

Statutory Review

Report of the Statutory Review of the *Civil and Administrative Tribunal Act 2013*

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Executive summary

The *Civil and Administrative Tribunal Act 2013* (**CAT Act**) establishes the NSW Civil and Administrative Tribunal (**NCAT**).

NCAT commenced operations on 1 January 2014. It exercises the jurisdiction of 23 former tribunals and other bodies, including the Administrative Decisions Tribunal, Consumer, Trader and Tenancy Tribunal and Guardianship Tribunal. NCAT was established to:

- Reduce the complexity of the previous tribunal system in NSW by providing a single point of access for most tribunal services
- Provide a forum for people to resolve disputes and other civil matters more quickly and cheaply compared to traditional court proceedings.

Section 92 of the CAT Act provides that the Attorney General is to review the Act after 5 years to determine whether its policy objectives remain valid and whether the terms of the Act remain appropriate to secure those objectives. The Department of Communities and Justice (**the Department**) conducted the Review on behalf of the Attorney General.

The Review received 94 submissions from 82 different individuals and organisations. Most submissions agreed that the objectives of the CAT Act remain valid, and that the terms of the Act generally remain appropriate for achieving them. For example, most submissions agreed that NCAT has simplified the tribunal network in NSW and that the terms of the Act provide the Tribunal with the functions and powers necessary to facilitate the just, quick and cheap resolution of proceedings.

Given the breadth and diversity of NCAT's jurisdiction, the Review agrees that the content and structure of the CAT Act generally remain appropriate. The Act sets out a high-level framework that provides the Tribunal with flexibility to tailor practice and procedure to the needs of each of its Divisions and Lists. This should remain the case to ensure that NCAT remains responsive and can quickly adjust to future changes in the operating environment.

Some submissions proposed discrete amendments to the CAT Act, including in relation to the representation of parties, the availability of costs, and the enforcement of orders. These matters are discussed in Part 3 of this report. A small number of minor and technical amendments to the CAT Act were also identified by the Review through discussions with stakeholders and by reviewing relevant case law. These amendments are discussed in Part 4.

A number of submissions also commented on matters relating to NCAT's operations, including the way hearings are conducted, the support materials that are provided to parties and the publication of operational data. These matters are discussed in Part 5. However, as operational matters are the responsibility of the Tribunal, the report does not contain an in-depth analysis of these issues but instead summarises the comments and suggestions made by stakeholders for NCAT's consideration.

If stakeholders have suggestions for further improvements in relation to operational matters, they are encouraged to provide feedback to the Tribunal directly. Information about how to provide feedback can be found at <https://ncat.nsw.gov.au/ncat/about-ncat/feedback-and-complaints.html>.

Summary of Recommendations

Recommendation 1

That the Department of Communities and Justice consider opportunities to strengthen provisions in the *Government Information (Public Access) Act 2009* that are aimed at restraining applicants who engage in improper conduct.

Recommendation 2

Once NCAT has transitioned to its new case management system, the Department of Communities and Justice should review opportunities to streamline the enforcement of NCAT money orders in order to enhance user experience.

Recommendation 3

That the NSW Government amend the CAT Act to clarify that the term 'any report of proceedings' in s 64 of the CAT Act includes sound recordings and transcripts.

Recommendation 4

That the NSW Government amend the CAT Act to clarify that the Tribunal may amend an Order to ensure that it reflects a party's full legal name administratively without complying with the requirements of s 50.

Recommendation 5

That the NSW Government amend the CAT Act to clarify the scope of the Tribunal's obligation in s 38(6)(a) to 'ensure all relevant material is disclosed' in proceedings.

Recommendation 6

That the NSW Government amend the CAT Act to clarify that, in proceedings where the publication of names or identification of persons is prohibited, parties may not on-publish an unredacted decision that has been provided for their personal use.

Recommendation 7

That the NSW Government amend the CAT Act to clarify that failure to comply with a summons can be dealt with as a contempt of the Tribunal.

Recommendation 8

That the NSW Government amend the CAT Act to allow the President to reallocate matters to a different Division where a matter defaults to the Administrative and Equal Opportunity Division under the terms of Schedule 3, clause 3(b).

Recommendation 9

That the NSW Government amend the CAT Act to broaden the President's power to reconstitute the Tribunal to align with provisions contained in equivalent legislation in other Australian jurisdictions.

