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# QCAT REVIEWS:

# HOW TO NAVIGATE THE SNAKES AND LADDERS[1]

## 1. Background to and Overview of the paper

My first introduction to the then new *Queensland Civil and Administrative Tribunal Act 2009* (QCAT Act), was in the context of assisting the Office of State Revenue in my role in the Legal Services Unit in Queensland Treasury. I was asked to assist the office to prepare for the commencement of the legislation and the management of review matters under the revenue and grants legislation administered by that Office. It was a brave new world for the Office of State Revenue, as it was for many Queensland government departments and agencies which had previously not been subject to external review other than by the Ombudsman.

Although some agencies had already experienced a level of review through one of the 18 Tribunals[2] which existed prior to QCAT, many were not within the scope of the jurisdiction of these Tribunals, and challenges to decisions were rare. Previously, in order for a person to externally challenge a government decision it would generally be necessary to venture to the Supreme Court to make a judicial review application under the *Judicial Review Act 1991* or in the Court's inherent jurisdiction or to bring a common law action in that Court (e.g. for breach of statutory duty).

In 2009/10 government agencies had to quickly come to grips with the notion that the external review of decisions would likely be sought with some frequency, by persons affected by

[1] Paper delivered to the Legalwise Seminar, Inquiries, QCAT and Constitutional Matters, Tuesday 20 March 2018. No part of this paper should be relied upon as legal advice.
[2] See Schedule 1 to the QCAT Act for a list of these Tribunals.

decisions, with or without legal representation, and at relatively low cost. The genesis for an external independent merits review Tribunal in Queensland dates from the Fitzgerald Report recommendations in 1989[3], and of course prior to that, from the model provided by the Administrative Appeals Tribunal (AAT) in the Federal jurisdiction. QCAT substantially changed the landscape in respect of the number and extent of challenges to administrative decision-making to which the Queensland government agencies would need to respond.

As it is now almost 9 years since the legislation was introduced [4], many will be at least partly familiar with the workings of QCAT. Accordingly, this paper will not provide a detailed overview of the provisions of the QCAT Act, rules and regulation, but will instead seek to highlight areas of practice in the review jurisdiction which differ from the practice in Courts: which can either trick the unwary (be a "snake" in the grass) or which may in fact offer opportunities (a "ladder") not available in the Courts. I will also spend a little time at the end of the paper reflecting on what has been achieved in this jurisdiction since QCAT was established, and what may require some consideration in any future statutory review of the legislation.

## 2. Nature of the Tribunal, jurisdiction and purpose

To put the practice issues discussed in this paper in some context it is necessary to first consider the nature of the Tribunal, its functions, and where it sits in the judicial landscape.

QCAT was established [5] under the QCAT Act and is empowered under that legislation and other enabling Acts [6] to deal with a wide variety of matters within its three areas of jurisdiction: original, review and appellate. In this paper I am addressing only the review jurisdiction in any detail, although it is to be noted that review matters may proceed through to appeal within QCAT.

(a) **Objects.** The objects of the legislation are set out in section 3 and include that the Tribunal deal with matters "*in a way that is accessible, fair, just, economical, informal and quick*". It is also of note that some of the other objects are directed to the broader aims of improving the "*quality and consistency of administrative decisions*" and enhancing the "*openness and accountability of public administration*". We will return

[3] Professor B Lane, *Queensland Administrative Law*, Westlaw AU at 5.30.
[4] The substantive provisions of the legislation commenced on 1 December 2009.
[5] Section 161 of the QCAT Act.
[6] See list of the 175 enabling acts in Annexure A, and on the QCAT website at http://www.qcat.qld.gov.au/resources/qcat-rules-and-legislation.

to these objects at the end of this paper when discussing issues relevant to the apparently imminent statutorily required review of the QCAT Act.

(b) **Is QCAT a Court or a Tribunal?** One of the first questions is whether QCAT is a Court exercising judicial power or simply a Tribunal exercising administrative power? Tribunals have traditionally been considered in the Federal jurisdiction to be exercising executive powers.

Less than 3 years after the QCAT Act came into operation the Court of Appeal was called upon in *Owen v Menzies* [7] to determine the status of QCAT under Chapter 3 of the *Commonwealth Constitution* i.e. whether it was "*a Court of a State*" capable of having vested in it judicial power of the Commonwealth under section 77 of that Constitution. The question arose in the context of whether QCAT could exercise federal jurisdiction in determining the constitutional validity of section 124A of the *Anti-Discrimination Act 1991 (Qld)*.

Counsel for the Applicant referred to provisions of the QCAT Act including section 13(1) which required that QCAT make orders in regard to minor civil disputes that it considered "*fair and equitable*", and submitted that this meant that QCAT was not necessarily obliged to apply the law.[8] The Applicant also submitted on a number of other bases that QCAT was not sufficiently independent for it to be characterized as a "Court" including that [9]:

- Although section 164(1) of the QCAT Act provided that QCAT is a "Court of record", it was not bound by the rules of evidence, practice or procedure (section 28) applying to Courts of record;
- The Tribunal was made up of only 3 judges, and the majority of decision-makers were non-judicial;
- Only the President or Deputy President had the power to punish for contempt;
- Members could be removed from office by executive government for nothing more than inefficiency or conduct warranting dismissal from the public service (section 188);

[7] [2012] QCA 170; (2012) 2 Qd R 327.
[8] See the judgment of de Jersey CJ at [12].
[9] Summarised by de Jersey CJ at [15].

- Members had relatively short terms of office i.e. there was no security of tenure and the conditions in their instruments of appointment eroded perceptions of independence;
- Powers given to the President were irreconcilable with the President being the "*proper repository of judicial power of the Commonwealth*" in that the powers included power of suspension of Members, managing the business of the Tribunal, and deciding on selection criteria for Members and adjudicators (and others of an administrative character;
- QCAT could not enforce its own orders i.e. section 131 and 132 provided for enforcement by filing the Tribunal's order in the Registry of a "*Court of competent jurisdiction*".

