Regulation and Discipline of Health Practitioners Under NCAT (Civil and Administrative Tribunal of New South Wales)

A paper delivered by Mark Robinson SC to an
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I am asked to speak to you today on the regulation and discipline of health practitioners under the new Civil and Administrative Tribunal of New South Wales ("**NCAT**"), which commenced operation on 1 January 2014.

The *Civil and Administrative Tribunal Act 2013* (NSW) ("**NCAT Act**") was passed by the NSW Parliament and assented to and commenced on 4 March 2013. The practical effect of this Act is that it provided for the State's first true Super Tribunal, in the form of the Civil and Administrative Tribunal of New South Wales (also officially known as NCAT). NCAT commenced operation on the "*establishment day*" defined by section 7(2), to be 1 January 2014.

Cognate Acts introduced months later include the *Civil and Administrative Tribunal Amendment Act 2013* (NSW) (Act No 94 of 2013) which was assented to on 20 November 2013. Schedule 1, which commenced on that day, extensively amended the *Civil and Administrative Tribunal Act 2013* (NSW). The NCAT Act is fully operative and the consolidated version is published by Parliamentary Counsel at www.legislation.nsw.gov.au.

Schedule 2 of the NCAT Act, which began operation on 1 January 2014, extensively amended the "*Administrative Decisions Tribunal Act 1997*" and renamed it the "*Administrative Decisions Review Act 1997*" ("**Review Act**"). It conferred on NCAT exclusive jurisdiction for the review of "*administratively reviewable decisions*" (formerly known as, "*reviewable decisions*").

In addition to this, Parliament passed the *Civil and Administrative Legislation (Repeal and Amendment) Act 2013* (NSW)(Act No 95 of 2013). It was assented on 20 November 2013. It commenced on the "*establishment day*" and effectively transferred the functions of the existing tribunals to NCAT, and repeals and amends legislation, consequent on the establishment of the new tribunal.

So we are now left with the NCAT Act and the *Administrative Decisions Review Act 1997.*

The Super Tribunal

The super tribunal is headed by a Supreme Court judge (as per section 13). The first appointment of President was Justice Robertson Wright. Ms Sian Leathem was appointed as the first "principal registrar of the tribunal" (section 4(1)).

The tribunal operates from three different locations. The NCAT Principal Registry is located at Level 9, John Maddison Tower, 86-90 Goulburn Street, Sydney NSW 2000.

The Administrative and Equal Opportunity Division and the Occupational Division operate from Level 10 John Maddison Tower. The Consumer and Commercial Division operate from Level 12, 175 Castlereagh Street, Sydney NSW 2000. The Guardianship Division operates from Level 3, 2a Rowntree Street, Balmain NSW 2041. Health professional matters continue to be heard in at the Health Professional Councils Authority premises at Level 6, North Wing, 477 Pitt Street, Sydney.

The contact details for NCAT are as follows - phone: 1300 006228 and the web site will be: www.ncat.nsw.gov.au. Some details are now available at:
http://www.ncat.nsw.gov.au/ncat/index.html
And some background is available at:
http://www.tribunals.lawlink.nsw.gov.au/tribunals/index.html

Civil and Administrative Tribunal Regulations 2013 have been promulgated which deal with filing fees and fee waiver; allowances and expenses payable to witness; to prescribe members of the Guardian Ad Litem Panel, constituted by the Director-General of the Department of Attorney General and Justice, who are appointed by the tribunal to represent parties to proceedings in the tribunal; the procedure for referral by the tribunal of parties to mediation, and there are the *Civil and Administrative Tribunal Rules 2014* which constitute procedural rules for the tribunal.

NCAT took over the jurisdiction and work of 22 existing State tribunals, including the Administrative Decisions Tribunal of NSW (ADT) – which itself was formed from a number of different State tribunals (including the Equal Opportunity Tribunal, the Legal Services Tribunal and the Community Services Appeals Tribunal).

The new tribunal also includes tribunals such as the Consumer, Trader and Tenancy Tribunal, the Medical Tribunal and the Local Government Pecuniary Interest and Disciplinary Tribunal.

The first thing to notice about the NCAT Act is that understanding it is complex.

The Act must be read together with and, often, subject to its many Schedules (which are also complex). Further, there are many dozens of other Acts, styled as enabling Acts, that also give or augment the NCAT's power, functions and procedure in particular matters or for particular administrative decisions.

For health practitioners in NSW, the *Health Practitioner Regulation National Law (NSW)(2009)* (NSW) ("**National Law**") is also of critical importance – it is the enabling Act that gives additional power and jurisdiction to the new tribunal.

If you like working in 3D, the NCAT world is in 4D.

This complexity was always to be, since the NCAT is structured as an amalgam of both:

1. the classic external independent administrative review tribunals, such as the Commonwealth's Administrative Appeals Tribunal; and also,
2. the jurisdiction of State courts or quasi-judicial tribunals, such as the Consumer, Trader and Tenancy Tribunal.

Parliament's intention was to attempt to maintain, as far as possible, each former tribunal's practice, procedure and diversity.

To this end, there are extensive savings and transitional provisions and provisions that caused <u>all</u> members of the existing tribunals to become members of the new tribunal on the establishment day (NCAT Act, Schedule 2, clauses 3 & 4). As well, <u>all</u> matters that were

current in 2013 in the various existing tribunals were be deemed to have been "*duly commenced*" in the new tribunal (Schedule 2, clause 7)).

In all, the new President of NCAT is be responsible for about 270 tribunal members who originated from about 29 former tribunals.

The objects of the NCAT Act

Section 3, the objects provision, sets out an overview of the tribunal. It provides

> The objects of this Act are:
>
> (a) *to establish an independent Civil and Administrative Tribunal of New South Wales to provide a single point of access for most tribunal services in the State, and*
> *(b) to enable the Tribunal:*
> *(i) to make decisions as the primary decision-maker in relation to certain matters, and*
> *(ii) to review decisions made by certain persons and bodies, and*
> *(iii) to determine appeals against decisions made by certain persons and bodies, and*
> *(iv) to exercise such other functions as are conferred or imposed on it, and*
> *(c) to ensure that the Tribunal is accessible and responsive to the needs of all of its users, and*
> *(d) to enable the Tribunal to resolve the real issues in proceedings justly, quickly, cheaply and with as little formality as possible, and*
> *(e) to ensure that the decisions of the Tribunal are timely, fair, consistent and of a high quality, and*
> *(f) to ensure that the Tribunal is accountable and has processes that are open and transparent, and*
> *(g) to promote public confidence in tribunal decision-making in the State and in the conduct of tribunal members.*

These are high ideals indeed.

