



# THE NSW CIVIL AND ADMINISTRATIVE TRIBUNAL

## Where did it come from? How does it work? How does the Supreme Court relate to NCAT?

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## Introduction

- 1 Unlike the Supreme Court of New South Wales, which is 193 or 192 years old,<sup>2</sup> the Civil and Administrative Tribunal of New South Wales is only 2 years and 75 days old, having come into existence on 1 January 2014. Also unlike the Supreme Court, the Tribunal has its own, legislatively endorsed pet name, 'NCAT': *Civil and Administrative Tribunal Act 2013* (NSW) (the Act), s 7(1).
- 2 The Tribunal 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 about 72,000 applications per year and conducts in the order of 100,000 hearings (both interlocutory and final) 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.
- 3 Managing this workload requires a vigorous but differentiated approach to case management, simple but flexible practice and procedure and an effective quality control mechanism.
- 4 It goes without saying that it would not be possible in the time allocated to cover all aspects of the Tribunal's formation, structure, case management, practice and procedure, appeals and relations with the Supreme and other Courts. Nor would it be fair to subject an audience to such an exposition.
- 5 Accordingly, I shall merely attempt to outline some of the significant features of the formation of the Tribunal, the structure and practice and procedure of the Tribunal and the part which the Tribunal plays in the civil justice system of this State. In other words:
  - Where did NCAT come from?
  - How does NCAT work?
  - How does the Supreme Court relate to NCAT?

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<sup>2</sup> Depending on whether its establishment is dated from the sealing of the Letters Patent in London on 13 October 1823 or when it was proclaimed in Sydney on 17 May 1824.

## Where did NCAT come from?

6 NCAT, not unusually, came about because politicians decided to create it and Parliament passed the laws to bring it into existence. In this context, it might be thought that Groucho Marx was tragically 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.

7 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>3</sup> That Committee, composed of politicians, had gone looking for trouble and found it almost everywhere in the tribunal system then current in New South Wales, which it described as “*complex and bewildering*”, with the consequences that access to justice was inhibited and the needs of the people of New South Wales were not being met. To address these problems, the Committee recommended as one option the creation of what it called a “Super Tribunal”.

8 In October 2012, the Government, in its Response to the Report,<sup>4</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>5</sup>

9 In the case of NCAT, I think Groucho Marx has been proved wrong. Whilst the politicians might have gone looking for trouble and found it almost everywhere, their diagnosis has been demonstrated to be correct and the right remedy has been applied — an effective super Tribunal for New South Wales.

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<sup>3</sup> New South Wales, Standing Committee on Law and Justice, *Opportunities to consolidate tribunals in NSW*, (March 2012).

<sup>4</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>5</sup> The Response at 1.

- 10 NCAT's gestation took just slightly more than nine months. The Working Group was formed in February 2013. The original *Civil and Administrative Tribunal Act 2013* (NSW) came into force on 4 March 2013 and contained a skeleton for the creation of NCAT on 1 January 2014. For example, in s 8, some appointments to facilitate the establishment of the Tribunal were permitted. Later, in November 2013, the *Civil and Administrative Tribunal (Amendment) Act 2013* (NSW) and the *Civil and Administrative Legislation (Repeal and Amendment) Act 2013* (NSW) were passed which gave the NCAT legislation the substance of its current form and content and amended all the enabling legislation to refer to NCAT in place of the 22 previously existing tribunals. The Tribunal commenced operations on 1 January 2014.
- 11 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;
  - The Medical Tribunal and 13 other health practitioner disciplinary tribunals;<sup>6</sup>
  - The 2 Local Council and Aboriginal Land Councils Pecuniary Interest and Disciplinary Tribunals; and
  - The Charity Referees,<sup>7</sup> the Local Land Boards and the Vocational Training Appeals Panel.

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<sup>6</sup> Aboriginal and Torres Strait Islander Health Practice Tribunal, Chinese Medicine Tribunal, Chiropractic Tribunal, Dental Tribunal, Medical Radiation Practice Tribunal, Medical Tribunal, Nursing and Midwifery Tribunal, Occupational Therapy Tribunal, Optometry Tribunal, Osteopathy Tribunal, Pharmacy Tribunal, Physiotherapy Tribunal, Podiatry Tribunal, Psychology Tribunal.

<sup>7</sup> See the *Dormant Funds Act 1942* (NSW) ss 5 and 15B in their form prior to 1 January 2014. Section 5 provided:

“(1) The Charity Referees shall be constituted as provided in this section from four persons appointed for the purpose by the Governor.

(2) One of such persons shall be a judge of the Supreme Court who shall be appointed on the nomination of the Chief Justice.

The person so appointed shall be the chairperson of the Charity Referees.

(3) One other of such persons shall be appointed on the nomination of the State Executive of The Returned Services League of Australia (New South Wales Branch) or, if no such nomination

- 12 The transitional provisions, which have permitted the amalgamation to occur with surprisingly little disruption to the tribunal or Court 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.

## How does NCAT Work?

### Members

- 13 NCAT currently has 247 members, including the 1 President, 5 Deputy Presidents, 14 Principal Members, 112 Senior Members and 115 General Members. These Members bring an extraordinary range of qualifications, experience and expertise to the Tribunal.
- 14 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 as well as those who can represent the community or a relevant section of the community.
- 15 All Members are assigned to a particular Division by the President and may be cross assigned by him to other Divisions. In this way, the expertise and experience of Members are flexibly and effectively deployed.
- 16 All term Members can be appointed for up to 5 years by the Governor or by the Attorney General. To supplement this, the President can also appoint, under s 11 of the Act, Occasional Members for particular proceedings where the persons are qualified to be appointed and their appointment is necessary to permit the Tribunal to perform its functions. This is how professional and community members are appointed for particular Health Practitioner

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is received within the time prescribed, the Governor may appoint any person to be the representative of The Returned Services League of Australia (New South Wales Branch).

(4)

(a) One other of such persons shall be an officer of the Public Service who shall be appointed on the nomination of the Attorney-General.

(b) One other of such persons shall be an officer of the Public Service who shall be appointed on the nomination of the Minister for Education and Training."

disciplinary matters. In addition, the President may, under s 15(2), if it necessary for the Tribunal to exercise its functions effectively, appoint any New South Wales judicial officer as a Member for particular proceedings, if the relevant head of jurisdiction agrees.<sup>8</sup>

- 17 There is also great flexibility in how the Tribunal is constituted in any particular matter. Under s 27, the Tribunal can be constituted by one or more Members, with certain specific requirements in different types of proceedings. For example, in proceedings for contempt, s 27(1)(b) requires the Tribunal to be constituted by one or more of the President and any other Member who is a current or former New South Wales judicial officer.
- 18 In addition, the Division Schedules to the Act and certain enabling legislation contain a number of special constitution requirements in a variety of different types of matters. See for example, Sch 3 cl 4, 5, 6, 7 and 8; Sch 4 cl 4; Sch 5 cl 5, 6, 13, 18, 19 and 25; and Sch 6 cl 4 and s 165B of the Health Practitioner Regulation National Law (NSW).

