from tenancy and professional disciplinary matters to the more traditional administrative review disputes. As a consequence, the ADT's jurisdiction is considerably more complex than that of its Commonwealth forebear [the AAT], and it requires a more detailed and sensitive set of rules for its operation.11

In light of the diverse and expanding jurisdiction of SAT,12 the question often arises as to where the burden of proof lies in SAT proceedings and what standard of proof is required for the Tribunal to be satisfied of the existence of a fact in a particular matter. As a point of departure the following principle applies:

As a general principle, the burden of proving a fact that is in dispute rests with the party asserting it. That party bears the onus of satisfying the Tribunal that the fact should be accepted. In SAT the civil standard of proof of a “balance of probabilities” applies. This means that the party asserting a fact must prove that it is more probable than not that the fact exists in order for the Tribunal to accept the fact.13

III BURDEN OF PROOF AND STANDARD OF PROOF

The burden of proof generally refers to the onus which rests upon the party who brings the proceeding to a court or tribunal to make out its case against the other party, and to satisfy the presiding officer that a case has been established on the basis of the standard of proof as applicable to the particular jurisdiction. The standard of proof generally refers to the evidentiary standard that must be satisfied for a determination of fact to be made. The requirement that a case must be made out 'on the balance of probabilities' means, in effect, that the court or tribunal is satisfied that it has been established that something is more probable than not, and more likely than not. The burden of proof and the standard of proof are 'basic building blocks' of the Australian accusatorial system.14
In civil proceedings, the plaintiff or applicant, as a general rule, bears the onus to prove all facts in issue which relate to establishing the cause of action. The standard of proof required in civil proceedings, to determine whether or not a fact or issue has been proved by the plaintiff, is known as the 'balance of probabilities'.

The legislation establishing super-tribunals, including SAT, does not spell out who bears the burden of proof or what standard of proof is required in tribunal proceedings. Although reference is made in the SAT Act to disputes being decided 'fairly and according to the substantial merit of the case' and 'without regard to technicalities and legal form', no explicit mention is made of who bears the burden of proof or what is the standard of proof that applies. The general approach of SAT, and other super-tribunals, is that the civil standard of a balance of probabilities applies to its proceedings and that the party who alleges the existence of a fact, carries the practical burden of satisfying SAT of the existence of that alleged fact.

It is, however, often said that determinations in administrative review tribunals are not guided by the applicant (being the person who seeks the review) bearing the burden of proof, since the objective of the review process is to provide the 'correct and preferable' decision. The reason why there is no burden of proof in review proceedings is because those proceedings are not characterised by a contest of evidence or an ultimate judicial finding on the basis of a balance of probabilities. Rather, the review proceedings' focus is on what is the correct and preferable administrative decision the tribunal is expected to make in light of all the information before it. The proceedings in the review tribunal are therefore not characterised as an “appeal” of the administrative decision of a government department or local government, but rather as a “review” of the decision on a de novo or fresh basis. The tribunal is, therefore, placed in the shoes of the original decision-maker and its decision becomes the decision of the decision-maker.

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common law and the provisions of the statutes that create the review tribunals. See Bertus De Villiers, ‘The State Administrative Tribunal of Western Australia – time to end the inquisitorial/accusatorial conundrum about Australia's super-tribunals?’ [2013] University of Western Australia Law Review (forthcoming).

16 S 9(a) SAT Act.
17 S 32(2)(b) SAT Act.
18 Some legislation clearly sets out who bears the burden of proof. Refer for example to Liquor Control Act 1988 (WA) (s73(10)) which determines that the burden of establishing the validity of any objection 'lies on the objector'. The same applies to the First Home Owner Grant Act 2000 (WA) which determines in s 29(2) that the objector carries the burden of proof. See in this regard Chaney J in Homisan and Commissioner of State Revenue [2011] WASAT 22 at [36].
20 Note, however, that SAT is not bound by the rules of evidence; it is bound by the rules of natural justice; SAT may inform itself; and SAT may make use of the knowledge of its members. B de Villiers (2012) ’S 32 – the soul of the State Administrative Tribunal’ Brief September: 14-18.
21 S 27(2) State Administrative Tribunal Act 2004 (WA).
22 S 27(1) State Administrative Tribunal Act 2004 (WA). 'De novo' entails that the Tribunal is placed in the shoes of the original decision-maker and that it can take into account all the information that was before the decision-maker as well as any new information or material that has since the original decision become available, so as to make its decision.
23 Ibid s 29(5).
Woodward J in *McDonald v Director-General of Social Security* 24 summarised the place of burden of proof within administrative review as follows:

The first point to be made is that the onus (or burden) of proof is a common law concept, developed with some difficulty over many years, to provide answers to certain practical problems of litigation between parties in a court of law. The use outside courts of law of the legal rules governing this part of the law of evidence should be approached with great caution. This is particularly true of an administrative tribunal which, by its statute “is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate” (AAT Act s 33(1)(c)). Such 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. Whether the principles adopted by such a tribunal, arising from these various considerations, are appropriately dealt with under the heading “onus of proof”, becomes a matter of choosing labels. It would probably be more convenient to avoid using that expression in cases such as the present. There is certainly no legal onus of proof arising from the fact that this is an “appeals” tribunal, because the AAT is required, in effect, by s 43 of the AAT Act, to put itself in the position of the administrator in carrying out its review and, in the light of the material before the AAT, (not the material before the administrator, *Drake v Minister for Immigration and Ethnic Affairs* (1979) 46 FLR 409 at 419) make its own decision in place of the administrator’s.

The 'absence' of a strict burden of proof is therefore one of the characteristics common to administrative review tribunals. 25 The rationale for the absence of a burden of proof in administrative reviews is found in the fact that tribunals ‘as the repository of administrative power must often balance the interests of the public at large and the interests of minority groups or individuals’. 26

For the administrative review tribunal there is more at stake during the proceeding than the competing positions of two individuals. There are also considerations of public interest and public policy to take into account so as to make the 'correct' and 'preferable' decision. 27 In addition, it is often expected of the review tribunal to make some inquiries about what the correct and preferable decision is, since the person seeking the review, may not have access to resources or to departmental files, policies and procedures. SAT, therefore, regularly uses its powers to oblige the decision-maker to make available to the proceeding, all its documents and material of relevance to the application. 28

The duty which rests on the shoulders of the review tribunal to make the correct and preferable decision and to conduct inquiries into a matter, is well illustrated in the functioning of the Commonwealth Refugee Review Tribunal and Migration Review Tribunal, where the 'burden to collect information' 29 is, to some extent, placed on the

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26 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 35-37 (Brennan J).
27 Ss 25 and 28 *State Administrative Tribunal Act 2004* (WA).
28 S 24 *State Administrative Tribunal Act 2004* (WA). This is commonly referred to as the 's 24 bundle'.
29 Bedford and Cryeke, above n 25, 8.
tribunal rather than on the parties.\textsuperscript{30} Those tribunals are often put in a position where they not only rely on the information presented to them by the parties, but the tribunals also collect information, for example, about the background of the applicant and relevant country information so as to determine the ‘correct and preferable decision’.\textsuperscript{31} This emphasises the objective of the relevant tribunal to come to the correct and preferable decision, without placing any of the parties under a burden of proof to prove their case.\textsuperscript{32}

The concepts of "onus of proof and burden of proof" therefore has no role to play before the [review] tribunal.\textsuperscript{33} According to Creyke, the burden of proof in the traditional administrative review tribunal therefore falls on the tribunal to be 'satisfied', rather than on a party to prove its case that appears before it.\textsuperscript{34}

The case management practices of tribunals and super-tribunals, are impacted upon by the way in which the burden of proof and standard of proof are dealt with. Tribunals in general, and super-tribunals in particular, discharge their functions with a greater degree of flexibility and with a greater interventionist style (often inappropriately referred to as 'inquisitorial')\textsuperscript{35} than the courts, so as to meet the objectives of the tribunals. In this regard, the following has been observed (about review tribunals):

\begin{quote}

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.\textsuperscript{36}

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Since super-tribunals are creations of statute, the burden of proof and the standard of proof will, in each case, be dependent upon the construction of the particular Act that establishes each tribunal, as well as any relevant provisions under the enabling Act pursuant to which a dispute arises. The super-tribunals do not have inherent powers. This means that, as far SAT is concerned, the only sources of its powers, functions and jurisdiction are the SAT Act, the enabling Act, interpretations given by the courts to the exercise of those powers and relevant provisions of the common law.