The Membership of the Tribunal

The membership of the tribunal consists of the President, Deputy Presidents, principal members, senior members, and general members. There are a number of other different descriptions.

The notion of judicial and non-judicial members from the former ADT has gone.

The President and the Deputy Presidents are referred to in the Act as "*presidential members*" and the others are referred to as "*non-presidential members*" (section 9). Occasional members may be appointed pursuant to section 11 and members may be appointed for a limited period pursuant to section 12.

To be appointed, the President must be a judge of the Supreme Court of NSW, and the Deputy Presidents, Principal members, and senior members must be Australian lawyers of at least seven years' experience or with special knowledge, skill or expertise in the relevant tribunal matters [or be a former judicial officer (in the case of the deputy presidents)]. General members are lay members who have necessary skills or those who represent relevant public or community groups concerned in the work of the tribunal (section 13).

Divisions and Structure of the Tribunal

There are four divisions of the tribunal (section 16(1)). They are the:

1. Administrative and Equal Opportunity Division,
2. Consumer and Commercial Division,
3. Occupational Division, and,
4. Guardianship Division.

The Appeal Panel functions of the tribunal are not allocated to any particular division (section 16(4)). Each division has its own schedule in the Act (section 17) dealing with the requirements for each appointment including the division head, division members and procedure. The Act also deals with the allocation of functions from the relevant enabling legislation (giving the tribunal its jurisdiction), and any "*special requirements*" in its practice, procedure and appeals. Section 17(4) of the regulations permits changes to the name of a division or to the division schedules in the NCAT Act.

The functions of the President are set out in section 20. He must make rules for use on establishment and he must manage the members. There is a Rule Committee of the tribunal (section 24) constituted by the President, the Division Heads and appointed members. The

President is given extensive power to issue "*procedural directions*" (section 26). These directions may relate to the practice and procedures to be followed or the conduct of proceedings in the tribunal. Members, parties to proceedings, and their representatives, "*must*" comply with any applicable procedural directions (section 26(4)).

At the moment, there are four NCAT-wide Procedural Directions that have been issued:

http://www.ncat.nsw.gov.au/agdbasev7wr/_assets/ncat/m771022l21/service_and_giving_notice.pdf
http://www.ncat.nsw.gov.au/agdbasev7wr/_assets/ncat/m771022l21/summonses.pdf
http://www.ncat.nsw.gov.au/agdbasev7wr/_assets/ncat/m771022l21/expert_witnesses.pdf
http://www.ncat.nsw.gov.au/agdbasev7wr/_assets/ncat/m771022l21/registrars_powers_directions.pdf

The President has also issued a Guideline on Internal Appeals:

http://www.ncat.nsw.gov.au/agdbasev7wr/_assets/ncat/m771022l29/ncat_guideline_internal_appeals.pdf

There are also some Divisional Procedural Directions that can be found at:

http://www.cc.ncat.nsw.gov.au/cc/Resources/Procedural_directions_and_guidelines.page?
http://www.ncat.nsw.gov.au/agdbasev7wr/_assets/ncat/m771022l8/procedural%20direction%20costs.pdf
http://www.ncat.nsw.gov.au/agdbasev7wr/_assets/ncat/m771022l8/procedural%20direction%20representation.pdf

Rules and procedural directions (in particular) are being used to essentially reflect the practice and procedure of the former tribunals as far as possible. This will be so initially. Whether they will be substantially modified in time remains to be seen.

The former ADT used "*practice notes/guidelines*" in the general conduct of the tribunal to great effect, instead of relying on regulations and rules.

The Tribunal's Jurisdiction

Part 3 of the NCAT Act (section 28) sets out the jurisdiction of the tribunal as follows:

1. General jurisdiction (section 29(1)),
2. Administrative review jurisdiction (the ADR Act and Schedule 3),

3. Appeal jurisdiction (external and internal appeals)- sections 31, 32 and Part 6 of the NCAT Act, sections 79-81, and
4. Enforcement jurisdiction (section 33 and Part 5 of the Act, sections 71 to 78).

The general jurisdiction deals with matters acquired by way of enabling legislation (other than the NCAT Act or the procedural rules). It allows the tribunal to make decisions, or exercise other functions, of a kind specified in the legislation either by a party's application, or of its own motion. The tribunal can make interlocutory or ancillary decisions and exercise the functions conferred by the enabling Act.

The administrative review jurisdiction is the jurisdiction as provided by the *Administrative Decisions Review Act 1997,* and that Act provides for circumstances in which the tribunal has administrative review jurisdiction over a decision of an administrator. Schedule 3 applies. External and internal appeals are provided for in section 31 and 32.

The enforcement jurisdiction is provided for in section 33 and Part 5 of the Act, sections 71 to 78. It deals with alleged or apparent contempt of the tribunal, and applications under section 77 of the NCAT Act for a contravention of a civil penalty provision.

The Tribunal and the Supreme Court

Section 34 of the NCAT Act provides that on an application for judicial review of an "*administratively reviewable decision*", the Supreme Court may refuse to hear the matter if it is satisfied that adequate provision has been made for an internal review of the decision (by an administrator), or an administrative review of the decision by the tribunal is available under the *Administrative Decisions Review Act 1997*. The Court can refuse to hear such an application if an external or an internal appeal is available under the NCAT legislation (cf: former 123 of the old *ADT Act*).

There is only one type of administratively reviewable decisions that impact on health professionals - they are review of decisions under section 41AA or 41A of the *Health Care Complaints Act 1993* (NSW) that the (former) health practitioner has breached a code of conduct for unregistered health practitioners, or an interim prohibition order or a prohibition order or a decision to issue, revoke or revise a public statement about the health practitioner.

Otherwise, the merits review jurisdiction of the NCAT, the ADR Act and the Administrative and Equal Opportunity Division play no part in the regulation and discipline of health practitioners in NSW.

