NCAT Jurisdiction and Appearing in NCAT Matters

A paper delivered by Mark Robinson SC to a Legalwise Seminar
NCAT Practice and Procedure in Sydney on 24 March 2020

I am asked to speak to you today about the Civil and Administrative Tribunal of New South Wales (NCAT). I will also cover:

- An overview of NCAT'S jurisdiction and structure;
- Ascertaining when NCAT proceedings should be commenced;
- Appearing in NCAT matters: practical issues; and
- Procedural standards, requirements and considerations in NCAT matters.

It is a place, like the Local Court and the District Court, where lawyers spend a fair bit of their time. It would pay you well to understand it and to practice there. It is complex and demanding. However, it will be worth your investment in time and energy.

It can be fun appearing there as well – but once you have first mastered its complexities.

The Civil and Administrative Tribunal of New South Wales (NCAT)

The *Civil and Administrative Tribunal Act 2013* (NSW) ("**NCAT Act**") was passed in March 2013. The practical effect of this Act was 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*" which was 1 January 2014.

The legislation extensively amended the "*Administrative Decisions Tribunal Act 1997*" and renamed it the "*Administrative Decisions Review Act 1997*" ("**ADR Act**"). It conferred on NCAT exclusive jurisdiction for the review of "*administratively reviewable decisions*" (formerly known as, "*reviewable decisions*").

Other cognate legislation was passed effectively transferring the functions of the existing tribunals to NCAT, and it repealed and amended legislation, consequent on the establishment

of the new tribunal. Parliament's intention was to attempt to maintain, as far as possible, each former tribunal's practice, procedure and diversity, while bringing them all under one roof.

To this end, there were extensive savings and transitional provisions and provisions that caused all 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, all matters that were current in 2013 in the various existing tribunals were deemed to have been "*duly commenced*" in the new tribunal (Schedule 2, clause 7)).

From all this legislative action, we are now left with the NCAT Act and the ADR Act and a significant body of related legislation, rules and tribunal decisions that have emerged since the establishment day (1 January 2014).

The Super Tribunal

The super tribunal is headed by a Supreme Court judge (as per section 13). The first appointment of a President was Justice Robertson Wright. The current President is Justice Lea Armstrong, former NSW Crown Solicitor. Ms Cathy Szczygielski is currently the principal registrar of the tribunal (section 4(1)).

The tribunal operates from two principal locations in Sydney. The NCAT Principal Registry is located at Level 9, John Maddison Tower, 86-90 Goulburn Street, Sydney NSW 2000 – there is no public counter there.

The Administrative and Equal Opportunity Division and the Occupational Division (including health profession matters) operate from Level 10 John Maddison Tower.

The Guardianship Division operates from Level 6, John Maddison Tower.

The Consumer and Commercial Division operates from Level 14, Civic Tower, 66 Goulburn Street, Sydney. This division has five other registries in regional NSW at: Liverpool,

Newcastle, Penrith, Tamworth, and Wollongong.

The contact details for NCAT are as follows - phone: 1300 006228 and the tribunal web site address is: www.ncat.nsw.gov.au.

Civil and Administrative Tribunal Regulations 2013 (NSW) are 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.

The *Civil and Administrative Tribunal Rules 2014* (NSW) constitute procedural rules for the tribunal.

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

The new tribunal also includes former 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, even at a basic level, is complex. If one were to only look at the terms of the NCAT Act itself, then understanding it would be relatively easy.

However, the Act must be read together with and, it is often subject to its many Schedules (which override the body of the Act are also complex). Further, there are many dozens of other Acts, styled as "enabling Acts", that each give the tribunal jurisdiction and/or augment or replace the NCAT's power, functions and procedure in particular matters or for particular administrative decisions.

I once counted 164 such enabling NSW Acts, each giving the tribunal jurisdiction and affecting its practice and procedure in most respects. They are expanding all the time.

In understanding the tribunal's jurisdiction and power and its practice and procedure one must read the NCAT Act and the ADT Act, and:

1. The Act's Schedules (called "Division Schedules)", which prevail over the terms of the Act to the extent of any inconsistency (per section 17(3) of the NCAT Act) (and there is lots of inconsistency);
2. The relevant enabling legislation, which provides for matters to come to and be heard by the tribunal. As to the tribunal's practice and procedure, section 35 of the NCAT Act provides that enabling legislation prevails over the provisions of the Act set out in Part 4 (Practice and Procedure – sections 35 to 70 inclusive);
3. The *Civil and Administrative Tribunal Rules 2014* (NSW) which also prevail over the practice and procedure provisions of the NCAT Act (by section 35)
4. *Civil and Administrative Tribunal Regulations 2013*(NSW) which also prevail over the practice and procedure provisions of the NCAT Act (by section 35).

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

Some complexity was always inevitable, since the NCAT is structured as an amalgam of both:

1. a classic external independent administrative or merits review tribunals, such as the Commonwealth's Administrative Appeals Tribunal; and also,

2. a quasi-judicial tribunal or court, such as the former Consumer, Trader and Tenancy Tribunal.

