

Queensland Civil and Administrative Tribunal and Other Legislation Amendment Regulation 2022

Human Rights Certificate

Prepared in accordance with Part 3 of the *Human Rights Act 2019*

In accordance with section 41 of the *Human Rights Act 2019* (HR Act), I, the Honourable Shannon Fentiman MP, Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence, provide this human rights certificate with respect to the *Queensland Civil and Administrative Tribunal and Other Legislation Amendment Regulation 2022* (Amendment Regulation) made under the *Queensland Civil and Administrative Tribunal Act 2009* (QCAT Act).

In my opinion, the Amendment Regulation, as tabled in the Legislative Assembly, is compatible with the human rights protected by the HR Act. I base my opinion on the reasons outlined in this statement.

Overview of the Subordinate Legislation

Under section 224 of the QCAT Act, the Governor in Council may make rules under the Act for the practices and procedures of the tribunal or its registry, including practices and procedures for jurisdiction conferred on the tribunal by an enabling Act, or a matter mentioned in schedule 2. A rule may only be made with the consent of the rules committee. Under section 242 of the QCAT Act, the Governor in Council may make regulations under the Act.

New case management system

A new case management system is being introduced for the management of minor civil disputes (MCDs) by the Queensland Civil and Administrative Tribunal (QCAT). The new system will enable MCDs 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 enable 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.

To support the new case management system, the Amendment Regulation will amend the *Queensland Civil and Administrative Tribunal Regulation 2019* (QCAT Regulation) and *Queensland Civil and Administrative Tribunal Rules 2009* (QCAT Rules) to:

- allow applications for all MCDs (including minor debt claims) to be served in a consistent way;
- provide for the electronic service of decisions by default in relation to MCDs;
- facilitate electronic filing of all documents in MCD matters; and
- make minor changes in relation to fees for electronic copies of documents and inspection of documents.

Affidavits under the *Oaths Act 1867*

To reflect changes to the way that affidavits can be made under amendments to the *Oaths Act 1867* made by the *Justice and Other Legislation Amendment Act 2021*, 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 can be given, produced or used for any purpose and relied on evidence of the affidavit under the Oaths Act (including an affidavit that has been electronically signed, witnessed over AV link or made using counterparts) can be filed for proceedings in QCAT’s ‘protective’ jurisdictions (e.g. adoption, child protection, guardianship and blue card);
- 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
 - provide retention requirements of 7 years from the day an electronically filed affidavit or original physical version of an affidavit is filed or admitted into evidence in a proceeding.

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 a 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).

The Amendment Regulation will amend the QCAT Regulation to enable QCAT to charge a fee for resolving a retail tenancy dispute referred to it under sections 63 or 64 the RSL Act following the commencement of the SBC Act.

Human Rights Issues

Human rights relevant to the subordinate legislation (Part 2, Division 2 and 3 HR Act)

Removal of personal service requirement for minor debt claim applications

Rule 39 of the QCAT Rules currently allows documents, other than applications for minor debt claims (a category of MCD), to be served in several ways including in person, by post or by email (if the receiving party has nominated an email address for service). Under rule 38, applications for minor debt claims must be served personally.

Clause 17 of the Amendment Regulation will omit rule 38 to ensure that all applications for MCDs, including minor debt claims, can be served in a consistent way under rule 39. Removing the requirement to personally serve minor debt claim applications engages the right to a fair hearing (HR Act, section 31).

Consideration of reasonable limitations on human rights (section 13 HR Act)

(a) the nature of the right

The right to a fair hearing (HR Act, section 31) provides that a party to a civil proceeding has the right to have the proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing. The right is concerned with procedural fairness (as opposed to substantive fairness regarding the merits of a specific decision).¹

A principle of the right is that each party must be given a reasonable opportunity to present their case, which involved being informed of the case being made by the opposing party and having the opportunity to respond.²

By omitting rule 38, the Amendment Regulation will limit the right to a fair hearing in that a respondent may not have the opportunity to respond to the case made by the applicant in situations where a respondent genuinely does not become aware of an application served a different way under rule 39 (for example, by post). This could result in a respondent failing to lodge a response to the application within the appropriate timeframe and having the applicant apply to the tribunal for a decision by default.

The omission of rule 38 will enable an applicant for a minor debt claim to serve the respondent in several ways under rule 39, including by delivering it personally, sending it by post or by email.

(b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The purpose of the amendment is to ensure that all applications for MCDs, including minor debt claims, can be served in a consistent way under rule 39 of the QCAT Rules.

¹ *Knight v Wise* [2014] VSC 76 [36].

² *Roberts v Harkness* [2018] VSCA 215 [48].

The amendment will provide applicants with more flexibility in how they can serve minor debt claim applications while maintaining appropriate safeguards under rule 39, consistent with a free and democratic society based on dignity, equality and freedom.

