

Director, Courts Strategy
Department of Justice,
[REDACTED]
Sydney NSW 2001

[REDACTED] 17 July 2019

Re: Review of the Civil and Administrative Tribunal Act 2013

I welcome the opportunity to submit comment of the operation of the NSW Civil and Administrative Tribunal (NCAT).

The following comments are based on personal experience as a self-represented applicant in [REDACTED] and observation of proceedings in a number of similar cases involving external review of administrative decisions by NCAT.¹

Procedural Fairness

At NCAT there is a profound lack of procedural fairness in cases where an applicant is self-represented and seeking review administrative decisions by the Commissioner of Police involving firearm matters.

In [REDACTED] the applicant was up against the extensive legal, administrative and financial resources available to the NSW Commissioner of Police, including the Crown Solicitor's Office, NSW Police Force Office of General Counsel and a commercial barrister.

There are at least 4 cases similar to [REDACTED] where self-represented applicants have been simply overwhelmed by the financial and legal might of the Commissioner of Police - [REDACTED]. The respondent's (NSW Commissioner of Police) costs in these cases for legal representation provided by the Crown Solicitor's Office, external barristers and solicitors, and expert witnesses, but excluding NSW Police Force Office of General Counsel were as follows:²

[REDACTED] -	\$60,597.53
[REDACTED] -	\$53,782.97
[REDACTED] -	\$27,193.60
[REDACTED] -	\$23,571.39
[REDACTED] -	\$30,226.31.

Clearly, self-represented applicants at NCAT are at a huge financial and legal disadvantage.

The above cases reveal *de facto* breaches of the Model Litigant Policy by the NSW Commissioner of Police who is obliged *not* to take advantage of applicants who lack the resources to litigate a legitimate claim.

If the playing field was level, which it isn't, I almost certainly would have appealed the tribunal's decision in [REDACTED].

Adherence to Model Litigant Policy

The NSW Government's Model Litigant Policy requires all lawyers representing NSW government agencies comply with the highest standards of professional behaviour.³

In [REDACTED] both written and verbal submissions by counsel for the respondent breached the NSW Government's Model Litigant policy on several occasions. These breaches were brought to the Tribunal's attention in the applicant's written submissions and in a subsequent complaint to the NSW Legal Services Commissioner (Attachment 1).

Apprehension of Bias

In [REDACTED] the tribunal member denied the applicant's request to present video evidence to support written submissions showing that animals are not unduly disturbed when a suppressor is used. This was despite making a formal request to the tribunal to do so prior to the hearing. The Crown Solicitor's Office, acting for the respondent, flagged their intention to object to me playing the video in their letter dated 12 June 2018 - a few days before the hearing (Attachment 2).

By contrast, during the hearing the tribunal member allowed expert witness for the respondent, a serving police officer, to demonstrate earmuffs to support the respondent's submissions.

I submit this amounted to actual bias by the tribunal member.

Competence of Tribunal Members

In [REDACTED] tribunal member [REDACTED] states at [32] "When he was shooting, the muzzle of the gun was placed next to his left ear." (emphasis added).

This is not only factually incorrect, it is a physical impossibility. Clearly the tribunal member was perplexed and/or did not accurately record the applicant's explanation during the hearing of how a rifle is *actually* held when it is fired. In the hearing, the applicant said:

"...I have a classical pattern [of hearing impairment] which is predominantly in the left ear which is due to the left ear being closer to the muzzle when shooting a rifle..." (emphasis added)

The holding of a rifle when it is fired was further explained in detail during cross examination of the applicant by counsel for the respondent. It should have been abundantly clear to the tribunal member that the muzzle of a rifle is *not* 'placed next to the left ear' when it is fired.

Conflict of Interest

[REDACTED]

[REDACTED]

- [REDACTED]
- [REDACTED]
- [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

I note paragraph 11 of the NCAT Members Code of Conduct requires tribunal members to advise the parties of any matter or circumstance which might give rise to bias or conflict of interest or a perception of bias or conflict of interest and determine whether in the circumstances it is appropriate to continue to conduct or determine the proceedings.⁷

The matter of perception of bias or perception of conflict of interest was never raised by [REDACTED]

Confidential / Secret Submissions

Confidential / secret submissions to the tribunal are grossly unfair. In the interests of transparency and fairness all submissions should be made available to both parties.

I have no evidence, but I suspect the legal representatives acting for the Commissioner of Police in [REDACTED] made confidential/secret submissions to the tribunal.

Administrative Procedures

Finally, in [REDACTED], an application by the respondent for a summons to be issued was neither signed nor dated by the tribunal Registrar. The application was sealed with the tribunal stamp on the front page and I acknowledge this is considered to be a valid application, however, for administrative completeness I believe all summons applications should actually be signed and dated by the Registrar, not just stamped.