The observations above, in regard to the purely administrative review tribunals, such as Administrative Appeals Tribunal; Migration Review Tribunal and the Refugee Review Tribunal, namely, that a burden of proof does not apply, cannot be imposed without

\textsuperscript{30} A decision-maker is not required to make the applicant’s case for him or her: \textit{Prasad v Minister for Immigration and Ethnic Affairs} (1985) 6 FCR 155, 169–70; \textit{Luu v Renevier} (1989) 91 ALR 39, 45. Nor is the Tribunal required to accept uncritically any and all allegations made by the applicant: \textit{Randhawa v Minister for Immigration and Ethnic Affairs} (1994) 52 FCR 437, 451; \textit{Minister for Immigration and Ethnic Affairs v Guo & Anor} (1997) 191 CLR 559, 596; Nagalingham \textit{v Minister for Immigration, Local Government and Ethnic Affairs} (1992) 38 FCR 191.

\textsuperscript{31} See James Stellios ‘Reconceiving the separation of judicial power’ (2011) 22 \textit{Public Law Review} 113, 125.

\textsuperscript{32} \textit{Bushell v Repatriation Commission} (1992) 175 CLR 408, 425 (Brennan J).


\textsuperscript{34} Robin Creyke ‘Inquisitorial practice in Australian tribunals’ (2006) 56 \textit{Administrative Review} 17, 27.

\textsuperscript{35} De Villiers, above n 14.

\textsuperscript{36} Emphasis added. \textit{McDonald v Director-General of Social Security} (1984) 1 FCR 354.
qualification on the super-tribunals. Super-tribunals are not limited to administrative review and the way in which they discharge their functions are therefore quite distinct from pure administrative review tribunals.

IV SAT’S APPROACH TO THE BURDEN OF PROOF AND STANDARD OF PROOF

As observed above, the SAT Act does not determine on whom the burden of proof rests or what standard of proof applies to SAT proceedings. The SAT Act only mentions that the Tribunal must decide a matter in accordance with the 'substantial merits of a case' and produce the 'correct and preferable' decision.37

Although SAT endeavours to ensure the greatest degree of consistency as far as is practical, in procedures across its wide jurisdiction, there are aspects in the procedures of specific jurisdictions that bring about a degree of uniqueness in the way that the burden of proof and the standard of proof are approached. This uniqueness, in turn, often gives rise to different case management procedures being followed within SAT – again highlighting the kaleidoscope nature of SAT as a super-tribunal.

SAT is organised into four so-called "streams" that reflect its main jurisdictions. Those streams are respectively called human rights; development and resources; vocational regulation; and civil and commercial.39 As is shown below, the approach adopted in the respective jurisdictions in regard to the burden of proof and the standard of proof demonstrates slight variations and this, in turn, impacts on the case management practices of the respective streams.

A Guardianship and administration proceedings

In guardianship and administration proceedings the preparation of a matter for hearing and the procedures during the hearing, are often of an investigative rather than an accusatorial/adversarial nature. In the overwhelming majority of matters, an application is lodged by a person (for example a family member, medical practitioner or social worker) on behalf of a proposed represented person, who is allegedly suffering from a mental disability that makes the person unable to make reasonable decisions about his/her estate or person.41 The documents and other information of relevance to an application are usually gathered by staff of the Tribunal and written and oral submissions are invited from family, friends, welfare and medical practitioners, as well as public authorities such as the Office of the Public Advocate and the Office of the Public Trustee. The staff of SAT fulfil an active, investigative role, more than in any other jurisdiction of SAT, to collate information that may assist the Tribunal to make a determination that is in the best interest of the (proposed) represented person.