The Court of Appeal rejected the arguments raised by the Applicant, placing emphasis on the requirement for Members to act independently [10] and impartially [11], the fact that QCAT was legislated to be a Court of record, and the availability to Members of judicial review to challenge adverse decisions associated with their appointment. It was also noted that the decisions of QCAT bind the parties and are enforceable. The conclusion drawn by the Court of Appeal was that QCAT was an "*inferior Court of summary jurisdiction*" [12]. Special leave was sought to appeal to the High Court in this matter, but leave was refused.

This judicial confirmation of the status of QCAT as a Court, in the context of the exercise of federal powers, was given in the face of decisions by the NSW Court of Appeal that the NSW equivalent of the former Tribunal to QCAT (i.e. the Anti Discrimination Tribunal), and even the NSW Administrative Decisions Tribunal were each found <u>not</u> to be a Court of a state under section 77(iii) of the Commonwealth Constitution [13].

[10] Section 162 QCAT Act.
[11] This was an element established in the decision in *Kable v Director of Public Prosecutions* (NSW) (1996) 189 CLR 51. As referred to by McMurdo P in *Owen v Menzies* at [46] and de Jersey CJ at [19].
[12] *Owen v Menzies,* per McMurdo P at [49].
[13] See McMurdo P discussion of this in *Owen v Menzies* at [47] and *Trust Company of Australia Ltd v Skiwing Pty Ltd (2006) 66 NSWLR 77*. For completeness, it is also noted that when exercising State functions and powers, there is no question that, as a matter of constitutional law, QCAT can be invested with both judicial and administrative powers. The *Constitution of Queensland 2001* does not contain any constitutional principle of separation of powers, and the State has plenary powers which enable it to determine the structure organisation and jurisdiction of its Courts: *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575; *State of Queensland v Together Queensland* [2012] QCA 353 at [52] to [56].

The recognition of QCAT as a Court was also inconsistent with comments in the Independent Panel of Experts report which led to the Queensland Government decision to pass the QCAT Act:

> *"the recognition that QCAT is a Tribunal and not a Court must be at the forefront of all the new Tribunal's business".*[14]

Indeed, the inaugural President of QCAT, His Honour Justice Wilson appeared somewhat bemused by the implications of the decision in his article published in the Queensland University Law Journal in 2013 [15]. President Wilson had been a strong advocate for QCAT differentiating the Tribunal from a Court, in keeping with the Independent Panel of Experts comments. In his article, President Wilson did not resile from his view of what the government expected from the Tribunal i.e. to make decisions:

> *"freed of what politicians see as the constraints of the adversarial system, with greater liberty and power to cut to the heart of a matter of whatever kind."* [16]

So the answer to the question is that QCAT is both a "*Court of record*" and a Tribunal, with broad powers, which are not always neatly to be categorised as judicial or administrative.

It is however, an inferior Court /Tribunal subject to the supervision of the Supreme Court [17]. We will see from some of the case law discussed in this paper that while the Tribunal retains considerable latitude as to the manner in which it exercises its powers, the Supreme Court has, on occasion, seen fit to strike down the occasional procedure which it considers to be a "*step too far*".

(c) **Power to inquire.** The ability to adopt an inquisitorial approach is a hallmark of Tribunals [18] and although the QCAT Act does not contain an express provision to the effect that QCAT has this power, it is taken that such a power is implied [19]. In common

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[14] Independent Panel of Experts, *Stage 1 Report* (2008) 4, 21; Groves M, *The Duty to Inquire in Tribunal Proceedings* (2011) 33 Syd LR 177.
[15] Wilson J*, Tribunal Proceedings and Natural Justice: A Duty to Inquire* [2013] UQLawJ 23.
[16] Ibid at p 24.
[17] *Kirk v Industrial Court of NSW* (2010) 239 CLR 531.
[18] *Minister for Immigration and Citizenship v SGUR* [2011] HCA 1 at [23].
[19] Such a power is said to be implied by section 28(3)(c) which permits QCAT to "*inform itself in any way it considers appropriate*", read in the context of the general objects and functions of QCAT in section 3 and 4 of the QCAT Act. Also section 28(3)(e) may have relevance, as outlined below. See Wilson J article ibid at p 26; Groves article, op cit at p187.

with other Tribunals, QCAT does not necessarily sit back and rely upon the parties themselves to drive the matter forward, as in the traditional adversarial system.

However, there appears to be a wide variation between Tribunals and even within a Tribunal as to the extent that the power is exercised in practice. Further, there remains uncertainty as to the whether this power should be taken to extend to the Tribunal seeking out evidence itself, no doubt in recognition of the dangers in such an approach, if taken too far.

The inquiry approach is most commonly manifested in my experience in QCAT, by a Member robustly questioning the parties or their legal representatives from the bench, to probe the evidence provided and as to its completeness. Further, it is open to the Tribunal to decide that a witness should be called, whether or not a party has so determined (section97).

It is also noted that section 28(3)(e) of the QCAT Act places an obligation on the Tribunal to ensure as far as is practicable all relevant material is disclosed to the Tribunal to enable it to decide the proceeding with all the relevant facts. This could imply that not only is there a power to inquire, but that in rare cases it may be found that a Member had a duty to enquire further into a matter e.g. where an obvious enquiry as to a critical fact which would be easily ascertained is not made, which amounted to a failure to review [20].

However, having regard to decisions of the High Court in the federal jurisdiction, it would appear that it would have to be a particularly blatant omission for a decision of QCAT to be overturned on appeal on this basis. For example, in *Minister for Immigration v SZGUR* [21] the High Court found that a provision which enabled the Tribunal to obtain any information it considered relevant, did not require the Tribunal to seek further information "*that might enhance, detract from or otherwise be relevant to information which it has already received*" [22].

