

BIG SISTER IS WATCHING - ORWELLIAN OVERTONES OR NO CAUSE FOR ALARM?

When one thinks of 1984, and George Orwell, one immediately thinks of state surveillance. Hence the title of my presentation. But 1984 was not just a story about omniscient overview. It was a story of finding love in difficult times and surveillance operated in an atmosphere of distrust and misinformation. Indeed, Winston Smith was employed as a writer in the Ministry of Truth. Why do I tell you these things? Because, in developing this paper, I realised that the relationship between the Court of Appeal and the tribunal, at least from the tribunal's point of view, is not a simplistic one of watcher and subject.

As with any good story, let's first set the scene. And let's examine the possibility of the Ministry of Truth making an appearance in this story.

SETTING THE SCENE

The number of appeals to the Court of Appeal

In 2014, I attended the AIJA Assisting Self Represented Litigants Conference in Sydney. The President of the Queensland Court of Appeal approached me at the conference drinks, saying '*of all the litigants in the Court of Appeal, QCAT litigants are the unhappiest. I think it's because you don't give them enough time.*' The President urged the tribunal (informally) to consider doing fewer matters 'on the papers'.

As the President acknowledged in a recent address to the tribunal¹, in the 2014/15 year, 28,666 matters were lodged in QCAT. 31,104 matters were finalised. Parties lodged 540 appeals to the appeal tribunal. There were 15 appeals from the appeal tribunal to the Court of Appeal – 0.013% of all matters filed.

The tribunal's annual report for 2014/15 records a user satisfaction rate of 71%. It is arguable, therefore, that the QCAT litigants who made it to the Court of Appeal were, by nature, unhappy people and no amount of 'time' would address that problem.

¹ "LESSONS LEARNT FROM APPEALS" The Honourable Justice Margaret McMurdo Ac President, Court Of Appeal QCAT Conference, Thursday, 19 May 2016.

The disposition of appeals

In 2014/15, with six Judges of Appeal, the Court of Appeal disposed of 323 criminal appeals and 213 civil appeals. Of course, they were assisted by Judges of the Supreme Court and are required to sit as a panel of three.

It was intended that the internal QCAT Appeal Tribunal would be constituted by the president, deputy president, another judicial member, or, **sometimes** (my emphasis), a suitably qualified member(s)². That intention is reflected in the QCAT Act ...

Section 166:

- (1) The tribunal is to be constituted for an appeal or an application for leave to appeal, under chapter 2, part 8, division 1, by 1, 2 or 3 judicial members.
- (2) If the president considers it appropriate for a particular appeal or application for leave to appeal, the president may choose 1, 2 or 3 suitably qualified members to constitute the tribunal for the appeal or application, whether or not in combination with a judicial member.

Section 149(2):

A party to a proceeding (other than an appeal under division 1) may appeal to the Court of Appeal against another decision of the tribunal in the proceeding if a judicial member constituted the tribunal in the proceeding.

Section 150(2):

A party to an appeal under division 1 may appeal to the Court of Appeal against the following decisions of the appeal tribunal in the appeal—
(a) a cost-amount decision;
(b) the final decision.

... and assumed by the Court of Appeal. On a number of occasions, the Court of Appeal has questioned the 'right' of a member to hear an appeal.³ (It's not as if the non-judicial members of the tribunal go out of their way to find work, or sit themselves on appeal tribunal panels without the approval of the President ...)

The Court of Appeal has also consistently observed that there is no appeal from an interlocutory decision of the appeal tribunal, where the tribunal is not constituted by a

² A Single Merits Review Tribunal: The Queensland Civil and Administrative Tribunal (QCAT) Nicolee Dixon Research Brief No 2009/32.

³ See, for example, *Chandra v Queensland Building and Construction Commission* [2014] QCA 335 at [52].

judicial member⁴. Absent an intention that judicial members should hear appeals, this appears to be a lacuna in the QCAT Act.

