

# AN OVERVIEW OF THE NSW CIVIL AND ADMINISTRATIVE TRIBUNAL

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## Introduction

- 1 On 1 January 2014, the Civil and Administrative Tribunal of New South Wales came into existence by operation of s 7(1) of the *Civil and Administrative Tribunal Act 2013* (NSW) (the Act). Under s 7(1), the Tribunal may be called 'NCAT'.
- 2 NCAT takes over the work and brings together the jurisdiction of 22 previous tribunals or bodies in the State's largest tribunal. It comprises 4 Divisions and an internal Appeal Panel. The Tribunal is headed by a Supreme Court judge (as required by s 13 of the Act) and is managed and coordinated by a Principal Registrar (s 4(1)).
- 3 As this is an address to lawyers, it is useful to note that there are three types of lawyers who appear in NCAT. First, there are those who appear as of right. Secondly, there are those who appear by leave of the Tribunal. Thirdly, there are those who appear as respondents in legal professional disciplinary proceedings in the Tribunal's Occupational Division. Perhaps the best advice is: avoid being in the third category. When you are to appear in NCAT, make sure you know whether you fit into the first category or the second category.
- 4 In recognition of the significant part lawyers play in the administration of civil justice in this State, it is appropriate to give a more detailed account of the formation of NCAT and its progress and practice.

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\* President of the Civil and Administrative Tribunal of New South Wales; Judge of the Supreme Court of New South Wales.

## How Did NCAT Come About?

5 NCAT came about because politicians decided to create it and Parliament passed the laws to bring it into existence. When thinking about politicians and lawmakers generally, it is tempting to agree with Groucho Marx's observation:

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

6 In the case of NCAT, however, I suggest that Groucho Marx has been proved wrong.

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>1</sup> That Committee, composed of politicians, had gone looking for trouble, found it and identified that the tribunal system then current in New South Wales was “*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.

8 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>.

9 I believe, in this case, the diagnosis of the politicians was correct and the remedy to be applied was the appropriate remedy.

10 The formation of this ‘super Tribunal’ represents one of the most significant changes made to the administration of civil justice in New South Wales since

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

<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.

the foundation of the Supreme Court in 1824. (You might expect me to say that, given my role as inaugural President of NCAT.) Combining 22 previously existing tribunals and bodies into one was not a simple matter.

### **Legislative Framework of NCAT**

- 11 NCAT was brought into existence and given its present structures by the *Civil and Administrative Tribunal Act 2013* (NSW). A host of other Acts, referred to as enabling legislation, confers jurisdiction on the Tribunal in relation to specific types of matters.
- 12 A useful summary of the various legislative efforts involved in arriving at the *Civil and Administrative Tribunal Act* in its current form is helpfully set out by Mark A Robinson SC in *New South Wales Administrative Law*.<sup>4</sup>

### **What Has the Formation of NCAT Delivered?**

- 13 The formation of NCAT has delivered at least five things for the administration of civil justice in New South Wales:
  - Simplification
  - Appropriate Differentiation of Practice and Procedure for Different Types of Cases in the Tribunal
  - An Inexpensive and Prompt System of Appeals from Tribunal decisions
  - A Broadly-Based and Flexible Membership
  - An Independent Super Tribunal

### **Simplification**

- 14 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

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<sup>4</sup> M A Robinson SC, *New South Wales Administrative Law*, Vol 1 at 1-2111 ff.

telephone number to contact and one website to visit. Some of that may sound trivial for lawyers but for individuals who have no experience of the law, it is very significant.

15 The Tribunal has taken over the work and brought together the jurisdictions of 22 previously existing tribunals and bodies. Those 22 pre-existing tribunals and bodies were:

- The Administrative Decisions Tribunal;
- The Consumer Trader and Tenancy Tribunal;
- The Guardianship Tribunal;
- The 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.

16 This is a major structural simplification for the administration of civil justice in New South Wales.

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

17 Notwithstanding that all of these bodies have been brought into one Tribunal, NCAT preserves appropriate differentiation of practice and procedure and case management. 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 the 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.

