

Review of the *Queensland Civil and Administrative Tribunal Act 2009*

Report

July 2018



**Queensland
Government**

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MINISTER'S FOREWORD

In December 2009 the Queensland Civil and Administrative Tribunal (QCAT) replaced 18 tribunals, along with the minor debt claims jurisdiction of the Magistrates Court, and almost all the administrative review jurisdiction of the courts.

The Attorney-General at that time, the Honourable Cameron Dick MP, said that the new QCAT represented *the most significant reform to Queensland's justice system in half a century*,¹ providing Queenslanders with access to civil and administrative justice through a single gateway, and removing the need for Queenslanders to negotiate a maze of administrative bodies, tribunals and courts.



The objects of the *Queensland Civil and Administrative Tribunal Act 2009* (QCAT Act) reflect those aims for a single independent, efficient and accessible tribunal. They require QCAT to:

- be accessible, fair, just, economical, informal and quick;
- promote and enhance the quality and consistency of tribunal decisions; and
- enhance the openness and accountability of public administration.

We have now completed the QCAT Act review. We have listened to QCAT's many stakeholders in doing so, and I am pleased to say that generally there is a high level of support for QCAT and its operations - QCAT's stakeholders believe that the tribunal is achieving its objects, and its objects remain valid.

Of course, there is always room for improvement, and the review recommends a number of legislative amendments. Many are minor or technical and will help with improving QCAT's efficiencies.

This report also addresses the Government's 2017 election commitment about 'lemon' cars (new motor vehicles with numerous, severe defects) and other vehicles. We have committed to improving fairness and providing greater rights for Queenslanders buying a vehicle. To implement this commitment, we will be increasing QCAT's jurisdictional limit on motor vehicles from \$25,000 to \$100,000, ensuring QCAT can consider claims relating to motorhomes and caravans up to this increased amount, and reinstating the statutory warranty for older second-hand vehicles sold by motor dealers.

YVETTE D'ATH MP

Attorney-General and Minister for Justice
Leader of the House

¹ Media Release, *Central tribunal to simplify access to civil and administrative justice*, Attorney-General and Minister for Industrial Relations, the Honourable Cameron Dick MP, 17 June 2009

OVERVIEW

This is the report of the first statutory review of the *Queensland Civil and Administrative Tribunal Act 2009* (QCAT Act) conducted in accordance with section 240 of the QCAT Act. In December 2012, the Department of Justice and Attorney-General (DJAG) published a Consultation Paper asking questions related to the review's terms of reference (see page 10). DJAG received ninety-seven submissions in response to the Consultation Paper.

In early 2015 the Honourable Yvette D'Ath MP, at that time the Attorney-General and Minister for Justice and Minister for Training and Skills (Attorney-General), wrote to key stakeholders seeking further submissions, given the Government's commitment to consultation and the time that had passed since the submissions were provided in 2013. The views expressed in the further 14 submissions in 2015 were, on the whole, consistent with those expressed previously.

Key issues most commonly addressed in submissions included: whether there should be a 'hierarchy' in the objects of the QCAT Act if there is a conflict between objects; whether costs and fees affect QCAT's accessibility; QCAT's regional service; legal representation; QCAT's jurisdictional limits for certain types of matters; QCAT's constitution, including the impact of specific provisions conferring jurisdiction; QCAT's independence; and QCAT's appellate jurisdiction.

Most stakeholders were supportive of QCAT and the QCAT Act. In particular, stakeholders commented that QCAT has continued to deliver fair and just outcomes and provides a less formal, cheaper and more accessible option for resolving disputes than the courts. An overwhelming number of stakeholders also supported maintaining the judicial status of QCAT's President and Deputy President, commenting that the actual and perceived independence of the tribunal is of fundamental importance.

DJAG has also undertaken an audit of provisions in other legislation conferring jurisdiction on QCAT (enabling Acts). The audit examined and analysed the differences between provisions in enabling Acts with analogous provisions in the QCAT Act, to see whether there may be efficiencies in amending these enabling Acts to provide consistency with the QCAT Act or creating schedules to the QCAT Act to co-locate similar procedural requirements under enabling Acts.

The review concludes that limited legislative amendment is required. Additional legislative amendments are also proposed to improve the efficiency of tribunal proceedings. These have been noted in the report.

Apart from the issues raised in the review's terms of reference, several other issues relevant to QCAT have either been raised in submissions or in other ways. These proposals are discussed in Part 5 of this report.

Finally, the report discusses the Government's 2017 commitment in relation to 'lemon' and other motor vehicles.

CONCLUSIONS

Objects of the QCAT Act (Conclusions for Terms of Reference 1, 2 and 3)

Independence, fairness, justice, economy, and informal and quick resolution of disputes

The following amendments should be made to the QCAT Act and enabling Acts to address issues raised by stakeholders in relation to the objects of the Act:

- provide that QCAT's jurisdiction for monetary decisions in residential tenancy matters is limited to claims for amounts that are not more than the prescribed amount of \$25,000;
- provide for an automatic stay of a tribunal decision regarding the issue of a 'blue card' negative notice under the *Working with Children (Risk Management and Screening) Act 2000* until the appeal period has expired or any appeal is heard. This would preclude the person who has applied for the 'blue card' from child-regulated employment until the matter is finally resolved;
- provide for an automatic stay of a decision regarding the issue of a 'yellow card' under the *Disability Services Act 2006* in the same circumstances;
- widen the circumstances in which a person may apply for a stay to include cases where a person applies to:
 - reopen a proceeding;
 - have a decision set aside; or
 - have a decision amended by default;
- allow QCAT to stay the operation of part of a reviewable decision;
- allow QCAT to impose conditions on a stay order;
- allow QCAT to reinstate proceedings dismissed in error;
- allow the Principal Registrar to issue notices to attend a hearing or proceeding, or to require a person to produce a stated document or thing to QCAT; and
- allow QCAT to remove a party joined to the proceedings.

The QCAT Act and the *Queensland Civil and Administrative Tribunal Rules 2009* should also be amended to ensure QCAT can provide conciliation services where required.

Specific issues (Conclusions for Terms of Reference 4.a to 4.g)

Appellate jurisdiction, including appeals in the minor civil disputes jurisdiction

To improve the QCAT appeal tribunal's ability to operate more efficiently, amendments to the QCAT Act should be made to:

- provide greater discretion to the appeal tribunal to remit matters to the review tribunal; and
- permit QCAT to reinstate proceedings that have been dismissed in error.

Addressing the operational concerns identified in the responses to the Consultation Paper, including through initiatives such as providing additional training for members, will also contribute to improved decision making and consistency across the tribunal. This should reduce the risk of parties believing they have not received due justice and result in fewer parties considering applying to appeal.

Constitution of the tribunal – specific enabling Act provisions

Only minor amendments should be made to the QCAT Act in relation to the constitution of the tribunal to allow the Attorney-General to appoint a member or other person as a senior member from time to time, and to amend the definition of ‘constitute’ to clarify that adjudicators may form part of the tribunal.

No other amendments are proposed in relation to this issue. Agencies will however be encouraged, when conferring a new jurisdiction on QCAT or when amending or reviewing enabling Acts, to consider whether there is a need to retain specialist constitution provisions, or whether their provisions may be better aligned with the tribunal constitution provisions in the QCAT Act.

Legal representation

There is not sufficient evidence to support a shift to general ‘as of right’ legal representation before QCAT. Stakeholder support for this proposal is limited and inconsistent, and it is contrary to the Productivity Commission’s recommendations² that legal representation should only be allowed with leave and that leave should only be granted in exceptional cases where one party would otherwise be significantly disadvantaged.

Judicial status of President and Deputy President

No changes to the judicial status of the President and Deputy President under the existing structure should be made at this time, but the situation will continue to be monitored.

Appellate jurisdiction

Minor amendments to the QCAT Act should be made to permit QCAT to reinstate proceedings that have been dismissed in error, and to allow matters to be remitted without being reheard by the appeal tribunal.

Related issues

While not raised by the Consultation Paper or terms of reference, Part 5 of the report considers operational issues and the enforcement of QCAT orders.

Many submissions for example expressed concerns about delays and other resourcing issues. While not within this statutory review’s terms of reference, these issues have been noted.

² Productivity Commission Inquiry Report, *Access to Justice Arrangements* No. 72, 5 September 2014, available at: www.pc.gov.au/inquiries/completed/access-justice/report

Government's 2017 commitment in relation to 'lemon' cars and other vehicle purchases

It is also proposed to amend the *Fair Trading Act 1989* to confer jurisdiction on QCAT for disputes involving claims up to \$100,000, where the dispute involves an alleged failure to comply with the:

- consumer guarantees for the supply of goods under the Australian Consumer Law in relation to a vehicle (including motor homes and caravans); or
- statutory warranties under the *Motor Dealers and Chattel Auctioneers Act 2014* (MDCA Act) in relation to the sale of a used motor vehicle by a motor dealer or auctioneer.

It is also proposed to amend the MDCA Act to reinstate the statutory warranty for 'class B' older second-hand vehicles that operated under the repealed *Property Agents and Motor Dealers Act 2000*.

1. Background

1.1 QCAT's role

The Queensland Civil and Administrative Tribunal (QCAT) commenced on 1 December 2009 and amalgamated 18 tribunals and 23 jurisdictions. Its legislative scheme consists of:

- the *Queensland Civil and Administrative Tribunal Act 2009* (QCAT Act);
- the *Queensland Civil and Administrative Tribunal Regulation 2009* (QCAT Regulation);
- the *Queensland Civil and Administrative Tribunal Rules 2009* (QCAT Rules); and
- over 160 Acts and Regulations (enabling Acts) which, in addition to the QCAT Act, confer jurisdiction on QCAT and sometimes provide for specific powers and procedures for certain matters.

QCAT has three different types of jurisdiction: original, review and appellate. These cover a broad range of areas, including occupational matters (e.g. decisions about registration to work as a health practitioner or decisions imposing conditions on an electrical contractor's licence), building disputes, anti-discrimination, residential tenancy, consumer, neighbourhood and debt disputes.

There are three broad operational areas covered by QCAT's **original jurisdiction**: human rights (e.g. applications to appoint guardians under the *Guardianship and Administration Act 2000*); civil disputes (e.g. disputes about retail shop leases); and disciplinary (e.g. applications seeking disciplinary orders against solicitors under the *Legal Profession Act 2007*).

QCAT's **review jurisdiction** is conferred by enabling Acts and provides for QCAT to review administrative decisions made by government agencies and disciplinary bodies under enabling Acts.

QCAT's **appellate jurisdiction**, sitting as the Appeal Tribunal, provides for QCAT to hear appeals against both its own decisions and decisions of other entities (e.g. the Information Commissioner) under enabling Acts.³

1.2 Requirement for review

Section 240 of the QCAT Act requires the Minister (the Attorney-General and Minister for Justice and Leader of the House (Attorney-General)) to review the QCAT Act. The review was undertaken by the Department of Justice and Attorney-General (DJAG). The review commenced in December 2012 with the publication of a Consultation Paper containing 23 questions related to the terms of reference. In 2013, DJAG received submissions addressing both the terms of reference and related operational issues. In April 2015, after the Attorney-General wrote to key stakeholders seeking further comment, DJAG received 14 additional submissions.

