

# THE NSW CIVIL AND ADMINISTRATIVE TRIBUNAL CASE MANAGEMENT AND PRACTICE AND PROCEDURE

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## Introduction

- 1 Unlike the Land and Environment Court of New South Wales, which is almost 35 years old, the Civil and Administrative Tribunal of New South Wales is only 1½ years old, having come into existence on 1 January 2014. Also unlike the Land and Environment Court, the Tribunal has its own, legislatively endorsed pet name, 'NCAT': *Civil and Administrative Tribunal Act 2013* (NSW) (the Act), s 7(1).
- 2 At this conference, it should be noted that NCAT owes a particular debt to the Land and Environment Court. This is because of the invaluable contribution made by Commissioner Linda Pearson, who chaired the Reference Group. This group played a vital role in the formation of NCAT and, in particular, the development of its legislative underpinnings. The Reference Group was composed of persons representing the 22 tribunals and bodies that have now been incorporated into NCAT as well as representatives of those groups most directly affected by the formation of the new Tribunal. Managing that group, and its constituents' competing interests, expectations and personalities was an enormous task. It was largely due to Linda's intellect, sound judgment, skill and charm that NCAT came to fruition and did so both in such a short time and with the solid and workable foundation that it has.
- 3 NCAT takes over the work and brings together the jurisdiction of 22 previous tribunals or bodies in the State's largest tribunal. It is structured with 4 Divisions and an internal Appeal Panel. It receives 70-75,000 applications per

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\* President of the Civil and Administrative Tribunal of New South Wales; Judge of the Supreme Court of New South Wales. I would like to acknowledge the great assistance of my tipstaff, Joshua Kang, in gathering the information for, and preparation of, this paper.

year and conducts in the order of 90,000 hearings annually. Some matters are listed on the basis of a nominal allocated hearing time of 7 minutes per matter while others are listed for hearings of 15 to 20 days.

- 4 Managing this workload requires a vigorous but differentiated approach to case management and flexible but effective practice and procedure.
- 5 It goes without saying that it would not be possible in the time allocated to cover all aspects of the Tribunal's case management or practice and procedure. Nor would it be fair to subject you to such an exposition. Accordingly, I shall attempt to outline some significant features of what the Tribunal does and the legal and practical considerations that drive the different approaches to case management in the Divisions.
- 6 In order to understand and appreciate the requirement for a differentiated approach to case management and practice and procedure in the Tribunal, it is worthwhile taking a little time to outline how NCAT came into existence and the nature of its multiple jurisdictions.

### **How Did NCAT Come About?**

- 7 NCAT, not unusually, came about because politicians decided to create it and Parliament passed the laws to bring it into existence. Groucho Marx might be thought to be close to the mark when he observed:

Politics is the art of looking for trouble, finding it everywhere, diagnosing it incorrectly and applying the wrong remedies.

- 8 In the case of NCAT, however, Groucho Marx did not take into account Linda Pearson.
- 9 In March 2012, the Standing Committee on Law and Justice of the Legislative Council of New South Wales published a report titled *Opportunities to consolidate tribunals in NSW* (the Report).<sup>1</sup> That Committee, composed of

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<sup>1</sup> New South Wales, Standing Committee on Law and Justice, *Opportunities to consolidate tribunals in NSW*, (March 2012).

politicians, had gone looking for trouble, found it everywhere in the tribunal system then current in New South Wales which it described as “*complex and bewildering*”, inhibiting access to justice and not meeting the needs of the people of New South Wales. It recommended as one option the creation of a super Tribunal to address these problems.

- 10 In October 2012, the Government in its Response to the Report<sup>2</sup> accepted the recommendations and decided to take up the option of establishing the Civil and Administrative Tribunal of New South Wales. The Government’s decision included a commitment to providing “*a simple, quick and effective process for resolving disputes and reviewing executive action*”<sup>3</sup>. The Reference Group and other implementation structures were established in early 2013 and after just slightly more than nine months NCAT was delivered on 1 January 2014.
- 11 In the hands of Linda Pearson, the diagnosis of the politicians was demonstrated to be correct and the remedy to be applied was developed into an effective super Tribunal for New South Wales. Groucho Marx was proved wrong in this case.

### **The Formation of NCAT**

- 12 The formation of NCAT has resulted in at least five significant changes for the administration of civil justice in New South Wales:
- Simplification of the Tribunal System
  - An Independent Tribunal
  - A Tribunal with an Qualified and Flexible Membership
  - An Inexpensive and Prompt System of Internal Appeals

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<sup>2</sup> New South Wales, NSW Government, *Response to the Standing Committee on Law and Justice Inquiry into Opportunities to consolidate tribunals in NSW*, (October 2012) (“The Response”).

<sup>3</sup> The Response at 1.

- Appropriate Differentiation of Practice and Procedure for Different Types of Cases in the Tribunal.

### **Simplification of the Tribunal System**

- 13 As a result of the formation of NCAT, instead of facing a bewildering array of tribunals, boards and other bodies, there is one Tribunal to go to, one telephone number to contact and one website to visit. Some of that may sound trivial but for individuals who have no experience of the law, it is very significant.
- 14 The Tribunal has taken over the work and brought together the jurisdictions of the 22 previously existing tribunals and bodies:
- The Administrative Decisions Tribunal;
  - The Consumer Trader and Tenancy Tribunal;
  - The Guardianship Tribunal;
  - 14 medical and other health practitioner disciplinary tribunals;
  - The 2 Local Council and Aboriginal Land Councils Pecuniary Interest and Disciplinary Tribunals; and
  - The Charity Referees, the Local Land Boards and the Vocational Training Appeals Panel.
- 15 This is a major structural simplification for the administration of civil justice in the tribunal system in New South Wales.
- 16 The transitional provisions, which permitted the amalgamation to occur without major disruption to the tribunal system, are found in Division 3 of Schedule 1 to the *Civil and Administrative Tribunal Act 2013* (NSW) (cll 6 to 14). A summary is provided in Attachment 1.

## **An Independent Tribunal**

17 The reality and the perception of independence are essential to assuring all litigants that justice in the Tribunal will be administered impartially and fairly.

18 The first object stated in s 3(a) of the Act includes:

to establish an independent Civil and Administrative Tribunal of New South Wales ...

19 This is supported by other provisions of the Act. For example, Members may be appointed for terms of up to 5 years and are eligible for reappointment under cl 2 of Sch 2 to the Act and, except in the case of the President, may be removed from office by the Governor for incapacity, incompetence or misbehaviour under cl 7(2) of Sch 2 of the Act. Importantly, a Member has, in the exercise of functions performed as a Member, the same protection and immunities as a Judge of the Supreme Court: cl 4 of Sch 2 to the Act.

20 The President must be a Supreme Court Judge. In this, NCAT is unlike any of its predecessors.

21 By this structure and these provisions, the Parliament can be seen as emphasising:

- (1) the independence of the Tribunal from the Executive Government; and
- (2) the significant role that the Tribunal has to play in the administration of civil justice in this State.