Recommendation 10

That the NSW Government amend the CAT Act to provide that the Tribunal is not required to issue written reasons on request in respect of a limited number of minor procedural decisions.

Recommendation 11

That the NSW Government amend the CAT Act to clarify:

- a) how the Tribunal is to be constituted when determining administrative review proceedings under the *Legal Profession Uniform Law (NSW)*
- b) that references to the *Legal Profession Uniform Law* include the *Legal Profession Uniform Law Application Act 2014*.

Recommendation 12

That the NSW Government amend the CAT Act to provide that the Tribunal may be constituted with 1 or 2 members, rather than 3 members, when determining a request to withdraw an application from the Guardianship Division under Schedule 6, clause 10.

Recommendation 13

That the NSW Government amend the CAT Act to provide that the Tribunal may be constituted with 1 or 2 members, rather than 3 members, when determining applications under s 46A of the *Guardianship Act 1987* where:

- a) the application is urgent, or
- b) the application is made as part of review proceedings.

Recommendation 14

That the NSW Government amend the CAT Act to provide that the Tribunal, when exercising any of its Guardianship Division functions, is under a duty to observe the principles in s 4 of the *Guardianship Act 1987*.

Recommendation 15

That the NSW Government amend the CAT Act to provide that the Tribunal may dispense with requirements to serve notice of hearing under the *Guardianship Act 1987* in circumstances where the delay associated with compliance may create a real, material and imminent risk of harm to the person who is the subject of an application.

1. Introduction

1.1. Background to the legislation

The NSW Government enacted the CAT Act in response to the March 2012 Legislative Council Standing Committee on Law and Justice Report 49 titled *Opportunities to consolidate tribunals in NSW*.¹ In this report, the Standing Committee noted that stakeholders found the previous tribunal system in NSW to be ‘complex and bewildering’ and recommended that the NSW Government consolidate the number of tribunals in NSW to reduce complexity and improve access to justice.

In response, the NSW Government announced the establishment of NCAT. Legislation was passed in two stages. The first Bill² established NCAT, authorised the appointment of key members, and provided for the abolition of 23³ existing tribunals. The second and third Bills⁴ prescribed practice and procedure and conferred jurisdiction on the new Tribunal. The legislation commenced, and NCAT began operations, on 1 January 2014.

1.2. The Government’s legislative strategy

In drafting the CAT Act, the Government set out to create a principles-based instrument that included only essential governance provisions, powers and functions. As a result, the CAT Act contains only those provisions that are required to ensure that the Tribunal can operate effectively, including:

- The objectives of the Act
- How proceedings are to be commenced and who has standing
- General positions in relation to representation and costs orders
- How hearings are to be conducted and how evidence may be taken
- Dispute resolution powers
- Enforcement and compliance powers
- The appointment of tribunal staff and members and their powers
- How panels are to be constituted
- The Tribunal’s jurisdiction to hear general, administrative review, appeal and enforcement applications
- Appeal rights and pathways.

In some cases, Division Schedules contain specific provisions that override the general provisions of the Act, including in relation to the rights of parties to be represented and the availability of costs. Legislation that confers jurisdiction upon NCAT may also contain provisions that override the general provisions of the CAT Act, including in relation to grounds for appeal and the Tribunal’s powers.

¹ <https://www.parliament.nsw.gov.au/lcdocs/inquiries/1721/120319%20Final%20Report.pdf>

² Civil and Administrative Tribunal Bill 2012.

³ 22 tribunals and other bodies were abolished on 1 January 2014. The Victims Compensation Tribunal was consolidated into the former Administrative Decisions Tribunal prior to NCAT’s establishment.

⁴ Civil and Administrative Tribunal Amendment Bill 2013; Civil and Administrative Legislation (Repeal and Amendment) Bill 2013.

Otherwise, the CAT Act authorises NCAT to set its own practice and procedure through the use of Tribunal Rules, Practice Directions and Guidelines. This ensures that NCAT's procedures can be tailored to the needs of each Division without creating an Act that is unwieldy in its detail and length. It also ensures that the Tribunal can more easily adjust procedural requirements in response to stakeholder feedback and changes in the Tribunal operating environment.

To accommodate the broad range of jurisdiction conferred on NCAT and ensure that the specialist focus of previous tribunals could be maintained, the CAT Act arranges NCAT into four separate Divisions.

