Queensland Law Society

Law Society House, 179 Ann Street, Brisbane Qld 4000, Australia
GPO Box 1785, Brisbane Qld 4001 | ABN 33 423 389 441
P 07 3842 5943 | F 07 3221 9329 | president@qls.com.au | qls.com.au
Office of the President

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Committee Secretary
Transport and Public Works Committee
Parliament House
George Street
Brisbane Qld 4000

By email: [redacted]

Dear Committee Secretary

Queensland Civil and Administrative Tribunal and Other Legislation Amendment Bill 2018

Thank you for the opportunity to provide comments on the Queensland Civil and Administrative Tribunal and Other Legislation Amendment Bill 2018 (**the Bill**) and for the short extension of time to provide our submission.

We raise some issues for consideration below however, we advise that any omission to comment on a potential effect of the proposed provisions should not be taken as an endorsement of same.

This response has been compiled with the assistance of our policy committees, including the QLS Competition and Consumer Law Committee whose members have substantial expertise in this area.

We understand that these reforms follow the "Review of the *Queensland Civil and Administrative Tribunal Act 2009*" and the report published in July 2018, tabled in September 2018 (**the Review report**).

On the whole, the Queensland Law Society (**QLS**) welcomes these amendments and the steps the Government is taking to ensure that consumers have appropriate protections and that the Queensland Civil and Administrative Tribunal (**QCAT/the Tribunal**) is fit for purpose.

One notable area of concern however is the inability of solicitors to appear in the Tribunal as a right. QLS considers such a right will assist the Tribunal in dealing with matters that come before it and is a central tenant in ensuring access to justice. We note this view is shared by the Tribunal itself as noted by the Review report, which referred to QCAT's 2015 submission that the achievement of its objects would be enhanced by providing a general right to legal representation.[1]

[1] The review report page 31.

Nevertheless, the Review report did not consider there was sufficient evidence to confer this right and referred to the Productivity Commission Inquiry Report, *Access to Justice Arrangements* No. 72, 5 September 2014 to support this conclusion. However, this report noted, with respect Tribunals, that:

> *"However, the Commission also accepts that some degree of representation is inevitable and indeed desirable. For example, representation is appropriate where it would facilitate efficient identification and resolution of the issues, or ensure fairness and equity, such as in specialist tribunals dealing with adult guardianship and mental health issues.*
>
> *In cases where representation might genuinely be required, the Commission considers that representatives should be required to support the objectives of the tribunals in which they appear. This was supported by the Administrative Appeals Tribunal, which suggested that these requirements be made explicit in legislation."*[2]

In respect of the reforms dealt with in the Bill, we note that the amendments to the *Fair Trading Act 1989* (**FTA**) and the *Motor Dealers and Chattel Auctioneers Act 2014* (**MDCAA**) seek to expand the jurisdiction of QCAT so that the Tribunal can determine a wider range of consumer disputes. In particular, we note the proposed insertion of section 50A with respect to the Tribunal's jurisdiction for particular matters relating to motor vehicles under the FTA.

We consider that the inability for parties to these disputes to be legally represented will adversely affect outcomes. Consumers are often at a disadvantage when bringing these types of claims compared to motor vehicle dealers who have more experience with the subject matter and often, greater knowledge and experience with the law and legal process – though we consider that all parties to a claim should have the right to seek legal advice and to be represented.

The perceived disadvantages of permitting parties to have legal representation as of right (increased costs, complexity and/or delay) are able to be mitigated through appropriate case management directions, and an appropriate approach regarding orders for costs.

In addition, the reforms expand the types of consumer disputes that the Tribunal can deal with, including claims where the monetary amount involved can now be up to $100,000. Such a significant sum of money may justify the appearance of a solicitor at a hearing and we note that this right is afforded to parties in similar claims brought in the Magistrates Court. In our view, there is an unjustifiable inconsistency between QCAT and the court in this regard.

QLS has previously made these submissions to the *'Lemon' Laws - An inquiry into consumer protections and remedies for buyers of new motor vehicles* and to other inquiries where legislation has sought to nominate QCAT as the body to hear and determine disputes. In each case, we raised the issue of adequate training and resources so that the Tribunal could meet existing needs and adequately deal with its new jurisdiction. We have not been provided with confirmation of a commensurate increase in training and resources following these inquiries and we note these issues were considered outside of the scope to the QCAT review. This is a significant concern and one that should be addressed without delay.

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[2] Productivity Commission Inquiry Report, Access to Justice Arrangements No. 72, 5 September 2014, available at: www.pc.gov.au/inquiries/completed/access-justice/report at page 14.