³ See, for example, *Right to Information Act 2009*, s 119.

1.3 Terms of Reference

The terms of reference for the review are as follows:

The review of the *Queensland Civil and Administrative Tribunal Act 2009* (the Act) is to investigate and advise the Queensland Government on:

1. Whether any amendments should be made to the objects of the Act to enhance or clarify the role of the Queensland Civil and Administrative Tribunal (QCAT)
2. Whether the Act is meeting its objects
3. Whether any amendments to the Act are required to ensure it better meets its objects
4. Specifically, whether any legislative amendments are required to better achieve the objects of the Act in relation to the following issues:
 - a. Appeals in the minor civil disputes jurisdiction
 - b. Whether provisions in the Act or an enabling Act restricting who may constitute the tribunal for the exercise of specific powers are appropriate and necessary
 - c. Whether provisions in enabling Acts setting out different powers and procedures for the exercise of QCAT's jurisdiction are appropriate and necessary
 - d. Regional service
 - e. Legal representation of parties
 - f. The requirement for the President and Deputy President to be a Supreme Court Judge and a District Court Judge respectively
 - g. The appellate jurisdiction
5. The review is to be conducted in consultation with major stakeholders.

1.4 Purpose of this report

The Attorney-General must table a report about the outcome of the review in the Legislative Assembly, as soon as practicable after finishing the review.⁴ This report has been prepared for that purpose. It sets out:

- the key issues raised by respondents to the Consultation Paper;
- a brief overview of the comments made in respect of those issues; and
- the conclusions reached by the Queensland Government about those issues.

⁴ QCAT Act, s 240(3)

A number of respondents raised concerns in their submissions about related issues that were not directly raised in the Consultation Paper. Issues were also raised separately about the enforceability of QCAT orders. These related issues are discussed in Part 5 below. In addition, the report of the Parliamentary Inquiry into Lemon Laws⁵ (Lemon Laws Inquiry Report), which contained recommendations relating to QCAT, was tabled after all the submissions to the review were received.

2. The review process

2.1 Consultation paper

The review commenced in December 2012 with DJAG publishing a Consultation Paper containing 23 questions related to the review's terms of reference. DJAG also invited comment on any other issues stakeholders considered relevant to the objects of the review. This report broadly follows the structure of the Consultation Paper.

2.2 Initial submissions

Ninety-seven responses from a cross-section of QCAT's stakeholders were initially received in relation to the Consultation Paper. The issues respondents most commonly addressed included:

- the objects of the QCAT Act, including whether priority should be given to some of QCAT's statutory objects;
- whether QCAT is meeting its statutory objectives;
- how QCAT's tribunal should be constituted, both generally and in relation to specific matter types;
- whether there should be a right to legal representation in all or some tribunal matters;
- service delivery in rural and regional areas;
- the judicial status of QCAT's President and Deputy President;
- QCAT's internal appeals mechanism; and
- using financial disincentives to limit frivolous and vexatious actions, including appeals.

2.3 Further submissions

Following the 2015 State election, a number of key stakeholders were invited by the Attorney-General to submit further comments on the issues raised in the Consultation Paper and 14 additional responses (2015 submissions) were received.

The main issues on which stakeholders commented in the 2015 submissions were:

- the objects of the QCAT Act and whether QCAT is meeting them;
- alternative dispute resolution mechanisms such as mediation and whether (and if so, how) they should be used to resolve disputes;

⁵ 'Lemon Laws' – *Inquiry into consumer protections and remedies for buyers of new motor vehicles*, Report no. 17. 55th Parliament, Legal Affairs and Community Safety Committee. November 2015

- how the tribunal should be constituted for specific types of matters;
- whether there should be a right to legal representation in all or some tribunal matters;
- service delivery in regional areas, particularly northern Queensland;
- retaining QCAT's internal appeals mechanism; and
- potential mechanisms to limit appeals or certain categories of appeals.

Consultation also occurred with QCAT.

3. Stakeholder Comments: QCAT Act objects

3.1 Are amendments to the objects of the QCAT Act needed? (Terms of Reference 1)

Question 1 in the Consultation Paper asked *are the QCAT Act's objects and the functions of the tribunal relating to the objects still valid?*

Section 3 of the QCAT Act sets out the objects of the Act. They include:

- establishing QCAT as an 'independent tribunal';
- having the tribunal deal with matters in a way that is accessible, fair, just, economical, informal and quick;
- promoting the quality and consistency of tribunal decisions;
- enhancing the quality and consistency of decisions made by decision-makers; and
- enhancing the openness and accountability of public administration.

Section 4 of the QCAT Act sets out the functions of the tribunal relating to the objects, requiring the tribunal to:

- facilitate access to its services throughout Queensland;
- encourage the early and economical resolution of disputes;
- conduct proceedings in a way that is informal, minimises costs to parties, and is as quick as is consistent with achieving justice;
- ensure like cases are treated alike;
- be accessible and responsive to the diverse needs of tribunal users;
- maintain specialist knowledge, expertise and experience of members and adjudicators;
- ensure the appropriate use of the knowledge, expertise and experience of members and adjudicators;
- promote a collegiate atmosphere; and
- maintain a cohesive organisational structure.

Respondents to the Consultation Paper strongly supported the objects of the QCAT Act and the functions of the tribunal relating to those objects. They believed that the objects continued to be valid.

The most significant comment by stakeholders was that at times there can be inconsistency between some of QCAT's objects and functions leading to the perception that some QCAT members gave precedence to a quick resolution of disputes at the expense of fairness. Several respondents suggested consideration should be given to weighting QCAT's statutory functions, arguing this would clarify the priority of functions where there is a conflict between functions. In particular, some respondents submitted that where there is conflict between the objects of fairness and justice on the one hand and efficiency on the other hand, fairness and justice should have priority.

The issue of weighting objects is handled similarly in each Australian jurisdiction. For example, the Commonwealth Administrative Appeals Tribunal (AAT) and the NSW Civil and Administrative Appeals Tribunal (NCAT) do not distinguish between the broad objects of fairness and efficiency.⁶ Similarly, no distinction between fairness and efficiency appears to be imposed on the Victorian Civil and Administrative Tribunal (VCAT). VCAT is obliged to act fairly according to the merits of each case, with as little formality and technicality, and as much speed, as the requirements of the relevant legislation and a proper consideration of the matters before it permit.⁷

QCAT is obliged to act fairly and according to the substantial merits of the case and to observe natural justice.⁸ It is also required to actively ensure that parties understand proceedings, particularly vulnerable parties (e.g. through the use of interpreters).⁹ These substantive provisions impose positive obligations on the tribunal to act fairly and can be relied upon to support a ground of breach of natural justice, should the obligations not be met.

It is considered that all objects are of equal importance and it is a matter for QCAT to consider how they are to be balanced in a particular case. Weighting the objects may fetter QCAT's discretion in this regard.

Conclusion: Objects of the QCAT Act

There is no need to amend the QCAT Act to provide a hierarchy of objects in the event of a conflict. QCAT will appropriately balance objects as required in any particular case. Additionally, amending the QCAT Act to provide a hierarchy of objects would be inconsistent with the approach in other Australian jurisdictions.

3.2 Are QCAT Act's objects being met? Is legislative amendment needed to ensure objects are better met? (Terms of Reference 2 and 3)

3.2.1 Independence

Question 2 in the Consultation Paper asked *what, if any, amendments should be made to the QCAT Act to strengthen the independence of QCAT?*

⁶ *Administrative Appeals Tribunal Act 1975* (Cwlth), s 2A; *Civil and Administrative Tribunal Act 2013* (NSW), s 3

⁷ *Victorian Civil and Administrative Tribunal Act 1998* (Vic), ss 97 and 98(1)(d)

⁸ QCAT Act, s 28

⁹ QCAT Act, ss 29 and 44

About 50% of the stakeholders making submissions about QCAT's independence directly or indirectly agreed legislative amendments are not required to strengthen QCAT's independence.

Submissions noted that the QCAT Act provisions requiring the President and Deputy President to be sitting judicial officers¹⁰ ensure and are essential to maintaining QCAT's independence. The New South Wales Government made similar comments in its response to the Legislative Council Standing Committee (Standing Committee) on Law and Justice *Inquiry into Opportunities to Consolidate Tribunals in NSW* which recommended the establishment of a new generalist tribunal along the lines of QCAT. The Government response stated 'the presence of judicial members will guarantee the independence of NCAT and ensure the Tribunal is not subject to the direction or control of the Executive'. As a result of the Standing Committee's recommendation, the NCAT was established on 1 January 2014.¹¹

A number of submissions, however, suggested QCAT's independence could be improved. The Court of Appeal's decision of *Maher v Adult Guardian & Anor* [2011] QCA 225 was critical of the fact that a member who had been involved in an original decision was also on the appeal tribunal. The 2013 submission from the Queensland Law Society (QLS) commented that, following this decision, the movement of members between QCAT's original jurisdiction and review arm, and its appeal division, should be reconsidered. The QLS suggested it might be preferable to assign members to either the review or appeal jurisdiction, rather than have members continuing to sit in both. However, this is not a matter which requires legislative amendment and the issue does not appear to have arisen since *Maher*.

Several of the 2015 submissions also proposed changes to QCAT's judicial structure, consistent with the separation of QCAT's appeal and other jurisdictions. In particular, the QLS, Bar Association of Queensland (BAQ) and QCAT suggested that new Vice-President positions should be established to assist in hearing appeals. Although there may be some merit in Vice President positions to address the appeal workload and provide additional management support to the President, this would have financial implications which could not be absorbed within QCAT's allocated resources. Accordingly additional Vice President positions are not proposed at this time.

3.2.2 Accessibility

Question 3 in the Consultation Paper asked *what, if any, amendments should be made to the QCAT Act, the QCAT Regulation or the QCAT Rules to promote accessibility?*

Many comments were made about the current level of accessibility of QCAT and what, if any, legislative amendments could ensure QCAT's accessibility is maximised. Issues raised by respondents in relation to accessibility primarily concerned representation (legal and non-legal), increasing or decreasing the types of matters which fall under QCAT's jurisdiction and costs and fees - discussed below.

Some respondents expressed support for the status quo. Others claimed QCAT is too accessible, arguing costs and increased application and appeal fees, or legislative

¹⁰ QCAT Act, ss 175 and 176

¹¹ *Civil and Administrative Tribunal Act 2013* (NSW), s 7

amendments, should be used to deter or prevent particular categories of proceedings or frivolous or vexatious claims.

A number of respondents submitted QCAT's accessibility could be improved through operational changes, such as improved education and assistance, greater availability of interpreters, more referrals to advocacy services and the use of alternative technologies for initiating, progressing and managing matters.

The QCAT Rules have been amended to improve efficiency and accessibility. The amendments, which commenced on 4 April 2016, now provide for a broader use of electronic filing in QCAT and an extension of the period within which applications must be personally served (from 28 days to 90 days).