Figure 1: NCAT's Divisional structure

Administrative & Equal Opportunity Division	Consumer & Commercial Division	Occupational Division	Guardianship Division
<ul style="list-style-type: none"> • Access to government information • Privacy of personal information • Firearms licences • State Revenue • Victims payments • Community Services • Working With Children Checks • Reviews of other government agency decisions • Anti-discrimination 	<ul style="list-style-type: none"> • Tenancy & social housing • Residential communities • Holiday parks • Strata & community • Home building • Retirement villages • Dividing fences • Consumer claims • Motor vehicles • Retail leases • Pawnbrokers • Conveyancing costs 	<p>Discipline of:</p> <ul style="list-style-type: none"> • Health practitioners • Lawyers • Veterinarians • Architects • Building professionals. <p>Review of licence decisions about:</p> <ul style="list-style-type: none"> • Drivers and operators of taxis, buses, hire cars and tow trucks • Security guards, builders, motor dealers, travel agents and others. 	<ul style="list-style-type: none"> • Guardianship orders • Financial management orders • Consent for treatment • Reviews of enduring power of attorney or enduring guardianship appointments • Approval of a clinical trial so that people with a decision-making disability can take part.

The CAT Act also establishes an internal appeal panel to provide tribunal users with the ability to seek review of most NCAT decisions quickly and efficiently, without the need to lodge an appeal in a court.

1.3. NCAT's role in the civil justice system

Since its establishment in 2014, NCAT has played a fundamental role in providing access to justice in NSW. According to a review conducted by the Law and Justice Foundation of NSW, it deals with approximately 42% of all civil law matters finalised in NSW Courts and Tribunals.⁵ Between 2014 and 2021 NCAT finalised around 522,000 applications, an average of 69,000 matters per year.

⁵ [http://www.lawfoundation.net.au/ljf/site/templates/reports/\\$file/NCAT_Overview_2016.pdf](http://www.lawfoundation.net.au/ljf/site/templates/reports/$file/NCAT_Overview_2016.pdf)

The majority of NCAT applications are dealt with by the Consumer and Commercial Division. However, the Guardianship Division also represents a significant and growing area of the Tribunal's jurisdiction. Lodgements in the Guardianship Division have risen by almost 25% since 2014–15 and now represent 20% of all applications to the Tribunal.⁶

Table 1: NCAT lodgements by Division 2020–21

Division	Lodgements	% of total applications
Administrative & Equal Opportunity	820	1.2%
Occupational	259	0.4%
Consumer & Commercial	53,718	76.9%
Guardianship	14,290	20.4%
Appeals	795	1.1%

Source: NCAT Annual Management Report

In addition to NCAT's Principal Registry in Sydney, the Tribunal also maintains 6 other registry locations around the State in Liverpool, Parramatta, Penrith, Newcastle, Wollongong and Tamworth. Around 30% of hearings are conducted in regional areas, utilising NCAT locations, court buildings and other premises.

Table 2: NCAT regional hearings July 2019 – February 2020⁷

REGION	AEOD	CCD	GD	OD	AP	NCAT TOTAL	% OF ALL REGIONAL HEARINGS HELD IN THIS REGION	% ALL NCAT HEARINGS (TO END FEBRUARY) HELD IN THIS REGION*
Hunter / New England / Central Coast	10	7,282	904	0	1	8,197	46%	14%
Illawarra / Shoalhaven	8	2,458	282	0	0	2,748	16%	5%
Mid North Coast	4	1,472	228	0	0	1,704	10%	3%
Northern NSW	5	1,345	149	0	0	1,499	8%	3%
Western NSW	7	1,311	224	0	0	1,542	9%	3%
Murray / Riverina	7	966	125	1	0	1,099	6%	2%
Southern NSW	1	832	103	0	0	936	5%	2%
Total Regional Hearings	42	15,666	2,015	1	1	17,725	100%	30.4%
All NCAT Hearings						58,224		

Source: NCAT Annual Report 2019–20

Administering NCAT's diverse and high-volume workload across this geographical footprint is a significant logistical challenge. Nevertheless, since its establishment NCAT has maintained an average clearance rate (the number of outgoing cases as a percentage of the number of incoming cases) of almost 100%.⁸

⁶ NCAT Annual Reports.

⁷ Since March 2020 NCAT has conducted a high proportion of hearings via telephone and video-link due to the impact of the COVID-19 pandemic.