18 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 procedures which reflect the nature of the work done in that Division. Each Division has its own Schedule in the *Civil and Administrative Tribunal Act* that sets out some of the different procedures applicable to it.

#### *Administrative and Equal Opportunity Division*

19 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 1977*;
- (2) All complaints under the *Anti-Discrimination Act 1977*.

- 20 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*.
- 21 The Administrative and Equal Opportunity Division received approximately 750 applications in 2014.
- 22 The 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*

23 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 matters;
- Home building and motor vehicle matters;
- Strata and community title disputes;
- Dividing fence disputes;
- Residential parks, retirement villages and similar matters.

24 This Division is the largest by workload and typically receives between 60,000 and 65,000 applications per year.

25 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*. The 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*

26 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.

27 The Guardianship Division is the second largest by number of applications, receiving over 11,300 applications in 2014. Lodgements made under this division were quite varied, with the two modal categories of applications – Guardianship and Financial Management – combined representing only slightly over half of all lodgements. For instance, in 2014, there were about 340 applications made under the Medical/Dental Consent category. Its Division-specific procedures and requirements are set out in Sch 6 of the *Civil and Administrative Tribunal Act*.

28 The 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*

29 Finally, there is the Occupational Division, which should be of particular interest to lawyers because it is responsible for the professional discipline of all legal practitioners in this State. The Occupational Division deals not only with legal practitioners but also with:

- Professional discipline and supervision of other professions, including architects, building professionals, medical practitioners and other health practitioners, surveyors and veterinarians;
- 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.

30 Although the Occupational Division is the smallest of the Divisions by reference to the number of applications lodged each year, approximately 320 in 2014, its decisions can be some of the most significant including striking solicitors off the roll of practitioners, deregistering doctors or depriving real estate agents of their licence to operate. The particular procedures that apply in the Occupational Division are set out in Sch 5 to the *Civil and Administrative Tribunal Act*.

31 The 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*

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

- 32 To provide a readily accessible, timely and cost-effective review of first instance decisions, NCAT has its own Appeal Panel: ss 80 and 81 of the Act.
- 33 Apart from professional disciplinary 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 *Civil and Administrative Tribunal Act*. Generally under s 80(2)(b) of the Act, a dissatisfied party can appeal
- (1) as of right on question of law, and
  - (2) by leave, on any other ground.
- 34 Interlocutory decisions can be appealed by leave of the Appeal Panel: s 80(2)(a).
- 35 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. Thus it is not an innovation for the Administrative and Equal Opportunity 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.
- 36 To ensure that these appeal rights are effective and not illusory, a written statement of reasons can be sought in respect of any decision of the Tribunal, which must be provided within 28 days<sup>5</sup>. In addition to this statutory

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<sup>5</sup> *Civil and Administrative Tribunal Act 2013* (NSW), s 62.

procedure, there is an independent duty at common law for the Tribunal to provide reasons for its decisions<sup>6</sup>.

37 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.

38 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.

39 In total, there were over 600 internal appeals in 2014.

### **A Broadly-Based and Flexible Membership**

40 NCAT currently has 251 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.

41 All Members are assigned to a particular Division. In this way, expertise Members bring with them to the Tribunal can be preserved and further developed. 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.

42 Legal Members must be lawyers of at least 7 years' standing. Perhaps most importantly 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.

43 In addition to Members appointed for a term, the President can appoint Occasional Members for particular proceedings where this is necessary to

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<sup>6</sup> *Collins v Urban* [2014] NSWCATAP 17 at [56].

permit the Tribunal to perform its functions. This is how professional and community members are appointed in Health Practitioner disciplinary matters.

### **An Independent Super Tribunal**

44 The independence of the newly formed super Tribunal is essential to assuring all litigants that civil justice will be administered impartially and fairly. Members may be appointed for terms of up to 5 years and are eligible for reappointment: cl 2 of Sch 2 to 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. The Governor may remove a Member, other than the President, from office for incapacity, incompetence or misbehaviour: cl 7(2) of Sch 2 of the Act.

