**NCAT Member Conference 4 November 2022**

**Tony Payne - Making good decisions**

1. Can I commence by acknowledging the traditional custodians of the land where we meet, the Gadigal people of the Eora Nation and pay my respects to their elders past, present and emerging. In acknowledging the traditional custodians of the land can I pay tribute to a particular aspect of First Nations culture to which I will return - resilience.

2. I am delighted to be invited to speak at the 2022 NCAT Member Conference. As you may have heard, we don't get out much in the Court of Appeal.

3. The topic of this address – making good decisions – is designed as a reflection about what it is that we as decision makers do – and how we might aim to do it better. I do not intend to trespass into the territory of suggestions about judgment writing or oral decisions – others who you will hear from today will admirably fill that role. I would like to take the time to reflect at a higher level on the qualities of good decisions.

4. It seems almost quaint now to think of NCAT as the progeny of what used to be called "the new administrative law". The administrative law jurisdiction has grown and become ever more complex since those days, particularly since NCAT's creation as the merger of most State administrative bodies and the creation of a mega-Tribunal.

5. In addressing good decision making, my window into the decision making at NCAT is admittedly limited. In the Court of Appeal in the calendar year 2021, only 5% (17 in total) of the new cases filed were from NCAT decisions. Later in the program today you will be addressed about the use of statistics, which my friend Robertson Wright describes as the "fun of statistics" but which perhaps should be sub-titled lies, damned lies, and statistics.

6. Of course I try and read NCAT decisions published on caselaw, but they are only a small part of the Tribunal's workload. Even in the blighted years of COVID lockdowns NCAT got through an enormous amount of work. As the 2020-2021 NCAT Annual Report demonstrates:
    a. 791 applications were finalised in that year in the Administrative and Equal Opportunity Division;
    b. 54,979 applications were finalised in the Consumer and Commercial Division – a mighty achievement given the twin complexities of COVID and the new strata legislation;
    c. 13,971 applications were finalised in the Guardianship Division;
    d. 231 applications were finalised in the Occupational Division; and
    e. 765 applications were finalised in the Appeal Panel

7. So, what do these numbers tell us?

8. First, it may be observed that only a tiny fraction of decisions made by NCAT members, whether alone or as part of multi-member panel, are appealed. Secondly, an even tinier fraction of decisions made by NCAT find their way to

the Court of Appeal. Those few cases that do come to the Court of Appeal can broadly be identified as professional discipline decisions about lawyers, doctors and health professionals, cases raising novel points of statutory construction or Constitutional issues and, finally, an increasing number of strata disputes bearing some of the unpleasant resonances of Dickens' Bleak House.

9. So far so good. By any of these metrics NCAT has much to be proud of and its decision making on the whole is a candidate for the description of an inverted commas "good decision". No doubt many litigants are satisfied by their NCAT experience and content with the decision that has been made and communicated to them. The NCAT Annual Report seeks, admirably, to consider user satisfaction as one of its performance indicators. It must be acknowledged, however that a significant percentage of litigants before NCAT are self-represented. Many litigants are on low incomes or are otherwise disadvantaged and for a variety of reasons, including resources, are unlikely to conduct an appeal. So some caution is warranted about the lack of appeals being the sole basis upon which to judge "good decision" making.

10. More fundamentally, I approach decision making in the belief that we can all make better decisions – ones happily able to be characterised as "good decisions". Why strive to improve our decision making? Chief Justice Allsop of the Federal Court some years ago at a dinner for the administrative law section of the Bar explained something simple yet true. Coming from a commercial background he said he had not given enough consideration to the

central guiding principle of public law, which is power – the control of power and the uses of power. I think that observation is an important starting point in considering good decision making. Subject to constitutional limits, what we each do as decision makers every day has at its core the regulation of power by or on behalf of the state and the exercise of power by or on behalf of the state.

11. Recognising the regulation of power or exercise of power as central to what we as decision makers do might sound overly dramatic, but I think it important to acknowledge that we all in our decision-making roles affect the lives of the litigants before us and, more generally, affect the community in which we live. Focussing on the regulation and use power at the outset brings into sharp focus the role that we decision makers play in serving the community.