Practice and Procedure

Part 4 of the NCAT Act provides for the tribunal's practice and procedure. It is subject to particular provisions in the enabling legislation and the "*procedural rules*" (defined in section 4(1) to be the tribunal rules and the regulations) (section 35). See also the schedules for each division of the tribunal. Note that these schedules actually override any general provisions as to practice and procedure in the NCAT Act.

Section 36(1) provides the "*guiding principle*" for the Act and the procedural rules namely to facilitate the "*just, quick and cheap resolution of the real issues in the proceedings*". These same principles apply to the Supreme Court of NSW by virtue of section 56(1) of the *Civil Procedure Act 2005* (NSW).

NCAT is required to give effect to this guiding principle when it exercises any power given to it by the NCAT Act or the procedural rules, or when it interprets any provision of the Act, or the procedural rules (section 36(2)). Each party to NCAT proceedings and each barrister or solicitor representing them is also "*under a duty to co-operate with the tribunal*". Their duty to give effect to the guiding principle includes participating in the processes of the tribunal and complying with directions and orders of the tribunal (section 36(3)).

In addition, the practice and procedure of NCAT is to facilitate the resolution of the issues so that the cost to the parties and the tribunal is proportionate to the importance and complexity of the subject-matter of the proceedings (section 36(4)). This provision will be particularly important in privacy and freedom of information cases, which are often conducted by self-represented litigants.

Mediation and other forms of alternative dispute resolution processes are provided for in section 37. The tribunal may, where it considers it appropriate, use (or require parties to proceedings to use) any one or more resolution processes. "Resolution processes" are defined

as any process in which parties to proceedings are assisted to resolve or narrow the issues between them in the proceedings.

Section 38 sets out the general procedure of the tribunal. The tribunal may determine its own procedure in relation to any matter for which the NCAT Act or the procedural rules do not otherwise make provision (section 38(1)).

The tribunal is not bound by the rules of evidence and may inquire into and inform itself on any matter in such manner as it thinks fit, subject to the rules of natural justice (section 38(2)). It is important to note, that the rules of evidence do apply in the tribunal's enforcement jurisdiction and section 128 (Privilege in respect of self-incrimination) of the *Evidence Act 1995* applies to all proceedings – section 38(3) and in disciplinary matters under the *Legal Profession Act* 2004.

In addition to this, the tribunal is to act with as little formality as the circumstances of the case permit and according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms (section 38(4)).

By section 38(5), the tribunal is to take such measures as are reasonably practicable:

1. to ensure that the parties to the proceedings before it understand the nature of the proceedings, and
2. if requested to do so—to explain to the parties any aspect of the procedure of the tribunal, or any decision or ruling made by the tribunal, that relates to the proceedings, and
3. to ensure that the parties have a reasonable opportunity to be heard or otherwise have their submissions considered in the proceedings.

Further, by section 38(6) the tribunal:

1. is to ensure that all relevant material is disclosed to the tribunal so as to enable it to determine all of the relevant facts in issue in any proceedings, and
2. may require evidence or argument to be presented orally or in writing, and
3. in the case of a hearing—may require the presentation of the respective cases of the parties before it to be limited to the periods of time that it determines are reasonably necessary for the fair and adequate presentation of the cases.

These provisions are the standard provisions applicable to independent external merits appeals tribunals in Australia – see, *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286, at [140]-[141], Kiefel J stated (with Crennan J agreeing (at [117]); at [96] to [100] (per Hayne and Heydon JJ); at [30] to [32], [33] to [38],[39] to [42] (per Kirby J). Note, some of the divisions are not quite merits review jurisdiction. For example, the Occupational division and the work of the former CTTT are original jurisdiction matters, more amenable to the work of quasi-judicial tribunals or courts. How this will square with section 38 remains to be seen.

Commencing proceedings in NCAT

An application may be made to the tribunal including a complaint, referral or other mechanism as provided in the enabling legislation for a matter to be brought to the tribunal for a decision (section 30). An application or an appeal is to be made in the time and manner prescribed by the enabling legislation or the procedural rules (section 40). The tribunal is empowered to extend time, even if the time has expired and in spite of what the enabling legislation might provide (section 41).

Pending applications or appeals do not stay the operation or effect of the original decision (section 42). However, the tribunal is empowered to make "*such orders (whether with or without conditions) staying or otherwise affecting the operation of a decision to which a pending general application or appeal relates as it considers appropriate to secure the effectiveness of the determination of the application or appeal*" (section 43(3)) (cf: ss 60 to 62 of the former ADT Act).

Participation in Proceedings

The tribunal may order that a person be joined as a party to proceedings if the tribunal considers that the person should be joined as a party (section 44(1)). This is a very wide joinder test. See, the limited test in s 67(1) of the former ADT Act (parties to proceedings before tribunal).

There is a right to intervene in proceedings and to "*be heard*" for the Attorney General,

the Minister who administers the relevant legislation, and any other person who is authorised by the NCAT Act, enabling legislation or the procedural rules to intervene in the proceedings (section 44(4)). If a Minister intervenes in proceedings, costs may be paid by the Minister to a party where the costs to the party have increased as a result of the intervention as per section 44(5).

The general rule is that legal representation of parties is not permitted in NCAT except by leave. Section 45(1) provides a party has the carriage of the party's own case and is not entitled to be represented by any person unless the tribunal grants leave. Legal representation is permitted without leave in an internal appeal to the Appeal Panel if the party had a right to representation below (section 45(2)). Exceptions exist to this rule in the division schedules for particular matters (see below, including for health professionals in the Occupational Division).

The tribunal may call any witness of its own motion, and examine them on oath, or affirmation, or require evidence to be verified by a statutory declaration, and compel any witness to answer questions which the tribunal considers to be relevant in any proceedings (section 46(1)). It can issue a summons (or direct a registrar to issue a summons) (section 46(2) and 48). Witness allowances and expenses can be paid if the regulations permit it (section 47).

Conduct of proceedings

Pursuant to section 49, a tribunal hearing is to be open to the public unless the tribunal orders otherwise. It may (of its own motion or on the application of a party) order that a hearing be conducted wholly or partly in private if satisfied by reason of the confidential nature of the evidence, or subject matter, or for any other reason.

