

6th ANNUAL GOVERNMENT LAWYERS' CONFERENCE

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

THE ROLE OF GOVERNMENT LAWYERS IN TRIBUNALS

Administrative Law in QCAT: the review jurisdiction

QCAT is a large, multi-jurisdictional tribunal that makes decisions about a range of matters and, also, reviews decisions previously made by State or local government departments or regulatory authorities. The review jurisdiction means QCAT plays a key role in improving the openness, accountability, quality and consistency of original decision-making in the public sector.

The range of administrative decisions within the fold of QCAT's review jurisdiction is very large. It is enlivened by an application to QCAT to exercise its review jurisdiction, for a reviewable decision.¹ In exercising that jurisdiction, QCAT must decide the review in accordance with its own legislation and the enabling Act and, importantly, it has all the functions of the decision-maker in respect of the reviewable decision. Additionally, the start of a proceeding for the review of a reviewable decision does not affect the operation of the decision or prevent the implementation of the decision.²

Section 21(1) of the QCAT Act, which obliges the decision-maker to '*use his or her best endeavours to help the tribunal*', casts a positive onus upon the respondent and, I think, its legal representatives to provide all possible aid to the sitting Member.

¹ Queensland Civil and Administrative Tribunal Act 2009 s 18 ('QCAT Act').
² Ibid s 22.

Representation in QCAT

The distinction between '*tribunal*' and '*court*' is one that underpins all aspects of QCAT's development and operation. Section 43 of the QCAT Act announces a legislative intention that, in QCAT, parties will usually *represent* themselves and, unlike the courts, lawyers have no automatic right of appearance.

There is also, however, a distinction evident in the QCAT Act and Rules, between '*representation*' and '*appearance*'. Many of QCAT's parties are state agencies or statutory authorities that have in-house legal units that manage much of the Tribunal work.

An appearance through an officer who is a lawyer and representation by an external lawyer are governed by different provisions. Rule 52 provides that Part 7 Div 1 of the Rules applies to how a party may appear in a proceeding, not how they may be represented.

Rule 53 allows a state agency to appear through an officer duly authorised but, if that officer is a lawyer, they must have leave to appear.

Applications and approval for representation: s 43

In deciding whether to give a party leave to be represented, the Tribunal *may* consider some things as circumstances supporting the granting of leave. They include that the proceeding is likely to involve complex questions of fact or law; or, that another party is represented; or, that all parties have agreed to the party being represented.

It is simply wrong to say – as some have been heard to say – that QCAT is 'anti-lawyer'. Rather than turning its face against legal representation, the tribunal must apply the law, so that the question whether or not legal representation should be permitted may itself give rise to a particular, further question, namely: *will the involvement of legal representatives help the parties*

and the Tribunal to meet these statutory goals? In other words, the legal representatives who wish to represent a party must be able to show that their presence is likely to simplify, expedite, and reduce the cost of the proceedings.

Applications for leave to appear: r 53

Unlike s 43, r 53 does not specify any factors thought, by the legislature, to have some potential relevance to the need for a lawyer to appear for a party. It specifically provides that a 'State Agency' may appear in a proceeding through an employee, officer or member of the agency, but can only appear through a 'legal practitioner or government legal officer' with leave.

Practical considerations will sometimes, as QCAT knows, affect the choice the State makes about who will appear for it. But, as a QCAT Senior Member observed in a recent decision, the role of person appearing for the State should not be confused with legal representation³.

In that case the Member accepted that the State has the right to determine 'which of its employees is most suited to appear' and if it so happens that that person is a lawyer, that factor should not operate as a bar. Obviously every case, and the discretion to be exercised in it, is different.

Lawyers and QCAT

Too often in applications by lawyers for leave to represent a party QCAT receives submissions addressed to arcane, and often arid, pleadings points; arguments for yet more particulars when, in truth, the lawyers well know what the real issues are and if they do not, they ought not be calling themselves lawyers; and demands for disclosure of yet more documents.

In other words, too often the lawyers are making submissions that appear to be inimical to the plain objects of the QCAT Act and, by those submissions,

³ *Rushton v Queensland* [2011] QCAT 440.

making a strong case that their involvement in the case is more likely to thwart, rather than complement, the statutory aims.

Awarding costs for in-house lawyers

A recent ruling by the Tribunal⁴ reasoned that it was inappropriate to order costs where there had no been external lawyers engaged, on the basis that no costs had been incurred. The Appeal Tribunal overturned this ruling, referring to the judgment of Davies AJ in *Commonwealth Bank of Australia v Hatterlsey & Anor*⁵, wherein His Honour wrote:

Practitioners who choose to carry on their profession as an employee of the Crown, of a statutory authority, or of a corporation, are entitled to have their work assessed on the same basis as that of independent solicitor exercising comparable skills in the performance of comparable work.

Section 102 of the *QCAT Act* allows an order requiring a party to pay all or a stated portion of the costs of another party, including those incurred through the work of in-house lawyers, where this is in the interests of justice.

Conclusion

It follows from this analysis of the legislation that, in seeking to represent a client before QCAT, your submissions should be directed towards the matters the Act itself makes paramount: *will what I do, as a lawyer, help to speed the proceedings towards a quick, economical, and (vitaly) just outcome?*

⁴ *Queensland Building Services Authority v Alternate Dwellings Pty Ltd* [2012] QCATA.
⁵ [2001] NSW SC 60, at [21].