[20] As alluded to by the High Court as a possibility in respect of the Refugee Review Tribunal in Minister for *Immigration and Citizenship v SZIAI* [2009] HCA 39; (2009) 259 ALR 429 at [25]. However, it has also been held that there is no general duty on such a Tribunal to make enquiries: *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* [2004] HCA 32 at [43].
[21] [2011] HCA 1; (2011) 241 CLR 594.
[22] Ibid at [86].

In the review jurisdiction, it must also be borne in mind that the contents of the enabling Act are important, as they may have the effect of limiting the extent to which the Tribunal will consider itself able to adopt an inquisitorial approach to a matter; e.g. provisions in enabling legislation that require the Tribunal to determine the matter on the basis of the evidence between the decision-maker, unless leave is granted to admit new evidence; provisions which place the onus of proof on the applicant; and the limitation of the grounds to the grounds before the decision-maker.

(d) **Determining jurisdiction involves consideration of the QCAT Act and the enabling Act**. As alluded to above, a trap for the unwary (a "snake") is to assume that to ascertain the scope of the jurisdiction and functions of QCAT in regard to a matter, one only need refer to the QCAT Act, rules and regulations. In fact, under section 6(4) of the QCAT Act, an enabling Act (provided it is not subordinate legislation) may "*add to, otherwise vary, or exclude functions stated*" in the QCAT Act [23]. Accordingly, it is important to consider at first instance the specific provisions of the enabling Act which grant jurisdiction to QCAT and note any applicable limitations e.g. the requirement for money to have been paid prior to applying for review or which may require strict compliance with time limits [24].

## 3. Review jurisdiction

The review jurisdiction is as conferred on the Tribunal by the relevant enabling Act [25]. The purpose of the review is to produce the "*correct and preferable decision*" (section 20(1)), and QCAT must hear and decide the review by way of "*fresh hearing on the merits*" (section 20(2)). The evidence that is submitted, is generally the bundle of documentation provided by the decision-maker (section 21), and any additional evidence generally provided by affidavit provided by the Applicant, although Members routinely consider "*evidence*" provided in the form of documents without verification by affidavit.

[23] Similar provisions apply in respect of the other jurisdictions (see section 6 QCAT Act).
[24] For example in the *Taxation Administration Act 2001* (TAA) section 69.
[25] Section 17 QCAT Act.

The process is the subject of practice directions, and standard directions are often issued by the Tribunal, tailored to the enabling legislation concerned.

It is important to bear in mind that as it is a merits review of an administrative decision it is not necessary for the applicant to identify an appealable error in the decision-making. Further, reference to grounds for judicial review in the *Judicial Review Act 1991* is usually not of relevance or substance.

However, ultimately there must be some reason that can be pointed to that the original decision was not the correct and preferable decision i.e. a party must at least satisfy an evidential onus as to the existence of facts that justify the decision sought to be made [26] within the context of the relevant legislation. In some cases, the enabling legislation expressly places an onus on the applicant to prove its case[27]. The type of matter must also be considered in determining the extent of and who bears the onus of proof e.g. in most disciplinary proceedings the respondent bears the onus of proof [28].

There is a practice direction as to the conduct of hearings of review matters, of which practitioners should be aware [29] and also specific practice directions for certain types of review matters [30].

## 4. Procedural quirks – snakes and ladders

The following is a general discussion, in which I hope you will participate, as to the "snakes" and "ladders" associated with the following procedures and characteristics of review matters in QCAT. I know there are practitioners here today with a variety of experiences under different enabling legislation, and anecdotal contributions are most welcome to add to my fairly brief analysis.

### (a) Compulsory conferences

[26] *Legal Practitioner "M" v Council of the Law Society of the Australian Capital Territory* [2015] ATSC 312, [98] as referred to in *Officer JGB v Deputy Commissioner Gollschewski* [2016] QCAT 348 at [37].
[27] See TAA section 73.
[28] Op cit *Officer JGB Case* at [74].
[29] See Practice Direction 2013/03 "Hearings in administrative review proceedings".
[30] For example Practice Direction 2005/06 "Process for administrative reviews in child protection matters".

Although the QCAT Act merely states that a Tribunal or principal registrar "*may*" direct the parties to a proceeding to attend one or more compulsory conferences [31], in practice this is a step in almost all review matters. There is a Practice Direction on the holding of such conferences [32]. Depending on the directions made in the matter, it is scheduled before or after the filing of evidence and written submissions.

Mostly I would characterise the compulsory conference as a "ladder", i.e. it is a useful step which enables:

- Fulfilment of the need of many applicants, to have an independent person listen to their concerns, even though the person holding the conference does not adjudicate on it;
- Both parties to better understand the other side's position, and perhaps identify drivers for the decision / review application being made which were not obvious on the written material;
- You, as the practitioner advising one of the parties, will often obtain a sense of what is likely to be put forward at hearing, and a better understanding of the strength of your client's case;
- Your client (whether a government agency or the applicant) is confronted with the reality of the matter, which may not be obvious on the written material;
- In some cases, a mediated settlement and therefore time and costs savings for the parties.

The snakes in the process include:

- Some Members are somewhat ineffective in their handling of the conference, e.g. not taking an active role.
- Some Members wholeheartedly take on board the mantra that the parties should come to the conference with instructions to settle. Of course this does not sit well with statutory duties and obligations which were not amenable to be conceded or ignored in reaching settlement.
- The other side may not be forthcoming as to any information or have any desire for settlement, making the exercise futile.

[31] Section 67 of the QCAT Act.
[32] See Practice Direction 2010/06 "Compulsory conferences and mediations"; Also see QCAT Act Part 6 Div 2.

- From a government agency perspective, where there is little possibility of settlement, it can appear to be a waste of time and resources, particularly as persons with the authority to authorise a settlement must at least be on call for the conference.