Representation (legal and non-legal)

Generally, parties are expected to represent themselves in proceedings before QCAT unless the interests of justice require otherwise. However, a party may be represented by a lawyer or someone else if: they are a child or person with impaired capacity; the proceeding relates to disciplinary action; an enabling Act or the QCAT Rules state that the person can be represented; or QCAT gives the party leave to be represented.¹² When considering whether leave should be granted, the tribunal may take into account whether: the party seeking representation is a State agency; complex legal questions are involved; another party is represented; and all parties have consented to a party being represented.

While several respondents asserted legal representation facilitates and promotes accessibility, others argued allowing legal representation reduces accessibility by increasing costs and creating an uneven playing field.

Legal representation is discussed further at Part 4.4.

Limits of QCAT's jurisdiction

Currently, QCAT has jurisdiction to deal with 'minor civil disputes' where the amount in contention does not exceed \$25,000. Enabling Acts set financial limits for other types of disputes. For example, under the *Queensland Building and Construction Commission Act 1991* (QBCC Act) QCAT may, if parties consent, deal with major commercial building disputes (i.e. where the claim or counterclaim exceeds \$50,000).

Two respondents (community legal centres) suggested that QCAT should be able to hear the majority of all lower level claims, including:

- claims involving second-hand car sales between private sellers and consumers.¹³ Currently, such claims fall outside QCAT's jurisdiction whereas similar disputes between traders and consumers can be heard by QCAT. Formal legal action through the courts is often not commercially viable for consumers and they are forced to abandon their rights;

¹² QCAT Act, s 43

¹³ Note - the consumer guarantees under the Australian Consumer Law do not apply to goods bought from private sellers and consumers. Disputes under the consumer guarantees treated as *minor civil disputes* are restricted to disputes between a consumer and a trader, or between two or more traders (QCAT Act, schedule 3, definition *minor civil dispute* 1(b)).

- claims for awards of unliquidated damages (e.g. personal injuries claims worth less than \$25,000). Respondents noted that the tribunal is inconsistent in its approach to interpreting the term ‘liquidated damages’ under section 12(4)(a) of the QCAT Act, and that this inconsistent approach could be remedied by extending the tribunal’s jurisdiction to determining both liquidated and unliquidated damages up to a limit of \$25,000; and
- detinue, conversion and bailment cases. For example, if the bailor of property cannot be located, it should be possible for the bailee to apply to QCAT for an order permitting and providing for the disposal of uncollected/abandoned goods.

Another respondent suggested increasing the threshold for minor commercial building disputes from \$50,000 to \$150,000 to reflect the increase in costs that has occurred since the threshold was first set. The QBCC Act has not been amended to make this change.

The Lemon Laws Inquiry Report also made recommendations about increasing QCAT’s jurisdiction to hear disputes concerning new motor vehicles. This matter is dealt with in Part 6.1 below.

Some respondents suggested changes that would reduce the scope of QCAT’s jurisdiction, including by:

- providing for body corporate and management rights disputes to be dealt with by the Supreme Court, rather than QCAT;
- limiting QCAT’s jurisdiction in domestic building disputes to \$25,000; and
- excluding QCAT’s jurisdiction for some rent increase decisions in manufactured home residential parks.

If these disputes were to be taken out of QCAT’s jurisdiction and dealt with by the Supreme Court, a disadvantage would be that this would potentially increase the costs to parties and have a negative impact on low income members of the community.

As noted above there are diverse views expressed as to the scope of QCAT’s current jurisdiction. The Government is not persuaded that the suggested changes to QCAT’s jurisdiction should be made at this stage (apart from the matters dealt with in Part 6 and below) but will continue to monitor the appropriateness of QCAT’s jurisdiction.

One respondent suggested a change to clarify that QCAT’s jurisdiction in residential tenancy matters is limited to \$25,000. The clarification was suggested due to what appeared to be an inconsistency between section 13(3) of the QCAT Act (providing that the restriction on QCAT making an order or decision requiring the payment of more than \$25,000 does not apply to residential tenancy matters) and the operation of section 516 of the *Residential Tenancies Rooming and Accommodation Act 2008* which provides that an application for more than the prescribed amount (i.e. \$25,000) under the QCAT Act should be made to a court with jurisdiction for the application amount. However, in *Avery v Palwa* [2018] QCAT 053 Justice Daubney held that there was no restriction on QCAT’s jurisdiction in relation to claims for residential tenancy matters.

An amendment is proposed to provide that QCAT does not have jurisdiction for tenancy claims of greater than the prescribed amount. This is because minor civil disputes are generally not suited to larger and more complex claims. Minor civil disputes are designed to be quicker and less formal than matters heard in other areas of QCAT’s jurisdiction.

Conclusion: QCAT's jurisdiction in residential tenancy matters

The QCAT Act should be amended to provide that QCAT's jurisdiction in residential tenancy matters is limited to \$25,000, consistent with the existing provision of the *Residential Tenancies Rooming and Accommodation Act 2008*.

Costs and fees

The issue of costs and fees impacts on accessibility, fairness and economy.

As a general rule, parties in QCAT bear their own costs.¹⁴ The QCAT Act does however, allow the tribunal to make an order requiring a party to pay all or some of the costs of another party in certain circumstances, if the tribunal considers the interests of justice require it.¹⁵

A range of submissions was made about the effect of costs and application fees on accessibility to QCAT. Some respondents argued costs and increased application and appeal fees should be used to minimise the number and impact of frivolous and vexatious actions. Other respondents considered the current costs provisions were a significant impediment to access to QCAT, with parties unwilling to risk a costs order being made against them in the event they seek to withdraw their claim or are unsuccessful.

Some respondents argued QCAT would be fairer and quicker if it took a more liberal approach to ordering costs, or if 'costs followed the event' (i.e. if the successful party was entitled to an order for costs against the unsuccessful party). The respondents supported their view by stating:

- the 'own costs' rule provides little incentive to settle matters, comply with deadlines set in directions or participate in alternative dispute resolution;
- the 'own costs' rule can lead to frivolous or vexatious claims being brought; and
- if costs follow the event, the successful party is relieved of the financial burden of paying their own costs.

Conclusion: Costs and fees

The issue of costs and fees as a tool to dissuade frivolous and vexatious claims was addressed by amendments to the QCAT Regulation which commenced on 12 December 2016. To discourage unmeritorious appeals and the associated impact on QCAT's appeal jurisdiction, the amendments to the QCAT Regulation removed the requirement for QCAT to refund half the fee for unsuccessful applications for leave to appeal and unsuccessful applications to reopen proceedings.

However, to address situations where payment of the full fee would cause a person undue financial hardship, the QCAT Regulation was also amended to give the principal registrar discretion to allow a reduced appeal fee of \$100 if satisfied these circumstances exist. Other amendments introduced a fee for counter-applications and photocopy fees for parties requesting copies of proceedings. These fees will assist in covering some of QCAT's costs in providing its administrative services.

¹⁴ QCAT Act, s 100

¹⁵ QCAT Act, s 102

3.2.3 Fairness, justice, economy, and informal and quick resolution of disputes

Questions 4 and 5 in the Consultation Paper asked:

- *What, if any, amendments could be made to the QCAT legislation to further promote fairness?*
- *What, if any, amendments could be made to the QCAT legislation to further promote economical, informal and quick resolution of disputes?*

Many respondents commented on how QCAT's methods of operation and level of resourcing could affect its objects of fairness, economy, informality and swiftness.

In addition, respondents identified a range of legislative amendments which could promote these objects. Several of these are discussed in other parts of this report, including changes to allow more legal representation as of right (discussed at Part 4.4) and adjustments to QCAT's jurisdiction (discussed above at Part 3.2.2 in the context of QCAT's accessibility). Others suggested changes relating to the use of costs, use of alternative dispute resolution procedures and timing for stays and reopenings.

Use of alternative dispute resolution procedures

QCAT currently uses compulsory conferences and mediation to assist parties reach agreement before a matter goes to hearing. Parties can be directed by the tribunal or Principal Registrar to attend a compulsory conference.¹⁶ The purpose of a compulsory conference is to identify and clarify the issues in dispute, promote settlement of the dispute, identify questions of fact and law to be determined by the tribunal, make orders and give directions about the conduct of the proceeding where a settlement is not reached and make orders the presiding member thinks appropriate to resolve the dispute.¹⁷ Parties may also be referred to mediation (e.g. to a dispute resolution centre) by the tribunal or Principal Registrar for the purpose of promoting the settlement of the dispute.¹⁸

A number of the 2015 submissions commented on how alternative dispute resolution can affect how QCAT achieves its objects of fairness, economy, informality and quick resolution of disputes.

Several respondents supported increased efforts to use alternative dispute resolution as a first step to resolve disputes, particularly where disputes occur within families – for example, in relation to guardianship. It was suggested this could more effectively resolve some forms of dispute and reduce the need for formal orders and hearings.

Respondents differed, however, on whether alternative dispute resolution should be made compulsory and who should organise it:

- two respondents suggested some cases ought to be able to proceed directly to QCAT, rather than be delayed by an obligation to participate in early dispute resolution;
- another respondent recommended facilitating alternative dispute resolution before any formal hearing; and

¹⁶ QCAT Act, s 67

¹⁷ QCAT Act, s 69

¹⁸ QCAT Act, ss 75 and 77

- some respondents supported the existing practice of early dispute resolution but requested changes to how current schemes were administered.

Conciliation

Conciliation differs from mediation in that conciliators can generally give parties advice, including about the operation of relevant legislation for the matter. Mediators, however, generally do not offer advice but support parties to arrive at a decision themselves.

The *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011*, from the time of its commencement, envisaged a specific role for conciliators in QCAT to deal with disputes about trees and dividing fences and amended the QCAT Act to provide a general head of power to make rules about conciliation. Subsequently the question arose about whether this power to make rules was sufficient to enable conciliation to be used, in addition to mediation, as an alternative dispute resolution process by QCAT. Arguably it was necessary to amend the QCAT Act and QCAT Rules to expressly provide for conciliation to enable it to be undertaken.¹⁹

Therefore, amendments to the QCAT Act will mirror provisions that exist in the QCAT Act in relation to mediation to provide consistency between different alternative dispute resolution processes in QCAT. These would address matters such as the purpose of conciliation, functions of conciliators, referral by the tribunal of matters for conciliation, who may be a conciliator, personal or representative attendance at conciliation, disclosure of conciliators' interests and provisions about privacy and confidentiality of evidence given at conciliation in subsequent proceedings. Amendments to the QCAT Rules would address matters such as qualifications required to be a conciliator, notice of conciliation, the requirement for parties to assist a conciliator and general powers of conciliators. This is consistent with the approach in relation to mediation and would provide QCAT with additional options to resolve disputes prior to hearing.

Although the Consultation Paper did not expressly ask questions about conciliation, it is anticipated that conciliation will assist in the early and efficient resolution of disputes so that a final hearing by QCAT is not needed.

Conclusion: Conciliation

The QCAT Act and QCAT Rules should be amended to facilitate the implementation of conciliation processes in QCAT.

Timing of stay orders and reopenings

A few respondents raised concerns about the operational consequences of certain provisions relating to obtaining reasons for a decision, appeals, stays, reopenings and executing warrants of possession²⁰ under the *Residential Tenancies and Rooming Accommodation Act 2008*. They argued that the effect of the current QCAT Act provisions²¹ is that a warrant of

¹⁹ The QCAT Act, chapter 2, division 3 provides for mediation in QCAT, including how matters are to be referred for mediation, representation at mediation, purpose of mediation and who may be a mediator.