12. Each NCAT Division is closely involved in the regulation of power by or on behalf of the state and the exercise of power by or on behalf of the state. The breadth of NCAT's jurisdiction, the volume of work and the importance of NCAT's role in the control and exercise of state power makes it even more important that the community should have confidence that we are all striving to make "good decisions".

13. So what goes into making a good decision? The starting point is what the *Civil Procedure Act* describes as the overriding aim of the NSW legal system; decisions that are "just, quick and cheap". One view of the requirements of a good decision is perhaps easy to state: a speedy decision which correctly

applies the law to the facts properly and clearly found – a decision that is both correct and preferable.

14. What the phrase “just quick and cheap” means is often said to depend on where you put the comma: just quick and cheap vs just (comma), quick and cheap. Whilst the precise origin of that observation is a hotly debated topic amongst adherents of two former Chief Justices of NSW, can I start with my own observation: achievement of the statutory requirement of a just, quick and cheap decision requires more than a consideration of the correct use of punctuation. To describe a good decision as being one that is just, quick and cheap is to describe a conclusion; it is a destination. I want to reflect this morning on some of the mechanics of the journey rather than simply to describe that destination. What are the qualities of decision making which make such an outcome likely to be achieved?

15. In addressing the desirable qualities of decision making I want to focus on five things:
    a. The importance of an open mind;
    b. Discipline in decision making;
    c. Modesty
    d. Ability; and
    e. Resilience;

16. The first quality: a decision maker needs to approach the task with an open mind. Despite provocation, I do not propose to talk to you about the undesirability of administrative tribunals, particularly in the federal sphere, allegedly being stacked with political partisans. I will say that we have much to be grateful for in NSW with a succession of excellent Attorneys General, of both major parties, whose appointments are beyond party political reproach. Long may it be so.

17. Sir Matthew Hale, who would go on to hold the office of Lord Chief Justice of England, resolved on a set of rules to guide his own judicial conduct around the time he was appointed Lord Chief Baron of the Exchequer in 1660. He called them '[t]hings necessary to be continually had in remembrance'. 350 years later, one of Hale's successors in the office of Lord Chief Justice, Lord Bingham, wrote that Hale's rules 'would still today be regarded as sound rules for the conduct of judicial office'.

18. Justice Stephen Gageler has recently said that these four rules together 'capture the personal intellectual and moral discipline of decision-making on which the integrity of the system depends'.

19. Those four rules are:
    a. 'That in the execution of justice, I carefully lay aside my own passions, and not give way to them, however provoked';
    b. 'That I be wholly intent upon the business I am about, remitting all other cares and thoughts as unseasonable and interruptions';

c. ‘That I suffer not myself to be prepossessed with any judgment at all, till the whole business and both parties be heard’; and
d. ‘That I never engage myself in the beginning of any cause, but reserve myself unprejudiced till the whole be heard’.

20. Not a bad introduction to open minded decision making, albeit in language of the 17th century.

21. My experience is that no decision maker enters into a case thinking that they are biased. I’m sure all of us can recite the tests: am I actually biased or *might* a reasonable observer think that I *might* not bring an open mind to the question.

22. Of course, none of us are automatons and it is human nature to respond better to some arguments and evidence than others. Coming to a particular problem considering the experiences we have gathered does not mean that we are biased.

23. I also want to emphasise that an open mind is not the same thing as an empty mind. By an open-minded approach, I mean a conscious engagement with the evidence and submissions – taking time to look at a problem from both sides. While saying this is almost trite, the exercise of trying consciously to articulate both sides of an argument before allowing any final conclusion to be reached is a useful starting point to making better decisions.

24. Bringing an open mind to decision making is a choice. Bias is not something that only affects other decision makers. The choice to employ an open mind is one you can, and I suggest should, decide consciously to make.

25. Thinking, almost as a reflex, that we are not biased, and actually taking time to reflect on our approach to a problem, is very different. Taking an open minded approach requires a conscious effort to think about and test evidence and submissions.

26. What else does a good decision require? Can I suggest an overlooked attribute is discipline in decision making. Discipline in making yourself listen to both sides of an argument. Discipline not to make any immovable or final decision until you have heard and considered all of the evidence and submissions.

27. Discipline to give genuine consideration to a litigant's arguments even when at first blush the argument is not a persuasive one or if the litigant is otherwise quite annoying.

