

QCAT 2026 Review conducted by the Hon David Thomas

Submission by QCAT President in respect of
Issues Paper 1, QCAT's objects and
procedures

Response to Question 21 Costs

15 June 2026

Contents

Issues Paper 1: QCAT's objects and procedures	3
Introduction to response.....	3
Remit of the section 240 Review	3
Costs	7
Consultation question 21.....	7
Summary	7
Section 47 of the QCAT Act.....	8
Section 100 and 102 of the QCAT Act.....	10

Issues Paper 1: QCAT's objects and procedures

Introduction to response

1. I observe that some of the issues raised in Issues Paper 1 "QCAT's objects and procedures" ('Issues Paper 1'), and questions posed, go to matters of policy, and thus are ultimately matters for Government, not something about which a sitting judge would ordinarily express a view.
2. However, the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ('QCAT Act') provides that one of the functions of the President is to advise the Minister about how the QCAT Act or the enabling Acts could be made more effective,¹ and that the President may do all things necessary or convenient to be done for the performance of the President's functions.²
3. Although a Reviewer has been appointed, I note that this is a statutory review by the Minister of the QCAT Act pursuant to section 240, directed to whether or not there should be legislative amendment of the Act and enabling Acts.
4. I consider it necessary in order to properly discharge my statutory functions to respond to the Minister's review. In addition, since this will be the only response made on behalf of QCAT, I wish to provide as much assistance as possible to the Review team to enable it to make informed recommendations to the Minister.
5. I have not, however, purported to respond to, or verify the accuracy of, everything said in the Issues Paper.

Remit of the section 240 Review

6. As in other issues papers, some of the consultation questions posed in this paper might give the impression that the Reviewer intends to make recommendations to the Minister about non-legislative operational change. I am sure this is not the Reviewer's intent, given QCAT's status as an independent tribunal and the terms of section 240 of the QCAT Act.
7. Section 240 of the QCAT Act, entitled 'Review of Act', requires the Minister to review the Act, not the practice of the Tribunal. The section is, rather, directed to whether there needs to be legislative change to:
 - a) the QCAT Act to change its objects if its currently stated objects do not remain valid; and/or

¹ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 172(3)(b) ('QCAT Act'). See also section 240(2)(d) of the QCAT Act which provides that one of the objects of the statutory review is investigate any specific issue recommended by the Minister or the President, including, for example, whether any provision of an enabling Act affects the effective operation of the Tribunal.

² QCAT Act s 172(4).

- b) the QCAT Act or an enabling Act or Acts to assist QCAT to be able to meet, or better meet, its objects. This may include changes giving QCAT the ability to enhance operational efficiency, such as removing legislative hurdles to such efficiency.
8. The Ministerial review contemplated by the provision does not, on its clear language, concern non-legislative operational changes.
9. It is trite to say that QCAT, as an independent tribunal, is free from the direction of the Executive as to the way in which it conducts its operations. So much is plain from convention, the separation of powers doctrine, and the Act itself:
 - a) section 3(a) of the QCAT Act states that one of the objects is to establish an independent tribunal;
 - b) section 162 provides that in exercising its jurisdiction, the Tribunal must act independently and is not subject to direction or control by any entity, including any Minister;
 - c) section 172(5) provides that the President is not subject to direction or control by the Minister.
10. These provisions are consistent with the Explanatory Memorandum to the QCAT Bill which states that the objectives of the Bill are to 'establish an independent tribunal' and that:

The independence of QCAT will be achieved by providing for the appointment of a Supreme Court judge as president of the tribunal and by providing that the tribunal is not subject to direction or control by the executive.³
11. I recognise that section 240(2)(d) includes among the objects of the Review 'investigating any specific issue recommended by the Minister or the President, including, for example, whether any provision of an enabling Act affects the effective operation of the tribunal'. This provision must be read, however, in the context of section 240's focus on the Act itself, and of course, having regard to the independence of both Tribunal and President from Ministerial direction.
12. The issues and statement of 'Scope' in the Terms of Reference appear to have been drafted with these obvious propositions in mind.
13. The issues set out in the Terms of Reference turn on provisions of the Act and are consistent with an examination of whether legislative reform is called for:
 - whether the current legislation creates hurdles to procedural efficiency within the Tribunal;
 - QCAT senior leadership structure (set out in Chapter 4, Part 3 of the QCAT Act), with comparison to tribunals in other states and the Commonwealth (including whether the President and Deputy President should be appointed to the Supreme and District Courts, and including Heads of Division);
 - the role and functions of the QCAT President and Deputy President (sections 172 to 174 of the QCAT Act);

³ Explanatory Memorandum, *Queensland Civil and Administrative Tribunal Bill 2009* (Qld) 4.

- the current appeal structure for QCAT decisions (Chapter 2, Part 1, Division 4 of the QCAT Act);
 - the operation of various professional disciplinary lists (in the exercise of the Tribunal's review jurisdiction under section 17 of the QCAT Act) and whether QCAT remains the most appropriate forum for these jurisdictions;
 - whether legal representation should be 'as of right' for certain, or all, types of tribunal matters (section 43 of the QCAT Act) and the impacts of any change on both the ability for QCAT to meet its objectives and the funding arrangements for legal service providers;
 - the current Minor Civil Dispute jurisdiction (sections 11 to 14 of the QCAT Act) and whether the jurisdiction could be expanded, minimised, or transferred to a different forum;
 - other jurisdictions conferred on QCAT through enabling Acts which have significant impact on its operations and the appropriateness of QCAT as a forum for those matters, including, for example, QCAT's role in relation to certain public housing disputes;
 - the role of Justices of the Peace at QCAT (Chapter 4, Part 4B of the QCAT Act) and ways their involvement in matters and processes can alleviate pressures at the Tribunal;
 - ways in which QCAT can be improved to support the small business community (presumably this concerns whether and if so how the QCAT Act should be changed to support the small business community);
 - the capacity of QCAT to hear matters, with reference to the available Tribunal Members and physical meeting or hearing room space (this would properly entail considering the ability of QCAT to carry out what is currently within its statutory remit pursuant to the QCAT Act and the enabling Acts; in this context it would be relevant to consider budget and resourcing); and
 - the extent to which previous statutory review recommendations still apply and may assist in addressing issues (the single previous review, conducted by then Minister D'Ath was confined, as section 240 requires, to legislative reform).
14. The statement of scope also makes plain that the remit of the Review is to examine whether legislative reform is necessary, with a consideration of resourcing relevant in that context:

The review will take a genuine look at QCAT to identify ways to alleviate the significant pressures QCAT is currently facing, including an examination of any systemic operational or legislative issues impacting on the ability for QCAT to perform its statutory functions, in an accessible, economical and timely manner. 'Systemic operational considerations' are those linked to how the legislation is currently framed and whether there should be changes in order to alleviate the significant pressures that QCAT is facing.

