Litigation Lawyers

LEVEL TWENTY SEVEN CHAMBERS

QBCC CONFERENCE

QBCC DECISIONS–PRACTICAL ASPECTS OF ADMINISTRATIVE LAW

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1. INTRODUCTION

1.1 This paper aims to review a number of aspects of administrative law and how they can be, and are, applied in Queensland Civil and Administrative Tribunal ("QCAT") matters.

1.2 It is not intended to examine the law relating to administrative review, but rather to make observations about some aspects of the administrative process as it operates in QCAT.

1.3 It also does not seek to cover judicial review in the Supreme Court, nor the interplay as to when it is appropriate to seek judicial review as apart from administrative review.

2. GENERAL CONSIDERATIONS FOR MERITS REVIEW

2.1 Obligation of QCAT to determine its jurisdiction

2.1.1 The review jurisdiction of QCAT is triggered where there is a reviewable decision which the applicant seeks to review. That is the only jurisdictional fact that QCAT is required to identify.[1]

2.1.2 In the *JM Kelly* case, the Judge went to some lengths to explain why a decision, even if made totally erroneously by the decision-maker is still a decision. This is the case, even if the decision was baseless and the necessary "jurisdictional facts" upon which such decision should be made do not exist. The important issue is that there is a decision which purports to have been made in accordance with the statute.

2.1.3 To put another way, jurisdiction is not ousted by the fact that an original decision-maker's error is such that the decision would be declared a nullity if challenged before a court.

2.1.4 Therefore, in relation to the QBSA, a "reviewable decision" is a decision which falls within, or at least purports to do so, s 86(1) of the *Queensland Building Services Authority Act ("QBSA Act")*. If that occurs, then QCAT has jurisdiction.

2.1.5 Importantly, a letter indicating QBSA is investigating a matter, and might in the future make a decision, clearly does not constitute the making of a decision.

2.2 Determining jurisdiction in the context where statutory insurance claim is on foot

2.2.1 In deciding whether there is jurisdiction to a review a decision under s 86(1) of the *QBSA Act*, consideration must be given to s 86(2), which provides circumstances when the Tribunal must not review a decision.

[1] *JM Kelly Project Builders v QBSA* Unreported (9 May 2013) GAR375-10 QCAT.

2.2.2 There has (previously) been contention recently regarding the ability to extend time pursuant to s 61 to bring such a decision within time and therefore technically reinstate its status as "reviewable".

2.2.3 Decisions concerning insurance claims that are reviewable in QCAT:

> ***"86 Reviewable decisions***
>
> *(1) Each of the following decisions of the commission under this Act is a **reviewable decision**—*
>
> *…*
>
> *(e) a decision to give a direction to rectify or remedy or not to give the direction;*
>
> *(f) a decision that building work undertaken at the direction of the commission is or is not of a satisfactory standard;*
>
> *(g) a decision about the scope of works to be undertaken under the statutory insurance scheme to rectify or complete tribunal work;*
>
> *(h) a decision to disallow a claim under the statutory insurance scheme wholly or in part;*
>
> *(i) a decision that a domestic building contract has been validly terminated having the consequence of allowing a claim for non-completion under the statutory insurance scheme;*
>
> *…"*

2.3 <u>What is "late"?</u>

2.3.1 More than 28 days since decision was served (see QCATA, s 33(3))

2.3.2 The rationale for this is that the statutory insurance claim should be able to progress. For example - perhaps a payment has been made.

2.4 <u>QCAT's discretion to grant extension of time</u>

2.4.1 The Tribunal has jurisdiction to extend time to review some decisions but is prohibited from reviewing others in certain circumstances

> *"**61 Relief from procedural requirements***
>
> *(1) The tribunal may, by order—*
>
> *(a) extend a time limit fixed for the start of a proceeding by this Act or an enabling Act; or*
>
> *(b) extend or shorten a time limit fixed by this Act, an enabling Act or the rules; or*
>
> *(c) waive compliance with another procedural requirement under this Act, an enabling Act or the rules.*
>
> *(2) An extension or waiver may be given under subsection (1) even if the time for complying with the relevant requirement has passed.*
>
> *(3) The tribunal can not extend or shorten a time limit or waive compliance with another procedural requirement if to do so would cause prejudice or detriment, not able to be remedied by an appropriate order for costs or damages, to a party or potential party to a proceeding.*
>
> *(4) The tribunal may act under subsection (1) on the application of a party or potential party to the proceeding or on its own initiative.*

(5) The tribunal's power to act under subsection (1) is exercisable only by—

(a) the tribunal as constituted for the proceeding; or

(b) a legally qualified member, an adjudicator or the principal registrar."