45 One significant feature of NCAT is that the President must be a Supreme Court Judge. In this, NCAT is unlike any of its predecessors. By making it mandatory that the President be a judge of the Supreme Court (which court is required to exist under Chapter III of the Australian Constitution<sup>7</sup>) and by the other provisions already referred to, the Parliament can be seen as emphasising:

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

### **Rationale for NCAT**

46 At this point I expect that the enquiring minds among you might be asking: given that there is a court system already in place, why is it necessary to create a tribunal to deal with matters that could be dealt with by the courts? There are three distinct characteristics of tribunals that make it appropriate to have the functions that have been entrusted to NCAT performed by a tribunal.

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<sup>7</sup> *Forge v Australian Securities and Investments Commission* [2006] HCA 44; 228 CLR 45 at [57].

47 First, tribunals such as NCAT have flexibility and informality in procedures and are not generally bound by the rules of evidence. This is of particular importance when dealing with:

- merits review of administrative decisions – where the process does not seek merely to apply the law to facts as found to quell a dispute, but rather seeks to arrive at the correct and preferable administrative decision in the circumstances; and
- guardianship and related matters – where the interests of the person with an impaired decision-making capacity are paramount but the claims and concerns of family, friends and other interested parties must be taken into account.

48 The flexibility and informality of procedures are also of general importance because they allow many less complex cases, or those not involving significant sums of money, to be resolved quickly and cheaply, without undue regard to legal forms or technicalities, in a manner proportionate to the subject matter of the claim.

49 The second reason why a tribunal such as NCAT is the appropriate forum for the types of matters assigned to it is that the Tribunal can be, and often is, constituted with professional, lay or community representatives, as well as lawyers. Having these non-lawyer Members participating in the decision-making process serves to ensure that:

- in professional disciplinary matters, decisions are consonant with professional and community standards;
- in discrimination and vilification matters, decisions reflect current community values; and
- in proceedings involving expert, professional or community issues, the issues are more efficiently dealt with by reducing the need for, and time

spent on, evidence because of the presence of professional, expert or community members on the Tribunal hearing the matter.

- 50 The third reason why a tribunal is appropriate for the types of matters that come before NCAT is that, in a large number of simple matters, a tribunal, given its flexibility and reduced emphasis on legal technicality, offers litigants the opportunity to present their own cases, without disadvantage and without the need to retain legal practitioners to act on their behalf.
- 51 Whilst the beneficial role that lawyers can play in proceedings should never be underestimated, it remains the case that in smaller value claims and in proceedings where resolution is not assisted by an adversarial approach, parties should be able to come to the Tribunal and have their case properly heard and determined without the need for, or expense of, retaining legal representation.

### **Practice and Procedure in the Tribunal**

- 52 The diversity of jurisdictions, the different types of matters and the variety of needs of the litigants before NCAT necessarily require differentiation in the practice and procedure in the Tribunal. As has already been mentioned, each Division has its own Schedule in the Act that establishes special procedures which apply only in respect of that Division.
- 53 The general provisions relating to practice and procedure in the Act are found in Pt 4, ss 35 to 70. Part 4 is helpfully headed '*Practice and Procedure*'.
- 54 The guiding principle 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 is set out in s 36 and other general principles concerning practice and procedure are contained in ss 36, 37 and 38 of the Act. Sections 36 to 38 are set out in full in Attachment A to this paper.

55 If you appear in the Tribunal, it will be not only wise but also essential to be aware of the terms of ss 17(3) and 35 of the Act and the legislative note to s 35. They are:

**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.

...

**35 Application of Part**

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

**Note.** The Division Schedule for a Division of the Tribunal may, in some cases, make special provision for the practice and procedure to be followed in connection with certain proceedings allocated to the Division for determination. The provisions of the Division Schedule prevail to the extent of any inconsistency with the provisions of this Part. See section 17(3).

