AUSTRALIAN SUPER-TRIBUNALS - SIMILARITIES AND DIFFERENCES

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BEST PRACTICE IN TRIBUNALS: A model for South Australia
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Since at least the 1970's, there has been agitation in Australia for reform of the proliferation of small specialised tribunals or other decision-makers outside of the court system.[2] At the Federal level, the Commonwealth Administrative Review Committee (otherwise known as the Kerr Committee) and the Committee on Administrative Discretions (otherwise known as the Bland Committee) provided the impetus for the eventual establishment of the Administrative Appeals Tribunal in 1975. At the State level, the proliferation of non-curial decision-makers continued until the Victorian Government established the Victorian Civil and Administrative Tribunal (VCAT) in 1998 under the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) ('VCAT Act'), and the New South Wales Government established the Administrative Decisions Tribunal (ADT). The broad jurisdiction of VCAT means it is generally regarded as the first of what, at the State level, are now commonly referred to as 'super-tribunals'.

Western Australia followed suit in 2005 when the State Administrative Tribunal (SAT) commenced operations under the *State Administrative Tribunal Act 2004* (WA) ('SAT Act'). The ACT Government established the ACT Civil and Administrative Tribunal (ACAT) under the *ACT Civil and Administrative Tribunal Act 2008* (ACT) ('ACAT Act'), with the Tribunal commencing operation in February 2009. Later that year, the Queensland Civil and Administrative Tribunal (QCAT) was established under the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ('QCAT Act').

The NSW Legislative Council's Standing Committee on Law and Justice published a report in March 2012 entitled 'Opportunities to consolidate tribunals in NSW' recommending that the NSW Government establish a new tribunal that consolidates existing tribunals where it is appropriate and promotes access to justice. In October 2012, the NSW Government published a response to the report ('NSW Government Response'),

[1] I acknowledge the contribution to this paper by the State Administrative Tribunal research officer Craig Williams whose research was of great assistance.

[2] In Western Australia, recommendations were made to consolidate tribunals in the 1982 report of the Western Australia Law Reform Commission, on Review of Administrative Decision Appeals, Project No 26 Part 1, the 1992 Western Australian Royal Commission into the Commercial Activities of Government, the 1996 Commission on Government, the August 1996 report to Government by Gotjamanos and Morton, the 1999 WALRC report of the Criminal and Civil Justice System, Project No 92, and the report of the Gunning Enquiry dated 15 December 2000.

deciding to establish the NSW Civil and Administrative Tribunal (NCAT). It proposed that NCAT would amalgamate 23 existing tribunals including the ADT and the very substantial Consumer, Trader and Tenancy Tribunal as well as 13 health professional tribunals. The NSW Government response stipulated, however, that 'NCAT will not seek to replicate the "super-tribunals" established in other states. Instead NCAT will be tailored to meet the needs of tribunal users in NSW'. The NSW Government response proposed that NCAT would have five divisions, a matter to which I will return later in this paper.

This seminar is, of course, being held in the context of contemplation of the establishment of a South Australian Civil and Administrative Tribunal (SACAT) in the near future.

The establishment of a super-tribunal inevitably creates concerns about a loss of specialist expertise, an increased level of formality or legality, and the application of a 'one size fits all' approach to procedures which is unsuited to the wide range of jurisdiction that super-tribunals exercise. Those concerns have not been borne out in practice. Rather, the benefits which have been identified in the way of accessibility, efficiency, flexibility, accountability, consistency, and quality have all come to pass.[3]

All super-tribunals have retained specialist expertise through full time members drawn from a variety of fields, and large numbers of sessional members from varied disciplines. That has preserved the availability of expertise. Super-tribunals have, in my observation, taken very seriously their statutory objectives of informality, expedition and dealing with the substantive merits of the case. They have tailored procedures to suit the nature of the matters before them, and thereby avoided unnecessary legality and formality.

I declare at the outset, therefore, that I am an advocate for super-tribunals. I am persuaded that, at least in my own State, the Tribunal has greatly improved public accessibility to the various areas of merits review or original jurisdiction that existed under previous decision-makers. There is no doubt that matters are dealt with more quickly and efficiently than under the previous decision-makers. The existence of full time members and judicial leadership enables a far higher degree of consistency in decision-making. The publication, and public accessibility, of tribunal decisions contributes to that consistency and provides an important educative function not only for the public, but for administrative decision-makers. Over the eight and a half years of SAT's operation, we have observed changes in the way that original

[3] In relation to my own Tribunal, the State Administrative of Western Australia, a Parliamentary Review of the effectiveness of SAT gave rise to a 500 page report concluding that the Tribunal was meeting its objectives and making a number of recommendations supportive of the Tribunal's continued operation and resourcing - Report No 14, Standing Committee on Legislation, Inquiry into the Jurisdiction and Operation of the State Administrative Tribunal.

administrative decision-makers have gone about their task, knowing of the potential for review by SAT, with consequent improvement in the quality of original decision-making.

As is inevitably the case in a federation, there are differences in the jurisdictions exercised by the various super-tribunals, and in the way that they go about their tasks. In this paper, I will first undertake a comparison of the structures of the existing super-tribunals, in particular SAT, QCAT and VCAT, and then examine the similarities and differences in some of the procedures utilised in those tribunals.

STRUCTURES

Membership

Each of VCAT, SAT and QCAT have judicial leadership, with the President in each case being a Supreme Court Justice and Vice Presidents or Deputy Presidents being County Court or District Court Judges. NCAT is proposed to have a President who is a Supreme Court Justice, but it would appear that the President will be the only judicial member. ACAT has a General President and an Appeal President, neither of whom is a member of a court. Table 1 sets out the membership hierarchy of VCAT, QCAT, SAT and ACAT.

