

QUESTIONS ON NOTICE - from the Public Hearing transcript (15 December 2011)

1. Access to CTTT in some rural locations

At the public hearing, Housing NSW indicated its officers "had experienced difficulties in accessing the Consumer, Trader and Tenancy Tribunal in some rural locations". The Hon Peter Primrose has sought advice on the local CTTT services that are accessible around the State.

The CTTT has registries in a number of metropolitan and regional areas, and each year conducts hearings in around 70 locations throughout New South Wales (refer pages 20-21 and 53 of the CTTT submission). This broad network enables the CTTT to deal with matters as close as possible to the point of dispute. The CTTT must allocate its resources in the most effective and efficient manner possible, while at the same time maintaining access to its dispute resolution services.

In the majority of hearing locations there are regular sitting days, though in some of the smaller towns hearing frequency is driven by the number and timing of matters lodged. A party may appear at a hearing by telephone in some instances, and we have found this to be a convenient option for many parties who may otherwise need to travel some distance for their hearing.

In relation to the comments by Housing NSW, the CTTT is unaware of their specific concerns. An ability to appear at the hearing by telephone is available to Housing NSW on the same basis as any other party. The CTTT has regular meetings with Housing NSW. In view of these comments, this issue will be placed on the agenda for the next meeting which has been scheduled for 22 February 2012.

2. Right of appeal

A parties' right to appeal CTTT decisions and the mechanisms available to deal with appeals were issues raised by a number of people during the public hearings.

The CTTT's submission to the Inquiry (pages 34-36) outlines the rehearing and appeals processes provided for under the *Consumer, Trader and Tenancy Act 2001*. The *Strata Schemes Management Act 1996* and the *Community Land Management Act 1998* contain their own appeal mechanisms which apply in those disputes.

A rehearing is a type of internal appeal process that applies to matters where the amount claimed or in dispute is \$30,000 or less. Rehearings can be granted by the Chairperson. The grounds on which a rehearing can be granted are set out in the *Consumer, Trader and Tenancy Act 2001* (section 68). That is, that the applicant may have suffered a substantial injustice because:

- the decision was not fair and equitable;
- the decision was against the weight of evidence; or
- significant evidence is now available that was not reasonably available at the time of hearing.

Dissatisfaction with the decision is not a sufficient reason for a rehearing absent one of the above factors. All rehearing applications are dealt with by the Chairperson or her delegate. The Deputy Chairperson (Determinations), Senior Members and full-time Members act as delegates of the Chairperson in this regard. Rehearing applications are determined on the basis of the written submissions provided.

In 2010-11, 1,940 rehearing applications were received at the CTTT – this equates to 3.3% of the 59,596 applications determined during that year. Close to 50% (960) of the rehearing applications met the legislative requirements and in those cases rehearings were granted. The most common

reason a rehearing is granted is because the rehearing applicant did not, for whatever reason, receive the notice of hearing sent by the Tribunal.

Where a rehearing is granted, the proceedings commence afresh and the matter is reheard in its entirety (unless the rehearing has been limited to specific issues).

The *Consumer, Trader and Tenancy Act 2001* provides for appeals from decisions made by the CTTT to be taken (under s65 or 67 of the CTTT Act) to either the District Court of New South Wales on a question of law or to the Supreme Court of New South Wales on the grounds of jurisdictional error or denial of procedural fairness.

In 2010-11, 85 appeals against decisions made by the CTTT were taken to the District or Supreme Courts. This number represents 0.14% of all applications determined by the CTTT that year.

Changes to the *Consumer, Trader and Tenancy Act* in 2008 have resulted in a situation whereby a person who wishes to have a Tribunal decision reviewed needs to decide whether they want to pursue a statutory appeal to the District Court or seek judicial review in the Supreme Court of NSW. Nothing in the legislation prevents a person who has unsuccessfully appealed against a Tribunal decision to the District Court from then seeking judicial review of the same Tribunal decision in the Supreme Court. This has introduced a layer of difficulty and potentially additional significant costs for people who might wish to appeal a Tribunal decision or who find themselves responding to such an appeal.

Any internal appeal in addition to or in substitution for existing appeal mechanisms would have significant cost implications for the CTTT and parties, particularly where very small disputes are involved.