In fact, much of the appeal work is done by senior members with the assistance of either permanent members or sessional members. This work is in addition to their usual case load as list managers and leaders of the tribunal members.

Each appeal judge has an associate. Tribunal members share one administrative assistant between approximately 20 users.

WHAT THE COURT OF APPEAL SAID TO THE TRIBUNAL

On 19 May 2016, the permanent members of the tribunal were privileged to receive an address from the President of the Court of Appeal. McMurdo P identified six lessons for the tribunal:

1. Be sure you have the jurisdiction to proceed and state the source of that jurisdiction.
2. Address all arguments raised by the parties.
3. Identify the orders parties are seeking and, if you give different orders, state why.
4. Understand and apply the difference between ss 146 and 147 of the QCAT Act.
5. Take care when deciding matters 'on the papers'.
6. When applying a principle of law, find the most persuasive authority available.

On behalf of the members, I want to respond to some of those lessons. I will, however, approach the lessons in a different order.

Understand and apply the difference between ss 146 and 147 of the QCAT Act.

Section 146 of the QCAT Act states:

In deciding an appeal against a decision on a question of law only, the appeal tribunal may—
(a) confirm or amend the decision; or
(b) set aside the decision and substitute its own decision; or
(c) set aside the decision and return the matter to the tribunal or other entity who made the decision for reconsideration—

⁴ See, for example, *Turnbull v State of Queensland* [2014] QCA 240

- (i) with or without the hearing of additional evidence as directed by the appeal tribunal; and
 - (ii) with the other directions the appeal tribunal considers appropriate; or
- (d) make any other order it considers appropriate, whether or not in combination with an order made under paragraph (a), (b) or (c).

Section 147 of the QCAT Act states:

- (1) This section applies to an appeal before the appeal tribunal against a decision on a question of fact only or a question of mixed law and fact.
- (2) The appeal must be decided by way of rehearing, with or without the hearing of additional evidence as decided by the appeal tribunal.
- (3) In deciding the appeal, the appeal tribunal may—
 - (a) confirm or amend the decision; or
 - (b) set aside the decision and substitute its own decision.

Mr Ericson was a concreter. On 29 June 2009, the Queensland Building Services Authority (QBSA) suspended Mr Ericson's licence because he could not satisfy the financial requirements for holding a licence. Mr Ericson had to demonstrate that he met the minimum current ratio, calculated as current assets/current liability, of 1:1. Mr Ericson included in his assets, a disputed debt of \$4,803,866.60. The QBSA held that this was a disallowed asset – an uncollectable debt. Without that asset, Mr Ericson failed the financial requirements. On 11 October 2010, the QBSA cancelled Mr Ericson's licence.

Mr Ericson applied to review that decision. The tribunal overturned the QBSA's decision. It relied on two factors:

- The decision to suspend Mr Ericson's licence was controversial. If the QBSA should not have suspended Mr Ericson's licence, then the suspension ought not to have been taken into account when deciding the cancellation.
- The proportion by which Mr Ericson failed the financial requirements was '*not large*'.⁵

QBSA appealed that decision. There were two main grounds of appeal:

- The tribunal was not entitled to have regard to the QBSA's decision to suspend Mr Ericson as that decision was not the subject of the application before the Tribunal;

⁵ *Ericson v Queensland Building Services Authority* [2012] QCAT 206 at [32], [33].

- The tribunal then fell into error by construing the Financial Requirements for Licensing in accordance with the objects of the Requirements as subordinate to those objects (in particular the object '*to promote more financially viable businesses*') but ignoring the other object of the Requirements ('*to foster more professional business practices in the building industry*').

The grounds of appeal were questions of law. Therefore s 146 applied.

The appeal tribunal found the tribunal below erred in having regard to the QBSA's decision to suspend Mr Ericson. The appeal tribunal also found that tribunal erred in its consideration of some of the objects of the Requirements but not others.

The appeal tribunal went on to say:⁶

We are satisfied that we have sufficient evidence in the documents filed and on the basis of accepted fresh evidence to set aside the decision of the learned member and substitute our own.