## Divisional Structure of the Tribunal

- 19 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 a number of first instance Divisions and there is also an internal Appeal Panel. I shall discuss the Appeal Panel later.
- 20 Section 16(1) of the *Civil and Administrative Tribunal Act* establishes 4 first instance Divisions:
- The Administrative and Equal Opportunity Division;
  - The Consumer and Commercial Division;
  - The Guardianship Division; and

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<sup>8</sup> One such appointment was the subject of an unsuccessful challenge in *Quach v New South Wales Health Care Complaints Commission* [2016] NSWCA 10, see [22] and generally [21] to [30].

- The Occupational Division.

- 21 Each Division has, under s 16(3) of the Act, the functions allocated to it in the Division Schedule for that Division. The Division Schedules are Schedules 3, 4, 5 and 6 to the Act. In addition to the functions allocated to each Division, the Division schedules specify special constitution requirements, special practices and procedures and particular appeal rights for each Division. It is important to bear in mind that the provisions of these Division Schedules prevail over the general provisions of the Act and the procedural rules, to the extent of any inconsistency, by virtue of s 17(3) of the Act.
- 22 Each Division also 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 practice and procedure which reflect the nature of the work done in that Division.

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

- 23 In general terms, the Administrative and Equal Opportunity Division replaced part of the Administrative Decisions Tribunal (ADT) and the Charity Referees and deals with:
- (1) Merits review of actions or decisions of the Executive Government in relation to matters such as:
    - (a) Community services, for example, working with children checks;
    - (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;
    - (e) From March 2016, certain gaming and liquor licences; and
    - (f) Other executive decisions or conduct reviewable under the *Administrative Decisions Review Act 1997*;

- (2) All complaints under the *Anti-Discrimination Act 1977*.
- 24 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*.
- 25 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*

*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*

26 The Consumer and Commercial Division took over the work of the Consumer, Trader and Tenancy Tribunal (the CTTT), the retail lease jurisdiction of the ADT and the work of the Local Land Boards. It generally deals with disputes between individuals and between individuals and suppliers of goods or services. 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 (up to \$400,00 and \$500,000 respectively);
- 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.

27 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*.

28 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*

*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**

- 29 The Guardianship Division replaced the Guardianship Tribunal and is principally concerned with:
- Making guardianship and financial management orders for persons over the age of 16 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.
- 30 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 somewhat over half of all lodgements.

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

32 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**

33 Finally, there is the Occupational Division, which took over some of the jurisdiction of the ADT, replaced the 14 health practitioner tribunals as well as the two pecuniary interest and disciplinary tribunals and the Vocational Training Appeal Panel. It is therefore 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.

34 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 recommending the striking of barristers and solicitors from the roll of practitioners, deregistering doctors or depriving real estate agents of their licence to operate.

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

- 36 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 Uniform Law (NSW)*

*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*

*Veterinary Practice Act 2003*

*Wool, Hide and Skin Dealers Act 2004*

### **Workload Summary**

- 37 The distribution of the applications lodged across the Divisions, not including the Appeal Panel, in the 2014-15 financial year was:

	Lodgements	% of Total
Administrative & Equal Opportunity	779	1.1%
Consumer & Commercial	58,360	82.4%
Guardianship	11,457	16.2%
Occupational	245	0.3%
	<b>70,841</b>	<b>100%</b>

## Legislative Framework for NCAT's Jurisdiction

- 38 Separate to the Divisional structure, the *Civil and Administrative Tribunal Act* also provides a somewhat complex jurisdictional structure for the Tribunal. It should, however, be noted that the Tribunal's actual authority to hear and determine any particular matter at first instance is generally derived not from the *Civil and Administrative Tribunal Act* but from the enabling legislation.
- 39 Under Part 3 of the Act, ss 28 to 34, the jurisdiction of the Tribunal is categorised into 5 different types:
- (1) General jurisdiction – the power to make decisions or exercise other functions conferred by legislation other than the NCAT Act that does not fall within the Tribunal's administrative review jurisdiction, appeal jurisdiction or enforcement jurisdiction: s 29;
  - (2) Administrative review jurisdiction – the power to make decisions or exercise other functions conferred by s 9 of the *Administrative Decisions Review Act 1997* (NSW) (the ADR Act). That section states that the Tribunal has administrative review jurisdiction over a decision of an administrator if enabling legislation provides that applications may be made to the Tribunal for an administrative review under the ADR Act of any such decision: s 30;
  - (3) External appeal jurisdiction – the Tribunal has external appeal jurisdiction over a decision made by an external decision maker if

legislation provides that an appeal may be made to the Tribunal against any such decision: s 31;

- (4) Internal appeal jurisdiction – the Tribunal has internal appeal jurisdiction over any decision made by the Tribunal in proceedings for a general decision or an administrative review decision or any declared decision of a registrar, subject to certain exclusions in s 32(3) and the Division Schedules: s 32; and
- (5) Enforcement jurisdiction – the Tribunal’s enforcement jurisdiction comprises the functions of the Tribunal when dealing with alleged or apparent contempt of the Tribunal and its functions when dealing with an application for a civil penalty under s 77 of the Act (as opposed to applications for a civil penalty in its general jurisdiction): s 33.

40 The last section of Part 3, s 34, is headed “Inter-relationship between Tribunal and Supreme Court” and travels into a new area. I shall return to that section when considering how the Supreme Court relates to NCAT.

41 Coming back to the jurisdictional structure of the Tribunal, it can be noted that the jurisdictional underpinnings established by ss 29 to 33 do not correspond with the Tribunal’s Divisional structure. For example and in general terms, the Administrative and Equal Opportunity Division exercises both administrative review and general jurisdiction, the Consumer and Commercial Division exercises general and external appeal jurisdiction, the Guardianship Division exercises general jurisdiction and the Occupational Division exercises administrative review, external appeal and general jurisdiction. The internal appeal jurisdiction is exercised by the Appeal Panel and the enforcement jurisdiction is exercised by the Tribunal constituted as required by s 27(1)(b) and (c).

42 It can also be noted that the internal appeal jurisdiction is only attracted in relation to decisions made in the general or administrative review jurisdiction but this encompasses the overwhelming majority of the Tribunal’s decisions.

43 One further observation can be made. The variety of jurisdictions conferred on the Tribunal and the workload of the Divisions indicate that it is not appropriate to think of the Tribunal as primarily an administrative tribunal. There is no doubt that part of the caseload of the Administrative and Equal Opportunity Division and the Occupational Division can be characterised as involving a purely administrative review function. Nonetheless, this accounts for only about 1% of the Tribunal's total workload. The remainder of the Tribunal's work can most probably be seen as involving the exercise of judicial power. Consequently, jurisprudence relating to purely administrative tribunals such as the Commonwealth Administrative Appeals Tribunal may not necessarily be applicable to NCAT as a whole.

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

44 It is also important to understand some further pieces of the NCAT jigsaw, namely, the legislative framework which supports the Tribunal's differentiated practice and procedure.

45 The general 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*".

46 As in the Supreme Court and other Courts of this State, 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 and 38.

47 Section 36(3) imposes an express duty on parties, legal practitioners and other representatives to co-operate with the Tribunal to give effect to the guiding principle and to comply with orders and directions. Section 36(4) introduces a requirement of proportionality in the following terms:

“the practice and procedure of the Tribunal should be implemented so as to facilitate the resolution of the issues between the parties in such a way that

the cost to the parties and the Tribunal is proportionate to the importance and complexity of the subject-matter of the proceedings.”