37 S 9(a) State Administrative Tribunal Act 2004 (WA).
38 Ibid s 27(2). The term ‘correct and preferable’ refers only administrative review decisions.
39 Parry and De Villiers, above n 1, 204-208.
40 The author prefers the concept 'investigative' to describe the role of SAT rather than 'inquisitorial' as is sometimes suggested. Refer for example to the matter of Perpetual Trustees (WA) Limited and BW [2012] WASAT 106, [27] in which the investigative role of SAT is described as 'inquisitorial'.
41 S 4; s 43; and s 64 of the Guardian and Administration Act 1990 (WA).
The nature of the administration and guardianship hearings ranges from very informal to formal, although by far the majority of hearings are at a level of great informality with a round-table atmosphere, where persons are invited to make oral submissions and give evidence, but with the central guiding principle being, what is in the best interest of the proposed represented person. Although there may often be differences of opinion among family members, the character of the hearings is not adversarial in nature but rather investigative since the role of SAT is not to determine between competing parties, but rather to establish what is in the best interest of the (proposed) represented person. In matters where there is a dispute about facts, the nature of a hearing may be more formal and in exceptional cases, be akin to an adversarial proceeding.

Since the objective of the proceeding in guardianship and administration applications is to make a decision that is in the 'best interest' of the (proposed) represented person, there is strictly speaking no 'burden of proof' on any of the persons participating in the proceeding. Even the person who lodges the application is not under any such 'burden'. Rather, the person is seen as an initiator of a process and although the person is given an opportunity to explain the reasons for lodging the application, it is not construed as a 'burden of proof'.

There may be contesting or conflicting views and conflicting evidence as to the mental condition of a person or what orders should be in the best interest of the person, but even in such circumstances, the proceeding is usually not conducted as if the person bringing the application carries a burden of proof. The person who alleges the existence of a certain fact is nevertheless required to satisfy the Tribunal of the existence thereof.

Refer in this regard to the matter of A and J in which the Tribunal said the following about the absence of a burden of proof in guardianship and administration applications:

Although the notion of onus of proof has no part in administration proceedings, there is nevertheless a practical onus on the applicant to support her application because the Tribunal is entitled to rely on the case an applicant presents: Bushell v Repatriation Commission (1992) 175 CLR; Abebe v Commonwealth (1999) 197 CLR 510, 576. The Tribunal's inquisitorial role does not mean that an applicant can simply present what are said to be facts and leave it to the Tribunal to search out the truth of any and all allegations, in effect shifting the burden of providing the evidence in support of a claim to the Tribunal: Dranichnikov v MIMA (2003) 197 ALR 389.

In S v State Administrative Tribunal Heenan J said, as follows, about the obligation that rests upon the person alleging a particular fact or circumstance, ‘… the onus lay upon the applicant to establish, to the degree of persuasion which the gravity of the allegation and the seriousness of its consequences required, that she [proposed represented person] was not … competent’. Although the Tribunal therefore fulfils an important supportive and investigative role in applications, the burden of proof does not rest on the Tribunal. The Tribunal is therefore in a peculiar position where it on the one hand conducts an investigation about the mental condition of a person or other relevant information about what decision may be in the person's best interest, while it one the other hand it also makes a determination based on the investigation it undertook.

In regard to the standard of proof required in guardianship and administration proceedings, the level of satisfaction is comparable to what is known as the civil standard.

42 S 4(2) of the Guardian and Administration Act 1990 (WA).
44 [2012] WASC 306, [101]
of 'balance of probabilities'. The Tribunal must therefore be satisfied that it is more likely than not, that a proposition put by a person can be accepted. It has been suggested, however, that depending on the gravity of the consequences if an allegation is accepted by the Tribunal, the degree of persuasion may be higher than that of a 'balance of probabilities'.