The appeal tribunal set aside the member's decision and substituted its own decision – that Mr Ericson's licence was cancelled.

Mr Ericson appealed to the Court of Appeal. The Court of Appeal found⁷ that the appeal tribunal was not in error in deciding the tribunal below erred in its interpretation of the Requirements. The Court of Appeal found that the appeal tribunal was not in error in deciding the tribunal below had no power to review the QBSA's decision to suspend Mr Ericson's licence. The Court of Appeal found no appellable error in the appeal tribunal's findings on matters such as the reception of fresh evidence, Mr Ericson's application for contempt, or the failure to strike out the QBSA's appeal.

And yet, Mr Ericson succeeded on appeal. Because the appeal tribunal characterised the questions as questions of law, the Court of Appeal found that the substantive issues could only be determined on a consideration of all the evidence, with appropriate findings and a fresh exercise of discretion.

The Court of Appeal considered it possible that the appeal tribunal was considering an appeal on a question of mixed fact and law and, therefore, acting under s 147.

⁶ *Queensland Building Services Authority v Flea's Concreting* [2013] QCATA 180 at [25].

⁷ *Ericson v Queensland Building Services Authority* [2013] QCA 391.

The Court of Appeal found, however, that the appeal tribunal did not address any factual matter and did not, itself, exercise any discretion. The Court of Appeal remitted the matter back to the appeal tribunal for proper determination according to ss 146 and 147.

The appeal tribunal reconsidered the matter in light of both ss 146 and 147. It came to the same conclusion. Mr Ericson appealed again. The Court of Appeal, again, found that the appeal tribunal misconceived its function under ss 146 and 147 and returned the proceeding to an appeal tribunal differently constituted.

The third appeal tribunal came to the same conclusions about Mr Ericson's grounds of appeal but in accordance with the strict requirements of s 146, set aside the member's decision and returned it to the tribunal below for determination. Mr Ericson appealed, again, to the Court of Appeal. This time, the application for leave to appeal was refused.

In the time taken by Mr Ericson to pursue his appeal, he had gone bankrupt, the QBSA has spent an inordinate amount of money on legal representation and, only once, has Mr Ericson succeeded in an argument that he should keep his licence.

As a member of the appeal tribunal that was twice overturned by the Court of Appeal, I acknowledge that we failed to apply the relevant test under s 146. Did we deal with the matter in a way that was accessible, fair, just, economical, informal and quick?⁸ Yes. Did we conduct the proceedings in an informal way that minimised cost to the parties and was as quick as is consistent with achieving justice?⁹ Did we observe the rules of natural justice?¹⁰ Did we act with as little formality and technicality and with as much speed as the requirements of the QCAT Act and a proper consideration of the matters before the tribunal permit?¹¹ Is the distinction between ss 146 and 147 understood by parties appealing the tribunal's decisions? Does the distinction assist in the disposition of the appeal tribunal's business?

Submissions to the appeal tribunal are often unfocussed. The submissions nearly always involve both pure errors of law and errors of mixed fact and law.

⁸ QCAT Act s 3(b).

⁹ QCAT Act s 4(c).

¹⁰ QCAT Act s 28(3)(a).

¹¹ QCAT Act s 28(3)(d).

Unrepresented parties rarely distinguish between the two types of error and almost never present submissions in a way that differentiates between a hearing on a question of law and a rehearing of mixed fact and law.

When asked how the tribunal should deal with an appeal hearing that is a combination of ss 146 and 147, the President of the Court of Appeal, essentially, said '*do your best and we will tell you if you get it wrong.*'

The difficulty in applying ss 146 and 147 are not confined to non-judicial members of the tribunal. Even judicial members, in an effort to meet the obligations of s 3(b) of the QCAT Act, get caught up:

The sole ground of appeal to the appeal tribunal defined the appeal as being one on a question of law only for which leave to appeal from the appeal tribunal was not required. Ordinarily, where a statute confers a right of appeal on a question of law, the ambit of the appeal is confined to a determination of the question. The ambit is not a broader one in the nature of a full rehearing of the matter with the demonstrated error of law being merely an entry pass to it.¹²

In *Robertson & Anor v Airstrike Industrial Pty Ltd*, Morrison JA stated:¹³

The distinction between different kinds of appeal under ss 146 and 147 is similar to the distinction made under ss 142 and 146 previously mentioned. The purpose of the distinction is to restrict some appeals.