Table 1

VCAT	QCAT	SAT	ACAT
• President of VCAT (Supreme Court Justice) • 16 Vice-Presidents (County Court Judges) • Deputy Presidents (3 Division Heads, 3 appointed to manage Lists) • Senior Members (12 full-time, 1 part-time, 16 Sessional - some appointed to manage Lists); • Members (21 full time, 2 part-time) • 172 Sessional Members	• President (Supreme Court Justice) • Deputy President (District Court Judge) • 4 Senior Members • 10 Full and part time members • 99 Sessional Members • 10 Adjudicators (lawyers limited to hearing minor civil disputes or other simple matters). • A trial program to have suitably qualified and experienced Justices of the Peace (Magistrates Court) hear some minor civil dispute matters has recently commenced.	• President (Supreme Court Justice) • 2 Deputy Presidents (District Court Judges) • 6 Senior Members • 11 Ordinary Members • 112 Sessional Members • Magistrates are ex officio tribunal members, although SAT does not utilise them.	• General President • Appeal President • 2 part-time Presidential Members • 1 full time Ordinary Member • 90 Sessional Members, including 21 Senior Members

In my view, an adequate number of full time members is critical to the success of a super-tribunal. The availability of full time members greatly facilitates the efficient acquittal of the work. It also facilitates the exchange of information and ideas which produces consistent procedures and decisions. It provides a group of people who are knowledgeable and experienced in the various jurisdictions of the tribunal, and who can provide guidance and assistance to sessional members, and valuable contributions to the management of tribunal business.

Organisational Structure

Attached to this paper is a diagrammatic representation of the organisational structure of VCAT, QCAT, SAT and the proposed structure of NCAT.[4]

Both VCAT and QCAT organise their work through 'Divisions'. SAT organises its work through what it refers to as 'Streams'. That term was adopted by the Tribunal at the outset specifically in order to reinforce the notion that the Tribunal is one Tribunal, not a series of different tribunals which have simply been co-located. Although both QCAT and VCAT refer to Divisions, QCAT's Divisions are less formally structured than in VCAT. QCAT has, from the outset, fostered the concept of members, at least full time members, sitting across different divisions, and in that sense operates in a similar fashion to SAT, albeit that they use the expression 'Divisions' rather than Streams. It may be that QCAT went further than SAT in implementing that philosophy.

In SAT, members are allocated to a particular stream based upon their background and expertise, and the vast majority of the work of individual full time members comes from within the stream to which they are allocated. From time to time, as work load has demanded, members have been allocated to two streams, and those members then derive the bulk of their work from those two streams. All members are, however, available to, and do, participate in matters in streams other than those to which they are allocated. Most commonly that occurs where full time members act as mediators on matters from other streams, or where they may participate as a member of a multi-member panel, for example in vocational matters.

VCAT's members are appointed to a Division, and usually will work only in that Division. As I understand it, there are some full time members who regularly do work in more than one division, but that is not the norm.

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[4] The diagrams in relation to VCAT and QCAT are taken from their annual reports. Annexure NCAT 1 shows the proposed structure of NCAT attached to the NSW Government response. The Annexure NCAT 2 is a more recent depiction of what may be interim arrangements to be put in place until the more ordered structure shown in Annexure NCAT 1 can be established.

Annexure NCAT 2 depicts the continued existence of Tribunals being brought into NCAT, and I understand that, in the initial stages at lease, the components of NCAT will remain in existing premises with existing personnel. I acknowledge that the larger the jurisdiction of a tribunal being brought into a super-tribunal is, the more difficult it may be to establish and foster the notion of a single tribunal exercising a wide variety of jurisdictions. As the numbers on Annexure NCAT 2 illustrate, the logistics of bringing over 600 members into a single organisation are extremely challenging. Having said that, I remain strongly of the view that the establishment of a super-tribunal provides an opportunity to, in effect, start from scratch by establishing practices and processes which best achieve the underlying purposes of a super-tribunal. In doing that, a new super-tribunal has the luxury of being able to draw from the better and more efficient practices of previous tribunals without being fettered by the constraint that matters of a particular type have historically been dealt with in some particular way.

The NSW Government response contained the table below which identified the benefits that might be obtained by the establishment of NCAT.

Accessibility	**Efficiency**	**Accountability**
• Greater visibility and increased access for the community through a single contact point for tribunal services (one phone number, one website) • Greater access to rural and regional locations • Equitable access for culturally and linguistically diverse people and other high-needs group • Reduced red tape for business and individuals when accessing tribunals • Consistent client service standards • Certainty for users through enhances quality of decision-making	• Economies of scale will create efficiencies (integration of back-end services, bulk ordering) • Common platforms, processes and infrastructure (co-ordinated training initiatives, shared technology resources) • Common branding on websites and other publicity • Better use of human resources • Consistency of appointment and conditions	• Improved decision-making through consistent professional development and training opportunities • Improved transparency and consistency of processes • Greater independence from Government, reducing the potential for perception of conflict of interests • Enhanced public confidence in the tribunal system • Consistent appeal rights and processes • Training and professional development opportunities for members and staff • Promotion of a collegiate culture • Improved resources for data collection

Very few of those benefits are achieved by simply lumping together a number of existing tribunals with their existing personnel, their existing practices and procedures, and their existing philosophies in relation to dispute resolution. I am firmly convinced that an important reason for SAT's success was that, although some of the inaugural full time members had been members of previous tribunals subsumed into SAT, the majority had not. That enabled the inaugural President to reinforce the notion that SAT was something different; that it was a single tribunal with a wide ranging jurisdiction and very important statutory objectives which would guide the approach to decision-making in all areas of jurisdiction.

Locations

VCAT, QCAT and SAT all sit at various suburban and regional locations. QCAT utilises the magistrates courts with magistrates, and soon JPs, exercising QCAT's jurisdiction. QCAT also has resident members or assessors in regional centres away from Brisbane.

VCAT has metropolitan and regional registries and members sit in outer metropolitan and regional centres on a regular basis.

SAT's registry is located in Perth, and it has no regional registries. Members travel to metropolitan or regional locations on a case by case basis, and there are no regular 'circuits' to regional centres.

Where possible, the super-tribunals all utilise telephone or video link facilities and accept filings by mail, fax or electronically in order to facilitate the lodgement of documents from remote areas. Guardianship hearings before the super-tribunals regularly occur off-site in hospitals, with some tribunals having dedicated hearing rooms in hospitals.

