TENANTS' UNION OF NSW

SUBMISSION

Civil and Administrative Tribunal Act 2013
Statutory Review
July 2019

TENANTS' UNION OF NEW SOUTH WALES

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OF NEW SOUTH WALES

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NACLC
National Association of
Community
Legal Centres

Civil and Administrative Tribunal review

The Tenants' Union of NSW is the peak body representing the interests of tenants in New South Wales. We are a Community Legal Centre specialising in residential tenancy law and policy, and the main resourcing body for the statewide network of Tenants Advice and Advocacy Services (TAASs) in New South Wales. The TAAS network assists more than 25,000 tenants, land lease community residents, and other renters each year.

We have long-standing expertise in renting law, policy and practice. We have been a key stakeholder throughout the development of and subsequent litigation concerning the Residential Tenancies Acts of 1987 and 2010, the Residential Parks Act 1998, the Residential (Land Lease) Communities Act 2013 and the Boarding Houses Act 2012.

We have been in contact with other stakeholder's who may have made submissions in their own regard. We particularly recommend the experiences of Tenants' Advice and Advocacy Services, and Community Legal Centres who have invaluable experiences assisting users of the Tribunal.

We and the network of tenant advocates who we train, resource and support have assisted tens of thousands of tenants in all predecessor Tribunals since the Residential Tenancies Tribunal in 1998. In our estimation we and advocates in our network have participated in approximately 30,000 cases in the NSW Civil and Administrative Tribunal. In these interactions we believe we have provided excellent service not only to our clients but to the Tribunal itself with professional conduct and expert analysis of the cases we assist in. We are a member of a number of the Tribunal's consultative committees and value this interactive opportunity.

While we will offer opinion in this submission largely relating to the ways the Tribunal could improve its practice, we are keen to stress that overall we support the model of the Tribunal. We believe the model to be an effective one even where justice through the Tribunal is hampered by defects with the laws and systems it is asked to adjudicate over.

We look forward to continuing to working with the NSW Civil and Administrative Tribunal registry and the Department of Justice to enhance the ways the civil justice system interacts with housing policy in NSW.

For more information regarding this submission, contact Leo Patterson Ross, Senior Policy Officer, Tenants' Union of NSW.

Summary of recommendations

1. NCAT adopt a fee scale to reflect seriousness, and funding source, of eviction proceedings for Residential Tenancies, Social Housing and Residential Communities lists (residential lists).

2. NCAT allow for the lodgement of repayment plans for rent arrears payment plans, where termination and vacant possession orders do not form part of the application form.

3. NCAT prepare a form for lodgement which ensures orders are effective and appropriate in the circumstances.

4. NCAT generally adopt a practice of allowing identification of parties to be carried out in a flexible manner. If a person presents to the Tribunal, can be identified as the relevant party and accepts the jurisdiction, this should be sufficient to proceed.

5. NCAT specifically adopt an information-sharing protocol with NSW Fair Trading to gain the operator details from the Residential Land Lease Communities register which NSW Fair Trading is required to hold and make available proper identification.

6. NCAT should explore bulk-billing arrangements with ASIC and make access available in the hearing to applicants where necessary for identification purposes. This avoids any need for adjournment if a party is not properly identified before the hearing.

7. Reduced fees become available to applicants assisted by a service funded under the Tenants' Advice and Advocacy Program.

8. NCAT consider further the feasibility of accepting applications from multiple applicants in one application, in circumstances where the substantive issues are the same for all applicants and respondents.

9. We recommend application fees be lowered for people who rent their home in recognition of their contribution to funding other parties applications, and their inability to claim the cost on their taxes. If fees are not lowered for people who rent their home we recommend they remain at their current level.

10. We recommend the Quarterly Management Reports currently provided to the Consultative Committees be made accessible to the public as an immediate start.

11. We further recommend that attendance, representation and orders made also be published. While we acknowledge the possibility of this data – in particular orders made - misleading participants, we believe the benefits outweigh this concern. It will allow better planning, education for participants and because we believe the rate of conciliated outcomes to be relatively high where both parties attend, may encourage participants to negotiate further. We recommend the annual reporting of this level of data.

12. We recommend the data management software of the Tribunal be upgraded, with investment if needed, in order to facilitate greater data. We consider funding for this can be sourced from the Property Services Interest Account as it is a clear element of the administration of the relevant Acts.

13. We recommend consideration of the establishment of a 'Duty Member' who may be situated in one or several of the larger registries who can be called upon to make a rapid decision.

14. This should be seen as a preliminary decision to err on the side of caution and maintain the status quo and prevent disadvantage to a party who needs a timely decision. This should be clearly done with the intention of a later hearing to determine the substantive issues.

15. NSW Government ensure adequate funding be made available to TAAS to provide duty advocates to assist tenants at Tribunal, and timely advice prior to proceeding commencement.

16. NCAT should review current communications to ensure parties in residential lists are aware of the availability and role of the Tenants' Advice and Advocacy Services.

17. NCAT should review the representation guidelines and include where a party is represented by an advocate from a Tenants' Advice and Advocacy Service as a circumstance where representation is assumed.

18. NCAT should consider greater use of the enforcement abilities under the current Civil and Administrative Tribunal Act, particularly where misleading statements are made with the intention of undermining Tribunal orders.