²⁰ *Residential Tenancies and Rooming Accommodation Act 2008*, ss 350-352

²¹ Relevant provisions in the QCAT Act include:

- s 122 (party may apply for reasons of a decision within 14 days of the decision and must be provided the reasons within 45 days after request is made);
- s 127 (decision generally takes effect when it is made);

possession may be enforced before a party is able to obtain reasons for the decision and apply to the tribunal to have a decision stayed.

Suggestions to resolve this problem included:

- allowing a person to apply for a stay if they apply to reopen a proceeding under section 139 of the QCAT Act, or make an application for QCAT to set aside or amend a decision under section 51 of the QCAT Act;
- amending the QCAT Rules (rule 92) to require an application for reopening to be lodged with QCAT within a shorter period than the current 28 days; and
- making better use of section 61 of the QCAT Act, which allows QCAT to extend or shorten a time fixed by the QCAT Act, including allowing determination of a stay even if an appeal has not yet been lodged.

After considering these options, no amendment to the QCAT Act is proposed to specifically address this issue. DJAG will work with QCAT and the Residential Tenancies Authority to ensure parties to residential tenancy disputes are informed of the option to apply to QCAT for an order under section 61 which allows QCAT to extend or shorten a time limit fixed by the QCAT Act (although see below amendments proposed to expand the circumstances in which a stay order may be granted).

A respondent also suggested providing for an automatic stay in the specific circumstances of a decision permitting a person to work with children. Section 145(1) of the QCAT Act provides that where an appeal against a QCAT decision is made, the decision can be put into effect, despite being the subject of an appeal. QCAT may make an order ‘staying’ the decision (i.e. preventing the decision from taking effect) either of its own volition or on application of a party, but this is not an automatic process. For instance, in the case of an application for a ‘blue card’ to work with children or young people, a person can be issued with a negative notice prohibiting them from working with children. Where QCAT in its review jurisdiction overturns that decision, the person may be entitled to work with children, even if the decision-maker intends to appeal QCAT’s decision. This is inconsistent with the child protection focussed policy intent of section 354 of the *Working with Children (Risk Management and Screening) Act 2000* which provides that if a person applies to have certain decisions under that Act reviewed including a decision to issue a negative notice, then QCAT may not: (a) stay the operation of the decision; or (b) grant an injunction in the proceeding for the review.

Due to the public policy concerns surrounding child safety, it is proposed that after the review is decided a QCAT decision to overturn the original decision would be stayed automatically (without the need for a separate decision to stay), pending the expiration of the appeal period and the hearing of any appeal. The subject person would not be entitled to engage in child-related employment while the decision-maker’s appeal is being heard and decided.

The QCAT Act in general provides for processes and procedures that apply to all the matters that come before it. It is therefore proposed that the *Working with Children (Risk*

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- ss 136 to 141 (dealing with applications to reopen a proceeding that has been heard and decided);
 - s 143 (relating to appealing or applying for leave to appeal, including providing that generally the application for leave or appeal, as relevant, must be filed within 28 days of the day the person is given written reasons); and
 - s 145 (the tribunal may stay a decision until appeal is finalised). Section 351 of the *Residential Tenancies and Rooming Accommodation Act 2008* provides if the tribunal makes an order for a warrant of possession, the warrant must be obtained within three days of the tribunal’s order and executed within 14 days of being obtained.

Management and Screening) Act 2000, rather than the QCAT Act, be amended for this purpose. To provide consistency with the system for screening individuals working with persons with a disability, equivalent amendments will be made to the *Disability Services Act 2006*.

Conclusion: Timing of stay orders and reopenings

The *Working with Children (Risk Management and Screening) Act 2000* should be amended so that if QCAT sets aside a decision made by the chief executive of DJAG to issue a person with a blue card negative notice (or a decision to refuse to cancel a blue card negative notice), the QCAT decision is stayed automatically pending the expiration of the appeal period or any appeal is heard. Currently, the blue card applicant would be immediately entitled to be engaged in child-regulated employment while the tribunal decides whether to stay the decision and the relevant agency's appeal is heard and decided.

Other operational efficiencies for QCAT

A number of other operational efficiencies have been identified through the course of the review, including the following:

- *expanding the circumstances in which a stay order can be made*: QCAT can make a stay order to stay the operation of a reviewable decision.²² A stay order can only be made where a proceeding for the review of the decision has started under the QCAT Act. No stay may be granted where a person applies to reopen a proceeding or to set aside or amend a decision by default. In practice, this means that parties at times resort to applying for interim orders to protect their interests;
- *allowing QCAT to stay the operation of part of a reviewable decision*: section 22(3) of the QCAT Act allows the tribunal to stay the operation of a reviewable decision but in some circumstances it would be appropriate to stay part of a decision. The AAT²³ already has this power;
- *allowing conditions to be imposed on stay orders*: QCAT can require a party to provide an undertaking before making a stay order or can lift the order after certain undertakings are met. However, section 22 of the QCAT Act does not provide QCAT with the flexibility to impose conditions on stay orders as appropriate, in contrast with some enabling Acts which do provide this flexibility;²⁴
- *allowing proceedings that have been dismissed in error to be reinstated*: QCAT may dismiss a proceeding and limit the ability of an applicant to start a proceeding of the same kind, relating to the same matter before QCAT, unless leave is granted by the President or Deputy President. If a proceeding has been dismissed in error, there is currently no provision in the QCAT Act for a party to apply to have their matter reinstated;
- *allowing the Principal Registrar to issue notices*: section 97 of the QCAT Act allows the tribunal, by written notice, to require a person to attend a stated hearing or proceeding to give evidence, or to produce a stated document or thing to QCAT. In the interests of efficiency, it is proposed to allow the Principal Registrar of QCAT to also issue a notice under section 97 to attend a hearing or proceeding, or to require a person to produce a stated document or thing to QCAT;

²² QCAT Act, s 22

²³ *Administrative Appeals Tribunal Act 1975* (Cwlth), s 41(2)

²⁴ *Animal Management (Cats and Dogs) Act 2008*, s 184(4) and *Food Act 2006*, s 240(3)

- *allowing QCAT to remove a party joined to the proceedings*: this could occur if QCAT considers that the person's interests are not, or are no longer, affected by the proceeding, or the person is not a proper or necessary party to proceedings, whether or not the person was a party originally.

Conclusions: improved efficiency of tribunal hearings

The QCAT Act should be amended to:

- widen the circumstances in which a person may apply for a stay to include cases where a person applies to: reopen a proceeding; have a decision set aside; or have a decision amended by default;
- allow QCAT to stay the operation of part of a reviewable decision;
- allow QCAT to impose conditions on a stay order, as appropriate;
- allow QCAT to reinstate proceedings dismissed in error;
- allow the Principal Registrar to issue notices to attend a hearing or proceeding, or to require a person to produce a stated document or thing to the tribunal; and
- allow QCAT to remove a party joined to the proceedings.

Quality and consistency of QCAT decisions

Question 6 in the Consultation Paper asked *what, if any, amendments could be made to the QCAT legislation to further promote the quality and consistency of decisions?*

A significant number of respondents raised concerns about the quality and consistency of QCAT decisions. The most commonly identified were perceived shortcomings that tended to concern QCAT's operational practices, for example:

- differing approaches to the provision of evidence by parties;
- the practice of publishing QCAT decisions;
- access to precedents and QCAT's readiness to follow precedent;
- the depth of expertise of QCAT members in specific jurisdictional areas; and
- views that QCAT members may be influenced by factors, such as concern for a party's financial position, rather than a strict application of the law.

To assist in addressing concerns about access to precedents, members, adjudicators and justices of the peace (JPs) may have access to a 'bench book' in certain jurisdictions to assist them with ensuring a consistent approach to deciding matters that come before QCAT. The bench book would also contain references to leading decisions on specific issues. In addition, to ensure their professional skills remain current, adjudicators and members are provided with training within QCAT's fiscal resources.

QCAT does not publish all its decisions. If the reasons for a decision contain information that is subject to a non-publication order or if legislation prohibits publication (e.g. the identity of adults in guardianship matters), reasons are published in a way that protects the relevant information or identity of relevant persons. If the decision is provided at the hearing (verbally) to the parties it is not subsequently published. However, in most cases, if a written

decision is provided to the parties, the decision is published on the Supreme Court Library's website as soon as possible.

If a party before QCAT believes that QCAT members may be influenced by external factors in coming to a decision, such as concern for a party's financial position, the aggrieved party can appeal (or seek leave to appeal, where required) to the QCAT appeal tribunal on that point of contention.

QCAT's impact on administrative decisions

Questions 7 and 8 of the Consultation Paper asked:

- *What impact, if any, do you think the establishment of QCAT has had on the quality and consistency of administrative decisions by government agencies and on the openness and accountability of public administration?*
- *What, if any, amendments could be made to the QCAT legislation that would enhance quality and consistency in administrative decision making and openness and accountability of public administration?*

Many respondents, including the QLS, agreed that QCAT has had a positive impact on the quality and consistency of government decision making. The reasons given for this included:

- the potential for administrative decisions to be reviewed;
- encouraging government agencies to prepare and provide applicants with a comprehensive explanation and statement of reasons for any action taken or decision made;
- the publication of some QCAT decisions; and
- QCAT's role as a central body which publishes its decisions across a number of jurisdictions, encouraging increased quality and consistency of administrative decision making across Government.

However, some decision makers claimed improvements were not necessarily due to the existence of QCAT but because of their adherence to the legislation by which they are bound.

4. Stakeholder comments: Specific Issues (Terms of Reference 4)

4.1 Constitution of the tribunal (Terms of Reference 4.b)

Question 9 of the Consultation Paper asked *whether the distinction between legally qualified members and other members should be retained, and whether provisions in enabling Acts requiring the tribunal to be constituted in a certain way are necessary.*

QCAT Act tribunal constitution provisions – qualifications of members

Chapter 4 of the QCAT Act provides for the establishment of QCAT and how it is constituted, specifically:

- the appointment of a President, a Deputy President, senior members, ordinary members and supplementary members;

- when a person is eligible for appointment as a senior member and an ordinary member;²⁵
- the powers that are exercisable only by legally qualified members, as defined in the QCAT Act;²⁶ and
- the choice of QCAT members. The President chooses the members who constitute a tribunal for each matter, subject to any relevant provisions of an enabling Act.²⁷ Such restrictions or directions are generally aimed at ensuring decision-makers have the appropriate expertise and experience for particular jurisdictions.²⁸ In some cases, enabling Acts provide that certain members are ineligible to hear particular proceedings.

Before QCAT was established, a review by an Independent Panel of Experts (Expert Panel) referred to the need for QCAT members to be sufficiently skilled to command the respect of parties and their legal representatives²⁹. The Expert Panel noted QCAT members would require sufficient expertise to run hearings and make proper determinations, including where there are complex disputes or difficult questions affecting a person's fundamental human rights. While the Expert Panel stated QCAT members would need to have a '*high level of understanding of the nature and impact of the decision being made*',³⁰ it did not say legal qualifications were necessary for all members.