## **A Tribunal with a Qualified and Flexible Membership**

22 NCAT currently has 248 members, including the President, Deputy Presidents, Principal Members, Senior Members and General Members. These Members bring an extraordinary range of qualifications, experience and expertise to the Tribunal.

- 23 All Members are assigned to a particular Division. In this way, the expertise and experience of Members are maintained and effectively deployed. Notwithstanding this, there is also flexibility. Members can be cross-assigned by the President to other Divisions so that talent can be deployed across the Tribunal's Divisions as required.
- 24 Legal Members must be lawyers of at least 7 years' standing. Quite significantly, however, not all the Members are lawyers. The body of Senior and General Members includes those with relevant professional or occupational qualifications or experience and those who can represent the community or a relevant section of the community.
- 25 In addition to Members appointed for a term, the President can appoint Occasional Members for particular proceedings where this is necessary to permit the Tribunal to perform its functions. This is how professional and community members are appointed for particular Health Practitioner disciplinary matters.

### **An Inexpensive and Prompt System of Internal Appeals**

- 26 To provide a readily accessible, timely and cost-effective review of first instance decisions, NCAT has its own Appeal Panel: ss 27(1)(a), 32, 80 and 81 of the Act.
- 27 Apart from professional disciplinary and similar decisions of the Occupational Division, almost all final decisions at first instance are appealable to the Appeal Panel: ss 30, 32 and 80 of the Act. Generally under s 80(2)(b), a dissatisfied party can appeal:
- (1) as of right on question of law, and
  - (2) by leave, on any other ground.
- 28 Interlocutory decisions can be appealed by leave of the Appeal Panel: s 80(2)(a).

- 29 The Appeal Panel was a feature of the Administrative Decisions Tribunal when it was established in 1998 and it proved its worth in that tribunal and for the Guardianship Tribunal. Thus, it is not an innovation for the Administrative and Equal Opportunity Division or the Guardianship Division. It is, however, new for the Consumer and Commercial Division. Previously, parties to proceedings in the Consumer Trader and Tenancy Tribunal (CTTT) could only appeal on a limited basis to the District Court in certain matters or seek judicial review in the Supreme Court. Now, almost all decisions made in the Consumer and Commercial Division are appealable to the Appeal Panel.
- 30 To ensure that these appeal rights are effective and not illusory, reasons must generally be given for decisions. A written statement of reasons can be sought in respect of any decision of the Tribunal, and this must be provided within 28 days<sup>4</sup>. In addition to this statutory procedure, there is an independent duty at common law for the Tribunal to provide reasons for its decisions<sup>5</sup>.
- 31 The internal appeal mechanism allows decisions at first instance to be corrected, where necessary, without the expense or time involved in bringing proceedings in the District Court or the Supreme Court.
- 32 The scrutiny of first instance decisions thus provided is an essential element of NCAT's strategy to improve the standard of making and writing decisions throughout the Tribunal.
- 33 In total, there were over 600 internal appeals to the Appeal Panel in 2014.
- 34 As has been noted, not every decision of the Tribunal is internally appealable. Section 32(3) expressly provides that the following decisions are not internally appealable:
- (1) decisions of the Appeal Panel;

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<sup>4</sup> *Civil and Administrative Tribunal Act 2013* (NSW), s 62.

<sup>5</sup> *Collins v Urban* [2014] NSWCATAP 17 at [56].

- (2) decisions in an external appeal;
- (3) decisions in proceedings for the exercise of the Tribunal's enforcement jurisdiction; and
- (4) decisions of the Tribunal in proceedings for the imposition of a civil penalty in exercise of its general jurisdiction.

35 In addition, the Division Schedules include provisions that remove other decisions of the Tribunal from its internal appeal jurisdiction and provide that some of these decisions are appealable to the Supreme Court or the Land and Environment Court. These are:

- (1) Clauses 15, 16, 17 and 18 of Sch 3, concerning Administrative and Equal Opportunity Division decisions; and
- (2) Clause 29 of Sch 5, concerning Occupational Division decisions which fall within the definition of "*a profession decision*" in that schedule.

36 The decisions of the Administrative and Equal Opportunity Division which may only be appealed to the Land and Environment Court are identified in Sch 3, cl 18 as follows:

- (1) A party to proceedings in which a Division decision is made for the purposes of the lands legislation may appeal to the Land and Environment Court against the decision.

Lands legislation includes:

*Agricultural Industry Services Act 1998,*  
*Australian Oil Refining Agreements Act 1954,*  
*Commons Management Act 1989,*  
*Crown Lands Act 1989,*  
*Crown Lands (Continued Tenures) Act 1989,*  
*Hay Irrigation Act 1902,*  
*Local Land Services Act 2013,*  
*Port Kembla Inner Harbour Construction and Agreement Ratification Act 1955,*  
*Water Act 1912,*  
*Wentworth Irrigation Act 1890,*  
*Western Lands Act 1901.*



- (2) Subject to any interlocutory order made by the Land and Environment Court, an appeal to this Court does not affect the operation of the decision under appeal or prevent the taking of action to implement the decision.

37 The decisions of the Occupational Division which may be appealed to the Land and Environment Court are dealt with in Sch 5, cl 29 as follows:

**(1) Profession decisions not internally appealable**

Despite section 32 of the NCAT Act, each of the following Division decisions (a profession decision) is not an internally appealable decision for the purposes of an internal appeal:

- (a) a decision for the purposes of the *Aboriginal Land Rights Act 1983* other than:
  - (i) a decision for the purposes of section 198 of that Act not to conduct proceedings into a complaint, or
  - (ii) a decision for the purposes of section 199 of that Act to determine proceedings into a complaint without a hearing,
- (b) a decision for the purposes of the *Architects Act 2003*,
- (c) a decision for the purposes of the *Building Professionals Act 2005*,
- (d) a decision for the purposes of the Health Practitioner Regulation National Law (NSW) (other than a decision for the purposes of clause 13 of Schedule 5F to that Law),
- (e) a decision for the purposes of the *Legal Profession Act 2004*,
- (f) a decision for the purposes of the *Local Government Act 1993* other than:
  - (i) a decision for the purposes of section 469 of that Act not to conduct proceedings into a complaint, or
  - (ii) a decision for the purposes of section 470 of that Act to determine proceedings into a complaint without a hearing,
- (g) a decision for the purposes of the *Surveying and Spatial Information Act 2002*,
- (h) a decision for the purposes of the *Veterinary Practice Act 2003*.

**Note.** A Division decision other than a profession decision that is a general decision or administrative review decision may be subject to an internal appeal. Refer section 32 and Division 2 of Part 6 of the Act.

**(2) Right to appeal to Supreme Court or Land and Environment Court**

However, a party to proceedings in which a profession decision is made may appeal against the decision in accordance with this clause to:

- (a) in the case of an order for the purposes of Division 3 of Part 5 or Division 4 of Part 7 of the *Aboriginal Land Rights Act 1983* declaring a vacancy in an office – the Land and Environment Court, and
- (b) in the case of any other decision – the Supreme Court.

**(3) Despite subclause (2), an appeal does not lie with respect to any of the following Division decisions:**

- (a) a decision made for the purposes of section 385(2) of the *Legal Profession Act 2004*,

- (b) any other decision of a kind prescribed by the regulations made for the purposes of that Act.