28. There is another aspect of discipline in making good decisions. Having considered all the arguments, coming up with a decision requires discipline. Writing reasons for a decision requires discipline. Delivering cogent oral reasons requires discipline. Whilst it is not the only desirable quality, a decision made after the decision maker has broken down each case and identified each decisional task within that case is likely to bear the hallmarks

of a good decision. A disciplined approach involves working out beforehand the law that applies; making clear findings of fact; grappling with the main submissions; and making the decision quickly while you still remember it all.

29. The next quality in making a good decision I would like to suggest is modesty. The longer I spend in judicial office the more I respect and admire an oft overlooked quality in a decision maker, and that decision maker's decisions – which is modesty. Now, of course, this leaves me open to the retort that I have much to be modest about, but bear with me.

30. It may come as a shock to many of you that one or two Supreme Court judges are not modest individuals. You may even have met the odd immodest barrister. I'm sure as I look around that the same affliction is not suffered by any NCAT member.

31. Modesty in our approach to decision making is something that I think is worth striving for. Modesty allows you to acknowledge that you have misunderstood something about a case. It allows you to listen with an open mind to others, including other members of a multi-disciplinary panel. Modesty permits you to change a preliminary view, even if it involves challenging your own long held views.

32. While talking about multi-member tribunals – can I commend NCAT for retaining multi-member and multi-disciplinary panels in the Guardianship Division. Whilst every day that Division makes some of the most difficult

decisions that confront out legal system, its decisions are virtually never seen in the Court of Appeal. Those decisions that I have come across have been of outstanding quality, perhaps due to the quality of decision making by experienced members of multi-disciplinary panels.

33. Modesty is an asset in our use of language and expression – and forms an important part of writing or giving oral reasons for a decision in a comprehensible way. In this jurisdiction it is even more important that the party who has been unsuccessful can understand why it is that they lost. Written or oral decisions that are long and verbose, referring to numerous tangentially relevant authorities and which repeat large chunks of the parties submissions are likely to confuse litigants rather than explain to them the reasons for the outcome. Such decisions are not good decisions.

34. A modest approach to decision making allows an element of self-reflection. As I've already said, we all come to the decision making task with biases. You will hear later today about the latest research concerning unconscious bias and the need for independence in decision making. Might I suggest that a modest approach to decision making is an asset in recognising and identifying biases – they are, after all, called unconscious biases for a reason. The late great Sir Gerard Brennan was a giant of the legal profession and, at the same time, a humble and modest decision maker. A reflection of his modest approach was the clarity of his expression, permitting the wider community to understand his judgments, a quality not always present in decisions of the High Court. In his portrait hanging in the High Court in

Canberra he is holding Volume 175 of the Commonwealth Law reports. I recently had cause to consider the contents; *Mabo (no 2)*, *Louth v Diprose*, *Marion's* case, *Wardley v Western Australia*, *David Securities*, *Rogers v Whitaker*, *Ainsworth.* The leading cases, still, on native title, unconscionability, invasive medical procedures for a child with intellectual disability, limitations in commercial cases, restitution and standing in public law to protect reputational interests. A mighty catalogue. Sir Gerard was right to be proud of that volume.

35. Ability is something I mentioned at the outset. We all have it. An attribute of a good decision is one where we have used that ability. Some of the best experiences I've had as a judge have been on the bench at one of our regular ceremonies for the admission of lawyers. The genuine happiness and openness to the potential of the legal system to improve lives is palpable in the courtroom. I daresay that we all started out that way.

36. I would also suggest that we all took on the role as a decision-makers because deep down, some perhaps deeper than others, that openness to the potential of the legal system to improve lives remains. I know that sometimes – mired in the details of a weekslong and seemingly intractable strata dispute – those ideals may not always be front of mind. But can I suggest that you lift your gaze. A good decision is one in which the decision maker has consciously applied their abilities to the problem *because* the application of that ability makes a positive difference in people's lives.

37. The final attribute I would like to consider returns to where I started. It is a quality we can all learn more about: resilience.

38. Decision making is a human process. In our judicial hierarchy there will always be an inverted commas “correct” decision. As a judge, I acknowledge that all decisions in the judicial hierarchy above me are presumptively correct. I am, however, always very open to discussing the merits of the dissenting judgments in any case where the High Court has disagreed with me. As my children often tell me, I should get over myself.