In summary, in guardianship and administration proceedings, the emphasis is on the best interests of the (proposed) represented person and as a result, there is no burden of proof on any of the persons, including the applicant, participating in the proceeding. However, for the Tribunal to accept a particular assertion of fact, it must be satisfied on the balance of probabilities of the existence of the fact and, depending on the gravity or consequences of the assertion, the degree of persuasion required by the Tribunal may be an "actual" persuasion as per the Briginshaw-standard. A person alleging the existence of a particular fact therefore carries the burden to prove on a balance of probabilities (or higher), the existence of the fact.

B Review of administrative decisions

In the development and resources stream as well as the civil and commercial stream, reviews take place in regard to the merits of decisions made by government departments and local authorities. By far the majority of reviews in SAT fall within the planning and development and local government categories, but there are also a substantial number of reviews that concern taxation and firearm licences. Although more than one stream of SAT is involved in the review of administrative decisions, the reviews are all concerned with the merit of a decision. Judicial review remains vested in the jurisdiction of the Supreme Court.

In the SAT review jurisdiction, there is no burden of proof on the person seeking a review of a decision, since the proceeding is directed at an inquiry into what constitutes the 'correct and preferable decision' at the time when the review is conducted. The review hearing is a hearing de novo which means that the review is not limited to the material that was before the original decision-maker or to the reasons for the decision of the original decision-maker. SAT is effectively placed in the shoes of the original decision-maker and SAT's decision is therefore more akin to a decision of the executive arm of government. The decision of SAT becomes the decision of the original decision-maker.

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45 Ibid. His honour found that the 'degree of persuasion' that is required should reflect the 'gravity of the allegation and the seriousness of its consequences'. This elevated requirement of persuasion may be similar to what is generally referred to as the Briginshaw test which is applied in vocational disciplinary matters. For a discussion of the Briginshaw test see below.

46 It must be noted that SAT does not have a general review of all decisions by state and local governments, but that its review powers are limited to the areas that are specifically allocated to it pursuant to an enabling Act.

47 S19 State Administrative Tribunal Act 2004 (WA).

48 Ibid s 27(2).

49 Ibid s 27(1).

50 See, e.g., the Migration Review Tribunal. The immigration tribunals 'have close links to the Immigration Department and Minister in terms of the legislative and administrative framework. Thus the immigration jurisdiction is closely controlled by the Executive for both the immigration tribunals and the AAT in its migration jurisdiction.' Yee-Fui Ng, "Tribunal independence in an age of migration control" (2012) 19 Australian Journal of Administrative Law 203, 204.
The absence of a burden of proof on the person seeking a review, impacts on the case management procedures of SAT. In review proceedings, the order of business of SAT is usually to invite the decision-maker, even though it is strictly speaking the 'respondent' in the proceeding, to file its statement of issues, facts and contentions before inviting the 'applicant' to reply. This process firstly enables the applicant (party seeking a review) to understand the reasons for a particular decision and secondly, it highlights that there is, strictly speaking, not a burden of proof on either party. The respondent is under a statutory obligation to assist the Tribunal\(^{51}\) so as to enable SAT to come to the correct and preferable decision. Decision-makers are therefore encouraged not to 'defend' their decisions, but to explain to the Tribunal the basis for their decision and to reflect on any additional information that has become available since the decision was made, so as to enable SAT to make the correct and preferable decision.

The powers of SAT include the discretion to refer a matter back to the decision-making department or local government for reconsideration.\(^{52}\) This again affirms the role of SAT as administrative decision-maker rather than a judicial entity to which a decision is appealed. SAT utilises this power of referral regularly so as to enable the decision-maker to reconsider a decision it had made.\(^{52}\)

The approach adopted by SAT in regard to the burden of proof in review applications, is consistent with other administrative review tribunals. Refer, for example, to the decision in *Daniels v Commissioner of Taxation*\(^{54}\) in which the Administrative Appeals Tribunal observed as follows about the absence of a burden of proof and yet, a requirement for a party to satisfy the Tribunal of the existence of a particular factual situation:

> In proceedings before the Tribunal, neither party carries the burden of proof. However, under s 14ZZK(b)(i) of the TAA, when the Tribunal reviews an objection decision, the taxpayer applying for review has the burden of proving, where an assessment is involved, that the assessment is excessive. In seeking to show that the assessment is excessive, the taxpayer must put his or her case before the Tribunal and produce records and other evidence in support of the case.