The Tribunal may dispense with a hearing if written submissions or any other documents or material lodged permit it to adequately determine the matter in the absence of the parties (section 50(2)and (3)). This is a change from the former ADT Act, where consent of the parties was necessary.

By section 54, if the president consents, the tribunal (including when constituted as an Appeal Panel) may, of its own motion or at the request of a party, refer a question of law arising in the proceedings to the Supreme Court for the opinion of the Court (cf: s 789A of the former *ADT Act*).

As to the costs of proceedings in the tribunal – section 60 – the primary position is that each party to proceedings in the tribunal is to pay the party's own costs. Costs may be awarded but only if the tribunal is "*satisfied*" that there are "*special circumstances*" warranting such an order (cf: section 88 of the former ADT Act, where the test started off as special circumstances, but was later amended to a test of fairness). In determining whether there are special circumstances, the tribunal may have regard to the following:

1. whether a party has conducted the proceedings in a way that unnecessarily disadvantaged another party to the proceedings,
2. whether a party has been responsible for prolonging unreasonably the time taken to complete the proceedings,
3. the relative strengths of the claims made by each of the parties, including whether a party has made a claim that has no tenable basis in fact or law,
4. the nature and complexity of the proceedings,
5. whether the proceedings were frivolous or vexatious or otherwise misconceived or lacking in substance,
6. whether a party has refused or failed to comply with the duty imposed by section 36(3), the guiding principle and whether the party facilitated the just, quick and cheap resolution of the real issues in the proceedings, and
7. any other matter that the tribunal considers relevant.

The Division Schedules provide exceptions to the general position on costs.

Reasons for the Decision

The tribunal and the appeal panel must give notice of any decision made on the proceedings (section 62(1)). If no reasons are provided, any party may, within 28 days of being given notice of a decision, request the tribunal to provide a written statement of reasons for its decision. The statement must be provided within 28 days after the request is made (section 62(2). Written reasons must include the following:

1. the findings on material questions of fact, referring to the evidence or other material on which those findings were based,

2. the tribunal's understanding of the applicable law,
3. the reasoning processes that lead the tribunal to the conclusions it made.

(cf section 49(3) and 89 of the former ADT Act). The tribunal also has the power to correct obvious errors on the face of decisions (section 63).

Information Disclosure

The tribunal may on its own motion, or on application, restrict disclosures in proceedings if it is satisfied that it is desirable to do so by reason of the confidential nature of any evidence, or subject matter, or for any other reason. The tribunal can restrict publication or prohibit publication or broadcast of a witness or evidence (section 64). Certain proceedings may not be published at all for example, proceedings in the Guardianship Division, including appeals (section 65).

As for freedom of information, the NCAT Act does not authorise any person or body, to disclose information to another person or body, if there is an overriding public interest against the disclosure of the information under the *Government Information (Public Access) Act 2009* (NSW) (*GIPPA*) (section 66). Further, if there is a disclosure to the tribunal under *GIPPA*, the tribunal is to do all things necessary to ensure that the information is not disclosed to any person other than a member of the tribunal as constituted for the purpose of the proceedings unless the person or body disclosing the information to the tribunal consents to the further disclosure (section 66(3)). Sections 67 and 68 protect the disclosure of privileged documents in tribunal proceedings.

Enforcement

Unlike the former ADT, the tribunal has its own enforcement regime – sections 71 to 78. For contempt committed in the face of the tribunal or in a hearing, the tribunal has the same powers as the District Court – section 73. It can also refer a contempt matter to the Supreme Court for determination (section 73(5)).

There are detailed provisions dealing with contraventions of civil penalty provisions of the NCAT Act (section 77). There are also provisions for civil enforcement of monetary

decisions of the tribunal (section 78), which allow a certificate to be filed in a court of competent jurisdiction for further recovery proceedings to continue.

Appeals

An external appeal may be made to the tribunal by a person entitled to do so under enabling legislation on any basis or grounds provided for in that legislation (section 79). There are lots of provisions for external appeals in the regulation of health professionals. A normal layer of tribunal review is usually skipped and the first time the tribunal hears the matter here is as an external appeal.

An internal appeal may be made to an Appeal Panel by a party to a tribunal decision from an "*internally appealable decision*" (section 80). Interlocutory decisions may be appealed with leave. Other appeals are heard "*as of right*" on any question of law, or with the leave of the Appeal Panel, on any other grounds (section 80(2)). There are few, if any, such appeals available to health professionals. The intention is to by-pass them – to go straight to the Supreme Court from a single layer tribunal hearing..

The Appeal Panel has wide powers to deal with an internal appeal. The Appeal Panel may decide to deal with it by way of a new hearing if it considers that the grounds for the appeal warrant a new hearing, and, it can permit such fresh evidence, or evidence in addition to or in substitution for the evidence received by the tribunal at first instance, to be given in the new hearing as it considers appropriate (section 80(3)).

In determining an internal appeal (section 81), the Appeal Panel may make such orders as it considers appropriate in light of its decision on the appeal, including (but not limited to) orders that provide for any one or more of the following:

(a) the appeal to be allowed or dismissed,
(b) the decision under appeal to be confirmed, affirmed or varied,
(c) the decision under appeal to be quashed or set aside,
(d) the decision under appeal to be quashed or set aside and for another decision to be substituted for it,
(e) the whole or any part of the case to be reconsidered by the tribunal, either with or without further evidence, in accordance with the directions of the Appeal

Panel.

On appeals, the Appeal Panel may exercise all the functions that are conferred or imposed by the Act or other legislation on the tribunal at first instance when varying, or making a decision in substitution for, the decision under appeal. The tribunal, will be able to stand in the shoes of the tribunal below, which itself, could stand in the shoes of the original administrative decision-maker - *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286.

Appeals to Courts

Subject to what is provided for in the division schedules or an enabling Act, the NCAT Act provides for limited appeals *with leave* to the Supreme Court (if the tribunal was constituted by one or more senior judicial officers) and for similar appeals to the District Court in civil penalty matters (but only if the tribunal or appeal panel was not constituted, by or with, any senior judicial officers) (section 83(1) & (2)). The tribunal or its members cannot be made a party to an appeal (section 84(3)).

A party may appeal:

1. any decision made by an Appeal Panel in an internal appeal,
2. any decision made by the tribunal in an external appeal, and
3. any decision made by the tribunal in proceedings in which a civil penalty has been imposed by the tribunal in exercise of its enforcement or general jurisdiction (section 82(1).