48 It is significant that the cost to the Tribunal as well as to the parties is mentioned in this subsection.

49 Finally, in s 36(5) a warning is sounded that nothing in the section requires or permits the Tribunal to exercise any functions conferred on it in a manner inconsistent with the objects or principles provided in legislation conferring functions on the Tribunal. Section 4 of the *Guardianship Act* is an example of legislation which establishes principles to be applied when the Tribunal is exercising functions under that Act.

50 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.

51 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 to 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,



- (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).

52 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. In particular, it should be noted that s 45 establishes the general proposition that parties are to 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. In particular, 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 the preservation of various forms of privilege: ss 64-70.

53 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 at least two reasons.

54 First, as has already been noted, the provisions of the Act are expressly stated to be subject to the provisions 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.

55 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.

56 The term “enabling legislation” is defined in s 4(1) of the Act as follows:

**enabling legislation** means legislation (other than this Act or any statutory rules made under this Act) that:

- (a) provides for applications or appeals to be made to the Tribunal with respect to a specified matter or class of matters, or
- (b) otherwise enables the Tribunal to exercise functions with respect to a specified matter or class of matters.

57 The “procedural rules” are defined in s 4(1) to mean each of “the Tribunal rules” and “the regulations in their application to practice and procedure of the Tribunal”. The Tribunal rules are made by the NCAT Rule Committee under ss 24 and 25 of the Act and are the Civil and Administrative Tribunal Rules 2014. The only regulation is the Civil and Administrative Tribunal Regulation 2013.

58 Thus, when dealing with 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;
- (3) the Civil and Administrative Tribunal Rules 2014; and
- (4) the Civil and Administrative Tribunal Regulation in its application to practice and procedure.

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

59 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, the parties and their representatives: 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>9</sup>

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

61 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

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<sup>9</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)

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 and when leave may be revoked.

62 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 addition, some of the Division Schedules make specific provisions in relation to costs for different types of matters (see cll 12 and 13 of Sch 3, cl 11 of Sch 4 and cll 23 and 26 of Sch 6), as does r 38 of the Rules. In appeals, the Rules now require the same approach to costs to be adopted in relation to an appeal as applied in relation to the hearing at first instance: r 38A.

## Differentiated Case Management

63 The profusion of jurisdictions<sup>10</sup> conferred on the Tribunal, the different enabling legislation that applies in the different Divisions, the variety of procedural provisions set out in the Division Schedules 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

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<sup>10</sup> General jurisdiction, administrative review jurisdiction, external appeal jurisdiction, internal appeal jurisdiction and enforcement jurisdiction.

applications, the significance of the subject matter, the requirements of the relevant enabling legislation and the needs of the litigants before the Tribunal.

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

### ***Different Case Management Impetus in Each Division***

- 65 In the case of the Consumer and Commercial Division, by far the largest of the Divisions at NCAT [123,329 lodgements to 31 January 2016, 82.9% of the total], 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, such as group lists and conciliation, online lodgements of a majority of applications and automatic listing processes, have been adopted to ensure justice can be done on a large scale, promptly and cost effectively.

- 66 The approach to case management in the Guardianship Division, which is the second largest Division by number of applications [23,205 lodgements to 31 January 2016, 15.6% of the total], 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>11</sup> Because the overriding concern is the interests and welfare of the person the subject of the application, this Division has a distinctive case management system that involves Tribunal

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<sup>11</sup> Section 4 provides:

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.

officers actively preparing matters, contacting parties and witnesses and collecting evidence within a framework where matters are triaged and prioritised by reference to an assessment of the degree of risk to the person or property of the subject person. The provisions of the *Convention on the Rights of Persons with Disabilities*,<sup>12</sup> especially Article 12,<sup>13</sup> are also influential in some aspects of case management in this Division.

67 In the Administrative and Equal Opportunity Division [1631 lodgements to 31 January 2016, 1.1% of the total], merits review matters form the bulk of the work. Under s 63(1) of the ADR Act, 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 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.

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<sup>12</sup> Opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008).

<sup>13</sup> Article 12 states:

1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.
2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.
3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.
4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.
5. Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.

- 68 The most significant element of the work of the Occupational Division is professional discipline and regulation [618 lodgements to 31 January 2016, 0.4% of the total]. The relevant enabling legislation in many cases establishes the priority for the Tribunal in this area. Under s 3A of the Health Practitioner Regulation National Law (NSW), “*the protection of the health and safety of the public must be the paramount consideration*”. In the Legal Profession Uniform Law (NSW), which came into force in July 2015, ss 3(c) and 260(b) 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 applicable 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.
- 69 In addition, in the Occupational Division, because of the volume of material often submitted in support of complaints of professional misconduct and the need to ensure that comprehensive and yet well targeted evidence is before the Tribunal, adequately disclosed to all parties and appropriately managed, the Division has adopted case conferences at an early stage and the use of technology in case management procedures.

## Internal Appeals

- 70 To use the terminology of business, given the throughput or disposal rate required to be achieved each year just to keep up with new filings, what quality control mechanism does the Tribunal have? We do, and always will after *Kirk*,<sup>14</sup> have the Supreme Court in its supervisory jurisdiction, presently available under s 69 of the *Supreme Court Act 1970* (NSW). In addition and in an attempt to ensure that the Supreme Court is not overworked, the *Civil and Administrative Tribunal Act* has created an internal appeal mechanism within the Tribunal. As has already been noted the internal appeal jurisdiction of the Tribunal is exercised by the Appeal Panel by virtue of ss 27(1)(a) and 32 of the Act.

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<sup>14</sup> *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531 at [55] and [96] to [100].

### *What decisions of the Tribunal are internally appealable?*

71 Section 32(1) of the Act establishes, subject to a number of exceptions or exclusions, that the following decisions are internally appealable:

- (1) Decisions made in the Tribunal's general jurisdiction;
- (2) Decisions made in the Tribunal's administrative review jurisdiction; and
- (3) Decisions made by a registrar of a kind declared in the Act or the rules to be internally appealable.

72 The first set of exceptions or exclusions is found in s 32(2). This subsection provides that the following decisions are not internally appealable:

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

73 As will be seen, these excluded decisions can generally be appealed to the Supreme Court.

74 Various exceptions or exclusions which prevent decisions which would otherwise be internally appealable being appealed to the Appeal Panel are also found in the Division Schedules as follows:

- (1) The Administrative and Equal Opportunity Division Schedule – Sch 3 – provides in cl 15 that each of the follow decisions is not internally appealable:

“(a) a decision of the Tribunal for the purposes of section 96 of the *Anti-Discrimination Act 1977* with respect to the granting of leave for the purposes of that section,

(b) a Division decision for the purposes of the *Child Protection (Working with Children) Act 2012*,

(c) (Repealed)



- (d) a Division decision for the purposes of the lands legislation,<sup>15</sup>
- (e) a determination of the Tribunal for the purposes of Part 7 of the *Native Title (New South Wales) Act 1994*,
- (f) an administrative review decision for the purposes of section 21 of the *Plant Diseases Act 1924*,
- (g) an administrative review decision for the purposes of section 51 of the *Victims Rights and Support Act 2013*.”

