



10 July 2019

NCAT Statutory Review
Director, Courts Strategy
Department of Justice
GPO Box 5341
Sydney NSW 2001

Lodged via email: policy@justice.nsw.gov.au

Dear Sir/Madam

SUBMISSION ON REVIEW OF THE CIVIL AND ADMINISTRATIVE TRIBUNAL ACT 2013

The Caravan, Camping & Touring Industry & Manufactured Housing Industry Association of NSW Ltd (CCIA NSW) is the State's peak industry body representing the interests of holiday parks, residential land lease communities (residential parks, including caravan parks and manufactured home estates), manufacturers and retailers of recreational vehicles (RVs, including caravans, campervans, motorhomes, camper trailers, tent trailers, fifth wheelers and slide-ons) and camping equipment and manufacturers of relocatable homes.

We currently have as members over 730 businesses representing all aspects of the caravan and camping industry. 473 of these members are holiday park and residential land lease community operators in various areas of New South Wales (NSW). 174 are manufacturers, retailers and repairers of RVs, camping equipment and accessories suppliers and manufactured home builders.

The geographical breakdown of our members is as follows:

Region	Number of Businesses
Far North Coast & Tweed	62
North Coast	82
New England	20
Manning/Forster	29
Newcastle, Hunter & Port Stephens	93
Central Coast	55
Sydney & Surrounds	91
Leisure Coast	61
South Coast	72
Central NSW	27
Murray & Riverina	34
Canberra & Snowy Mountains	16
Western NSW	5
Interstate	87

Like all businesses, members of CCIA NSW have a number of rights and obligations when dealing with their customers. All are regulated by the Australian Consumer Law and the *Fair Trading Act 1987*. However, our members also have rights and responsibilities under other key pieces of legislation, including:

-) Holiday parks need to be aware of their rights and obligations under the *Holiday Parks (Long-term Casual Occupation) Act 2002* and the *Holiday Parks (Long-term Casual Occupation) Regulation 2017*,
-) Residential land lease communities need to be aware of their rights and obligations under the *Residential (Land Lease) Communities Act 2013*, *Residential (Land Lease) Communities Regulation 2015*, *Residential Tenancies Act 2010* and the *Residential Tenancies Regulation 2010*,
-) RV dealers and repairers need to comply with licensing and conduct requirements under the *Motor Dealers and Repairers Act 2013* and *Motor Dealers and Repairers Regulation 2014*, and
-) Manufactured home builders need to comply with applicable aspects of the *Home Building Act 1989* and *Home Building Regulation 2014*.

Each of the above-mentioned Acts confer jurisdiction on the Consumer and Commercial Division of the NSW Civil and Administrative Tribunal (NCAT).

As such, almost all members of our Association are subject to the NCAT dispute resolution process, making CCIA NSW a key stakeholder in relation to the review of the *Civil and Administrative Tribunal Act 2013* (the “NCAT Act”). We welcome the opportunity to provide feedback on the issues under consideration, and the services and processes of NCAT, as relevant to our industry.

Purpose of NCAT

In the second reading speech introducing the *Civil and Administrative Tribunal Amendment Bill 2013* and the *Civil and Administrative Legislation (Repeal and Amendment) Bill 2013* into the Legislative Assembly, The Hon. Greg Smith, Attorney General and Minister for Justice, stated:

“The Government is establishing the NSW Civil and Administrative Tribunal to provide the citizens of this State with a cost-effective, informal and efficient forum for resolving disputes and other matters. While the legislation gives the president of the NSW Civil and Administrative Tribunal flexibility to run the tribunal's day-to-day business, the legislation also gives clear guidance to the tribunal regarding the need to deliver fast and effective services to its users.”¹

Section 36 of the NCAT Act contains the guiding principle that practice and procedure in NCAT is to “*facilitate the just, quick and cheap resolution of the real issues in the proceedings*” and “*should be implemented so as to facilitate the resolution of the issues between the parties in such a way that the cost to the parties and the Tribunal is proportionate to the importance and complexity of the subject-matter of the proceedings.*”

¹ New South Wales, *Parliamentary Debates*, Legislative Assembly, 30 October 2013, 25096, (Greg Smith, Attorney General and Minister for Justice), < <https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/HANSARD-1323879322-54711/HANSARD-1323879322-54711>>

Echoing this guiding principle are key objects of the NCAT Act to ensure the Tribunal is:

-) accessible and responsive to the needs of all of its users,
-) resolves the real issues in proceedings justly, quickly, cheaply and with as little formality as possible, and
-) delivers decisions that are timely, fair, consistent and of a high quality.