15. The reference to 'systemic operational considerations', it can be seen, is appropriately limited to a consideration of how systemic pressures on QCAT could be addressed by legislative change – that is, how pressures affecting its ability to achieve its statutory objects could be alleviated, having regard to the amount and breadth of its work, and its resourcing, (with reference, among other matters to the availability of Tribunal Members and physical meeting or hearing room space).
16. Obviously, the Attorney-General, as First Law Officer of the State, and possessed of a clear understanding of the independence of the Tribunal and the President's insusceptibility to the direction of the Minister, did not frame Terms of Reference intended to extend to the Reviewer making recommendations to the Minister, about how QCAT should run its business. (Nor, I am sure, would anyone think that a limited life, desk-top review, by an external person or group, without the requisite comprehensive and current understanding of operations, would be well-placed to make recommendations about non-legislative operational change).
17. The Terms of Reference, read as a whole, demonstrate no intent to depart from the restricted form of Ministerial review contemplated by section 240.
18. As stated above, I am sure it is not the Reviewer's intent to make recommendations to the Minister about non-legislative change, that is, about matters concerning which the Minister is expressly prohibited from directing the President of the Tribunal.⁴ I accept, however, that it would be reasonable to have regard to budget and resourcing, in the context of the reference in the Terms of Reference to 'identifying the implications for other forums if transfer of jurisdiction is proposed, the key cost drivers, and any potential savings and efficiencies' and to 'the capacity of QCAT to hear matters, with reference to the available Tribunal Members and physical meeting or hearing room space'.
19. Accordingly, in providing responses to the consultation questions, I have taken the questions to be directed to whether changes to the QCAT Act or the enabling Act would be desirable, in order for QCAT to better achieve its objects, taking into account any resource implications of the options posited.
20. As always, I encourage any stakeholders who have suggestions for operational reform, to write to the Principal Registrar and/or the President of QCAT with those suggestions, and to do so by providing as much specificity as possible of any problem encountered so that there can be a proper interrogation of the matter raised, and an informed view reached as to the best course of action moving forward. As the Reviewer would appreciate from his time as President, very generalised complaints which do not provide QCAT with sufficient information to explore the issue and get to the root of any problem (or perceived problem) are, unfortunately, not helpful vehicles for operational reform.

⁴ Pursuant to section 172(5) of the QCAT Act. I acknowledge that section 240(2)(d) states that the objects of the review include investigating any specific issue recommended by the Minister or the President, including, for example, whether any provision of an enabling Act affects the effective operation of the Tribunal. This provision must be read together with the limitation in section 172(5) in determining its ambit.

21. In those limited instances where the issues papers have set out assertions of non-legislative and non-budgetary concerns in a way which provides sufficient detail for QCAT to interrogate the concerns, the Minister can be assured that QCAT has taken notice.

Costs

Consultation question 21

Q21 Should the current position as to awarding costs in the QCAT Act be revised? If so:

- (a) What should the new position be?
- (b) Should the position be different for different types of matters? If so in what way?

Summary

22. Paragraph 37 of my response to Issues Paper 5 (Building and Construction) should be read subject to this response. That paragraph was in the context of the *Queensland Building and Construction Commission Act 1991* (Qld) ('QBCC Act') proceedings, including the existence of s 77(3)(h).⁵
23. The Review might consider that the costs regime be amended so as to expressly provide that:
- a) costs may be awarded in the event of a section 47 order;
 - b) section 47 applies to an application in the proceeding; and
 - c) an order for costs (whether under section 47 or section 102 or otherwise) is not dependent on leave for legal representation. That is, if a party has been assisted by a lawyer, and it is in the interests of justice that they recover their costs, then costs should be awarded. This is particularly so when no leave is needed because no appearance has been needed.
24. Feedback received from members is that with the exception of these proposed amendments, the current position in relation to awarding costs is considered to be sufficient: it provides the Tribunal with the required flexibility to award costs on a case

⁵ Section 77(3)(h) QBCC Act is discussed in Issues Paper 5. In essence, that response states that "In relation to building disputes, the Tribunal has held that s 77(3)(h) of the QBCC Act displaces the costs provisions in ss 100 and 102 of the QCAT Act. Section 77(3)(h) of the QBCC Act gives the Tribunal a broad general discretion to award costs as may be appropriate in the particular circumstances. The Tribunal has held that where there is a power to award legal costs, a successful party who has incurred legal costs should ordinarily recover costs as an expense incurred in achieving success. It was said that building disputes are essentially about money, which gives them a commercial flavour, and that the costs of legal proceedings affect the justice of the proceedings."

by case basis and is consistent with the objects of the QCAT Act, in particular for the Tribunal to “deal with matters in a way that is accessible, fair, just, economical and quick”.⁶ Members have found the decision of the Court of Appeal in *Health Ombudsman v du Toit*⁷ (‘du Toit’) particularly elucidating, providing very helpful clarity.

