



## NEW SOUTH WALES BAR ASSOCIATION

### SUBMISSIONS TO STATUTORY REVIEW OF THE NSW *CIVIL AND ADMINISTRATIVE TRIBUNAL ACT 2013*

#### **Introduction**

The New South Wales Bar Association appreciates the opportunity to make submissions to the statutory review of the NSW *Civil and Administrative Tribunal Act 2013* (NSW).

The Association notes that comments are being sought regarding the effectiveness of the NSW Civil and Administrative Tribunal (NCAT) and ideas are sought on any changes to the legislation that may promote increased access to justice.

In particular, the following questions are raised for consideration and comment:

- Is it easy or difficult for people to work out whether NCAT is the right body to resolve their legal issue?
- Is NCAT accessible and responsive to its users' needs?
- Are there things that NCAT could do to make it easier for people appearing in the Tribunal to understand the process and participate?
- Does NCAT resolve legal disputes quickly, cheaply and fairly?
- Should NCAT resolve some matters just by looking at the documents submitted by the parties, without a hearing in person?
- Does NCAT need additional powers to be able to enforce its decisions?

The Association's members appear in all Divisions of NCAT. This submission will provide comment in relation to the specific questions raised and also raise some more general matters for consideration in the context of the Occupational Division in particular.

#### **A. Specific Questions**

*Is it easy or difficult for people to work out whether NCAT is the right body to resolve their legal issue?*

The information provided both on the NCAT website and by NCAT staff in response to specific enquiries is adequate to enable practitioners and parties to determine NCAT's jurisdiction and whether it is the appropriate body to resolve particular disputes.

***Is NCAT accessible and responsive to its users' needs?***

In the Association's view, information regarding NCAT is generally accessible to users. The NCAT website is user friendly, and has very good Fact Sheets and appropriate links. NCAT is also to be commended on the use it makes of consultative forums for the legal profession and other stakeholders and the steps it takes to provide plain language guidance to litigants, particularly self-represented litigants.

However, the Association does recommend that consideration be given to the following areas in which its responsiveness to the needs of users could be improved:

- (a) At present, applications and other documents can only be lodged online in the Commercial and Consumer Division. Online services are not available for Administrative and Equal Opportunity, Guardianship or Occupational Division matters. This creates concerns around access to justice in those Divisions where electronic lodgement is not available. It also means that, where parties or representatives are not based near a physical registry, timetables must allow extra time to take into account posting time or physical attendance at the registry, causing tension with NCAT's "just, quick and cheap" imperative, especially given current Australia Post delivery timelines. The Association recommends that consideration be given to expanding online lodgement of applications and other documents in those Divisions where it is not currently available.
- (b) In some Divisions, members of the Association have experienced difficulties in having matters dealt with on an urgent basis, particularly in circumstances where, for example, there have been timetable breaches necessitating further orders shortly before the hearing, or where an applicant seeks a stay of some kind. It would be useful to allocate a duty member, for example, who could hold a telephone directions hearing at short notice where necessary to make ancillary or interlocutory decisions.

The Association's experience is that there is a relatively high proportion of self-represented litigants involved in NCAT proceedings. To this end, the Association's Legal Assistance Referral Scheme (LARS) has since 2017 participated in an arrangement with the Administrative and Equal Opportunity Division whereby unrepresented litigants seeking help can have their matter assessed by counsel and, if appropriate, referred for legal assistance. There have been 62 referrals of NCAT matters to LARS under this arrangement to date.

In this context the Association considers that it would be helpful if NCAT could compile and publish statistics regarding the number of self-represented litigants involved in proceedings in its various Divisions. Such information would prove valuable in developing further policies and procedures in this regard.

***Are there things that NCAT could do to make it easier for people appearing in the Tribunal to understand the process and participate?***

In the Association's view, NCAT is already alive to, and working on, these issues, both through general guidance and the approaches taken by individual members during hearings.

It is always important for presiding members to explain the law and legal context to parties, in plain English, at directions hearings and at the commencement of any hearing in view of the interests of self-represented litigants. In the Association's experience, this tends to be done well.

***Does NCAT resolve legal disputes quickly, cheaply and fairly?***

On the whole, NCAT is effective at resolving legal disputes quickly, cheaply and fairly.

Although there can be at times a move to greater formality or technicality in some areas, this tends to be a result of the substantive legislation NCAT is required to consider and apply and/ or a consequence of appellate or review decisions from the Supreme Court, rather than any structural or procedural deficiencies in NCAT itself.

***Should NCAT resolve some matters just by looking at the documents submitted by the parties, without a hearing in person?***

NCAT does resolve matters on the basis of the papers where appropriate at present. In the Association's view, the discretion to do so should be exercised in particular circumstances where the parties agree to this approach.

However, the determination of matters on the papers should not become the general rule. One of the objects of the *Civil and Administrative Tribunal Act 2013* (NSW) is to ensure that NCAT is accountable and exercises its functions openly and transparently (s 3(f)). Determination of matters on the papers should be done only where to do so would be consistent with that object, for example, where the factual basis of the decisions under consideration are uncontroversial. Moreover, there are many self-represented litigants in NCAT proceedings, who often may not fully understand the legal process and the evidence that is required of them. These kinds of circumstances are best dealt with in person where questions can be asked and dealt with.

***Does NCAT need additional powers to be able to enforce its decisions?***

As a general comment, the practical experience of members of the Association is that additional powers to enforce decisions are not required. However, it would sometimes be of assistance if NCAT had powers to compel medical examinations in relevant Guardianship Division matters.

**B. General comments in relation to the operation of the Occupational Division**

The following comments are made concerning the operation of the Occupational Division of the Tribunal, and in particular, in relation to proceedings under the *Legal Profession Uniform Law*. As a result of its regulatory responsibilities regarding barristers' professional conduct matters, the jurisdiction of the Occupational Division is of particular relevance to the Association, which regularly conducts disciplinary proceedings in that Division.

### Transcripts of proceedings

Transcripts are not available unless a transcript has already been prepared at the request of a member. A party can obtain a sound recording of the proceedings for a modest fee and provide it to a transcription service, however when a transcript is required for an appeal, on occasion an appellant lawyer has prepared a transcript personally to save on costs. The regulatory body is then required to review the content and format of the transcript. In the case of proceedings in the Occupational Division, it would be preferable that transcripts be available from NCAT (at a fee in the usual way for court transcripts), having regard to the fact that contested oral evidence (to which the rules of evidence apply) is a regular feature of disciplinary proceedings, and particularly now that the Tribunal can only recommend the removal of a lawyer's name from the roll, which then requires proceedings to be commenced by the designated local regulatory authority in the Court of Appeal to effect the removal based upon the application heard and determined by the Tribunal.

### Ensuring members have copies of documents

The usual orders made in the Occupational Division are for the parties to serve their evidence on each other in accordance with the timetable made, with the parties to provide four copies of all material (i.e., evidence and submissions) to the Tribunal between two and four weeks before the hearing. However, it is not unusual to appear at a hearing at which the members indicate that they do not have parts of the evidence or submissions, only to discover that, for example, submissions have been stapled to the back of an affidavit. In order to assist the Registry to ensure all documents are provided to the members, each of the parties could provide (four copies of) a list of documents at the time of filing the evidence and submissions as a check list for Registry and members as to the documents relied upon. It would also be of assistance to members and parties to have access to electronic recordings of proceedings, not only in the Occupational Division, but in other Divisions of NCAT.

**24 July 2019**