UNIVERSITY OF QUEENSLAND MASTER CLASS

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The Honourable Justice Alan Wilson
Supreme Court of Queensland
President, Queensland Civil and Administrative Tribunal

The Queensland Civil and Administrative Tribunal

History of Tribunals

Over the past three decades, tribunals in Australia have flourished, providing a unique and innovative system that brings informality and economy to the resolution of disputes. However, tribunals are not a recent phenomenon, having long played a role in providing review functions and securing administrative justice.

The growth of tribunals as part of the broader system of Australian public administration reflects societal changes that occurred in Britain and countries with British-derived systems of government and law, like Australia, during the first part of the 20th century. The increased degree of state regulation during this period saw Australia follow the British tradition, establishing boards and tribunals in an ad hoc manner to regulate particular classes of social and economic activity. Once these specialised tribunals were proven to be an efficient tool for the provision of administrative justice, their suitability for dealing with other areas of public decision-making was recognised. However, the ad hoc creation of administrative tribunals resulted in a largely uncoordinated framework of adjudicatory tribunals, prompting a series of wide-ranging reforms at both the Commonwealth and State levels.

In the mid-1970s, legislative reforms were implemented by the Commonwealth Parliament, which included the establishment of a generalist review tribunal, namely the Administrative Appeals Tribunal. These reforms at the Commonwealth level influenced the development of administrative law in the Australian States and Territories. Significant reform has since been achieved in Victoria, Western Australia and Queensland, where a wide range of appeal tribunals and other boards and tribunals were brought together into a unified tribunal structure with civil and administrative jurisdiction.

Tribunals in Queensland

In March 2008 the Queensland Government, following a review by the Department of Justice and Attorney-General, announced its intention to create a civil and administrative tribunal. The new Tribunal, the announcement said, was intended to create a single recognisable gateway to Queensland's many existing tribunals; to increase the community's access to justice; and, increase the efficiency and quality of decision making through a larger administrative structure.

An independent panel of experts were set up to oversee the creation of the new Tribunal.[1] That panel produced three reports which lead, ultimately, to the passage of the *Queensland Civil and Administrative Tribunal Act* 2009, and the commencement of QCAT on 1 December 2009. Their reports were written in the face of the disjointed development, over previous decades, of a number of independent tribunals and bodies having appeal or review jurisdiction in a wide range of matters affecting the lives of Queenslanders.

This was not, however, the first time that the introduction of a clearer, easier path to tribunal justice had been suggested in Queensland. Similar views had been suggested in the Fitzgerald Report in 1989; an EARC Report in 1993 (endorsed by the PCEAR in 1995); the Wiltshire Review, undertaken by the Ombudsman's office, in 1998; and, a Department of Justice and Attorney-General discussion paper distributed in 2007.

The Legal, Constitutional and Administrative Review Committee (LCARC), in its report of April 2008, commented that rights to administrative review in Queensland had been conferred in an ad hoc way. The Report considered whether access to administrative justice was effective and efficient, and whether reform was necessary.

The full list of Tribunals and Review Bodies amalgamated into QCAT can be found in Appendix 7 to the Independent Panel's Stage 1 Report. It included the Anti-Discrimination Tribunal; Children's Services Tribunal; Guardianship and Administration Tribunal; Commercial and Consumer Tribunal; the Computer Games and Images Appeals Tribunal; Film Appeals Tribunal; Publication Appeals Tribunal; Appeals from Referees under the *Building Units and Group Titles Act* 1980; the Retail Shop Leases Tribunal; the Panel of Referees under the *Fire and Rescue Service Act* 1980; the Small Claims Tribunal; the Public Service Commission (disciplinary decisions only); Appeal Tribunals under the *Local Government Act* 1993, and Appeal Boards under the *City of Brisbane Act* 1924 and *Local Government Act* 1993; the Misconduct Tribunal; the Veterinary Tribunal; the Legal Practice Tribunal; the Surveyors Disciplinary Committee; the Racing Appeal Tribunal; the Health Practitioners Tribunal; the Nursing Tribunal; the Fisheries Tribunal; the Teachers Disciplinary Tribunal; the Gaming Commission; and, a wide range of review jurisdictions invested in the District, Magistrates and Supreme Courts under legislation as diverse as the *Education (overseas students) Act* 1996), the *Electricity Act* 1994, the *Weapons Act* 1990, the *Tow Truck Act* 1973, Transport Operations Legislation and Traffic Regulations, the *Local Government Act* 1993, the *Surveyors Act* 2003, the *Retirement Villages Act* 1999, the *Stock Act* 1915, the *Drugs Misuse Act* 1996, the *Travel Agents Act* 1998, and the *Associations Incorporations Act* 1981.