Schedule 3 of the QCAT Act defines 'legally qualified member' to mean a judicial member, or an ordinary or supplementary member who is a magistrate, or a senior or ordinary member who is an Australian lawyer of at least six years standing. Only legally qualified members can exercise certain powers or decide certain matters – for example, the power under section 66(4) to make a non-publication order and the powers under sections 22(8), 58(5), and 59(8) to assess damages. The distinction between legally qualified members and other members in QCAT was supported by the vast majority of respondents.

In its 2013 submission, the BAQ argued that all senior members and most ordinary members should be qualified and admitted lawyers who hold a current practising certificate. The BAQ asserted the only exception should be for members required for special knowledge, expertise or experience relating to a particular class of QCAT matter.

The reasons cited by respondents for retaining the distinction between legally qualified members and other members included:

- QCAT has significant powers to provide parties with remedies and make other judicial orders which can impact upon a person's rights and liberties. Effectively exercising these powers requires a considerable understanding of the law;
- to ensure, particularly in guardianship, anti-discrimination and professional discipline cases, that all relevant legal rights are observed and upheld and legal technicalities are properly understood and analysed;
- to ensure public confidence in, and the integrity of, the process;

²⁵ QCAT Act, s 183(4)

²⁶ QCAT Act, schedule 3

²⁷ QCAT Act, ss 165 to 167

²⁸ *Information Privacy Act 2009*, s 131 – requires a judicial member on the tribunal; *Education (Queensland College of Teachers) Act 2005*, s 124 – tribunal must include a registered teacher

²⁹ Tribunals Review - Independent Panel of Experts (2008) QCAT: Stage 1 report on scope and initial implementation arrangements, pp. 27 and 28

³⁰ *Ibid.* p. 28

- none of the aims cited for removing the distinction between legally qualified members and other members, such as reducing complexity and increasing flexibility, should take precedence over the need for properly constituted tribunals in guardianship and administration cases where at least one member has training and experience in dealing with legal matters; and
- removing the distinction would likely result in an increased strain on judicial resources through a greater number of appeals.

The few respondents who supported removal of the distinction considered:

- the distinction is unnecessary and complicated – removing it would simplify the process and increase flexibility in selecting QCAT members;
- appropriate training can address knowledge gaps of non-legally qualified members; and
- QCAT members’ skills – in particular, mediation skills – are more important than their occupation.

Enabling Acts - specific tribunal constitution requirements

Question 10 of the Consultation Paper asked whether provisions in enabling Acts requiring the tribunal to be constituted in a certain way are necessary given the President’s responsibilities and functions under the QCAT Act?

Most respondents’ comments were based on their own personal experiences or their members’ experiences with a particular enabling Act or type of matter.

Most respondents who addressed this consultation question supported retaining enabling Act provisions requiring the tribunal to be constituted in a certain way. The reasons for doing so included:

- to ensure appropriate tribunal composition in cases where the unique or specialised nature of the matter requires specific expertise or where specialist understanding is essential to ensure quality decisions are made;
- to ensure relevant members have no conflict of interest or bias;
- in matters such as those involving vulnerable parties, to reflect the gravity of the decisions being made;
- to recognise the President has broad responsibilities and functions and that it is not feasible for the President to personally choose who is to constitute the tribunal in all matters – prescriptive requirements in enabling Acts allow the President to delegate the function with confidence; and
- to ensure resourcing issues do not undermine the intention of the legislature.

The QLS suggested some matters appeared to warrant the involvement of the President or Deputy President because of the matter’s public interest or test case value. However, it observed geographic and resourcing allocation constraints, especially in rural, regional or remote areas, can mean such matters do not get that level of membership for hearing.

Where respondents supported the President having greater flexibility to choose tribunal membership, the key reason given was to reduce administrative complexity.

QCAT has raised concerns that requirements under some enabling Acts for the tribunal to be constituted by a judicial member have resource implications for QCAT.

Audit of enabling Act provisions

An audit of relevant provisions in enabling Acts was undertaken as a separate body of work and was not covered by the terms of reference for the review. This involved a detailed consideration and analysis of more than 200 specialist powers spread across more than 160 enabling Acts. The existence of detailed legislative provisions in addition to QCAT Act provisions applicable to proceedings could potentially lead to inconsistencies and confusion as to which, if any, special processes, powers and procedures apply. The audit therefore sought to establish:

- whether changes could or should be made to the relevant enabling Act provisions, for example, to streamline or consolidate them to ensure consistency across enabling legislation as much as possible;
- the potential for such changes to improve QCAT's operations; and
- if such changes were desirable, the appropriate way to progress any future amendments.

Options to address this issue included:

- amending all enabling Acts to make them consistent with the QCAT Act; and
- developing schedules which would provide a single point of reference in the QCAT Act (e.g. schedules to the *Civil and Administrative Tribunal Act 2013* (NSW) list enabling legislation conferring functions on each of the tribunal's divisions) which could assist in streamlining or removing inconsistencies between the enabling Acts themselves, and between the enabling Acts and the QCAT Act.

Analysis of the first option revealed that aligning all enabling Acts with the QCAT Act would involve a large body of work requiring significant amendment of enabling Acts. It also raises competing policy tensions: on one hand, the desirability of standard, but flexible processes and procedures across QCAT's operations; on the other hand, the benefits of specialist processes and procedures to address the demands of particular matters.

Analysis of the second option indicated limited duplication between the QCAT Act and enabling Acts existed, meaning a schedule list of legislation was unlikely to result in greater efficiency.

Instead, the approach was taken to focus on whether it is possible to 'streamline' the content of provisions in a specific area. Of particular concern to QCAT is the way that a QCAT tribunal is to be constituted and that provisions vary across enabling Acts. Tribunal constitution provisions are those provisions which mandate the specific skill set or qualifications that must be held by QCAT tribunal members for certain matters (e.g. tribunal membership to include a judicial member, or a member of an occupational area with specific experience). Such provisions remove the President's ability to decide how a tribunal should be constituted 'for a particular matter' under section 167 of the QCAT Act. Difficulties may also occur where there is a small pool of appropriately qualified and available persons to hear matters. There could also be a perceived conflict of interest where representatives from particular interest groups (e.g. industry) form part of the tribunal. The issue of enabling Acts' tribunal constitution provisions are best addressed incrementally as enabling Acts are amended, reviewed or created.

Amendments relating to the tribunal's constitution

Minor amendments to the QCAT Act related to the constitution of the tribunal are proposed to allow the Attorney-General to appoint members and other persons who can act as senior members as required from time to time. The President will then be able to select from that pool a person to act as a senior member to fill any temporary senior member vacancy as necessary. An amendment to the definition of 'constitute' is also proposed to clarify that adjudicators may form part of a tribunal.

Conclusion: Constitution of tribunal

Minor amendments should be made to the QCAT Act in relation to the constitution of the tribunal regarding the appointment of senior members and the definition of 'constitute' in relation to adjudicators. No further amendments are proposed on this issue as it is considered the current provisions continue to be appropriate.

Agencies will be encouraged, when creating, amending or reviewing enabling Acts, to consider whether there is a need to retain specialist constitution provisions or whether their provisions may be better aligned with the tribunal constitution provisions in the QCAT Act. This should also be reflected in the DJAG Administrative Review Policy.

4.2 Enabling Act provisions - specialist procedures and powers (Terms of Reference 4.c)

The QCAT Act sets out standard powers and procedures for QCAT, but section 6 provides for enabling Acts to override or vary these provisions. In addition to matters such as the constitution of the tribunal (discussed above), these specialist provisions cover matters such as limits on QCAT's jurisdiction, stays on internal review decisions, restrictions on orders and timeframes for hearings.

Question 11 of the Consultation Paper asked whether, in the light of the QCAT Act's objects, the specialist powers and procedures in the enabling Acts were still necessary?

The QLS commented that specialist procedures and powers in enabling Acts remain necessary due to QCAT's broad jurisdiction and the discrete nature of the decisions it reviews. Several departments agreed the specialist powers and procedures were appropriate and necessary. An advocacy organisation commented on how important the principles in the enabling Act were for the area in which it operated.

Conclusion: Specialist provisions and powers in enabling Acts

Incremental alignment of enabling Act provisions with the QCAT Act will be the most effective means of achieving greater consistency between enabling Act provisions and QCAT Act provisions over time.

Agencies will be encouraged, when creating, amending or reviewing enabling Acts, to consider standard QCAT Act provisions when they amend, create or review legislation conferring jurisdiction on QCAT with a view to maximising consistency between provisions of enabling Acts and the QCAT Act. This should be reflected in the DJAG Administrative Review Policy.

4.3 Regional Service (Terms of Reference 4.d)

Question 14 of the Consultation Paper asked whether, *taking into account the current fiscal environment in Queensland, what could be done to improve QCAT's regional and rural service delivery?*

While QCAT's registry is located in the Brisbane CBD, arrangements exist to provide regional and rural services.

Local Magistrates Courts act as QCAT's registry across regional and rural Queensland and in south-east Queensland (excluding Brisbane). Outside Brisbane, Magistrates Court registry staff accept QCAT applications and supporting documents, receive application fees, process minor civil dispute applications, assign hearing dates and manage applications through to resolution. Within Brisbane, applications are forwarded to QCAT's Brisbane registry.

In south-east Queensland (including Brisbane), minor civil disputes are heard by QCAT adjudicators appointed under the QCAT Act, who circuit the south-east Queensland centres. In regional and rural areas, minor civil disputes are heard by Magistrates who are deemed ordinary members of QCAT for minor civil dispute hearings.

In Brisbane, matters other than minor civil disputes are heard by QCAT members. In other areas of south-east Queensland and across regional and rural Queensland, QCAT members circuit to conduct hearings for non-minor civil dispute matters.

QCAT (in Brisbane) and the Magistrates Courts are equipped with videoconferencing facilities to allow regional and remote parties to participate in QCAT proceedings. QCAT regularly uses online platforms to mediate minor civil dispute matters. In the 2015-16 financial year QCAT listed over 20 hearings by videoconference, predominantly in the human rights jurisdiction (children's and guardianship matters).

The now-embedded QCAT JP Trial commenced on 3 June 2013 in Brisbane, Ipswich, Maroochydore, Southport and Townsville. The QCAT Act allows JP panels consisting of two JPs (one of whom is legally qualified) to hear certain minor civil disputes under \$5,000. Ongoing funding was provided in the 2016-17 budget process to enable JPs to continue hearing certain minor civil disputes in QCAT. Amendments to the QCAT Act to permanently embed JPs in QCAT's operations commenced on 11 November 2016.³¹

The Consultation Paper noted:

- the tribunal's use of videoconferencing and teleconferencing for clients unable to access their local courthouse;
- the development of the QCAT website to increase the accessibility of QCAT, particularly for QCAT's regional and rural clients, is ongoing; and
- work is also underway to increase the availability of electronic lodgement of QCAT applications.

Generally, respondents saw both need and opportunity for improvement in QCAT's regional and rural service delivery.

³¹ *Limitation of Actions (Institutional Child Sexual Abuse) and Other Legislation Amendment Act 2016*

Although the Consultation Paper indicated it was not feasible to establish a permanent presence in North Queensland, several respondents, including QCAT, suggested establishing regional offices or more specifically, a northern regional office (e.g. in Townsville).