Since commencing in January 2014, NCAT has certainly simplified the complexity of the previous tribunal system and created a 'one-stop shop' for specialist tribunal services in NSW.

However, in relation to NCAT's case management and decision-making processes, feedback from industry indicates that some improvements can be made so that the Tribunal is better meeting its guiding principles and the expectations of its users. These include:

1. Streamlining the application process.
2. Increasing fairness and efficiencies in the dispute resolution process.
3. Improving enforcement.

Our recommendations for each of these improvements are set out below. In formulating this submission, CCIA NSW has consulted with industry members and other stakeholders to crystallise their views. The focus questions of the review were distributed in our communications with industry and the information received in response has informed this submission.

Recommendation 1: Streamlining the Application Process

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

On the question of whether it is easy or difficult for people to work out whether NCAT is the right body to resolve their legal issue, the majority view of our members is that this is easy. The information available on the NCAT website on making an application, case types and legislation is generally easy to find and comprehend, and NCAT's jurisdiction is well understood by businesses. There is, however, an important issue at the initiation stage of NCAT matters that needs to be addressed.

The Consumer and Commercial Division is the largest division in NCAT by workload and receives approximately 50,000 – 60,000 applications each year.² In order to improve the management of this significant workload, we submit that Tribunal staff should be empowered with appropriate flexibility, autonomy and decision-making powers to identify and filter out frivolous, vexatious and misconceived applications before they are listed for hearing.

Implementing a Triage System

In 2009, the then Federal Attorney-General, the Hon Robert McClelland, MP, said that an effective, accessible civil justice system should be a system where people are able to resolve their disputes quickly, effectively and fairly, using the most appropriate method for their particular circumstances. Access to information and increasing the opportunities to resolve disputes early, either in or outside court, are important drivers for access to justice.³

² NCAT Annual Reports 2014 – 2015 to 2017 – 2018

³ The Hon. Robert McClelland, MP, Attorney-General, *Address to The Law Council of Australia 36th Australian Legal Convention*, Perth, 18 September 2009.

Like a hospital, an effective justice system should have an inbuilt triage function, enabling matters to be directed to the most appropriate destination for resolution, irrespective of how people make contact with the system.⁴

An effective and affordable civil justice system has even greater importance in the current economic climate. More than ever it is imperative we have a well-functioning justice system better equipped to assist people when they most need assistance, advice and guidance.

A 'triage' system implemented at the preliminary stage of the application process, to sort and allocate applications according to appropriate criteria, would greatly assist in streamlining NCAT's dispute resolution services, making more efficient use of resources and limiting the time and cost burden on parties, particularly small business respondents. Only after triage should a matter be listed requiring the appearances of parties.

The vast majority of Australian businesses are small businesses, and their ability to deal with costly and time-consuming Tribunal disputes, without adverse impacts on their operations, is extremely limited. The feedback received from industry is that having a dispute resolved "quickly" and "cheaply" through NCAT is actually considered infrequent for businesses.

Delays are a regular occurrence, as is the requirement to attend NCAT on multiple occasions for the same matter, and in most cases, the costs of participating in the Tribunal system are much higher for businesses than consumers.

Applicants who are concession holders can file an application in NCAT for a very low fee of \$13, and if they do not have a bona fide claim (but are rather seeking to cause unnecessary cost and disruption for the respondent) there is no real or effective costs disincentive for these applicants.

On the contrary, corporations pay significantly higher fees for all matter types in NCAT. They often have to seek costly advice when responding to claims (particularly those that are vexatious or unsubstantiated) and businesses also suffer lost productivity due to employees being required to attend the Tribunal on multiple occasions before a final hearing.

Overcrowded group hearing lists and multiple adjournments contribute to delays, and the situation worsens for parties based in regional or rural areas and located many kilometres from their relevant NCAT hearing venues.