39. None of us can make any decisions, let alone ones meriting the conclusion “just, quick and cheap”, if undue attention is paid to things over which we have no control. Some decision makers, at all levels of the decision making hierarchy, become frozen by a fear of the possibility of an appeal. Some symptoms of this problem are overly long decisions, which recite vast detail about matters of little relevance, and contain excessive citation of marginally relevant authority and a minute examination of non-dispositive facts.

40. Decision making, if you only concentrate on the possible consequences of appeals and comments from colleagues can be paralysed. The possibility of a speedy decision goes out the window. It is a distraction to pay much too much attention to cases where in the past others in the judicial hierarchy or colleagues have disagreed with you or the possibility of an appeal and a subsequent disagreement.

41. There are many other influences in life. As the National Australia Bank and various health insurers seem insistent on remining us if we are unwise enough to watch free to air television: “Life Happens”. Children, partners, parents, illnesses, and the four horsemen of the apocalypse who have recently visited these shores – fire, flood, pestilence and death – have presented enormous challenges for us all.

42. All of these things test our resilience. Can I suggest that an important part of our making good decisions is acknowledging our imperfections and responses to the challenges we all face and, having recognised those imperfections and limitations, determinedly attempt not to take out our frustrations on litigants or their representatives.

43. Our resilience as decision makers has, of course been tested these last three years by COVID. I do not downplay the considerable hardships that we have all faced. But might there be at least some silver lining? In their own way the COVID lockdowns at least taught us all that technology could, in some cases when used properly, improve efficiency and cut delays and costs. Now it is true that I wont be receiving any Christmas Card from the Justice IT Department, but with a resilient approach providing sufficient encouragement and focus, improvements in Court IT experiences can improve outcomes for uses of our legal system.

44. If I may be permitted a brief digression - at the commencement of the first COVID lockdown the performance of the IT systems available to the Supreme

Court was abysmal. The cameras in the Banco Court, the premier Court in NSW, were over 30 years old. When I complained that a photograph of Queens Square taken from space had a better resolution than a photo taken by the cameras facing the bench in the Banco Court, I was proudly told that "judge, one of the cameras was installed last year". That turned out to be true. Regrettably, however, that camera showed a fixed view of the empty bar table and could not be moved. So we were for a time able to beam out excellent shots of empty chairs and lecterns not being used but we judges remained on users screens, in the words of one barrister, as "delightfully pixilated".

45. I'm pleased to say that persistence paid off and by the end of the first lockdown cameras built in the 21st century had been installed and Court users had some hope of distinguishing the judicial officer they were addressing. Things did improve. At the start of the second lockdown, however, when we were at all levels of the justice system back on line, a disturbing pattern of drop outs at about 10.15am again emerged. Upon polite enquiry I was told that the system that we used logged all participants and, if not reset, the system would continue to think that all of the previous days participants were still logged on to the court room and shut the whole thing down when we got over the number of licences we had paid for. Problem: the person at IT central whose job it had been in the first lockdown to push the reset button every night had left and forgotten to tell anybody where the button was. Happily, the button was located and this important role of reset button pusher

was filled and by the end of the second lock down the system again worked very well.

46. Now despite all of these tests to the resilience of our system, I am cautiously optimistic that a careful use of the technology we now have can provide a positive contribution to attacking costs and delays, at least in three ways – cutting down travel and waiting time in lists, facilitating interlocutory hearings and allowing evidence to be heard with less delay and inconvenience for witnesses (especially expert witnesses) which ultimately leads to reduced costs for litigants. I say cautiously optimistic, as I'm equally convinced that face to face experiences are better for litigants and other court users and the benefits of digital participation in decision making processes should not be exaggerated. So my take out from the IT experience of Covid – resilience is not only a desirable quality in a decision maker but a vital one.

47. Can I leave you with this thought about a resilient approach? We should all try and approach decision making by looking back to why it was that we came to the legal profession and why it was that we each accepted the weighty responsibilities of taking on a role making decisions about the regulation and use of power. Looked at through that prism, the decisions we are asked to make will shape our community. And we should remain grateful for the opportunity to serve in that capacity and hopefully leave our community a little better than we found it.

48. Thank you for your attention. I wish you all well for the remainder of your important annual conference.