19. NCAT should consider broadening the use of section 72 where landlords or agents contravene orders of the Tribunal.

20. Online and paper forms should be checked for consistency.

21. Video conferencing should be explored as an alternative to phone hearings

22. Where hearings are moved, travel should be limited to no further than 1 hour by public transport from the original hearing location.

23. NCAT should explore with other government departments and tiers of government the use of other facilities which may be appropriate for hearing use.

24. NCAT registry staff should provide specific training for Service NSW staff in handling NCAT applications and other material, and ensure at minimum a supervisor with relevant training is on duty at all times in Service NSW Centres.

25. NCAT review communication and document handling between registry and Service NSW and explore improvements that can be made.

26. NCAT explore ways to increase the number of first hearings at which conciliators are present.

27. NCAT should ensure processes are in place to ensure Members who attempt conciliation do not go on to hear the substance of the matter

28. NCAT should re-adopt previous practice of evaluating the applicant's claim and where a cause of action is expressed, amending the application to ensure consistency with the applicable law. Members should avoid dismissing a case where a valid claim is clear but is expressed otherwise than in the language of the relevant Act.

29. A clear guidance regarding uplift of documents be issued regarding the treatment of documents following submission, and the Tribunal ensure consistent practice with this guidance.

30. The Tribunal should issue guidelines for members, and the public, concerning the running of a hearing. Members who deviate from this running should clearly explain to participants why they are deviating and ensure opportunity to provide evidence and submissions is clearly identified.

31. All decisions for which there are written reasons should be published and made available in a timely manner

NCAT should consider a more active partnership with NSW Fair Trading around investigation of matters which may have been the subject of Tribunal proceedings but also constitute breaches of the Residential Tenancies Act 2010 et al.

32. The Appeals form should give more indication of the options available to applicants including seeking a stay in relation to the orders currently made.

33. The time needed to seek appeals should be lengthened to give parties time to seek advice and consider their case.

34. NCAT should consider redistributing hearings more evenly throughout the day

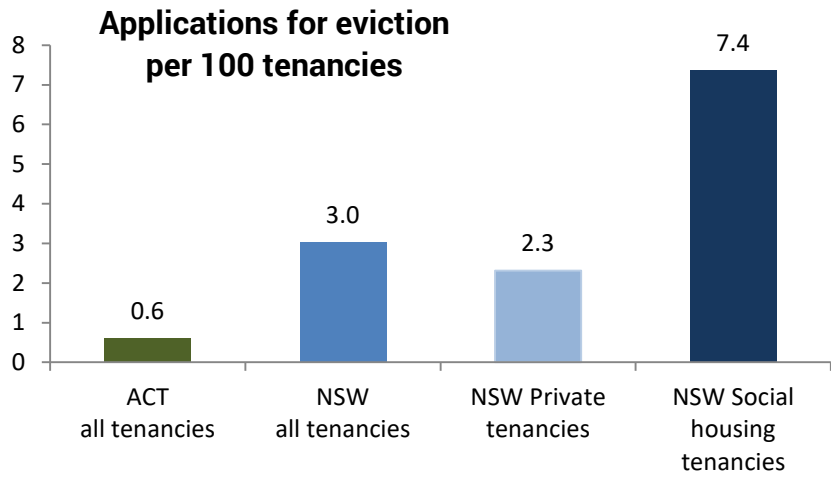
35. NCAT should explore options to allow parties to nominate hearing times, within limits to ensure parties still allow practical options and do not prevent the hearing from occurring at all.

Application costs

Fees for evictions

Tenancy applications are heavily subsidised. In general, we support this position in service of a low-cost jurisdiction to resolve disputes. However it is important to acknowledge that most of the cost burden of subsidy is paid by tenants through the interest earned from their bonds held in trust by the Rental Bond Board, and the portion of money held in real estate agent trust accounts that is rent. It appears inequitable that they are asked to heavily subsidise all applications – a large proportion of which are made up of landlord initiated evictions. Many of these applications are a result of the landlord's (or their agent's) failure to take adequate steps to resolve disputes before making a formal application for a hearing. All evictions can be seen as a failure to resolve a dispute.

The majority of applications to the entire Consumer and Commercial division are for rent arrears evictions. The Quarterly Management Reports provided irregularly by NCAT to consultative committee members indicate that the vast majority of applications by landlords are evictions for rent arrears. In the most recent report received (Jan-Mar 2018) 54% of applications to the Residential Tenancies and Social Housing lists are recorded as rent arrears evictions. Social housing providers and private market landlords often express to advocates that the eviction is not the desired outcome – a payment plan is. However, once a person is applying to the Tribunal, there is an incentive to put as many orders as possible on the one form because it attracts only one application fee.



Source: ACAT Annual Review; NCAT Quarterly Management Reports (Q1 and Q3 2017-18); ABS Census 2016; NSW Rent and Sales Report

We believe the interests of all parties, and the purpose of the Tribunal, can be better served by encouraging dispute resolution which holds the continuation of the home and the relationship as the preferred outcome. Increasing the application fee specifically for rent arrears eviction matters would encourage a landlord or their agent to enter into

negotiations for a repayment plan before making an application to the Tribunal for eviction. The material benefit of continuing a tenancy that can be saved is significant for all parties, including landlords and agents. There is also the very significant social benefit of avoiding a potential exit into homelessness.