**(4) Basis or grounds of appeal**

An appeal to a court under this clause:

...

- (b) in the case of any other appeal (a non-lawyer appeal) – may be made as of right on any question of law, or with the leave of the court, on any other grounds.

**Note.** See also section 84 (Practice and procedure for appeals to courts under this Act).

...

**(6) Leave required in certain cases**

Despite subclauses (2)–(5), an appeal does not lie to a court under this clause against any of the following decisions except by leave of the court:

- (a) an interlocutory decision of the Tribunal,
- (b) a decision made with the consent of the parties,
- (c) a decision as to costs.

**(7) Non-lawyer appeals**

The court in a non-lawyer appeal may:

- (a) decide to deal with the appeal by way of a new hearing if it considers that the grounds for the appeal warrant a new hearing, and
- (b) permit such fresh evidence, or evidence in addition to or in substitution for the evidence received by the Tribunal at first instance, to be given in the new hearing as it considers appropriate in the circumstances.

- (8) In determining a non-lawyer appeal, the court may make such orders as it considers appropriate in light of its decision on the appeal, including (but not limited to) orders that provide for any one or more of the following:

- (a) the decision under appeal to be confirmed, affirmed or varied,
- (b) the decision under appeal to be quashed or set aside,
- (c) the decision under appeal to be quashed or set aside and for another decision to be substituted for it,
- (d) the whole or any part of the case to be reconsidered by the Tribunal at first instance, either with or without further evidence, in accordance with the directions of the court.

**(9) Effect of appeal on profession decision**

Subject to any interlocutory order made by the court concerned, an appeal under this clause does not affect the operation of the Division decision under appeal or prevent the taking of action to implement the decision.

38 Decisions of the Guardianship Division (except a decision of a registrar under cl 8(1)) may be appealed either to the Tribunal's Appeal Panel or to the Supreme Court, but not to both: Sch 6, cl 12.

### **Appropriate Differentiation of Practice and Procedure**

39 Combining 22 previously existing tribunals and bodies into one is not without its complications. To manage the workload and to deal appropriately with the different types of matters and litigants that come before the Tribunal, there are 4 first instance Divisions and an Appeal Panel. The 4 first instance Divisions are:

- The Administrative and Equal Opportunity Division;
- The Consumer and Commercial Division;
- The Guardianship Division; and
- The Occupational Division.

40 Each Division has its own Division Head, who is also a Deputy President of the Tribunal, its own structure with different Lists for different types of matters, its own Divisional Registry and, most importantly, its own practices and procedures which reflect the nature of the work done in that Division. Each Division also has its own Schedule in the *Civil and Administrative Tribunal Act* that sets out some of the different procedures applicable in that Division. The provisions of those Division Schedules prevail over the general provisions of the Act or the procedural rules: s 17(3) of the Act.

#### *Administrative and Equal Opportunity Division*

41 In general terms, the Administrative and Equal Opportunity Division deals with:

- (1) Merits review of actions or decisions of the Executive Government in relation to matters such as:
  - (a) Community services;
  - (b) State taxation and revenue;
  - (c) Privacy and access to information under the *Government Information (Public Access) Act 2009*, which replaced the previous Freedom of Information legislation;
  - (d) Firearms licensing; and
  - (e) Other executive decisions or conduct reviewable under the *Administrative Decisions Review Act 1997*;
  
- (2) All complaints under the *Anti-Discrimination Act 1977*.

42 The provisions that establish the particular procedures for matters in the Administrative and Equal Opportunity Division are found in Sch 3 to the *Civil and Administrative Tribunal Act*.

43 The body of enabling legislation under which proceedings may be brought in the Administrative and Equal Opportunity Division includes the following Acts:

*Agricultural Industry Services Act 1998*

*Anti-Discrimination Act 1977*

*Australian Oil Refining Agreements Act 1954*

*Child Protection (Working with Children) Act 2012*

*Combat Sports Act 2008*

*Combat Sports Act 2013*

*Commission for Children and Young People Act 1998*

*Commons Management Act 1989*

*Community Services (Complaints, Reviews and Monitoring) Act 1993*

*Crown Lands (Continued Tenures) Act 1989*

*Crown Lands Act 1989*  
*Dormant Funds Act 1942*  
*Education Act 1990*  
*Government Information (Public Access) Act 2009*  
*Hay Irrigation Act 1902*  
*Local Land Services Act 2013*  
*Native Title (New South Wales) Act 1994*  
*Plant Diseases Act 1924*  
*Port Kembla Inner Harbour Construction and Agreement Ratification Act 1955*  
*Public Health Act 2010*  
*Victims Rights and Support Act 2013*  
*Water Act 1912*  
*Wentworth Irrigation Act 1890*  
*Western Lands Act 1901*

#### *Consumer and Commercial Division*

44 The Consumer and Commercial Division, as its name implies, generally deals with the resolution of consumer and commercial disputes between citizens, between citizens and businesses and, when the government is providing goods or services, between citizens and government. The Consumer and Commercial Division's jurisdiction extends to:

- Consumer claims up to \$40,000;
- Residential tenancy and social housing disputes;
- Retail lease and agricultural tenancy matters;
- Home building matters (up to \$500,000) and motor vehicle matters (in certain cases with unlimited jurisdiction);
- Strata and community title disputes;
- Dividing fence disputes;

- Residential park, retirement village and similar matters.

45 Some of the Consumer and Commercial Division's particular rules of practice and procedure are set out in Sch 4 to the *Civil and Administrative Tribunal Act*.

46 The body of enabling legislation that is relevant to claims which may be brought in the Consumer and Commercial Division includes:

*Agricultural Tenancies Act 1990*

Australian Consumer Law (NSW)

*Boarding Houses Act 2012*

*Community Land Development Act 1989*

*Community Land Management Act 1989*

*Consumer Claims Act 1998*

*Contracts Review Act 1980*

*Conveyancers Licensing Act 2003* (but only in relation to Division 3 of Part 4 of that Act)

*Credit (Commonwealth Powers) Act 2010*

*Dividing Fences Act 1991*

*Fair Trading Act 1987*

*Holiday Parks (Long-term Casual Occupation) Act 2002*

*Home Building Act 1989*

*Motor Dealers Act 1974*

*Motor Dealers and Repairers Act 2013*

*Motor Vehicle Repairs Act 1980*

*Pawnbrokers and Second-hand Dealers Act 1996*

*Property, Stock and Business Agents Act 2002*

*Residential (Land Lease) Communities Act 2013*

*Residential Parks Act 1998*

*Residential Tenancies Act 2010*

*Retail Leases Act 1994*

*Retirement Villages Act 1999*

*Strata Schemes Management Act 1996*

*Sydney Water Act 1994*

## *Guardianship Division*

47 The Guardianship Division is principally concerned with:

- Making guardianship and financial management orders for persons with impaired decision-making capacity;
- Reviewing enduring powers of attorney;
- Approving clinical trials; and
- Other matters arising under the *Guardianship Act 1987* and other legislation in relation to persons with an impaired decision-making capacity.