SAT, like other administrative review tribunals, is not a court.\(^{55}\) SAT, like other tribunals, do not exercise judicial power when reviewing administrative decisions.\(^{56}\) They are, in some respects, part of the administration of the executive and their decisions are treated as administrative decisions. The decisions of review tribunals are treated as those of

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\(^{51}\) S 30 *State Administrative Tribunal Act 2004* (WA).

\(^{52}\) Ibid s 31.

\(^{53}\) The decision-maker may make a new decision which is acceptable to the applicant, therefore leading to the proceeding before SAT to be discontinued. The parties may also propose to SAT orders to be made, but in such a case it falls within the discretion of SAT to make the orders or to refuse to make the orders. Refer for example to the matter of *Tonkin and Commissioner of Police* [2010] WASAT 181 in which SAT refused to make orders proposed by the parties for the issuing of a firearms licence to the applicant.

\(^{54}\) [2012] AATA 792, [31]

\(^{55}\) SAT is not a court but an administrative tribunal, even when constituted by a judicial member: *Mustac v Medical Board of Western Australia* [2007] WASCA 28, [48]; *Hartwig v Builders' Registration Board of Western Australia* [2009] WASCA 138, [26].

\(^{56}\) *Ego Pharmaceuticals Pty Ltd and Minister for Health and Ageing* [2012] AATA 113.
the original decision-maker since these tribunals effectively stand in the shoes of the original decision-maker.\textsuperscript{57}

The standard of proof that is required in review proceedings is, in practice, akin to the civil standard of 'balance of probabilities'. SAT must therefore be satisfied on the balance of probabilities, of the existence of facts as alleged.\textsuperscript{58} In the matter of Pinesales Pty Ltd and Commissioner of State Revenue\textsuperscript{59} SAT emphasised that, in administrative review proceedings 'no party expressly bears any "onus" to prove a case one way or the other', although there may be a practical burden of proof.

In the matter of Wignall and Commissioner of Police it was put as follows:

The nature and purpose of review proceedings, and the question of any formal "onus" of proof has been discussed by the Tribunal in Pinesales Pty Ltd and Commissioner of State Revenue [2006] WASAT 202 at [43]-[46]. In short, the hearing is de novo, or afresh, so additional material to that placed before the original decision-maker may be adduced in evidence: State Administrative Tribunal Act 2004 (WA), s 27(1). The task of the Tribunal is to make the 'correct and preferable' decision: s 27(2). In that way, no party bears any formal onus to prove any facts. However, in some circumstances one or other party may bear a practical onus to prove facts in issue.

In summary, in reviews of administrative decisions before SAT, there is no burden of proof on any party, but SAT must be satisfied on the balance of probabilities of the existence of facts upon which a finding is based.

C Vocational regulation

SAT has a wide jurisdiction in the field of vocational regulation. The precise nature of the jurisdiction of SAT in regard to each vocation is set out in the enabling Act of relevance to the specific vocational area. In general, the jurisdiction may include reviews of decisions in regard to registration of persons to practise in certain vocations, as well as disciplinary proceedings associated with vocations. Examples of the vocational areas that fall within the jurisdiction of SAT are medical; legal; child care services; valuers; and building services.

In vocational proceedings the regulating authority that had made the decision that has given rise to the proceeding is required to explain to the satisfaction of SAT, the basis of its decision. In this sense, a hearing is conducted in similar vein as an administrative review proceeding where the decision-making regulatory body is given the opportunity to first explain the basis of its decision, before the aggrieved person is given an opportunity to reply. If, for example, a vocational body refuses to register a person to practise in a certain profession, then the vocational body must provide to the Tribunal the reasons for the decision so as to explain why its decision should be affirmed. In the case where a


\textsuperscript{58} Refer for example to the matter of Homisan and Commissioner of State Revenue [2011] WASAT 22 in which the Tribunal emphasised the 'burden lies on the applicants to establish by evidence that they occupied the Bunbury property as the principal place of residence'.