This burden on businesses is aggravated by the requirement to respond to applications even when there is no basis in law or fact for a claim and/or where the grounds of an application are unclear due to minimal information provided in the first instance, causing confusion about the case to meet. A common example in our industry is holiday makers, such as long-term casual occupants, seeking orders to enforce rights that are reserved for residents under tenancy legislation.

Applications to NCAT with no arguable case are being allowed to proceed to full hearing before being dismissed and, because the ability for parties to recover costs in NCAT proceedings is limited, businesses usually have no effective recourse to recoup the losses they incur.

⁴ Access to Justice Taskforce, Attorney-General's Department, *A Strategic Framework for Access to Justice in the Federal Civil Justice System*, Australian Government, September 2009, p 63.

A fairer system would have a mechanism in place to ensure that any applications not within the jurisdiction of NCAT, or which are lacking in substance, seeking inappropriate orders, or where it is clear that there is no real question to be tried, are addressed prior to the matter being listed for hearing.

If a Tribunal staff member assigned a triage role (e.g. Triage Officer) reviews an application that is not on its face legally sustainable, they should be empowered to contact the applicant and explain why the application is not sufficient to be set for hearing.

We do not suggest that the Triage Officer advise the applicant on how to structure their arguments, or what orders to ask for. Rather, the Triage Officer could explain why the application cannot proceed at this stage and either assist with resolving the problem and re-lodging the claim, or direct the applicant to contact NSW Fair Trading, an advocacy service or a legal adviser to assist. If it is clear, however, that NCAT has no jurisdiction to hear the claim then it should be rejected at the outset.

The adoption and implementation of a 'triage' system in NCAT, to review applications before they are listed for hearing to verify jurisdiction, merit and formal compliance, would produce quality outcomes for all parties.

It would save businesses from having to unnecessarily expend time and money appearing before the Tribunal to defend futile applications. In turn, members of NCAT would be freed up to allocate their time more effectively to expedite cases that do require determination via hearing, and self-represented applicants would benefit from receiving early, personalised support.

Recommendation 2: Increasing Fairness and Efficiencies in the Dispute Resolution Process

Focus Question: Is NCAT accessible and responsive to its users' needs?

In responses to this focus question, the overarching theme in the feedback received from industry was the negative impact of the Tribunal process on the time and resources of small business owners. To help alleviate this, there are improvements that could be made to increase the accessibility and responsiveness of NCAT to the needs of small business users.

Greater Use of Telephone and Video Conferencing

During 2017 – 2018, 75.2% of all applications received in the Consumer and Commercial Division of NCAT were lodged online,⁵ and we note that this year the Tribunal expanded its audio-visual link (AVL) facilities to include hearing rooms at Newcastle, Wollongong and Penrith. AVL technology was used successfully in over 1,700 NCAT hearings in the 2017-2018 financial year.⁶

This is great to see, as continuing to embrace technology is crucial to NCAT's accessibility and the above statistics indicate there is a willingness and preference for accessing NCAT services online wherever possible. We strongly support further expansion of NCAT's online and remote communication services.

Currently, in order to request a telephone hearing parties must be located more than 200km or 2 hours travel from the NCAT hearing venue, or not able to attend in person due to disability

⁵ NCAT Annual Report 2017-2018, p 20.

⁶ Ibid, p 23.

or health reasons. The request must be in writing and preferably include reasons and supporting documents.

These criteria are too inflexible and unnecessary given current technologies. As directions hearings are not hearings, but an opportunity to organise the parties and information for a resolution of the matter, unless a case is complex parties should be able to attend most directions hearings via telephone or video conference if that is their preference.

This would be particularly helpful for parties located in rural or regional areas, which is the majority of our members. For them, even a distance of 50kms is an access barrier that deprives them of equal access to justice.

Attending NCAT on any occasion, involves considerable time, cost and inconvenience to a small business owner. A short directions hearing can involve day-before travel and overnight accommodation costs or driving very early in the morning (which can be dangerous in winter or in areas where there is wildlife). Businesses also have to arrange for relief staff, adding to the costs they face.

Increasing the use of telephone and video conferencing for directions hearings, and making it easier to request them, would be extremely beneficial for parties in rural and regional NSW. Access to conciliation and mediation via telephone or video conference should also increase.