48 Applications in this Division are quite varied, but the two largest categories are applications for guardianship orders and applications for financial management orders, combined representing slightly over half of all lodgements.

49 The Guardianship Division's specific procedures and requirements are set out in Sch 6 of the *Civil and Administrative Tribunal Act*.

50 The body of enabling legislation that is relevant to the work of the Guardianship Division includes:

*Children and Young Persons (Care and Protection) Act 1998*

*Guardianship Act 1987*

*NSW Trustee and Guardian Act 2009*

*Powers of Attorney Act 2003*

## *Occupational Division*

51 Finally, there is the Occupational Division, which is responsible for the professional discipline of all legal practitioners in this State as well as

professional discipline and regulation of other professions, including architects, building professionals, medical practitioners and other health practitioners, surveyors and veterinarians. The Occupational Division also deals with:

- Merits review of licensing and other decisions concerning occupations regulated by the Executive Government; and
- Pecuniary interest and disciplinary matters in relation to local councils and aboriginal land councils.

52 Although the Occupational Division is the smallest of the Divisions by reference to the number of applications lodged each year, its decisions can be some of the most significant including striking barristers and solicitors off the roll of practitioners, deregistering doctors or depriving real estate agents of their licence to operate.

53 The particular procedures that apply in the Occupational Division are set out in Sch 5 to the *Civil and Administrative Tribunal Act*.

54 The body of enabling legislation that is relevant to the work of the Occupational Division includes:

*Aboriginal Land Rights Act 1983*

*Architects Act 2003*

*Building Professionals Act 2005*

*Commercial Agents and Private Inquiry Agents Act 2004*

*Conveyancers Licensing Act 2003* (except in relation to Division 3 of Part 4 of that Act)

*Fair Trading Act 1987*

*Health Care Complaints Act 1993*

Health Practitioner Regulation National Law (NSW)

*Home Building Act 1989*

*Legal Profession Act 2004*

*Local Government Act 1993*



*Motor Dealers Act 1974*  
*Motor Dealers and Repairers Act 2013*  
*Motor Vehicle Repairs Act 1980*  
 Occupational Licensing National Law (NSW)  
*Passenger Transport Act 1990*  
*Pawnbrokers and Second-hand Dealers Act 1996*  
*Property, Stock and Business Agents Act 2002*  
*Public Notaries Act 1997*  
*Security Industry Act 1997*  
*Surveying and Spatial Information Act 2002*  
*Tow Truck Industry Act 1998*  
*Valuers Act 2003*  
*Veterinary Practice Act 2003*  
*Wool, Hide and Skin Dealers Act 2004*

## Workload Summary

55 The distribution of the applications lodged across the Divisions in the first 9 months of the 2014-15 financial year was:

	Lodgements	% of total
Administrative & Equal Opportunity	639	1.2%
Consumer & Commercial	43,449	82.2%
Guardianship	8,536	16.2%
Occupational	213	0.4%
	<b>52,837</b>	<b>100%</b>

## Legislative Framework for NCAT's Practice and Procedure and Case Management

56 The framework for practice and procedure in the Tribunal is found in Pt 4 of the Act, ss 35 to 70. Part 4 is helpfully headed '*Practice and Procedure*'.

57 As in the Land and Environment Court and the Supreme Court, the guiding principle is that the Act and the procedural rules should be applied so as to

facilitate the just, quick and cheap resolution of the real issue in the proceedings: s 36(1) of the Act. Additional general principles concerning practice and procedure are contained in ss 36, 37 and 38.

58 A most useful provision is s 38(1), which states:

The Tribunal may determine its own procedure in relation to any matter for which this Act or the procedural rules do not otherwise make provision.

59 The remaining provisions of s 38 establish that:

- (1) Generally, the Tribunal is not bound by the rules of evidence except in proceedings in exercise of its enforcement jurisdiction or proceedings for the imposition of a civil penalty but s 128 of the *Evidence Act 1995* (NSW) is taken to apply evidence given in the Tribunal even when the Tribunal is not required to apply the rules of evidence: s 38(2) and (3). Note: the rules of evidence also apply in professional discipline proceedings concerning legal practitioners or notaries: Sch 5, cl 20;
  - (2) The Tribunal is also required to take such measures as are reasonably practicable:
    - (a) to ensure that the parties to the proceedings before it understand the nature of the proceedings, and
    - (b) if requested to do so—to explain to the parties any aspect of the procedure of the Tribunal, or any decision or ruling made by the Tribunal, that relates to the proceedings, and
    - (c) to ensure that the parties have a reasonable opportunity to be heard or otherwise have their submissions considered in the proceedings
- s 38(5)(a), (b) and (c); and

- (3) Finally, the Tribunal is to ensure that all relevant material is disclosed to the Tribunal so as to enable it to determine all of the relevant facts in issue in any proceedings: s 38(6)(a).

60 Part 4 of the Act then goes on to deal with:

- (1) Commencement of proceedings, extensions of time and stays: ss 39-43;
- (2) Participation in proceedings, limited rights of representation, witnesses and summonses: ss 44-48 [**note** s 45 establishes the general proposition that parties generally have the carriage of their own case and may be represented only with leave];
- (3) Conduct of proceedings and summary dismissal: ss 49-55;
- (4) Determination of issues and proceedings: ss 56-63 [**note** s 60 establishes the general proposition that each party is to pay the party's own costs except if there are special circumstances warranting the awarding of costs]; and
- (5) Information disclosure or non-disclosure and privilege: ss 64-70.

61 To have regard only or principally to Pt 4 in relation to practice and procedure in the Tribunal would, however, be a grave error for a number of reasons.

62 First, as has already been noted, the provisions of the Act are expressly stated to be subject to the provision of the Division Schedules, namely Schs 3, 4, 5 and 6 of the Act. Section 17(3) provides:

**17 Division Schedule for a Division of Tribunal**

...

- (3) The provisions of a Division Schedule for a Division of the Tribunal prevail to the extent of any inconsistency between those provisions and any other provisions of this Act or the provisions of the procedural rules.

...

63 Secondly, s 35 provides:

Each of the provisions of this Part [*Part 4 Practice and Procedure*] is subject to enabling legislation and the procedural rules.

64 Thus, when dealing with practical questions relating to practice and procedure in the Tribunal, it is essential to consider not only the Practice and Procedure Part of the Act, Pt 4, but also:

- (1) the relevant enabling legislation;
- (2) the relevant Division Schedule in the Act; and
- (3) the procedural rules (defined in s 4(1) of the Act to mean the Tribunal's Rules and the regulation made under the Act in their application to practice and procedure in the Tribunal).

Each of these prevails over the terms of Pt 4 to the extent of any inconsistency.

65 The Tribunal's Rules are made by the NCAT Rules Committee under ss 24 and 25 of the Act and are the Civil and Administrative Tribunal Rules 2014. The regulation is the Civil and Administrative Tribunal Regulation 2013.