In part, this high rate of applications for evictions appears to be a result of the cheap application rate. The ACT Civil and Administrative Tribunal charges a higher fee for eviction applications[1] and has a significantly lower rate of applications[2]. There is no evidence that tenants in NSW default on their rent at a higher rate than tenants in the ACT.

Increasing the application fee to reflect the seriousness of the matter would not inhibit a landlord's ability to enforce their contractual right where they deemed it appropriate and necessary. It is worth noting that NSW Civil and Administrative Tribunal costs will remain an income tax deduction for landlords and not for tenants.

To encourage dispute resolution and the continuation of viable tenancies, the Tribunal should consider lodging repayment plans from parties where eviction is not being actively sought. This should be seen as analogous to conversion of consent orders, but without the cost of putting on and attending hearings.

The repayment plan should be lodged with appropriate evidence to confirm they will be effective and appropriate orders – at minimum a copy of the tenancy agreement, and rent ledger showing an amount of rent arrears. Further consideration should also be given to how the form:

- ensures signatures are verified; and

Case study – Georgina*:

Georgina was an Aboriginal person in social housing, and was in rent arrears. Georgina was taken to NCAT and did not attend, and a termination was ordered. She had exceptional circumstances that led to arrears, but had the capacity to pay rent ongoing, as well as to pay back the money outstanding.

The landlord got a warrant, and the tenant applied for renewal of proceedings out of time. Before the outcome of the renewal, the landlord agreed for the tenant to stay in housing, provided they complied with a payment plan.

Case study – Andrew*:

Andrew was on his way to the NCAT hearing, but got lost trying to get there.

At the hearing, a termination was ordered and a warrant was obtained.

The tenant got in touch with a Tenants' Advice and Advocacy Service who were able to ascertain the landlord wanted a payment plan. This was entered into and the tenancy continued.

*names changed for privacy

[1] ACT Civil and Administrative Tribunal, 2018," Summary of ACAT f
2018)" accessed at https://www.acat.act.gov.au/__data/assets/p
2019-20.pdf

[2] ACT Civil and Administrative Tribunal, 2018, "2017-18 Annual Re
https://www.acat.act.gov.au/__data/assets/pdf_file/0005/1362947/ACAT-Annual-Review-2017-18.pdf

- ensures that parties are entering into the agreement with appropriate capacity and consent to make such an agreement, particularly for parties with cognitive impairment, or who are not fluent in English.

These are issues that are live even within the hearing room. There will always be cases which need to be heard fully, or where conciliation is the most likely outcome but where physically being in the same room is a necessary condition to negotiation. This proposal is not intended to avoid the need for this type of dispute resolution, but to facilitate the fair, quick and cheap resolution of those cases where it is not.

This proposal will save all parties, and the Tribunal, significant costs. The Macarthur Real Estate Engagement Plan across 2012-2014 estimated the added direct cost to a real estate agent of seeking vacant possession over a repayment plan was $214[3] In Schedule 1 we have made some small adjustments to calculate the savings in 2019, and compare the costs for seeking a repayment plan without hearing. A real estate agent, or property manager-equivalent position in social housing providers can save significant costs under our proposal. The savings to a landlord of avoiding eviction is worth even more than this - in our experience it is the most reliable way to recover the unpaid rent and avoid vacancies.

We note recent changes in New York and other American cities where tenants have a right to be represented in all eviction proceedings. This would be another option if the current high rate of eviction applications were to continue.[4]

Recommendation:

- NCAT adopt a fee scale to reflect seriousness, and funding source, of eviction proceedings for Residential Tenancies, Social Housing and Residential Communities lists (residential lists).
- NCAT allow for the lodgement of repayment plans for rent arrears payment plans, where termination and vacant possession orders do not form part of the application form.
- NCAT prepare a form for lodgement which ensures orders are effective and appropriate in the circumstances.

Fees for residential land lease communities

Residential land lease community residents are increasingly being asked to pay for an ASIC search, regardless of whether the other party presents to the Tribunal. Ensuring the accurate identity of the other party is not a cost onus for park operators, for landlords or for

[3] Real Estate Engagement Project, 2014 "Cost of Eviction". Accessed at http://reep.org.au/wp-content/uploads/2014/03/Cost-to-Real-Estate-Agents-of-evicting-tenants.pdf. TUNSW modifications in Schedule 1.

[4] Office of Civil Justice, 2018, "Universal Access to Legal Services: A Report on Year One of Implementation in New York City" available at: https://www1.nyc.gov/site/hra/help/legal-assistance.page

other tenants. In those cases where there is a discrepancy between named applicant and appropriate party in non-parks matters, this is rectified during the hearing by amendment. The requirement of an ASIC search for residential land lease community residents has become a de facto higher application fee for this class of applicant.

This appears to us to be inequitable and a barrier to justice for residential land lease community residents who may be on income support. Their hearing fee is reduced in recognition of their limited means, but the requirement for the ASIC search increases their fee from $13 to an effective $30.

Residential land lease communities have an obligation to be registered under the Residential (Land lease) Communities Act 2013. Under section 19 of that Act the register is required to make public information that we believe would be adequate to ensure effective orders are issued by the Tribunal.[5] This should be the primary method used – if there are deficiencies with the register, this is a regulatory matter for discussion between relevant government departments.

In the same way a copy of a residential tenancy agreement is sufficient to identify the parties in the majority of residential tenancy applications and is presented for the first time at a hearing, a copy of a site agreement should be sufficient in the majority of residential land lease communities applications.