Section 4 (4) also provides that any provisions of this Act that are expressed to be subject to the procedural rules have effect subject to any exceptions, limitations or other restrictions specified by the procedural rules.

Enabling legislation may also make provision for matters relating to practice and procedure in relation to functions conferred on the Tribunal, including (for example) specifying periods within which applications or appeals under that legislation are to be made.

56 Thus, when dealing with practical questions relating to practice and procedure in the Tribunal, such as representation, costs, appeal rights or similar issues, it is essential to consider not only the Practice and Procedure Part of the Act in Pt 4, but also:

- (1) the relevant enabling legislation,
- (2) the relevant Division Schedule in the Act, and
- (3) the procedural rules,

all of which prevail over the terms of Part 4 to the extent of any inconsistency.

57 Under s 4(1), the expression 'procedural rules' is defined as meaning "*the Tribunal rules [and] the regulations in their application to practice and procedure of the Tribunal*".

58 The regulations are found in the *Civil and Administrative Tribunal Regulation 2014* (the Regulation). The Tribunal has rules, made by the NCAT Rules Committee under ss 24 and 25 of the Act. These are the *Civil and Administrative Tribunal Rules 2014* (the Rules). Both the Regulation and the Rules are available on the NSW Legislation website under 'Regulations' as well as on the NCAT website: <http://www.ncat.nsw.gov.au/> .

59 In addition, under s 26 of the Act, the President may issue procedural directions in relation to practice and procedure with which the Tribunal and the parties must comply (see s 26(4)). 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 Division-specific procedural directions. These may all 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) .

60 To illustrate how this works, two examples can be taken:

- (1) Legal representation; and
- (2) Costs.

## Legal Representation in the Tribunal.

- 61 The starting point when considering legal representation is s 45 of the Act, which states the general proposition 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.
- 62 First, it is possible that the enabling legislation, i.e. the Act which confers power on the Tribunal to hear and determine the matter, may include specific provisions dealing with practice and procedure. This should be checked but, in the case of legal representation, there do not appear to be any relevant provisions in most of the enabling legislation.
- 63 Secondly, it is necessary to consult the Division Schedules to the Act to determine whether that general position applies in the Division in which the matter in question is being determined.
- 64 If the proceedings are in the Administrative and Equal Opportunity Division, cl 9 of Sch 3 is relevant. Clause 9 of the Schedule states that, despite s 45, a party to proceedings is entitled to be represented by an Australian legal practitioner without requiring the leave of the Tribunal except in matters arising under the *Community Services (Complaints, Review and Monitoring) Act 1993*.
- 65 For a matter in the Consumer and Commercial Division, cl 7 of Sch 4 is the relevant provision and provides that, despite s 45:
- (a) if the party has been granted legal assistance under the *Fair Trading Act 1987*, a party is entitled to be represented by an Australian legal practitioner without requiring the leave of the Tribunal; and
  - (b) in proceedings under the *Retail Leases Act 1994*, a party is entitled to be represented by an Australian legal practitioner or other agent without requiring the leave of the Tribunal.

- 66 In the Occupational Division, a party is entitled to be legally represented in any matter without the need to obtain leave by operation of cl 27 of Sch 5.
- 67 By way of contrast, in the Guardianship Division, cl 9 of Sch 6 (the Division Schedule for the Guardianship Division) maintains the prohibition on legal or other representation without leave, except in matters arising under s 175 of the *Children and Young Persons (Care and Protection) Act 1998*.
- 68 Having consulted the Division Schedule, it is then necessary to check the *Civil and Administrative Regulation*. Fortunately, it contains no provisions dealing with representation.
- 69 Next, it should be borne in mind that the *Civil and Administrative Tribunal Rules* contain rr 31, 32 and 33 concerning representation. Those rules allow:
- an application for leave to be represented to be made orally or in writing at any time (r 31(1));
  - the Tribunal to impose conditions (r 31(2)) and to revoke leave in certain circumstances (r 32(2)); and
  - the Tribunal to require disclosure of the estimated cost of representation as a condition of granting leave (r 33).
- 70 Finally, there are also Divisional Procedural Directions and Guidelines in relation to representation which may be of assistance.
- 71 For appeals to the Appeal Panel, s 45(2) of the Act provides that a person is entitled to be represented without leave if they were entitled to be represented without leave in the Tribunal at first instance. Otherwise, leave is required.