Clearly, the Court of Appeal's approach to ss 146 and 147 in *Ericson* had the opposite effect. The utility of the difference, and the Court of Appeal's insistence on different treatment, must be called into question.

The appeal tribunal tries to be risk averse; the only logical conclusion is that appeal tribunal hearings will be longer and more legalistic, contrary to the objects of the QCAT Act.

Address all arguments raised by the parties

Mr and Mrs Partington engaged Mr Urquhart to build an extension to their home. The Partingtons paid the first four progress payments but failed to pay the progress claim for the enclosed stage. Mr Urquhart terminated the contract and issued proceedings for payment of the enclosed stage.

¹² *Flegg v Crime and Misconduct Commission & Anor* [2013] QCA 376 at [28].

¹³ [2016] QCA 104 at [32].

The tribunal at first instance had eight questions to answer. The first two were:

- a) Did the building works reach the enclosed stage?
- b) Did Mr Urquhart lawfully terminate the contract?

The balance of the questions for the tribunal depended upon the answer to those two questions.

Although Mr Urquhart claimed for the enclosed stage, he had not affixed a front door and he had not laid the upstairs flooring. The question of whether the building works reached the enclosed stage was a threshold question for the tribunal. The tribunal found that the building had reached the enclosed stage and Mr Urquhart lawfully terminated the contract. It then went on to assess the amount owing to Mr Urquhart, having regard to the Partingtons' claims of defective work. The tribunal ordered the Partingtons pay Mr Urquhart \$214,946.

The Partingtons appealed that decision. Their grounds of appeal were:

1. The tribunal erred in law in determining the building had reached the enclosed stage.
2. The tribunal erred in law in determining the extent of the defects and the cost of rectifying defects and the building work undertaken by Mr Urquhart.
3. The tribunal erred in ordering the respondent/applicant for leave to pay default interest.
4. The tribunal erred in law in ordering the respondent/applicant for leave to pay costs.
5. The respondent/applicant for leave was denied natural justice and procedural fairness.
6. Other grounds may be raised following the obtaining advice from solicitors who have now been engaged.

The appeal tribunal found that the tribunal erred in finding the works had reached the enclosed stage. Because of this error, the appeal tribunal found that the tribunal erred in not considering the Partingtons' cross claim. That required hearing fresh evidence and a reconsideration of the issues. It therefore remitted the proceeding back to the tribunal for further consideration.

Mr Urquhart appealed to the Court of Appeal. The Court found that the enclosed stage had been reached. That decision is uncontroversial. In the course of the Court's reasons, however, Henry J observed:¹⁴

[45] Having reached the above conclusions, the Appeal Tribunal did not, as it may have done to avoid potential cost and inconvenience in the event of error, dispose of the balance of the material issues before it. It did not deal with the balance of ground 1, which went to whether defective works precluded the enclosed stage from being met. Nor did it consider any of the remaining grounds, namely grounds 2, 3 and 4 (ground 5 does not appear to have been the focus of separate argument). It instead ordered that the claim and cross-claim be returned to the Tribunal for rehearing according to law.

[46] Even if the balance of ground 1 and grounds 3 and 4 may, by implication, have fallen away as irrelevant in light of the conclusion as to part of ground 1, it is not apparent why the Appeal Tribunal did not at least go on to determine appeal ground 2. Ground 2 went to alleged errors in determining the extent and cost of rectifying defects in the building work. That component of the matter was not rendered irrelevant by the Appeal Tribunal's conclusion about whether or not the enclosed stage had been reached. It was a separate aspect of the matter, arising from the owners' cross-application. Its only connection with the "enclosed stage" aspect of the case relates to the extent of the eventual offsetting of the damages. Having already been argued and determined at first instance and already argued on appeal, the issues relating to ground 2 should have been considered and determined on appeal.