In situations where further evidence to the identification of the parties is required, then we appreciate the ASIC search and additional costs may be justified. In such circumstances the Tribunal should consider making access to ASIC searches available during hearings.

Recommendation:

- NCAT generally adopt a practice of allowing identification of parties to be carried out in a flexible manner. If a person presents to the Tribunal, can be identified as the relevant party and accepts the jurisdiction, this should be sufficient to begin proceedings.
- NCAT specifically adopt an information-sharing protocol with NSW Fair Trading to gain the operator details from the Residential Land Lease Communities register which NSW Fair Trading is required to hold and make available proper identification.
- NCAT should explore bulk-billing arrangements with ASIC and make access available in the hearing to applicants where necessary for identification purposes. This avoids any need for adjournment if a party is not properly identified before the hearing.

[5] https://www.legislation.nsw.gov.au/#/view/act/2013/97/part3/sec19

Fee reductions

We note that the fees guideline allows for complete fee waivers, and that applicants assisted by community legal centres are entitled to reduced fees. We recommend that this reduction be extended to applicants assisted by a Tenants' Advice and Advocacy Service.

Recommendation:

- Reduced fees become available to applicants assisted by a service funded under the Tenants' Advice and Advocacy Program.

Multiple applicants

An issue raised by land lease community residents, which nonetheless also applies to certain other applicants, is the ability for applicants applying on the same matter to lodge applications together. Hearing and making binding orders affecting multiple parties on the same substantive issue is an effective and efficient method of resolving disputes. Land lease community residents currently have this ability in rent increase matters, but the *Residential (Land Lease) Communities Act 2013* does not give the ability for other matters of communal concern. We are aware of instances where a park operator has had orders made against them for communal charges which will apply equally to all residents with identical circumstances, but has demanded each park resident apply (knowing they may be paying for both application fee and ASIC charge) individually before agreeing to refund money. This may constitute an attempt to avoid the effect of NCAT decisions.

While any recommendation to amend other acts is outside scope of this review, we believe it could be of value for NCAT to consider whether these kinds of joint applications could be accommodated. Other possible uses arise anywhere that multiple people are receiving services or facilities from the same person. Boarding houses, general consumer claims, and residential tenancies where one landlord has responsibility for communal areas may all benefit from this ability.

Recommendation:

- NCAT consider further the feasibility of accepting applications from multiple applicants in one application, in circumstances where the substantive issues are the same for all applicants and respondents.

Fees otherwise

We note that all current applications to NCAT are subsidised by funds from the Rental Bond Board Interest Account and Property Services Statutory Interest Accounts. Any difference between the true cost of an application and the application fee is therefore primarily funded by tenants through their bonds being held in trust and through their rents. This subsidy often goes unrecognised.

Recommendation:

- We recommend application fees be lowered for people who rent their home in recognition of their funding contribution to other parties, and their inability to claim the cost on their taxes. If fees are not lowered for people who rent their home we recommend they remain at their current level.

Data

The amount of data relating to residential matters published by NCAT has significantly reduced since the predecessor tribunal. Currently data is made available to advocates and others within the TAAP network via NCAT Quarterly Management Reports distributed to members of NCAT Consultative Committees. However these reports are provided somewhat irregularly, for example the last report made available to us was the NCAT Quarterly Management Report Jan-Mar 2018.

Within the Quarterly Management Reports the data available is limited. For example they do not currently provide data on:

- attendance by parties at hearing
- representation of parties at hearing
- orders made (determination, negotiated outcome, dismissal, withdrawal, adjournment)
- orders sought vs orders made
- orders made with reference to data on attendance and representation of parties.

While the level of detail indicated above may not necessarily be best provided through Quarterly Management Reports, we believe annual reporting of such data to be appropriate. Providing regular and more detailed data on application and outcomes allows external stakeholders to better plan the allocation of resources and provide best possible advice to parties.

We are aware the CCD Case Management System (CCD CMS) does not currently record the value of orders sought vs orders made, and is not able to report on this except for in decisions which are published. The CCD CMS is also currently unable to record applications where more than one order is sought in a single application. The most recent analysis of data sourced from the CCD Case Management System undertaken in 2016 (based on 2015 data) by the Law and Justice Foundation identified a number of concerning limitations regarding variability of detail recorded in relation to matters. We recommend the report to the review. [6]

[6] Law and Justice Foundation, 2016, "Data Insights in civil justice: NSW Civil and Administrative Tribunal - Consumer and Commercial Division (NCAT Part 2)." Accessed at: http://www.lawfoundation.net.au/ljf/site/templates/reports/$file/NCAT_CCD_2016.pdf

The current limitations on data collection and reporting hampers policy debate in areas from homelessness prevention, social housing policy and practice, the effectiveness of current regulation of the private rental market, and appropriate funding of advice and advocacy services.

The lack of outcomes and decisions reporting also diminishes advocates' capacity to give clients good guidance as to likely outcomes and recommend courses of action. A key strength of Tenants' Advice and Advocacy Services is the advice and information about the Tribunal that we provide tenants to assist them in weighing up the various factors impacting upon their decisions. Legal analysis of the case, likely outcomes both legal and interpersonal, and financial are all relevant to decisions. Ensuring tenants are well informed about the Tribunal process and previous outcomes results in a high rate of negotiated outcomes which are less costly for all parties. This is only possible where advocates have access to accurate and timely data on the likely range of outcomes and past experiences.