Electronic Service and Lodgement

At the moment, NCAT's system does not allow for supporting material to be lodged electronically. Parties are advised to send case-related documents by post, fax or in person to NCAT registries. It is, however, indicated on the NCAT website that the Tribunal is working on changes to its systems to enable this in the future.⁷

We strongly support expediting these changes to bring about a paperless NCAT to the extent possible. All correspondence, notices, submissions, supporting materials and orders involved in an NCAT matter should be able to be served between the parties, and lodged with NCAT, electronically. There also needs to be consistency across NCAT registries.

Reducing the production and consumption of paper would lower costs and reduce the environmental footprint of the Tribunal process. It would also help alleviate the difficulties that parties can experience in complying with tight deadlines for submissions, particularly parties located in regional and rural areas.

In one example reported by a member of our Association, their business is located Tweed Heads and their closest NCAT registry is the Tamworth Registry (over 500kms away). As the respondent in a matter they were directed to reply to the applicant's submissions, serving and lodging documents, within two weeks.

This seems like a reasonable amount of time, however, recent changes to the *Interpretation Act 1987*, requiring seven working days for delivery time for documents and notices served by post, means a party's preparation time is reduced to seven days. Considering this respondent is a business, their preparation time was reduced even further, as only three of their remaining seven days were business days.

⁷ NCAT, *Common Questions – NCAT Online*, retrieved from https://www.ncat.nsw.gov.au/Pages/apply_to_ncat/apply_online/common_questions.aspx

In this particular matter, the respondent needed to seek external advice and this was not received until the day before their reply was due. Although they applied for an extension of time from the Tribunal a week earlier, they did not receive agreement to this extension of time from NCAT until five days after the due date for their reply.

In providing this example, we are not suggesting that NCAT give parties more time to prepare and serve submissions. That will only exacerbate existing delays in the Tribunal process (see further submissions below). We are advocating for the removal of paper-based and post-based processes, wherever possible, in order to limit the inconvenience and uncertainty that parties are exposed to.

More Conciliators and Mediators

Conciliation and mediation are important forms of alternative dispute resolution. They give parties more control over the outcome of their dispute, they can reduce costs and lead to more effective settlements.

Encouraging resolution of disputes through conciliation and mediation is one of the great attributes of NCAT. However, if they are to be the preferred methods for resolving disputes, then the required facilities and personnel should not be under-resourced, particularly at hearing locations with busy hearing lists.

Industry feedback is that the number of conciliators and mediators available at NCAT registries and hearing locations is not sufficient and needs to be increased. At least two conciliators and/or mediators should be available at each hearing location, with additional meeting rooms also made available.

One business reported their mediation meeting took place in the public foyer of the Court building due to a lack of meeting rooms. At this particular venue, only two meetings rooms were available for more than 20 cases on the list, which is clearly insufficient.

There also needs to be a separation of duties between Tribunal Members and conciliators and mediators. Even though the Tribunal process is less formal than a Court, it can still be intimidating and confusing for many people, including small business owners, and this needs to be taken into account for all of NCAT's services.

Currently, in some regional areas the Tribunal Member will act as both conciliator and determining Member. Although this is done with the consent of the parties, we have received feedback that some small business owners are not entirely comfortable with this process. They don't, however, feel confident in withholding their consent and have genuine fears as to impartiality of the Tribunal Member should conciliation fail and the matter needs to proceed to a hearing.

Tribunal Members should be appointed to make determinations, not to take part in negotiations (especially commercial negotiations) between parties. Having additional conciliators and mediators, as recommended above, would remove the need for Members to undertake this function in regional areas.

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

As well as our recommendation for a triage system, there may be opportunities for NCAT to provide more support for people to understand the process and participate through education at the time of application.

We often hear from small business owners that they wish some applicants were better informed about their rights, but also their responsibilities, in the Tribunal process and that the expectation for parties to comply with procedures was applied more consistently.

Small business owners often feel that they are expected to participate in the Tribunal process impeccably, while leniency is given to applicants who fail, without reasonable excuse, to attend NCAT when required and/or pursue their case by providing required information on time. We have been advised by one business that on multiple occasions they have attended the Tribunal and the applicant has failed to have the information required without reason. In each case, the matter was adjourned for another date causing inconvenience and unrecoverable costs for the respondent.