[47] For that reason alone it is inevitable, if leave is granted here, that this court should return the matter to the Appeal Tribunal for it to determine that ground of appeal. As will be seen, there are other reasons to return the matter.

Henry J went on:¹⁵

Although it would be preferable for both members of the Appeal Tribunal to finish their task, if one or both are unavailable the parties' written submissions on the matters that remain live and a transcript of the hearing before the Appeal Tribunal will be available. The Appeal Tribunal can now make a determination of those matters, consistently with this court's reasons and without the parties having to incur any further costs. The more appropriate order therefore is that the matter be returned to the Appeal Tribunal for determination according to law.

It is clear the Court of Appeal expects the appeal tribunal to deal with every ground of appeal submitted by an applicant. This is so when submissions from parties have:

... lengthy, rambling and unfocussed grounds of appeal to it which were said to constitute errors of law.¹⁶

The Court of Appeal expects the appeal tribunal to deal with every ground of appeal submitted by an applicant when: the distinction between errors of law and errors of

¹⁴ *John Urquhart t/as Hart Renovations v Partington & Anor* [2016] QCA 087.

¹⁵ *Supra* at [91].

¹⁶ *Albrecht v Ainsworth & Ors* [2015] QCA 220 per McMurdo P at [44].

mixed fact and law are indistinguishable; when an applicant has a 'catch all' ground of lack of procedural fairness which can be anything from a valid complaint to one of '*the tribunal preferred the evidence of the Mr Bloggs who was a liar*'; or where an applicant, finally understanding what the dispute is about and what law applies, simply wants to have another attempt to get it right.

The appeal tribunal does not mind being told it is wrong. It does have a bit of a problem with a suggestion that it is lazy.

Take care when deciding matters 'on the papers'

The tribunal may, if appropriate, conduct all or part of a hearing entirely on the basis of documents, without the parties, their representatives or witnesses appearing at a hearing.¹⁷ Early in its life, the tribunal adopted a practice of hearing many matters on the papers:

- Access to hearing rooms is limited. Often urgent matters cannot wait for a date when a hearing room is available.
- The number of appeals swamped the Judges' capacity to deal with them in a hearing. Justice Alan Wilson burnt much midnight oil attempting to keep pace with the avalanche of appeals from minor civil disputes.
- The registry resources required to conduct '*application days*' or an '*application list*' for interlocutory matters outweighed the advantage in having matters listed for an oral hearing.

The Court of Appeal acknowledges the efficacy of the tribunal's practice but, in truth, doesn't think much of it:¹⁸

In general, the determination of applications such as those before the Senior Member, without an oral hearing is, in principle, to be encouraged. However the objects of the Act also include having the tribunal deal with matters in a way that is "fair (and) just". To achieve the objects of the Act, the tribunal is required to ensure that proceedings are conducted "in an informal way that minimises costs to the parties, and is as quick as is consistent with achieving justice". In light of these provisions, and the provisions of s 28, the requirements of a fair hearing are not to be sacrificed to achieve economy, informality and speed.

And:¹⁹

True it is that under the *QCAT Act* proceedings are to be conducted in an informal way and the discretion of the Tribunal and the proceedings in the Tribunal are not

¹⁷ QCAT Act s 32(2).

¹⁸ *Chandra v Queensland Building and Construction Commission* [2014] QCA 335 at [60].

¹⁹ *Bartlett v Contrast Constructions Pty Ltd* [2016] QCA 119.

governed by pleading requirements such as those found in relevant rules of court but nevertheless the Tribunal is obliged to accord parties natural justice, to give parties a reasonable opportunity to be heard and in the context of a nature such as this the written submissions, prepared by legal advisers, will frequently provide a guide as to the issues joined between the parties to the dispute.