Recommendations:

- We recommend the Quarterly Management Reports currently provided to the Consultative Committees be made accessible to the public as an immediate start.
- We further recommend that attendance, representation and orders made also be published. While we acknowledge the possibility of this data – in particular orders made - misleading participants, we believe the benefits outweigh this concern. It will allow better planning, education for participants and because we believe the rate of conciliated outcomes to be relatively high where both parties attend, may encourage participants to negotiate further. We recommend the annual reporting of this level of data.
- We recommend the data management software of the Tribunal be upgraded, with investment if needed, in order to facilitate greater data. We consider funding for this can be sourced from the Property Services Interest Account as it is a clear element of the administration of the relevant Acts.

Justice-in-time decisions

Currently some applications are not able to be heard at a time which would be most useful in resolving the dispute and allowing the relationship to continue. There are instances when hearing on the matter is not heard rapidly, sometimes on the same day, and then the exercise of justice becomes redundant. In these instances it can often be the case that a full determination of the issues is not required, rather a preliminary decision pending further negotiation and if necessary determination would be sufficient.

Some of these disputes are fundamental to the contractual relationship, or health and safety issues. They are all decisions which impact most heavily on the most vulnerable

people. From TAAS practice, we have identified the following as key matters in which an interim or preliminary decision is often required before an urgent hearing can be arranged:

- unlawful lock outs;
- utility disconnections in tenancies and residential land lease communities;
- boarding house evictions;
- declarations of tenancy.

We believe a preliminary decision by a specific 'Duty Member' empowered to make rapid interim decisions could be done on the papers. The Tribunal may consider whether to require a brief opinion of a competent advocate in these decisions.

We are aware of a number of issues currently arising with the granting of urgent hearings. Our networks have described a diversity of practice in relation to granting urgent hearings. While some advocates report being able to have urgent hearings set up within 24 hours, others report similar cases being treated very differently. While we acknowledge the difficulties of a prescriptive list, we believe it would be useful to review the current guidelines[7] and operational practice for consistency. Some current applications for urgent hearings may be diverted to a 'Duty Member', reducing costs while maintaining the Tribunal's responsiveness.

Recommendation:

- We recommend consideration of the establishment of a 'Duty Member' who may be situated in one or several of the larger registries who can be called upon to make a rapid decision.
- This should be seen as a preliminary decision to err on the side of caution and maintain the status quo and prevent disadvantage to a party who needs a timely decision. This should be clearly done with the intention of a later hearing to determine the substantive issues.

Access to advice and advocacy

Adequate resourcing

Tenants Advice and Advocacy Services (TAAS) are a vital part of the Tribunal infrastructure. In 2017/18 there were 43,000 applications in the Tribunal effecting tenants and residential land lease community residents. Many tenants and residents are missing out on valuable information and advice.

Around 3,000 tenants per year receive direct assistance with matters relating to the Tribunal from TAASs. Of the further 25,000 people who receive advice many receive advice about their options including relating to the Tribunal.

[7] https://www.ncat.nsw.gov.au/Pages/cc/Applications/ccd_urgent_applications.aspx

Based on detailed experience in the Tribunal TAASs are able to effectively provide advice to tenants on the real world implications of their matter and assist them to negotiate solutions, often with the result that the matter does not need to be heard.

TAAS advocates are effective in assisting all parties achieve fairer and more just outcomes, and at increasing efficiency in the Tribunal and within broader conflict resolution systems. A report recommending funding for duty advocacy found that the presence of duty advocates delivered "more efficient CTTT [Consumer Trader and Tenancy Tribunal] hearings and improve outcomes from negotiation and performance orders between tenants and landlords, particularly NSW Housing and social housing providers.

Efficiency gains for the CTTT include:

- settlement of matters between tenants and real estate agent/landlords prior to hearing
- clearer presentation of the evidence and key issues for consideration
- reduction in re-hearings that might otherwise arise due to lack of preparedness of tenants."[8]

TAAS are the only organisations that provide this highly valued service for tenants most in need of assistance.

According to analysis of our client database, in cases where advocates were able to offer Tribunal advocacy to a client (which tend to be more complex cases either due to legal issues or client needs) the advocates were able to negotiate an outcome at the conciliation stage in 58% of all cases. Over half of the cases advocates provided assistance to at Tribunal involved eviction (56%). In 57% of these cases advocates were able to prevent homelessness or eviction. Nearly a third of the eviction cases were with Aboriginal or Torres Strait Islander clients, and homelessness or eviction was prevented in 68% of those cases.

In 12% of cases the assistance offered was a duty advocacy assistance where the advocate generally has no prior interaction (and therefore, could not have altered whether the case would arrive at the Tribunal). Nevertheless, in duty advocacy cases, advocates were able to assist to negotiate an outcome and avoid a full hearing in 54% of cases. These were often in cases of higher conflict where negotiation can be more difficult - over 50% of duty advocacy matters were evictions.

Through their expertise, advocates provide a clear saving to the Tribunal and government.

[8] Robyn Kennedy Consultants, 2010 "Tenants Advice and Advocacy Program Research Project on Duty Advocacy, Aboriginal Services and the TAAP Funding Formula" Released under GIPA Act - NSW Fair Trading - GIPA 2011-12/30

There is currently no specific funding for duty advocacy for TAASs. Many TAAS services have been doing duty advocacy and in recent years have increased this service. However, this is often at the expense of phone advice and/or ongoing casework.