\textsuperscript{59} [2006] WASAT 202, [45].
vocational body seeks to impose disciplinary action against a practitioner, the burden rests on the regulating authority to satisfy SAT that the disciplinary action is justified.\(^{60}\)

The regulatory body must satisfy the Tribunal that on a 'balance of probabilities' a certain finding of fact can be made, and that such a finding should give rise to disciplinary proceedings or to the decision in regard to the registration of a practitioner.

If, however, a finding of serious misconduct or illegal conduct is sought, the test, referred to as the *Briginshaw* test\(^{61}\), although still on a balance of probabilities, requires clear, cogent and strong evidence in order to establish an allegation of vocational misconduct or incompetence.\(^{62}\) The Tribunal therefore 'must feel an actual persuasion of the occurrence or existence of the relevant facts'.\(^{63}\) Although the Briginshaw-standard does not set a third standard of proof (in addition to widely accepted balance of probabilities and beyond reasonable doubt in common law), the Briginshaw standard does require more persuasive proof the more serious the allegation is.\(^{64}\)

### D Commercial and civil disputes

The commercial and civil jurisdiction of SAT involves a wide range of enabling Acts that previously fell within the jurisdiction of the magistrate and district courts and other tribunals. These matters constitute the 'original' jurisdiction of SAT and involve disputes arising, for example, in areas such as strata titles, commercial tenancies, retirement villages, construction and building. The nature of these disputes is such that the proceedings resemble the closest of all the streams of SAT, court-type procedures and case management practices.

The burden of proof and standard of proof within the civil and commercial areas are consistent with the approach by the courts when the courts used to deal with these types of disputes.

In the commercial and civil jurisdictions, the burden of proof rests on the party who lodges an application. The applicant must satisfy the Tribunal that the remedy sought is justified. The case management standard is therefore akin to a court where the applicant presents its case; the respondent replies; and a decision is made whether the applicant is entitled to the relief sought or not.

The standard of proof to be complied with is the same as the civil standard of proof. The standard is referred to as a 'balance of probabilities' which means that the Tribunal must be satisfied that it is more probable than not, that a particular fact is demonstrated.

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60 'The practitioner is not required to prove that the incidents did not occur. Rather, the Board must prove on the balance of probabilities that they did occur. We must be persuaded that on balance, either or both of the alleged incidents occurred; further, we must feel an actual persuasion that they occurred. What evidence has the Board put before us so that we feel that actual persuasion as required by *Briginshaw*: Medical Board Of Western Australia and Moffson [2009] WASAT 190, [126-127]

61 *Briginshaw v Briginshaw* (1938) 60 CLR 336, 361-2 (Dixon J)

62 The *Briginshaw* standard has also been referred to as 'comfortable satisfaction' by Rich J in the same decision – ibid, [350].


64 Chris Davies 'The Comfortable Satisfaction'' standard of proof: applied by the Court of Arbitration for Sport in drug-related cases' (2012) 13 University of Notre Dame Australia Law Review 1, 4.
It is an error in law if the burden of proof is placed upon the respondent, as was demonstrated in the matter of *Swanell*, where it was found that the then Strata Title Referee had erred by concluding that the burden of proof is on respondent to prove that the floor covering of its unit complied with the Strata Titles Act. The Court found that 'there is nothing in the terms of the by-law or the Act which requires a respondent to an allegation that he or she breached a by-law to provide compliance with that by-law'.65 The burden is on the applicant to satisfy the Court that a by-law had been breached. The same approach has been followed in commercial tenancies disputes where it has been held that the burden of proof rests on the person who alleges that approval for a lease to be assigned was withheld unreasonably, to satisfy the Tribunal of the unreasonableness of the landlord's decision.66

**E  Equal Opportunities**

SAT has jurisdiction to consider applications pursuant to the *Equal Opportunity Act 1984* (WA) as part of its original jurisdiction.