(2) The Consumer and Commercial Division Schedule – Sch 4 – only contains in cl 12 a restriction on the ability of the Appeal Panel to grant leave to appeal, where required, from decisions of that Division, which is in the following terms:

“(1) An Appeal Panel may grant leave under section 80(2)(b) of this Act for an internal appeal against a Division decision only if the Appeal Panel is satisfied the appellant may have suffered a substantial miscarriage of justice because:

- (a) the decision of the Tribunal under appeal was not fair and equitable, or
- (b) the decision of the Tribunal under appeal was against the weight of evidence, or
- (c) significant new evidence has arisen (being evidence that was not reasonably available at the time the proceedings under appeal were being dealt with).

(2) Despite section 80(2)(b) of the NCAT Act, an **internal appeal** against a Division decision may only be made on a question of law (as of right) and not on any other grounds (even with leave) if:

- (a) the appellant is a corporation and the **appeal** relates to a dispute in respect of which the Tribunal at first instance had jurisdiction because of the operation of Schedule 3 to the *Credit (Commonwealth Powers) Act 2010*, or
- (b) the **appeal** is an **appeal** against an order of the Tribunal for the termination of a tenancy under the *Residential Tenancies Act 2010* and a warrant of possession has been executed in relation to the order.”

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<sup>15</sup> The “lands legislation” is defined in Sch 3 cl 1 as the following Acts:  
*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*.

- (3) The Occupational Division Schedule – Sch 5 – contains cl 29(1) which provides that certain decisions are not internally appealable in the following terms:

“Despite section 32 of this 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 Uniform Law (NSW)*,
- (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*.”

- (4) The Guardianship Division Schedule – Sch 6 – does not contain any exclusions or exceptions in respect of the right to an internal appeal but in cl 12 provides that a party may appeal from any internally appealable decision made in that Division to the Appeal Panel or to the Supreme Court but not both.

75 From all of these provision and given the legislation under which most applications are made, internally appealable decisions include:

- (1) most decisions of the Administrative and Equal Opportunity Division;
- (2) virtually all decisions of the Consumer and Commercial Division;
- (3) all decisions of the Guardianship Division;

- (4) all administrative review decisions of the Occupational Division relating to occupations licensed under State law or regulated by State authorities.

76 Judicial review and appeals are not, however, the only avenues for correcting Tribunal decisions. Further means of correcting errors or irregularities in Tribunal decisions include:

- (1) Section 53 of the Act under which irregular decisions are preserved from nullity by s 53(3) but may be set aside under s 53(4);
- (2) Clause 9(1) of the Civil and Administrative Tribunal Regulation which allows a decision to be set aside if the parties consent or if the decision was made in the absence of a party and the party was thereby deprived of the opportunity adequately to put its case;
- (3) Section 63 which allows obvious errors and slips to be corrected.

77 During the 2014–15 financial year, 608 internal appeals were lodged. The vast majority of these (90.8% of the total) were from the Consumer and Commercial Division. In addition, there were 33 appeals from the Administrative and Equal Opportunity Division, 17 from the Guardianship Division and 6 from the Occupational Division. The small number of appeals from the Occupational Division is not just a result of its being the smallest division, it is also the consequence of the fact that many of decisions of the Occupational Division are not internally appealable. The internal appeals by Division (for 2014-15) are as set out in the following table:

Division – 2014-15	Number of internal appeals	% of total
Administrative & Equal Opportunity	33	5.4%
Consumer & Commercial Division	552	90.8%
Guardianship Division	17	2.8%
Occupational Division	6	0.1%
<b>Total</b>	<b>608</b>	<b>100%</b>

78 This position may be compared to the historical information for 2011-12 concerning:

- (1) internal appeals from first instance decisions of the Administrative Decisions Tribunal (ADT) which corresponds roughly with the Administrative and Equal Opportunity and Occupational Divisions of NCAT;
- (2) appeals to the District Court or judicial review in the Supreme Court from decisions of the Consumer, Trader and Tenancy Tribunal (CTTT) which corresponds roughly with the Consumer and Commercial Division; and
- (3) appeals to the Appeal Panel of the ADT from decisions of the Guardianship Tribunal which corresponds with the Guardianship Division.

Tribunal – 2011-12	Number of appeals	2014-15 Rough Comparison
Administrative Decisions Tribunal	47 (Internal)	39 (33 + 6)
Consumer, Trader & Tenancy Tribunal	97 (appeals to the District Court and judicial review in the Supreme Court)	552 (not including judicial review in the Supreme Court)
Guardianship Tribunal	11 (to the ADT)	17

79 The most striking difference is in the number of appeals from decisions of the CTTT to the District Court compared to the number of internal appeals from the Consumer and Commercial Division. Part of the explanation may be the lower cost of an internal appeal within NCAT compared to the cost of appealing to the District Court. Another part of the explanation may be the nature of the appeal right. Section 67(1) of the *Consumer, Trader and Tenancy Tribunal Act 2001* (NSW) established a right of appeal in the following terms:

If, in respect of any proceedings, the Tribunal decides a question with respect to a matter of law, a party in the proceedings who is dissatisfied with the decision may, subject to this section, appeal to the District Court against the decision.

80 The internal appeal right in NCAT is broader.

### *The Nature of the Right to an Internal Appeal*

81 Under s 80(1) any party to proceedings in which an internally appealable decision is made can appeal against that decision to the Appeal Panel. Under s 80(2), the nature of the appeal right differs depending on whether the decision is an interlocutory decision or any other kind of decision, including an ancillary decision. Section 4(1) of the Act contains definitions of “ancillary decision”<sup>16</sup> and “interlocutory decision”.<sup>17</sup>

82 Interlocutory decisions can be appealed only by leave of the Appeal Panel: s 80(2)(a). Under s 80(2)(b), all other internally appealable decisions (including ancillary decisions) can be appealed to the Appeal Panel:

- (1) as of right on any question of law, and
- (2) by leave, on any other ground.

### *How is the Appeal Panel Constituted?*

83 As has already been noted, the Appeal Panel can be constituted in accordance with s 27(1)(a) by one or more Members, one at least of whom is an Australian lawyer. My practice is to constitute the Appeal Panel with at least 2 legal Members, except for interlocutory or ancillary applications. In important or more difficult matters I may choose to sit 3 legal Members. Generally, I constitute the Panel so that it is presided over by a Presidential or

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<sup>16</sup> An ancillary decision is a decision, other than an interlocutory decision, that is preliminary to, or consequential on, a decision determining proceedings and includes: a decision concerning whether the Tribunal has jurisdiction to deal with a matter; and a decision concerning the awarding of costs in proceedings.

<sup>17</sup> Under s 4(1), an interlocutory decision is a decision concerning any of the following:

1. the granting of a stay or adjournment,
2. the prohibition or restriction of the disclosure, broadcast or publication of matters,
3. the issue of a summons,
4. the extension of time for any matter (including for the lodgment of an application or appeal),
5. an evidential matter,
6. the disqualification of any Member,
7. the joinder or misjoinder of a party to proceedings,
8. the summary dismissal of proceedings,
9. any other interlocutory issue before the Tribunal.