A party to an external or internal appeal may, with the leave of the Supreme Court, appeal on a question of law to the Court against any decision made by the tribunal in the proceedings (section 83(1)). A civil penalty matter may be appealed to an appropriate appeal court for the appeal (without leave) on a question of law (section 83(2)) (*ie;* The Supreme Court or the District Court, depending on whether the tribunal was constituted by "*senior judicial officers*" – defined in section 82(3)).

On any appeal, the court hearing the appeal may make such orders as it considers appropriate in light of its decision on the appeal, including (but not limited to) the following:

1. an order affirming, varying or setting aside the decision of the tribunal,
2. an order remitting the case to be heard and decided again by the tribunal (either with or without the hearing of further evidence) in accordance with the directions of the court.

In civil penalty matters, the appellate court may substitute its own decision for the decision of the tribunal that is under appeal (section 83(4)).

There is no automatic stay of the operation of a decision of the Appeal Panel. It must be obtained at NCAT or from the appellate court (section 83(5)).

These limited appeal provisions to the Supreme Court are new. There was a right of appeal to the Supreme Court in the ADT Act (section 119 of the ADT Act) as of right "*on a question of law*" (but with leave on interlocutory and consent and costs decisions). Now, leave to appeal is required in all cases from NCAT's Appeal Panel and external appeals.

Judicial review (as of right) is unaffected by these provisions. Section 69 of the *Supreme Court Act (NSW)* 1970 and Part 59 of the *Uniform Civil Procedure Rules 2005* would apply to such matters.

The Division Schedules

The particular work and jurisdiction of the divisions is set out in the schedules to the NCAT Act. Each schedule deals broadly with special provisions regarding composition of the division (usually a division head and appointed members), functions of the division, special NCAT constitution requirements, special practice and procedure requirements (including any special rights of legal representation); appeal rights – both to the Appeal Panel and/or the Supreme Court or other courts.

Schedule 3 Administrative and Equal Opportunity Division

This schedule sets out the functions of the Administrative and Equal Opportunity Division. Broadly speaking, this division covers:

1. Freedom of Information (GIPPA)
2. Privacy
3. Community services
4. Equal opportunity
5. Discrimination
6. Victims services
7. Job and firearm licensing
8. State revenue
9. Working with children checks
10. Charity referees
11. Land matters

Thirteen Acts are listed there as giving jurisdiction to this division. However, Schedule 3, clause 3(1)(b) provides that the division's work includes "*any other function of the Tribunal in relation to legislation that is not specifically allocated to any other Division of the Tribunal by another Division Schedule for a Division*".

The tribunal is constituted differently in Schedule 3 for different matters (Schedule 3, clauses 4-8). There is a general right of legal representation in the division, no leave is required (Schedule 3, clause 9 – cf section 45) except for matters under the *Community Services (Complaints, Reviews and Monitoring) Act 1993*).

There are provisions as to who may be a party in some jurisdictions and special provisions about appeal rights. Direct appeal to the Supreme Court on a question of law is provided for regarding decisions under the *Child Protection (Working with Children) Act 2012* and the *Commission for Children and Young People Act 1998* (Schedule 3 clause 17). An appeal direct to the Land and Environment Court is provided for regarding "*lands legislation*" matters (Schedule 3, 18).

Schedule 4 Consumer and Commercial Division

This division deals with the following types of matters:

1. Consumer claims
2. Commercial matters
3. Home building
4. Motor vehicles

5. Residential parks
6. Retirement villages
7. Social housing
8. Strata & community schemes
9. Residential tenancies
10. Retail leases
11. Dividing fences

There is no right of legal representation for this division, except for *Retail Leases Act 1994* matters and for those granted legal assistance under Division 2 of Part 2 of the *Fair Trading Act 1987* (Schedule 4, clause 7). Everyone else is subject to section 45, with no right of representation except by leave.

Schedule 4, clause 12 outlines complicated appeals provisions for this division. An internal appeal is available as of right (section 80(2)(b)) on a question of law or (with leave) on any other grounds. However, an appeal <u>from this division</u> may only be made with leave from the Appeal Panel if the Appeal Panel is "*satisfied*" that the appellant has suffered a substantial miscarriage of justice because the decision of the tribunal under appeal:

1. was not fair and equitable, or
2. was against the weight of evidence, or
3. significant new evidence has arisen (being evidence that was not reasonably available earlier).

An internal appeal may <u>only</u> be made on a question of law and not on any other ground for a corporation where the first instance jurisdiction was Schedule 3 of the *Credit (Commonwealth Powers) Act 2010*, or the appeal is an appeal against an order of the tribunal for the termination of a tenancy under the *Residential Tenancies Act 2010* and a warrant of possession has been executed in relation to that order (Schedule 4, clause 12).

Schedule 6 Guardianship Division

This division hears matters concerning:

1. Appointment of a guardian
2. Appointment of a financial manager
3. Review of enduring guardianship
4. Review of power of attorney and revocation

5. Medical or dental treatment
6. Clinical trials
7. Review of orders

This division, when exercising substantive functions, must be constituted as a three-member tribunal, comprising a lawyer, a member with professional qualifications and a member with community based qualifications (Schedule 6, clause 4(1)).

Legal representation is granted without leave, but only in respect of matters under section 175 of the *Children and Young Persons (Care and Protection) Act 1998* (carrying out special medical treatment on a child). Everyone else must seek leave if representation is desired, section 45.

There are complex appeal provisions both to the Appeal Panel and the Supreme Court, in clause 12-14.

Amendments to the *Administrative Decisions Tribunal Act 1997*

As mentioned, on the establishment day, this Act became known as the *Administrative Decisions Review Act 1997*. The long title was replaced and it became an Act "*to provide for the administrative review by the Civil and Administrative Tribunal of certain decisions of administrators*".

A new objects section is provided in section 3 of the ADR Act as follows:

> "The objects of this Act are as follows:
>
> (a) to provide a preliminary process for the internal review of administratively reviewable decisions before the administrative review of such decisions by the Tribunal under this Act,
> (b) to require administrators making administratively reviewable decisions to notify persons of decisions affecting them and of any review rights they might have and to provide reasons for decisions of administrators on request,
> (c) to foster an atmosphere in which administrative review by the Tribunal is viewed positively as a means of enhancing the delivery of services and programs,
> (d) to promote and effect compliance by administrators with legislation enacted by Parliament for the benefit of the citizens of New South Wales."