2.5 Decisions for which QCAT has no jurisdiction

"86F Decisions that are not reviewable decisions

(1) The following decisions of the commission under this Act are not reviewable decisions under this subdivision—

(a) a decision to recover an amount under section 71;

(b) a decision to give a person a direction to rectify or remedy, and any finding by the commission in arriving at the decision if—

(i) 28 days have elapsed from the date the direction was served on a person and the person has not, within that time, applied to the tribunal for a review of the decision; and

(ii) the commission has—

(A) started a disciplinary proceeding against the person under part 6A; or

(B) served a notice on the person advising a claim under the statutory insurance scheme has been approved in relation to the building work relevant to the direction; or

(C) started a prosecution, or served an infringement notice, for an offence against section 73 in relation to the direction;

(c) a decision about the scope of works to be undertaken under the statutory insurance scheme to rectify or complete tribunal work if 28 days have elapsed since the decision was served on the building contractor and the contractor has not, within that time, applied to the tribunal for a review of the decision;"

2.5.1 In *QBSA v Watkins* [2014] QCA 172 (at [8] and [13]-[16] per Douglas J, with whom McMurdo P and Morrison JA agreed) the Court of Appeal confirmed that the *Tribunal* does not have power to extend time to review a scope of works decision where the review was not commenced by the contractor within the prescribed 28 days.

2.5.2 The decision approved the statement by Dr Forbes decision at first instance that, *"The prohibition in section 86(2) defines and limits the jurisdiction of the Tribunal ... It is not merely a procedural rule that may be relaxed under section 61 of the QCAT Act. It is a mandatory substantive rule of law, and a condition of jurisdiction."*

2.5.3 Section 86F(1)(c) is framed so that time runs by reference to what the **building contractor** does and not some other party (such as a director or a former director/contractor). See *Namour v QBCC* [2014] QCA 72 at [18] – [19] per Fraser JA (with whom McMurdo P and Douglas J agreed).

2.6 What if there is jurisdiction for QCAT to review, but the insurance claim has advanced?

2.6.1 The Court of Appeal says that the consequent liability of the contractor or director under ss 71(1) and 111C is not affected (unless certain circumstances exist)…

2.6.2 Sections 71(1) and 111C of the QBCC Act provides the Commission with a right of recovery as a debt, payments made under the statutory insurance scheme which are not dependent upon the Commission establishing the legal correctness of:

(a) A determination made by it to make the payment; or

(b) Any **anterior step taken by it that led to the payment** being made;

2.6.3 It is not enough to avoid liability for a builder to point to a mere error of fact connected with the claim process;

2.6.4 **The scheme of the QBCC Act is that a building contractor or other interested person who wishes to challenge such decisions should make the challenge before the Commission pays under the policy**. Where there is no challenge by the building contractor, liability under section 71(1) arises, whether or not one of the anterior decisions might have been the subject of a challenge. A director caught by section 111C(6) is similarly unable to challenge one of those anterior decisions in a proceeding to recover a debt; and

2.6.5 There is limited scope to defend a claim made by the Commission to recover a payment made under the statutory insurance scheme on the basis that the payment sought to be recovered was not validly made under the QBCC Act.