Tenure of members

Members of super-tribunals are invariably appointed for a fixed term, although the term may be renewed. Judicial members are, of course, appointed to their Courts and cannot be removed except for misconduct until the relevant retiring age for judges in the State concerned. The appointment of judicial members to a tribunal is, however, for a limited term. In VCAT and SAT, the term of appointment of judicial members is five years. In QCAT the term is not less than three years, nor more than five years but the President may not be reappointed upon the expiry of a term as President other than where the initial appointment was for less than three years, and an extension of that time would not result in a term

in total greater than five years. [5] ACAT Presidents are appointed for 7 years.[6]

The tenure of Deputy Presidents in each of VCAT, QCAT and SAT reflects the terms of the appointment of the Presidents.

The qualifications for appointment of Senior or Ordinary Members are similar in each of VCAT, QCAT and SAT although in SAT and QCAT, a Senior Member who is legally qualified must have been admitted for not less than eight years, whereas in VCAT it is sufficient to have been admitted for not less than five years.[7] In all cases, an alternative qualification of extensive knowledge or experience in relation to a class of matter within the tribunal's jurisdiction is sufficient for appointment.

The terms of appointment of Members differ from state to state. VCAT has recently extended the maximum term of appointment from five years to seven years. In SAT the term is a maximum of five years, and in QCAT, it is a period of three to five years. In all cases, terms can be renewed upon expiry. In ACAT, the appointment of a person as a non-presidential member is for the term stated in the appointment or, if no term is stated, for 5 years.

Legal representation

In SAT and VCAT, parties are entitled to be represented by a lawyer. In QCAT, parties must represent themselves except in specified circumstances including where the parties are a child or a person with impaired capacity, the proceeding relates to disciplinary action, an enabling Act permits representation or leave of the Tribunal is obtained.[8]

Under the SAT Act, a person may be represented by somebody other than an Australian legal practitioner where:

- the party is a body corporate or public sector body;
- a person is a party by reason of employment by a public sector body;
- the person has particular knowledge or experience relevant to the matter being dealt with (for example a town planner); or
- the Tribunal otherwise agrees to representation.[9]

Representation by a person who is not a legal practitioner is subject to a proscription against the recovery of any fee or reward which might contravene the *Legal Profession Act 2008* (WA).[10]

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[5] QCAT Act s 175, SAT Act s109(1), VCAT Act s10(2)
[6] ACAT Act s 98(1)(b)
[7] VCAT Act s 13(2)(a), QCAT Act s 183(4)(a), SAT Act s 117(4)(a)
[8] QCAT Act s 43
[9] SAT Act s 39

In VCAT, a person may be represented by a 'professional advocate' if they are a:

- child;
- municipal council;
- State or Minister or other person representing the State, public entity, the holder of a statutory office;
- credit provider; or
- insurer.[11]

Representation is also permitted if another party to the proceeding is represented by virtue of being in one of the categories mentioned in the previous paragraph, or if another party to the proceeding is a professional advocate, or if all the parties to the proceeding agree.

The VCAT definition of professional advocate is relatively wide. It includes a person who is a legal practitioner, an articled clerk or law clerk, a person who holds a degree, diploma or other qualification in law granted in Australia, or a person who in the opinion of the Tribunal has had substantial experience as an advocate in proceedings of a similar nature.[12]

In ACAT, a person may, in relation to an application before the tribunal, appear in person or be represented by a lawyer or someone else (other than a person prescribed under the rules).[13]

Work mix

A significant difference between SAT and both VCAT and QCAT is that SAT does not have the high volume jurisdictions of residential tenancies or small debts. That work comprises a very large proportion of QCAT's filings. The small debts jurisdiction in QCAT is largely administered by what are called assessors, a category of QCAT Member different from full time or sessional members. Assessors are paid at a different (and lower) rate than members. The QCAT trial of Justices of the Peace as adjudicators of minor civil disputes involves a substantially lower rate of remuneration that is paid to assessors.

At ACAT, a significant proportion of matters arise from the Electricity and Water jurisdiction. ACAT exercises jurisdiction under the *Utilities Act 2000*. ACAT determines applications for hardship assistance for energy and water customers who cannot afford to pay their bills and are facing

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[10] SAT Act s 39(2)
[11] QCAT Act s 62(1)
[12] VCAT Act s 62(8)
[13] ACAT Act s 30. At current, the rules do not prescribe any class of people not able to represent a party. Rule 8 provides that ACAT can order a representative not to take any further part in a proceeding, if the Tribunal is satisfied the representative does not have sufficient knowledge of the dispute to effectively represent the party; the representative does not have sufficient authority to bind the party; or the representative's representation is inconsistent with the objects of the Act.

disconnection or restriction of supply. ACAT also investigates and determines complaints made by customers and consumers against energy and water utilities licensed in the ACT including complaints about the Feed-in Tariff.

The following table provides a (admittedly rough) breakdown of the percentage of work, by numbers of filings in each of VCAT, QCAT, ACAT and SAT.[14]

Type of Matters	VCAT % of work	QCAT	ACAT	SAT
Human Rights				
Guardianship	12.19%	0.80%	4.92%	59.25%
Children		32.86%		0.03%
Mental health	0.03%		5.96%	0.16%
Anti-Discrimination	0.35%	0.50%	0.35%	0.85%
Civil				
Minor civil disputes	9.99%	59.45%	41.45%	0.03%
Residential Tenancies (includes strata titles and caravan parks)	65.74%		23.52%	
Retail shop leases	0.37%	0.51%		17.61%
Building	1.26%	1.39%		7.98%
Owners Corporations/Strata	3.45%			2.29%
Real property	0.21%			
Administrative and Disciplinary				
General administrative review	1.32%	1.53%	2.49%	1.75%
Occupational regulation	0.49%	1.38%	0.80%	2.91%
Electricity and Water			19.54%	
Planning and Environment	4.33%			6.19%
Taxation	0.09%			0.24%
Land Valuation	0.15%			
Appeals, reopenings and renewals		1.59%	0.97%	

[14] Major work areas are highlighted. Figures are based on reported figures from the respective organisations, and subject to inaccuracy which might result from comparison of areas which may not be like for like. Areas of jurisdiction were roughly aggregated to facilitate more meaningful cross-tribunal comparison.

PROCEDURES

While existing super-tribunal structures contain many similar features, jurisdictional differences have driven variations in procedures.
Because all super-tribunals sit across varied jurisdictions, which call for different and specialised procedures, it is dangerous to generalise about procedures adopted in any of them. One of the great advantages of tribunals is their flexibility to approach dispute resolution in ways which are proportional, efficient and cost effective, constrained only by the requirement to ensure that the procedures lead to fair and just outcomes, and accord with the rules of procedural fairness.