Other suggestions included:

- expanded use of videoconferencing, teleconferencing and other technology to better manage and hear proceedings;
- dealing with matters ‘on the papers’ wherever possible – although other respondents raised concerns with this approach;
- increased use of the facilities of Magistrates Courts and other Queensland Government agencies to hold compulsory conferences and conduct hearings, including directions hearings;
- training for magistrates about key legal issues within specific jurisdictional areas, and on the QCAT Act and QCAT practice;
- better support for regional and rural registries including all registries having a common checklist of how cases run from start to finish, with flexible options for dealing with parties in regional and rural areas; and
- to ensure consistency in practices and decision making, regular case conferencing between all QCAT members, including magistrates and adjudicators, and meetings with community legal centres to discuss registry and tribunal issues and facilitate development of consistent QCAT practice.

No legislative amendment is required to implement these suggestions and there have been some developments in this area since the Consultation Paper was released. Applications for minor civil disputes, as well as a number of other QCAT services, may now be made online. QCAT’s 2016-17 Annual Report states that increased digitisation of minor civil dispute forms and processes, and enhanced online information and video links, has provided better support to tribunal users in their interaction with QCAT and assisted them to understand QCAT processes and procedures.

4.4 Legal representation (Terms of Reference 4.e)

‘As of right’ legal representation

Section 43 of the QCAT Act limits legal representation in QCAT proceedings, so that parties are generally expected to represent themselves unless certain circumstances apply.³² This is consistent with the views of the Expert Panel,³³ which noted such a position would reflect that *‘the tribunal is not a court and provides flexibility for the tribunal to consider whether procedural fairness requires representation in a particular matter’*.

³² QCAT Act, s 43(2)(b); also see *Gupta v Medical Board of Australia* [2015] QCAT 142 regarding access ‘as of right’ to legal representation in health practitioner disciplinary matters.

³³ Queensland Civil and Administrative Tribunal: Stage 2 report on legislative amendments to implement the tribunals: Tribunals Review - Independent Panel of Experts: October 2008; **recommendation 14**: p.75

Questions 12 and 13 of the Consultation Paper asked:

- *Should legal representation as of right in QCAT proceedings be extended, and if so, to what types of matters and in what circumstances?; and*
- *How could free legal representation be extended to impecunious parties in QCAT proceedings?*

Some respondents argued that inequity arises if one party (such as a property owner) is represented by a person familiar with QCAT requirements and processes (such as a real estate agent), while the opposing party represents themselves. These respondents supported allowing, and possibly providing funding (e.g. for advocates with specialist skills), to overcome this imbalance. In contrast, another respondent argued the same imbalance of skill and experience may cause QCAT members to be biased against parties who are represented by persons experienced in QCAT procedure, such as property managers.

Respondents had mixed views about whether representation should be allowed ‘as of right’ (i.e. without seeking leave from QCAT). A few respondents suggested both legal and non-legal representation should be permitted as of right in relation to guardianship (including when considering restrictive practice matters) and for adults with physical or behavioural issues. However, section 43(2)(b)(i) of the QCAT Act already provides that parties who fall into these categories may have representation, including legal representation, without seeking leave. Another respondent noted that most of its matters where the party is a child or a person with impaired capacity (where representation is available as of right) were resolved effectively without recourse to legal representation.

QCAT and three other respondents (including the QLS and the BAQ) expressly supported ‘as of right’ legal representation for all matters before QCAT. Approximately 40% of respondents supported an extension to ‘as of right’ legal (or advocate) representation in certain matters. Examples included where the State is a party to the proceeding, appeals, retail shop lease disputes, body corporate and community management disputes, where tenants are facing eviction, guardianship actions and restrictive practices proceedings.

On the other hand, around 30% of respondents did not support an extension of ‘as of right’ legal representation, including for some of the categories of proceedings listed above. Several respondents were troubled that increasing rights to legal representation would further disadvantage disempowered parties, increase the time taken for and costs of actions, and reduce access and equity.

A number of respondents noted a need for relevant services to either be subsidised by government or provided *pro bono* by the private sector, as any right to legal representation would be futile if such assistance were not readily available.

Currently, LawRight (formerly Queensland Public Interest Legal Clearing House), a *pro bono* organisation, offers a self-representation service at the Brisbane and Townsville QCAT registries, assisting parties with matters such as form filling, drafting statements and understanding the tribunal process. LawRight’s self-representation service in QCAT focusses on areas of law which could affect the more vulnerable members of society (e.g. housing, guardianship and administration, administrative reviews and children). In 2016-17, LawRight supported 212 QCAT users through its self-representation service.

Other comments:

- indicated support for free or subsidised legal representation while noting that most of the particular respondent group's matters had been resolved effectively without recourse to legal representation;
- indicated support for 'as of right' legal representation, but only where impecunious parties had access to free legal representation; and
- stated that if QCAT requires parties to comply with a legalistic process, then arguably legal representation should be 'as of right'; however, appropriate measures should be adopted to ensure equality of access to justice.

In 2015 QCAT submitted that the achievement of its objects would be enhanced by providing for a general right to legal representation. As an alternative, QCAT suggested removing the legislative presumption that parties should represent themselves unless the interests of justice require otherwise,³⁴ instead requiring QCAT to consider the obligations in section 29 when deciding whether to grant leave to appear. Section 29 requires QCAT to take reasonable steps to ensure parties understand proceedings, assertions made in proceedings and any QCAT decision concerning proceedings. It also requires QCAT to take reasonable steps to understand parties' views, actions and assertions, and ensure proceedings are conducted in a way that recognises cultural diversity and parties' other needs.

It is arguable, however that QCAT would need to consider some of the factors under section 29 (e.g. a party's cultural/linguistic background and ability to understand matters) in considering whether the interests of justice require a party to be represented. This suggests it may not be necessary to add to the list of matters to be considered by QCAT under section 43(3) when deciding whether to grant leave for legal representation.

Productivity Commission Report

Legal representation 'as of right' is not consistent with the Productivity Commission Inquiry Report, Access to Justice Arrangements, No. 72, 5 September 2014 (Productivity Commission Report) available at: www.pc.gov.au/inquiries/completed/access-justice/report.

The Productivity Commission Report commented that the use of legal representation in tribunals:

- is thought to be contributing to the problem of 'creeping legalism' – with tribunals being seen by users as increasingly formal bodies; and
- increases the costs incurred by parties.

The Productivity Commission's recommendations included:

- tribunals should rigorously apply existing restrictions, that is, legal representation should only be allowed with leave and that leave should only be granted in exceptional cases where one party would otherwise be significantly disadvantaged; and
- tribunals should report on the frequency with which parties are legally represented, whether or not requirements to seek leave are in place.

³⁴ QCAT Act, s 43(1)

The Commonwealth Government response to the Productivity Commission's Report, released on 29 April 2016, did not address this aspect of the Productivity Commission's report.³⁵

Extending free legal representation

Several respondents supported the provision of free, or at least substantially subsidised, legal services for impecunious parties. Some respondents noted the community legal services currently available, including LawRight, Legal Aid Queensland and community legal centres.

Suggestions for ways to extend free legal representation or other support included:

- funding of community legal centres, LawRight, Legal Aid Queensland and advocacy services;
- greater use of, or referrals to, pro bono resources;
- providing a duty lawyer service; and
- encouraging QCAT members to rely more often on section 43(6) of the QCAT Act, which allows QCAT to appoint a person to represent an unrepresented party.

Conclusion: Legal Representation

There is not sufficient evidence to support a shift to a general 'as of right' legal representation for parties appearing at QCAT. Stakeholder support for this proposal is limited and inconsistent, and it is contrary to the Productivity Commission's recommendations.

4.5 Judicial officer status of President and Deputy President (Terms of Reference 4.f)

Questions 15, 16 and 17 of the Consultation Paper asked:

- *Is a judicial presidential structure preferable for the effective operation of QCAT?*
- *If you are of the view that a judicial presidential structure is not required, how should QCAT be restructured to ensure it continues to meet its objects?*
- *If there were no judicial members, should appeals from some QCAT decisions continue to be heard within QCAT or should appeals be heard by the courts?*

The QCAT Act provides for a President and a Deputy President, who are required to be a Supreme Court judge and a District Court judge, respectively.³⁶

The functions of the President and Deputy President include managing the business of QCAT to ensure it operates effectively, managing the members of QCAT and adjudicators, advising the Minister about how QCAT could improve the performance of its functions to ensure

³⁵ www.ag.gov.au/LegalSystem/Pages/response-to-report-into-access-to-justice-arrangements.aspx

³⁶ QCAT Act, part 3, division 2,

matters are dealt with in a way that is fair, just, economical and quick, and how the QCAT Act or an enabling Act could be more effective.³⁷

Some QCAT functions and powers may only be exercised by judicial members, for example:

- sitting on the appeal tribunal for appeals from decisions of magistrates;³⁸
- the power to punish for contempt;³⁹
- constituting QCAT to hear and decide legal profession disciplinary matters⁴⁰ or health profession disciplinary matters;⁴¹ and
- providing an opinion to the Anti-Discrimination Commissioner on how the *Anti-Discrimination Act 1991* applies in a specific situation.⁴²

The requirement for judicial leadership is intended, in part, to ensure the actual and perceived independence of QCAT so that justice is both done and seen to be done. It has been suggested by the President of the State Administrative Tribunal in Western Australia (SAT) that this contributes to '*a far higher degree of consistency in decision-making*' than would otherwise be likely.⁴³ Further, it is consistent with the structural arrangements of NCAT, VCAT, SAT and the South Australian Civil and Administrative Tribunal. All of these tribunals are headed by a President who is a Supreme Court judge and most also require their Deputy or Vice President to hold judicial office. However, while Deputy Presidents in NCAT may hold judicial office, it is not mandatory.

The Consultation Paper sought comment regarding the judicial status of the President and Deputy President. An overwhelming majority of respondents supported preserving the requirement for their judicial status. Respondents felt that the actual and perceived independence of QCAT is fundamental and, as noted in the Explanatory Notes to the Queensland Civil and Administrative Tribunal Bill 2009,⁴⁴ to achieve that, the President and Deputy President must remain sitting judicial officers.

Respondents were concerned that removal of judicial leadership would:

- diminish QCAT's status;
- jeopardise the standard of QCAT's decisions; and
- create a risk that parties may not regard their matter as having been finally resolved.

A significant number of respondents were concerned that removing judicial leadership would result in the cessation of QCAT's internal appeals with a return to appeals to the courts. For many respondents this was their primary reason for supporting the retention of the existing judicial structure.

³⁷ QCAT Act, ss 172 and 174

³⁸ QCAT Act, s 166(3)

³⁹ QCAT Act, s 219

⁴⁰ *Legal Profession Act 2007*, s 598

⁴¹ *Health Ombudsman Act 2013*, s 97; also see *Gupta v Medical Board of Australia* [2015] QCAT 142

⁴² *Anti-Discrimination Act 1991*, s 228

⁴³ Justice J Chaney, *Australian Super-Tribunals – Similarities and Differences* (2013) at p. 2

⁴⁴ At p. 4

One respondent saw benefit in changing the current judicial structure, suggesting the President and Deputy President could be accorded the status of a Supreme Court judge and District Court judge respectively, without having to be members of the judiciary.