Principal Member or by a Senior Member who is a Queen’s Counsel or Senior Counsel. I attempt to ensure that one Member of the Panel is from a Division other than the Division in which the decision appealed against was made.

84 To ensure that the right of internal appeal is effective and not illusory, reasons for decision must generally be given for all first instance decisions. There is a statutory right to a written statement of reasons on request in respect of any decision of the Tribunal found in s 62(2) of the Act, and this must be provided within 28 days. In the Guardianship Division matters, there is an additional obligation to give reasons for decisions, found in the Division Schedule for that Division.<sup>18</sup> In addition to these statutory requirements, the Appeal Panel has held that there is an independent duty at common law for the Tribunal to provide adequate reasons for its decisions.<sup>19</sup>

### *Effectiveness of the Appeal Panel*

85 It is legitimate to ask: How effective has the Appeal Panel been as a quality control mechanism? There are at least 2 ways to answer this.

86 First, anecdotally, it can be said that Members at first instance are ambivalent about the Appeal Panel. Their responses can be summarised in the words of Catullus, “Odi et amo”<sup>20</sup>. They hate it when they are overturned and they love it when they are upheld. Members of the Tribunal are only human.

87 The results of the internal appeals are currently running as follows:

	% of Total
Upheld	32%
Dismissed	58%
Withdrawn, etc	10%

<sup>18</sup> See cl 11 of Sch 6 to the Act.

<sup>19</sup> *Collins v Urban* [2014] NSWCATAP 17 at [56] and generally at [43] to [64].

<sup>20</sup> Gaius Valerius Catullus, Carmen LXXXV, “Odi et amo. Quare id faciam, fortasse requiris. nescio, sed fieri sentio et excrucior.”

- 88 My impression is also that over the 2 years and 75 days of the operation of the Appeal Panel, the quality of first instance decision making and writing has improved significantly because of the practical feedback of having matters remitted for redetermination as well as the guidance contained in the Appeal Panel's reasons for decision.
- 89 Secondly, information is available for the period January 2014 to 16 March 2016 concerning the fate of first instance Tribunal decisions and decisions of the Appeal Panel when they have gone on appeal or judicial review to the Supreme Court.
- 90 Where the internal appeal mechanism is not available or has not been used and parties have gone directly to the Supreme Court (single judge and Court of Appeal), usually by way of a judicial review application or a special appeal right, the Court has set aside the Tribunal's first instance decision in 9<sup>21</sup> out of 21 cases.<sup>22</sup>
- 91 Where the parties did avail themselves of the internal appeal mechanism, out of the 986 final decisions of the Appeal Panel, there were 14 appeals or

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<sup>21</sup> *AEA Constructions Pty Ltd v New South Wales Civil and Administrative Tribunal* [2014] NSWSC 911 (9 July 2014), *The Owners - Strata Plan No 73943 v Gazebo Penthouse Pty Limited* [2014] NSWSC 1536 (14 November 2014), *Mehajer v Chief Executive of the Office of Local Government* [2014] NSWSC 1804 (19 December 2014), *Donaghy v Legal Services Commissioner of New South Wales* [2014] NSWCA 445 (19 December 2014), *BCS v NSW Civil & Administrative Tribunal* [2015] NSWSC 126 (27 February 2015), *Allen v TriCare (Hastings) Pty Ltd* [2015] NSWSC 416 (17 April 2015), *BKE v Office of Children's Guardian* [2015] NSWSC 523 (11 May 2015), *Donaghy v Council of the Law Society of NSW (No 2)* [2015] NSWCA 224 (5 August 2015), *Mehajer v Director-General of the Department of Local Government* [2016] NSWSC 143 (26 February 2016).

<sup>22</sup> In addition to those 9 set aside (in footnote 21): *Quach v New South Wales Civil and Administrative Tribunal* [2015] NSWCA 63 (24 March 2015), *P v NSW Trustee and Guardian* [2015] NSWSC 579 (18 May 2015), *Kumar v Legal Services Commissioner* [2015] NSWCA 161 (17 June 2015), *Ibrahim v Medical Board of Australia* [2015] NSWCA 207 (20 July 2015), *Veterinary Practitioners Board of New South Wales v Gallagher; Veterinary Practitioners Board of New South Wales v Gallagher* [2015] NSWSC 1233 (3 September 2015), *Qasim v Health Care Complaints Commission* [2015] NSWCA 282 (22 September 2015), *C v W* [2015] NSWSC 1774 (27 November 2015), *Bahramy v Medical Council of New South Wales* [2015] NSWCA 384 (7 December 2015), *Fraser v Health Care Complaints Commission* [2015] NSWCA 421 (23 December 2015), *Quach v New South Wales Health Care Complaints Commission* [2016] NSWCA 10 (10 February 2016), *BRJ v Council of the New South Wales Bar Association* [2016] NSWSC 146 (29 February 2016), *BRJ v Council of the NSW Bar Association (No 2)* [2016] NSWSC 228 (11 March 2016).

judicial review applications heard by the Supreme Court (whether single judge or Court of Appeal).<sup>23</sup> Of these:

- (1) 11 were dismissed and 3<sup>24</sup> were upheld.
- (2) Of the 3 appeals or reviews upheld:
  - (a) 1 was upheld by the Court of Appeal on a ground that had not been argued before the Appeal Panel and because the parties agreed that it should be upheld but the decision of the Appeal Panel was found to have been correct in relation to the question that it did decide.<sup>25</sup>
  - (b) 1 was upheld by McCallum J,<sup>26</sup> overturning an Appeal Panel decision<sup>27</sup> that had, as her Honour acknowledged,<sup>28</sup> already been expressly overruled by the Appeal Panel in a later decision.<sup>29</sup>
  - (c) 1 was upheld by the Court of Appeal<sup>30</sup> and, besides demonstrating that the decision contained a multiplicity of errors of law, the judgment did at least describe the reasons of the Appeal Panel (over which I presided) as “careful”.<sup>31</sup>

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<sup>23</sup> *Commissioner of Police, New South Wales Police Force v Fine* [2014] NSWCA 327 (21 August 2014); 87 NSWLR 1, *Avery v Registrar of Births Deaths and Marriages* [2014] NSWCA 303 (22 August 2014), *McGeown v NSW Land and Housing Corporation* [2015] NSWCA 23 (23 February 2015), *Margan v Manias* [2015] NSWSC 307 (26 March 2015), *Hills v Djordjevic (No 2)* [2015] NSWSC 429 (16 April 2015), *Hudson v Arap 1(NSW) Pty Ltd* [2015] NSWCA 126 (14 May 2015), *New South Wales Land and Housing Corporation v Diab* [2015] NSWCA 133 (21 May 2015), *Pymont Point Pty Ltd v Westacott* [2015] NSWSC 783 (18 June 2015), *Seovic Engineering Pty Ltd v Chief Commissioner of State Revenue* [2015] NSWCA 242 (20 August 2015), *City Convenience Leasing Pty Limited v Boo* [2015] NSWSC 1271 (3 September 2015), *Black v Brereton* [2015] NSWSC 1781 (27 November 2015), *Symes v Mick Fabar Constructions Pty Ltd* [2015] NSWSC 1922 (16 December 2015), *Margan v Manias* [2015] NSWCA 388 (7 December 2015), *Robinson-Murray v Bargshoon* [2016] NSWSC 14 (3 February 2016).

