

Queensland Civil and Administrative Tribunal and Other Legislation Amendment Regulation 2022

Explanatory notes for SL 2022 No. 155

made under the

Queensland Civil and Administrative Tribunal Act 2009

General Outline

Short Title

Queensland Civil and Administrative Tribunal and Other Legislation Amendment Regulation 2022

Authorising law

Sections 224 and 242 of the *Queensland Civil and Administrative Tribunal Act 2009*

Policy objectives and the reasons for them

New case management system for minor civil disputes

A new case management system for the management of minor civil disputes (MCDs) is being developed as part of the Department of Justice and Attorney-General's (DJAG) Information Communication Technology (ICT) Strategic Implementation Program.

The new case management system will enable parties to file documents for civil cases electronically and include a portal enabling online lodgement and interaction between the parties and the registry, replacing the civil system currently used in the Magistrates Courts and the Queensland Civil and Administrative Tribunal (QCAT) for MCDs.

The new case management system will enable MCDs at QCAT to be entirely digitised (with the option of hard copy applications and filing of documents still available for those applicants who wish to use them) and for the record of proceedings to be held in digital form so that even if a party files in paper form, it will be converted to a digital file.

Amendments to the *Queensland Civil and Administrative Tribunal Regulation 2019* (QCAT Regulation) and the *Queensland Civil and Administrative Tribunal Rules 2009* (QCAT Rules) are required to support the new case management system.

Affidavits under the *Oaths Act 1867*

On 30 April 2022, the *Justice and Other Legislation Amendment Act 2021* (JOLA Act) modernised the way that affidavits can be made, signed and witnessed under the *Oaths Act 1867* (Oaths Act), including by allowing affidavits to be:

- made in the form of an electronic document or made using counterparts (identical copies that do not contain the signatures of all persons who are to sign the document);
- signed electronically or signed by substitute signatories; and
- witnessed by audio visual (AV) link by a narrow cohort of special witness or prescribed persons.

Fee for retail tenancy disputes

The *Small Business Commissioner Act 2022* (SBC Act) commenced on 3 May 2022. The SBC Act permanently established the Queensland Small Business Commissioner (commissioner) whose functions include mediating retail tenancy disputes under part 8 of the *Retail Shop Leases Act 1994* (RSL Act).

Before the commencement of the SBC Act, QCAT administered the mediation process for retail tenancy disputes under the RSL Act. Under sections 63 and 64 of the RSL Act, a retail tenancy dispute can be referred to QCAT for resolution following mediation if, for example, the parties could not reach a mediated solution to the dispute. To start the mediation process, the prescribed fee for section 55(2) of the RSL Act was \$358 (section 9 of *Retail Shop Lease Regulation 2016*, before amended by the *Small Business Commissioner Regulation 2022*).

Since the commencement of the SBC Act, the prescribed fee to start the mediation process is 350 fee units and paid to the commissioner (who administers mediation services for retail tenancy disputes) instead of QCAT. Parties must share the cost of mediation equally.

Schedule 2, part 2 of the QCAT Regulation currently prescribes nil fee for starting QCAT proceedings under sections 63 and 64 of the RSL Act. The purpose of prescribing a nil fee was to prevent QCAT from charging a fee twice for the same dispute (for conducting the mediation and then hearing the dispute if it was not resolved through mediation).

Achievement of policy objectives

To support the new case management system, the *Queensland Civil and Administrative Tribunal and Other Legislation Amendment Regulation 2022* (Amendment Regulation) will amend the QCAT Regulation and QCAT Rules to:

- allow applications for all MCDs (including minor debt claims) to be served in a consistent way by removing the requirement for applications for minor debt claims to be served personally under rule 38;
- provide for the electronic service of decisions by default (meaning an order made by QCAT in favour of the applicant for the debt, liquidated demand or unliquidated damages claimed where the other party has not lodged a response) by removing rule 61 (which requires a decision to be given by post if a person files an application for a decision by default by post). Rule 39 will apply to the sending of decisions by default so that a decision by default can be sent electronically where an entity has an address for service that includes an electronic service address;
- make minor changes to continue to facilitate electronic filing by approved entities in MCD matters;
- clarify that QCAT can charge copying fees for documents in electronic form as well as printed form;

- omit rule 34(2) so that an entire file can be held electronically even if paper documents are filed by applicants; and
- remove all relevant references to fax as QCAT no longer has a fax machine.