SUPPLEMENTARY QUESTIONS – referred by the Standing Committee (20 December 2011)

1. The Committee's terms of reference ask us to consider the appropriateness of matters within the jurisdiction of the CTTT. To what extent do you think the current jurisdiction of the CTTT is appropriate including in relation to both the types of claims and its procedures?

An outline of the CTTT's current jurisdiction is provided in the CTTT's submission to the Committee (pages 8-9, 25-26 and 52). All jurisdictions concern disputes between consumers and traders or are in relation to property used for residential or business purposes. In most jurisdictions the monetary amount that can be awarded is unlimited. There is, however, a \$500,000 limit in home building claims, \$30,000 for claims under the *Consumer Claims Act 1998* (except in relation to new motor vehicles purchased for private purposes, where it is unlimited) and the limit is \$15,000 plus \$30,000 in relation to a rental bond in residential tenancy disputes. (Legislation currently before Parliament to give the CTTT jurisdiction to deal with disputes concerning agricultural tenancies will impose a \$500,000 limit on those claims.) Time limits for making claims in the Tribunal can vary considerably depending on the nature of the dispute.

In general, there is little difficulty caused by the different monetary limits or time limits on applications across the jurisdictions. However, differences in CTTT jurisdictional limits compared to those in the Local Court for the same matter can create confusion for some people. For example, a consumer claim must be made to the CTTT within 3 years while the time limit for the same claim in the Local Court is 6 years.

There can also be some confusion for traders who can debt recover in the CTTT in relation to home building claims but not for other matters. Strata managers have also expressed the view

that they would like to be able to recover unpaid strata levies in the CTTT. Landlords, of course, can recover rental arrears in the CTTT.

There are some other disputes of a commercial nature, for example, retail tenancies, which do not fall within the CTTT's jurisdiction. Sometimes these cases may also involve an associated residential tenancy or strata dispute and the parties may have to make applications in more than one tribunal to have the entirety of their dispute resolved. These issues may be overcome in a super tribunal.

The *Consumer, Trader and Tenancy Tribunal Act 2001* allows the CTTT great flexibility in the procedures that it can utilise in relation to various types of disputes. These procedures are outlined in the CTTT's submission to the Committee (pages 31-32). The CTTT has a differential case management approach to the disputes which fall within its jurisdiction and the procedures are tailored according to the nature of the dispute.

Some comments were made in submissions to the Committee and at the public hearing either wishing to see greater legal representation in the CTTT or less. The circumstances in which the Tribunal can permit legal representation are limited and appropriate. To allow greater legal representation would change the character of the CTTT and would greatly impact on the cost to parties.

A number of criticisms levelled at the CTTT in relation to its handling of disputes in strata schemes are in fact issues stemming from the procedures which must be adopted by the Tribunal when dealing with adjudications and hearings in disputes about strata schemes. These procedures are set out in the *Strata Schemes Management Act 1996*. The Minister for Fair Trading has recently announced a review of strata laws and this will provide an opportunity for these matters to be addressed.

2. A number of submissions to the Committee have emphasised the importance of a tribunal system providing adequate support to self-represented litigants. Do you agree? How do you think a super-tribunal could properly achieve this?

Self representation is the "norm" for parties that come before the CTTT. Representation is only permissible in a limited number of circumstances as set out in the legislation.

The *Consumer, Trader and Tenancy Act 2001*, section 28 (4), requires the Tribunal "to take such measures as are reasonably practicable to ensure that the parties in any proceedings understand: (a) the nature of the assertions made in the proceedings and the legal implications of those assertions, and (b) the procedure of the Tribunal and any decision or ruling made by the Tribunal that relates to the proceedings."

As a result, the CTTT's systems and processes are designed to assist self represented litigants. For example, application forms are easy to follow and can be lodged in paper or over the internet. Also, interpreters can be arranged without cost to litigants. Also, the information available on the CTTT website, at CTTT Registries and over the phone is geared towards helping people understand the application process and their role in the dispute resolution process. For example, *A Guide to the CTTT*, features a series of short YouTube videos in English and five community languages that explain each step in bringing a dispute to the CTTT, preparing for a hearing, etc. The CTTT also publishes a range of fact sheets and holds information sessions to help people understand the process.