2.7 Queensland Court of Appeal decisions:

- *QBCC v Turcinovic* [2017] QCA 77 – see at [23] to [28] and [32] per North J (with whom Morrison and Philippides JJA agreed). Note the High Court refused special leave in *Turcinovic v QBCC* [2017] HCASL 306

- *Samimi v QBCC* [2015] QCA 106 – see at [30] per Boddice J (with whom McMurdo P and Morrison JA agreed)

- *Namour v QBCC* [2014] QCA 72 – see at [24]-[25] per Fraser JA (with whom McMurdo P and Douglas J agreed)

- *Mahony v QBCC* [2013] QCA 323 – see at [34] per Gotterson JA (with whom McMurdo P and Douglas J agreed). Note the High Court refused special leave *Mahony v QBCC* [2014] HCASL 93

- *Lange v QBCC* [2011] QCA 58 – see at [72] and [73] per Margaret Wilson AJA (with whom Lyons A agreed)

2.8 The “Real” Agenda and How to Deal

2.8.1 Some applications for review of anterior decisions are brought by contractors who ultimately seek to:

(a) Delay the progression of an insurance claim (by then applying for a stay); or

(b) Prevent liability pursuant to s 71 / 111C by obtaining having an anterior decision overturned.

2.8.2 In relation to the latter objective, would a successful review actually have this effect?

2.8.3 The Court of Appeal says no:

> *"Section 71(1) confers a right to recover as a debt from any of the designated persons "any payment on a claim under the insurance scheme". It is sufficient for recovery under the section that the authority have made a payment on a claim under the insurance scheme. The statutory right to recover is not conditioned upon the legal quality of a determination by the authority to make the indemnity payment or of any anterior step taken by the authority that had led to the decision to pay."*
>
> - *per Gotterson JA in Mahony at [34].*

> *"Neither the reasonableness of a payment made by the respondent nor the amount owing by a claimant under the insurance scheme to the contractor is made a criterion of liability under s 71(1). Those criteria would be relevant in a recovery action under s 71(1) only if they were relevant to the determination of the question whether the amount sought to be recovered by the respondent is the amount of the "payment on a claim under the insurance scheme". The appellant argued that they were made relevant by the statutory insurance policy. The relevant provision is in cl 1.4(a), which applies where the contractor had embarked upon the contract works. In such a case, the policy limits the amount of a payment by reference to "[the respondent's] assessment of the reasonable cost of completing the contract less the owner's remaining liability under the contract (exclusive of any amount by way of liquidated damages or damages for delay) at the date of termination of the contract…"."*
>
> - *per Fraser JA in Namour at [24].*

> *"The availability of both internal and external review of decisions made under the Act given by Div 3 of Pt 6 of the Act and of judicial review 15 under the Judicial Review Act 1991 suggests that there is limited scope for complaint about the legal quality of the decision-making in making a payment or the decisions anterior to it."*
>
> - *per North JA in Turcinovic at [28].*

2.9 <u>Dealing with this type of review:</u>

2.9.1 Look beyond the QCAT Form – what decision is in truth being challenged? What outcome is the Applicant seeking?

2.9.2 Consider the status of the relevant insurance claim – has it advanced to payment?

2.9.3 If the application for review is misconceived or out of time, consider an Application to Dismiss / Strike Out.

2.9.4 This analysis can be done in the early stages of the review. Being informed in relation to the whole picture (including the insurance claim process) for the purpose of the compulsory conference may assist in resolving the matter early, or narrowing the issues.

2.10 <u>The nature of Merits Review</u>

2.10.1 Pursuant to s 20(2) of the *QCAT Act*, QCAT is to decide a review matter by way of fresh hearing on the merits.

2.10.2 The role of QCAT therefore is to reconsider the original decision and make the correct and preferable decision.[2]

2.10.3 As stated above, QCAT has jurisdiction whether or not the decision being reviewed was properly made. That is, even if a decision was made beyond jurisdictional limits, as there has in fact been a decision, the purported decision is capable of review and cannot be struck out.

2.10.4 Even if there has been an error in the decision process, it is QCAT's job to make a fresh decision, and the Tribunal is not required to identify error in either process or reasoning that lead to the decision being made. As stated by Kiefel J in *Shia v Migration Agents Registration Authority*:[3]

> *"The argument put by the respondent on this appeal, that the Tribunal's exercise of power is dependent upon the existence of error in the original decision, Smithers J denied that the Tribunal was limited to something of a supervisory role. As his Honour said, the Tribunal is authorised and required to review the actual decision, not the reasons for it…"*

2.10.5 Conversely, if in fact no decision had been made, then QCAT would lack jurisdiction and an Application to Review could be struck out.

