

COUNCIL OF AUSTRALASIAN TRIBUNALS

(COAT)¹

Public inquiry into Access to Justice Arrangements

Submission to the
Australian Government, Productivity Commission

¹ This submission is made by the National Council of COAT, which represents 88 tribunals, commissions and boards in Australia and New Zealand. COAT is incorporated under the Associations and Incorporations Act (NSW) 1984. Under its Constitution, COAT is constituted by the National Council (comprising the Executive and member tribunals); and State, Territory and New Zealand Chapters of the Council headed by convenors.

*[I]n my opinion the adversarial system is not working satisfactorily in the civil jurisdiction... [M]ost parties would accept a truncated procedure, compared with the present procedure, if that saves time and money... **[T]he system has strangled itself. The quest for justice... has come at an unacceptable cost... Access to the system is effectively denied...** We will have to develop a concept of justice as relatively quick, and relatively cheap, accepting a higher risk of error than we accept under the present system.*

Chief Justice John Doyle (ret'd), 9 September 2013²

² Hon John Doyle AC QC, 'Commercial Litigation and the Adversarial System – Time to Move On' (Speech delivered at the Supreme Court of Victoria Commercial Law Conference, Melbourne, 9 September 2013).

Summary of COAT submission

Australasian tribunals have, with legislative support, the progressive refinement of their statutory structures and practices, and the sharing of information formally through COAT and informally through regular professional contact, developed largely unsung abilities to provide quick, relatively inexpensive *dispute resolution*³.

In doing so they have found ways to overcome the structural problems (delay, costs and complexity) inherent in traditional dispute resolution provided by the courts and identified by former SA Chief Justice, John Doyle.

COAT advances the proposition that this ability, and the techniques which underpin it, may be extrapolated into principles of general application and utility in dispute resolution in courts as well as tribunals – and, thereby, light a path to more accessible, timely and affordable justice.

³ A term used generically to describe administrative review proceedings, the hearing and determination of civil claims, and the resolution of human rights cases – guardianship, anti-discrimination, and the care of children.

Tribunals in Australasia – accessible, speedy and inexpensive justice

Tribunals in Australia (and New Zealand) have developed a reputation for providing accessible, speedy and inexpensive justice. That reputation explains why legislatures have, since the Commonwealth set up the Administrative Appeals Tribunal in 1975, steadily created more of them, and on a greater scale.

The Commonwealth laid the groundwork and has continued to build upon it with further large tribunals, commissions and boards.⁴ Some of them have deep historical roots in the courts systems, like the Fair Work Commission,⁵ but have metamorphosed into bodies bearing greater similarities to tribunals than courts.

From 1 January 2014 five states and territories (Victoria, Western Australia, Queensland and New South Wales, and the ACT) will have large ‘super’ civil and administrative tribunals with a wide jurisdictional reach and broad but similar powers to decide administrative review matters, civil disputes and human rights cases quickly and economically. South Australia has announced plans for one.⁶ The Northern Territory government has instituted discussions to a similar end.

What tribunals do

Tribunals impinge upon the lives of citizens in broad and diverse ways. Large or small, they are busy. In 2011/12 VCAT⁷ (Vic) received 89,470 applications; CTTT⁸ (NSW) 64,803; FWC⁹ (Cth) 37,444; QCAT¹⁰ (Qld) 29,832; SAT (WA)¹¹ 7,667 and the Weathertight Homes Resolution Service (NZ) 13,392.

The larger state and territory super tribunals have extensive jurisdiction including trader/consumer disputes, guardianship and administration, child protection, administrative review, anti-discrimination, professional discipline and town planning. The Commonwealth has established the AAT with a broad jurisdiction to review Government decisions and a number of specialist merits review tribunals. Chapter III of the Constitution imposes limits on the general jurisdiction that can be conferred on Commonwealth tribunals.