Recommendation:

- NSW Government ensure adequate funding be made available to TAAS to provide duty advocates to assist tenants at Tribunal, and timely advice prior to proceeding commencement.

Promotion of availability

NCAT should review its material relating to tenancy to ensure the availability of tenants' advice services is included wherever relevant. We particularly recommend these details, and the Legal Aid Appeals Service details be placed on the Appeal forms.

Recommendation:

- NCAT should review current communications to ensure parties in residential lists are aware of the availability and role of the Tenants' Advice and Advocacy Services.

Representation

Currently NCAT has a guideline concerning circumstances where the Tribunal should generally allow representation. Landlords are assumed to be able to be represented by their real estate agent. In the interests of equity and the smooth running of Tribunal hearings we consider that tenants should have the option to be represented by a Tenants' Advocate. We recommend that Tenants' Advice and Advocacy Services should be included in this list of circumstances – though we are not aware of instances where Tenants Advocates who aren't Australian legal practitioners have been refused representation.

Recommendation:

- NCAT should review the representation guidelines and include where a party is represented by an advocate from a Tenants' Advice and Advocacy Service as a circumstance where representation is assumed.

Enforcement

Civil and Administrative Tribunal Act enforcement

A common frustration, and a reason tenants give to not apply to NCAT, is the lack of enforcement options for many behavioural orders. A landlord who is ordered by the Tribunal to carry out repairs but fails to do so faces little consequence. By comparison, a tenant who fails to abide by orders faces eviction.

A tenant who can construct an economic loss claim may be able to increase pressure and costs which once translated into money orders are enforceable. However many repairs,

access or privacy breaches are stressful and inconvenient to deal with rather than giving rise to an economic claim. This means orders do not have the same ability to cause a change in the respondent's behaviour. Access issues equally fall into this barrier – non-economic loss is of limited availability to tenants, land lease community residents and other renters.

NCAT currently has orders available to it to issue penalties under sections 71 and 73 in limited circumstances. NCAT should consider the more active application of the penalties under these sections, particularly of section 71, where it becomes apparent that a party has mislead the Tribunal about their intent to follow orders. NCAT should also consider the expansion of section 72 in to the residential lists.

Recommendation:

- NCAT should consider greater use of the enforcement ability under the current Civil and Administrative Tribunal Act, particularly where misleading statements are made with the intention of undermining Tribunal orders.
- NCAT should consider broadening the use of section 72 where landlords or agents contravene orders of the Tribunal.

Enforcement outside Civil and Administrative Tribunal Act

Another method to improve enforcement of the subject laws may be combining the resources of NCAT and Fair Trading. Predecessor tribunals made orders requesting the Secretary of Fair Trading to investigate matters where the Member thought it appropriate. We believe a similar system could be instituted again. Depending on the evidence and complaints raised through a hearing, a Tribunal Member may be in a position to:

- direct Fair Trading NSW to investigate further any potential breaches of the relevant Act;
- direct Fair Trading NSW to issue a show cause notice, or equivalent;
- direct Fair trading NSW to issue the relevant penalty notice using the evidence given to the Tribunal as their basis.

Recommendation:

- NCAT should consider a more active partnership with NSW Fair Trading around investigation of matters which may have been the subject of Tribunal proceedings but also constitute breaches of the Residential Tenancies Act 2010 et al.

Quality of decision-making including publication of decisions

NSW Civil and Administrative Tribunal members are highly qualified practitioners who are asked to perform at a high level in challenging situations. As with any such circumstance there is often a range of opinions regarding the Member's performance. The success or failure of a particular case may sway this opinion.

However, we have real interest in promoting the best possible practice of Members within this context.

Publication of decisions

Since NSW Civil and Administrative Tribunal began there has been a move away from publishing general decisions. We understand this may relate to technological restrictions. However we recommend that all decisions for which they are written reasons should be published and made available in a timely manner.

We believe this will better inform the public of the expert thinking of the Tribunal, as well as improve decision making across Members. Even without the restrictions of a binding decision from a superior court, being able to see and argue for the applicability of a particular line of reasoning will create a more transparent decision-making processes and encourage quality decisions.

The Appeal Panel has taken on a clear function of leading the decision-making and it is appropriate this be preserved, but many decisions are not subject to appeals.

Recommendation:

- All decisions for which there are written reasons should be published and made available in a timely manner.

Hearing style

The Tribunal is to determine its own procedure except where the procedural rules or the Act restrict it. However, we would encourage the Tribunal to take this to mean the whole of the Tribunal rather than individual Members whilst remaining consistent with s38(4).

In particular, we encourage the Tribunal to consider whether an inquisitorial or an adversarial approach is to be preferred, or issue clear guidelines to determine when these different approaches will be taken. Currently, it can be difficult for participants to know what style of hearing is being taken. This can lead to a denial of justice as it may be unclear when the opportunity to make submissions and/or enter evidence ends.

Recommendation:

- The Tribunal should issue guidelines for members, and the public, concerning the running of a hearing. Members who deviate from this running should clearly explain to participants why they are deviating and ensure opportunity to provide evidence and submissions is clearly identified.