Rather than to attempt to compare the procedures used by the different tribunals in any particular area of jurisdiction, a task fraught with difficulty because of variations in jurisdiction, and structure, I will rather examine the way that particular processes are implemented by different tribunals.

Directions hearings

In SAT, directions hearings play a critical role in case management in almost all areas of jurisdiction, other than guardianship and administration matters. The standard practice in SAT is that, upon filing, a matter is listed for a directions hearing within two to three weeks. The directions hearing is designed to identify the real issues in the matter as quickly as possible, and ensure that the parties address those issues in the most effective way. The time allocated to a directions hearing will vary depending on the nature of the matter. Some matters are allocated one hour for directions, others one half hour, and in some areas matters list at the rate of two, three, or four matters per half hour.

Those which are allocated longer times are in those areas where parties are rarely represented and a detailed and relatively informal discussion between the member and the parties often leads to either resolution at the initial directions hearing, or a clear path forward leading to resolution without the need for a hearing. Longer directions hearings are held in simple planning review applications and in building disputes. Shorter directions hearings are held where parties are more frequently represented by legal practitioners. These hearings identify preliminary issues and direct the matter to mediation or hearing, and generally enable the Tribunal to take control of the case management relating to the matter. No matter is ever adjourned without a further hearing date, whether for further directions, mediation or compulsory conference, or a final hearing.

In all directions hearings, the Tribunal is mindful of the possibility of resolution without a hearing. It is also mindful of the need to tailor the interlocutory steps taken in a matter in a way that focuses on the real issues, avoids delay and expense and is proportionate to the issues.

QCAT operates with a similar process and approach as SAT. VCAT does not routinely conduct initial directions hearings shortly after lodgement of an application. Rather, it tends to issue directions on the papers, aided by information provided by the parties upon or shortly after lodgement of the application. Where a Tribunal member considers it appropriate, directions hearings may be held, but my impression is that that occurs only in the more complicated types of matters.

Mediations / Compulsory Conferences

Mediations and compulsory conferences are utilised extensively in SAT, ACAT, and QCAT, and regularly, although perhaps not so often, in VCAT. All experience a high level of dispute resolution through these mechanisms.

Each of the super-tribunals can refer parties to mediation without their consent.[15] In my experience in SAT, it is rarely necessary to use that power. At worst, it may be necessary at a directions hearing to cajole a party who is reticent about mediation to consent by explaining the advantages of the process and that mediation will at least give the parties a better understanding of each other's position and identify the real issues in dispute.

In VCAT and QCAT, standard mediation or compulsory conferences are not usually utilised in the small claims or high volume civil disputes areas.[16] At QCAT, there is an ADR division which liaises with the Department of Justice and Attorney-General's Dispute Resolution Branch who mediate minor civil matters on behalf of QCAT.

The super-tribunals utilise mediation in a range of contexts, including in the area of vocational regulatory proceedings. In each tribunal, the outcome in vocational cases is public, but the process of discussion may be confidential. Because of the public interest being served by vocational regulatory proceedings, it is necessary that the outcome be public, and that the basis upon which any orders are made are in the public domain. It is necessary for the tribunal to satisfy itself that an agreed outcome following mediation or compulsory conference is appropriate having regard to the principles underlying the imposition of disciplinary penalties, or the relevant tests in relation to reviewable regulatory decisions.

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[15] VCAT Act s 88(2); SAT Act s 54(3); QCAT Act s 75(2); ACAT Act s 35.

[16] See for example VCAT Practice Note PNPE 7 - Short Cases List; VCAT Practice Note PNDB 1 - Domestic Building List General Procedures which contemplates immediate listing of small claims, standard claims being immediately referred for mediation, and complex claims being the subject of a directions hearing.

In SAT, orders made following vocational matter mediation contain a recital of the facts which underpin the finding and any mitigatory facts which may impact upon the penalty.[17]

In VCAT and QCAT, a resolution of a vocational matter achieved following compulsory conference or mediation is invariably referred to a hearing, which may be on the papers, to consider whether the findings and orders proposed by the parties should be made. Rather than then simply publishing the consent orders and agreed facts, the Tribunal in QCAT or VCAT will publish reasons for decision.

At ACAT, in those vocational matters in which the parties are able to agree on an appropriate disciplinary outcome, a joint submission is made to the Tribunal so that it may consider all relevant factors before making orders in the terms of the agreement reached. The parties may be required to appear to explain the joint submission and provide further information relevant to the exercise of the Tribunal's discretion.

At SAT, whilst mediation or compulsory conference is heavily utilised in many areas of jurisdiction, there are areas where, matters are simply referred to an early hearing rather than risk the delay and expense which might result from an unsuccessful mediation. One of those areas is building disputes where simple cases can often be resolved by a relatively short hearing. Because the initial directions hearing is listed for a half hour, the member conducting a directions hearing has the opportunity to explore options for settlement. If that is unsuccessful, then the Tribunal's approach is to give directions for a brief hearing on a reasonably short time frame so that the matter can be quickly resolved. In some cases the initial directions hearing may lead to the member deciding that mediation is appropriate, and will result in the matter being sent to mediation rather than hearing.

In guardianship matters, applications are generally listed for a hearing within a relatively short space of time without mediation. The hearings themselves are very informal and often are conducted in a way which leads to a common position being reached by all those in attendance. Formal mediation is not utilised because of the protective 'best interests' nature of the jurisdiction which limits the range of outcomes that might be available by way of agreed 'settlement'. There are also constraints in the *Guardianship and Administration Act 1990* (WA) concerning service and notice provisions which fetter the flexibility of the Tribunal in that area of its jurisdiction.

[17] SAT Practice Note 10 - Consent orders in vocational regulation proceedings. For a full explanation of SAT's approach to mediation in vocational matters - see *Legal Profession Complaints Committee and Love* [2011] WASAT 13 at [17] - [22].