And:²⁰

The decision to conduct the proceedings in that way was made by QCAT without reference to the parties whose views on that mode of proceeding were not sought. There is nothing in s 32 which requires such a consultation. The decision to conduct the application and appeal “entirely on the basis of documents” was one for QCAT to make. Whether it was wise to make it without hearing submissions of the appropriateness of that course is a different question. As the proceedings in this Court demonstrate time, anxiety and cost could have been saved had QCAT indicated it intended to proceed in that way and had it revealed who would constitute QCAT to determine the application and appeal.

In 2008, the Commercial and Consumer Tribunal found that Mr Chandra, a building certifier, engaged in unsatisfactory conduct. Therefore, the QBSA referred a disciplinary proceeding to the tribunal. In a decision dated 5 August 2010, the tribunal cancelled Mr Chandra’s licence and determined that he be disqualified from obtaining a licence for a period of not less than 2 years and 3 months.

On 14 October 2013, on a different referral, the tribunal ordered that Mr Chandra never be re-licensed as a certifier. Mr Chandra filed an application for leave to appeal the second decision on 31 January 2014. The application was out of time, so he also filed an application to extend time for filing. The appeal tribunal refused the extension of time. The Court of Appeal took a different view:

The immediate statutory context in the present case is the provision of a right of appeal against a decision of the tribunal. Decisions which are made in a disciplinary proceeding may be protective of the public; but can also have considerable significance for the person against whom the proceedings were brought.²¹

The views which I have expressed are, it seems to me, consistent with the observation of Lord Bingham about the difficulties in effectively dealing with a matter, without knowing the points which are troubling the decision-maker. It was not suggested that some mechanism, other than an oral hearing, could more appropriately have dealt with these difficulties.²²

The application was remitted to a different appeal tribunal, which gave an extension of time for leave to appeal. On 22 February 2016, the appeal tribunal confirmed the

²⁰ *Maher v Adult Guardian & Anor* [2011] QCA 225 at [6].

²¹ *Chandra* supra per Peter Lyons J at [68].

²² *Supra* at [72].

tribunal's 2013 decision, save for the amount of the penalty. On 20 April 2016, the appeal tribunal ordered that Mr Chandra pay 80% of the QBSA's costs of the application for leave to appeal.

Since *Chandra*, the appeal tribunal has conducted most appeal hearings as an oral hearing, so that decisions on the papers are now an exception. Section 148 of the QCAT Act requires the appeal tribunal to give its final decision, and reasons, in writing. An oral hearing may promote procedural fairness. It does not promote efficiency or timeliness. Sometimes, it does not promote a party's ability to understand the decision; the tribunal deals with many parties who are functionally illiterate or for whom English is a second language. It assists the parties to have the appeal tribunal give them the reasons at the hearing.

At this point of the paper, I am inclined to the view that the function of the Court of Appeal is more of a threatening, Orwellian Big Sister, than the kindly, advisory big sister one may expect in a familial setting.

Some other cases

The Court of Appeal has been less than helpful in other ways.

Ms Rintoul took action against the Department of Education for defamation.

She lodged her complaint with the Anti-Discrimination Commission Queensland on 6 September 2012. Her complaint was out of time but the Commission considered Ms Rintoul's explanation of the delay and accepted the complaint. Her complaint was referred to the tribunal on 6 June 2013.

Ms Rintoul was legally represented. On four occasions, the tribunal ordered Ms Rintoul file and serve particulars of her statement of contentions, setting out the factual detail of the conduct complained of; identifying why that conduct amounts to unlawful discrimination; particularising the impact the conduct had; and stating what outcomes she sought. Ms Rintoul did not comply. On 17 March 2014, the tribunal again ordered that Ms Rintoul provide a detailed statement of contentions. The tribunal further ordered that, if she did not comply by 31 March 2014, her complaint would be dismissed without further order.

