

You can lead a horse to water – and you can make it drink!

The QCAT Experience

It is first necessary to explain what I mean by the term “compulsory ADR”. It is not a reference to all matters before a particular tribunal being sent to ADR as a matter of course: instead, my use of the term means that parties are referred to an ADR process reluctantly or, indeed, against their will.

Classic ADR theory suggests that such a practice is bound to fail because, at its heart, ADR is a process in which parties engage freely and voluntarily, secure in the knowledge that they always have the option to terminate the ADR process and step back into the Court process.

If that proposition is true ask yourself this question: why does anyone drink beer or smoke cigarettes? Through an analysis of the QCAT process, I will demonstrate that early and gentle exposure to ADR through compulsory referral will reap long term benefits and, like alcohol and nicotine, lifelong converts to the process. The difference is that ADR addiction is not harmful to anyone’s health.

The Queensland Civil and Administrative Tribunal (“QCAT”) commenced on 1 December 2009. It was formed from a number of separate tribunals whose jurisdiction ranged across guardianship and child protection matters, building disputes, residential tenancy and community living disputes, discrimination and professional regulation. All but two members of QCAT were members of a pre-existing tribunal. The President of the Tribunal is a Supreme Court Justice (currently Justice Alan Wilson) who is supported by a Deputy President, who is a Judge of the District Court (currently Judge Fleur Kingham).¹ Collectively, the Judges are referred to as “the Presidential team.”

The use of ADR in the former tribunals was mixed, as was the perceived efficacy of ADR:

- Residential tenancy and retail shop lease disputes were subject to compulsory mediation prior to parties’ being entitled to file proceedings in the tribunal.
- Anti-discrimination, body corporate and other community living disputes were subject to compulsory conciliation before being referred to the tribunal for adjudication.
- Building disputes were routinely referred to external mediation.

¹ Paper presented to the American Bar Association in March 2011 (ADR Spring Conference, Denver Colorado).

- Child protection matters were subject to a “preliminary conference” which may have operated as an informal ADR process. Otherwise, there was active resistance to ADR.
- Similarly, there was active resistance to any form of ADR in guardianship matters.
- There was no history of any form of ADR in regulatory jurisdictions. Indeed, ADR was actively resisted in these jurisdictions.

From its inception, QCAT had a very strong ADR focus. The first discussion paper on the proposed new tribunal listed its proposed performance measures. A systemic indicator of “efficiency” was “Appropriate alternative dispute resolution processes to ensure only entrenched disputes go to hearing.”²

In the first report from the Tribunals Review Independent Panel of Experts the panel said “ADR will be part of the fabric of the new amalgamated tribunal”.³ Recommendation 25 stated “Alternative dispute resolution should be an essential element in QCAT...”⁴ The panel acknowledged that compulsory referral to ADR was possible but may be counterproductive in some cases.⁵

In introducing the QCAT legislation into Parliament, the Attorney-General endorsed the remarks of the Panel of Experts⁶ that ADR would be part of the fabric of QCAT and, to emphasise the importance of ADR, announced that the new registry structure of QCAT would have a specific ADR area to examine the role of ADR within the tribunal and how this can be improved over time.

Section 4(b) of the *Queensland Civil and Administrative Tribunal Act 2009* (“QCAT Act”) specifically requires QCAT to “encourage the early and economical resolution of disputes before the tribunal, including, if appropriate, through alternative dispute resolution processes.” The concept of a robust ADR process was embodied in the legislation through section 69 of the QCAT Act which sets out the purposes of a compulsory conference and section 75, which allows the referral of a matter to mediation. Both sections contemplate referral in the face of a party’s opposition. The only limit to the referral to ADR occurs in section 4(c) – “if appropriate”.

² Discussion paper: Reform of civil and administrative justice November 2007.

³ Queensland Civil and Administrative Tribunal: Stage 1 report on scope and initial implementation arrangements June 2008 at page 77.

⁴ Supra at page 82.

⁵ Supra at page 83.

⁶ Hansard Wednesday 17 June 2009.

The mediation power is rarely used as compulsory conferences give the presiding person more power and flexibility of process. Section 69 of the QCAT Act states that the purposes of a compulsory conference are:

- (a) to identify and clarify the issues in dispute in the proceeding;
- (b) to promote a settlement of the dispute the subject of the proceeding;
- (c) to identify the questions of fact and law to be decided by the tribunal;
- (d) if the proceeding is not settled, to make orders and give directions about the conduct of the proceeding;
- (e) to make orders and give directions the person presiding over the conference considers appropriate to resolve the dispute the subject of the proceeding.