Mediations in the super-tribunals are usually carried out by tribunal members who are trained as mediators. VCAT is a recognised mediator accreditation body, and over the past few years, QCAT, VCAT and SAT have worked together to develop an accredited course for training mediators. The lead role in that project was undertaken by QCAT in collaboration with representatives of the other tribunals. This has had the advantage of saving the expense of having mediators trained by external bodies, and has also enabled training in a context of tribunal mediation and compulsory conferences as distinct from the 'pure' mediation model promoted by organisations such as LEADR or IAMA.

In 2011, VCAT piloted a formal ADR intake process in a number of lists. The intake coordinator oversees the intake and lodgement of matters to be dealt with through VCAT's ADR centre, and provides authoritative, clear and accurate information to parties. The programme assists parties to be ready for, and to understand, the process which they are about to undertake. It also has the advantage of ensuring that VCAT's resources are used effectively.[18]

VCAT also provides a compulsory 'cooling off' period of two business days for mediations conducted by panel mediators in which one or more of the parties were self-represented. SAT does not provide for a 'cooling off' period, nor, so far as I am aware, does QCAT.

Short mediation and hearing / hybrid hearings

In 2011/2012, VCAT established what it calls short mediation and hearing (SMAH) listings following a pilot programme in 2010/2011. SMAH listings are a shortened form of mediation, at which the parties can explore options to resolve their dispute. If the parties are unable to resolve their dispute, the matter proceeds to hearing on the same day. SMAH is utilised in the civil claims list.

In 2012, QCAT introduced what it refers to as hybrid hearings. In a hybrid hearing, parties attend the hearing first, and then attend a mediation on the same day.[19] The practice direction establishing hybrid hearings explains that the opportunity to mediate after the hearing is provided because the parties will have heard all of the evidence and submissions of the other party and may therefore take a different view about reaching settlement. The practice direction identifies the benefit of mediation outcomes generally as distinct from outcomes imposed by the Tribunal.

The system involves both the hearing and the mediation being conducted by the same member. After the hearing, at which all evidence and submissions are received, the member considers that material, records

[18] VCAT Annual Report 2011/2012 page 21.
[19] QCAT Practice Direction No. 1 of 2012 – Hybrid hearings

their proposed decision in writing including brief reasons, and places the proposed decision and the reasons in an envelope which is sealed.

Mediation then takes place, although the mediator is not to meet with any of the parties in private session. If it is settled at mediation, the terms of settlement are recorded and any necessary orders made, and the sealed envelope is destroyed without the parties knowing the proposed decision. If the proceeding is not settled at mediation, the member opens the sealed envelope and delivers the decision.

SAT has no formal process akin to SMAH or hybrid hearings, although in residential parks matters, a process similar to SMAH occurs. Those matters are listed for an initial directions hearing at which the potential for settlement will be explored, although not to the extent that the member would prejudice his/her capacity to hear the matter. If settlement through mediation appears likely, the parties are referred immediately to a mediator who is on standby to deal with such matters.

If the matter is not resolved, it goes back to the member who heard the matter in directions and a hearing takes place. This expedited process is necessary due to the nature of residential parks disputes, which often involve a resident of a caravan park being required to surrender their premises.

In appropriate cases, usually involving relatively minor planning matters, the Tribunal occasionally invites parties to consider consenting to determination of their dispute by a mediator if mediation proves unsuccessful. That process is adopted where the information exchanged in mediation is likely to comprise the entire cases of the respective parties if the matter goes to a hearing. Because the mediator is a person who might otherwise hear the matter, there is no reason to cause another member to hear all of the same material at a subsequent hearing.

Parties are invited to consider the possibility prior to the commencement of mediation and are usually content to give consent. Obviously, the process is not used where any relevant information is provided to the mediator by a party in a private session unless the parties consent to full disclosure of that information before the mediator moves into a decision-making role. Usually, where it is contemplated that a decision might be made following unsuccessful mediation, there would be no private sessions in the course of the mediation.

A recent change at ACAT resulted from a noticeable increase in applications under the *Unit Titles Act 2001* which is under the Civil Disputes and Unit Titles Disputes work area. Unit titles applications are often complex and can include many parties, and the Tribunal responded by establishing an amended case management process in March 2012. Applications are now listed for directions in the first instance so that a

member can identify the issues in dispute, any additional parties can be joined, and the best procedure for dealing with the particular case can be determined. Some matters lend themselves to early mediation, while others require interim determinations and quick hearings. The new process allows for the use of a procedure that is more responsive to the needs of the individual case.

All of these different approaches to dispute resolution illustrate the flexibility which super-tribunals exhibit. They have the resources to implement programmes of this nature through accessible practice notes, pamphlets or rules. Through a collegiate approach to work and adequate member training, consistency of approach and refinement of processes and practices are facilitated.

Internal reviews

The QCAT Act confers an extensive internal appeal process in relation to tribunal decisions.[20] Internal appeals are made to an Appeal Tribunal which is constituted by either one, two or three judicial members, or in suitable circumstances, one, two or three suitably qualified members. In practice, as I understand it, a substantial burden of internal appeals falls on the President of QCAT.

In SAT, no general right of internal appeal is provided. Some enabling acts provide for internal appeals. In guardianship matters, a right of review to a full tribunal chaired by a judicial member exists for decisions by a single member. In minor planning matters, a right of internal review by a judicial member exists for decisions involving questions of law where the original decision was made by a non-legally qualified member.

In building disputes matters, a right of review with leave is provided in relation to all decisions, with the Tribunal constituted on review by more senior members than those making the original decision. Otherwise, appeals are only available from tribunal decisions to the Supreme Court with leave and on questions of law from decisions of a non-judicial member, and to the Court of Appeal with leave and on questions of law from decisions by the Tribunal constituted by or including a judicial member.

No internal review provisions are found in the VCAT Act, and I am unsure as to whether internal reviews may be available in relation to particular matters specified under enabling legislation.

At ACAT, the Appeal President is responsible for the discharge of tribunal business relating to referrals and appeals, including the allocation of members to appeal hearings. An appeal tribunal is constituted by one or

[20] QCAT Act s 25, s 26, and s 142.

more presidential members, or one or more presidential members and one or more nonpresidential members.

A party to an original application, may, for most cases, lodge an application for appeal within the Tribunal on a question of fact or of law, once the Tribunal has decided the original application. There is no internal appeal process for decisions made under the *Heritage Act 2004* (ACT), the *Planning and Development Act 2007* (ACT) or the *Tree Protection Act 2005* (ACT). Parties in these matters may only appeal to the Supreme Court on a question of law.