A small number of respondents, particularly in the 2015 submissions, supported retention of a judicial structure but proposed changes to address the shortage of available judicial members, provide greater leadership stability and facilitate better management of QCAT's appeals jurisdiction. Suggestions included:

- having QCAT managed by an appropriately qualified and experienced administrator holding executive status, to free up the President to concentrate on judicial leadership, quality and mentoring processes;
- appointing two Vice Presidents who would have the same jurisdiction as the President and Deputy President and be granted tenure; and
- extending the minimum term of the President and Deputy President to five years (currently they are appointed for at least three years but not more than five years).

As discussed earlier in this report, the appointment of additional Vice President positions is not proposed at this time.

Conclusion: Judicial officer status of President and Deputy President

No changes to the current requirement for the judicial status of the President and Deputy President will be made at this time.

4.6 QCAT's appellate jurisdiction, including appeals in minor civil disputes jurisdiction (Terms of Reference 4.a and 4.g)

Questions 18, 19 and 20 of the Consultation Paper asked:

- *Should internal appeals be abolished with appeals being heard by the courts?*
- *If yes, what should be the grounds of appeal?*
- *Which court should hear appeals from QCAT decisions? Should leave of the relevant court be required to appeal or should an appeal be as of right?*

QCAT's internal appeals process (i.e. providing for appeals to its appeal tribunal) is intended to provide an accessible, inexpensive and speedy review of QCAT decisions at first instance, compared to appeals to a higher court.

The QCAT appeal tribunal is constituted by one, two or three judicial members, or if the President considers it appropriate, one, two or three suitably qualified members, whether or not in combination with a judicial member.⁴⁵ If the decision being appealed was made by a magistrate the appeal tribunal must be constituted by a judicial member.

⁴⁵ s166 QCAT Act

The QCAT Act places restrictions on the right of appeal.⁴⁶ For example, a party cannot appeal a decision to accept, reject or refer an application or referral or a decision about the amount of costs fixed or assessed by QCAT. Also, the QCAT appeal tribunal cannot hear an appeal against a decision of a judicial member. However, appeals against some of these excluded decisions can be heard by the Court of Appeal, with that Court's leave.⁴⁷

The QCAT appeal tribunal must give leave to appeal in order for a party to appeal the following decisions:

- a minor civil dispute decision;
- a decision that is not the final decision in a proceeding;
- a costs order;
- an appeal on a question of fact or a question of mixed law and fact.

QCAT has noted that appeals against QCAT decisions refusing leave to be legally represented may draw out proceedings and lead to delays. QCAT has observed that many parties do not fully appreciate the distinction between the leave to appeal process and the appeal hearing itself. QCAT has also observed that some parties do not understand the grounds on which their applications may be refused. These factors can lead to unsuccessful applications. There are no proposals, however, to restrict appeals relating to legal representation and QCAT will continue to work with applicants to assist them in understanding how QCAT operates.

A significant proportion of the matters heard in QCAT's appeals jurisdiction have proven to be unsuccessful, with up to 70% of applications for leave to appeal or appeals that go to hearing being unsuccessful. A significant proportion (69%) of these are appeals from QCAT's minor civil dispute jurisdiction. A large number of decisions sought to be appealed are made by magistrates sitting as ordinary members of QCAT. As noted above, these appeals can only be heard by judicial members.

Overall, respondents were firmly of the view QCAT's internal appeals mechanism should be retained.

A very small number of respondents asserted that appeals in certain jurisdictions should be heard by courts, rather than QCAT. However, those commenting on this issue differed as to which court would be most appropriate for this purpose.

In contrast, many respondents saw a benefit in amendments that would:

- limit unmeritorious appeals; or
- reduce the impact of unmeritorious appeals on the successful party, through mechanisms such as an award of costs.

Respondents considered these actions would also serve to reduce the strain on QCAT resources.

The Consultation Paper suggested three possible options aimed at alleviating the pressure on the appeal tribunal:

⁴⁶ s142 QCAT Act

⁴⁷ s166(3) QCAT Act

- provide for external appeals to the courts;
- restrict appeal rights by monetary value; or
- create financial disincentives for unmeritorious minor civil disputes appeals.

External appeals to the courts

The option of abolishing QCAT's internal appeals mechanism and returning appeals to the courts was opposed by the majority of respondents who addressed this issue.

Key comments in support of the existing internal appeals mechanism included:

- abolishing internal appeals would free up hearing resources in QCAT, but it is also necessary to consider the number of appeals that would be referred to the courts and the impact on the courts' resources, as well as the cost for parties to appeal externally;
- a number of respondents submitted reinstating external appeals to the courts in respect of certain minor civil disputes would delay matters as well as having significant cost implications for the courts and litigants – among other things, this would make appeals out of reach for many parties; and
- the system of internal appeals has the attraction of building expertise within QCAT in various legislative schemes.

In contrast, a small number of respondents were critical of internal appeals and therefore, it appears, supportive of this option. Primarily, the criticism was that it is unfair not to have the ability to appeal externally. The respondents making submissions on this issue differed as to which court would be most appropriate for hearing appeals.

Some respondents who indicated support for the existing internal appeals mechanism noted concern about having the same members and, for one respondent, the same entity - decide original and appeal matters. This issue was also mentioned in the context of the need to improve QCAT's independence (see Part 4.5).

Restrict appeal rights by monetary value

Question 21 of the Consultation Paper asked *whether appeal rights should be restricted according to the monetary value of the matter in issue, and if so, how appeal rights should be restricted.*

This option would restrict appeals for disputes under a specified amount (the Consultation Paper noted \$2,000 had been suggested) to set grounds of appeal, for example, only on a question of law or on the basis that QCAT lacked jurisdiction to decide the dispute.

Respondents were fairly evenly divided in respect of this option. Respondents representing more vulnerable parties generally opposed it, as did the QLS, whereas responding government bodies supported it.

Concerns about this option included:

- creating a perception that QCAT is only for persons with sufficient funds;
- decreased public confidence in QCAT's administration of justice;

- it was counter to the belief that the ability to appeal a decision should be based on substance rather than a dollar amount, as what appears to be a small amount to one person may be significant to another person; and
- it may encourage ambit claims for amounts below the monetary limit in the knowledge that such claims are not able to be appealed.

Respondents who supported this option, on the other hand, made comments including that QCAT's resources are wasted on frivolous, unmeritorious matters. Therefore, they supported a restriction of appeal rights.

Creating financial disincentives for unmeritorious appeals

Questions 22 and 23 of the Consultation Paper asked:

- *How could financial disincentives be appropriately used to discourage unmeritorious appeals without denying access to meritorious but impecunious parties?*
- *Whether stakeholders had any comments or views on issues relating to QCAT's appellate jurisdiction, in particular appeals from decision in minor civil disputes.*

Possible financial disincentives mentioned in the Consultation Paper included partial fee waivers instead of full fee waivers, replacement of the current tiered fee structure for minor civil disputes appeals with a flat fee,⁴⁸ removal of the requirement to refund 50% of the filing fee where an application for leave to appeal is unsuccessful and introducing a requirement for the appellant to pay the costs of the transcript.

Of the respondents who addressed this option, nearly one third expressly opposed any attempt to limit appeals through new financial disincentives. Comments included:

- while financial disincentives may discourage unmeritorious appeals, they jeopardise the objects of the QCAT Act;
- the current fee structure appropriately balances the rights of appellants to challenge incorrect decisions and QCAT's objectives and the principle of finality;
- in order to reduce appeals, the focus should be on improving the quality and consistency of decisions and the decision making process rather than limiting appeal rights; and
- affordable or free legal advice would also likely have a positive impact on stopping or reducing unmeritorious appeals as legal advisors could advise potential appellants whether their case had any prospect of success, QCAT's processes (e.g. why an application for leave was required) and the evidence required to put before QCAT. Legal advisers could also explain why the original or review decision was made.

The balance of respondents indicated some level of support for considering costs orders or adjustments to fees in order to act as a financial disincentive for unmeritorious minor civil dispute appeals.

⁴⁸ The fee structure as at 1 July 2017 is: \$25.45 (for matters up to \$500); \$65.40 (for matters between \$500 and \$1000); \$116.40 (for matters between \$1000 and \$10,000); \$326.80 (for matters over \$10,000) (QCAT Regulation 2009, s 5)

Additional amendments about appeals not covered by the review

Additional amendments to the QCAT Act have been proposed by QCAT as, although not directly related to the review, these proposals would improve the QCAT appeal tribunal's ability to operate more effectively. The proposals are to: permit QCAT to reinstate proceedings that have been dismissed in error; and amend appeal provisions to enable matters to be remitted to the QCAT review tribunal without being reheard by the QCAT appeal tribunal.

Conclusions: Appellate Jurisdiction

To improve the QCAT appeal tribunal's ability to operate more efficiently, amendments to the QCAT Act should be made to:

- provide greater discretion to the appeal tribunal to remit matters to the review tribunal; and
- permit QCAT to reinstate proceedings that have been dismissed in error.

As discussed earlier in the report, the QCAT Regulation has been amended to remove the requirement for QCAT to refund half the fee for unsuccessful applications for leave to appeal and unsuccessful applications to reopen proceedings.

5. Related Issues

5.1 Operational Issues

Many respondents provided comments on aspects of QCAT's operations and raised matters which fell outside the review's terms of reference. Respondents addressing such operational issues expressed concern about what they saw as:

- delays in progressing or finalising matters, particularly in the areas of serving documents, interlocutory processes or decisions, holding hearings and publishing decisions and associated reasons;
- some QCAT members lacking appropriate expertise in key subject matters;
- inconsistent treatment of cases and inconsistent decisions and outcomes depending on the presiding member, the member's expertise in the area and the location of the hearing;
- insufficient quality, consistency and timeliness of, or access to, reasons for QCAT decisions;
- insufficient help and support for parties and potential parties to QCAT proceedings, particularly in regional areas; and
- delays in having appeals heard and finalised.

Several respondents suggested their operational concerns may be able to be addressed, at least in part, by additional funding being made available to QCAT. The issue of resources, however, was outside the scope of this statutory review.

Concerns about operational matters have been brought to QCAT's attention. QCAT is committed to continuing to improve its delivery of accessible justice for Queenslanders. For

example, since mid-2013 the now-embedded JP Trial has been in place, enabling JPs to be trained and appointed to QCAT to hear minor civil dispute matters for amounts of up to \$5000 (e.g. neighbourhood fence disputes or residential tenancy disputes). Under Part 4B of Chapter 4 of the QCAT Act, QCAT must be constituted by two JPs, one of whom must be legally qualified. The provisions aim to reduce the amount of time taken for QCAT to resolve some minor civil dispute matters. Following amendments to embed an earlier trial, JPs can hear certain minor civil dispute matters in QCAT on an ongoing basis. In addition, since 2016, the QCAT Rules have facilitated electronic filing, leading to greater efficiencies.