A triage system and pre-emptive education at the application stage would help to minimise such inefficiencies. Members of our Association have suggested that when a person makes an application to NCAT, they are provided with simple guidance about the NCAT process, a list of the types of information and/or evidence required to support their case and to confirm in writing that they have read and understood this information.

The NCAT website does have a page dedicated to publications and resources, including videos and a factsheet for respondents. However, there does not appear to be a similar factsheet for applicants. Perhaps one could be developed to form part of the NCAT application forms.

In addition, while NCAT application forms for the Consumer and Commercial Division do ask applicants to provide 'as much information as possible' in support of the orders they are seeking, and include an 'application checklist,' a triage system would verify every application for completeness, ensuring that a sufficient amount of information is at hand before matters are listed for hearing.

Focus Question: Does NCAT resolve legal disputes quickly, cheaply and fairly?

While NCAT is seen to resolve legal disputes cheaply when compared with the Court system, concerns about unfairness and delays permeate the feedback from our members.

Favouritism in the conduct of cases has been raised as an issue. Whether this happens or not, small business owners sometimes feel that the opposing party is given leniency in the conduct of their case in terms of reduced emphasis on legal technicalities, while the small business owner is not. As a result, they do not always feel they are provided with the same opportunity to present their own cases without disadvantage and without the need to retain legal practitioners to act on their behalf, which increases their costs.

Perceptions aside, many NCAT disputes are taking too long to resolve, particularly those involving tenancy issues such as site fee increases and rent or utilities arrears. There are delays in getting to a final hearing, which increases the costs for businesses, and decisions are not being handed down in a timely manner. One residential land lease community has reported that an NCAT matter (which was a dispute about a site fee increase) took nine months to resolve. Such a lengthy period of uncertainty is detrimental to business operations and can cause disharmony in communities.

Small business owners are also frustrated with the Tribunal process when matters about which there can be no legitimate dispute are referred to conciliation, rather than expedited to hearing. This often happens on very busy days when the number of matters listed for hearing

exceeds the time available, which suggests that conciliation may be being used as a case management technique.

Our members have also raised concerns about an inconsistency of Tribunal outcomes, the difficulties they face when unclear orders are made and when conciliators, mediators and/or Tribunal Members appear to be unfamiliar with the legislation that is relevant to the dispute.

We have received reports that in some matters, the Tribunal Member has not had a copy of the applicable legislation available and has requested this from the parties. While this may have no impact on receiving a just decision, maintaining faith and client satisfaction in the Tribunal system is important.

Currently, the objectives of the Act are commendable and appropriate. They seek to achieve the right balance between providing decisions that are fair, consistent and of a high quality against the speedy and cost-effective resolution of matters. However, NCAT needs sufficient resources to be able to achieve all of its statutory objectives.

This feedback from industry indicates there may need to be a review of the level of resources, training and administrative support for Tribunal Members and staff. There is no denying that NCAT has a significant workload. To ensure the functioning of the Tribunal is as efficient as possible and appropriately responsive to its users' needs, Tribunal Members and staff should receive the support they need.

We acknowledge that the issues raised here are primarily issues of practice not directly governed by the Act. However, there is a regulatory inconsistency that should be addressed in the review.

Under rule 25 (4) of the *Civil and Administrative Tribunal Rules 2014* (the "NCAT Rules") unless the Tribunal grants an extension under section 41 of the NCAT Act, an internal appeal must be lodged:

- (a) *in the case where the enabling legislation specifies the period within which the appeal is to be made—within the period specified, or*
- (b) *in the case of an internal appeal against a decision made in residential proceedings—within 14 days from the day on which the appellant was notified of the decision or given reasons for the decision (whichever is the later), or*
- (c) *in any other case—within 28 days from the day on which the appellant was notified of the decision to be appealed or given reasons for the decision (whichever is the later).*

Under section 80 (2) (b) of the NCAT Act, internal appeals may only be made as of right on any question of law and in order for a party to make a proper determination of whether there is a question of law, written reasons are necessary. However, under section 62 (2) of the NCAT Act, the Tribunal has 28 days in which provide written reasons at the request of a party.