2.11 Correct and preferable

2.11.1 The meaning of this phrase was discussed by Wilson J in *QBSA v Meredith:*[4]

> "The term commonly used in similar legislation touching administrative review and, I think, the better expression is "the correct or preferable" decision – for reasons explained by Kiefel J in *Shia v Migration Agents Registration Authority*."

2.11.2 In *Shia*[5] Kiefel J stated at [140]:

> *"The object of the review undertaken by the Tribunal has been said to be to determine what is the "correct or preferable decision". "Preferable" is apt to refer to a decision which involves discretionary considerations. A "correct" decision, in the context of review, might be taken to be one rightly made, in the proper sense. It is, inevitably, a decision by the original decision-maker with which the Tribunal agrees. Smithers J, in Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd, said that it is for the Tribunal to determine whether the decision is acceptable, when tested against the requirements of good government. This is because the Tribunal, in essence, is an instrument of government administration."*

2.11.3 Therefore:

- "Correct" is taken to refer to situations in which the Tribunal considers there is only one acceptable decision.
- "Preferable" refers to situations where it considers there to be more than one correct decision.[6]

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[2] *Kehl v Board of Professional Engineers of Queensland* [2010] QCATA 58 [9]; *JM Kelly (Project Builders) Pty Ltd v QBSA* QCAT GAR375-10 20 September 2013 at [62].
[3] [2008] HCA 31 at at [141].
[4] [2010] QCATA 50.
[5] *Shia v Migration Agents Registration Authority* [2008] HCA 31 at at [141].
[6] Also see the text *Principles of Administrative Law* at paragraph 8.6.1.

2.11.4 This also raises the procedural point. What if, very late in the review process, a party identifies a fresh document which is said to be critical? Must the Tribunal always adjourn to allow time to get such document in a quest for the perfect decision? Clearly, where further delay is unacceptable, there comes a time when it is preferable to proceed on the existing material, rather than further adjournment. Basically, this raises a balancing of the objects of the *QCAT Act* as listed in s 3.

2.11.5 The Tribunal is not bound by any concessions that the parties make in

3. PRELIMINARY STEPS IN THE REVIEW JURISDICTION OF QCAT

3.1 Documents Required to be filed in QCAT by QBCC

3.1.1 Section 21 of the *QCAT Act* provides:

> "*(1) In a proceeding for the review of a reviewable decision, the decision-maker for the reviewable decision must use his or her best endeavours to help the tribunal so that it can make its decision on the review.*
>
> *(2) Without limiting subsection (1), the decision-maker must provide the following to the tribunal within a reasonable period of not more than 28 days after the decision-maker is given a copy of the application for the review under section 37—*
>
> *(a) a written statement of the reasons for the decision;*
>
> *(b) any document or thing in the decision-maker's possession or control that may be relevant to the tribunal's review of the decision."*

3.1.2 In the normal circumstances, "*any document or thing in the decision-maker's possession or control that may be relevant to the Tribunal's review of the decision*" is relatively easy to identify. However, there are times when information is conveyed to a decision-maker on a confidential basis. What duties does the decision-maker have to provide such documents to QCAT?

3.1.3 In *Applicant VEAL of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs,*[7] the issue was whether a "dob-in" letter must be disclosed, notwithstanding the author had requested it be kept confidential. Prior to this case, the established law was that an adverse allegation must be disclosed only if it is "credible, relevant and significant" (per *Kioa v West*[8]). In *VEAL*[9] it was held that it was beside the point that the Tribunal (or therefore a decision-maker) purported to ignore the letter, as the allegations were clearly relevant to the veracity of the applicant's claim and could not be dismissed as completely lacking credibility. The necessity to disclose adverse allegations "*is not based on answering a causal question as to whether the material did in fact play a part in influencing the decision*". Fairness required that the substance of the allegations be revealed, but the applicant was not entitled to know the identity of his accuser, as there was public interest in allowing the tribunal to access information provided in confidence.

3.1.4 This suggests that information that is "credible, relevant and significant" should be included in the documents provided pursuant to s 21(2). However, in appropriate cases, it may be appropriate to redact confidential parts of a document.

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[7] (2005) 225 CLR 88.
[8] (1985) 159 CLR 440.
[9] *Applicant VEAL of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs* (2005) 225 CLR 88.