66 The final pieces of the Tribunal's practice and procedure jigsaw are the procedural directions which are issued by the President and which are binding on the Tribunal and the parties (see s 26(4) of the Act). Four NCAT-wide procedural directions have been made and published:

- (a) Service and giving notice – Procedural Direction 1
- (b) Summonses – Procedural Direction 2
- (c) Expert witnesses – Procedural Direction 3

(d) Registrars' power – Procedural Direction 4

There are also procedural directions that are limited in their application to proceedings in particular Divisions.<sup>6</sup>

67 To illustrate how this works, two examples relating to representation and costs can be used.

68 As to representation, the general proposition, found in s 45 of the Act, is that each party is responsible for the carriage of the party's own case unless leave is granted by the Tribunal for the party to be represented. That is not, however, the end of the matter. Although few, if any, enabling Acts contain provisions dealing with representation, the Division Schedules do. In summary, in the Administrative and Equal Opportunity Division and in the Occupational Division legal representatives can appear without leave in virtually all matters (see Sch 3, cl 9 and Sch 5, cl 27). In the Consumer and Commercial Division and the Guardianship Division, leave to appear is required in virtually all matters except proceedings under the *Retail Leases Act 1987* (NSW) (see, Sch 4, cl 7 and Sch 6, cl 9). In addition, rr 31, 32 and 33 of the NCAT Rules make provision for how an application for leave to be represented may be made and dealt with.

69 As to costs, the general position is set out in s 60(1), which provides that each party is to pay the party's own costs. Section 60 itself, however, contains a qualification on that position in subs (2), which states that the Tribunal may award costs in relation to proceedings before it only if it is satisfied that there are special circumstances warranting an award of costs. A non-exhaustive list of matters to which the Tribunal may have regard in determining whether there are special circumstances is set out in subs (3). Notwithstanding this, enabling legislation not uncommonly confers on the Tribunal a general power to award costs. For example, cl 13 of Sch 5D of the Health Practitioner Regulation National Law (NSW) expressly displaces s 60 of the Act. In

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<sup>6</sup> All the procedural directions (both NCAT-wide and Division specific) may be found on the NCAT website:  
[http://www.ncat.nsw.gov.au/Pages/about\\_us/publications\\_and\\_resources/procedural\\_directions.aspx](http://www.ncat.nsw.gov.au/Pages/about_us/publications_and_resources/procedural_directions.aspx)

addition, some of the Division Schedules make specific provisions in relation to costs for different types of matters (see cl 12 and 13 of Sch 3, cl 11 of Sch 4 and cl 23 and 26 of Sch 6) as does r 38 of the Rules.

## **Differentiated Case Management**

70 The profusion of jurisdictions<sup>7</sup> conferred on the Tribunal, the different enabling legislation that applies in the different Divisions and the variety of matters which may be litigated in the Tribunal require that the Tribunal's practice and procedure, as well as case management, be differentiated according to the type of proceedings being dealt with, the volume of applications, the significance of the subject matter, the requirements of the relevant enabling legislation and the needs of the litigants before the Tribunal.

71 As a practical consequence of these factors, each division of the Tribunal can be seen as having a different impetus that has shaped its approach to case management.

### *Differing Impetus in Each Division*

72 In the case of the Consumer and Commercial Division, by far the largest of the Divisions at NCAT, the driving force is volume of work and the overwhelming concern is proportionality in the delivery of justice, as required by s 36(4) of the Act. Consequently, case management practices in this Division, from group lists and conciliation to online lodgements, have been adopted to ensure justice can be done on a large scale, promptly and cost effectively.

73 The approach to case management in the Guardianship Division, which is the second largest Division by number of applications, is driven by entirely different principles. This Division is under the express statutory duty to observe the principles in s 4 of the *Guardianship Act 1987* (NSW).<sup>8</sup> Because

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<sup>7</sup> General jurisdiction, administrative review jurisdiction, external appeal jurisdiction, internal appeal jurisdiction and enforcement jurisdiction. See ss 28-33 of the Act.

<sup>8</sup> Section 4 provides:

the overriding concern is the interests and welfare of the person the subject of the application (the subject person), this Division has a distinctive case management system that involves Tribunal officers actively preparing matters, contacting parties and collecting evidence within a framework where matters are triaged and prioritised by reference to an assessment of the degree of risk to the subject person. The provisions of the *Convention on the Rights of Persons with Disabilities*<sup>9</sup>, especially Article 12, are also influential in some aspects of case management in this Division.

74 In the Administrative and Equal Opportunity Division, merits review matters form the bulk of the work. Under s 63(1) of the *Administrative Decisions Review Act 1997*, the Tribunal's role is to decide "*what the correct and preferable decision is*". This has to be done in a context where there is a duty, under s 38(6)(a) of the *Civil and Administrative Tribunal Act*, to "*ensure that all relevant material is disclosed to the Tribunal*". Consequently, case management in the Administrative and Equal Opportunity Division tends to focus on ensuring two things. First, that by the end of the extensive prehearing processes, all the relevant material is before the Tribunal and, secondly, that unrepresented litigants understand the nature of the proceedings and are enabled to present their cases effectively. Similar processes are also used in anti-discrimination cases to clarify the real matters in issue and enable complainants to prosecute their cases more effectively.

75 The most significant element of the work of the Occupational Division is professional discipline and regulation. The relevant enabling legislation in many cases establishes the priority for the Tribunal in this area. Under s 3A

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It is the duty of everyone exercising functions under this Act with respect to persons who have disabilities to observe the following principles:

- (a) the welfare and interests of such persons should be given paramount consideration,
- (b) the freedom of decision and freedom of action of such persons should be restricted as little as possible,
- (c) such persons should be encouraged, as far as possible, to live a normal life in the community,
- (d) the views of such persons in relation to the exercise of those functions should be taken into consideration,
- (e) the importance of preserving the family relationships and the cultural and linguistic environments of such persons should be recognised,
- (f) such persons should be encouraged, as far as possible, to be self-reliant in matters relating to their personal, domestic and financial affairs,
- (g) such persons should be protected from neglect, abuse and exploitation,
- (h) the community should be encouraged to apply and promote these principles.

<sup>9</sup> Opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008).

of the Health Practitioner Regulation National Law (NSW), “*the protection of the health and safety of the public must be the paramount consideration*”. Sections 3(a) and 494(1)(a) of the *Legal Profession Act 2004* (NSW) provide that the object and purposes of the relevant provisions of that Act include promoting “*the interests of the administration of justice and ... the protection of clients of law practices and the public generally*”. In the new Legal Profession Uniform Law (NSW), ss 3(c) and 260(b) (due to come into force in July 2015), similarly establish the objective of the Law as being “*the protection of clients of law practices and the protection of the public generally*”. Not dissimilar provisions appear in other enabling legislation. Hence, the protection of the public and the protection of those who are clients or patients of the professionals in question significantly influence how proceedings in the Division are conducted.

- 76 In the Occupational Division, ensuring that comprehensive and yet well targeted evidence is before the Tribunal, adequately disclosed to all parties and appropriately managed has encouraged the early adoption of technology in case management procedures.
- 77 With these different approaches and driving forces in mind, how each Division manages its caseload can now be examined.