Predictably, Ms Rintoul again failed to comply with the tribunal's order. On 31 March 2014, her lawyers sought a further extension of time. The request, by letter not application, did not come to the tribunal's attention until 1 April 2014. The tribunal extended the time for compliance until the end of that day.

On 13 May 2014, the State of Queensland asked the tribunal to refer a question of law to the President: '*Whether the proceeding ADL047-13 was dismissed on 31 March 2014 following Ms Rintoul's failure to comply with the decision (specifically paragraph 2) dated, 17 March 2014*' (Ms Rintoul had still not provided the required statement of contentions). The President answered the question in the affirmative – the proceeding was dismissed.²³

Ms Rintoul appealed to the Court of Appeal. She had still not provided the required statement of contentions. The Court of Appeal found that the tribunal had validly extended time and the proceeding had not been dismissed:²⁴

In *FAI General Insurance Co Ltd v Southern Cross Exploration NL*, the High Court was concerned with a New South Wales Supreme Court Rule which gave the court the power to extend any time fixed by a judgment or order after the time had expired and whether or not the application for the extension was made before or after its expiry. The High Court held that the rule conferred jurisdiction to extend time, notwithstanding that a self-executing order for dismissal of the proceedings had taken effect.

In my view, s 61 is a provision of precisely that kind and ought to be construed in the same way. The Tribunal member, then, had power to waive the appellant's non-compliance with her orders, as she did by vacating them and setting a new time line. The proceeding was not finally and irretrievably dismissed on 31 March 2014; it was reinstated by the further orders of 1 April.

The Court of Appeal gave a further lifeline to a party who was chronically late in filing anything and who, years after her initial complaint, had still not been able to articulate the basis of her claim.

The Court of Appeal has also interpreted the tribunal's obligation under s 29 widely.

Section 29 states:

- (1) The tribunal must take all reasonable steps to—
 - (a) ensure each party to a proceeding understands—

²³ *Rintoul v State of Queensland & Ors (No 2)* [2014] QCAT 332.

²⁴ *Rintoul v State of Queensland & Ors* [2015] QCA 079 per Holmes JA at [16].

- (i) the practices and procedures of the tribunal; and
- (ii) the nature of assertions made in the proceeding and the legal implications of the assertions; and
- (iii) any decision of the tribunal relating to the proceeding...

Ms Underwood was a tenant in a housing block that was damaged by flooding. She unsuccessfully applied for a rent reduction due to the flooding. She unsuccessfully appealed that decision to the appeal tribunal. She then sought leave to appeal to the Court of Appeal.

Although her application for leave to appeal was unsuccessful, the Court of Appeal was critical of the appeal tribunal. Ms Underwood had filed a large volume of material prior to the initial hearing. She filed more with her application to the appeal tribunal. The appeal tribunal refused to take the additional material into account. The Court of Appeal said:²⁵

For completeness, I would add a reference to s 29(1)(a) of the QCAT Act. It required the Appeal Tribunal to take all reasonable steps to ensure that a party to a proceeding understood its practices and procedures. Had the Appeal Tribunal validly adopted practices and procedures relating to the reception of further evidence on an appeal, it seems to me it would have been incumbent on the Appeal Tribunal to inform the applicant of that. Since the purpose of s 29(1)(a) is plainly to enable a party to act in accordance with such practices and procedures, it seems to me inevitable that that would have been necessary to do, before the Appeal Tribunal ruled on the reception of the further evidence.

Since then, Ms Underwood has twice been to the appeal tribunal. In one matter:

Ms Underwood has now filed over 40 centimetres of material in this appeal and many documents are produced many times in her different applications. The documents themselves are discursive and not, with respect, easy to comprehend.²⁶

And in the second:²⁷

As previously observed in my reasons of 2 May 2013, despite the enormous volume of paper she has filed in the Tribunal and the many and varied applications she has brought, no basis has been established for the array of orders she has sought in them: for example, compelling admissions of fact, the production of documents, or the answering of interrogatories by the respondents.