The main new concept is that of an "*administratively reviewable decision*" which is defined in section 7 to mean a decision of an administrator over which, the tribunal has administrative review jurisdiction (in the Administrative and Equal Opportunity Division). The tribunal has such jurisdiction if "*enabling legislation*" gives it to the tribunal (section 9). An application for review to the tribunal can only be made by an interested person (section 55). Subject to changes in terminology, there remains provision for formal internal reviews and reasons to be provided.

The administrator still has a duty to lodge with the tribunal the relevant documents relating to the decision under review (section 58).

The regulations are renamed the *Administrative Decisions Review Regulation 2009* and amended. The *Administrative Decisions Tribunal Rules 1998* are repealed. The remainder of the old ADT Act is largely omitted, rendering the new amended version as merely support for the jurisdiction and work of the NCAT's Administrative and Equal Opportunity Division.

Schedule 5 - The Occupational Division - Framework

This division deals with:

1. Legal practitioners
2. Health practitioners
3. Architects
4. Local Government pecuniary interests and discipline
5. Taxi licences
6. Veterinarians
7. Surveyors
8. Building professionals

"Health practitioners" are defined in the NCAT Act (Schedule 5, Division 3, clause 8) to have the same meaning as in the National Law, and includes a student within the meaning of that Law. They are defined in section 3 of the National Law as:

"an individual who practises a "health profession"".

"health profession" means the following professions, and includes a recognised specialty in any of the following professions—

(a) Aboriginal and Torres Strait Islander health practice;
(b) Chinese medicine;
(c) chiropractic;
(d) dental (including the profession of a dentist, dental therapist, dental hygienist, dental prosthetist and oral health therapist);
(e) medical;
(f) medical radiation practice;
(g) nursing and midwifery;
(h) occupational therapy;
(i) optometry;
(j) osteopathy;
(k) pharmacy;
(l) physiotherapy;
(m) podiatry;
(n) psychology.

In all matters in this division, legal representation is permitted without leave of the tribunal (Schedule 5, clause 27 – *cf* section 45).

Schedule 5 contains numerous special provisions specific to the individual occupations concerned. I will concentrate on the health profession here only.

Some particular matters in this division for health professionals to note are as follows:

By clause 13 of Schedule 5 of the NCAT Act, the tribunal must be constituted with members according to the National Law. Those provisions are principally in section 165B (read with clauses 12 and 13 of the NCAT Act). In essence, if a complaint is referred to the tribunal or there is an application or appeal to it under the National Law, the tribunal must first inform the relevant professional council (e.g. the Medical Council of NSW) and that council must select three persons (whether they are division members or not) to sit as members of the tribunal in the proceedings. In ordinary cases the tribunal is to be constituted by one division member, a lawyer of seven years standing or, if the matter involves a doctor, one division member who is a senior judicial officer, two health practitioners and one lay person.

In matters involving appeals restricted to points of law, the tribunal is to be constituted by a Division member who is a senior judicial officer (if the matter involves a doctor) or, a lawyer of seven years standing.

The rules of evidence do not apply in the Occupational Division (except in relation to legal practitioners).

There is a complicated provision for appeals from the tribunal in the occupational division relating to health professionals. Most matters, including the legal profession and health practitioners, appear to go on appeal to the Supreme Court (bypassing the NCAT's Appeal Panel) (Schedule 5, clause 29). There is also provision for "external appeals" to go direct to the appeal panel of NCAT in some matters. Such an appeal bypasses the bottom layer of the tribunal's ordinary structure.

In all cases, the Supreme Court's judicial review or administrative law jurisdiction is untouched and therefore unaffected by the legislative regime relating to health practitioners – section 69 of the *Supreme Court Act 1970* (NSW).

The Discipline and Regulation of Health Practitioners

Before looking further at the NSW system one should bear in mind there is a long established and very active Commonwealth disciplinary system (Professional Services Review) that applies to all specialist practitioners in Australia equally as well as to GPs in respect of "inappropriate practice" - see, section 82 and Pt V AA of the *Health Insurance Act 1973* (Cth). There are about 24,000 Medicare registered GPs practicing in Australia, and they have received the bulk of the Commonwealth's attention in this area to date. They are also the busiest and the naughtiest doctors (that we know of).

There are many State-based (but National) schemes that are in place. For example, the former NSW Medical Board, now, the Medical Council of NSW and the Medical Tribunal of NSW are governed by the National Law.

There is also the Australian Health Practitioner Regulation Agency (AHPRA), which is the organisation now responsible for the implementation of the National Registration and Accreditation Scheme across Australia.

It covers 580,000 health practitioners across Australia. It provides for registration and regulation of all health practitioners.

In NSW, medical practitioners will be most familiar with the operation of the Health Care Complaints Commission ("HCCC"), the Medical Council of NSW and the former Medical Tribunal of NSW (now, NCAT). That is where very naughty doctors go in NSW.

The NSW Coroners Court also deals with doctors and other health practitioners who have (unwittingly or not) killed their patients. Their actions are scrutinised in considerable detail in public hearings and reported on there. Coroners in NSW investigate about 6,000 reportable deaths annually.

As we have seen, on 1 January 2014, the Medical Tribunal of NSW was folded into the new "super tribunal" NCAT.

How do Complaints First Get Made and Dealt With?

Part 8 of the National Law has detailed provisions for making a complaint about a registered health practitioner (sections 144 to 144G of the National Law). Any person can make a complaint. It can be made to the relevant professional council, the HCCC or the Director General. It needs to be in writing and further particulars may need to be required from the complainant. Any complaint needs to be notified to the National Board (for example, the Medical Board) even if it is self-generated (for example a complaint by the HCCC).

Complaints may then be referred to another body including, to the tribunal. In serious matters the complaint must be sent to the tribunal. The HCCC may only refer a complaint to the tribunal after consultation with the relevant professional council (section 145C(1)(a)).