#### *The Administrative and Equal Opportunity Division*

- 78 The Administrative and Equal Opportunity Division deals with matters in the following six streams:
- (1) Administrative review;
  - (2) Equal opportunity (or Anti-Discrimination);
  - (3) Community services;
  - (4) Revenue;



- (5) Victims of crime;
- (6) *Government Information (Public Access) Act (GIPA)* (formerly freedom of information) and privacy.

79 The preparation and other interlocutory procedures are dealt with primarily by way of planning meetings (in GIPA and privacy matters), case conferences (in anti-discrimination cases) or directions hearings (in other streams).

80 These meetings, conferences or hearings are tailored to the particular needs of the various streams of work and the types of litigants who are usually involved in such matters. They involve substantial, active management by the Member conducting the process. Each stream has a Member's checklist of steps and matters to be covered and directions that may be made at the meeting, conference or hearing. The principal purposes sought to be achieved by these processes are:

- (1) Identifying the issues really in dispute in the proceedings;
- (2) Ensuring that all relevant evidence is put before the Tribunal but is confined to the real issues in dispute;
- (3) Ensuring that the parties, and especially unrepresented litigants, understand the nature of the proceedings, how the Tribunal will proceed and what they have to do in order to present their cases effectively at the final hearing.

81 In order to ensure that resolution is achieved as early as possible, matters may be referred to mediation as part of the preparatory phase, especially in anti-discrimination, GIPA and privacy matters. Mediations are used both to resolve proceedings in their entirety and to narrow the issues really in dispute. The Tribunal may give effect to mediated and other settlements under s 55(1) of the Act. However, because of the nature of the cases that come before the Division, including where there have been allegations of sexual misconduct or

harassment between parties or there are standing apprehended violence orders (AVO) against one or more parties, mediation cannot always be assumed to be appropriate.

- 82 It is quite common in the Administrative and Equal Opportunity Division for there to be multiple case conferences, planning meetings and directions hearings to ensure that the issues are as confined as possible and the matter is fully prepared for hearing.
- 83 Unrepresented litigants in some streams are further assisted by having a duty solicitor from Legal Aid available onsite to provide advice and assistance concerning matters raised at the planning meeting, case conference or directions hearing. These solicitors do not, however, generally appear or act as advocates for those parties.

#### *The Consumer and Commercial Division*

- 84 The Consumer and Commercial Division maintains nine lists. They are:
- (1) Tenancy
  - (2) Social housing
  - (3) General
  - (4) Motor vehicle
  - (5) Home building
  - (6) Residential parks
  - (7) Strata and community schemes
  - (8) Commercial
  - (9) Retirement villages.

85 Matters filed in the Consumer and Commercial Division proceed in one of two ways:

- (1) In the case of the first four lists, in home building matters under \$30,000 and in certain small matters in the commercial list (such as dividing fence disputes), matters are group listed.
- (2) For all other lists, the matter is usually listed for a directions hearing followed by a special fixture for a final hearing.

### **Group lists**

86 Group lists typically involve approximately six matters in a one hour list and between eight and ten matters in a two hour list before a single Member. The hearing of the matters so listed typically begins with the Member briefly explaining what is to happen during the group listing to the parties assembled together in a hearing room. After that explanation, the parties are encouraged to take the opportunity to resolve their matter by conciliation.

87 The Tribunal has a number of small conference rooms available around the hearing room which the parties can use. There is also available a conciliator, who is a Member or employee of the Tribunal. The conciliator assists the parties in each matter to explore their issues and options for resolution. As practised in the Consumer and Commercial Division, conciliation is a specialised form of alternative dispute resolution similar to a mediation but under strict time constraints. If the parties come to an agreement as a result of the conciliation process, the Member conducting the group list may give effect to the agreement by making orders, under s 55(1) of the Act. On average, over two thirds of matters group listed are resolved at this stage by agreement. Matters that are not resolved in this way, will either be finally heard and determined by the Member conducting the group list, if there is sufficient time and the parties are ready to proceed, or the Member will conduct a short directions hearing and fix the matter for further directions or a final hearing as a special fixture on a future date, depending on the circumstances.

- 88 The group listing method is an extremely effective means of managing the Consumer and Commercial Division's high volume lists.

#### **Directions and Special Fixtures**

- 89 Matters that are not group listed, or those that do not resolve or are not listed for final hearing at the group listing stage, proceed to a directions hearing, followed by the substantive hearing itself. Mediations can be ordered at any point during proceedings where a Member makes the assessment that mediation would be appropriate or beneficial.
- 90 A directions hearing in the Consumer and Commercial Division is similar to a directions hearing in a Court and directions are made which reflect the particular circumstances and requirements of each matter.

#### **Online lodgements and automatic listing**

- 91 The Tribunal is presently in the process of extending its digital case management system from the Consumer and Commercial Division and the Appeal Panel to all other Divisions. One benefit of this system is that it allows applications to be lodged online. In addition, parties can elect to lodge and receive documents by email rather than in hardcopy. Recently, 57% of all applications in the Tribunal (and 69% of all applications in the Consumer and Commercial Division) have been lodged online and in March 2015, there were 3,763 parties who had elected to receive notices of hearing, correspondence and orders by email.
- 92 Online lodgement also permits suitable cases to be automatically listed in group lists at the most appropriate hearing location. The Consumer and Commercial Division has registries and hearing rooms in the Sydney CBD and at Liverpool, Newcastle, Penrith, Tamworth and Wollongong. In addition, hearings take place at approximately 70 other locations across New South Wales.

93 Online lodgement procedures, combined with automatic listing, are another extremely effective mechanism that helps the Consumer and Commercial Division manage its caseload.

#### **Other processes**

94 The Consumer and Commercial Division has a number of further procedures which assist in case management. Under the *Strata Schemes Management Act 1996* (NSW), many matters in the strata and community schemes list are dealt with on the papers. In addition, s 50 to the Act permits the Tribunal to determine matters of all types without an oral hearing if certain requirements are satisfied.

95 Another special procedure is the holding of conclaves of experts in home building matters. These are meetings, often onsite, of the parties' experts without the parties being present and are facilitated by a 'conclaving' Member. The purpose of these conclaves is to reach agreement on, or narrow, the factual issues in dispute.

96 Finally, in the Consumer and Commercial Division, in order to assist self-represented litigants to understand the nature of the proceedings and the Tribunal's processes, information sheets are included on notices of hearings, setting out essential information for parties such as the nature of the hearing for which the notice has been issued and what the party needs to do to be prepared for that hearing. In addition, the information sheet may, in an appropriate case, also deal with the need and the procedure for obtaining a stay. The contents of the sheets are also available, in some cases, as videos which may be accessed at the Tribunal's website. A new range of 8 short and 4 longer videos in English and 4 community languages is presently being developed.

#### *The Guardianship Division*

97 The Guardianship Division's case management procedures are generally quite dissimilar to what occurs in the other Divisions. Uniquely amongst the

Divisions of the Tribunal, case files are organised by reference to the person the subject of the application, rather than by applicant. In addition, the subject person's file is not closed, even after a particular application is finalised. This is necessary not only as a result of the protective nature of the jurisdiction but also because orders made by the Guardianship Division are, in some cases, required to be reviewed periodically and, in other cases, may be reviewed upon request. A subject person's file may date back many decades and may contain numerous applications for orders and reviews of orders made.