<sup>24</sup> *Commissioner of Police, New South Wales Police Force v Fine* [2014] NSWCA 327; 87 NSWLR 1, *Hudson v Arap 1(NSW) Pty Ltd* [2015] NSWCA 126, *Robinson-Murray v Bargshoon* [2016] NSWSC 14.

<sup>25</sup> *Hudson v Arap 1(NSW) Pty Ltd* [2015] NSWCA 126 at [36].

<sup>26</sup> *Robinson-Murray v Bargshoon* [2016] NSWSC 14.

<sup>27</sup> *Robinson Murray v Bargshoon* [2015] NSWCATAP 19.

<sup>28</sup> *Robinson-Murray v Bargshoon* [2016] NSWSC 14 at [33].

<sup>29</sup> *Jenkinson v Chaw* [2015] NSWCATAP 127 at [30].

<sup>30</sup> *Commissioner of Police v Fine* (2014) 87 NSWLR 1.

<sup>31</sup> *Commissioner of Police v Fine* (2014) 87 NSWLR 1 at [47].



93 It should be borne in mind, however, that in period up to the beginning of February 2016:

- (1) There were 153,354 final decisions made at first instance; and
- (2) There were 986 internal appeals determined.

94 On this basis, it could be argued that, where the internal appeal mechanism has been availed of, the work of the Supreme Court in correcting errors by the Tribunal has been limited, in effect, to:

- (1) 1 out of 14 decisions of the Appeal Panel taken to the Supreme Court;  
or
- (2) 1 out of the 986 final decisions of the Appeal Panel; or
- (3) 1 out of the 153,354 final decisions of the Tribunal as a whole.

95 In summary, I think it is probably fair to say that the Appeal Panel is serving as an effective means of correcting errors in first instance decisions. In my view, it has certainly led to an improvement in the quality of decision making and writing in the Tribunal.

96 These statistics raise the last element to be addressed: the relationship between the Supreme Court and the Tribunal.

## **How does the Supreme Court relate to NCAT?**

97 This question of the relationship between the Supreme Court and the Tribunal is important. As has already been mentioned, the Supreme Court will always have its constitutionally entrenched supervisory jurisdiction in respect of a subordinate tribunal such as NCAT. There are also a number of express provisions in the NCAT legislation which establish or affect the relationship between the Supreme Court and the Tribunal.

## The President

98 First, there is s 13(1) of the Act, which probably has more symbolic than practical implications. This provision contains the requirement that a person is only qualified to be appointed President of the Tribunal if the person is a judge of the Supreme Court and that the Attorney General must consult with the Chief Justice before a person can be recommended for appointment as President. Accordingly, the Supreme Court is, to that extent, embedded in the Tribunal.

99 Symbolically and together with the other provisions in the NCAT legislation, s 13(1) confirms that NCAT is not to be thought of as a tribunal of the type described by Eve J in *Law v Chartered Institute of Patent Agents*.<sup>32</sup> In that case, his Lordship described the tribunal the subject of the proceedings as follows:

[The tribunal is] selected by the [government department] but [it is] not necessarily composed of individuals with any judicial or other appropriate qualifications. The [tribunal] conducts its investigation in private; it has ... no power to compel the attendance of witnesses or to insist on the production of documents; it cannot administer an oath, and has apparently no rules of procedure to guide it; it communicates no findings or decisions to the parties; it makes a report to the [department] which is conclusive as to the facts, but of which no copy is furnished to accuser or accused; and on this report the [department] exercises the powers conferred upon it .... and there is no appeal.

A late Lord Justice – one of great learning and wide experience – Lord Justice Farwell – once stated that he could not trust the whole bench of bishops to do justice under such conditions. With a respect for the episcopate as profound as that of the Lord Justice I entirely adopt his language. I share to the full his distrust of justice administered by a tribunal sitting in private, unassisted and untrammelled by the salutary rules regulating procedure, uncontrolled by the invigorating and corrective criticism provoked and stimulated by publicity, and finally wrapping up its findings in a secret communication to the department which appointed it.<sup>33</sup>

100 NCAT differs from that tribunal in every significant respect identified by Eve J.

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<sup>32</sup> [1919] 2 Ch 276.

<sup>33</sup> [1919] 2 Ch 276 at 293.

## Judicial Review

101 Secondly, s 34 of the Act addresses the inter-relationship of the Tribunal and the Supreme Court's supervisory jurisdiction directly. That section provides:

- “(1) The Supreme Court may:
- (a) refuse to conduct a judicial review of an administratively reviewable decision if it is satisfied that, in all the circumstances, adequate provision is made for an internal review of the decision or an administrative review of the decision by the Tribunal under the *Administrative Decisions Review Act 1997*, or
  - (b) refuse to conduct a judicial review of a decision of an external decision-maker if it is satisfied that, in all the circumstances, adequate provision is made for the review of the decision by the Tribunal by way of an external appeal, or
  - (c) refuse to conduct a judicial review of a decision of the Tribunal if an internal appeal or an appeal to a court could be, or has been, lodged against the decision.
- (2) This section:
- (a) permits, but does not require, the Supreme Court to refuse to conduct a judicial review of a decision on a ground referred to in subsection (1), and
  - (b) does not limit any power that the Supreme Court has, apart from this section, to refuse to conduct a judicial review of a decision.
- (3) In this section:
- internal review** of an administratively reviewable decision means an internal review of the decision conducted by or on behalf of an administrator under:
- (a) the *Administrative Decisions Review Act 1997*, or
  - (b) any other Act instead of the *Administrative Decisions Review Act 1997*.
- judicial review** does not include an appeal to the Supreme Court under this or any other Act.”

102 Thus s 34 appears to be, in essence, support for and reinforcement of the common law position that relief in judicial review proceedings is discretionary and may be refused if another form of appropriate redress, such as an internal or external review or appeal, is readily available: see for example *The Queen v Cook ex parte Twigg* (1980) 147 CLR 15 at 30 and 34, *Hill v King* (1993) 31 NSWLR 654 at 656, 658-659, *Quach v New South Wales Civil and Administrative Tribunal* [2015] NSWCA 63 at [51] and *Quach v New South Wales Civil and Administrative Tribunal* [2016] NSWCA 10 at [40], [42] and [43].

103 The predecessor of this provision was s 123 of the *Administrative Decisions Tribunal Act 1997* (NSW) (the ADT Act) in its form before the creation of NCAT when the ADT Act became the *Administrative Decisions Review Act 1997* (NSW). Section 123 was to substantially the same effect as s 34 of the Act and was considered at some length by Barrett J (as he then was) in *NSW Breeding & Racing Stables Pty Ltd v Administrative Decisions Tribunal (NSW)* (2001) 53 NSWLR 559. In that case it was concluded that the Court should refuse an application for judicial review of a number of ADT decisions on the basis that adequate provision was made in the ADT Act for the plaintiff to seek alternative review of each of the decisions by way of an appeal to the ADT Appeal Panel. A similar approach has been taken under s 34.