In all, the President of NCAT is responsible for about 226 tribunal members who originated from about 29 former tribunals.

In a paper given to the NSW Bar Association on 21 March 2017 ("Administrative Review Proceedings in NCAT"), the first President of the tribunal, Justice Robertson Wright, said that:

> "[The tribunal] can be thought of as a large, multi-bodied beast with one head, the inverse of the Lernaean Hydra of Greek mythology which was a large, multi-headed beast with one body. Hesiod [a Greek poet, from around the same time as Homer] described the Hydra unflatteringly as "grisly minded". An effective advocate in merits review proceedings in NCAT does not need to be a Hercules, who slew the Hydra by clubbing off its heads and cauterising with burning brands the bleeding stumps to prevent two new heads from growing where each head had been removed. Indeed, the administrative review advocate can be most effective by understanding the beast that is NCAT, how it operates and how to tame it. With this knowledge, the advocate can avoid the Tribunal becoming grisly minded and can help it to come, calmly and rationally, to the correct and preferable decision."

He also correctly described the drafting of the legislative regime as having a "certain labyrinthine quality" and that practitioners require the skills of Theseus (one of the founding heroes in Greek mythology who fought monsters and established democracy) not to "lose the thread". He concluded:

> "The challenge for any practitioner coming to administrative review proceedings in NCAT is to master the complexity that stems from the multi-bodied nature of the Tribunal: 5 bodies of jurisdiction, 4 Divisions and the Appeal Panel. This involves understanding the relevant enabling legislation, the ADR Act, the general provisions of the NCAT Act, the Divisions Schedules, the NCAT Rules and the NCAT Regulation. It is wise to remember that the Tribunal, while multi-bodied, is not hydra-headed. Careful consideration of the legislative labyrinth will produce superior results for the willing advocate rather than attempts to club the Tribunal about the head."

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 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 division's own particular requirements including provisions for the division head, division members and division 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. She must make rules and 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 five NCAT-wide Procedural Directions that have been issued, on the following subjects:

1 Service and giving notice;
2 Summonses;
3 Expert witnesses;
4 Registrars' powers directions; and
5 Acceptance of Home Building claims

They may be found at:

http://www.ncat.nsw.gov.au/Pages/about_us/publications_and_resources/procedural_directio

ns.aspx

The President has also issued a "Guideline" on Internal Appeals (the Appeal Panel) (to provide guidance to parties on specific matters and issues that may arise) published at: https://www.ncat.nsw.gov.au/Documents/ncat_guideline_internal_appeals.pdf

There are also a number of guidelines published for the Consumer and Commercial Division (same web page) pertaining to, for example:

1 Representation of parties;
2 Suspension of operation of termination order; and
3 Termination for non-payment of rent.

There are also many Divisional Procedural Directions that pertain to each of the four divisions. These are all published on the tribunal's website, starting from: http://www.ncat.nsw.gov.au/Pages/about_us/publications_and_resources/procedural_directions.aspx

There are also some NCAT policy documents available. There is a policy document published that sets out the NCAT's practices as to the publication of reasons – see, NCAT Policy 2 - *Publishing Reasons for Decisions*.

The Tribunal's Jurisdiction

Part 3 of the NCAT Act (section 28) sets out the types or kinds of 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* (NSW), 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.

In *Burns v Corbett* [2017] NSWCA 3, *Burns v Corbett* (2018) 92 ALJR 423 and *Attorney General for NSW v Gatsby* (2018) 99 NSWLR 1 the courts determined that the Tribunal has no jurisdiction to hear disputes between "residents" of different states. Part 3A (ss 34A to 34D) has been inserted into the NCAT Act to deal with the effects of the Court of Appeal's decision in *Burns v Corbett* [2017] NSWCA 3. It provides, in effect, that where an application is made to the Tribunal in respect of federal jurisdiction (including disputes between residents of different States), a party may apply to the Local or District Court for leave to bring the proceedings in that court instead.

When to Commence Proceedings?

The easiest way to check whether your client has an appeal right available in NCAT is to read the enabling legislation defined in section 4 of the NCAT Act to mean:

> "… legislation (other than this Act or any statutory rules made under this Act) that:
> (a) provides for applications or appeals to be made to the Tribunal with respect to a specified matter or class of matters, or
> (b) otherwise enables the Tribunal to exercise functions with respect to a specified matter or class of matters.

Find the Act and search for the word "tribunal" and you should soon find a list of reviewable decisions and any special or additional powers the NCAT might have.

Appeal rights should be notified in the body of the decision itself (on administrative review matters). Section 48(1) of the *Administrative Decisions Review Act 1997* (NSW) provides:

> "An administrator who makes an administratively reviewable decision must take such steps as are reasonable in the circumstances to give any interested person notice, in writing, of the following:
> (a) the decision, and
> (b) the right of the person to have the decision reviewed."

