

Submission to the Civil and Administrative Tribunal Act Statutory Review

The RVRA represents the interest of residents of retirement villages throughout New South Wales and has, since the implementation of NCAT legislation in 2014, had its attention drawn to the operation of NCAT by many, many of its members who have been involved in matters before the Tribunal. In the great majority of those instances feedback about the way in which the Tribunal operates has indicated dissatisfaction, and in some cases very great dissatisfaction, among retirement village residents about its operations. The very small numbers of claims lodged from the sector is indicative of the poor regard in which the Tribunal is held.

This submission does not seek in any way to pursue reviews of the specific cases it has knowledge of, but to draw attention to some basic tenets which should be incorporated into the legislation which will, in relation to retirement village matters, make it more closely aligned to its objects.

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

To a large extent the answer to this question, so far as the retirement village sector is concerned, is to be found within the terms of the Retirement Villages Act 1999. This statute lays down the Tribunal's jurisdiction.

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

Applicants to NCAT in retirement village matters are elderly and in almost every case suffer the impediments that accompany ageing.

- They have limited (and diminishing) mental, emotional and physical resilience.
- The NCAT website is not user friendly for those with visual impairment e.g. not much difference between the normal and increased font size and some parts do not increase in size; many would not be aware of the Listen facility.

They frequently have limited knowledge of, or skills in, computerised communication and research availability. Our statistics show that more then 50% of our members do not have a computer or do not have the skills to interact with the NCAT website and work through the process of selecting the correct orders.

- They have widely varying levels of education and of advocacy skills.
- The decision to go to NCAT is, for retirement village residents almost always made as a last resort after they have exhausted their strength and patience with the other party and with enormous levels of stress over a long period of time.
- Residents in receipt of various pensions (be they government funded or privately funded) need
 to husband assets which are the source of their living income. A very large proportion of
 retirement village residents have limited financial resources without the opportunity to
 replenish through continuing employment. The threat of being confronted with legal
 representation costs and/or the imposition of another party's legal costs is a major barrier to
 many residents seeking access to the Tribunal.
- Residents are in many ways captive to their village. Unlike other classes of consumer, they
 cannot take advantage of an open market to secure just and fair treatment by simply changing
 suppliers. In most cases they have a very large part of their capital assets invested in their
 retirement village unit. Were they to leave the village, they know that they would surrender
 approximately one third of those assets in the form of a deferred management fee.
 Consequently, they would be unable to afford alternative living arrangements of the same
 standard (to say nothing of the trauma and stress of moving residences).
- Because of their age, retirement village residents (particularly those living in New South Wales
 regional areas) have difficulty travelling to major centres, particularly when an NCAT matter may
 require multiple appearances before a tribunal, and the requirement that they do this in many
 cases acts as a severe disincentive for the lodgement of any application to a Tribunal.

Specifically, the distances residents must travel, the hours of sitting and taking part, the formality of the 'court' like proceedings and the intimidation felt by elderly residents when faced with the operator, manager and often a high powered, aggressive solicitor make this a very hostile event for residents. If experienced once, they are unlikely to follow up with a second attempt.

The retirement village resident demographic is arguably a special class of potential applicants to NCAT, yet there is no recognition of this in either the NCAT Act or the Retirement Villages Act. On the basis of many complaints that RVRA receives from its members, these circumstances create for retirement village residents serious disadvantage in terms of NCAT's accessibility and responsiveness. It is simply not good enough for Tribunal members to treat them as they would other members of the community.

Does NCAT resolve legal disputes quickly, cheaply and fairly?

The issue of legal representation is a matter of very great concern to retirement village resident applicants before NCAT. The application of section 45 of the NCAT Act is, in RVRA's view, far too widely interpreted in relation to retirement village matters. It needs be made clear that exceptional circumstances need to exist for a Tribunal to allow legal representation given the very clear intention of section 45(1) of the NCAT Act.

In cases recounted to RVRA, costs orders have been made against an applicant who has attempted to pursue their matter without representation while being confronted with legal representation on behalf of the respondent. This is a catastrophic development which mitigates very strongly against village residents' perception of the NCAT's relevance to them.