**(b) Legal Representation**

The general rule is set out in section 43(1) of the QCAT Act i.e. that the parties should "*represent themselves unless the interests of justice require otherwise*". Section 43(2) recognises that in some situations legal representation is as of right (e.g. if the party is a child, is a person with impaired capacity; or it is a disciplinary action or review of disciplinary action taken against a person). In some cases the enabling legislation specifically provides that the parties to the proceeding may be legally represented [33]. Section 43(3) prescribes circumstances and factors to be considered in the decision as to representation where leave is requires.

State agencies and corporations are envisaged to be able to "*appear*" by means of attendance of an "*employee, officer or Member*" of the entity but if they are to be "*represented*" by an Australian legal practitioner or a government legal officer, leave is required [34].

In the early days of QCAT there were numerous decisions on the issue of legal representation.[35] Over time my sense is that QCAT in the review jurisdiction has more regularly granted leave. However, it remains a tussle and there are some confusing or artificial results, as illustrated in the decision in *McKinnon v State of Queensland and Anor* [36], where leave was refused for legal representation until after the compulsory conference, but at the same time leave was granted for an appearance on behalf of the State by a government legal officer.

Having such control over the use of legal representation, was apparently considered to be a means of avoiding "*unnecessary costs to parties and an overly legalistic and formal approach to the conduct of proceedings*" [37]. It is questionable whether the necessity to go through the

[33] For example section 72 of the TAA.
[34] Rules 53 and 54 of the *Queensland Civil and Administrative Tribunal Rules 2009*.
[35] See discussion of the early cases and arguments put in the article by Lane B and Dickens E, *Twelve Months On – Reflections on the Key issues Considered by the Queensland Civil and Administrative Tribunal* (2010) 30 QLD Lawyer 152.
[36] [2012] QCAT 169.
[37] Ibid at p 156.

steps of arguing the case for legal representation to be permitted, results in a costs saving in many cases or always benefits the parties.

In a decision of the District Court in *Campbell v Fields & Anor* [2013] QDC 206, regarding the possibility of a transfer of a proceeding to QCAT involving elderly respondents, His Honour Long DCJ commented:

> *"Here there are substantial reasons why the respondents have made their claim in this Court and the advantage of an absolute right to have legal representation in making that claim is justifiably important to them in those circumstances. Similarly they would be likely to be at a disadvantage in any alternative dispute resolution process, conducted without that benefit….Accordingly, any suggestion of advantage in terms of the more expected or usual processes of QCAT, is more in the subjective view of the applicants and has as much potential to delay the resolution of the respondent's claim, such as had already occurred due to inaction on the part of the applicants, as it has to expedite such resolution.*[38]

This is an area in which the benefits and disadvantages can be hotly debated, and is beyond the scope of this paper to discuss further.

As practitioners however, the main snake to be aware of is that your involvement in the proceedings is not as of right, and usually will require leave. However, there is nothing in the legislation preventing your advice to your client outside of the proceedings, or assisting your client in developing submissions.

**(c) Not bound by the rules of evidence**

Under section 28(3)(b), QCAT is "*not bound by the rules of evidence, or any practices or procedures applying to Courts of record, other than to the extent the Tribunal adopts the rules, practices or procedures*". This provision together with section 28(3)(c) which permits the Tribunal to "*inform itself in any way it considers appropriate*" and section 28(3)(e) which requires that the Tribunal ensure that as far as is practicable, all relevant material is disclosed to the Tribunal; results in a significant departure from practice in other Courts. In other Courts the evidence is restricted to that presented by the parties, except for facts of which judicial notice is taken, and it must be "admissible" under the rules prescribed by the *Evidence Act 1977* and the common law.

[38] Ibid at [43].

As outlined by Her Honour, Atkinson J in a paper presented to a QCAT Conference in 2016, this does not mean that the rules are irrelevant, as there are usually sound rationales for the rules that have developed over time [39]. The key is to approach the issue from the fundamentals of whether the evidence is relevant, reliable, and the best evidence of what occurred that is available [40]. These issues should be addressed in general terms, if necessary by reference to the case law on the rules of evidence.

The ladders for practitioners arising from the reduced focus on evidential rules are that:

- Evidence can be received and the weight to be accorded to it determined later in the proceedings;
- Less time and effort is required to source original documents or exclude hearsay evidence.

The downside includes:

- The uncertainty which arises from not having clear rules of evidence applicable;
- The lack of attention sometimes given by Members to the quality of the evidence before them;
- The danger that irrelevant evidence is thereby taken into account, so as to give rise to appealable issues.

**(d) Directions**

Directions issued by QCAT under section 62 of the QCAT Act are largely of a standard type and effect and generally provide clear guidance on what is required by the parties. Under section 62, the Tribunal is empowered to make directions "*at any time in a proceeding and do whatever is necessary for the speedy and fair conduct of the proceeding*". Compliance with QCAT directions is required under section 62(4), and failure to comply is potentially an offence under section 213 or punishable as contempt under section 218 of the QCAT Act.

[39] Atkinson J, *Observations on Evidence and Practice in QCAT and the Supreme Court of Queensland,* Presentation to the QCAT Conference 2016 (Supreme Court library collection).
[40] Ibid at p 2 citing BBH v The Queen (2012) 245 CLR 499 regarding the need for relevance and *Pollit v The Queen* (1992) 174 CLR 558, 620 regarding reduced reliability being the overarching reason that hearsay is generally excluded.

In the interests of speedy resolution, QCAT has in some cases issued a "*self-executing order*". Such an order was made in the matter of *Rintoul v State of Queensland and Ors (No 2)* [41], where there had been prior non-compliance with directions, as follows:

> *"If Ms Rintoul does not comply with paragraph 2 and 4 by the due dates, application ADL047-13 will be dismissed without further order".*

Subsequently outside of the due dates, a Member purported to extend time for compliance with the order. A question of law was referred to the President under section 117 of the QCAT Act as to whether the original order was effective to dismiss the matter following the failure to comply. President Thomas J, found that the original order did dismiss the proceeding from the date after the due date.