As the name suggests, attendance at a compulsory conference is not optional and there can be serious consequences if a party fails to attend.⁷ This process may be seen as a version of what Chief Justice Marilyn Warren has called “judicial case conferences”: that is, she says, a method of direct judicial involvement in ADR other than mediation. She suggests these conferences include “judicial case or settlement conferences, judicial early neutral evaluation, and summary trials” and calls it “the facilitative form of judicial mediation”.⁸ Compulsory conferences are conducted by a member of the same standing as the member who may eventually hear the dispute. In QCAT’s view, this mirrors Justice Warren’s concept of judicial case management; the views of the member at the conference, and therefore the process, is given legitimacy and weight.

Save for the minor civil disputes jurisdiction, nearly all cases at QCAT are referred to a compulsory conference. Given the emphasis on ADR, this decision is not so surprising. But was it necessary to implement compulsory ADR?

Like the Planning & Environment jurisdiction, there was initial opposition to ADR from the profession in many areas of the Tribunal’s work and, it is fair to say, many of the members of the Tribunal had similar doubts about its efficacy.

In the human rights jurisdictions, there was a perception that matters such as guardianship and child protection were too important to be subject to ADR or that they were unsuitable for ADR because many of the parties involved were subject to an impairment that affected their ability to reason and, therefore, to negotiate.

⁷ Section 72 QCAT Act: the conference may proceed in the absence of a party, or, if the member is satisfied that the missing party has been given sufficient notice and all parties present agree, the member can make decisions or orders adverse to the absent party, including orders for costs.

⁸ **Should Judges Be Mediators?** The Honourable Marilyn Warren AC Chief Justice of Victoria the Supreme & Federal Court Judges’ Conference Canberra, Wednesday 27 January 2010.

In the professional regulation matters, parties argued that these cases involved matters of public interest that required a decision. In addition, they argued that negotiation required an accused party to make admissions adverse to that party's interest and those admissions might be used in later criminal prosecutions. The regulators also perceived that agreements arising from "without prejudice" negotiations would not be published. Because the regulators, rightly, held the view that publication of the decision was an important part of the penalty, they would not countenance any process that avoided publication.⁹

QCAT was fortunate in that both the President and Deputy President had been Judges in the Planning & Environment Court. They were used to the "public policy" arguments and knew that this objection could be addressed. QCAT was also fortunate that these same arguments had been raised and met in another Australian jurisdiction.

The State Administrative Tribunal of Western Australia ("SATWA") was established on 1 January 2005. It also has the ability to refer parties to a compulsory conference¹⁰ and mediation¹¹. Prior to the commencement of SATWA, approximately 38 different vocational bodies dealt with disciplinary matters concerning their members. The bodies both prosecuted and heard the matters. If a member was inclined to make admissions, there was no process by which they could be informed of the likely penalty nor was there a good system of precedent by which they could "guesstimate" the likely result. The consequence is that nearly all professional regulation matters were vigorously defended at a very high cost to all concerned.

SATWA, despite resistance, referred vocational regulation matters to some form of ADR or active case management. In the reporting year 2007/8, 86% of vocational regulation matters finalised by SATWA happened through ADR.

To address the public policy and publication concerns, all vocational matters are finalised by tribunal order. SATWA will only make an order if:

1. The mediator is satisfied that the penalty agreed to is within an acceptable range, bearing in mind other decisions of the tribunal. If the mediator is not so satisfied, the matter is listed for a hearing on penalty only.
2. There is full public disclosure of the identity of the person, the facts of the case, the allegations put, the admissions made, the penalty agreed and there is no suppression of any of the matters involved. The order is published on the tribunal's website.

⁹ See, for example Murray, Peter L 2008, "The privatization of civil justice" *Judicature*, volume 91, issue 6, p. 272, at 275.

¹⁰ Section 52 of the State Administrative Tribunal Act 2004 (WA) ("SAT Act").

¹¹ Section 54 of the SAT Act.

Encouraged by the SATWA experience, QCAT introduced ADR into all jurisdictions. In relation to ADR in regulatory and disciplinary matters, QCAT has emulated SATWA in its approach: all agreements between the parties must be ratified by a Judge or Member and all decisions are published.