Section 47 of the QCAT Act

25. Section 47 provides:

Dismissing, striking out or deciding if unjustified proceeding or part

- (1) This section applies if the tribunal considers a proceeding or a part of a proceeding is—
 - (a) frivolous, vexatious or misconceived; or
 - (b) lacking in substance; or
 - (c) otherwise an abuse of process.
 - (2) The tribunal may—
 - (a) if the party who brought the proceeding or part before the tribunal is the applicant for the proceeding, order the proceeding or part be dismissed or struck out; or
 - (b) for a part of a proceeding brought before the tribunal by a party other than the applicant for the proceeding—
 - (i) make its final decision in the proceeding in the applicant’s favour; or
 - (ii) order that the party who brought the part before the tribunal be removed from the proceeding; or
 - (c) make a costs order against the party who brought the proceeding or part before the tribunal to compensate another party for any reasonable costs, expenses, loss, inconvenience and embarrassment resulting from the proceeding or part.
- Note—*
- See [section 108](#) for the tribunal’s power to order that the costs be paid before it continues with the proceeding.
- (3) The tribunal may act under subsection (2) on the application of a party to the proceeding or on the tribunal’s own initiative.
 - (4) The tribunal’s power to act under subsection (2) is exercisable only by—
 - (a) the tribunal as constituted for the proceeding; or
 - (b) if the tribunal has not been constituted for the proceeding—a legally qualified member or an adjudicator.

26. Members have provided feedback that it would be helpful if section 47 could be amended so as to expressly state that a costs order can be made if there is a section 47 dismissal. Some members are of the view that the current drafting presents an ambiguity due to the use of the word “or” between each of the available powers under section 47(2) of the QCAT Act.

⁶ QCAT Act s 3(b).

⁷ *Health Ombudsman v du Toit* [2024] QCA 235, [65]–[66].

27. In the decision *ADU*,⁸ Acting Senior Member Kanowski referred to an earlier decision of *Seeiseo Pty Ltd v Body Corporate for Taralla Apartments CTS 15627 (No. 2)*⁹ and held:

As explained in *Seeiseo Pty Ltd v Body Corporate for Taralla Apartments CTS 15627 (No. 2)*, although it initially appears that a costs order under section 47 of the QCAT Act is available only as an **alternative to dismissal**, the **better interpretation is that it is a power that can be used in addition to dismissal**. Further, **section 47 permits ‘a costs order to be made without the stricture of the usual rule under s 100, that the parties should bear their own costs, applying’**. Nonetheless, the **factors set out in section 102(3) of the QCAT Act will ‘usually still be relevant to the exercise of the general discretion under s 47(2)(c)’**, or at least they may be useful. The section 102(3) factors include, relevantly, whether a party is acting in a way that unnecessarily disadvantages another; the nature and complexity of the dispute; and the relative strengths of the claims made in the proceedings.¹⁰

(Emphasis added).

28. While the Tribunal has interpreted section 47 of the QCAT Act to enable an order to dismiss proceedings and order costs, it would be preferable if this were expressly stated. It would seem that this could be achieved by replacing the word “or” at the end of section 47(2)(b), with the word “and”. An amendment of this nature would need to consider whether any limitations are required similar to section 102(2) of the QCAT Act in relation to Minor Civil Disputes and whether the *Queensland Civil and Administrative Tribunal Rules 2009* (‘QCAT Rules’) need to place limits on the costs that can be ordered under section 47(2)(c) in the context of Minor Civil Disputes.
29. The Review might also consider there to be utility in expressly stating that section 47 applies to any application in a proceeding. While this might be covered by the “part of a proceeding”, express provision as suggested in the preceding sentence would put the issue beyond doubt.
30. The Review might also consider simplifying the wording in section 47(2) more generally. It seems that section 47 is directed at:
- a) A party being able to apply to strike out/dismiss another party’s application or the substantive proceeding itself or part of the substantive proceeding; and
 - b) A party being able to get an order to be removed from the proceeding.
31. If that is all section 47 is directed at, it seems the wording could be simplified accordingly, together with expressly stating that a section 47 order can be accompanied by a costs order.
32. It is a matter of policy for government as to whether or not the “interests of justice” test should apply to section 47 (it currently doesn’t, presumably because the threshold for section 47 is that there be a proceeding or part of a proceeding which is frivolous, vexatious, misconceived, lacking in substance or an abuse of process), and whether

⁸ *ADU* [2022] QCAT 149 (26 April 2022).