Tribunals are now a major element in the Australian legal dispute resolution pantheon. They are busy, and they are producing legal decisions which affect the lives of Australians in many areas. In 2011/12 the Queensland Supreme

⁴ Social Security Appeals Tribunal, Migration and Refugee Review Tribunals, Veterans' Review Board, National Native Title Tribunal, Superannuation Complaints Tribunal *et al.*

⁵ Formerly known as Fair Work Australia: see Schedule 9 to the *Fair Work Amendment Act 2012* (Cth).

⁶ See South Australian Civil and Administrative Tribunal Bill 2013.

⁷ Victorian Civil and Administrative Tribunal.

⁸ Consumer, Trader and Tenancy Tribunal.

⁹ Fair Work Commission.

¹⁰ Queensland Civil and Administrative Tribunal.

¹¹ State Administrative Tribunal of Western Australia.

and District Courts received 10,600 new matters, as against almost 30,000 in the state tribunal, QCAT. In the same period, QCAT delivered and published 1,043 written decisions; the Queensland Court of Appeal and Supreme Court delivered 828 judgments, the District Court 463, and the Magistrates Court 49.

How tribunals operate

Most tribunals operate under statutory exhortations to be quick, economical and inexpensive while observing principles of natural justice and procedural fairness.¹²

Almost all are excused strict compliance with rules of evidence and statutorily exhorted to conduct proceedings informally.¹³

Rights to legal representation, and the power to award legal costs, vary within COAT's constituent bodies. Some operate subject to limitations upon a party's right to be legally represented.¹⁴

These limitations are regularly coupled with a statutory requirement that each tribunal ensures that all parties understand its practices and procedures and, also, the issues in the matter in which they are involved and what they must do to prove or rebut those issues.¹⁵

Why are tribunals less expensive and quicker for parties, and cheaper for governments?

The court fees collected by state Supreme courts and the Federal Court are, on average, only about 10% of the recurring cost of running those courts.¹⁶

In many tribunals total filing and other fees charged to parties also remain extremely low: e.g. SAT (WA) \$315, FWC (Cth) \$65.50, and CTTT (NSW) \$38.¹⁷ For a number of tribunals, there is no application fee for all or significant parts of their jurisdiction (AAT, SSAT, VRB).

¹² *Fair Work Act 2009* (Cth) s 577 (FWA); *Administrative Decisions Tribunal Act 1997* (NSW) s 3 (ADT Act); *Administrative Appeals Tribunal Act 1975* (Cth) s 2A (AAT Act); *State Administrative Tribunal Act 2004* (WA) s 32 (SAT Act); *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ss 3, 4, 28 (QCAT Act); *Consumer, Trader and Tenancy Tribunal Act 2001* (NSW) s 3 (CTTT Act).

¹³ AAT Act s 33(1)(c); FWA s 577; *Guardianship Act 1987* (NSW) s 55(2); *Mental Health Act 2007* (NSW) s 151; *ACT Civil and Administrative Tribunal Act 2008* (ACT) s 7; QCAT Act s 3(b); SAT Act s 32.

¹⁴ *Social Security Appeals Tribunal* (Cth); FWC (Cth); *Guardianship Tribunal* (NSW); CTTT (NSW); VCAT (Vic); QCAT (Qld); *Weathertight Homes Resolution Service* (NZ).

¹⁵ ADT Act s 73(4); CTTT Act s 28(4); SAT Act s 32(6); QCAT Act s 29.

¹⁶ SCRGSP (Steering Committee for the Review of Government Service Provisions) 2013, *Report on Government Services 2013*, Productivity Commission, Canberra.

¹⁷ Tribunal websites, accessed 30 September 2013.

Most tribunals operate under a statutory regime requiring them to deal with matters in a way that is quick.¹⁸ QCAT must ‘...encourage the early and economical resolution of disputes before the Tribunal’.¹⁹

In the result, tribunals achieve high annual clearance rates, across the board: e.g. in 2011/12 the Guardianship Tribunal (NSW) 102.88%; Motor Accidents Assessment Service (NSW) 100.90%; VCAT 100.24%; Social Security Appeals Tribunal 97.45%; and, CTTT (NSW) 97.41%.²⁰

How do tribunals achieve savings in costs, and time?