104 A number of judgments have referred to s 34 of the Act:

- (1) *Allen v TriCare (Hastings) Pty Ltd* [2015] NSWSC 416 (17 April 2015) at [56] to [64] where Beech-Jones J considered that the appeal mechanism available in NCAT was “(more than) adequate” (at [62]) but decided “with some reluctance” (at [64]) to grant relief in the nature of certiorari because: there was jurisdictional error on the part of NCAT; there was potential for injustice if the proceedings were dismissed, an appeal was pursued but no extension of time for the appeal was granted; and, if an appeal was pursued and an extension of time was allowed, there would be delay likely to disadvantage all parties.
- (2) *CCC v Office of the Children’s Guardian* [2015] NSWSC 471 (27 April 2015) at [15] where Beech-Jones J held that time for the application of s 34 had not yet arisen in that case.
- (3) *C v W* [2015] NSWSC 1774 (27 November 2015) where Lindsay J considered the nature of the appeal rights created by the Act, including the right of appeal from decisions of the Guardianship Division directly to the Supreme Court under cl 14 of Sch 6 to the Act, in the light of various sections including s 34 at [29] to [51].

- (4) *Tan v The Owners Strata Plan 22014 (No 2)* [2015] NSWSC 1920 (17 December 2015) where Robb J considered whether the “interests of justice exception to the proper plaintiff rule [did] not apply in the present case, because there are other remedies to address the alleged wrong” (at [134]), one such remedy being judicial review by the plaintiffs in their own names. He found it was unnecessary to consider in detail the operation of s 34 (at [146]) but thought it was possible that “the discretion vested by that section in the court may alter the predilection that the court previously had generally to require parties to institute appeals where that course was available to them, in preference to seeking an order in the nature of certiorari to quash an order made by the tribunal on the basis of an error of law on the face of the record, even where the party must seek leave to appeal”.

## Reference of Questions of Law

105 Thirdly, s 54 of the Act permits the Tribunal at first instance or an Appeal Panel to refer a question of law to the Supreme Court for the opinion of the Court. Section 54 is in similar but not identical terms to s 79A of the ADT Act. In particular, unlike s 79A, under s 54(3) whilst jurisdiction is expressly conferred on the Supreme Court to hear and determine any questions of law so referred, the Court “may decline to exercise that jurisdiction if it considers it appropriate to do so”. No question has yet been referred to the Supreme Court under this section.

## Reference of Alleged or Apparent Contempt and Appeals in Contempt Matters

106 Fourthly, s 73 establishes the Tribunal’s power to deal with contempt in the face of the Tribunal (s 73(1)) and to refer alleged or apparent contempt to the Supreme Court to be dealt with (s 73(5)). This provision expressly picks up and makes applicable in relation to the Tribunal or any member ss 199, 200 and 202 of the *District Court Act 1973* (NSW) (the DC Act) as those sections otherwise apply to the District Court or a judge of that Court: s 73(4)(a) and (b). Further, s 201 of the DC Act is also picked up and applied so that

contempt decisions of the Tribunal under s 73 can be appealed to the Supreme Court: s 73(4)(c).

107 There has been at least one application for such a reference under s 73(5) which was refused in the very peculiar circumstances of that case.<sup>34</sup>

## Appeals to the Supreme Court and Other Courts from NCAT Decisions

108 Fifthly, Div 3 of Pt 6 of the Act, ss 82 to 84, establishes the regime for appeals from NCAT decisions generally to the Supreme Court but in limited cases to the Land and Environment Court or the District Court. Under s 82(1) and (2), the following NCAT decisions are “appealable decisions”:

- (1) Any decision of the Appeal Panel in an internal appeal;
- (2) Any decision of the Tribunal in an external appeal;
- (3) Any decision of the Tribunal in proceedings in which a civil penalty has been imposed,

except for:

- (4) Any decision made in proceedings for contempt of the Tribunal; and
- (5) Any decision in an internal appeal against a decision of a registrar.

109 A party to proceedings in which an appealable decision is made can appeal to the Supreme Court on a question of law in respect of any decision made in an internal or external appeal, with leave of the Court: s 83(1).

110 A person on whom a civil penalty has been imposed by the Tribunal can appeal to the Supreme Court on a question of law in respect of any decision made in the civil penalty proceedings, if the Tribunal was constituted by one

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<sup>34</sup> *Burns v Corbett* [2015] NSWCATAD 188.

or more “senior judicial officers”:<sup>35</sup> ss 83(2) and 82(3) and (5). Otherwise, such an appeal lies to the District Court: ss 83(2) and 82(3).

- 111 The powers, practice and procedure of the Courts on such appeals are dealt with in s 83(3), (4) and (5) and s 84. In this regard it may be noted that under s 84(3), neither the Tribunal nor any members of the Tribunal can be made a party to such an appeal. This appears to have been overlooked in *BRJ v Council of the New South Wales Bar Association*<sup>36</sup> in which the Tribunal was apparently named as the second defendant. That case is also curious as it appears not to have been assigned to the Court of Appeal as might have been expected under s 48(1)(viii) and (2) of the *Supreme Court Act 1970* (NSW).<sup>37</sup>
- 112 As with other aspects of the Tribunal’s functioning, any analysis of appeals from Tribunal decisions will be incomplete if the provisions of the Division Schedules are disregarded. Three of the Division Schedules have special appeal provisions.

### **Qualifications and Exceptions in the Division Schedules**

- 113 Schedule 3, the Administrative and Equal Opportunity Division Schedule, contains in cl 17 a special appeal right directly to the Supreme Court on a question of law from a first instance decision of the Tribunal for the purposes of the *Child Protection (Working with Children Act) Act 2012*. These decisions are expressly excluded from those which are internally appealable to the Appeal Panel by cl 15(b) of Sch 3. Similarly, an appeal is available directly to the Land and Environment Court from any first instance decision made for the purposes of the lands legislation<sup>38</sup>, under cl 18 of Sch 3. Decisions for the purposes of lands legislation are also excluded from those which are internally appealable by cl 15(d) of Sch 3.

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<sup>35</sup> A “senior judicial officer” is defined in s 82(5) as a judge of the District Court, a judicial member of the Industrial Relations Commission, a judge of the Land and Environment Court or a Judge of the Supreme Court.

<sup>36</sup> [2016] NSWSC 146.

<sup>37</sup> The very recent decision of the Court of Appeal in *Gaynor v Burns* [2016] NSWCA 44 deals with s 48(1) of the *Supreme Court Act* and when the Tribunal is a “specified tribunal” at [31] – [32].

<sup>38</sup> See footnote 15.

