7th Annual Government Lawyers' Conference

Law Society House, Brisbane
31 May 2013

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PROCEDURAL FAIRNESS v MODERN TRIBUNALS: CAN THE TWAIN MEET?

QCAT's first Deputy President Judge Fleur Kingham coined the phrase '*Actively Fair*' to describe how the Tribunal planned, from its inception, to go about its work. It has, rightly, stuck. The term nicely encapsulates what the legislature plainly intended to enshrine in the QCAT Act[1]: the provision of dispute resolution services to the citizens of Queensland that were accessible and speedy and economical but also just, and fair.

The need to balance these things is vivid in the Act. QCAT must deal with matters in a way that is '*accessible, fair, just, economical, informal and quick*'[2]. It must ensure proceedings are '*conducted in an informal way that minimises costs to the parties, and is as quick as is consistent with achieving justice*'[3]. It is not bound by the rules of evidence or the practices or procedures of courts,[4] and must act with as little formality and technicality and with as much speed as it can;[5] and, it can do '*whatever is necessary for the speedy and fair conduct of the proceeding*'.[6] Parties themselves are required to act quickly,[7] and are subject to sanctions and penalties if they do not.[8]

But this emphasis does not allow the Tribunal to pursue speedy resolution at all costs. In all proceedings it must '*act fairly and according to the substantial merits of the case*'[9] and '*observe the rules of natural justice*'[10].

It must meet these obligations while also discharging an additional burden which is not imposed upon courts: fulfilling an overarching responsibility to ensure that parties understand what is going on – '*that each party understands… the practices and procedures of the tribunal… and the nature*

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1 *Queensland Civil and Administrative Tribunal Act* 2009 (Qld).
2 QCAT Act s 3(b).
3 Ibid s 4(c).
4 Ibid s 28(3)(b).
5 Ibid s 28(3)(d).
6 Ibid s 62(1).
7 Ibid s 45.
8 See e.g. dismissing, striking out or deciding if party causing disadvantage (s 48); and costs against party in interests of justice (s 102).
9 QCAT Act s 28(2).
10 Ibid s 28(3)(a).

of assertions made in the proceeding and the legal implications of the assertion… (and) any decision of the tribunal'[11].

QCAT and other tribunals are not, however, alone in having to operate under the aegis of these statutory imperatives. They are echoed in the Queensland courts in r 5 of the UCPR[12], although in less emphatic terms. (There is another noteworthy difference, of course: the UCPR are subordinate legislation, and lack the force of an act of Parliament[13].)

This emphasis on speed and the efficiency in decision-making bodies within the justice system reflects a sea change in the way the judicial arm of our Westminster model of government, and society, now seek to address the individual's right to have access to state-provided dispute resolution.

Two factors have propelled that change: the growth in individual rights, and increasing pressure from the Executive and Parliament upon courts and tribunals to be 'productive' in the sense that more services are to be provided to more citizens, but at lesser cost to society. Both factors are usually categorised in very general terms as 'access to justice'.

Individual rights have expanded with legislation which gives new substantive rights to many large groups like consumers, employees, and tenants. As the governments which grant these rights recognise, the possession of them is valueless if the means of vindication and adjudication are not also made available through access to courts, and tribunals.

Those dispute resolution bodies have, in turn, adapted by moving from a system which ensured a litigant's substantive rights were always paramount, and could not usually be defeated by procedural steps, to one which places a heavy emphasis upon efficient case management, accompanied by serious sanctions for parties who breach procedural guidelines.

The difference is between Lord Bowen's 1883 statement '*Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy*'[14] and Lord Woolf's observation in 1999 that courts could not, and would not, tolerate non-compliance with time limits for procedural steps.[15]

In just over a century the dispute resolution system provided by courts has moved, then, from one in which the parties dictate the pace, with virtually no interference, to one where courts have overarching power to manage their lists and will use that power where a party is acting a way which involves the inefficient use of a public resource – judges and courtrooms, and court staff.

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11 Ibid s 29(1)(a)(i) and (ii).
12 *Uniform Civil Procedure Rules* 1999 (Qld).
13 *Harrington v Low* (1996) 190 CLR 311.
14 *Clarepede & Co v Commercial Union Association* (1883) 32 WR 262, 262.
15 *Biguzzi v Rank Leisure plc* [1999] 4 All ER 934, 940.