Consistency of hearing members

We believe the most effective practice to ensure a matter is heard and determined fairly is that the Member who begins hearing evidence should be the Member who concludes hearing evidence and makes a decision. We understand this is also the preferred option of

the Tribunal. However we are aware that in some instances of illness or other circumstance this may not be possible. Consideration should be given to ensuring the replacement member is given adequate time and resources to familiarise themselves with the case, including listening to recordings of prior hearings.

Legality of process and procedure

Applicants have reported to us being dissuaded from making applications by the current application forms, and even members in hearing, which require applicants to identify the correct section number of the relevant act even where the applicant has a clear cause of action identified. This has been a change in practice since the Consumer, Trader and Tenancy Tribunal. We believe it works to reduce access to justice and should be reviewed. We also believe it is inconsistent with section 38(4) which directs the Tribunal with as little formality as circumstances of the case permits.

We wholly support the principle that the respondent must be able to know the case against them, but we do not consider this incompatible with a clear statement from the applicant of their grievance.

We believe it reasonable to expect that Members should be expert in the legislation relevant to the list they sit, and therefore able to translate a plain language application to the more formal language of the Act, and assess the plain language application for its legal merit. It is reasonable to expect a higher standard from tenant advocates, real estate agents and other professional representatives – we do not believe it reasonable to expect it of self-represented applicants.

We note that minor errors are routinely modified during the hearing and proceed on that basis. We are not aware of cases where a real estate agent or landlords who use the wrong section number are wholly prevented from pursuing their claim.

Some users of the Tribunal have raised with us an inconsistency around the uplifting of documents following a summons, with the Tribunal insisting upon a solicitor to receive the documents. This does not appear to us to be a requirement under the Civil and Administrative Tribunal Act, subordinate legislation or other procedural guidance. We recommend a clear statement in 'Procedural Directions 2: Summons' be made regarding the expected practice.

Recommendation:

- NCAT should re-adopt previous practice of evaluating the applicant's claim and where a cause of action is expressed, amending the application to ensure consistency with the applicable law. Members should avoid dismissing a case where a valid claim is clear but is expressed otherwise than in the language of the relevant Act.

- A clear guidance regarding uplift of documents be issued regarding the treatment of documents following submission, and the Tribunal ensure consistent practice with this guidance.

Conciliation

We believe conciliation services should be available as much as possible. The focus of the conciliation should be ensuring parties are making informed decisions about their case as well as encourage negotiated outcomes. The distinction between the conciliator making a decision, and informing parties of the range of outcomes, should be clear and the subject of specialist training.

The separation of conciliation processes and hearings should also be made clear. We are aware of several instances where a member took on a conciliation role and then went on to hear the substance of the matter. This creates an insurmountable barrier for confidentiality of the negotiation process to be maintained.

Recommendation:

- NCAT explore ways to increase the number of first hearings at which conciliators are present.
- NCAT should ensure processes are in place to ensure Members who attempt conciliation do not go on to hear the substance of the matter.

Access issues

Utilising Service NSW for registry services

Utilising Service NSW centres to lodge applications and handle documents has raised some issues where staff at Service NSW are not familiar with processes to assist tenants. In some instances Service NSW has been unable or unwilling to accept payment for the application, causing delays to the application being listed.

Delays in the delivery of lodged documents and relevant paperwork is causing unnecessary delays in setting a hearing date and/or requiring parties to provide additional copies of paperwork on the day or be disadvantaged. In one case we are aware of, documents lodged at Service NSW took more than 5 weeks to arrive at NCAT, placing the party in breach of procedural directions.

Recommendation:

- NCAT registry staff should provide specific training for Service NSW staff in handling NCAT applications and other material, and ensure at minimum a supervisor with relevant training is on duty at all times in Service NSW Centres.
- NCAT review communication and document handling between registry and Service NSW and explore improvements that can be made.

Locations

We understand from the experiences of advocates and other users that NCAT has a guideline that when hearings are moved there is an attempt to ensure the hearing is no more than 2 hours travel away from the original hearing. However this travel is judged by car – presenting an issue with users who do not own or are otherwise unable to travel by private car. Public transport options may not exist. We have had our attention drawn by residents of the Tweed area who have had their hearings moved to Lismore. Attending a hearing at 9.15am requires a person to leave on a coach from Tweed Heads at 5.15am, or travel the night before – there are no other public transport options. This creates severe disadvantage for users of the Tribunal and denies them access to justice.

We understand the Tribunal prefers using local courts due to the lower room costs associated with using Department of Justice facilities. We believe there may be other options available, including public libraries, local government rooms and others, which NCAT could explore the use of to ensure parties are able to attend in person whenever possible.

Recommendation:

- Where hearings are moved, travel should be limited to no further than 1 hour by public transport from the original hearing location.
- NCAT should explore with other government departments and tiers of government the use of other facilities which may be appropriate for hearing use.

Phone hearings

We acknowledge the ability to utilise phone hearings is useful to facilitate hearings where other options are unavailable. Users and advocates have noted with us that phone hearings are often challenging due to technological issues and the disadvantage of being unable to see other parties.

We believe other technological options may assist with these difficulties, including the use of video conferencing. While this may entail some investment, there may be opportunity to use the facilities at hearing locations and this should form part of the decision-making in relation to venue choice.

Recommendation:

- Video conferencing should be explored as an alternative to phone hearings.