3.2 What constitutes the "record" of the QCAT hearing

3.2.1 There may be a breach of natural justice if a decision-maker bases a decision on evidence, findings or reasons not disclosed to the party, thus necessarily depriving them of the opportunity to address on the matter.

3.2.2 A party may well be surprised if a Member chose to consider the entire QCAT file, without identifying what was actually contained within that file. It is likely that a party will not have inspected the QCAT file, and will not know precisely what is contained therein.

3.2.3 As a result, it is clearly appropriate from a procedural perspective, for documents to be identified during the course of the hearing as documents to be considered. The way this has been done in the past is by marking them as exhibits.

3.2.4 The result is that the parties are clearly apprised of the documents which are to be considered when the QCAT Member makes the decision.

3.3 Cross Examination of the decision-maker?

3.3.1 Paragraph 5 (d) of the QCAT Practice Direction 3 of 2013 effective as from 6 May 2013 provides that:

> "*Because the Tribunal's role in merits review is to make the decision afresh, the decision make shall not give evidence or be cross-examined about why it made the decision. However depending on the nature of the particular review, the decision-maker may have other evidence to present. For example in a review of a decision by the Queensland Building Services Authority, a building inspector or engineer's evidence which was relied upon in the making of the decision…"*

3.3.2 Clearly, as a general rule, the decision-maker should not be cross-examined. In what circumstances might an applicant seek to cross-examine the decision-maker?

3.3.3 Unless a decision-maker has given evidence of primary factual finding, the only reason to cross-examine a decision-maker is an attempt to seek costs - that is, aiming to trigger s 102 *QCAT Act*. That would probably be best undertaken in a costs application after the QCAT decision is obtained.

3.3.4 Respect of any issues – particularly where a question of law is involved.[10]

4. COMPULSORY CONFERENCES

4.1 The aim of this part of the paper is to discuss planning and conduct of Compulsory Conferences in QCAT. The paper is not intended to be a definitive guide, but rather to assist in the approach to common issues that arise.

4.2 PRELIMINARY ISSUE: WHAT IS OUR PURPOSE IN ATTENDING?

4.2.1. We will all be familiar with the QCAT opening information, read out by Members that the purpose of the conference is to allow open discussion with a view to resolution, and failing resolution, to facilitate directions for the conduct of the matter.

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[10] *Re Martin and Commonwealth of Australia* (1982) 5 ALD 277; *Kuswardana v Minister for immigration & Ethnic Affairs* (1981) 35 ALR 186.

4.2.2. What however should be our aim as a participant in the conference?

4.2.3. We submit your aim should be:

- Firstly – to attempt to resolve the matter;
- Secondly – to simplify the matter; and
- Thirdly – to elicit information.

4.3 Scope of issues at CoCo

4.3.1 Power to Call a Compulsory Conference

Section 67 of the QCAT Act provides:

*"**67 Direction by tribunal or principal registrar***

(1) The tribunal or the principal registrar may direct the parties to a proceeding to attend 1 or more compulsory conferences.

(2) The principal registrar must give each party to the proceeding written notice of the compulsory conference, as stated in the rules."

Rule 69 of the QCAT Rules provides:

*"**69 Notice of conference***

(1) This rule applies if, under section 67 of the Act, the tribunal or the principal registrar directs the parties to a proceeding to attend a compulsory conference.

(2) The written notice of the conference given under section 67(2) of the Act must—

(a) state when and where the compulsory conference is to be held; and

(b) be given in the time stated in a practice direction."

Practice Direction 6/10 includes:

"4. If any proceeding is not completely resolved at a compulsory conference or wholly settled at a mediation the person presiding at the compulsory conference or the mediator must:

(a) remind the parties that evidence of anything said or done during the compulsory conference or mediation is not admissible at any stage in the proceeding;

(b) inform the parties that they may agree upon a list of issues to be filed, admitted into evidence, and used for the purposes of the hearing of the proceeding; and

(c) inform the parties that the person presiding or the mediator can help them to draw up, and sign:

(i) an agreed list of issues in dispute;

(ii) an agreed list of issues not in dispute."

4.3.2 Discussion

The QCAT power is an adjunct of its statutory role. In the review jurisdiction, that role is to decide afresh the "Decision Under Review".