²⁵ *Underwood v Queensland Department of Communities (State of Queensland)* [2012] QCA 158 per P Lyons J at [96].

²⁶ *Underwood v Department of Housing and Public Works & Ors* [2013] QCATA 130.

²⁷ *Underwood v Department of Housing and Public Works & Anor* [2013] QCATA 192.

The President continues to enjoy Ms Underwood's company in the tribunal. Her zeal in fling voluminous material of dubious relevance continues unabated.

THE COURT OF APPEAL LENDS A HELPING HAND

I should, of course, acknowledge that the Court of Appeal has assisted the tribunal in grappling with the idiosyncrasies of the QCAT Act and the interpretation of the enabling Acts:

- A person the subject of a joinder application is not a party to the proceeding. This was relevant to an application for costs from a proposed third party (although the QCAT Act does not contemplate the concept of a third party).²⁸
- A person can be a party for the purposes of an appeal even if not a party to the proceeding below.²⁹
- A decision of the appeal tribunal may be a final decision, and therefore susceptible to appeal, even if it does not fully dispose of all the issues before it.³⁰
- Section 28(3)(b) of the QCAT Act – that the tribunal is not bound by the practices and procedures of the courts – does not mean that it should not be influenced by statements of principle in superior court decisions.³¹
- Sometimes, the tribunal's objectives of fast, efficient, economical and quick, are important considerations.³²
- The construction of a contract is a question of law, not fact.³³
- The Court of Appeal has confirmed the principles to be applied in an appeal against the exercise of the tribunal's jurisdiction.³⁴
- Section 61 of the QCAT Act – which allows the tribunal to give relief from procedural requirements, including an extension of time to bring an application – will operate unless there is a specific exclusion in the enabling Act:

Section 61 exists for a variety of cases in which enabling Acts or the QCAT Act may fix a time limit or impose other procedural requirements. Its presence

²⁸ *Donovan Hill Pty Ltd v McNab Constructions Australia Pty Ltd* [2015] QCA 114.

²⁹ *Jamieson v Body Corporate for Paradise Island Apartments* [2011] QCA 080.

³⁰ *Miller & Anor v Lida Build Pty Ltd* [2013] QCA 332 per Gotterson JA at [8].

³¹ *Till & Anor v Rose* [2016] QCA 127 per P McMurdo JA at [20].

³² *Robb v Tunio* [2014] QCA 127 per Jackson J at [26].

³³ *Ryan v Worthington* [2015] QCA 201.

³⁴ *Francis v Crime and Corruption Commission & Anor* [2015] QCA 218.

removes the need to laboriously insert in numerous enabling Acts words such as “unless the Tribunal extends the time or waives compliance with this requirement” in conjunction with time limits or other procedural requirements.³⁵

CONCLUSION

‘War is peace. Freedom is slavery. Ignorance is strength.’ This was the slogan of the Party.

The Court of Appeal and the tribunal are not at war, although, often, the tribunal feels as if it is standing in an open field receiving pot shots from the protected and gilded bunker inhabited by the Court.

The tribunal has the freedom to make mistakes, test the boundaries of its jurisdiction and the elasticity of its legislative remit to deal with matters in a way that is accessible, fair, just, economical, informal and quick while providing procedural fairness. Justice Alan Wilson has already addressed you at length on this conundrum and I will not further labour the point.

Ignorance is not strength. Ignorance is a dangerous state for anyone, but particularly for a tribunal not yet 10 years old and still struggling to establish its proper place in the justice system of Queensland. However painful it is to receive the wisdom of the Court of Appeal, it is necessary. From the tribunal’s perspective, the Court of Appeal’s decisions that affect the tribunal have hints of Orwellian overtones but, at the end of the day, there is no cause for alarm.

³⁵ *Campaigntrack Victoria Pty Ltd v The Chief Executive, Department of Justice and Attorney-General & Ors* [2016] QCA 037 per Applegarth J at [48].