⁹ *Seeiseo Pty Ltd v Body Corporate for Taralla Apartments CTS 15627 (No. 2)* [2019] QCAT 10 (22 January 2019). With a stay granted until leave to appeal and appeal decided in *Seeiseo Pty Ltd v Body Corporate for Taralla Apartments CTS 15627* [2019] QCATA 70 (28 May 2019).

¹⁰ *ADU* [2022] QCAT 149, [7].

the costs to be ordered should remain as currently phrased (ie, “any reasonable costs, expenses, loss, inconvenience and embarrassment resulting from the proceeding or part”, which appears to go beyond what is currently envisaged by a standard legal costs order.)

Section 100 and 102 of the QCAT Act

33. While there has previously been inconsistency in the way in which sections 100 and 102 are interpreted and applied in the Tribunal,¹¹ the interplay between these provisions has been clarified in the decision of du Toit.¹²
34. In particular, *Du Toit*, confirms (by agreeing with the observations of Judicial Member D J McGill SC in *Marzini v Health Ombudsman (No 4)*)¹³ that:
 - (a) “...Leaving aside the reference to a provision of another Act, when ss 100 and 102 of the QCAT Act are read together, the position is that no order for costs is to be made unless the Tribunal considers the interests of justice require it to do so...”;
 - (b) “...The terms of the sections [sections 100 and 102 of the QCAT Act] make it clear that the starting point is that no order for costs is to be made, but authorises a costs order if the interest of justice require it”;
 - (c) “...The use of the word “require” suggests that the interests of justice must clearly support a costs order; but to say that they must do so “compellingly”, and to treat s 100 as having “a strong contra-indication against costs orders”, is to read into the statutory discretion restrictions which are not based on the terms of the Act.”
35. This provides the Tribunal with flexibility to consider the objects of the QCAT Act and apply sections 100 and 102 of the QCAT in the context of the individual facts and circumstances of the particular proceedings.
36. It is observed that the circumstances in which a payment of costs may be ordered in a proceeding where an offer to settle the dispute has been made, but not accepted, is a matter that is currently dealt with under rule 86 of the QCAT Rules, as authorised by section 105 of the QCAT Act. It is not expressly included as one of the matters that may be considered pursuant to section 102 of the QCAT Act. There may be merit in doing so given the benefit to the administration of justice of parties accepting appropriate offers to settle. Some members have suggested a formula to the following effect: amend section 102(3) to include an “unreasonable act or omission that caused the party to incur the costs”.¹⁴

¹¹ The Honourable David Thomas, ‘QCAT’s objects and procedures’ (Issues Paper 1, Queensland Civil and Administrative Tribunal Act Statutory Review 2025-26, October 2025) [164]-[171].

¹² *Health Ombudsman v du Toit* [2024] QCA 235, [65]–[66].

¹³ *Marzini v Health Ombudsman (No 4)* [2020] QCAT 365, [17].

¹⁴ Noting this is similar terminology used in s 46PSA of the *Australian Human Rights Commission Act 1986* (Cth) and the terminology used in s 570 of the *Fair Work Act 2009* (Cth).

37. Finally, it would also be of assistance to the Tribunal if there was greater clarity around a party being able to seek their costs in circumstances where they have not been granted leave to be represented pursuant to section 43 of the QCAT Act and/or there is a determination of the proceedings on the papers. This will enable a party to still seek and if the “interests of justice” require, enable a party to be awarded an order for costs incurred during the proceedings (for example seeking and obtaining legal advice or assistance with drafting key documents in the proceedings).