The new Tribunal also assumed responsibility for administrative and disciplinary work in respect of architects, engineers, building contractors, plumbers and drainers, building certifiers, property agents and motor dealers, inbound tour operators, lawyers, chiropractors, dental technicians, medical practitioners, occupational therapists, pharmacists, physiotherapists, psychologists, speech pathologists, nurses and midwives, teachers, veterinarians, and surveyors.

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[1] The Honourable Glen Williams AO, QC (Chair), Peter Applegarth SC (as His Honour then was), and Ms Julie-Anne Schafer, the President of the Commercial and Consumer Tribunal.

The Structure of the New Tribunal

The three reports of the Independent Panel steadily refined the proposed structure of the new QCAT. At its commencement on 1 December 2009 the Tribunal had a President who was a Supreme Court Judge, one Deputy President who was a District Court Judge, four Senior Members, 9 Permanent Members and over 120 Sessional Members throughout Queensland. It also had 5 Permanent Adjudicators who were to conduct Minor Civil Disputes (the work of the former Small Claims Tribunal) in South East Queensland; outside SEQ, all Magistrates became Ordinary Sessional Members of QCAT, and were engaged to do the MCD work.

The Registries of all the constituent Tribunals were amalgamated, creating a Registry with an Executive Director and a Principal Registrar, and two Deputy Registrars and about 110 staff.

The Tribunal was given premises in the Bank of Queensland Building at 259 Queens Street previously occupied by the Land and Resources Tribunal, Land Court, Commercial and Consumer Tribunal, Guardianship Tribunal and Children Services Tribunal.

Two matters were emphasised by the Independent Panel in each of the three Reports:

(a) *That QCAT is to be a Tribunal, and not a Court.* It was said that the Tribunal must have the processes, flexibility, and the degree of formality appropriate to a tribunal as distinct from the courts, with the '*requisite accessibility and efficiency to deliver quick and fair outcomes, consistent with fair process*'. It was said that '*processes appropriate to a Court are not necessarily appropriate to the new Tribunal*';

(b) *That alternative dispute resolution should be 'part of the fabric of the new amalgamated Tribuna*l' – because ADR is '*complementary to the non-judicial and flexible nature of Tribunals*' and 'the *use of ADR in QCAT will assist in ensuring a range of objectives are met, including a process that is responsive to parties*'.

The other significant reform suggested by the Independent Panel was the creation of an **internal QCAT Appeal Tribunal**. Of the many Australian State tribunals, only the NSW Administrative Decisions Tribunal had an internal appeal panel to hear appeals from decisions made by divisions of the Tribunal, and external appeals from some decisions of the NSW Guardianship, Mental Health Review Tribunals and Magistrates Court.

In Queensland the usual avenue of appeal from tribunals was to the District or Supreme Courts and, the Independent Panel observed, very few appeals were lodged and prosecuted because of the '…*reluctance or inability of most aggrieved parties to embark upon costly external appeals to a higher court*'.

The Panel suggested an internal Appeals Tribunal would have these benefits:

- Support and establish the leadership role of Judicial Members of QCAT, and provide guidance to other members by way of authoritative decisions on questions of substantive law, and procedure;
- be heard and determined more quickly and less expensively than external appeals to the courts;

- be heard by tribunal Judicial Members who would be familiar with QCAT practice and law ; and,
- promote consistency and quality in Tribunal decisions.

How the QCAT Act reflects these goals

Under s 3 of the QCAT Act one of the objects is to have the Tribunal deal with matters in a way that is *accessible, fair, just, economical, informal and quick*.

Under s 4 the Tribunal's functions relating to those objects include *encouraging the early and economical resolution of disputes including, if appropriate, through ADR*; and, ensuring proceedings are *conducted in an informal way that minimises cost to parties and is as quick as is consistent with achieving justice*.

Under s 28 the Tribunal, when conducting proceedings, must act fairly and according to the substantial merits of the case and observe the rules of natural justice; but, is not bound by the rules of evidence; may inform itself in any way it considers appropriate; and, *must act with as little formality and technicality and with as much speed as the requirements of the Act, and proper consideration of matters before the Tribunal, permit*.

Under s 29 the Tribunal must take *all reasonable steps to ensure each party to a proceeding understands its practices and procedures; the nature of assertions made in the proceeding and the legal implications of the assertions; and, any decision of the Tribunal relating to the proceeding*.

The main purpose of s 43 is to have *parties represent themselves, unless the interests of justice require otherwise*. In deciding whether to give a party leave to be represented the Tribunal *may* consider whether it is a state agency; a proceeding is likely to involve complex questions of fact, or law; another party is represented; or, all of the parties have agreed to representation.

Under s 100 each party to a proceeding *must* bear its own costs. Under s 102, however, the Tribunal may make a costs order if it considers the interests of justice require one. In deciding whether to award costs the Tribunal can have regard to the conduct of a party; the nature and complexity of the dispute; the relative strengths of the parties' claims; their financial circumstances; and, anything else it considers relevant.