It is important to note that QCAT's jurisdiction is limited to that. Even with consent of the parties, it does not have power to make decisions outside its jurisdiction.

4.4 When Should A Coco Be Held?

4.4.1 General

Of course, in the usual course, it is QCAT who calls the conference.

However, from time to time, it might be beneficial not to merely allow the usual QCAT timetable to be followed.

4.4.2 Why would you seek to adjust the QCAT Timetable?

The real issue is whether it would be beneficial for the parties to receive statements of evidence prior to conference.

It most matters, it will be clearly be necessary to receive the Applicant's material before conference, and there is little point to conference before that time.

In some matters however:

(a) There is no need to await statements of evidence – for example if there has been a stay application at which extensive evidence has already been given;

(b) The issues can be clear, because the matter turns on a narrow and discrete point. There can be no need for evidence;

(c) There might be a need for urgency and the usual listing date for a Conference might not be acceptable;

(d) The scope of the issues is not sufficiently clear to enable statements to be prepared, and an early conference would be beneficial to crystallise the issues to be dealt with.

The point arising from the above is that we are not constrained by QCAT's usual timetable. We can seek to adjust to accelerate or delay a conference if there is good reason.

4.5 Who Should Attend The Conference?

4.5.1 General

The QCAT notice will require a person with knowledge of the issues and standing to negotiate resolution to attend. That means the decision-maker.

Considerations however:

(a) Is the decision-maker relevant? (particularly significant for matters outside Brisbane)

(b) QBCC's current policy is for IRU officers to attend when there is an IRU decision.

(c) The decision-maker can commonly be a person who does not have technical knowledge. In those cases, it can be useful for technically skilled

person to attend – within QBCC, this would commonly be a Building inspector or certifier.

(d) It would be unusual to arrange for an external expert to attend. Experts attend conclaves, not conferences.

4.6 When can/should you seek attendance by telephone?

4.6.1 Frankly, some conferences have no real prospect of resolving matters. Where they are in a remote location, it is merely a waste of time and money attending in person.

4.6.2 In those instances, it seems more sensible to organise telephone attendance, for either or both lawyer and/or decision-maker.

4.7 Non-Parties attending?

4.7.1 QCAT does not have the power to direct attendance at conference by a non-party.

4.7.2 However, there is usually no objection to an interested non-party attending where their presence will assist to progress the conference.

4.7.3 Consider a complaint about defective building work. In those reviews:

(a) It is common that the other "stakeholder" will not have been joined as a party;

(b) Settlement can only occur at a Compulsory Conference if the parties to the conference can agree.

(c) In a review by an owner, who is unhappy that no DTR was issued – the only results in QCAT can be to issue a DTR, or proceed with the matter to hearing.

(d) In a review by a builder, who is unhappy that a DTR was issued – the only results in QCAT can be to withdraw the DTR or continue to hearing.

(e) If you concede at conference to change, then you will be making a fresh reviewable decision – and doing so "by consent".

(f) However, if the other stakeholder is present, even though not a party. There can be resolution reached at some mid-point. The possibilities for settlement are far wider.

4.8 Preparation Prior To CoCo

4.8.1 Position Statement.

A Position Statement is a useful tool to enable the lawyer to focus thoughts as to what the conference is about, and also to elicit input from the decision-maker.

This should be prepared at least 1 week prior to conference, to enable discussion to occur (meaning discussion with the decision-maker).

Normally the Position Statement can be given to the other side, usually at the conference.

That facilitates open discussion. It also can focus discussion in the format and covering the issues you have identified. That enables you to control the conference.

It is a tactical decision as to whether you give the Position Statement to the other side prior to conference.

4.8.2 Contents of Position Statement

The Position Statement does not need to re-state the case, or even the law.

It needs to state sufficient information to explain the QBCC position to the proceeding.

It should cover the issues in a non-contentious way, then moving to explain the stance of QBCC to the issue in a persuasive way.

4.8.3 Distribution of Position Statement

It might be helpful for the other party to have your position before the conference. In those cases, you might provide your Position Statement to them prior to conference.

However, on other occasions, you might expected that provision of your Position Statement to the other side will not be helpful. If so, do not provide it to them.