## **Costs**

- 72 Once again, the general position is set out in Pt 4, the Practice and Procedure Part of the Act. Section 60(1) provides that each party to proceedings in the

Tribunal 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).

- 73 Bearing in mind ss 35 and 17(3), the vigilant practitioner will consult the enabling legislation, the Division Schedules, the Regulation and the Rules and any applicable procedural directions.
- 74 Enabling legislation not uncommonly confers on the Tribunal a 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. Clause 13 states:

**13 Tribunal may award costs [NSW]**

(1) The Tribunal may order the complainant (if any), the registered health practitioner or student concerned, or any other person entitled to appear (whether as of right or because leave to appear has been granted) at an inquiry or appeal before the Tribunal to pay costs to another person as decided by the Tribunal.

...  
(4) This clause applies instead of section 60 (Costs) of the *Civil and Administrative Tribunal Act 2013*.

- 75 In addition to the enabling legislation, it is also necessary to have regard to the Division Schedules in the Act. For matters in the Administrative and Equal Opportunity Division, cl 12 of Sch 3 allows the Tribunal to make a costs order despite s 60(1) and (2) of the Act in cases under the *Dormant Funds Act 1942* (NSW) whilst cl 13 prohibits the awarding of costs, despite s 60 of the Act, in relation to decisions under the *Commission for Children and Young People Act 1998*, the *Child Protection (Working with Children) Act 2012* and the *Victims Rights and Support Act 2013*.

76 For proceedings in the Consumer and Commercial Division, cl 11 of Sch 4 to the Act provides that s 60 of the Act does not apply to costs of a review application under s 32A(1) of the *Retail Leases Act 1994*. If, however, a practitioner assumed that that was the only specific exception to s 60 of the Act that applied in the Consumer and Commercial Division, it would be a mistake. The Rules contain a costs regime for the Consumer and Commercial Division that is different from that set out in s 60. Rule 38 is as follows:

### **38 Costs in Consumer and Commercial Division of the Tribunal**

(1) This rule applies to proceedings for the exercise of functions of the Tribunal that are allocated to the Consumer and Commercial Division of the Tribunal.

(2) Despite section 60 of the Act, the Tribunal may award costs in proceedings to which this rule applies even in the absence of special circumstances warranting such an award if:

(a) the amount claimed or in dispute in the proceedings is more than \$10,000 but not more than \$30,000 and the Tribunal has made an order under clause 10 (2) of Schedule 4 to the Act in relation to the proceedings, or

(b) the amount claimed or in dispute in the proceedings is more than \$30,000.

77 In the Guardianship Division, there are no provisions of the enabling legislation, the Division Schedule, Sch 6, the Regulation or the Rules that alter the position established by s 60 of the Act.

78 In the Occupational Division, the enabling legislation often contains costs provisions which are different from those in s 60. The position under the Health Practitioner Regulation National Law, Sch 5D, cl 13 has already been referred to. The Division Schedule for the Occupational Division, Sch 6, contains special costs provisions quite different from s 60 in relation to legal practitioners and veterinarians in cll 23 and 26, respectively, but there do not appear to be similar costs rules for architects. Among other things, legal practitioners and veterinarians must be ordered to pay costs if disciplinary findings are made against them unless the Tribunal is satisfied that exceptional circumstances exist.

79 Finally, in the Appeal Panel, it is generally the case that the ordinary costs rule under s 60 of the Act applies, subject to any applicable enabling legislation.

## **Conclusion**

80 From these practical illustrations it can be seen that the laws by which 22 different tribunals and bodies were combined into one super Tribunal were not without their complexities.