The Tribunal may refer questions of law and original applications or appeals to the Supreme Court. Parties are usually required as a first step to attend a conference where the prospect of settlement is explored. Directions are made to progress the appeal to hearing if settlement is not possible. Some matters require interim hearings to consider issues such as whether the implementation of a decision should be stayed pending the hearing of the appeal.

Costs

The general position in each of the super-tribunals is that, as a starting point, parties bear their own costs.[21] In each case the Tribunal has a discretion to depart from that starting point. In all cases that discretion is exercised sparingly.

In VCAT, the discretion to award costs arises 'only if (the Tribunal is) satisfied that it is fair to do so'. Having regard to certain matters set out in s 109(3). Those matters include the nature and complexity of the proceeding, the relative strength of the claims made by the parties, and the way in which the proceedings were conducted.

The power to award costs in SAT is not as constrained by the SAT Act as in Victoria. However, in practical terms the matters which might lead the Tribunal to make a costs order in SAT proceedings are, if anything, more limited than the matters prescribed by s 109(3) of the VCAT Act. [22]

Section 102 of the QCAT Act identifies the circumstances in which the no costs starting point might be departed from in QCAT. That section permits the Tribunal to make an order requiring one party to pay another party's costs 'if the Tribunal considers the interests of justice required to make the order'. The section permits the Tribunal to have regard to matters concerning the conduct of the party, the complexity of the issues, the conduct of a decision-maker in relation to review proceedings, the

[21] VCAT Act s 109; SAT Act s 87; QCAT Act s 100; ACAT Act s 48.

[22] For a full discussion of the exercise of the discretion to award costs in SAT, see Guide to Proceedings in the West Australian State Administrative Tribunal – DR Parry and B DeVilliers 1st ed, Common Law Book Co. 2012 Ch 17

financial circumstances of the party and anything else that the Tribunal considers relevant.

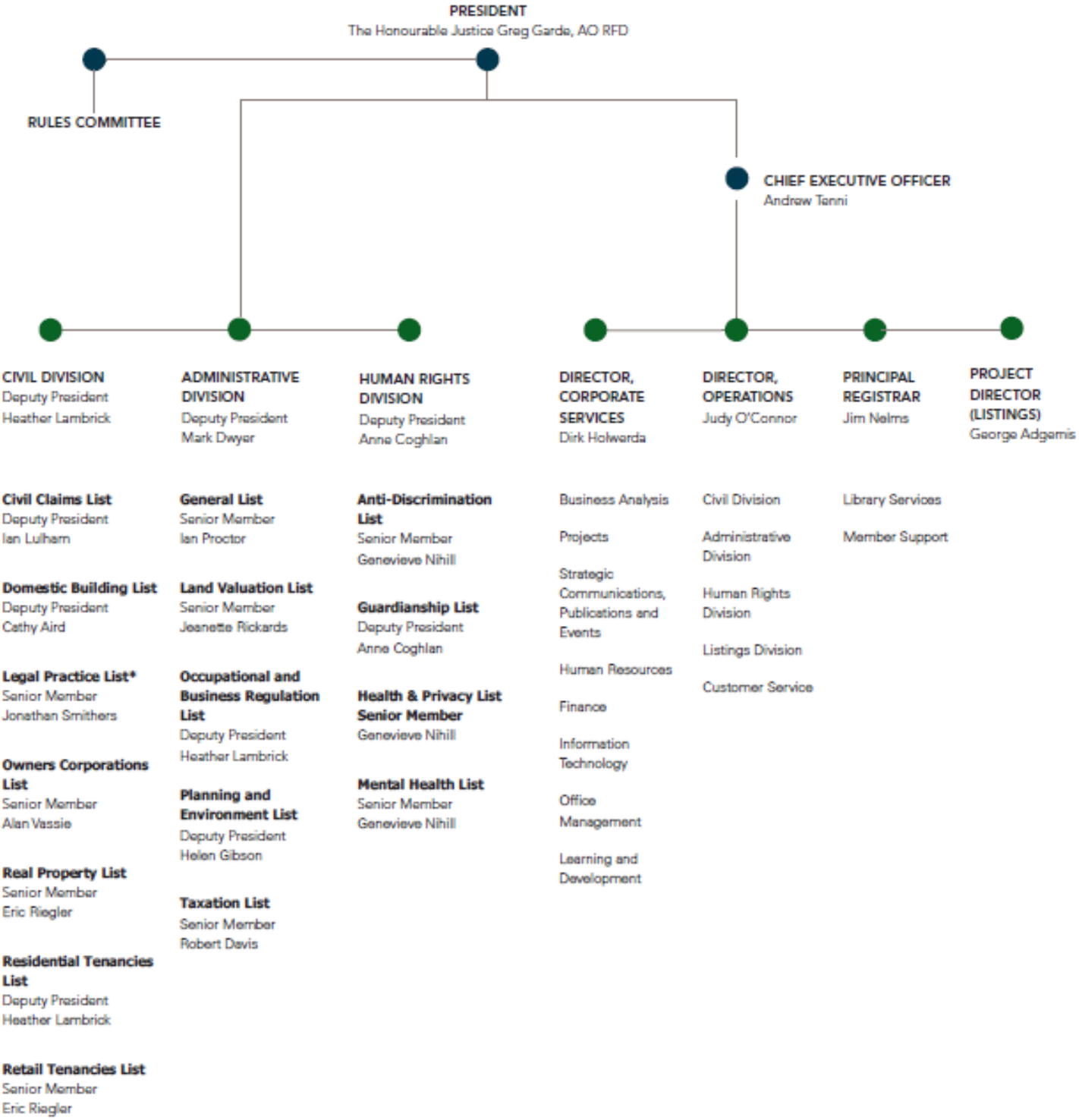
Notwithstanding the capacity to make costs orders, they are relatively unusual in each of the super-tribunals.

CONCLUSION

This paper touches upon some of the similarities and differences between QCAT, VCAT, ACAT, and SAT. Each has approached its wide and varied jurisdiction in slightly different ways. From my discussions with the Presidents of VCAT, QCAT and ACAT, and my exposure to the work of those tribunals through that contact, I can say that one major similarity which all have, is the clear focus which each has on achievement of their statutory objectives of being fair, quick, informal and cost effective.