QCAT Now

From the outset QCAT's statistics proved that Queenslanders had, indeed, been seeking a Tribunal that was accessible. In its first (part) financial year the number of applications QCAT received was 37% higher than all its constituent Tribunals in the preceding year. In some jurisdictions the rise was spectacular – Anti-Discrimination, 233%; and Minor Civil Disputes, 60%.

In 2010-11 growth continued, by 6%.

Unfortunately, government funding did not keep pace with these increases. QCAT's funding for sessional members fell, in the current financial year, by 23%. This means its ability to engage sessional members throughout Queensland is increasingly constrained and the Tribunal is less able to meet its statutory remit of being speedy; it cannot now offer hearings in building cases until early 2013, and urgent residential tenancy matters face increasing delays.

Lawyers in QCAT

The introductory words to s 43 of the QCAT Act say that '*the main purpose of this section is to have parties represent themselves'.* The section goes on to say '*…unless the interests of justice require otherwise'.* The phrase '*interests of justice'* is not defined, but s 43(3) contains some examples – the Tribunal may consider that the matter involves complex questions of fact, or law; or, it may be relevant that another party is represented; or, all parties may have agreed to legal representation.

Representation is an automatic right in some jurisdictions – e.g., guardianship, (for the subject adult), and legal disciplinary matters.

The Tribunal has written and published over 200 decisions in applications for leave to be represented. Only two have come to the Appeal Tribunal, and none have gone further, to the Court of Appeal.

QCAT has established certain principles around s 43;

- Simply because all parties agree to legal representation does not mean that an order must follow;

- the Tribunal requires satisfaction that a proceeding truly involves complex questions of fact or law; and,
- applications should address s 29 of the QCAT Act.

S 29 obliges the Tribunal to, in effect, provide self represented parties with a measure of legal assistance. The Tribunal must ensure that parties understand its practices and procedures, and the nature of assertions made in proceedings, and their legal implications. Satisfying these obligations may be, as QCAT members have recognised, be aided by the presence of lawyers.

The Tribunal is also entitled to consider whether legal representation will aid in the perform of its statutory aims and obligations under ss 3 and 4 and, also, s 28 which requires it to act fairly, in accordance with the substantial merits of the case, in ways which observe the rules of natural justice but, again, with as little formality and technicality as the proper consideration of the issues permit.

Many lawyers now couch their submissions in support of a grant for legal representation in terms which address these aspects of the legislation – that is, rather than emphasise the number of issues involved, the complexity of interlocutory steps that may be required, or the possible length of the hearing, these lawyers will attempt to show how their presence will help QCAT in reducing the issues in dispute, reducing hearing times, simplify the issues, and reduce costs.

ADR and Compulsory Conferences

The aim of a compulsory conference under the QCAT Act (s 69) is to identify and clarify issues; settle a matter if possible; if not, identify the questions to be decided at a hearing; and, make orders and give directions which either reflect the terms of a partial or complete settlement or, if not, direct what the parties will do to prepare for the hearing.

Compulsory conferences are now extensively used in every jurisdiction and have achieved a settlement rate of over 50%. They have proven to be a very useful tool both for ADR, and case management. Presided over by members who are now quite experienced, they achieve a good settlement rate; enable parties to express, describe and define issues in their own terms; help the Tribunal identify real, and irrelevant issues; and, are an effective case management tool because the member is able, if the matter does not settle, to fashion directions which ensure the parties are ready for a hearing, and that the hearing can be conducted as effectively and inexpensively as possible.

They are consonant with the notion of 'tribunal' (as opposed to Court) dispute resolution, and adjudication. They are plainly significantly different from the court system where Judges case manage the proceedings, but independent lawyers conduct ADR processes – but, without the ability to impose directions or make orders which will shorten hearings, etc.

The results have been salutary: over and above the settlement rate, hearings have been shortened – the longest hearing in the Tribunal in the past 12 months has been about 8 days, in a major anti-discrimination case. Building hearings which often took weeks in the CCT now, rarely, last more than 3 days.

Another advantage of compulsory conferences is the opportunity they allow members to discharge the Tribunal's obligations under s 29.

Hearings

In most of the previous Tribunals three member hearings were customary. Budgetary constraints, and the growing expertise of members, now means one member panels are the norm (expect in those jurisdictions like retail shop leases requiring outside assessors, or matters involving children).

The hearing process has elements of, but does not mimic, what occurs in court rooms. To comply with their statutory obligations members are expected to take an active role in the hearing process, to guide and direct parties about the presentation of cases, and to impose reasonable limits on times for evidence, questioning of witnesses, and submissions.

Decisions and Reasons

The legislation requires that reasons be given in every decision. This has added a significant burden in Minor Civil Disputes – in the former Small Claims Tribunal, reasons were not required. It has also necessitated extensive training in all Tribunal members in the work crafting reasons which are accessible.