- 98 There are a number of other aspects of the Guardianship Division's case management which are distinctive.

#### **Preparatory Investigation by the Tribunal**

- 99 First, the Tribunal officers play a very significant role in preparing Guardianship Division matters for hearing. In discharge of the obligation in s 38(6) of the Act to ensure that all relevant material is disclosed to the Tribunal so as to enable it to determine all of the relevant facts in issue, the Tribunal's officers perform an investigative role, which in other Divisions might be required to be performed by the parties or their representatives. These officers obtain and collate the initial evidence concerning subject persons through interviews with the subject persons themselves, their families, carers and interested persons and through correspondence with health practitioners, social workers and any relevant health facility.
- 100 The Division currently takes upon itself the task of reproducing and serving all documents on the relevant parties and it attempts to ensure that hearings are conducted in a manner appropriate and convenient for the subject person and their circumstances. More efficient ways of meeting the needs of the subject person and others involved in Guardianship Division proceedings are being trialled at present.

#### **The triage process and risk categories**

- 101 Secondly, cases in the Guardianship Division are managed by their being triaged into different risk and complexity categories and listed for hearing in order of urgency, based fundamentally on the assessed degree of risk of likely future harm to the subject person. There are 5 risk categories used in this triage process and one category where no risk is assigned. The 5 risk categories range from where there is a significant and imminent risk of harm to the subject person, or his or her estate, to where the risk of harm is minimal. The no assigned risk category is reserved for matters that involve applications for medical or dental consents, applications for the approval of clinical trials, applications for the recognition of interstate appointments of guardians or financial managers or matters where no risk to the subject person can be identified from the application. The fact that no risk category is assigned does not, however, mean that applications of these types are not dealt with as promptly as the circumstances require.
- 102 Applications may be retriaged when further information comes to light. The triaging process is adapted to ensuring that the Tribunal is responsive to the changes in circumstances of the subject person.
- 103 Because of the need, in some cases, to deal with very urgent matters even when the Tribunal is not usually sitting, Members are also rostered to hear applications after hours.

#### **Other features specific to the Guardianship Division**

- 104 As has already been noted, given the nature of the jurisdiction being exercised and the fact the circumstances of the subject person and those appointed as a guardian or financial manager may change, many orders made by the Guardianship Division are required to be reviewed from time to time. The review process focuses upon whether there is a continuing need for the type of order in question and whether the specific order itself remains appropriate. The Division has a dedicated review team of Tribunal officers, which examines cases due for review. Reviews are usually conducted by a

Member sitting alone, and not the three Member panel that hears most applications in the Guardianship Division.

- 105 Finally, matters in the Guardianship Division may progress without an applicant. Even if an applicant who has made an application in respect of the subject person wishes to withdraw, the Guardianship Division is required to be satisfied that the subject person is not at risk before permitting the application to be withdrawn. The Division may continue to investigate and determine an application if required. Where necessary, the Tribunal attempts to locate a substitute applicant but may proceed even if a substitute cannot be found, because the interests and welfare of the subject person are of paramount concern.

#### *The Occupational Division*

- 106 The practices and procedures of the Occupational Division are specific to that Division. The Occupational Division was created as a result of amalgamating 17 different tribunals and incorporating some of the work of the former Administrative Decisions Tribunal.

- 107 The Occupational Division operates the Health Practitioner List and three other informal lists relating to:

- (1) Legal Practitioners;
- (2) Other professionals; and
- (3) Administrative review of Executive decisions concerning occupations.

#### **Health Practitioner List**

- 108 Matters in the Health Practitioner List are dealt with under the Health Practitioner Regulation National Law (NSW), which regulates 14 different health professions.



- 109 When a complaint or appeal is lodged, the matter is usually listed for a directions hearing. These directions hearings are generally held on a monthly basis. A matter may also be listed for a separate directions hearing if it is urgent or there has been an application for a stay of the relevant National Board's decision (usually an immediate suspension of the practitioner's ability to practise and generate an income).
- 110 During the course of the directions hearing, the presiding Member will make procedural directions to prepare the matter for hearing, consolidate multiple complaints or appeals or deal with other interlocutory applications.
- 111 Unless the issues in dispute are well defined and the evidence is quite confined, a matter will then usually progress to a case conference. Case conferences, like those in the Administrative and Equal Opportunity Division, are used as an opportunity for the Member and the parties' representatives to actively explore how legal or factual issues can be resolved or narrowed. They are also used to ensure that all necessary lay, expert and documentary evidence will be before the Tribunal but will be confined to the real issues in dispute. In addition, at the case conference, arrangements may be put in place both for confining the extent of any disputes between expert witnesses and for concurrent expert evidence at the hearing. It is not unusual at a case conference in a matter involving a large volume of evidence for directions to be made for the provision of that evidence in digital form, whether by USB drive or some other means.
- 112 Professional disciplinary hearings in the Health Practitioner List usually proceed in two stages, consistently with the Court of Appeal's decision in *Health Care Complaints Commission v King* [2011] NSWCA 353. Stage 1 deals with the questions of whether the complaint of professional misconduct or unsatisfactory professional conduct or similar substantive issues have been made out whilst in stage 2, the Tribunal deals with what protective orders should be made as a result of the findings made and conclusions reached in stage 1.

### **Legal Services List**

- 113 Matters in the Legal Services List also proceed by way of a monthly directions hearing, although, unlike in the Health Practitioner List, the need for urgent directions or other hearings has not, judging from experience to date, arisen. In the past, there has been no case conferencing in this list, but this procedure is in the process of being implemented, after consultation with relevant regulatory bodies, legal practitioners and others with a legitimate interest in the functioning of this list. The procedures in this list are somewhat more formal as the rules of evidence apply in hearings concerning the professional discipline of barristers and solicitors. Hearings also generally proceed in a two stage process.

### **Other Professionals**

- 114 Where possible, matters relating to the professional discipline of other professionals and, where necessary, pecuniary interest and discipline proceedings relating to local government bodies and Aboriginal Land Councils, are dealt with in the same way as in the Legal Services List.

### **Administrative Review of Occupational Decisions**

- 115 The Occupational Division is also responsible for the administrative review of licensing and other decisions relating to occupations such as real estate agents, valuers, taxi and bus drivers and other occupations regulated by the State. Thus, the Occupational Division shares the Tribunal's administrative review jurisdiction with the Administrative and Equal Opportunity Division. In practice, however, all administrative review matters are dealt with together by Members who are assigned to both the Occupational and Equal Opportunity Divisions in the administrative review list conducted by the Administrative and Equal Opportunity Division.

### **Future developments**

- 116 An institution-wide Transformation Project at NCAT is currently being planned and undertaken in two phases. A very significant part of the first phase was

successfully completed over the Easter break, when (most) Members and staff were brought onto the same operating system, server and email and telephone system. Previously, NCAT had been operating on what might charitably be called heritage systems, which came with the former tribunals and which in some cases reflected the technology of the nineteenth and twentieth centuries rather than that of the twenty-first. The remaining part of phase one is to bring all the Divisions onto the digital case management system which is currently supporting the Consumer and Commercial Division, the Appeal Panel and Principal Registry.

