QCAT HYBRID CONFERENCING PROCESSES: ADR AND CASE MANAGEMENT

Justice Alan Wilson*

The Queensland Civil and Administrative Tribunal ('QCAT') is a new star in the constellation of Australian State 'super tribunals', replicating some (but not all) of the jurisdictions, structure and procedures of older similar tribunals like the Victorian Civil and Administrative Tribunal ('VCAT') and the State Administrative Tribunal ('SAT') in Western Australia.

Its governing legislation[1] places a heavy emphasis on the provision of speedy and inexpensive justice through the use, in particular, of alternative dispute resolution ('ADR') techniques.

Using ADR extensively in any new, large Queensland tribunal has been a prominent theme since QCAT was first envisaged by the Queensland Government. The Panel of Experts[2], whose reports recommended the advent of the Tribunal to the government, expressed strong views that ADR must be a vital part of its operations.

Their enthusiasm was subsequently enshrined in both the legislation and in the Tribunal's operations and structure. From the outset; for example, the new registry structure of QCAT had, and has maintained, a group specifically charged with the effective use of ADR throughout the Tribunal's many jurisdictions (over 200).

The legislative emphasis on ADR is vivid and inescapable. The *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ('*QCAT Act*') sets up expectations of the Tribunal, and then makes it clear that ADR will be central to the achievement of those expectations.

The path to ADR in the *QCAT Act* is as follows: a primary object of the Act is to '*have the tribunal deal with matters in a way that is accessible, fair, just, economical, informal and quick*';[3] and the functions of the Tribunal include the obligation to '*ensure proceedings are conducted [in a way that is]… as quick as is consistent with achieving justice*'.[4]

Then, s 4(b) specifically requires the Tribunal 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 use of ADR processes is embedded elsewhere in the legislation; for example, in s 69, which sets out the purposes of a Compulsory Conference, and in s 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 referral to ADR occurs in s 4(b): '*if appropriate*'.

QCAT has taken the view from the outset that these provisions comprise a statutory imprimatur requiring that the Tribunal strive to avoid adversarial hearings, if that is appropriate and possible, and use ADR in inventive and thoughtful ways. It has taken that

* *Justice Alan Wilson is Judge, Supreme Court of Queensland and President, Queensland Civil and Administrative Tribunal.*

charge to heart, so that what it does now includes much more than traditional mediation. It has developed a hybrid model, combining elements of mediation and case management, which we think is working well.

Is ADR appropriate for administrative review matters?

Using these techniques in administrative review matters has not been without controversy. That is unsurprising: eminent jurists and commentators have questioned whether ADR will or should have a role to play in administrative law.

Lord Irvine said in 1999 that, while ADR has an expanding role within the civil justice system '*… there are serious and searching questions*' to be answered about its use, and that it is '*naïve*' to assert that all disputes are suitable for ADR and mediation. By way of example, he cited cases concerning the establishment of legal precedent, administrative law problems, and cases which '*… set the rights of the individual against those of the State*'. The use of ADR in these cases, he said, must be approached with great care.[5]

Commentators have also expressed concern about the dangers of the '*vanishing trial*' and the privatisation of justice.[6] As Bondy *et al* ask, is the principle of public accountability served by mediation? How might its increased use impact upon the supervisory jurisdiction of the courts over the activities of decision-makers and public bodies? It has also been suggested that, in the field of public law, the radiating effect of court judgments on decision-making by public bodies is an important check on the authority of State.[7]

In the United Kingdom the special status and function of public law was recognised in a government pledge, in 2001, to use ADR to resolve disputes involving government departments wherever possible; *but*, the pledge specifically excluded public law and human rights disputes.[8]

Even in Britain, however, there is a divide at very high levels between those who believe ADR does have a role to play in public law, and others who contend that its role must be quite limited.

Lord Woolf said in his judgment in *Cowl*[9] that, in public law disputes, both sides must now be

> … acutely conscious of the contribution Alternative Dispute Resolution could make to resolving disputes in a manner that both meets the needs of the parties and the public, and saves time, expense and stress … Today, sufficient should be known about ADR to make the failure to adopt it, in particular when public money is involved, indefensible.

At QCAT we have concluded that the legislative exhortations in our Act are so plain, and so strong, that to exclude or limit the use of ADR in any of our jurisdictions would fly in the face of parliament's obvious intention.

We have then, from the outset, striven to use ADR in appropriate ways in our administrative law cases.