This issue of timing between the deadline for an appeal and the deadline for written reasons creates a risk that parties may run out of time if they wait for written reasons in order to lodge their appeal. Extensions of time under section 41 of the NCAT Act cannot be relied upon.

This matter was raised at the NCAT Residential Communities Consultative Forum in July 2018. Our Association was advised that an appeal can still be lodged without the written reasons (if they had not been received) and at the call over of the appeal, or at a directions

hearing, the specific grounds of appeal can be amended to include the written statement of reasons.

This is not an efficient solution and causes three problems:

1. A party seeking to appeal is forced to seek advice and make a determination about whether they have a right to appeal on a question of law without sufficient information from the written reasons.
2. Fees are payable to lodge an appeal. If a party lodges an appeal without receiving the written reasons and then later (upon receiving and reviewing the written reasons) determines that there are no grounds for an appeal on a question of law, or the grounds are tenuous at best, they will have to withdraw and incur the costs of the filing fees and preparation of the appeal.
3. The Tribunal must process an appeal application only to have it withdrawn, creating unnecessary administration for Tribunal staff, as well as skewing the appeals lodgement data.

This issue could be easily resolved and thereby increasing efficiencies, by amending the timeframes in the NCAT Act and/or the NCAT Rules.

We also request that where written reasons are given in NCAT matters, all of these should be published in order to assist other parties with similar matters. This change would not significantly increase the Tribunal's workload, as the time is being used anyway to prepare the written reasons. The only additional work involved is the administrative task of publishing the information.

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

We support an ability for NCAT to conduct hearings 'on the papers' in matters that are simple and straight forward. Complex matters and those involving witnesses and expert evidence are more likely to require oral, in-person hearings to ensure that all relevant issues are explored.

However, where both parties consent to a hearing on the papers, we submit that the Tribunal Member should be required under the NCAT Act to determine the matter in this way, unless the Tribunal Member believes on reasonable grounds that genuine consent has not been provided by one party.

Being able to 'opt-in' to having their written submissions and evidence considered by the Tribunal Member, without needing to attend a hearing, would save all parties precious time and resources.

Recommendation 3: Improving Enforcement

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

Improvements are needed in the enforcement of NCAT's orders where the other party has not complied. The most common examples in our industry include a failure to pay an amount of money (e.g. an amount representing occupation or site fee arrears or utilities arrears) and failure to do something (e.g. comply with a term of an agreement or community rule or carry out work within a specified period).

Here, the options of enforcement are:

- a) Enforcing an order for the payment of money by registering a certified money order with the NSW Local Court or District Court.
- b) Applying to renew proceedings under Schedule 4, Clause 8 of the Act.

In many cases neither of these enforcement options are worth pursuing by small business owners. This is because the additional time and costs of starting enforcement action through the Local Court, or applying to renew proceedings in NCAT (only to go through all the above-mentioned inefficiencies and delays again), far outweigh the consequences of the other party's non-compliance.

As an example, if the Tribunal has ordered a long-term casual occupant to pay a holiday park operator \$900.00 in outstanding occupation fees and they do not comply with the order, the operator is likely to expend more than this amount in fees, lost productivity and wages trying to enforce the order. Consequently, many of our members are forced into relinquishing their rights.

While additional powers or processes that allow for more effective enforcement of NCAT orders could be considered in further consultations, an immediate improvement would be to remove the fee that is payable for renewing proceedings. The current requirement to pay the 'same fee as the original application' is an unfair impost on the party who has not received the remedy stipulated by the Tribunal in the first instance. They should not be penalised for having to pursue their case again.

If a party must renew proceedings because of a breach of the Tribunal's orders by the other party, then any fees required should be made payable by the party in breach. This may help prevent wilful non-compliance with NCAT orders.

Conclusion

Thank you for taking into consideration the issues we have raised. As an important stakeholder in relation to the governance and functioning of NCAT, we are keen to continue to participate in any further consultations and provide any assistance we can on the issues we have raised. We request we be noted as a stakeholder and continue to be included in all future communications and meetings on this important review.

Yours sincerely

Lyndel Gray
Chief Executive Officer