Support for self represented litigants is also available from a number of advocacy and legal services in New South Wales, many funded by the Government, that play an important role in helping people with their legal problems. The CTTT refers people to these services and also has a

Getting Help fact sheet (available on the CTTT website and from CTTT Registries) to help self represented parties.

The nature of most tribunals makes support for self represented people a fundamental aspect of ensuring procedural fairness. If a super-tribunal were established it would need to provide an appropriate level of support for self represented parties through ready access to services, user-friendly processes, online and printed information, experienced Members and knowledgeable staff.

3. Several submissions¹ have expressed the view that the CTTT should have dedicated staff to review an individual's case and provide a basic assessment of that person's prospects of success in their claim. What do you think of this suggestion?

As with any tribunal, the staff who work in the CTTT Registry must ensure they remain impartial when providing services to individual parties or the general public. This preserves the integrity of the Tribunal's independence and ensures people receive an appropriate amount of information and assistance regardless of who they speak to within the Registry.

The CTTT has published a What we can and cannot do fact sheet on its website to help people to understand the level of service available from Registry staff. This clarifies the role of these staff who provide high level procedural advice rather than legal advice, and aims to help manage the expectations of people who contact the CTTT Registry. It is essential that there is no blurring between procedural advice and legal advice.

As mentioned above, there are many not-for-profit legal and similar services that are available to assist people in bringing a dispute to the CTTT. For example, tenancy advocacy services have been in place for many years to provide tenants with balanced and impartial advice. These advocates are skilled in assisting tenants to understand proceedings and to present their case at the CTTT. It is appropriate for these services to be quite separate from a tribunal which is, by its very nature, required to be an independent decision making process. In my view, it would be counterproductive to have this type of service within a tribunal as it would inevitably result in perceptions of partiality, distrust of the decision making process and would in turn increase the scope for complaints and appeals. It would essentially result in a merging of functions of staff and the role of the Tribunal.

4. In its submission (p 9), the Administrative Decisions Tribunal noted that 'persistent litigants can magnify the conduct of a small case so that it becomes a major drain on resources and the time of senior members and staff'.

- How does the CTTT deal with vexatious litigants?
- How would you suggest a super tribunal should effectively manage vexatious litigants?

The Tribunal deals with a range of disputes which can be extremely emotive, particularly in the Home Building, Strata & Community Schemes and the Social Housing Divisions where people can have extreme points of view. Overall, very few parties that bring disputes to the CTTT are truly "vexatious".

The Tribunal has the power to dismiss proceedings because they are frivolous or vexatious² but does not exercise this power lightly. In most matters costs can be awarded against a party whose claim is clearly vexatious (the exception being in strata schemes adjudications). This can go some way to compensating a party who may take on a financial burden as a result of responding to

¹ Submission 21, Mr Bruce Ryan, p 1; submission 28, Motor Traders Association of NSW, p 2; submission 36, Ms Julie Murray, pp 1-2; submission 48, Housing Industry Association, p 10.

² Consumer, Trader and Tenancy Act 2001 Section 28(5)(i); Strata Schemes Management Act 1996 Section 192.

a vexatious claim. The most important thing, however, is to deal with a matter quickly so that costs do not escalate.

Most tribunals have available to them the sort of powers available to the CTTT to deal with vexatious claims and no doubt a super tribunal would also have these powers available. In general CTTT application fees are relatively low and there is therefore not a huge financial impost to lodge an application. This may be viewed as encouraging people to lodge frivolous applications, but it also enables access to justice and the right to be heard. While a slight increase in fees or a different fee structure, including the use of a hearing fee, might be contemplated, imposing significant fees would be unlikely to dissuade people who firmly wish to take action in a dispute.

OBSERVATIONS MADE AT PUBLIC HEARINGS (15 and 16 December 2011)

A number of observations were made at the Public Hearings by other organisations regarding certain aspects of the CTTT's operations. The following comments provide clarification in relation to those observations.

Issues relating to delays in matters before the CTTT

- **Alleged illegal behaviour by public housing tenants**

A comment was made that there can be delays in progressing matters before the CTTT that involve allegations of illegal behaviour on the part of public housing tenants.