This submission extracts elements of tribunal practice which, while not universal, are common and proven to be effective in saving parties, the justice system, and the community, costs and time.

Those elements are:

- the intensive and widespread use of Alternative Dispute Resolution;
- assisting and empowering unrepresented parties;
- active, interventionist case management (including in ADR proceedings); and
- limiting rights of legal representation, and the power to award costs.

The intensive and widespread use of ADR

*[A]t all stages of the system resort to ADR would be encouraged.*²¹

Almost all tribunals operate under legislation which exhorts and encourages parties and the tribunal itself to use a range of ADR techniques and strategies – called, variously, mediation, compulsory conferences, settlement conferences, neutral evaluation, arbitration or conciliation.²²

Tribunals throughout Australia use ADR actively, and comprehensively. In the world of courts and tribunals they are often in the vanguard of the use of new techniques. Examples include VCAT’s ‘*short mediation and hearings*’ and QCAT’s ‘*hybrid hearings*’ in which parties to a range of disputes are provided with a combined hearing/ADR process which is short, and sharp.

¹⁸ See e.g. VCAT Act s 98(1)(d); SAT Act s 9; QCAT Act s 3(b); ADT Act s 73(5)(a).

¹⁹ QCAT Act s 4(b).

²⁰ Tribunal Annual Reports for 2011/12, accessed on 30 September 2013.

²¹ Doyle, Commercial Litigation and the Adversarial System – Time to Move On, above n 1, 21.

²² See e.g. AAT (Cth), FWC (Cth), ADT (NSW), MAAS (NSW) for the variety of terms used.

VCAT uses a typical armoury of ADR tools: compulsory conferences, mediation, and '*short mediations and hearings*'²³. The Fair Work Commission may generally deal with its matters '*...as it considers appropriate by mediation or conciliation, or by making a recommendation or expressing an opinion.*'²⁴

The youngest of the state 'super' tribunals, QCAT, operates under a statutory imperative to use ADR widely and energetically.²⁵ Only a very small proportion of its 30,000 matters per annum in 160 jurisdictions go to a hearing without, first, a compulsory conference presided over by a tribunal member (sitting at the same level as the member/s who will hear and determine the case at a final hearing) who has, at that conference, not only the usual powers and incidents attached to a mediator but, also, the power to give directions. The same applies in the AAT where ADR processes are primarily conducted by staff (Conference Registrars) who are ADR specialists.

That directions power is salutary, and invaluable. It enables the presiding member, after an unsuccessful mediation, to make case-specific directions about remaining unresolved issues, evidence, and the speediest and cheapest method of getting the matter to the shortest possible hearing.²⁶

The product is high settlement rates at these conferences,²⁷ and the reduction of hearing times because parties receive focussed directions on the issues they may be allowed to argue, the preparation of their cases, the exchange of evidence and materials including pre-hearing submissions, and strict time-tables for the hearings themselves.

Assistance to unrepresented parties

Regrettably, information about the proportion of non-legally represented parties in courts and tribunals is sparse, and disorganised. As Richardson and Sourdin observed this year,²⁸ while there is a perception that the numbers of self-represented parties in Australian courts and tribunals is increasing there is a paucity of data about those numbers, the causes of any increase, and the steps which might be taken to address it.

²³ VCAT Act ss 83-93.

²⁴ FWA s 595.

²⁵ QCAT Act s 4(b).

²⁶ See e.g. VCAT Act s 80, SAT Act s 34, QCAT Act s 62.

²⁷ See e.g. 57% of matters referred to compulsory conferences at VCAT were resolved at those conferences in 2012/13 (VCAT Annual Report 2012/13, 20); there was a 78% conciliation settlement rate at FWC in 2011/12 (Fair Work Australia Annual Report 2011/12, 11); 56% of new building matters were settled through the directions hearing process and mediation at SAT in 2011/12 (SAT Annual Report 2011/12, 10); and, 62% of non-minor civil disputes were settled at mediation at QCAT in 2011/12 (QCAT Annual Report 2011/12, 14).