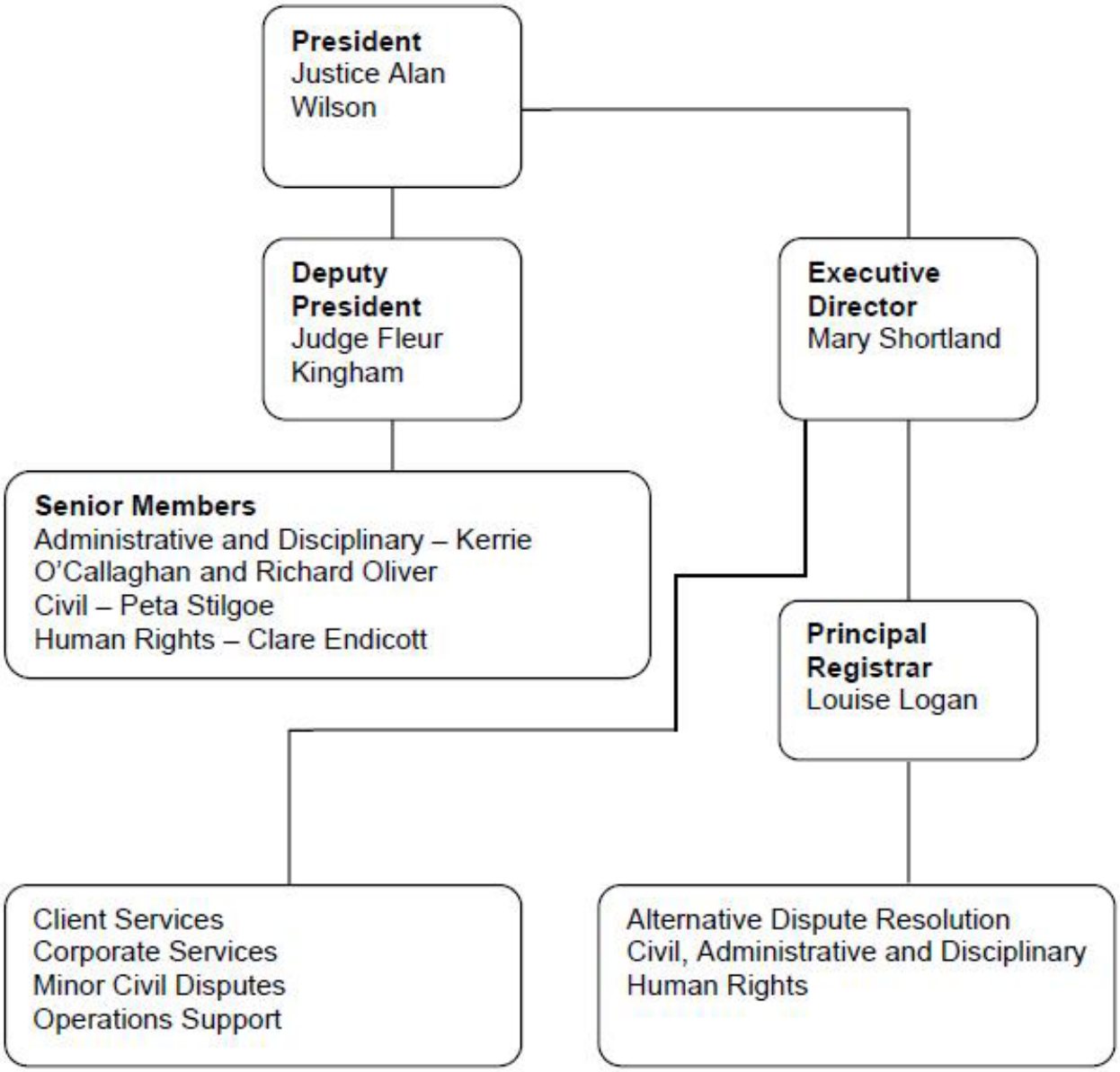
Compared to the plethora of tribunals which they replaced, the super-tribunals all offer far greater accessibility, efficiency, consistency of decision-making and greater independence, both in perception and in reality, from government. The availability of full time tribunal members greatly contributes to the achievement of the statutory objectives. Properly resourced, super-tribunals make a very positive contribution to public administration and the administration of the law.