To reflect the changes to affidavits under the Oaths Act as a result of the JOLA Act, the Amendment Regulation will amend the QCAT Rules to:

- enable an affidavit (including an affidavit that has been electronically signed, witnessed over AV link or made using counterparts) to be filed electronically in the way or in a format prescribed by practice direction;
- ensure that an affidavit that has been made or signed electronically, witnessed over AV link or made using counterparts can be filed for particular proceedings under rule 28; and
- insert new part 10A (Affidavits), which includes rules to:
 - reflect new terminology under the Oaths Act;
 - require a statement stating particular information to be placed at the end of an affidavit (a jurat);
 - provide how alterations to affidavits may be treated or made; and
 - specify retention periods for affidavits.

The Amendment Regulation will also amend the QCAT Regulation to ensure that QCAT can charge a fee for retail tenancy disputes referred to it under the RSL Act. As a result, the default fee of 358 fee units under section 8 of the QCAT Regulation will apply to retail tenancy disputes referred to QCAT for resolution.

Consistency with policy objectives of authorising law

The Amendment Regulation is consistent with the policy objectives of the authorising law.

Inconsistency with policy objectives of other legislation

The Amendment Regulation is not inconsistent with the policy objectives of other legislation.

Benefits and costs of implementation

The Amendment Regulation will support the introduction of the new case management system for MCDs at QCAT, including by enabling MCD matters to be entirely digitised and for the record of proceedings to be held in digital form. The Amendment Regulation will also ensure that QCAT can charge a fee for retail tenancy disputes referred to it under the RSL Act.

Any costs to departments of agencies arising from the implementation of the Amendment Regulation will be met from existing resources.

The fee for retail tenancy disputes referred to QCAT under the RSL Act will be payable in addition to the fee payable for mediation under the RSL Act. This may be a minor additional impost on small businesses with a retail tenancy dispute that is not able to be resolved at mediation.

Consistency with fundamental legislative principles

Clause 17 will omit the personal service requirement for minor debt claim applications under rule 38 of the QCAT Rules. This amendment potentially breaches the fundamental legislative principle that legislation has sufficient regard to the rights and liberties of individuals in relation to consistency with principles of natural justice including procedural fairness (*Legislative Standards Act 1992*, section 4(3)(b)).

Omitting rule 38 will enable an applicant for a minor debt claim to serve the respondent in several ways under rule 39, including in person, by post or by email. This amendment potentially limits access to justice by removing the procedural protection provided by personal service which ensures that a recipient is aware of a proceeding made against them.

However, rule 39 provides appropriate safeguards for service by post or email by effectively providing a 'consent-based' approach to service. Before documents can be sent by post or electronically, rule 39 requires an entity to have filed an address for service nominating a service address (an address in Queensland) or electronic address (a fax number, email address or other electronic address). Documents may also be sent by post to a relevant address provided for in the service practice direction (e.g. for an individual, their last known residential or business address) if the party does not have an address for service.

The benefits gained from allowing all MCDs to be served in a consistent way while maintaining appropriate safeguards outweigh the potential limitations on a person's access to justice.

Consultation

QCAT was consulted and supports the Amendment Regulation. As required under section 224(2) of the QCAT Act, the Rules Committee has consented to the making of the Rules.

DJAG consulted on the amendments to support the new case management system with government departments, Community Legal Centres Queensland, Queensland Law Society, Bar Association of Queensland, LawRight, Legal Aid Queensland, Tenants Queensland, Residential Tenancies Authority, CITEC Confirm, Supreme Court of Queensland, District Court of Queensland and Magistrates Court of Queensland. All parties had nil comment or support the amendments in relation to the new case management system.

The Office of Best Practice Regulation (OBPR) was consulted and advised that no further regulatory impact analysis was required in relation to the fee for retail tenancy disputes. given the original intention of the regulatory proposal under the SBC Act was for QCAT to continue to charge a fee for retail tenancy disputes that were referred to it following mediation. At the time of assessing the original proposal under the SBC Act, OBPR considered the proposal for QCAT to charge a fee in addition to the fee for mediation did not appear significant as parties are able to exercise their discretion as to whether continuing to pursue a dispute to QCAT is in their net interest.

DJAG has self-assessed the remaining amendments to be excluded from further regulatory impact analysis under *The Queensland Government Guide to Better Regulation* under exclusion category (j) as a regulatory proposal relating to the administration of courts and tribunals.