81 Bismarck is reputed to have said that laws are like sausages, it is best not to see how they are made. Whilst a bad sausage may be described as an emulsified fat filled offal tube, a good sausage can be seen as a deliberate and balanced amalgamation of meat, starch and spices preserving the nutritional value, appropriate texture and accumulated flavours of the ingredients from which it is made.

82 Similarly the NCAT legislation can be seen as involving a deliberate and balanced amalgamation of specialist tribunals and bodies into a single Tribunal while seeking to preserve the expertise, appropriate procedures and accumulated wisdom of those bodies. It is by no means an easy or simple solution to the issue of how this State's tribunal system should be structured, but its first year of operation has demonstrated that it works effectively. If the NCAT legislation can be compared to a sausage, it is far from the worst.

83 To assess the significance of NCAT, one might pose one question: Does NCAT matter to the people of NSW? The answer can be given in a number of figures:

- In the first 12 months of operation, NCAT received approximately 75,000 applications and appeals.
- In 2014, the NCAT website had more than 2.35 million hits.

**84** NCAT is significant for many people.

## ATTACHMENT A

### 36 Guiding principle to be applied to practice and procedure

- (1) The **guiding principle** for this Act and the procedural rules, in their application to proceedings in the Tribunal, is to facilitate the just, quick and cheap resolution of the real issues in the proceedings.
- (2) The Tribunal must seek to give effect to the guiding principle when it:
  - (a) exercises any power given to it by this Act or the procedural rules, or
  - (b) interprets any provision of this Act or the procedural rules.
- (3) Each of the following persons is under a duty to co-operate with the Tribunal to give effect to the guiding principle and, for that purpose, to participate in the processes of the Tribunal and to comply with directions and orders of the Tribunal:
  - (a) a party to proceedings in the Tribunal,
  - (b) an Australian legal practitioner or other person who is representing a party in proceedings in the Tribunal.
- (4) In addition, 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.
- (5) However, nothing in this section requires or permits the Tribunal to exercise any functions that are conferred or imposed on it under enabling legislation in a manner that is inconsistent with the objects or principles for which that legislation provides in relation to the exercise of those functions.

### 37 Tribunal to promote use of resolution processes

- (1) The Tribunal may, where it considers it appropriate, use (or require parties to proceedings to use) any one or more resolution processes.

**Note.** See section 59 for the power of the Tribunal to give effect to a settlement reached by the parties following the use of a resolution process.

- (2) A **resolution process** is any process (including, for example, alternative dispute resolution) in which parties to proceedings are assisted to resolve or narrow the issues between them in the proceedings.

### 38 Procedure of Tribunal generally

- (1) 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.

(2) The Tribunal is not bound by the rules of evidence and may inquire into and inform itself on any matter in such manner as it thinks fit, subject to the rules of natural justice.

(3) Despite subsection (2):

(a) the Tribunal must observe the rules of evidence in:

- (i) proceedings in exercise of its enforcement jurisdiction, and
- (ii) proceedings for the imposition by the Tribunal of a civil penalty in exercise of its general jurisdiction, and

(b) section 128 (Privilege in respect of self-incrimination in other proceedings) of the *Evidence Act 1995* is taken to apply to evidence given in proceedings in the Tribunal even when the Tribunal is not required to apply the rules of evidence in those proceedings.

**Note.** Section 67 also prevents the compulsory disclosure of certain documents in proceedings in the Tribunal that would, in proceedings before a court, be protected from disclosure by reason of a claim of privilege.

(4) The Tribunal is to act with as little formality as the circumstances of the case permit and according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms.

(5) The Tribunal is 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.

(6) The Tribunal:

- (a) 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, and
- (b) may require evidence or argument to be presented orally or in writing, and
- (c) in the case of a hearing—may require the presentation of the respective cases of the parties before it to be limited to the periods of time that it determines are reasonably necessary for the fair and adequate presentation of the cases.