I trust these comments are helpful and lead to much needed improvements to make sure NACT actually fulfils its promise of providing procedural fairness.

Yours faithfully

[REDACTED]

References

1 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

2 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

3 Model Litigant Policy for Civil Litigation. <https://arp.nsw.gov.au/m2016-03-model-litigant-policy-civil-litigation-and-guiding-principles-civil-claims-child-abuse>

4 [REDACTED]
[REDACTED]
[REDACTED]

5 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

6 [REDACTED]
[REDACTED]

7 NSW Civil and Administrative Tribunal. Member Code of Conduct.
https://www.ncat.nsw.gov.au/Documents/member_code_of_conduct.pdf

Complaint regarding the conduct of [REDACTED]
Counsel for the NSW Commissioner of Police, in
[REDACTED]

Complaint 1: False and Misleading Statements

In *Submissions for the Commissioner*, prepared by Counsel for the Commissioner [REDACTED] [REDACTED] dated 14 March 2018, [REDACTED] asserts at paragraph 9:

“The Commissioner considered the Applicant’s contentions in a careful and detailed manner.”

Response

I strongly disagree with this claim. Submissions by the applicant dated 9 February 2018 pointed out in paragraphs 10, 14, 15, 19, 20, 24, 25, 27, 28, 30, and 31 substantial shortcomings in the evaluation of the application by the Commissioner’s delegate. For example, paragraph 14 of the applicant’s submissions noted ‘there is evidence to show some relevant issues were not considered at all and those that were considered were given only perfunctory consideration.’ The shortcomings included:

- Indication by the Commissioner’s delegate on page 4, paragraph 5 of the Statement of Reasons that she had not *personally* read the Lister Report cited by the applicant: “However I understand that this thesis was highly theoretical in nature...” (emphasis added).

The Commissioner’s delegate then drew conclusions from the un-read Lister thesis: “In my view that raises concerns with reliance on that document for the purposes of determining an application for authorisation for possession and use of a silencer for recreational/sporting reasons.”

The Statement of Reasons from the NSW Firearms Registry indicates that the Lister report was not in fact read by the adjudicator who it seems relied on *another* person’s account of the Lister report to dismiss its relevance, despite knowledge of a previous case¹ in which NSW Civil and Administrative Tribunal Appeal Panel finding that the Lister diagram was “credible, relevant and significant”.

- Conspicuously, the adjudicator made no comment about the ‘Hierarchy of Risk Control’ in the Statement of Reasons despite this being a prominent part of supporting evidence submitted by the Applicant. (para. 14)
- In the Statement of Reasons conclusion the Adjudicator stated: “However based on the totality of the information before me, I am satisfied that you have not demonstrated that

¹ Commissioner of Police, NSW Police Force v Allen [2016] NSWCATAP 148

the recreational/sporting activity concerned requires the prohibited weapon sought.”
(emphasis added)

Conclusion

For [REDACTED] to assert that the application was considered in a “careful and detailed manner” by the Commissioner is disingenuous, false and misleading.

[REDACTED] knew, or ought to have known, from reading the Applicant’s submissions dated 9 February 2018, and from his reading of the Commissioner’s Statement of Reasons, that the application was not in fact considered in a “careful and detailed” manner.

I submit [REDACTED] breached Principle 4(c), Rule 23, Rule 24 and Rule 64 of the Legal Profession Uniform Conduct (Barristers) Rules 2015 and the NSW Government’s Model Litigant Policy.

Complaint 2: False and Misleading Statements; Badgering the Witness

In the NCAT hearing on 14 June 2018, during cross-examination of the Applicant, [REDACTED] badgered the Applicant on the validity of (a) the applicant’s hearing test report from Macquarie University, and (b) the applicant’s statement at paragraph 7 of his submissions dated 9 February 2018.

After quoting from paragraph 7 of the Applicant’s submissions dated 9 February 2018 the following questions were asked...

[REDACTED] Do you accept that the statement... the proposition that you have a ‘serious and debilitating medical condition: noise-induced hearing impairment’, is incorrect?”
(Disc 2; Track 1; Time code 55:43)

[REDACTED] No. I’m talking about myself there. This is correct, based on the hearing assessment I had at Macquarie University in August 2016.”

[REDACTED] “What I’m putting to you is that you, in fact, do not have a serious and debilitating hearing impairment condition. Do you accept that?”
(Disc 2; Track 1; Time code 56:09)

[REDACTED] “No.”

[REDACTED] *referring to and quoting from the hearing report by [REDACTED]*

[REDACTED] “He certainly didn’t see anything serious enough to warrant you taking specific action or seeing a specialist or seeing him at an earlier point. Do you accept that?”
(Disc 2: Track 1; Time code 1:03:00)

██████: "He did state there was mild to moderate high-frequency hearing loss."