The Toolkit for Health Practitioner NCAT Matters

A practitioner in this area hoping to appear before the NCAT in any matter must be aware of the following:

- The NCAT Act, especially schedule 5;
- *Civil and Administrative Regulations 2013* (NSW);
- *Civil and Administrative Rules 2014* (NSW);
- *Health Practitioner Regulation National Law* (NSW)
- *Health Care Complaints Act 1993* (NSW);
- NCAT's Procedural Direction 3 - Health Professionals Registration Appeals;
- The practice and operation of the "Health practitioner list" or the "Health list" (as is known at the NCAT)
- Relevant decisions of the NCAT
- Relevant decisions of the former Medical Tribunal
- Relevant decisions of the former ADT.

Pursuant to clause 8 of Schedule 5 of the NCAT Act, the tribunal established a Health Practitioner Division List within the Occupational Division – styled informally as the Health List. The List Manager is granted enormous power under the NCAT Act and the National Law. Ms Jenny Boland is the current List Manager at NCAT.

All proceedings under the National Law are entered into and managed in that List (clause 10(2) of Schedule 5 of NCAT Act). The tribunal, when exercising its Division functions for the purposes of the National Law, is under a duty to observe the objectives and principles referred to in sections 3 and 3A of the National Law (clause 9(1) of Schedule 5 of NCAT Act), namely to maintain national registration and accreditation scheme for the regulation of health practitioners and to operate the scheme in a "transparent, accountable, efficient, effective and fair way" (section 3(3)(a)).

The objective of the Act and the guiding principle to be used in the exercise of functions under the National Law is stated to be the protection of the health and safety of the public. It

is “the” paramount consideration in any tribunal exercise (section 3A).

NCAT’s Jurisdiction

There are a number of ways a health profession matter can work its way into the NCAT. It has jurisdiction in the following areas:

First – An Appeal under Part 8 of the National Law, section 158, provides for appeals to the tribunal against decisions of the Assessment Committees or, a Professional Standards Committee. The Assessment Committees are governed by sections 172 to 172C. These are committees of three registered health practitioners and one person nominated by the Minister. The Professional Standards Committee is governed by sections 169 to 171F of the National Law. Such committees are established when a complaint is referred by a relevant professional council about a health practitioner. That committee consists of two registered health practitioners in the same field as the person the subject of the complaint, one Australian lawyer and one other person nominated by the Minister. The committee has enquiries and procedure and power under the National Law. If the committee becomes aware of a matter that, if it was substantiated, may provide the grounds for suspension or cancellation of the practitioner, it must then refer the complaint to the tribunal for determination (section 171D).

Second: A referral to the tribunal under section 171D (as indicated)

Third: Part 8 of the National law provides for “reviews” to a number of entities listed in section 163(1) including the tribunal. In this (slightly convoluted) process of identifying the appropriate review body, if it is the tribunal, a person may apply to it for a review of a prohibition order made in relation to that purpose or an order that the person’s registration be suspended, cancelled or disqualified or that conditions be imposed on that person’s registration.

The review is as of right (section 163A) but it cannot be made if the terms of the order provide that it cannot be made (!) or, while an appeal is pending in the tribunal or the Supreme Court in respect of the same matter.

This review is available in respect of decisions by an Assessment Committee, a Professional Standards Committee, a Performance Review Panel, the Medical Council (or its equivalent), the tribunal, the tribunal list manager and the Supreme Court. This list is not exhaustive.

The nature of the review is set out in section 163B and the tribunal or the appropriate review body "must conduct an enquiry into" the review and it can, *inter-alia*, dismiss the application, make a reinstatement order, shorten the period of suspension or make an order removing or adjusting the conditions imposed.

Fourth: Appeals from Registration Decisions. Sections 175 to 175C of the National Law provide for "appeals" for persons who are the subject of decisions by the National Board (such as the Medical Board of Australia) to refuse to register a practitioner or to endorse their registration or to renew their registration. It also applies to imposing or changing conditions on a registration or to refuse to change or revoke an undertaking given by the health practitioner to the National Board.

Such decisions are defined (in section 175(1)) as "appealable decisions" and the appeal is to "the responsible tribunal for the participating jurisdiction".

Such appeals are made to the Appeal Panel of NCAT and they are styled as "external appeals" within that tribunal (thus, in effect, skipping the first layer of tribunal review).

Parties to the proceedings are the medical professional and the National Board.

There is a special provision here as to costs (section 175B), which provides that the tribunal may make any order about costs "*it considers appropriate for the proceedings*". This provision, of course, overrides anything in the NCAT Act.

The tribunal will be empowered to hear the matter and confirm, amend or substitute another decision for the appealable decision (section 175C).

Fifth: Appeals against decisions or action of the Performance Review Panel. Such appeals are provided for in section 160 and 160A of the National Law. Performance Review Panels are

formed from time to time pursuant to sections 156 to 156F and they must conduct a review of the professional performance of a registered health practitioner. This is usually done after complaints are made about a particular health practice. A "performance assessment" may be carried out by a relevant professional council pursuant to section 155 by an assessor. That assessor in essence goes into the practitioner's private practice and interviews people and inspects records. The Panel is then convened.

The actions available to the Panel are listed in section 156C and they include imposing conditions, requiring an educational course be undertaken, requiring a report from the practitioner, requiring the practitioner to take advice or referring a complaint be made to the relevant professional council. Reasons for any such decision must be given (section 156E).

There are two kinds of appeals from panel decisions. Firstly, under section 160, there is an appeal to the tribunal which is expressed to be an appeal "by way of rehearing" and fresh evidence or additional evidence may be adduced (section 160(2)). The tribunal is empowered to dismiss the appeal or to make any finding that the panel could have made.

Alternatively, section 160A provides for an appeal to the tribunal "with respect to a point of law". Such an appeal will be heard by the tribunal as an "external appeal" thus skipping the bottom layer of the tribunal. An appeal on a point of law may be taken during a performance review or even before the performance review commences. If an appeal is made, an automatic stay of the performance review is to take effect (section 160(3)) and the panel is bound by any determination made by the appeal panel of the NCAT.

Sixth: An unregistered health practitioner may apply to the tribunal for an "administrative review" under the *Administrative Decisions Review Act 1997* (NSW) of the following decisions under section 41AA or 41A of the *Health Care Complaints Act 1993* (NSW) to review a decision that the health practitioner has breached a code of conduct for unregistered health practitioners, or an interim prohibition order or a prohibition order or a decision to issue, revoke or revise a public statement about the health practitioner.