The QCAT Administrative Review jurisdiction

The Tribunal has a vast array of jurisdictions under the heading of General Administrative Review including, for example:

(a) Decisions made by a Building Services Authority regarding the rectification of work, insurance claims, exclusions and bans for domestic and commercial building work;

(b) Review of consumer credit matters;

(c) Disaster compensation;

(d) Licensing of drivers and vehicles;

(e) Decisions about drugs, and drug and poison licences;

(f) Decisions about prohibiting persons from entering educational institutions;

(g) Management of explosives;

(h) Compensation for exotic diseases;

(i) Regulation of: films; food businesses; funeral benefit schemes; casinos and gaming machines; motor vehicle insurance; wildlife management; taxis; public transport; retirement villages; and road uses;

(j) Review of decisions made by the Commissioner for Fair Trading about motor dealers;

(k) A wide range of decisions about horse racing.

How QCAT uses ADR

As a matter of policy, in line with QCAT's statutory foundations, almost no matter goes to a final hearing in the Tribunal without, at least, a directions hearing at which ADR is discussed with the parties and, in the majority of cases, subsequently undertaken.

The favoured ADR technique is the *Compulsory Conference*, under s 69. The conference is conducted by a QCAT Member with the same adjudicative powers as the Member/s who will preside and hear the matter at its final hearing. The effect is equivalent to judicial mediation – that is, where a judge acts as a mediator.

The statutory purposes of a Compulsory Conference are identified in the legislation as:

(a) The identification and clarification of the issues in dispute;

(b) Promoting settlement;

(c) Identifying the questions of fact and law to be decided;

(d) If the proceeding is not settled, to make orders and give directions about the future conduct of the proceeding;

(e) To make any other orders or directions the presiding Member considers appropriate to resolve, or encourage the resolution of, the dispute.

Our Members have embraced these conferences and used them thoughtfully, and inventively. What they commonly report is that, in the arena of a Compulsory Conference, parties have an excellent opportunity to explain their cases and positions; to reach a better understanding of their opponent's position; to explore, in the light of that understanding, avenues for resolution; and, if the matter cannot be resolved, to be informed about what is needed to take the matter to a hearing as speedily, inexpensively, and efficiently as possible.

What the figures show

Statistics from our first nine months of operation show 205 Compulsory Conferences in General Administrative Review matters, of which 58 were successful, 53 remain the subject of on-going management, and 94 were unsuccessful.

The second figure, comprising about 26% of all matters, reflects cases where the Presiding Member has usually been of the view that the matter can ultimately settle and, for that reason, has directed a second Compulsory Conference for the purpose of continuing discussions, further assisting the parties toward resolution, and giving appropriate directions.

We struck some difficulty incorporating this variant into our statistics; in truth, they show that we are settling over 50% of matters at a Compulsory Conference. We also see that, even in matters which do not resolve, hearings are shorter and more efficient.

There is nothing surprising in QCAT's figures.[10] In the UK, research in 2009 has shown that most review claims are settled (over 60%) and that most settlements are perceived as resulting in positive outcomes for the claimants.[11]

The reception of Compulsory Conferences

One of our Members has solicited views from Brisbane legal practitioners who work regularly in the Administrative Review jurisdiction. She has collated their responses; here are some of the more interesting:

> The process (i.e. Compulsory Conferences) **forces decision-makers to think early about the merits of their decision**. In the setting of a Compulsory Conference it can be beneficial for a respondent to have the decision-maker think specifically about the respondent's case. Even if this does *not lead to a resolution, the parties will often take large strides towards a reduction of issues...*
>
> 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.**
>
> Compulsory Conferences are proving to be a very effective vehicle to achieve early resolution. They have been a mechanism to have the parties **sit down and talk at an early stage**. In every Compulsory Conference in which I have been involved, the Member has read the file and been aware of the party's position and that has been of considerable assistance.
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> **Initially I was opposed to these conferences because, by its nature, proceedings involving Administrative Review are inquisitorial, by way of hearing de novo, and require the Member to make the 'correct and preferable' decision.** It is not for the parties to agree upon a result but rather for the Member to decide the matter afresh**. Upon further reflection and after attending a number of conferences I am impressed that they offer an arena for open and frank discussion which is worthwhile and which need not detract from the Member's primary role as a decision-maker. At best, if all necessary matters can be agreed upon between the parties and the Member, the matter can effectively be decided by consent. Even if that does not occur, the parties can agree on a joint Statement of Facts and submissions on any outcome.**

Granted this is a long way from hard-edged research material but, in each instance, a lawyer experienced in an administrative law jurisdiction has been prepared to write these views down and permit their publication.