Annexure VCAT: Organisational Structure of VCAT

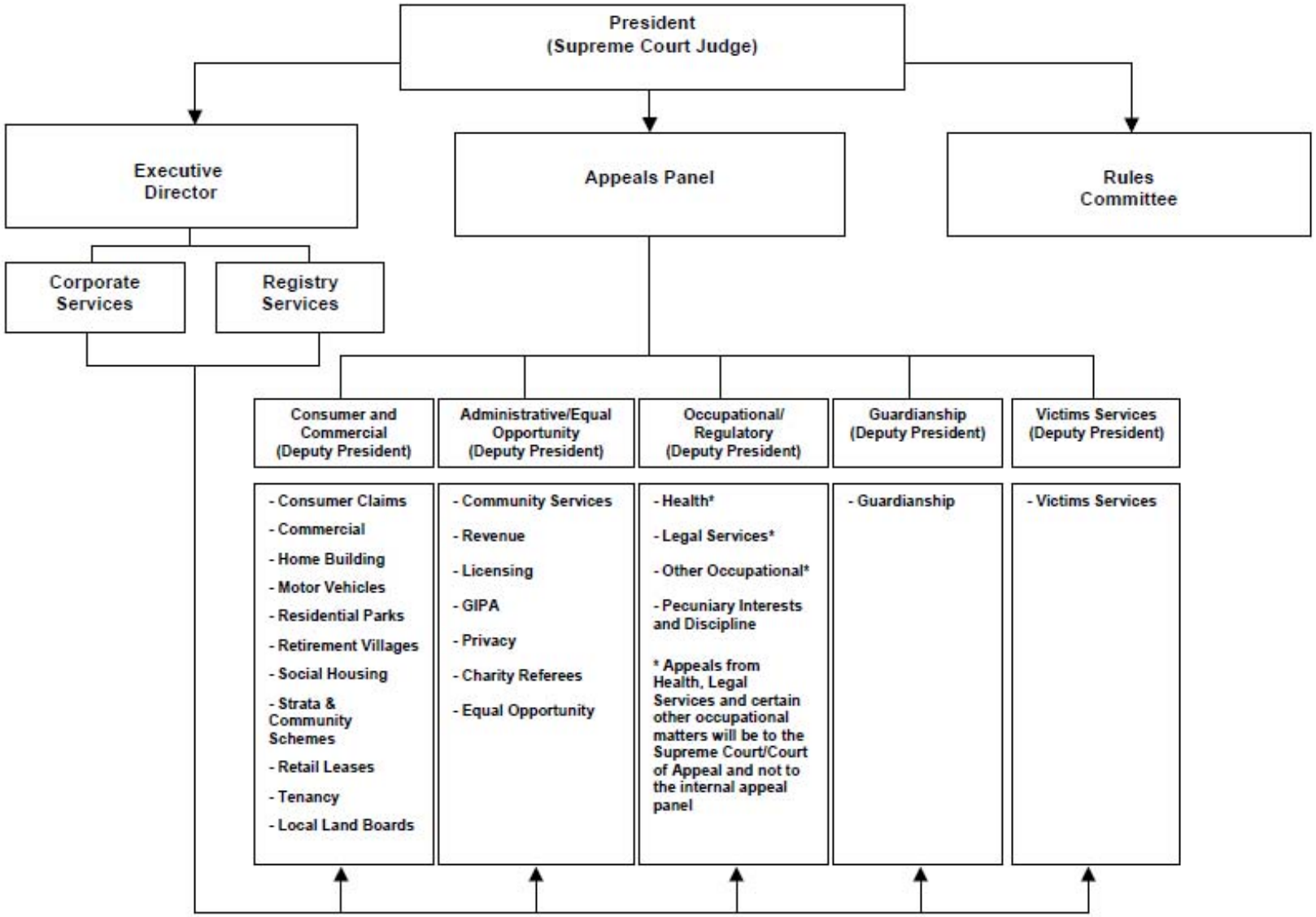


*The VCAT Rules 2008 established the Legal Practice List in the Civil Division, but for registry purposes it sits within the Administrative Division

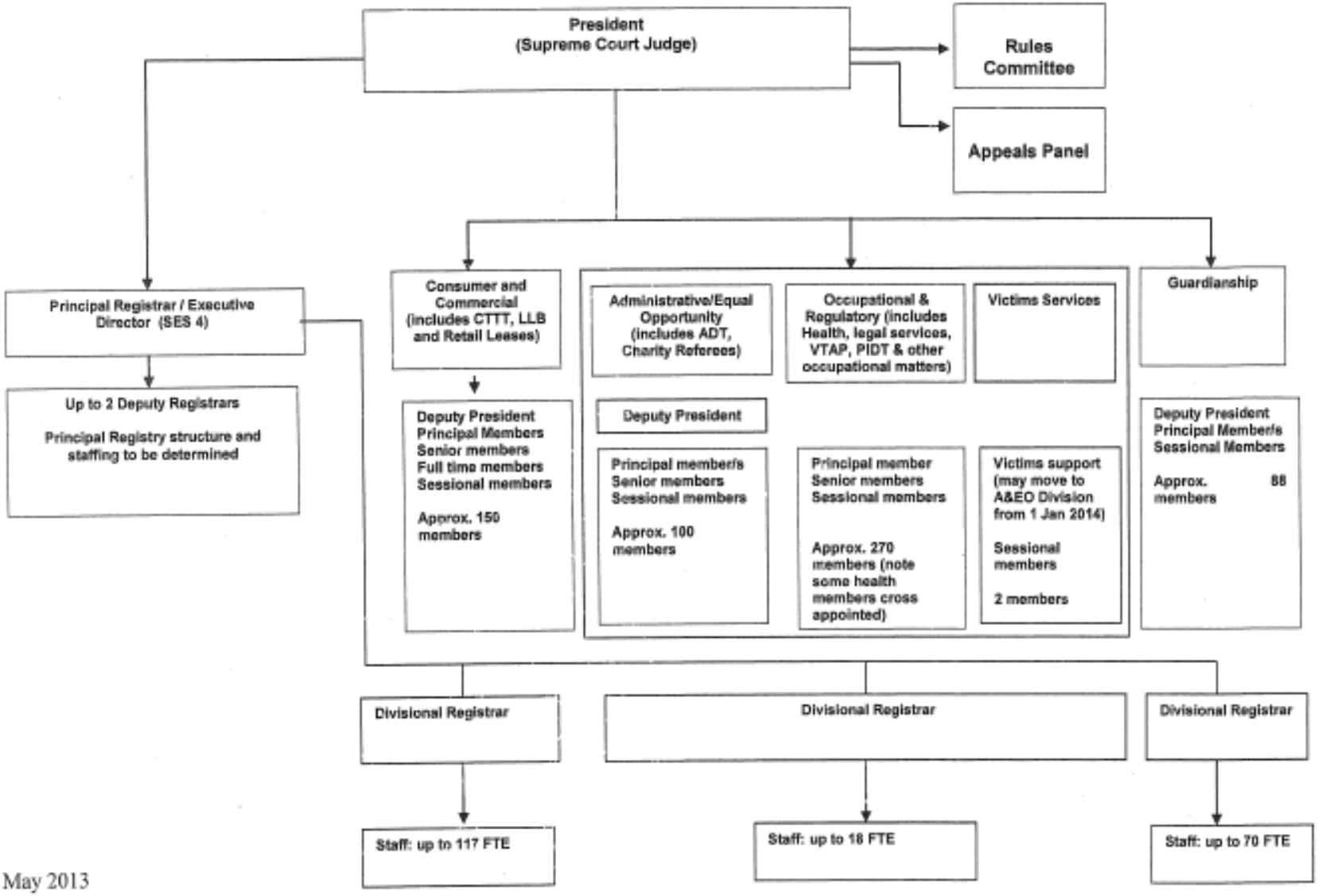
Annexure QCAT: Organisational Structure of QCAT



Annexure NCAT 1: Structure Proposed in Government Response to NCAT Report



Annexure NCAT 2: Update to Proposed NCAT Structure



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Annexure SAT: Organisational Structure of SAT