(c) the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose

As a result of omitting rule 38 from the QCAT Rules, all MCD applications can be served under rule 39. As noted above, rule 39 allows for service in several ways, including delivery by person, sending it by post and by email.

(d) whether there are any less restrictive and reasonably available ways to achieve the purpose

There are no less restrictive or reasonable available ways to achieve the purpose of the amendment.

(e) the balance between the importance of the purpose of the limitation and the importance of preserving the human right, taking into account the nature and extent of the limitation

Omitting rule 38 removes the procedural protection provided by personal service which ensures that a recipient is aware of an application made against them. However, rule 39 provides a number of safeguards where service is not effected personally.

Under rule 39, documents can only be served on a respondent electronically where the respondent has specified an electronic address for service in documents already filed in QCAT. For example, under rule 39(1)(d), if an entity has an address for service that includes an email address, documents can be emailed to the entity at that address. This effectively provides a 'consent-based' approach to electronic service.

Documents sent by post must be sent to the *relevant address* of an entity. *Relevant address* is defined in rule 39(2) to mean the service address in the entity's address for service filed in QCAT; or if the entity does not have an address for service for posting documents to the entity - the address provided for in the service practice direction to which documents may be posted.

QCAT Practice Direction No. 8 of 2009 prescribes for the purpose of posting a document the relevant address where the entity does not have an address for service is:

- (a) for an individual, their last known residential or business address;
- (b) for an entity other than an individual:
 - i. its last known business address; and
 - ii. the last known residential address of a person apparently in a position of authority in relation to that entity.

A further safeguard is that a decision for default can only be made by the tribunal under sections 50(5) and 50A(6) of the QCAT Act after the applicant has provided proof that the respondent has been given a copy of the application.

Rule 42 of the QCAT Rules provides that where proof of the giving of a document is required, the proof must be given by affidavit. The affidavit must include certain information depending on whether the document was personally delivered or by other means (for example, email).

I consider that the limit on the right to fair hearing is unlikely to occur in many circumstances. The benefits gained from allowing all MCDs to be served in a consistent way while maintaining appropriate safeguards outweigh the limitations on a person's access to justice.

Fee for retail tenancy disputes

The Amendment Regulation will amend the QCAT Regulation to enable QCAT to charge a fee for resolving a retail tenancy dispute referred to it under the RSL Act following the commencement of the SBC Act.

Consideration of reasonable limitations on human rights (section 13 *Human Rights Act 2019*)

(a) the nature of the right

The right to property may be considered limited by enabling QCAT to charge a fee for hearing a retail tenancy dispute referred to it under the RSL Act because it results in a deprivation of property in the form of money.

The right to property protects the right of all persons to own property and provides that people have a right to not be arbitrarily deprived of their property (including money). In a human rights context, 'arbitrary' means capricious, unpredictable, unjust or unreasonable in the sense of not being proportionate to a legitimate aim sought.

(b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

To ensure that QCAT can charge a fee for retail tenancy disputes referred to it under section 63 or 64 of the RSL Act following commencement of the SBC Act, the Amendment Regulation will omit these sections from schedule 2, part 2 of the QCAT Regulation. 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.

The amendment is consistent with a free and democratic society based on human dignity, equality and freedom in that it will allow QCAT to continue to provide its services and resolve retail shop lease disputes referred to it, consistent with its object of being an accessible tribunal that efficiently resolves disputes.

(c) the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose

As a result of the amendment, QCAT will be able to charge a fee for hearing retail tenancy disputes referred to it under the RSL Act. This amendment will help QCAT continue its services as an independent, accessible tribunal that efficiently resolves disputes on a range of matters.

(d) whether there are any less restrictive and reasonably available ways to achieve the purpose

There are no less restrictive or reasonable available ways to achieve the purpose of the amendment.

(e) the balance between the importance of the purpose of the limitation and the importance of preserving the human right, taking into account the nature and extent of the limitation

Allowing QCAT to charge a fee to resolving retail tenancy disputes referred to it under section 63 or 64 of the RSL Act may impose an additional impost on small businesses. However, based on feedback from other small business commissioners and the success rate from the temporary small business commissioner (that operated from May 2020 to commencement of the SBC Act), it is anticipated that most matters would be resolved either through case management or mediation.

I consider that the limit on the right to property is unlikely to occur in many circumstances. The benefits gained from allowing QCAT to charge a fee for retail tenancy disputes referred to it under the RSL Act outweigh the limitations on a person's property rights.

Conclusion

I consider that the Amendment Regulation is compatible with the *Human Rights Act 2019* because it limits human rights only to the extent that is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

SHANNON FENTIMAN MP
ATTORNEY-GENERAL AND MINISTER FOR JUSTICE AND
MINISTER FOR THE PREVENTION OF DOMESTIC AND FAMILY VIOLENCE

© The State of Queensland 2022