On appeal, the Court of Appeal overturned this decision [42], finding that the matter was not finally dismissed by means of the original order. The Court confirmed that section 62(1) was broad enough to encompass an order which dismisses a proceeding for non-compliance with a direction and that the order was effective. However it also found that the Tribunal had the power to waive the appellant's non-compliance with the direction in the second order and to extend the time for compliance with the original order under section 61, even though the power was exercised after the due date [43].

I would suggest that the "ladder" in the broad power of QCAT to make directions, is the ability to have directions tailored to the circumstances and the legislation involved, which parties should take advantage of to ensure the efficient and effective management of the matter. The "snake" is the necessity to comply with the time limits or seek amendment as necessary to ensure that no allegation of a breach of the Act or finding of contempt can be made.

Self-represented applicants are often not in compliance with time limits, and it can be difficult to prompt them into making the appropriate application for extension of time. Often the non-compliance is waived by the Tribunal, but it is recommended that the parties to a review application should try to liaise and obtain the appropriate amendments to directions rather than assume that the initial and any consequent directions will automatically be extended "by consent".

[41] [2014] QCAT 332.
[42] *Rintoul v State of Queensland & Ors* [2015] QCA 79.
[43] Ibid at [17].

**(e) Hearing on the papers / right to a hearing**

In keeping with its objects, QCAT Members are not adverse to deciding matters on the papers under section 32(2) of the QCAT Act. However, there is need to ensure that this does not deny a party, particularly the Applicant, procedural fairness [44]. There can sometimes be challenges, to the right of a party to have an oral hearing, which come from the Member him or herself. In such circumstances, be prepared to argue the need for such a hearing on the basis of procedural fairness.

There can be advantages in an on the papers determination, in savings in costs for both parties, particularly if they are legally represented. However, in my view an oral hearing is often in the best interests of both parties, as it gives the Tribunal Member the opportunity to clarify any issues in the written submissions or filed material from the decision maker and enables the parties and their representatives an opportunity to obtain a sense as to the thinking of the Member and proactively provide further submissions or clarification to assist. Often the costs are incurred in the drafting of written submissions and costs of attendance at the hearing are relatively small.

**(f) Costs**

Under section 100 of the QCAT Act, the default position is that each party to a proceeding must bear their own costs. However, section 102(1) provides for an award of costs in circumstances where the Tribunal considers that the "*interests of justice require it to make the order*". Section 102(3) sets out some relevant considerations to which the Tribunal "*may have regard*".

Interestingly, QCAT is also empowered by section 103 to make orders against a "*representative*" of a party if the Tribunal considered that the representative has unnecessarily disadvantaged another party.

Originally QCAT was considered to be virtually a "*no costs*" jurisdiction. However, there appears to have been greater acceptance by Tribunal Members over time that costs may be appropriate.

[44] *Commercial Property Management Pty Ltd v Commissioner of State Revenue (Qld)* [2015] QCATA 70; See also *Chandra v Qld Building and Construction Commission* [2014] QCA 355 at [60]-[78].

There have been some surprises in the limitations on the ability of QCAT to award costs. One such case is that of *Donovan Hill Pty Ltd v McNab Constructions Australia Pty Ltd* [45]. In that case, the Queensland Building Services Authority (QBSA) issued directions to rectify alleged defects in building works, against the respondent. These directions were the subject to an application for review and subsequently the respondent filed an application to join a number of entities including the Applicant under section 42 of the QCAT Act. QCAT dismissed the joinder application, and ordered the respondent pay the costs of the applicant and the other entities of the unsuccessful joinder application. The respondent appealed to and was successful in the QCAT Appeal Tribunal in arguing that QCAT had no power in exercising its review jurisdiction to award costs to entities who were non-parties to the review proceedings. The Court of Appeal by a majority decision (per Gotterson JA and Philippides JA) upheld the decision of the QCAT Appeal Tribunal. The result is that in its original jurisdiction, QCAT is able to award costs in favour of a person who successfully resists a joinder application as it will be a party to the proceeding, but this is not the case where QCAT is acting in its review jurisdiction as the person will not be a party to that type of proceeding[46]. The joinder application was found not to be a proceeding in the original jurisdiction or even a proceeding in its own right [47].

In *Medical Board of Australia v Alroe* [48] , which was a decision under the *Health Practitioner Regulation National Law (Qld)*, it was made clear that a Member determining to award costs was required to take account of the requirements of s100 and 102 of the QCAT Act i.e. it was not sufficient for the Member to apply what is the usual position under the *Uniform Civil Proceeding Rules 2009*, i.e. that costs follow the event, without calling for submissions on costs and giving due consideration to the requirements of these provisions of the QCAT Act. It is interesting to note that on referral back to QCAT to remake the decision, His Honour Carmody J ultimately ordered costs against the Medical Board in any event.[49]

In another matter involving the same legislation, *Medical Board of Australia v Wong* [50]*,* a different QCAT judicial Member, Sheridan J ordered costs to be paid by the Medical Board,

[45] [2015] QCA 114.
[46] Ibid at [42] per Gotterson JA and see section 40 and section 102 of the QCAT Act.
[47] Ibid at [64] and [65] per Philippides JA.
[48] [2016] QCA 120.
[49] [2016] QCAT 440.
[50] [2016] QCAT 112.

part of which were to be assessed on an indemnity basis. On appeal [51], the Court of Appeal set aside the orders for costs and instead ordered that there be no order for costs in the proceeding in the Tribunal (but did order Mr Wong to pay the costs of the Medical Board in the Court of Appeal). The Court found *inter alia* that the judicial Member erred in not recognising the importance of the mandatory requirement in the enabling legislation for the Board to refer a matter to QCAT where it had a reasonable belief that there had been professional misconduct [52]. It also found that:

> "*Absent any finding of unreasonableness, there could not have been a basis for departing from the default position, according to section 100, that each party bear its own costs… Absent a finding, which this Court is not asked to make, that the Board's characterisation of Dr Wong's conduct as professional misconduct was unreasonable, there can be no proper criticism of the Board for bringing and prosecuting this proceeding as it did. No finding was sought here that the Board acted in bad faith. It must be kept in mind that the Board has a statutory responsibility for the protection of the public in this context and the fact that the outcome was not that which was sought should not of itself burden the Board with an order for costs, especially in a proceeding in QCAT where the starting position is that prescribed by section 100.*" [53]

The ladders in this area include:

- These provisions encourage the parties not to take proceedings lightly, as generally the parties will not recover their costs;
- The provisions also ensure that the Tribunal has a means to curb tendencies to pursue unmeritorious arguments and strategies in QCAT.

The snakes include:

- The need, as a legal representative to be aware of the different position on costs in QCAT and to ensure correct reference is made to the potential for liability in costs in costs agreements with their clients;
- Ensuring that QCAT does not have reason to award costs against the representative personally;
- The distinctions drawn between the original and review jurisdictions on costs need to be borne in mind. (As a matter of policy it is a little unclear why the legislature would

[51] *Medical Board of Australia v Wong* [2017] QCA 42.
[52] Ibid at [32].
[53] Ibid at [35] and [37].

have intended a distinction between the original and review jurisdictions in, for example, joinder applications [54]);

- Agencies need to be aware that despite being required under their legislation in some cases to refer matters to QCAT, there is the risk of an adverse costs order.

**(g) The tension between fulfilling instructions to defend the reviewable decision and the obligations to assist the Tribunal**

Section 21(1) places an obligation on the decision-maker to "*use his or her best endeavours to help the Tribunal so that it can make its decision on the review*".

Some Members take this provision very seriously, and appear to consider that any argument put forward from the perspective of the respondent, is unhelpful advocacy. It is true that the Explanatory Notes to the QCAT Bill state: "*it is not the role of the decision-maker to act like a party in an adversary system*". However, there is a clear tension between this provision and the need to properly represent a government agency and act on their instructions. Agencies have an understandable desire to explain and justify their decision. Sometimes it is a delicate line to tread and definitely a snake in the grass!

The import of section 21 together with the need to adhere to the model litigant principles, can place considerable limitations on the ability of a respondent to respond in review matters in ways that would usually be open to parties in other Courts. This is particularly difficult, where an adversarial approach is taken by the Applicant.

It should be noted that the obligation insection21(1) is to assist the Tribunal and not necessarily the other side, although such assistance by means of provision of documents held by the respondent may be so directed by QCAT [55].

Generally my approach is to try to word my submissions to avoid hyperbole or wording that could be interpreted as the respondent being overly protective of its decision.

[54] As alluded to by McMurdo CJ in *Donovan* at [13].
[55] See *Crime and Misconduct Commission v Deputy Commissioner Queensland Police Service and Chapman* [2010] QCAT 319. See the discussion of this issue in "*Twelve Months on – Reflections on the Key Issues Considered by the Queensland Civil and Administrative Tribunal*" Lane B, and Dickens E, (2010) 30 Qld Lawyer 152 at 153 -155.

The ladder from the point of view of an Applicant, is that section 21 can be pointed to should there be a need to obtain from the Respondent further documents or to assert that the arguments being put are unnecessarily adversarial.

The extent of the obligation upon a respondent government agency to a review application and subsequent appeals is illustrated in *LVR (WA) Pty Ltd v Administrative Appeals Tribunal* [56]. In this matter the Full Court of the Federal Court found that the Commissioner's legal representatives should have drawn the attention of the Court below to the fact that the AAT decision reproduced large tracts of the submissions made by the Commissioner without attribution. It found that this obligation existed even though the Applicant had Counsel, and the Applicant's Counsel had not raised the issue with the Full Court in submissions or in the Court below. The Court found that the model litigant requirements placed upon the Commonwealth and its agencies, required them:

> "as parties to litigation, to act with complete propriety, fairly and in accordance with the highest professional standards. This obligation may require more than merely acting honestly and in accordance with the law and Court rules. It also goes beyond the requirement for lawyers to act in accordance with their ethical obligations." [57]

## 5. Success at the snakes and ladders game

The foregoing is not an exhaustive list as to issues to be wary of in QCAT. However, hopefully they are a starting point for your further consideration of some of the quirks and benefits of practice in QCAT. Some brief points can be made to summarise my recommended approach to QCAT matters:

- *Flexibility is the key*: Within limits be prepared to respond to the Member's determination as to how the proceedings are to be run;
- *Ensure that you are aware of the relevant practice direction*: This is usually the best indication of the manner in which the proceedings will be conducted – but note that some Members consider it their prerogative to ignore or substantially depart from them and embark on an "inquisitorial" approach without warning.
- *Be prepared*: Particularly to argue points such as the relevance, reliability and weight to be given to evidence. Close consideration of the enabling Act is also crucial.

[56] [2012] FCAFC 90.
[57] Ibid at [42].

- *Take the benefit of procedures such as compulsory conferences*. Review your case well beforehand, and ensure your client has an appreciation of the strengths and weaknesses of their case. Reassess after the compulsory conference also, if necessary, having regard to insights gained from the conference.
- *Remember the breadth of powers of QCAT*. These powers should assist the parties to find a pathway to resolution or at least the efficient conduct of the proceedings. However, the adversarial approach is definitely not entirely absent from the proceedings, and you will need to be prepared to respond as necessary (in a measured manner if possible, in keeping with assistance of the Tribunal).
- Make yourself indispensable to the Tribunal i.e. assist with the decision-making process where possible, whilst still remaining faithful to your instructions and properly presenting your client's case.