In QCAT's first annual report, the President reported that:

1. In its first seven months to 30 June 2010 QCAT received 16,566 new applications and appeals; conducted 16,762 hearings; and, finalised 14,443 matters.
2. Of the 16,700 hearings, over 10,000 have occurred in the minor civil disputes jurisdiction, where the increase over the previous Small Claims tribunal has been a remarkable 60%.
3. In other anti-discrimination matters, filings were up 233%, and in guardianship 113%.
4. The number of lodgements was almost 40% higher than the applications received by the 23 tribunals and boards that QCAT absorbed in the similar, preceding period.
5. QCAT conducted 696 compulsory conferences of which 316, or 45%, concluded successfully.

The statistics might not indicate to you that referral to ADR is a widespread, successful, or cost effective regime. The process of educating the members in ADR techniques, and allowing them time to develop their skills involved an obvious disadvantage – in the early months of the Tribunal, taking matters promptly to hearing would probably have ended them more quickly; but the President took the view that the use of compulsory conferences would ultimately tell in faster resolution, and fewer and shorter hearings.

His faith was justified. Although some increase was expected, 40% was not. In a report to the Justices of the Supreme Court, the President said this¹²:

The widespread use of ADR was necessary to enable the tribunal to meet its objectives and to stop it disappearing under the volume of hearings. That would not have been possible if we had relied on parties to elect compulsory conferencing.

¹² QCAT - Picayune Justice, or the Age of Aquarius? A talk presented to the Judges of the Supreme Court of Queensland Annual Conference - 10 August 2010.

Operational efficiency alone cannot justify the imposition of compulsory ADR. After 12 months' experience, the Presidential team and the members of QCAT believe there are other benefits in compulsory referral to ADR:

- **Education**

Legal representation in the Tribunal is not encouraged. Indeed, section 43 of the QCAT Act provides that the main purpose of the section is to have parties represent themselves unless the interests of justice require otherwise. This means that many cases in the tribunal are conducted without the benefit of legal representation. Even though the legislation does not preclude a party from engaging professional legal assistance in the preparation of a case, members are often asked to decide matters where there is no clear identification of the issues, no proper examination of the evidence required to prove the allegations and unrealistic expectations of their prospects of success, the Tribunal process or the relief available.¹³

Although QCAT is supposed to be informal, quick and cheap, it is still a legal process and many of its users have limited literacy skills. Section 29 of the QCAT Act imposes a positive obligation on members of the Tribunal to take all reasonable steps to ensure each party to a proceeding understands:

- (a) the practices and procedures of the Tribunal; and
- (b) the nature of assertions made in the proceeding and the legal implications of the assertions; and
- (c) any decision of the Tribunal relating to the proceeding; and
- (d) the actions, expressed views and assertions of a party to or witness in the proceeding, having regard to the party's or witnesses age, any disability, and cultural, religious and socioeconomic background; and

The Tribunal is also required to ensure proceedings are conducted in a way that recognises and is responsive to:

- (a) cultural diversity, Aboriginal tradition and Island custom;
- (b) The needs of a party with...impaired capacity or a physical disability.

The best way to deliver information to people who are unfamiliar with the Tribunal process, who have limited literacy, whose first language is not English, who have an

¹³ As Australians, we like to blame that phenomenon on such authoritative productions such as Judge Judy, LA Law, Ally McBeal and Boston Legal. If our criticism is misplaced, on behalf of the Australian legal profession, I apologise.

impairment or a different cultural background is in a face-to-face meeting. Judges or tribunal members who manage busy lists – where up to 20 matters per day are listed for review – do not have the capacity to sit with parties and explain tribunal procedures and requirements, the intricacies of the rules of evidence or how a member may go about deciding a case. A member presiding in a compulsory conference does have the time and can, by a focussed use of the powers in section 69, address procedural or evidentiary deficits in each party’s case so that they clearly understand what must be done to prepare for adjudication. Those further steps can be the subject of direction by the member or, in some cases, operate as a reality check.

A party to a dispute who does not understand the process is unlikely to choose a method of dispute resolution that transfers responsibility from the Tribunal back to the parties. If the parties could resolve the dispute, they wouldn’t need to be before the Tribunal in the first place. For that reason, realistically, the education of parties can only be achieved through compulsory referral to ADR.