The CTTT receives very few applications in the Social Housing Division that fall within this category. For the period 1 February to 31 December 2011, Housing NSW lodged 36 applications seeking a termination order under section 91 of the *Residential Tenancies Act 2010* due to unlawful use of the premises by a tenant or occupant. This represents 0.35% of the applications lodged by Housing NSW during that period.

There are times when matters involving alleged illegal use of the premises by public housing tenants can involve a longer timeframe than other matters in the Social Housing Division. This is because both parties, including Housing NSW, are likely to be legally represented and must be given adequate time to prepare. Issues can also arise regarding self incrimination where criminal proceedings are still on foot, and there can be difficulties in obtaining documentation (eg police can understandably be reluctant to provide documents under summons that are also needed for the criminal proceedings but not yet disclosed to the defendant in those proceedings). It is important for procedural fairness to be accorded to both parties and an appropriate decision arrived at by the Tribunal. This will help avoid the matter being appealed which would result in further delays, and costs to the parties and the State.

- **Criminal proceedings**

It was suggested that in social housing tenancy disputes it is not necessary for the CTTT to delay the progress of a matter where there are separate criminal proceedings underway.

Criminal proceedings do not need to be determined prior to tenancy disputes being resolved. However, in some cases issues relevant to a serious breach of the tenancy agreement are invariably tied in with information in the criminal proceedings and that information may not necessarily be available to the CTTT at an early stage. This can delay the finalisation of those cases.

- **Retirement village disputes**

A question was raised regarding lengthy delays between a retirement village dispute application being lodged and the CTTT hearing taking place.

The number of retirement village disputes brought to the CTTT is small, and sometimes bringing the various parties together can result in some lag between an application being lodged and the conduct of mediation or a hearing. The CTTT often convenes mediations on site at a retirement village and the logistics of bringing all the parties together can be considerable. However, this should be balanced against the considerable benefits that arise as it enables more parties to more easily participate in the process.

Rent arrears and public housing tenants

It was suggested that there are differences in the way tenancy matters are dealt with in the CTTT's Social Housing Division compared to its Tenancy Division – particularly in relation to disputes about rent arrears.

The CTTT's statistics for the Tenancy Division (private landlords and tenants) and the Social Housing Division (Housing NSW, Aboriginal Housing, other community housing providers and tenants) show there is no difference between the two Divisions in the proportion of matters that end in termination of tenancies or where agreements are entered into to pay arrears. The *Residential Tenancies Act 2010* applies equally to both Divisions and the CTTT is required to follow the provisions of that Act. In the CTTT's experience, applications to terminate a tenancy on the grounds of rent arrears will more often result in specific performance orders that the arrears be paid than in orders terminating the tenancy. This is true in both the private rental market and in social housing where all parties are keen to preserve the tenancy if possible.

CTTT Social Housing Division

A comment was made concerning the benefits of a separate Social Housing Division and it was suggested the CTTT was responsible for creating the Division.

The establishment of a Social Housing Division to deal with applications relating to social housing premises leased by social housing providers was in fact recommended by the statutory review of the *Consumer, Trader and Tenancy Act 2001* in 2007/08. Application forms and supporting information for this new Division were developed in close consultation with Housing NSW and other social housing providers, and the CTTT continues to liaise with these providers when divisional processes and other changes are required. The Social Housing Division has resulted in better statistical information being available on the number and types of applications made to the CTTT in relation to social housing premises.

Home Building and Strata & Community Schemes disputes

There were a few comments about the way in which complex disputes are dealt with at the CTTT and the delays often entailed in finalising complex matters, for example in the Home Building and Strata & Community Schemes Divisions.

Home building disputes involving significant amounts of money, numerous alleged building defects and complex contractual issues can be lengthy. Any delay in resolving cases usually occurs as a result of adjournments, which generally arise due to the lack of availability of parties, their witnesses, experts or legal representatives; the requirement to exchange evidence or to obtain additional evidentiary material; additional time to allow for specific actions or events to take place, etc. The CTTT has a pool of Senior Members, all of whom are legal practitioners who deal with these disputes. The CTTT also utilises the services of a small number of Members who are expert in this area.