## 6. Review of QCAT legislation

The explanatory notes to the QCAT Bill encapsulated the intention in establishing QCAT:

> "*The new Tribunal is to provide a single recognisable gateway to increase the community's access to justice and increase the efficiency and quality of decision making through a larger administrative structure*" [58]

In 9 years there has been substantial progress in achieving this aspiration by the Tribunal.

The reach of the effect of QCAT decisions is illustrated by a matter which has reached the High Court. In *Lyons v State of Queensland* [59], an important issue relevant to our jury system was determined, involving whether or not a deaf person was being discriminated against in not being able to serve on the jury. It was decided that the need for an Auslan interpreter to sit in on jury deliberations would not have been in compliance with the *Jury Act 1995* (Qld) and was not unfair discrimination under the *Anti-Discrimination Act 1991* (Qld). It is of note that the decision of the original QCAT Member was upheld by the Court.

Such a case illustrates that QCAT can be the starting point for a Member of the public to take up an important issue, which can ultimately find its way to the High Court.

[58] Explanatory Notes to the QCAT Bill at p 1.
[59] [2016] HCA 38; (2016) 259 CLR 517.

But is it time for a review of the legislation and administrative processes of QCAT? There would be some who would doubt that it has yet fulfilled the promise to "*deal with matters in a way that is accessible, fair, just economical, informal and quick*" [60]. Over the course of the last 9 years it could be argued that as procedures have become more developed, the Tribunal has become less flexible in the handling of the matters before it. On the other hand, some would consider this a positive development, as more routine procedures provide some predictability for practitioners and litigants. Anecdotally there has been some improvement in the quality and clarity of reasons given by government agencies for their decisions, since QCAT commenced, but little in the way of empirical evidence is available to properly assess this.

It is noted that section 240 of the QCAT Act provides for a review by the Minister responsible for the Act within 3 years and at further intervals of 5 years, and that a report as to the outcome is to be tabled in the Legislative Assembly. I note that a consultation paper was released by the Department of Justice and Attorney-General in 2012, and submissions closed according to the Department's website in 2015. I have been unable to locate a report to parliament, but that may have been my inability to search for such reports on the parliamentary website.

In any event, it would seem that the 8 year review is now overdue, and therefore likely to be scheduled soon.

Issues which arguably should be considered in any review include:

- *Over legalisation?* This is the usual claim launched at Courts and Tribunals. In the context of complex legislation this may not be a sustainable claim.
- *Right to legal representation*. Should there be a greater recognition of the value of such legal representation? It is noted that Lawright is shortly to begin to provide legal representation on a pro bono basis in QCAT in response to need. Should the legal representation rules be relaxed?
- *Timeliness*. Are there measures that can be taken to assist with achieving this goal? The old adage is "*justice delayed is justice denied".* Many will be aware of decisions that have been delayed for 3 years. Greater access to electronic filing may be of assistance, and appointment of additional Members, particularly judicial Members, would be welcomed.

[60] Section 3(b).

- *Specialisation*. QCAT handles a wide variety of matters, but still has not developed specialised divisions to the extent of Tribunals in other jurisdictions such as NSW. There may be merit in formalising what may already be occurring informally.

I wish you best of luck in the QCAT game!

G Hartridge
Counsel

Annexure A

**List of legislation conferring jurisdiction on QCAT**

from QCAT website at

http://www.qcat.qld.gov.au/resources/qcat-rules-and-legislation

*Adoption Act 2009*
*Adult Proof of Age Card Act 2008*
*Agents Financial Administration Act 2014*
*Agricultural Chemicals Distribution Control Act 1966*
*Agricultural Chemicals Distribution Control Regulation 1998*
*Animal Care and Protection Act 2001*
*Animal Management (Cats and Dogs) Act 2008*
*Anti-Discrimination Act 1991*
*Architects Act 2002*
*Associations Incorporation Act 1981*

*Biodiscovery Act 2004*
*Biosecurity Act 2014*
*Births, Deaths and Marriages Registration Act 2003*
*Body Corporate and Community Management Act 1997*
*Building Act 1975*
*Building and Construction Industry Payments Act 2004*
*Building Boost Grant Act 2011*

*Casino Control Act 1982*
*Charitable and Non-Profit Gaming Act 1999*
*Chemical Usage (Agricultural and Veterinary) Control Act 1988*
*Child Protection Act 1999*
*Child Protection (International Measures) Act 2003*
*City of Brisbane Regulation 2012*
*Civil Partnerships Act 2011*
*Classification of Computer Games and Images Act 1995*
*Classification of Films Act 1991*
*Community Ambulance Cover Levy Repeal Act 2011*
*Community Services Act 2007*
*Cooperatives Act 1997*
*Corrective Services Act 2006*
*Credit (Rural Finance) Act 1996*
*Crime and Corruption Act 2001*

*Debt Collectors (Field Agents and Collection Agents) Act 2014*
*Disability Services Act 2006*
*Disaster Management Act 2003*
*Drugs Misuse Act 1986*
*Duties Act 2001*

*Education (Accreditation of Non-State Schools) Act 2017*
*Education and Care Services Act 2013*
*Education and Care Services National Law (Queensland) Act 2011*

*Education and Care Services National Law (Queensland)*
*Education (General Provisions) Act 2006*
*Education (Overseas Students) Act 1996*
*Education (Queensland College of Teachers) Act 2005*
*Education (Queensland Curriculum and Assessment Authority) Act 2014*
*Electrical Safety Act 2002*
*Electricity Act 1994*
*Electricity Regulation 2006*
*Electronic Conveyancing National Law (Queensland) Act 2013*
*Electronic Conveyancing National Law (Queensland)*
*Environmental Offsets Act 2014*
*Environmental Offsets Regulation 2014*
*Exhibited Animals Act 2015*
*Explosives Act 1999*
*Explosives Regulation 2017*