Online applications

The online applications for applications under the Boarding Houses Act 2012 have not been populated with the application options under the Boarding Houses Act, which are available in the paper version. This increases complexity for people making applications, especially where a strict requirement to use correct sections is practiced.

Recommendation:

- Online and paper forms should be checked for consistency.

Review options

The Appeals form should make mention of the ability for NCAT to put a stay on the original decision. We are aware of instances where appellants were not aware of the requirement to specifically request the stay and where they were disadvantaged as a result.

We also recommend a lengthening of time to make an appeal. 14 days is very limited, particularly in instances where the decision itself is not accessible by the parties until several days later. We note that the appeal time for a commercial dispute concerning, for example, a broken toaster is 28 days. Appeal time frames must give the ability for parties to consider the merits. We believe tenancy disputes where appeals have merit are often complex and require more time. We acknowledge that in many cases of minor delay, particularly caused by uncontrollable externalities, the Appeal Panel has granted extensions of time some potential appellants are put off from a legitimate case. They are not familiar with the usual practice of the Panel and read the requirement as a strict time limit.

Recommendation:

- The Appeals form should give more indication of the options available to applicants including seeking a stay in relation to the orders currently made.
- The time needed to seek appeals should be lengthened to give parties time to seek advice and consider their case.

Hearing times

Users and advocates have raised with us that hearing times are often listed at times which make it difficult for those with parenting responsibilities, travel difficulties or long travel times to attend. Our analysis of listings suggests the most common time for residential hearings is 9.15am which supports this claim. Hearings starting at 11.15am and 1.15pm are much less common.

Users have also expressed with us that there is less opportunity now to request particular dates, creating further difficulty for parties. With online applications run by computer, we believe it is easier now to allow parties to nominate dates which work for them. We also believe that allowing a choice of time where possible should be considered.

Recommendation:

- NCAT should consider redistributing hearings more evenly throughout the day
- NCAT should explore options to allow parties to nominate hearing times, within limits to ensure parties still allow practical options and do not prevent the hearing from occurring at all.

Schedule 1: TUNSW adaptation of Real Estate Engagement Project estimate of costs to Real Estate Agents of evicting tenants for rent arrears

Original available at: http://reep.org.au/wp-content/uploads/2014/03/Cost-to-Real-Estate-Agents-of-evicting-tenants.pdf

Cost to Real Estate Agents of evicting tenants

Timeframe	Task	Hours	Hourly rate*	Cost
Day 3 arrears	Letter	0.2	60	$ 12.00
Day 3 arrears	Call & documentation to tenant & landlord	0.2	60	$ 12.00
Day 5 arrears	Call & documentation to tenant	0.1	60	$ 6.00
Day 7 arrears	Letter to tenant	0.1	60	$ 6.00
Day 7 arrears	Call & documentation to landlord	0.2	60	$ 12.00
Day 10 arrears	Call & documentation to tenant	0.1	60	$ 6.00
Day 10 arrears	Call & documentation to landlord	0.1	60	$ 6.00
Day 14 arrears	Call & documentation to tenant	0.1	60	$ 6.00
Day 14 arrears	Call & documentation to landlord	0.1	60	$ 6.00
Day 15 arrears	Notice of Termination to tenant and copy to landlord	0.25	60	$ 15.00
Day 15 - 32 arrears	Miscellaneous - e.g. Dealing with irate landlord, investigating abandoned property, chasing payments	1	60	$ 60.00
Day 32	NCAT Application	0.5	60	$ 30.00
Day 33 - 40	Waiting for hearing - miscellaneous - e.g. Calls to tenants and landlord	0.5	60	$ 30.00
	Preparation for hearing	1	60	$ 60.00
	Attend hearing, inc. Travel, waiting, conciliation, hearing & outcomes	4	60	$ 240.00
	Under order - delivery notices & outcomes to tenant & owner	1	60	$ 60.00
	Orders being SPO-tenant stays - monitoring tenant compiles with order - 3 - 6 months (check weekly)	4.3	60	$ 258.00
	Internal review time by Manager - supervision, communication to landlord	2.1	60	$ 126.00
	Order being Notice to Vacate - monitoring, correspondence with tenant & Landlord	1	60	$ 60.00
	Vacating inspection - travel, inspection, report, correspondence to tenant & landlord	1.5	60	$ 90.00
	Arranging maintenance	0.5	60	$ 30.00
	Re-inspection with owner	0.75	60	$ 45.00
	Readvertise	0.2	60	$ 12.00
	Viewing & applications for new tenancies	2.5	60	$ 150.00
	Ingoing inspection and new lease	1	60	$ 60.00
	Lease set-up & signing	0.75	60	$ 45.00
Cost of dealing - SPO without hearing		**9.9**		**$ 621.00**
Cost of eviction - NCAT orders that tenant stays		**15.9**		**$ 951.00**
Cost of eviction - NCAT orders that tenant to be evicted		**19.8**		**$ 1,473.00**

*$60 based on hourly rate of Property Manager + on-costs, at 2% inflation each year from 2014 to 2019

Value of lost future revenue *

	Description	Cost
Capital loss	Value of the loss of your landlords property if they remove property as a result of a tenant eviction	$ 4000
Loss of landlord revenue	Property management income - 7% x average 5 years of investment x average $350 week	$ 6370
	Commission sale of landlord investment property	$ 9000
TOTAL potential value of lost future revenue per tenancy		**$19,370**

*Based on a tenanted property of $350 per week