²⁸ 'Mind the Gap: Making evidence-based decisions about Self-represented Litigants' (2013) 22 *JJA* 191.

It is known that 51% of special leave applications to the High Court in 2009/10 were made by self-represented parties and in past three years in the Federal Circuit Court 36% of cases involved at least one unrepresented party.²⁹

A significant proportion of people who use tribunals are not legally represented. Tribunals accommodate and assist self-represented parties through:

- simplified forms and procedures;
- informal hearing procedures;
- flexible hearing arrangements; and
- in some tribunals, observing legislative exhortations to ensure parties understand procedures, the issues in the matter, and what they must do to present their own case and meet their opponent's.³⁰

Almost all tribunals are governed by provisions requiring them to exercise their functions and powers in ways that avoid unnecessary technicalities.³¹ All, too, prescribe informal hearing practices and procedures.³² Tribunals are easy to locate, easy to contact and easy to use. The widespread emphasis in their governing legislation on accessibility, informality and ease of use is satisfied by combinations of these elements.

Active, interventionist case management (including at ADR proceedings)

The first cause of the problem... [is that] parties have too much influence over the pace and events of litigation, even under judicial case-management. The system offers too much by way of processes for elaboration and investigation of claims and defences...

To my mind there is not, in principle, any injustice in a system in which the court takes greater control over the course of litigation than is presently the case... [I]s it not better to have a system... that is accessible to would-be litigators rather than a system which enshrines party autonomy but is inaccessible?³³

High rates of self represented parties have meant that most tribunals have adopted case management techniques involving early discussions with the parties themselves at directions hearings, compulsory conferences and the

²⁹ Richardson, E, Sourdin, T and Wallace, N. 'Self-Represented Litigants – Gathering Useful Information', Final Report – June 2012, Monash University, June 2012, Appendix E, pp 67, 73.

³⁰ See e.g. QCAT Act s 29; SAT Act s 32(6); CTTT Act s 28(4); ADT Act s 73(4); and, *Mental Health Act 2007* (NSW) s 68.

³¹ FWA s 577 and FWC Practice Note 2/2013 – Fair hearings; CTTT Act s 3; VCAT Act s 98; ADT Act s 3; *Social Security (Administration) Act 1999* (Cth) ss 141 and 167.

³² AAT Act s 33; FWA ss 589, 590 and 591; VCAT Act s 98; QCAT Act s 28.

³³ Doyle, *Commercial Litigation and the Adversarial System – Time to Move On*, above n 1, 11.

like. Tribunal members also often adopt an inquisitorial approach to dispute determination.

This early intervention through directions hearings and the like informs the tribunal about the real issues in a matter, and enables members to frame directions designed to ensure the quickest and least expensive method of resolution.

Some tribunals also use registry and administrative staff more intensively in the business of case management, than courts. Case files are managed individually by Conference Registrars in the AAT and by designated case officers (not members or decision makers) in other tribunals whose duties include watching to ensure that parties comply with directions orders, communicating with them if they do not and, generally, ensuring that matters do not languish within the registry.

The system is not unlike that adopted by Judges in the Federal Court – the ‘*docket*’ system – whereby individual judges, members or staff assume personal responsibility for ensuring matters proceed promptly. In effect, it adds a second layer to the case-management process and helps to ensure that cases do not fall through the cracks.

Legislation empowering tribunal members presiding at ADR processes to, also, make directions about the future conduct of a matter if the ADR process does not fully resolve it are also an important feature of active, successful case management in tribunals.³⁴

The intelligent and adroit use of these powers enables members presiding at ADR proceedings to use information gained from them to fashion orders which are case-specific, focussed and effective.