Increasing QCAT's monetary limit

While we support the increase proposed in these amendments, we note that the increase is significant (it is almost comparable to the Magistrates Court's monetary limit) and as such we urge Government to consider the issues we have raised about better training and resources as well as the right of appearance to be granted to a party's legal representative.

We note a limit of $25,000 will still exist for matters where an expedited hearing is required, unless the President of the Tribunal considers otherwise. We do not believe this is appropriate. The circumstances surrounding the need for urgency should be the criteria for determining whether an expedited hearing is required, not the amount of money involved. There also may be delay in having the President determine these matters which, if the claim is urgent, will be problematic.

Costs

The issue of costs in certain claims under the FTA and MDCAA has been considered in the Bill (we refer to proposed sections 50C and 18 respectively). On the one hand, we consider that it is important that costs cannot be awarded against an applicant in a QCAT motor vehicle case. However, we note that this approach to costs is inconsistent with the Magistrates Court where costs are able to awarded in these types of matters. Given that these amendments will allow QCAT to hear certain matters up to a value of $100,000, consideration should be given to whether this inconsistency should be addressed.

Proposed amendments to the *Queensland Civil and Administrative Tribunal Act 2009*

Clause 24 of the Bill amends section 12 of the *Queensland Civil and Administrative Tribunal Act 2009* (**QCAT Act**), however, the amendments to this section do not address an issue that our members frequently come across in respect of relatively minor motor vehicle accidents between an insured party and an uninsured party where it is not clear which party was at fault.

In these circumstances, if the insured party instructs their insurer that they were not at fault, the insurer will meet the cost of the repairs to their car and will then have its (internal or external) debt collectors pursue the uninsured party to recover the cost of the claim. The uninsured party (often an elderly and/or impecunious person), who disputes that they were at fault, will then be pursued by debt collectors who will commence a proceeding in the Magistrates Court. This process can add $1,000 to $2,000 to the total claim given the court and legal costs, and the legal costs increase if the uninsured party defends the proceedings, and can even exceed the original amount claimed. Often the best advice to the uninsured party is to not fight the claim, even if they do not believe they were at fault.

As noted above, the QCAT Act creates a "costs-free" process for resolving disputes about property damage after a minor motor vehicle accident (via section 12(4)(d)), but in our members' experience, debt collectors are unlikely to use this process because they are not able to recover their legal costs.

Unfortunately, the uninsured party cannot bring a pre-emptive claim in QCAT via section 12(4)(d) (in order to avoid Magistrates Court proceedings) because that provision only allows the person seeking the payment to use the process. It is not open to a party seeking to avoid a payment.

The situation is different in consumer-trader disputes. If a trader is pursuing payment from a consumer, and the consumer disputes whether the amount is payable (e.g. if trader did not do

their job properly), then the consumer has the option of bringing a pre-emptive consumer-trader application in QCAT because section 12(4)(b) only requires that the claim is "arising out of" the contract. It does not require the consumer bringing the claim to be seeking a payment of money.

In our view, parties to minor motor vehicle claims (who are often vulnerable) should also be entitled to bring pre-emptive proceedings in QCAT to avoid the costs associated with disputing fault in the Magistrates Court. This could be facilitated by amending section 12(4)(d) of the QCAT Act to allow applications by either party to the accident, not just the party claiming damages.

Clauses 29, 30 and 35

We note that the exercise of the Tribunal's power in proposed section 49 (6), 51A (3) and 138A (3) is on the application of a party or on its 'own initiative'. We support these amendments, on the basis that they will expand the Tribunal's ability to manage its processes and do justice in each case (bearing in mind the Tribunal's obligations under clause 4 of the existing Act).

Conciliation

QLS supports reforms to facilitate increased engagement in alternative dispute resolution, where appropriate. We consider this process will benefit many QCAT users. However, we consider that there should be guidance about when a matter may or may not be appropriately referred for conciliation. This may include the consideration of matters where there is an obvious power imbalance between the parties.

We also consider that the definition of "relevant entity" under proposed section 66B requires further clarification.

We note the Review report stated that amendments to the *Queensland Civil and Administrative Tribunal Rules 2009* (**Rules**) would address matters such as the qualifications a conciliator would be required to possess and their powers. QLS would be pleased to review the proposed amendments to the Rules before these are made.

Senior members

We welcome the creation of a pool of persons to act as senior members under the new section 191.

Thank you again for the opportunity to provide comments on the Bill. We look forward to consulting with you further as you implement the other reforms addressed in the Review report.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Policy Solicitor, Kerryn Sampson by phone on (07) 3842 5851 or by email to k.sampson@qls.com.au.

Yours faithfully

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Bill Potts
President