- **Therapeutic justice**

QCAT is also interested in developing notions of therapeutic jurisprudence. As you would know better than I do, President Lincoln said this to lawyers in 1850:

Discourage litigation. Persuade your neighbours to compromise wherever you can. Point out to them how the nominal winner is often the real loser: in fees, expenses and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man.

You would also be aware that the adversarial system of justice has come under considerable criticism in recent years as being antagonistic and confrontational with primacy being accorded to destroying the opposition case rather than settling the dispute, in proof or disproof, rather than finding the truth, of elevating the interests of the parties over the broad concepts of justice, of having regard to parties’ interests and costs above the interests and costs of the public resources required to administer the system. It is said that the adversarial system does not adequately deal with the imbalances between the parties created by the availability of resources, perceived power and credibility or the advantage that repeat players have over the “one-off” litigator¹⁴.

One of the objects of the QCAT Act¹⁵ is to “have the tribunal deal with matters in a way that is accessible, fair, just, economical, informal and quick”. The functions of the Tribunal include the obligation to “ensure proceedings are conducted [in a way that is]...

¹⁴ See King, Frieberg, Batagol, Hyams **Non-Adversarial Justice** The Federation Press, Sydney 2009

¹⁵ Section 3(b) QCAT Act.

as quick as is consistent with achieving justice.”¹⁶ In our view, the terms of the QCAT Act compel us to avoid adversarial hearings if that is appropriate, and possible.

The members of the former child protection and guardianship tribunals have always operated within the framework of therapeutic justice. An order of the tribunal that lacks endorsement of, or approval by, the members of the family charged with compliance, is bound to fail. By focussing on the subject of the proceedings, that is, the child or person with the alleged incapacity, these members have avoided the less desirable aspects of the adversarial system.

QCAT has used these members’ skills to introduce the concepts of therapeutic justice into the civil, and traditionally adversarial, jurisdictions by presiding over compulsory conferences in those jurisdictions. At the same time, those members skilled in civil, adversarial litigation have been sitting in the human rights jurisdictions and thereby learning that positional bargaining is not always the most effective negotiation tool.

QCAT has many hundreds of building disputes. The relationship between homeowner and the builder usually begins on a happy, optimistic footing. Delay, misunderstandings and increasing costs during the building process create unhappiness and sometimes distress on both sides, and passions grow. By the time the parties come to QCAT they are often unable to speak to each other. When QCAT took over the duties of the former tribunal that dealt with building disputes, we discovered that many cases had been dragging through the interlocutory steps for years, the amounts claimed in the litigation were often many multiples of the cost of the original job and legal costs were a further, daunting multiple of the costs.

While compulsory conferences in that jurisdiction rarely lead to hugs all around, members are reporting that compulsory conferences are resulting in realistic and sensible concessions, buildings being finished and a reduction in disharmony.

These conferences are conducted in a way that is some distance from pure mediation theory. While ensuring that no party is overborne or intimidated, members have the opportunity to be open and frank with parties about the issues in the case and what the outcome might be if an adjudication proceeds. This frank expression of views is a form of neutral evaluation that addresses the emphasis our legislation puts on speed and informality.

The introduction of the principles of therapeutic justice into areas that are traditionally adversarial requires goodwill, understanding and education.

¹⁶ Section 4(c) QCAT Act.

- **Cultural change**

There is a frank acknowledgement from the parties that they would not have voluntarily participated in a compulsory conference, would not have been aware of the possibilities that are available in a compulsory conference and, therefore, would not have been converted to the QCAT view of dispute resolution unless they had been compelled to attend:

The above points were amongst the reasons for my initial opposition to conferences. However, upon reflection and after conducting a number of conferences.... An open and frank discussion is worthwhile...

And:

By way of general background I was initially quite sceptical of the compulsory conference process from the point of view of the regulatory prosecutor. This was based on concerns that respondents to any disciplinary charges might seek to avoid a proper response to the allegations by watering down any admissions and deflecting attention from some of the more serious aspects of the allegations. A "plea bargain" in that sense was seen to be contrary to the public interest objects and purpose of the legislation under which the proceedings were brought.

In the past the various regulatory boards I have acted for took an approach that unless there was a commitment to a particular evidential position by a respondent (with either filed statements or affidavits) then there was no basis upon which any agreement on sanction could be reached. Also it was a general practice that any negotiations on sanction would have to be set out in writing initially.