██████: "No, no. I ask the question."

██████: "Okay"

██████: "You accept that ██████s did not see anything serious enough to warrant you either seeing another specialist, coming back earlier or...um... treating the problem in any particular way."

██████: "There is nothing mentioned in his report. That's correct."

██████: "Or otherwise."

██████: "Well, not that he mentioned."

██████ (in an elevated forceful tone): "Well did he say anything outside this report?"

██████: "I can't recall. This is 18 months, two years ago, going on to two years ago."

██████: "Do you accept my proposition?" (Disc 2; Track 1; Time code 1:03:52)

██████: "Just say that again for me please."

██████ (in a condescending manner): "I'll say it to you again for the *third* time..."

"Do you accept that ██████ on that date, sorry, in his report I should say, did not see anything... did not conclude that there was anything seriously wrong with your hearing to warrant you coming back earlier to see a specialist or to take some specific remedial action."

(Disc 2; Track 1; Time code 1:04:01)

██████: "I agree with that. There were two parts to your question or your statement. That there was nothing seriously wrong – I disagree with that part because... in that... in the audiological assessment he says there was mild to moderate high-frequency sensorineural hearing loss on the left side. I disagree with that statement that you made, but on the rest where he has said nothing in terms of seeking further specialist intervention or assessment, I agree with you on that point."

██████ *referring to and quoting from the hearing report by ██████*

██████: "Given what you've just said, it's at the very least an embellishment to say, as you have said in paragraph 7, that you have a serious and debilitating medical condition: noise induced hearing impairment."

(Disc 2; Track 1; Time code 1:06:49)

██████: "No, I disagree."

██████████: "Well you are being unreasonable in your disagreement."

██████████: "No it's not. I have social impact, I have tinnitus, I have difficulty hearing my wife and my kids. There is a huge impact on that. I disagree with your assertion."

██████████: "How can we believe you... when ██████████ says word recognition scores were good in both ears at conversational levels when presented in quiet."

██████████: "You've got to understand that when these tests are done you're in an isolated quiet room. You've got earphones on, there's no background noise. In a social environment, at home, where I've got kids in the kitchen, my wife's talking to me while cooking dinner... it's a totally different environment."

██████████: "Do you accept that you have had no trouble hearing either myself or the senior member during the course of this hearing?"

██████████: "Yes I accept that."

██████████: "Again, I'm going to put to you that it is not correct to say that you have a serious debilitating medical condition: noise induced hearing impairment."

██████████ firmly: "Again ██████████, I disagree with you."

██████████: "And what I'm going to suggest to you, just to be fair to you... is that you have put that statement in you submission purely to present your case in a better light."

██████████: "No. That's not correct. I get woken up early in the morning with tinnitus. That has a serious impact on me."

(Ends at time code: 1:08:30)

Conclusion

██████████ badgered the witness. He pursued the same line of questioning multiple times despite repeated responses from the applicant refuting his propositions that:

- I did not have a serious and debilitating medical condition: noise-induced hearing impairment;
- I embellished the extent of my hearing impairment purely to present my case in a better light.

By his actions, I submit ██████████ has breached:

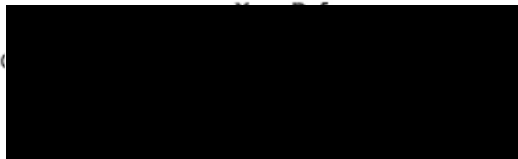
- Principle 4 (c), Rule 23, Rule 24, Rule 49, Rule 64 and possibly others of the Legal Profession Uniform Conduct (Barristers) Rules 2015.
- Paragraph 3.1, the NSW Government's Model Litigant Policy for Civil Litigation.

Attachment 2: Letter Objecting to the Applicant Presenting Video Evidence

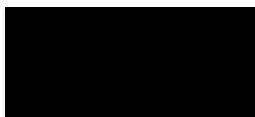
Sensitive: Legal



**Crown
Solicitor's
Office**



12 June 2018



By post and email:



Dear

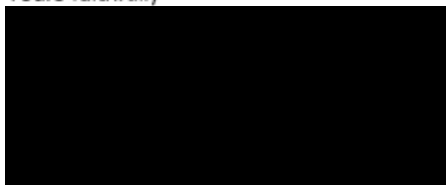


I refer to the above matter and your correspondence to the NSW Civil and Administrative Tribunal dated 7 June 2018.

I am instructed to write and notify you that, at the hearing on 14 and 15 June 2018, Counsel for the Commissioner of Police may object to the playing of the video identified in your correspondence.

Please do not hesitate to contact [redacted] if you have any queries in relation to this matter.

Yours faithfully



Sensitive: Legal

201800047
D2018/403061

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]