In relation to disputes involving strata schemes, the *Strata Schemes Management Act 1996* sets up a procedure of preliminary mediation, adjudication on the papers and then appeal to the CTTT for most disputes. By its very nature this process can be somewhat lengthy. As

noted previously, the Minister for Fair Trading has announced a review of strata laws and no doubt the dispute resolution process will be one of the issues explored in the review.

Listing timeframes

Access to, and the frequency of, hearings for people in rural areas was mentioned at the public hearing.

The CTTT applies the same time standards for listing of matters to all applications, irrespective of where the parties reside. Where there are insufficient applications lodged to justify travelling to a particular location, the Tribunal will list matters at a nearby town or will offer parties the ability to appear at the hearing by telephone.

Advice to parties when hearing is rescheduled

It was claimed at the Public Hearing that parties are not sent a notice when a matter is rescheduled for hearing. This is not the case and the CTTT follows the same process to serve its Notices of Hearing as the Local Court. Under the *Consumer, Trader and Tenancy Act 2010* (section 25) the Tribunal is required to serve a Notice of Hearing and the CTTT Registry has processes in place to ensure notices are issued in advance of hearings. From time to time a party may state that they have not in fact received the notice of hearing, but this is a very different issue to whether or not the Notice was in fact sent by the Registry.

It is also relevant to note two CTTT innovations relating to the availability of information about upcoming hearings – firstly, hearing schedules are publicly available on the CTTT website and are updated in “real” time; secondly, the introduction of eConnect from January 2012 will enable parties to opt-in to receive Notices of Hearing and other case-related correspondence via email from the CTTT. Both of these innovations simplify and speed up access to hearing information for parties.

Conciliation

There was a suggestion made that people are compelled to arrive at an agreement during the conciliation process.

Conciliation is an important aspect of the CTTT’s work and in many cases helps parties to come to a shared agreement, or to better understand different points of view. Tribunal Conciliators, where available, may assist parties to reach an agreement. If agreement is reached during conciliation, before making the terms of the agreement into a CTTT order a Tribunal Member (not the Member or officer acting as the Conciliator) will check with the parties to ensure they were not coerced into arriving at an agreement.

The Tribunal Member will ask whether the parties understand the exact nature of the agreement they have reached and that the agreement was arrived at voluntarily. The Member will also explain what the agreement means in terms of future redress if the agreement is not adhered to by either party, and that the decision cannot be changed if they subsequently have second thoughts about the outcome.

Reporting on dispute statistics

A question was raised about the way in which the CTTT measures (in statistical terms) residential parks dispute applications and those relating to retirement villages disputes. It was indicated that the number of residents involved in a retirement village dispute is not reflected in the CTTT’s statistics, whereas in residential parks all residents involved are counted.

In the Retirement Villages Division, the *Retirement Villages Act 1999* (s122) enables one Village resident to make an application to the CTTT on behalf of a number of residents in the same village. The *Residential Parks Act 1998* does not include a similar provision and

residential park residents must lodge individual applications with the CTTT even where the dispute relates to the same issue that may impact on all park residents (eg a rent increase that applies to all park residents)³. The issue of “class actions” has been raised in the current review of residential parks⁴.

Stakeholder involvement

During the Public Hearing observations were made about the CTTT's processes and the opportunities for stakeholders to provide comment on those processes.

Over the past 10 years the CTTT has developed good partnerships with its many key stakeholders. As noted in the CTTT submission (see pages 23-24), this consultation process involves regular and ad hoc meetings of Consultative Forums where issues can be raised, information exchanged, and proposed process changes discussed. The involvement of Forum Members when legislative change is being implemented is of particular assistance to the CTTT and helps to ensure system changes and processes better meet user needs.

Consultative Forum meetings also provide an opportunity for the CTTT to receive feedback that can help to inform its continuous improvement activities, and provide greater understanding of issues. A regular e-newsletter is sent to stakeholders to keep Forum members up-to-date between meetings, and members are encouraged to disseminate information to their constituents.

The list of organisations represented on CTTT Consultative Forums (see page 52) is lengthy. In late 2010 the Law Society was invited to join the CTTT's Home Building Forum – a response is awaited.

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³ The CTTT's processes enable 'multiple' applications in Residential Parks to be case managed collectively and are listed together for conciliation and hearing.

⁴ Discussion Paper *Improving the governance of residential parks* issued by the Minister for Fair Trading in November 2011