Another concern was based on the escalation of costs through the introduction of a process which did not previously exist.

From the point of view of acting for respondents to administrative action I have also seen clear benefits in the compulsory conference process. For example in some cases in which I have been involved I would have thought that the decision making body would simply have stone walled without having to afford much feedback and engagement with the respondent's plight. However the process does force decision makers to think early about the merits of their decision. In the setting of a conference it can be beneficial for a respondent to have the decision maker think specifically about the respondent's case and if not initially resolve the matter, take large strides toward an early settlement without hearing. It can be very frustrating to deal with some decision making bodies and having an active "conciliator" working at confining the issues and getting a recalcitrant party to see reason can be very useful.

And:

I think compulsory conferences are useful and an effective means of both, streamlining management and conduct of cases, and promoting and bringing about settlements.

In my experience on the occasions when they are required to occur and achieve neither of these things they do little harm rendering the risk they pose to positive outcomes, low.

Clients commonly don't want to be told to participate in alternative dispute resolution procedures (or to make other overtures to the other side directed at one or more of the things referred to in the second sentence above), whether formal or informal, at too early a stage in litigation. They think it reflects, or will be taken to reflect, weakness or uncertainty or the absence of the

necessary will to see the case to trial - even if they are secretly terrified of the case going another day.

Legal advisors either see things the same way or, not wanting to be too out of sync with their client's views, feel a reluctance to recommend or encourage early overtures of this kind even though experience shows that early discussion or case planning will commonly see the case proceed on a more efficient (and cheaper) basis and regularly result in early consensual resolution.

If however the court imposes such a process this reluctance (on the part of legal advisors) is overcome - they can always blame the system itself while privately understanding it is likely to be beneficial. The client, whether it actually wants to meet the other side but is concerned about appearances, or actually does not want to meet, has to, whether it likes it or not.

I think compulsory conferences, like all face to face exchanges, tend to winnow away posturing and nonsense or at least minimise them and do in general promote a greater understanding of the real issues.

There are, of course, parties who do not fully endorse compulsory referral to mediation:

My experience is that my clients would not have participated in the conference if it had not been mandatory at the time it was first ordered but would likely have participated in one at a time which was later in the proceedings.

This comment came from a lawyer who practices most frequently in commercial litigation disputes. If you accept the principle that parties are entitled to conduct litigation at a pace that suits them, then this statement is entirely understandable. It does not sit quite so well in a dispute resolution framework such as QCAT, bearing in mind the obligation to provide a quick, cost effective and informal dispute resolution process. On balance, the members of QCAT and, in particular, the Presidential team remain of the view that compulsory referral to ADR was a necessary and integral part of the cultural shift that has enabled QCAT to exceed the performance criteria in its first year of operation.

One question remains: should QCAT maintain its practice of compulsory referral to ADR? Experience and research has demonstrated that cultural change is not effected, or embedded, overnight. The Registrar of QCAT reports that the harmonisation of the registry operations is still a work in progress and she expects that full integration will not be achieved for another 2 or 3 years. As the Attorney-General for New South Wales, John Hatzistergos observed in 2009,¹⁷ ADR has featured in many pieces of legislation over the past decade but the take up has been slow or non-existent. The *Children and Young Persons (Care and Protection) Act* (NSW) was enacted in 1998. In 2008, Justice Wood of the New South Wales Supreme Court wrote:¹⁸

¹⁷ Alternative Dispute Resolution and Tribunal Justice' Council of Australasian Tribunals, NSW Chapter Menzies Hotel, Carrington Street, Sydney 22 May 2009.

¹⁸ James Wood (2008), Report of the Special Commission of Inquiry into Child protection Services in New South Wales, page 467, paragraph 12.10.

Notwithstanding that the Children and Young Person's Care and Protection Act specifically provides for ADR, the Inquiry has been consistently informed that in practice, there is no real form of ADR operating in the care jurisdiction.

It is unrealistic to expect, of the foreseeable future, that users of QCAT will routinely and voluntarily choose ADR without compulsion. It is also unrealistic to expect that QCAT's educative process has been so successful that unrepresented litigants will understand, and therefore prefer, the procedure offered by a compulsory conference. The present permanent members have been appointed for a term of 5 years. I expect that compulsory referral to ADR will be required for the duration of that period. Whether it is required beyond that time frame is, as yet, a question without answer.

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