*Fair Trading Act 1989 (incorporating the Australian Consumer Law)*
*Farm Business Debt Mediation Act 2017*
*Financial Intermediaries Act 1996*
*Fire and Emergency Services Act 1990*
*First Home Owner Grant Act 2000*
*Fisheries Act 1994*
*Food Act 2006*
*Food Production (Safety) Act 2000*
*Funeral Benefit Business Act 1982*
*Further Education and Training Act 2014*

*Gaming Machine Act 1991*
*Gas Supply Act 2003*
*Gold Coast Waterways Authority Act 2012*
*Guardianship and Administration Act 2000*
*Guide, Hearing and Assistance Dogs Act 2009*

*Health (Drugs and Poisons) Regulation 1996*
*Health Ombudsman Act 2013*
*Health Practitioner Regulation National Law Act 2009*
*Health Practitioner Regulation National Law (Queensland)*
*Heavy Vehicle National Law Act 2012*
*Heavy Vehicle National Law (Queensland)*

*Information Privacy Act 2009*
*Integrated Resort Development 1987*
*Interactive Gambling (Player Protection) Act 1998*
*Interactive Gambling (Player Protection) Regulation 1998*
*Introduction Agents Act 2001*

*Keno Act 1996*

*Land Valuation Act 2010*
*Legal Profession Act 2007*
*Liquid Fuel Supply Act 1984*
*Liquid Fuel Supply Regulation 2016*
*Liquor Act 1992*
*Liquor Regulation 2002*

*Local Government Regulation 2012*
*Lotteries Act 1997*

*Manufactured Homes (Residential Parks) Act 2003*
*Marine Parks Act 2004*
*Marine Parks Regulation 2017*
*Mineral Resources Act 1989*
*Mixed Use Development Act 1993*
*Motor Accident Insurance Act 1994*
*Motor Dealers and Chattel Auctioneers Act 2014*

*National Injury Insurance Scheme (Queensland) Act 2016*
*Nature Conservation Act 1992*
*Nature Conservation (Administration) Regulation 2017*
*Neighbourhood Disputes (Dividing Fences and Trees) Act 2011*

*Occupational Licensing National Law (Queensland) Act 2010*
*Occupational Licensing National Law (Queensland)* (access as *Occupational Licensing National Law (Victoria)* via the Office of the Chief Parliamentary Counsel ( http://www.legislation.vic.gov.au/ ))

*Pest Management Act 2001*
*Petroleum and Gas (Production Safety) Act 2004*
*Pharmacy Business Ownership Act 2001*
*Plumbing and Drainage Act 2002*
*Police Powers and Responsibilities Act 2000*
*Police Service Administration Act 1990*
*Powers of Attorney Act 1998*
*Private Health Facilities Act 1991*
*Professional Engineers Act 2002*
*Property Occupations Act 2014*
*Prostitution Act 1999*
*Public Guardian Act 2014*
*Public Health Act 2005*
*Public Health (Infection Control for Personal Appearance Services) Act 2003*
*Public Health (Medicinal Cannabis) Act 2016*
*Public Interest Disclosure Act 2010*

*Queensland Building and Construction Commission Act 1991*
*Queensland Heritage Act 1992*

*Racing Act 2002*
*Racing Integrity Act 2016*
*Radiation Safety Act 1999*
*Rail Safety National Law (Queensland) Act 2017*
*Rail Safety National Law (Queensland)*
*Recreation Areas Management Act 2006*
*Residential Services (Accreditation) Act 2002*
*Residential Tenancies and Rooming Accommodation Act 2008*
*Residential Tenancies and Rooming Accommodation Regulation 2009*
*Retail Shop Leases Act 1994*
*Retirement Villages Act 1999*
*Right to Information Act 2009*

*Safety in Recreational Water Activities Act 2011*
*Sanctuary Cove Resort Act 1985*

*Second-hand Dealers and Pawnbrokers Act 2003*
*Security Providers Act 1993*
*South Bank Corporation Act 1989*
*South-East Queensland Water (Distribution and Retail Restructuring) Act 2009*
*State Penalties Enforcement Act 1999*
*Stock Route Management Act 2002*
*Surat Basin Rail (Infrastructure Development and Management) Act 2012*
*Surveyors Act 2003*

*Tattoo Industry Act 2013*
*Taxation Administration Act 2001*
*Tourism Services Act 2003*
*Tow Truck Act 1973*
*Tow Truck Regulation 2009*
*Traffic Regulation 1962*
*Transport Infrastructure Act 1994*
*Transport Infrastructure (Dangerous Goods by Rail) Regulation 2008*
*Transport Infrastructure (Public Marine Facilities) Regulation 2011*
*Transport Infrastructure (Waterways Management) Regulation 2012*
*Transport Operations (Marine Pollution) Act 1995*
*Transport Operations (Marine Safety) Act 1994*
*Transport Operations (Marine Safety) Regulation 2016*
*Transport Operations (Passenger Transport) Act 1994*
*Transport Operations (Road Use Management) Act 1995*
*Transport Operations (Road Use Management—Accreditation and Other Provisions) Regulation 2015*
*Transport Operations (Road Use Management—Dangerous Goods) Regulation 2008*
*Transport Operations (Road Use Management—Driver Licensing) Regulation 2010*
*Transport Planning and Coordination Act 1994*

*Valuers Registration Act 1992*
*Vegetation Management Act 1999*
*Veterinary Surgeons Act 1936*
*Victims of Crime Assistance Act 2009*

*Wagering Act 1998*
*Waste Reduction and Recycling Act 2011*
*Water Act 2000*
*Water Supply (Safety and Reliability) Act 2008*
*Weapons Act 1990*
*Wine Industry Act 1994*
*Work Health and Safety Act 2011*
*Work Health and Safety Regulation 2011*
*Working with Children (Risk Management and Screening) Act 2000*