This approach has been given the highest imprimatur in the High Court's decision in *Aon v ANU*[16]. But before we talk about that case it is worth diverting to the death throes, as it were, of the old system and what happened in an English case usually called *BCCI – Three Rivers*[17].

In that case the trial court had decided that depositors with BCCI had no realistic prospect of establishing that Bank of England officials knowingly acted unlawfully with the intention of damaging them (or reasonable foresight of any damage), and therefore gave summary judgment in favour of the Bank. That decision was affirmed by the Court of Appeal but overturned by the House of Lords, in which the majority disregarded an important principle of modern case management: that of balancing 'pure' justice against court and litigant resources. In effect, the lower courts identified the case as futile and removed it from their lists, but the highest court clung tenaciously to the old dispensation and said, in effect, that even parties with very poor cases were still entitled to their day in court – and, of course, the chance to clog up lists and delay other more meritorious cases.

Sadly – and very expensively – the trial court, the Court of Appeal (and the dissenting judges in the House of Lords) were proved right. When the trial eventually commenced it proved a futile exercise, and collapsed on day 256. The costs to the defendants alone were thought to be in the region of 80 million pounds. The cost in terms of judicial time was incalculable.[18]

This sea change involves something more than just a shifting of the goalposts. As a New Zealand academic lawyer, Les Arthur, has pointed out in a recent article in the Journal of Judicial Administration[19], intrusive modern case management techniques and their rigorous application by courts and tribunals reflect a new view about the fundamental purpose of a civil trial: that, while the parties themselves are ultimately and primarily concerned with winning their litigation, the justice system itself views the overall purpose of a trial now as one which seeks to arrive at a *just* decision at a reasonable cost to the parties (and society), within a reasonable time.

As Arthur points out this involves, in a sense, a change in the way our adversarial system defines 'justice'. The change is from a definition which depends solely upon the decision of a court after the parties have used the adversarial system to exhaustion (i.e., 'justice' is measured by reference to the 'winning' outcome) to one which focuses more heavily on what he calls *justice on the merits*, which is the product of the cooperative ethic imposed by case management and associated modern court rules with their much greater emphasis on cooperation, candidness and respect for the truth.

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16 *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175.

17 *Three Rivers District Council and others v Bank of England (No 3)* [2001] 2 All ER 513

18 Adrian Zuckerman, 'Court adjudication of civil disputes: A public service to be delivered with proportion resources, within a reasonable time and at reasonable cost' (Speech delivered at the University of Melbourne, 21 September 2006).

19 Les Arthur, 'Does case management undermine the rule of law in the pursuit of access to justice?' (2011) 20 *JJA* 240.

In other words, the focus has shifted from a system in which there is scope for a stronger or richer party (unfettered by effective control by the courts of the conduct of proceedings) to intimidate or browbeat a weaker or poorer party to produce a resolution of the case which may be, as Lord Woolf noted, either unfair or achieved at a grossly disproportionate cost, or after unreasonable delay.[20]

This is the brave new world into which QCAT was thrust. Its statutory brief is, as we have seen from the provisions in its Act mentioned earlier, focused intensively upon process but not, of course, exclusively because it pays equal attention and gives equal weight to a just outcome. We must use the limited public resources we have efficiently and effectively but with a constant, unwavering eye upon just outcomes.

For reasons which should by now be apparent I see little difference between the approach our statute requires us to adopt, and that of the courts. The difference, if there is one, is simply a matter of scale. (In that context may I mention how astonishingly cheap the Tribunal has proved to be? In our first year the average cost to the citizens of Queensland of a QCAT matter, all the way to final resolution, was about $770.00. As we have grown better at our work, it has dropped to $618.00. The Attorney-General is right to describe us, as he has from time to time, as a '*lean, mean justice machine*'[21].)

The Tribunal has approached the work of balancing these statutory exhortations towards efficiency with achieving fair and just outcomes by focusing intensively upon the *issues* in each of the 30,000 or so matters which come to it each year.

In the context of an arena in which the presence of lawyers is not the norm and the legislation itself turns its face against legal representation,[22] the Tribunal has attempted to develop an ethos in which it meets its obligations of ensuring parties a fair hearing and also ensuring that they understand the case they must meet by, itself, focusing upon the primary issues on every possible occasion in which parties come before it and guiding the parties to a better understanding of those issues, and what they involve, and how a case about them can most effectively and efficiently be resolved, or adjudicated.