- 114 Schedule 4, the Consumer and Commercial Division Schedule, does not contain any special appeal provisions concerning appeals to the Supreme Court.
- 115 Schedule 5, the Occupational Division Schedule, contains in cl 29(2) provisions relating to appeals from decisions that are excluded from those which are internally appealable to the Appeal Panel by cl 29(1).<sup>39</sup> The result is that all “profession decisions”<sup>40</sup> made in the Occupational Division may be appealed to the Supreme Court<sup>41</sup> except decisions for the purposes of Div 3 of Pt 5 or Div 4 of Pt 7 of the *Aboriginal Land Rights Act 1983 (NSW)* declaring a vacancy in an office. Those latter decisions may be appealed to the Land and Environment Court.<sup>42</sup> An appeal against a decision for the purposes of the *Legal Profession Uniform Law (NSW)* is an appeal to which s 75A of the *Supreme Court Act 1970* applies and is accordingly by way of a rehearing rather than a new hearing: cl 29(4)(a) of Sch 5 to the Act. All other appeals from a “profession decision” may be made as of right on a question of law and by leave on any other ground: cl 29(4)(b) of Sch 5. Under subcl (6), leave to appeal is also required in respect of interlocutory decisions, decisions made by consent and decisions as to costs if they otherwise fall within the decisions covered by cl 29 of Sch 5. Other aspects of practice and procedure in relation to those appeals are also covered by cl 29.
- 116 Schedule 6, the Guardianship Division Schedule, in cl 12 establishes the bifurcated right of appeal to the Appeal Panel or the Supreme Court from Guardianship Division decisions (except decisions of a registrar under cl 8(1) of Sch 6). An appeal to the Supreme Court under cl 12(1)(b) may be made against an interlocutory decision with the leave of the Court but appeals to the Court against any other types of decision, may be made as of right on a question of law and by leave on any other ground: cl 14(1) of Sch 6.

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<sup>39</sup> See par 74(3) above.

<sup>40</sup> See par 74(3) above where cl 29(1) of Sch 5, which defines “profession decision”, is quoted.

<sup>41</sup> Sch 5 cl 29(2)(b).

<sup>42</sup> Sch 5 cl 29(2)(a).



## Consumer and Commercial Division Non-Overlapping Exercise of Jurisdiction

117 Sixthly, the relationship between the Tribunal and Courts in relation to proceedings assigned to the Consumer and Commercial Division that could be brought in either the Tribunal or a Court is expressly dealt with in the Consumer and Commercial Division Schedule, Sch 4 cll 5 and 6. These clauses provide:

### **5 Relationship between Tribunal and courts and other bodies in connection with Division functions**

#### **(1) Meaning of “court”**

For the purposes of this clause, court means any court, tribunal, board or other body or person (other than one referred to in subclause (2)) that:

- (a) is empowered under any other Act, or
- (b) by consent of, or agreement between, 2 or more persons has authority, to decide or resolve any issue that is in dispute, whether through arbitration or conciliation or any other means.

#### **(2) However, court does not, for the purposes of this clause, include:**

- (a) a court, tribunal, board or other body or person that, in relation to a particular matter, is empowered by law to impose a penalty, admonition or other sanction for a contravention of a law or for misconduct or breach of discipline proved to have been committed in connection with that matter but is not empowered to award or order compensation or damages in respect of that matter, or
- (b) the Fair Trading Administration Corporation constituted under Part 7 of the *Home Building Act 1989*, or
- (c) the Ombudsman, or
- (d) any person exercising the functions of an ombudsman under any law of the Commonwealth, or
- (e) any person authorised, under a law of the State or of the Commonwealth or of another State or a Territory, to make decisions or orders, or give directions, that are binding only on one party to a dispute.

#### **(3) Effect of application to Tribunal or court**

If, at the time when an application was made to the Tribunal for the exercise of a Division function, no issue arising under the application was the subject of a dispute in proceedings pending before a court, a court has no jurisdiction to hear or determine such an issue.

- (4) Subclause (3) ceases to apply to the extent to which the application concerned is dismissed for want of jurisdiction or withdrawn.
- (5) Subclause (3) does not prevent a court from hearing and determining any proceedings in which it is claimed that any order, determination or ruling of the Tribunal in exercise or purported exercise of a Division function is invalid for want of jurisdiction or from making any order as a consequence of that finding.
- (6) For the purposes of subclause (3), an issue arises under an application made to the Tribunal for the exercise of a Division function

only if the existence of the issue is shown in the applicant's claim or is recorded in the record made by the Tribunal in accordance with this Act.

(7) **Effect of pending court proceedings on Tribunal**

If, at the time when an application is made to the Tribunal for the exercise of a Division function, an issue arising under the application was the subject of a dispute in proceedings pending before a court, the Tribunal, on becoming aware of those proceedings, ceases to have jurisdiction to hear or determine the issue.

(8) Subclause (7) ceases to apply to the extent to which the proceedings concerned are dismissed or quashed by the court, or by another court, for want of jurisdiction or without deciding the issue on its merits, or withdrawn.

(9) **Evidence from court proceedings**

In proceedings on an application to the Tribunal for the exercise of a Division function, a finding or decision made by a court, tribunal, board, body or person referred to in subclause (2) is admissible as evidence of the finding or decision.

(10) **Clause prevails over other law**

This clause has effect despite Part 3 of this Act or any other Act or law to the contrary.

**6 Transfer of proceedings to courts or to other tribunals**

(1) If the parties in any proceedings for the exercise of a Division function so agree, or if the Tribunal of its own motion or on the application of a party so directs, the proceedings are:

- (a) to be transferred to a court (in accordance with the rules of that court) that has jurisdiction in the matter, and
- (b) to continue before that court as if the proceedings had been instituted there.

(2) If the parties in any proceedings that have been instituted in a court so agree, or if the court of its own motion or on the application of a party so directs, the proceedings are, if the proceedings relate to a matter for which the Tribunal has jurisdiction to exercise a Division function:

- (a) to be transferred to the Tribunal in accordance with the procedural rules (if any), and
- (b) to continue before the Tribunal as if the proceedings had been instituted in the Tribunal.

118 The relevant effect of these provisions is that if a Consumer and Commercial Division application is first made to the Tribunal rather than a Court, no Court will thereafter have jurisdiction to deal with the issues which are raised by the claims the subject of the application: cl 5(3). This ceases to apply if the Tribunal application is withdrawn or dismissed for want of jurisdiction: cl 5(4). In addition, cl 5(3) does not prevent a Court from hearing and determining proceedings in which it is claimed that any decision of the Tribunal is invalid for want of jurisdiction: cl 5(5).

- 119 Similarly, if at the time when a Consumer and Commercial Division application is made to the Tribunal there are relevant proceedings on foot before a Court, the Tribunal “on becoming aware of those proceedings” ceases to have jurisdiction to hear and determine the proceedings: cl 5(7). That subclause ceases to apply to the extent that the proceedings concerned are dismissed or quashed by the Court, or by another Court, for want of jurisdiction or without deciding the issue on its merits, or withdrawn: cl 5(8).
- 120 Under cl 6 of Sch 4, the transfer of proceedings between the Tribunal and a Court and vice versa is permitted.

### Other Relevant Provisions

- 121 Finally, experience has taught me that it is likely that somewhere in the Act, the Schedules, the Regulation, the Rules or the enabling legislation there will be some additional provision which concerns the relationship between the Tribunal and the Supreme Court that I have missed in the outline given above. When you find it, please let me know.

### Conclusion

- 122 It is perhaps too early to attempt to assess whether or not NCAT has been a success, whatever that might mean and however that might be judged.
- 123 Nonetheless, one can gain an insight into its significance for the people of New South Wales from the figures. In its first 2 years and 31 days of operations it has finalised 153,340 matters.
- 124 Since January 2014, the NCAT website has received 4,674,019 web page hits.
- 125 NCAT is an integral part of the civil justice system. It affects, and makes a difference for, many people in New South Wales.

## 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.