Matters between elderly residents and corporations often represent an unfair and prejudicial balance of abilities and resources. It needs to be recognised that resident applicants must fund any legal representation from their own, personal, resources. In contrast, village operators almost universally are corporations or are represented by employees who are at virtually no legal or financial risk in pursuing the matter and are therefore at liberty to maneuver within proceedings to imply threats, intimidate, obfuscate and delay the resolution of applications.

In RVRA's view NCAT should be seen (in the retirement village context) as the place for the resolution of disputes – it is not a court conducted in an adversarial fashion by legal practitioners to build legal precedent. Sections 3 and 45 of the Act makes it clear that it is the presiding Member who must determine what the law is in all but special circumstances. Legal representation before a Tribunal in these matters should only be considered initially on the application of the applicant based on their capacity (or lack of it) to represent themselves. Alternatively, a Tribunal should need to rigorously apply a significant special circumstances test before granting any application for legal representation.

One of the great sources of frustration and dissatisfaction with the NCAT system is the difficulty of enforcing the decisions of Tribunals. The need to return time and time again for an enforcement order is debilitating physically and emotionally for retirement village residents. As with many of the processes within retirement villages, some recalcitrant operators use delay and frustration as a strategy to defeat the intention of legislation, knowing that retirement village residents are more prone to exhaustion of resolve than the bulk of the population.

The Act needs to be amended to allow a party, in the face of unreasonable delay in compliance with an order, to have work carried out and to simply convert that order into a payment order which can be quickly enforced by application to the appropriate court.

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

RVRA's commentary above in relation to:

- the physical, mental and emotional limitations of retirement village residents;
- the minimization of legal representation;
- the conduct of hearings locally to the residence of the resident are relevant here.

In RVRA's experience, the manner in which hearings are conducted can be intimidating because of the legal processes and conventions that are followed. This is exacerbated when legal representation is allowed (particularly where one party cannot afford legal representation).

The physical accoutrements of the hearing rooms are debilitating for elderly applicants, particularly for individuals who have no or little experience with recorded environments, the management of complex records and folders, of public speaking and debating. An initial consideration of an application upon written submissions by the parties would assist in these regards. In the (unsatisfactory) alternative

there should be no legal representation allowed at hearings until the facts of the matter(s) in dispute are established.

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

RVRA would wholeheartedly support this initiative so long as the applicant were given the opportunity to make the initial submission and to subsequently respond to the riposte. Such an arrangement would to some extent address the difficulties we now encounter with distance, cost, undue formality of the hearing process and the prospect of facing legally qualified opposition.

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

As detailed above, RVRA receives constant complaint that enforcement of Tribunal work orders is often a laborious task requiring multiple hearings. Again, there is an underlying strategy by some retirement village operators to use delay and frustration as the means to defeat the interests of residents.

RVRA considers that authority should be embedded in work orders which directs that, if not complied with within the time frame set by a Tribunal, the the work can be carried out on the initiative of the holder of the order and for a monetary order for recovery of the cost thereof will take the place of the original work order. Further, RVRA considers the cost of converting and pursuing the money order should be recoverable in the same way, and as part of that order.

SUMMARY

It is RVRA's submission that, in relation to the retirement village sector at least, NCAT significantly fails to meet the objects set out in section 3, subsections (c), (d), (e) and (f) of the NCAT Act.

There are several important ways in which the NCAT Act can be amended to provide improved access and responsiveness for retirement village resident applicants and RVRA advocates:

- The NCAT Act needs to recognise the special needs of retirement village residents as a special group of users that require special consideration as to access to the Tribunal and to participate in its processes.
- 2. Requiring NCAT to conduct hearings of matters within reasonable distance of the retirement village in which the resident party resides.
- 3. Requiring NCAT to consider, in the first instance, applications based on an initial written submission and responses. Any subsequent application by one of the parties for the matter to be further considered at a formal hearing should be restricted to the issues first raised and not open to the introduction of other matters.
- 4. Restricting any applications for legal representation to the retirement village resident applicant, rather than from any party. In the alternative, making it clear that an application for legal representation must meet a rigorous special circumstances test before being granted.

- 5. Restricting any orders for costs that might be made by a Tribunal to circumstances in which the tribunal has clearly warned a village resident applicant that their actions place them in jeopardy.
- 6. Enhancing the process under which orders of a Tribunal are enforced to ensure, in the terms of s3(d) of the NCAT Act justice, speed, cost effectiveness and minimal formality is achieved.