New South Wales Civil and Administrative Tribunal (NCAT)

SUBMISSION TO 5 YEAR STATUTORY REVIEW

JULY 2019

I wish to make the following comments and recommendations in relation to the above review.

I am providing the following as a direct result of experience with the processes and decisions of the NCAT under the ***Strata Schemes Management Act 2015*** **(the Act).**

Any administrative review of the NCAT must allow reference to the provisions of the relevant act it is authorised to administer, otherwise what is the purpose of the NCAT?

I refer to the statement that the NCAT has been established to provide services that are prompt, accessible, economical and effective.

I am concerned that there is virtually **no** information available to applicants / respondents / *whoever* on the NCAT process to resolve **strata** issues as per those objectivves.

What information there is, is generic in nature – i.e. that it appears to apply across a number of NCAT jurisdictions. The Consumer and Commercial Division of the NCAT covers 18 areas ranging from strata, tenancy, motor vehicles, dividing fences and pawnbrokers.

1

Specific *fact sheets need to be provided in regard to* ***strata*** *applications*

- What is the Tribunal; e.g. how does its' functions and decision-making **authority** in regard to deciding *strata* issues differ from a judicial process?
- The role of the Tribunal Member (TM): their rights, responsibilities and **liability**.
- **Discretionary powers of the Tribunal Member**: what is meant by "discretion"; when and how can the powers be applied; (e.g. when a submission does or does not have to be taken into account); when and in what circumstances can the powers be challenged – 90% of the population would have no idea about this and how it can impact consideration of an application.
- What is meant by "independent" appointment – can a TM be directed and if so by whom and when?
- Step by step process sheet – e.g. Step I: apply; Step 2 registrar; Step 3 receive notification, etc. **Pretty simple really**.
- "**Expert reports**": what constitutes an expert report for the purpose of a decision; what, when and who needs to provide them; what is not acceptable (e.g. quotes, unattributable statements).

- Appeals process.
- The role of the Registrar in assessing applications – can these be reviewed and by whom (bit late in the day when you are in front of a TM and constrained by appearance protocols).
- The role of registry staff in assisting applicants / respondents – information and advice **are** 2 different concepts.
- "Cross claim" application – what is the "relevant legislation" – PERFECT example of the type of non-information available to the jurisdiction being judged.
- Interim orders – how long do they take; what is involved? why have to advise mediation? This process certainly does **not** support the "prompt, accessible" claims of the Tribunal.
- "Seek legal advice" – the *mantra* of the Tribunal. However, TM's appear to be reluctant to provide their decisions in a manner that allows relevant instructions to be provided to a legal adviser, *without excessive cost*. I refer in particular to "Directions Hearings".
- ALL FACT SHEETS SHOUD REFER TO THE RELEVANT LEGISLATION, SECTION, PART ETC.

The fact that the NCAT appears not to have seen it as necessary at any time over the last 4 years to provide even this standard type of information specific to a jurisdictional area raises questions as to how accessible/appropriate the NCAT really is for resolving issues according to its' charter.

It also raises issues as to just how informed and aware those responsible for the delivery of those outcomes are.

2

"**Expert reports**":

It appears that a TM can decide what does and what does not constitute an "expert report".

What **constitutes** an expert report for the purpose of assisting a decision - what, when; who needs to provide them; what is not acceptable (e.g. quotes, unattributable statements) needs to clearly specified.

3

Decision

- The legal decision supporting a TM decision needs to be explained in "plain English". Just citing a previous decision is not sufficient - it should be clearly explained how it applies to the TM's decision.
- It can be almost impossible to assess whether to appeal a decision and provide relevant instructions to a solicitor without this.
- The time frame in which to do so is ludicrous – 7 days?

- It should **not** require a solicitor to interpret the “legal” basis” of the decision – this can involve time and considerable cost (there seems to be a general view of “don’t waste my time and your money, they will have covered their a****”).

The manner in which a TM provides their decision would appear to be inconsistent with the “economical” and “accessible” objectives.

4

By-laws breaches

By-laws are essential to the reasonable operation of a body corporate. They **cannot** be viewed as “guidelines” by anyone, in particular a TM.

If breaches of by-laws can be unequivocally proved by an applicant there should be **no requirement to go to mediation**. An unnecessary bureaucratic process has been instituted, increasing the time and cost to resolve matters, probably with very little outcome.

The fact that an Owners Corporation – or in the case of a 2 unit scheme an owner – is seeking remediation for by-law breaches would indicate they are considered serious and that attempts to resolve these have already been attempted.

Whoever is responsible for the breach should have 14 days to reply and then penalties apply automatically.

It would save a significant amount of time and effort for both the Tribunal and strata owners / managers.

5

Appeals

In “certain circumstances” parties can appeal a decision, but only if an Appeal Panel “approves”.

The opportunity to appeal should be lengthened to at least **14** days and be able to be made on process, not just “a point of law”.

Process is just as important at arriving at a good decision; a point of law can be made to excuse poor decision making.

This again refers to the need for a decision to reference in plain English legal antecedents for that decision.

6

Section 131 of the Act

The Tribunal’s right to decide common property rights under this section of the act needs to be **removed**, as it appears to allow a TM unfettered authority to confer property rights on an owner/s if they want to argue that their “enjoyment of the lot” is being impeded in some way.

- **There is no definition in the Act as to what constitutes "enjoyment of the lot".**
- **Section 131 makes NO reference to any other section of the Act; any other act; and does not define "enjoyment of the lot";**
- **Therefore, how would a TM arrive at a decision?**
- **On what grounds would an owner/s seek legal advice to defend such an application?**

This section of the Act, if applied by a TM, could potentially result in significant legal challenges extending over who knows how many years? Corruption could also be involved. Certainly prompt, accessible, economical and effective don't apply here. Liability issues would also have to come into consideration.

7

Reimbursement to owner for cost of expert report/s

TM's may be assisted in coming to reasonable decisions if reimbursement for the cost of an expert report is able to be made to an owner/s if the Owners Corporation / owner decides not to seek such a report, but there are clear indications issues are happening.

However, the "expert" report must meet the definition of what that is - refer to the need for definition of "expert report".

This would be particularly useful in schemes where there are few units – 2 unit schemes in particular.

8

Liability for decision by a Tribunal Member

Given the apparent feudal nature of the NCAT decision making process in regard to strata issues, it is neither impossible or inconceivable that corruption will (and probably is) occurring.

I refer to the non-defined nature of "discretion" allowed to TM's and section 131 of the Act.

9

Burden of Proof

The NCAT appears to require that the burden of proof rests solely with an applicant/s.

That burden of proof should also rest with a respondent/s This issue is also central to what the Tribunal can consider is an expert report, etc. It is also an area were the potential for corruption in decision making can occur.

Where an applicant/s can provide evidence that a respondent/s is misrepresenting a situation or providing false evidence, then an applicant/s should be allowed to present that new evidence at a hearing. Currently the "rules" attaching to a hearing preclude this.

10

Conclusion

There is currently very little that is prompt, accessible, economical or effective about the NCAT when attempting to resolve strata issues.

Addressing the above issues would result in significantly improving the probability of achieving those objectives.

Removing the requirement for mediation in a number of areas would also improve NCAT resolution timeframes.

In my experience the NCAT process to resolve my issues – in general straightforward - has proved to be a time consuming, arduous and confusing process with decisions reached on neither good or reasonable evidence / argument.

Respectfully

D F Ryder

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