Limiting rights of legal representation; and, limiting the right to award costs

*The legal profession will have to change its attitude... A quite different culture is required. That would be one in which the main aim is a prompt trial without most of the traditional pre-trial activity.*³⁵

The majority of Australasian tribunals operate under provisions requiring that parties may only be legally represented with the leave of the tribunal.³⁶ Where the legislation turns its face against legal representation³⁷ there remains, nevertheless, a discretion to allow representation when the proceeding is

³⁴ See e.g. QCAT Act s 69(d) – ‘if the proceeding is not settled, to make orders and give directions about the conduct of the proceeding’; and s 69(e) – ‘to make orders and give directions the person presiding over the conference considers appropriate to resolve the dispute the subject of the hearing’.

³⁵ Doyle, Commercial Litigation and the Adversarial System – Time to Move On, above n 1, 14.

³⁶ *Social Security (Administration) Act* 1999 (Cth) s 161; FWA s 596; *Guardianship Act* 1987 (NSW) s 58; CTTT Act s 36; VCAT Act s 62; QCAT Act s 43.

³⁷ See e.g. QCAT Act s 43(1).

likely to involve complex questions of fact or law, another party is represented, or all parties have agreed to representation.

Lawyers granted leave to appear are both expected and required to act in a way which meets the precepts of each tribunal's governing legislation.

In the AAT a party may appear in person or be represented by some other person. The representative need not be a lawyer. The representative could be a person with relevant expertise (such as a tax agent in a tax appeal or a veterans' advocate in a veterans entitlements case) or a friend or relative.

The legislative regime under which QCAT, for example, operates includes requirements that every party to a proceeding must act quickly in any dealings relevant to the proceeding;³⁸ that the tribunal when conducting a hearing is to inform itself in anyway it considers appropriate and to act with as little formality and technicality as a proper consideration of the matter permits;³⁹ that the parties are to be given all reasonable help to ensure they understand the tribunal's practices and procedures, including the completion of forms;⁴⁰ and, to take all reasonable steps to ensure that each party to a proceeding understands the tribunal's practices and procedures, the nature of assertions made in the proceedings and the legal implications of those assertions and any decision made by the tribunal.

Within those parameters lawyers granted leave to appear can, not unreasonably, be expected and required to assist the tribunal in meeting these obligations and, if they do not, have their right of appearance withdrawn.

Statutory provisions of this kind are, it is submitted, invaluable. They impose, upon lawyers, obligations both to the tribunal and their clients to assist in the process of achieving each tribunal's statutory goals of speed, and a minimum of expense.

Limits on the right of legal representation must of course be used appropriately, and fairly. In, for example, specialist tribunals dealing with adult guardianship and administration and mental health issues representation is often a matter of automatic right or, at least, allowed in the majority of cases. The Mental Health Review Tribunal (NSW) permitted legal representation in 63% of all hearings in 2011/12, and 98.1% of all forensic hearings.⁴¹

Many tribunals also discourage orders for legal costs.⁴² Where costs are discouraged there usually, however, remains a discretion in the tribunal to order costs where it is considered that the interests of justice require it. The Commonwealth merits review tribunals generally do not have any power to award costs.

³⁸ Ibid s 45.

³⁹ Ibid s 28.

⁴⁰ Ibid s 30.

⁴¹ Annual Report 2011/12, 16, 22.

⁴² VCAT Act s 109; QCAT Act s 100; SAT Act s 87; ADT Act s 88.

Examples are where a party to a proceeding has acted in a way that unnecessarily disadvantages the others, or brought and fought a claim that was plainly without merit. The discretion is sometimes accompanied by a requirement that, if costs are awarded, the Tribunal must if possible assess those costs itself so as to avoid further long delay, and expense, in the costs assessment process.

Conclusion

There is nothing hidden, secretive or arcane about the widespread use of these techniques by tribunals in Australia. Nor is there anything mysterious or unusual about their elements.

Governments at State and Federal levels have long recognised that, when some faster and less expensive way of providing legal dispute resolution for citizens is sought, a developed and evolving mechanism exists within the pantheon of tribunals already operating throughout the country.

COAT brings this circumstance to the attention of the Commission, and respectfully suggests that there is much to be learnt from the way in which tribunals address the types of issues raised in the Terms of Reference.