There are exceptions.

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*). This provision reflects the common law of judicial review where the Supreme Court will always have a discretion to deny a party a remedy if a merits appeal is available elsewhere - (See the discussion of the discretion generally and citation of some of the relevant cases at *Commissioner of Taxation v Futuris Corporation Limited* (2008) 237 CLR 146 at [88]-[92] per Kirby J. See also, *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294 at 322[80] (McHugh J); and *Re Refugee Review Tribunal; Ex Parte AALA* (2000 204 CLR 82 at 108-109 [57]-[58] (Gaudron and Gummow JJ)).

Practice and Procedure

Part 4 of the NCAT Act provides for the tribunal's practice and procedure.

It is expressed to be <u>subject to</u> 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)).

Significantly, each party to NCAT proceedings and each barrister or solicitor representing them is "*under a duty to co-operate with the tribunal*". Their duty is to give effect to the guiding principle and it 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 and they can be drawn out.

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 most independent external merits review tribunals in Australia – see, *Frugtniet v Australian Securities and Investments Commission* (2019) 93 ALJR 629 at [14] to [15] and *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 deal with 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.

The tribunal's merits review of State administrative decisions is not unlike the work of the Commonwealth Administrative Appeals Tribunal. The High Court recently discussed the nature of the AAT's administrative merits review and said in *Frugtniet v Australian Securities and Investments Commission* (2019) 93 ALJR 629 at [14] to [15]:

> The enactment of the AAT Act established a new and substantially unprecedented regime of administrative merits review, distinguished principally by the AAT's jurisdiction to re-exercise the functions of original administrative decision-makers. The question for determination by the AAT on the review of an administrative decision under s 25 of the AAT Act is thus whether the decision is the correct or preferable decision. That question is required to be determined on the material before the AAT, not on the material as it was when before the original decision-maker[11]. As Bowen CJ and Deane J held in *Drake v Minister for Immigration and Ethnic Affairs*, however, and has since been affirmed by this Court in *Shi v Migration Agents Registration Authority*, the AAT is not at large. It is subject to the same general constraints as the original decision-maker and should ordinarily approach its task as though it were performing the relevant function of the original decision-maker in accordance with the law as it applied to the decision-maker at the time of the original decision.
>
> Depending on the nature of the decision the subject of review, the AAT may sometimes take into account evidence that was not before the original decision-maker, including evidence of events subsequent to the original decision. But subject to any clearly expressed contrary statutory indication, the AAT may do so only if and to the extent that the evidence is relevant to the question which the original decision-maker was bound to decide; really, as if the original decision-maker were deciding the matter at the time that it is before the AAT. The AAT cannot take into account matters which were not before the original decision-maker where to do so would change the nature of the decision or, put another way, the question before the original decision-maker. As Kiefel J observed in *Shi*, identifying the question raised by the statute for consideration will usually determine the facts that may be taken into account in connection with the decision. The issue is one of relevance, to be determined by reference to the elements of the question necessary to be addressed in reaching a decision. (footnotes omitted)

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 (and Legal Representation)

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.

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 <u>not</u> 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 <u>if</u> the party had a right to representation below (section 45(2)). Exceptions exist to this rule in many of the division

schedules for particular matters (see below, including for health professionals in the Occupational Division and for most matters in the Administrative and Equal Opportunity 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)).

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.

As to the <u>costs</u> of proceedings in the tribunal – **section 60** – the primary position is that each party to proceedings in the tribunal is to pay that 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, as can individual enabling Acts.

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.

The tribunal also has the power to correct obvious errors on the face of its decisions (section 63).

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, or
(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 <u>not</u> 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)). 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).

Amendments to the *Administrative Decisions Tribunal Act 1997*(NSW)

This was the main Act setting out the practice and procedure of the former ADT. 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.

Upon the commencement of proceedings to review an administratively reviewable decision, the administrator still has a duty to gather and lodge with the tribunal the relevant documents relating to the decision under review (section 58).

The remainder of the old ADT Act is largely omitted, rendering the amended version as merely support for the jurisdiction and work of the NCAT's Administrative and Equal Opportunity Division.

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 "s*atisfied*" 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 of the Schedule.

Schedule 5 - The Occupational Division - Framework

This division deals with:

1. Legal practitioners
2. Health practitioners
3. Architects
4. Local Government
5. Taxi drivers

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 *Health Practitioner Regulation National Law (NSW)(2009)* (NSW) ("**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).

NCAT Conclusion

These were all significant changes. The tribunal created a whole new landscape for administrative review and quasi-judicial civil matters in New South Wales. The actual and potential benefits are enormous, to the parties and to the legal profession and the tribunal members themselves. The tribunal has developed a learned culture based on shared

experience, skill and expertise. It is 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 is disappearing and the benefits of amalgamation are becoming manifest.

The tribunal needs to be 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 time.

Thank you