A complaint of unlawful discrimination contrary to the *Equal Opportunity Act 1984* (WA) can only be made by a complainant to the Commissioner for Equal Opportunity under s 83 of that Act, and not directly to SAT. Where the Commissioner for Equal Opportunity dismisses a complaint under s 89 of the *Equal Opportunity Act*, the complainant may, by written notice within 21 days of receiving notice of the Commissioner's decision, require the Commissioner to refer the complaint to SAT under s 90. The Commissioner also has discretion to refer a complaint to SAT under s 93 where the Commissioner considers that the complaint cannot be resolved by conciliation and should be referred to the Tribunal.

In equal opportunity proceedings, the burden of proof rests on the applicant who alleges that it has suffered discrimination. The standard of proof that applies is similar to that in civil and commercial disputes, namely, a balance of probabilities. However, as in the case of vocational disciplinary proceedings, the Tribunal must be satisfied at *Briginshaw*-level, namely actual persuasion of the occurrence or existence of the relevant facts. The approach of SAT was well-summarised in the matter of *Soelberg (Formerly Van Droffelaar) and Commissioner Of Police*.67

Ms Soelberg bears the onus of proof and must prove her case on the balance of probabilities; *Dowling v Bowie* (1952) 86 CLR 136; *Williams and Commissioner of Police* [2005] WASAT 349 at [34]. Discrimination proceedings should be assessed on a case-by-case basis, and the standard of proof should take into account the seriousness of the allegations, the gravity of the consequences flowing from an adverse finding and the unlikelihood of the matters alleged having occurred: *State of Victoria v Macedonian Teachers’ Association of Victoria Inc* (1991) 91 FCR 47 at [21]. This is known as the *Briginshaw* standard of proof which is generally accepted as the relevant standard: (Briginshaw v Briginshaw (1938) 60 CLR 336), - Ronalds, *Discrimination Law and Practice* (3rd ed, The Federation Press, 2008) at 202.

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65 *Swannell v Lilliman* (unpublished 15 April 2004, File no APP 86 of 2003), [15].
66 *TAJ Coffee Company Pty Ltd and Plaza Arcade* [2009] WASAT 107. This follows the decision in *EDWF Holdings 1 Pty Ltd and EDWF Holdings 2 Pty Ltd* [2008] WASC 275 of Martin CJ, holding that the assignor carries the burden of proving that consent was unreasonably withheld.
67 [2008] WASAT 305, [71].
VI SUMMARY

This article has considered how the burden of proof and the standard of proof in a super-tribunal such as SAT are somewhat of a case of horses for courses. This is because the super-tribunals have, as part of their jurisdiction, a combination of review and original proceedings. Each of those proceedings exhibit aspects that are unique, and those uniqueness's in turn, impact upon the case management practices adopted by the respective streams of SAT.

It has been shown how SAT's approach to the burden of proof and the standard of proof varies, depending on whether the dispute arises in either the review; original, vocational, equal opportunities or administration and guardianship proceedings.

The practice that has developed by SAT can be summarised as follows:

- In original proceedings, the approach is similar to those found in civil courts, namely, that the applicant bears the burden of proof; the civil standard of balance of probabilities applies; and the applicant presents its case during a hearing before the respondent replies.

- In review proceedings, there is no legal burden of proof since the correct and preferable decision must be produced; the civil standard of balance of probabilities applies; and the respondent presents the reasons for its decision during a hearing before the applicant replies.

- In vocational proceedings, the burden of proof rests on the vocational regulatory body; the civil standard of balance of probabilities applies although in certain cases a level of satisfaction referred to as the Briginshaw standard applies; and the regulatory body presents its case during a hearing before the practitioner replies.

- In guardianship and administration proceedings, there is no legal burden of proof since the best interest of the represented person is sought to be achieved; the civil standard of balance of probabilities applies, although in cases where the consequences may bear a certain gravity, the Briginshaw standard applies; and the proceeding is conducted with the applicant introducing the evidence it believes justifies an order, after which all other persons are invited to give evidence or make submissions.

- In equal opportunity proceedings, the approach is similar to those found in civil courts, namely, that the applicant bears the burden of proof; the civil standard of balance of probabilities applies, but at the Briginshaw standard; and the applicant presents its case during a hearing before the respondent replies.