5. CONDUCT OF THE CONFERENCE

5.1 Who Speaks first?

5.1.1 The QCAT Member will give their opening standard form words.

5.1.2 The Applicant usually then speaks first. Many solicitors for Applicants will speak for a long time, explaining the case and facts in detail. There is usually no point to this.

5.1.3 You cannot stop the Applicant speaking, but if possible, it is usually best to minimise the amount of time they speak – for example confirming that non-contentious matters are not in issue.

5.2 Your dealings with the QCAT member

5.2.1 Some QCAT Members will try to dictate to you as to how they think you should act or react. Whilst remaining polite, it is your duty to represent QBCC fearlessly.

5.3 Decision-maker to speak?

5.3.1 The lawyer should speak to legal issues, normally the decision-maker can talk to practical and technical issues within their sphere of skill.

5.4 What to cover - their position

5.4.1 Sometimes, it is best not to cover your position in response, but rather address questions as to their position.

5.5 What to cover – your position

5.5.1 Explain the position based on the Position Statement.

5.6 When do you suggest break-out from the conference?

5.6.1 Where matters arise that need separate discussion, you should seek to break from the conference for private discussion.

5.6.2 This applies where there is concern that lawyer and decision-maker need to clarify the position and instructions. This could arise because the lawyer sees the needs; but equally, it could arise because the decision-maker (ie the "client") sees the need.

5.7 Negotiation technique

5.7.1 Firstly, do not allow QBCC to be portrayed as an unreasonable and uncaring regulator. The reputation of QBCC should be upheld at all times.

5.7.2 For example, if there is unhappiness at the wording of the statute, then really, that is unhappiness with government legislation, not decision-making by QBCC.

5.7.3 Most decision-making does not allow for settlement negotiations – it is more about the application of the legislative requirements.

5.7.4 "Play the ball" and do not "play the man". That is, discuss the arguments; without attacking the people.

5.7.5 Don't get be tempted to own personally and defend the decision. However, equally, do not allow pointless attack on the decision maker. Tangential criticism or personal attack by the other side is distracting and can cause the negotiation to get off-track. Remember that the decision under review is a decision of the Commission. Keep the focus on the application of the legislative requirements (which form the basis of that decision).

5.7.6 Where there is room for negotiation, be prepared to bounce offers back.

6. RESOLUTION ARISING FROM CONFERENCE

6.1 Even if the parties propose orders by consent, QCAT is limited to its jurisdictional power – hence to re-decide the decision under review.

6.2 However, the parties could agree (ie by contract, not court order) to a resolution beyond the power of QCAT.

6.3 If there is an interested stakeholder present, that person could agree to a settlement that QBCC could not entertain without them.

6.4 An agreement reached between parties that covers matters outside QCAT's jurisdictional power should not, of course, form part of a QCAT order.

6.5 If there is to be work performed, or action by any party, pursuant to the settlement, then attention must be paid to the detail of what is to occur and by when it must occur.

6.6 Potential resolution to narrow the scope of a matter can cause new difficulty. For example:

- A plan to agree upon a Statement of Agreed Facts can lead to extensive debate/negotiation as to the wording of the facts. What seems to be a sensible way to reduce dispute in fact opens up much more debate. Therefore, if facts cannot be agreed at the conference, and in clear and short form, then agreement of facts should not be pursued.

- A Scott Schedule should be avoided in most matters. It is unnecessary in most review proceedings. If it is to be used, it should be formulated at the conference and prepared in a non-contentious way.

7. ORDERS IF A PARTY FAILS TO ATTEND

7.1 QCAT is charged with making the correct and preferable decision.

7.2 That is perhaps not addressed by making default orders if there is non-attendance on one occasion. However, repeated failure would trigger QCAT's powers to control proceedings.

8. USE OF INFORMATION RECEIVED AT CONFERENCE

8.1 It is commonly said that information received at a conference is off-record, and not capable of being used in evidence later. The aim of this is to facilitate free-flowing discussion.

8.2 It is worthy to consider *Essendon Football Club v Chief Executive Officer of the Australian Sports Anti-Doping Authority* [2014] FCA 1019 at [490] and [491].

8.3 Once the fact of information is known, it can be the basis for eliciting the same information from a lawful source that can then be relied upon.

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