Codes of conduct for unregistered health practitioners are provided for by way of regulations made under section 100 of the *Public Health Act 2010* (NSW).

Review applications are to be made within 28 days after the day on which the health practitioner is provided with the statement of the decision (section 41C(2) HCCA Act).

It appears likely that such matters will be heard in the Administrative and Equal Opportunity Division of the tribunal instead of the Occupational Division (Schedule 5 of the NCAT Act, clause 10).

Such review matters will be heard as a de novo merits review matters in the tribunal proper.

Seventh: Finally, there is the traditional disciplinary jurisdiction in relation to health practitioners that is possessed by the tribunal. The first kind of disciplinary power is a "referral of a recommendation" to the tribunal (under section 146D) that a health practitioner's registration be suspended for a period or cancelled if the Committee is satisfied the practitioner does not have sufficient physical and mental capacity to practise the practitioner's profession. Also, if he or she is no longer registered, the Committee may recommend that the person be disqualified from being registered.

The tribunal may (section 146D(4)) make an order in the terms recommended (there might be a bootstraps argument to be made here) or another order about the suspension or cancellation "as the tribunal thinks proper based on the findings of the Committee". This is an unusual provision and in the absence of any provision obviously stating the nature of the tribunal's review jurisdiction here it would tend to suggest that the tribunal is <u>not</u> undertaking a *de novo* review jurisdiction here. It would be examining the correctness of the findings of the committee. This does not appear to have been determined at this stage.

The Committee may also refer contraventions of conditions imposed by a Committee direction to the tribunal (section 146E).

Appeals to the tribunal from Committee decisions is provided for in section 158 and 158A. As discussed, these are "external appeals".

The primary way to get a disciplinary matter into the tribunal is by way of sections 145B, C &

D of the National Law. In short, if a complaint is made against a practitioner, before any action is taken the relevant professional council and the HCCC must confer to see if any agreement can be reached between them as to the cause of action (section 145A of the National Law).

Among the number of actions available to the relevant professional council is that it may refer the complaint to the tribunal (section 145B). Similarly, the HCCC is also given a number of courses of action including that it may refer a complaint to the tribunal (section 145C).

In all cases, serious complaints must be referred to the tribunal in NSW. The relevant professional council and the HCCC are under a duty to refer complaints if they form the opinion that, if substantiated, it provides grounds for the suspension or cancellation of a practitioner or student's registration (but not at the complaint relates to the physical or mental capacity of the practitioner to work in his or her profession) (section 145D).

A relevant professional council may also refer to the tribunal the failure to comply with an order or conditions made by the tribunal to the tribunal itself (section 149D).

Once seized of this jurisdiction, the tribunal is possessed of extensive "disciplinary powers" set out in sections 149 to 149D.

The tribunal may exercise these disciplinary powers if it finds the subject-matter of a complaint against the practitioner to have been proved or the health practitioner admits it in writing (section 149). These disciplinary powers include, among other things, the ability to caution or reprimand, impose appropriate conditions on registration or require the performance of educational courses. In certain circumstances the tribunal can also impose a fine of not more than 250 penalty units (x $110 = $27,500 fine) (section 149B).

If the tribunal finds that the practitioner is guilty of "professional misconduct" (defined in section 139E), or that he or she is not competent to practice medicine, the tribunal may suspend or cancel the practitioner's registration and a prohibition order may be made as well prohibiting them from providing health services in the future.

There are already a number of cases handed down this year by the tribunal that deal with health practitioners and medical practitioners in particular concerning these kinds of matters that were the stock in trade of the Medical Tribunal when it operated. For example: there is *Health Care Complaints Commission v Naiyer (No 1)* [2014] NSWCATOD 54 and *Health Care Complaints Commission v Naiyer (No 2)* [2014] NSWCATOD 58 which is a sad case about a GP who could not stop hitting on his patients who were young single women. As in seducing them or touching them inappropriately or just asking them out for coffee. His registration was cancelled for at least 18 months.

There are cases this year about GPs who inappropriately prescribe benzodiazepines and other drugs of dependence - *Health Care Complaints Commission v Townsend* [2014] NSWCATOD 65 and *Health Care Complaints Commission v Kwan* [2014] NSWCATOD 72.

There was a nurse who administered botox to women in a day spa routinely and illegally (she was suspended for three months) - *HCCC v Piper* [2014] NSWCATOD 62.

Appeals for Health Practitioners

Clause 29 of Schedule 5 to the NCAT Act provides for appeal of certain 'profession decisions' directly to the Supreme Court.

Clause 29(1) provides that a decision under the National Law (except certain decisions in relation to pharmacies) is not an internally appealable decision. Instead, a party to such a professional decision may appeal directly to the Supreme Court (Clause 29(2)). An appeal may be made as of right on any question of law, or with the leave of the court, on any other ground (Clause 29(4)).

In appeals from decisions of the tribunal under the National Law, the Supreme Court may decide to deal with the appeal by way of a new hearing if it considers that the grounds for appeal so warrant (Clause 29(7)(a)). In such a hearing, the Supreme Court may permit such fresh evidence as it considers appropriate in the circumstances. It is open to the Supreme Court to make such orders as it considers appropriate in light of its decision on appeal (Clause 29(8)).

Conclusion

These are all significant changes. The new tribunal creates a whole new landscape for administrative review and quasi-judicial civil matters in New South Wales. The potential benefits are enormous, to the parties and to the legal profession and the tribunal members themselves. In time, the tribunal will develop a learned culture based on shared experience, skill and expertise. The ADT developed in this fashion over many years and soon operated as an identifiable single entity, rather than as a collection of members hearing diverse matters in different places. Whatever "club" culture existed in NSW within the many varied tribunals and boards should now disappear and the benefits of amalgamation will become manifest.

Whether it will become "*a new era of accessible justice*" in NSW, as opined by the then NSW Attorney General in his second reading speech (30 October 2013 LA, Hansard page64) it is too early to tell.

If the tribunal is provided with sufficient resources and afforded sufficient support and encouragement from government, the parties and the legal profession, it is set to become Australia's pre-eminent super tribunal over the next few years.

Thank you