That focus helps to ensure that time is not wasted on irrelevant or minor matters; that the parties receive the guidance they are entitled to under s 29 of the QCAT Act; and, that ADR and hearing processes are as short and efficient as they can be.

The Tribunal – unsurprisingly, in light of this approach – expects of lawyers that they will provide assistance in this exercise.

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20 Lord Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales*, June 1995.

21 Queensland, *Parliamentary Debates*, Legislative Assembly, 30 April 2013, 1314 (Jarrod Bleijie, Attorney-General).

22 QCAT Act s 43.

You will best advance the interests of your clients if, from the first, you approach proceedings in the Tribunal with two paramount questions in mind:

1. What are the issues to be determined?

2. By what means can those issues be most quickly and inexpensively resolved?

A short diversion: QCAT has an undeserved reputation for being hostile to lawyers. That is wrong; its legislation does not encourage legal representation but the Tribunal always welcomes, in those cases where representation is justified, the contribution that lawyers can make.

Where tensions can arise between the Tribunal and lawyers is when the latter fail to acknowledge, and behave in a way that reflects, the new dispensation of the QCAT Act. In light of the obligations upon parties and the Tribunal to be quick and efficient we do not think it unreasonable to expect the same of legal representatives.

After three years of operation QCAT Members now have the regular pleasure of seeing good lawyers working, in numberless cases, in ways that show they also appreciate the new milieu and its cooperative ethos under which lawyers, parties, and the Tribunal work towards the best possible answer to those two questions.

That new approach has, as mentioned earlier, the highest approval in the High Court's decision in *Aon v ANU*. The decision there was made within the ambit of modern court procedure rules like r 5 of the UCPR which emphasise the overriding principle of achieving a just, timely and cost effective resolution of proceedings. The case involved a very late request to adjourn a long trial, without an adequate explanation. As the High Court observed, to allow the adjournment would '*… undermine confidence in the administration of justice*'.[23]

It is now appreciated that '*the courts are concerned not only with justice between the parties… but also with the public interest in the proper and efficient use of public resources*'[24]. QCAT is no different and has, as you will appreciate, the full statutory armory to act in a way which ensures parties do not misuse it (or public resources) or disadvantage their opponents.

How, then, has it gone about balancing those powers with the need to ensure parties are granted their full measure of procedural fairness, and natural justice?

First, by not applying its rules in a harsh or unreasonable way. Unsurprisingly, lay parties who take the time to digest the QCAT Act and

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[23] *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175, 195 per French CJ.

[24] Ibid 189.

Rules can become over excited about an opponent's minor infringements of them. The Tribunal has applied its legislation and rules equably and fairly and in a way which affords procedural fairness, while not allowing parties to offend the principles laid out in *Aon v ANU.*

QCAT has also had the advantage, unlike other large Australian Federal or State '*super'* Tribunals, of an internal Appeals Tribunal which can set benchmarks in these areas and, if necessary, ensure that outcomes are not harsh or unjust.

An example is *King v TIC Realty (No 4)*[25] in which a party objected to a decision extending, by five days, the time in which his opponent might file written submissions. When the extension was granted he sought reasons, as he was permitted to do under s 122 of the QCAT Act. In its reasons the Appeal Tribunal said that to have denied the extension '*… in the context of the legislative provisions governing the Tribunal's practices and procedures was inconceivable*'; and, that '… *denial would also have been against the plain tenets of justice and even handedness which the legislation, and principles of procedural fairness, dictate.*'

Secondly, the Tribunal will right wrongs to parties when they involve denials of procedural fairness. There are a large number of examples, particularly amongst the decisions of the Appeal Tribunal. In *Collins v Percival*[26], for example, parties applied to present evidence by telephone at the hearing, but one party did not appear. The Tribunal had consented to his appearance by telephone but failed to provide him with information about the procedure for the telephone hearing and, itself, failed to contact him after the hearing commenced. The Appeal Tribunal had no hesitation in finding that the distressed party had been denied procedural fairness.