Does ADR add value to Administrative Review?

Many cases in this jurisdiction involve technical legal arguments with little or no active participation by the claimant, whose involvement is usually confined to giving instructions,

signing affidavits and the like. Remedies are sometimes remote from, and academic for, the claimant and will not necessarily resolve substantive personal issues.

ADR can, in those circumstances, have some attractions and benefits for individual participants because it provides an arena in which they may be heard, and take an active part in the unfolding of their case.

The Compulsory Conference arena may also be seen as less threatening than a formal hearing room. As Bondy et al observed:

> *Mediation could therefore **afford individuals an opportunity to take part in negotiations and present their own narrative** … the sense of empowerment arising from involvement in shaping and agreeing the outcome may be a positive experience, in contrast with the alienation that parties may experience when divorced from the process. This sense of empowerment can in itself be regarded as a form of positive outcome.*[12]

Research in the UK and within QCAT suggests that the matter of process (procedural justice) is often perceived as being as important as outcomes (substantive justice) and that satisfaction with both process and outcome can be inter-related.

Thus, a disappointing result might be more acceptable to a party if it is reached in a way that the party perceives is fair or in which the party believes he or she has been heard, and understood.[13] As the passages set out earlier suggest, that process of communication is likely to be enhanced in a Compulsory Conference.

Ancillary benefits of Compulsory Conferences

QCAT Members have found that Compulsory Conferences may serve a range of useful purposes even if they fall short of achieving a negotiated compromise.

In particular they provide an opportunity for frank discussion involving the parties and the Member and may include forms of 'reality testing' of each party's contentions and arguments. There is no prohibition or inhibition upon the presiding Member expressing an informed view about the likely outcome of the proceedings. That will usually occur privately in caucus with individual parties and is not prejudicial because the presiding Member cannot (unless all the parties and the Member agree) continue in the matter or sit on the Tribunal which ultimately hears it.

Parties may come to a fuller appreciation of weaknesses and decide not to proceed. Information relevant to each party's perception of its case may be exchanged, expanded and clarified.

Conclusion

Abraham Lincoln, then a Congressman, 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.

QCAT sees no reason to ignore this sage observation in the arena of Administrative Review, notwithstanding the particular constraints said to operate in that jurisdiction. Its experience with its statutory tools including, in particular, Compulsory Conferences, has reinforced its perception that they offer a range of uses in most areas of administrative law.

Endnotes

1 *Queensland Civil and Administrative Tribunal Act 2009*.

2 Queensland, *Parliamentary Debates*, 17 June 2009.

3 *QCAT Act*, s 3(b).

4 *QCAT Act*, s 4(c).

5 *Inaugural Lecture to the Faculty of Mediation and ADR* (27 January 1999), <www.dca.gov.uk/speaches/1999/27-1-99.htm>.

6 Bondy, Mulcahy, Doyle and Reid, 'Mediation and Judicial Review: an Empirical Research Study' [2009] *The Public Law Project* (The Nuffield Foundation) 1, 3.

7 Bondy, Doyle and Reid, 'Mediation and Judicial Review – Mind the Research Gap', [2005] *Judicial Review* 220.

8 UK Government Consultation Paper, *Access to Justice with Conditional Fees* (March 1998).

9 *R (Cowl) v Plymouth City Council* [2001] EWCA Civ 1935.

10 It has been acknowledged that QCAT's present statistics are inadequate. Further analysis and refinement will, it is expected, indicate an average settlement rate of 50% - 60% of Administrative Review cases.

11 Bondy and Sunkin, 'The Dynamics of Judicial Review Litigation: the Resolution of Public Law Challenges before Final Hearing', [2009] *Public Law Project* 1; and see, too, Bondy and Sunkin 'Settlements in judicial review proceedings' [2009] *Public Law* 237.

12 Bondy et al, above n 6, 37-38.

13 Genn at al, 'Tribunals for Diverse Users' (2006) *DCA Research Series* 1/06, January, 194; and, see Ashman and Joachim, 'Consumer Satisfaction: a Case Study from an Australian Guardianship Jurisdiction' [2010] 18(1) *Australian Journal of Administrative Law*.