QCAT's 2016-17 Annual Report also refers to a wide range of initiatives which will contribute to efficiencies and benefit tribunal users, including:

- a QCAT Magistrates Court Engagement Strategy to improve and enhance state-wide service delivery;
- the appointment, on a trial basis, of 3 new North Queensland team members to support users, stakeholders and members in Cairns and Townsville;
- providing guardianship hearings on site for hospital patients; and
- a member appraisal and professional development process, training for members and adjudicators and the appointment of associates for senior members.

It should be noted that QCAT's clearance rates⁴⁹ have been 100% or more in the 2012-13, 2013-14, 2014-15 and 2015-16 financial years.⁵⁰ However, there were variations between the different jurisdictions. The 100% clearance rate in 2015-16 was achieved despite workload increases of 17% in children's matters, 12% in guardianship matters, 19% in retail shop lease matters and 16% in building matters. Its appeal clearance rate increased 7% in 2015-16.⁵¹ In 2016-17, QCAT's clearance rate fell slightly to 96%. QCAT has attributed the decrease to the increasing complexity of QCAT matters and growth in lodgements in key jurisdictions such as guardianship.⁵²

5.2 Enforcing QCAT orders

QCAT's decisions are legally binding on all parties. However, if a party fails to comply with an order the aggrieved party can apply to a court for the order to be enforced. There is no filing fee. This approach is consistent with that of tribunals in other jurisdictions.

The perception that enforcing QCAT orders through the courts is time consuming and complex has been raised at various times in the media, and the Queensland Law Reform Commission 'Review of the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011*'⁵³ (QLRC Report) (tabled 11 May 2016) discusses whether there should be a simplified process to enforce non-monetary orders in the neighbourhood dispute context. For example, the QLRC Report recommends that where an order to carry out work on a tree has not been complied with, QCAT may make another order empowering the aggrieved party to carry out the necessary work and recover as a debt the reasonable expenses of the work from the non-complying party.

⁴⁹ Number of matters finalised divided by number of lodgements x 100

⁵⁰ QCAT Annual Report 2015-16.

⁵¹ QCAT Annual Report 2015-16, pp. 7 and 5.

⁵² QCAT Annual Report 2016-17, pp 8 and 10.

⁵³ www.qlrc.qld.gov.au

There are no current proposals for QCAT to enforce its own orders as this would duplicate existing court and legal processes and be at odds with the procedures of interstate bodies. However, the *Courts and Civil Legislation Amendment Act 2017*, the relevant parts of which commenced on 5 June 2017, amended sections 131 and 132 of the the QCAT Act to remove the requirements for: the QCAT decision to be certified by the Principal Registrar prior to filing in the relevant court; and the filing of an affidavit to confirm the QCAT decision has not been complied with. While the order will still be enforced by the relevant court, not QCAT, this amendment will reduce the red tape for parties as they will no longer need to certify a copy of the QCAT decision or prepare an affidavit to initiate enforcement proceedings.

DJAG will continue to consider what other improvements can be made to streamline processes for tribunal users.

6. Government commitment relating to the purchase of ‘lemon’ cars and other motor vehicles

Government commitment

In 2017, the Government committed to improving fairness and providing greater rights for Queenslanders buying a vehicle by:

- lifting QCAT’s jurisdictional limit on motor vehicles from \$25,000 to \$100,000;
- redefining the term ‘vehicle’ to include motorhomes and caravans;
- reinstating the statutory warranty for ‘class B’ older second-hand vehicles sold by motor dealers; and
- continuing to advocate for national laws to specifically protect new car buyers, including purchases of ‘lemon vehicles.

Consumer guarantees under the Australian Consumer Law

The Australian Consumer Law (ACL) is a national application law scheme which commenced on 1 January 2011. The ACL is applied as a Commonwealth law through the *Competition and Consumer Act 2010* (Cwlth) and as a law of Queensland through part 3 of the *Fair Trading Act 1989* (Fair Trading Act). Other states and territories have similarly applied the ACL in their own jurisdictions. The ACL is jointly administered and enforced by federal, state and territory consumer law regulators through an Intergovernmental Agreement.

The ACL includes statutory consumer guarantees that set out the rights and obligations of both consumers and traders and provides remedies for consumers when goods or services do not comply with those guarantees. There are nine guarantees that generally apply to the purchase of goods. The consumer guarantees for the purchase of goods require, among other things, that the goods are of acceptable quality, are fit for any disclosed purpose and match any demonstration model, sample or description provided.

Under the ACL, where there has been a failure to comply with the consumer guarantees, consumers can seek a remedy from a supplier or manufacturer, including damages. While the ACL includes a number of remedies, if there is an ongoing dispute regarding consumer guarantees, the onus is on the consumer to resolve the dispute.

Currently, disputes in Queensland involving the ACL consumer guarantees for the supply of goods (including vehicles) are treated as minor civil disputes (MCDs) under the QCAT Act and are subject to the \$25,000 claim limit for MCDs. Disputes about motor vehicles with higher value claims are dealt with in the courts.

Used motor vehicles under the Motor Dealers and Chattel Auctioneers Act 2014

The sale of used motor vehicles is regulated under the *Motor Dealers and Chattel Auctioneers Act 2014* (MDCA Act). The MDCA Act provides a statutory warranty that applies to the sale of certain used motor vehicles by motor dealers or auctioneers. Claims for repairs of defects under the MDCA Act statutory warranty are also treated as MCDs under the QCAT Act and are subject to the \$25,000 MCD claim limit. The statutory warranty provisions of the MDCA Act do not apply certain types of vehicles, such as caravans.

Lemon Laws Inquiry Report

On 15 July 2015, the Queensland Legislative Assembly directed the Legal Affairs and Community Safety Committee (Committee) to:

*... inquire into and report on whether there is a need to improve the consumer protections and remedies for buyers of new motor vehicles with numerous, severe defects that reoccur despite multiple repair attempts or where defects have caused a new motor vehicle to be out of service for a prolonged period of time ('lemons').*⁵⁴

Among other things, submissions to the Committee highlighted concerns about QCAT's low monetary threshold for remedies (\$25,000) which excludes many new motor vehicle disputes from QCAT's jurisdiction. The \$25,000 limit applies only in relation to QCAT's MCD jurisdiction, in which claims relating to vehicles are heard.

Currently, a MCD may include a claim arising out of a contract between a consumer and trader in relation to a new or used motor vehicle, motorhome or caravan, up to the limit of \$25,000.

The Committee report '*Lemon' Laws– Inquiry into consumer protections and remedies for buyers of new motor vehicles* (Lemon Laws Inquiry Report) was tabled in the Queensland Parliament on 30 November 2015 and made nine recommendations. Recommendation 7 was as follows:

*The committee recommends the government change the Queensland Civil and Administrative Tribunal (QCAT) jurisdictional limit of \$25,000 for matters involving new motor vehicles with major defects. Government committee members recommend the limit be removed, so no cap applies. Non-government committee members recommend the limit be increased to \$40,000.*⁵⁵

The Government response to the Lemon Laws Inquiry Report (tabled 1 March 2016) states:

*The Queensland Government supports **recommendation 7** in principle and will work with QCAT to determine how this recommendation can be appropriately implemented, having regard to financial and resource implications and the differing*

⁵⁴ <https://www.parliament.qld.gov.au/work-of-assembly/sitting-dates/dates/2015/2015-07-15>

⁵⁵ Ibid, p. 64

views regarding the setting of a jurisdictional limit for matters involving new motor vehicles with major defects.

6.1 Lifting QCAT’s jurisdictional limit on motor vehicles from \$25,000 to \$100,000

The QCAT Act provides for certain disputes about motor vehicles to be dealt with as part of QCAT’s MCD jurisdiction, which has a limit of \$25,000.

To address recommendation 7 and the above Government commitment, QCAT will be given jurisdiction for claims of up to \$100,000 for disputes made under: the ACL consumer guarantees for the supply of goods that are new or used vehicles (including caravans and motorhomes); and the MDCA Act for claims relating to statutory warranties for vehicles (including motorhomes but not caravans). The \$100,000 claim limit would mean that disputes about higher value vehicles typically used by families, such as SUVs, sedans and most caravans and motorhomes, could be considered. An unlimited amount would be at odds with the financial limits applying to matters able to be considered by the Magistrates Court (\$150,000) and District Court (\$750,000).

6.2 Redefining the term ‘vehicle’ to include motorhomes and caravans

The ACL consumer guarantees cover the supply of ‘goods’ (including second-hand goods) to ‘consumers’. New motor vehicles, used motor vehicles, motorhomes and caravans are considered goods and are ordinarily covered by the ACL consumer guarantees.

6.3 Reinstating the statutory warranty for ‘class B’ older second-hand vehicles sold by motor dealers

The repealed *Property Agents and Motor Dealers Act 2000* (PAMD Act) provided a statutory warranty for certain older used motor vehicles (‘class B’ warranted vehicles) sold by motor dealers or auctioneers. ‘Class B’ warranty provisions were contained in the PAMD Act prior to its repeal on 1 December 2014. The MDCA Act continues to provide statutory warranties for what were ‘class A’ vehicles under the PAMD Act. However, ‘class B’ warranty provisions were not included in the MDCA Act.

Under the PAMD Act, a ‘class B’ warranted vehicle was defined as a warranted vehicle that—

- at the day of its sale, had an odometer reading of 160,000km or more; or
- was manufactured at least 10 years before the day of sale.

The MDCA Act will be amended to implement the commitment to reinstate the statutory warranty for ‘class B’ older second-hand vehicles that operated under the PAMD Act. Consistent with definitions in the MDCA Act this will include motor homes but not caravans.

6.4 Continuing to advocate for national laws to specifically protect new car buyers, including purchases of ‘lemon’ vehicles

This element of the election commitment is to continue to advocate for national laws to specifically protect new car buyers, including purchases of ‘lemon’ vehicles.

The Lemon Laws Inquiry Report endorsed supporting a national approach to the issue of 'lemon' laws and for the State and Commonwealth governments to take some joint actions. **Recommendation 4** of the Lemon Laws Inquiry Report was that the appropriate mechanism to ensure a national approach to changes in existing 'lemon' motor vehicle laws is to amend the ACL such that it specifically sets out nationally consistent laws applicable to new 'lemon' motor vehicles in Australia. **Recommendation 3** was that Queensland legislation be amended to ensure effective implementation of the Committee's recommendations, but to do so as part of any national approach to 'lemon' laws.

Queensland continues to advocate for national laws to specifically protect new car buyers (including in relation to 'lemon' vehicles) through both Consumer Affairs Australia and New Zealand⁵⁶ and the Legislative and Governance Forum on Consumer Affairs. In particular, Queensland has pursued this issue as part of the recent national review of the ACL.

7.0 Conclusion

QCAT's role is to serve the community in resolving issues in a way that is economical, informal, accessible fair and quick. The 2016-17 Annual Report shows that QCAT achieved an 82% user satisfaction rate.

The review of the QCAT Act has revealed broad satisfaction with the legislation. In a limited number of areas, amendments will assist QCAT to achieve its goals. The Government will continue to work with QCAT as QCAT seeks to achieve its vision of *fair and just outcomes* for the people of Queensland.

⁵⁶ CAANZ is a sub-committee of the Legislative and Governance Forum on Consumer Affairs, which comprises all Commonwealth, State, Territory and New Zealand Ministers responsible for consumer policy.