Third, the Tribunal has been active in ensuring a proper balance of competing rights to be heard[27] and, also, that its Members and Adjudicators observe the applicable principles. In *Jimenez v Sternlight Investments*[28], a tenancy dispute, the Adjudicator failed to give reasons but simply said at the conclusion of the hearing that he thought one party, a real estate agent, was '*right*' and, when pressed for reasons, said that he preferred the real estate agents '*submissions*'. As the Appeal Tribunal observed, this involved a manifest failure to give proper reasons (as s 122 of the QCAT Act requires).

Unsurprisingly, the special demands and challenges presented by unrepresented parties have required careful and delicate steps when those parties press the boundaries of misconduct – for example, by failing to comply with rules or Tribunal directions in a way which exposes them to the most serious sanction – striking out.

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25 [2010] QCATA 105.
26 [2011] QCATA 245.
27 *Chapman v State of Queensland* [2011] QCATA 242.
28 [2011] QCATA 29.

Like the Courts, the Tribunal uses '*guillotine*' orders, but attempts to express them in plain and simple language so that parties have a clear warning of the risk attached to non-compliance.

The system is supplemented, within QCAT, by an institutional structure for file management which differs from the Courts, and involves individual management of each file by a nominated case officer. At the direction of a Tribunal Member that officer may take steps to supplement and enhance the process by which parties are lead to a full and proper understanding of Tribunal practices and procedures by, for example, writing warning letters if time limits in directions orders are breached.

All these stratagems form part of the balancing exercise we are here to discuss today.

But what can you expect, in practical terms, when you represent and appear for one of your clients in the Tribunal?

Are you at risk of being brow-beaten by a Tribunal Member into directions involving a timetable which will present impossible challenges for you? How do you resist pressure from the Tribunal itself, in circumstances where you believe there is a risk your client will be denied procedural fairness?

Your first appearance in a Tribunal matter will usually be at an initial directions hearing. The presiding Member will be looking to identify the answers to the two questions posed earlier: what are the issues, and how can they most efficiently and effectively be resolved or adjudicated?

Preparation for that hearing by legal representatives will be most effective if lawyers attend ready to show the presiding Member that they have pondered those questions, and are able to advance a timetable for, and appropriate steps in, the proceedings which realistically reflects answers to them; and that those answers also reflect a proper balancing of speed, and economy, with procedural fairness.

This early focus upon clarifying the issues and moulding a process that will succinctly but justly address them has paid dividends. It is further supplemented by the usual second step, the Compulsory Conference, which is a mixed ADR and case management process presided over by a member who is usually at the same level as the ultimate adjudicator, if the matter goes to hearing. If the matter cannot be fully resolved at the CoCo, more directions are likely to issue from it to ensure that the parties' preparation for hearing remains focussed, and efficient.

The Members of the Tribunal are keenly aware of the public interest requirements that proceedings be conducted properly and efficiently and that the costs of those proceedings be confined insofar as is reasonably practicable. As you will appreciate delays in the conduct of proceedings impacts upon the parties themselves, on parties in other matters, and on you and your practice. In a busy but resource-poor tribunal like QCAT, taking up

Members' time with disputes arising out of inefficiency or non-performance of directions has immediate adverse effects upon many other parties waiting to have their matters determined.

Another aspect of these modern case management practices is proportionality: so far as possible, resolving the issues in each case in such a way that the costs to the parties (and the public) are proportionate to the complexity of the subject matter in dispute.

Both lawyers and the Members of the Tribunal are required to assist in achieving this purpose. The powers of management expressly conferred on Members of the Tribunal to reduce delay and refine issues are extensive. They include powers to give directions as to the conduct of the hearing,[29] to limit the number of witnesses who may be called or documents which may be tendered,[30] and to specify the time that may be taken by a party in presenting their case.[31] The Members must, however, exercise these powers in a manner that does not detract from the principles of natural justice.[32]

The Tribunal has, after over three years, experienced Members who have expertise in managing cases in many of our 160 or so jurisdictions.

They will – as the QCAT Act mandates – be firm but fair in giving directions for the conduct of matters which are speedy but balanced and achievable if the parties remain focussed upon the effective resolution of the principal issues and are not diverted by arid skirmishing; and, in setting hearing times which are often strictly limited, but reflect the overarching principles of balance, and proportionality.

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29 QCAT Act s 62(1).
30 Ibid s 95(2).
31 Ibid s 95(3).
32 Ibid s 28(3).