117 The second phase involves three initiatives, which can be summarised as follows:

- (1) Digitalisation of the Tribunal – so that all users (the public, parties, representatives, Members and Staff) can access information and documents and participate in the Tribunal’s functioning by digital means from any device using any readily available technology;
- (2) User interaction focus – ensuring that all users have access to complete, up-to-date and accurate information and documentation so that they are empowered to participate effectively in, or perform their duties in relation to, proceedings in the Tribunal; and
- (3) Pathways to earliest resolutions – ensuring that the public and parties are guided (primarily by digital or online means) to the earliest resolution of their issues or disputes by means of communication with other parties, all forms of ADR, a formal hearing or any other appropriate means.

118 These initiatives are reflected not just in the Transformation Project but also in current pilots and projects within the Tribunal. For example, the Consumer and Commercial Division recently ran a pilot of an online dispute resolution platform, by means of which parties could conduct structured negotiations through an online portal, before the matter was listed for a formal hearing. An

online dispute resolution mechanism, whatever its final form, will certainly be consistent with, and advance all of, the initiatives referred to above. The pilot showed that such a mechanism can operate to fill a gap in the dispute resolution process by helping applicants in consumer claims overcome difficulty in approaching larger corporations by allowing them to do so in their own time and on their own terms in order to discuss resolution of their issues. On the other hand, the larger corporations themselves benefit from early and effective contact with consumers giving them the opportunity of avoiding the time and expense involved in responding to the first contact by way of an application in the Tribunal and a hearing.

### **Other Aspects of Case Management**

119 There are, of course, significant aspects of case management in the Tribunal which have only been touched upon above and some others which have not been mentioned at all. Some examples include:

- (a) the issue of representation, whether by a legal practitioner, agent, separate representative, guardian ad litem or otherwise;
- (b) the constitution of the Tribunal, whether with a single Member panel or a multiple Member panel, composed of judicial, legal, professional or community representatives or otherwise;
- (c) the conduct of hearings;
- (d) the awarding of costs;
- (e) stay applications.

120 These could all provide almost endless hours of fun and amusement.

121 Discussion of the practice and procedure in relation to, and case management of, appeals to NCAT, appeals within NCAT to the Appeal Panel and appeals from NCAT, at first instance or from the Appeal Panel, to the Supreme Court

or the Land and Environment Court might alone occupy a whole two day conference.

122 To deal with all of these matters comprehensively would require considerably more time than is available.

## Conclusion

123 I note that although the Tribunal has only 4 Divisions, the Land and Environment Court has 8 classes of jurisdiction and that case flow management varies according to the class of proceedings. Your Court has considerable experience in managing a variety of matters and ensuring that case are resolved in a just, timely and cost-efficient manner.

124 Although the Tribunal deals with dividing fence disputes, we do not, like you, have a Tree List dealing with matters under the *Trees (Disputes between Neighbours) Act 2006* (NSW).

125 It is unfortunate that disputes arise out of trees and dividing fences, but they do.

126 When the Tribunal was launched early last year, I observed:

NCAT's principal functions are to review decisions of the executive, to quell disputes between citizens and between government and citizens, to assist to supervise professions and occupations and to exercise part of the *parens patriae* jurisdiction of the State. These are all functions of government. If these powers were not exercised by NCAT or some other judicial and quasi-judicial body, the alternative is for those affected to take matters into their own hands, often literally, and rely on self-help. This alternative has the potential to become a threat to the existence of a peaceful and ordered society.

127 The Tribunal and the Land and Environment Court both deal with a range of matters from the very serious to those whose significance lies principally in the impact the dispute has on the lives of the individuals concerned. We both face the imperative of ensuring that parties before us:

(1) have their cases resolved as promptly as possible;

- (2) are given a reasonable opportunity to put their case and be heard; and
- (3) obtain a just and readily understandable resolution of their case whether by decision or agreement.

128 The purpose of case management is not to make life easier for the Tribunal. Rather it is to ensure that these objectives are achieved for the parties to proceedings before us. If our case management does not achieve these objectives, there is the significant risk that parties will take matters into their own hands with the consequent detriment to the rule of law and to the peace and order of society.

129 Effective case management by courts and tribunals is not just about running an organisation efficiently. It is one of the essential underpinnings of the rule of law.

May 2015

## Attachment 1

### Notes on the Transitional Provisions in the *Civil and Administrative Tribunal Act 2013 (NSW)*.

1 Division 3 of Schedule 1 to the Act (cll 6 to 14) contains the transitional provisions that apply in respect of NCAT and the tribunals which were abolished on NCAT's establishment. It is helpful to note the structure of the transitional provisions and briefly to identify their contents.

- (1) Subdivision 1, "Interpretation", contains cl 6, which defines "*part heard proceedings*", "*pending proceedings*", "*unexercised rights*" and "*unheard proceedings*". These relate to proceedings in abolished tribunals that are now to be determined by NCAT or appeals from those tribunals to various courts.
- (2) Subdivision 2, "Determination of Pending Proceedings", contains cll 7 and 8. Clause 7 sets out how pending proceedings in abolished tribunals, whether unheard or part heard, are to be dealt with by NCAT. Clause 8 deals with how pending proceedings in a court relating to a decision of an abolished tribunal are to be dealt with, including the power to remit the proceeding to NCAT instead of the abolished tribunal.
- (3) Subdivision 3, "Exercise of Certain Unexercised Rights", contains cll 9 and 10. Clause 9 relates to applications or appeals based upon an "*existing unexercised application or appeal right*". Such rights are rights that existed as at 31 December 2013 to apply to, or appeal from, a tribunal that has since been abolished. Applications can now be made to NCAT for the exercise of the same functions that could have been exercised by the relevant abolished tribunal. Clause 10 relates to appeals based upon an "*existing unexercised appeal right*" to the Appeal Panel of the ADT or to a court. It allows such appeals to be made to the Appeal Panel of NCAT or the court in question.

- (4) Subdivision 4, “Reviews of certain existing Orders and Renewal of certain Proceedings”, contains cl 11 and 12. Clause 11, in effect, provides for certain orders made by the Guardianship Tribunal to be reviewed by NCAT. Clause 12 effectively provides for proceedings to be renewed in respect of certain CTTT decisions as if the decisions had been made by the Consumer and Commercial Division of NCAT.
- (5) Subdivision 5, “Allocation of Transitional Proceedings and Enforcement of existing Orders”, contains cl 13 and 14. Clause 13 allocates various types of transitional proceedings to particular Divisions and allocates appeals to the Appeal Panel. It also sets out how the Tribunal should be constituted in those cases. Clause 14 provides that orders made by abolished tribunals are taken after 1 January 2014 to be orders of NCAT.

2 Finally, and very usefully, Division 4 of Schedule 1 contains cl 17, which seeks to ensure that nothing falls through the legislative cracks. In general terms, it provides that references in legislation to abolished tribunals and their functions are to be read as references to NCAT and its functions.