⁸ NCAT Annual and Management Reports.

1.4. Conduct of the Review

How was the Review conducted?

Section 92 of the CAT Act requires the Attorney General to review the Act to determine whether its policy objectives remain valid, and whether the terms of the Act remain appropriate for securing those objectives. The Department of Communities and Justice (**the Department**) conducted the review on behalf of the Attorney General.

A report on the outcome of the review was initially due to be tabled in Parliament by 1 January 2020. The Department commenced the Review and sought submissions from interested parties and stakeholders on 29 May 2019. A total of 94 submissions were received from 82 individuals and organisations. Due to the number of submissions received and breadth of issues raised, it was not possible to complete the review by 1 January 2020. The Review was then further delayed due to unanticipated work priorities that emerged from the COVID-19 pandemic.

The Department conducted targeted roundtable discussions with organisations that represent the interests of tribunal user groups between November 2020 and February 2021, including:

- Legal Aid NSW
- NSW Council for Intellectual Disability
- Mental Health Coordinating Council
- Dementia Australia
- Tenants' Union of NSW
- Tenants Advice and Advocacy Service
- Real Estate Institute of NSW
- Marrickville Legal Centre
- Australian College of Strata Lawyers
- Retirement Villages Residents Association
- Caravan and Camping Industry Association NSW
- Affiliated Residential Park Residents Association.

Targeted consultation also occurred in relation to legislative proposals identified during the course of the Review, including with the Law Society of NSW and NSW Bar Association.

What did the Review look at?

Section 92 of the CAT Act requires the Review to consider whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives. The Review's primary focus was therefore the CAT Act itself. The Review did not consider the operation of any legislation that confers jurisdiction on NCAT or assess the Tribunal's operations or performance.

The Review did not consider issues relating to the Civil and Administrative Tribunal Regulation 2013 (**CAT Regulation**), including fees and expenses or the Tribunal's power to set aside proceedings. Issues raised by stakeholders in relation to these matters will be considered further as part of the staged repeal and remake of the CAT Regulation. The CAT Regulation is currently scheduled to be remade on or before 1 September 2022.

The Review also did not consider the operation of Part 3A of the CAT Act, which was inserted into the Act in 2017 in response to the NSW Court of Appeal's decision in *Burns v*

Corbett; Gaynor v Burns.⁹ Part 3A was further amended in 2018 in response to the High Court's decision in *Burns v Corbett*¹⁰ and the NSW Court of Appeal decision in *Attorney General for New South Wales v Gatsby*.¹¹ These decisions determined that NCAT is not able to exercise jurisdiction referred to in s 75 or 76 of the Commonwealth Constitution (commonly called 'federal jurisdiction') and is not a Court of the State.

Part 3A provides that, where NCAT is unable to hear a matter affected by federal jurisdiction, the Local Court or District Court can hear the application or appeal and make the same orders that NCAT could have made. As the Department noted when calling for submissions to the Review, the question of whether NCAT is a Court of the State has been determined by recent court decisions and will not be re-examined.

If stakeholders continue to hold concerns regarding the practice and procedure followed by NCAT and the Local and District Courts in relation to Part 3A, these can be further discussed outside the context of the Review. However, the NSW Government does not intend to revisit its decision to enact Part 3A.

2. The policy objectives of the CAT Act

2.1. Are the policy objectives of the CAT Act still valid?

The policy objectives of the CAT Act

The policy objectives of the CAT Act are set out in s 3 of the Act:

3 Objects of the Act

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 need 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.

⁹ [2017] NSWCA 2.

¹⁰ *Burns v Corbett* [2018] HCA 15.

¹¹ *Attorney General for New South Wales v Gatsby* [2018] NSWCA 254

Section 36 of the CAT Act also provides that the guiding principle for the Act and the procedural rules is to facilitate the just, quick and cheap resolution of the real issues in proceedings. NCAT must seek to give effect to the guiding principle when it exercises any power given to it by the CAT Act or procedural rules or interprets any provision.¹²

NCAT should continue to be a single point of access for ‘most’ tribunal services

Submissions to the Review agreed that NCAT has simplified the tribunal network in NSW. A small number of tribunals continue to operate separately from NCAT, such as the Industrial Relations Commission, Mental Health Review Tribunal and the recently established Personal Injury Commission.

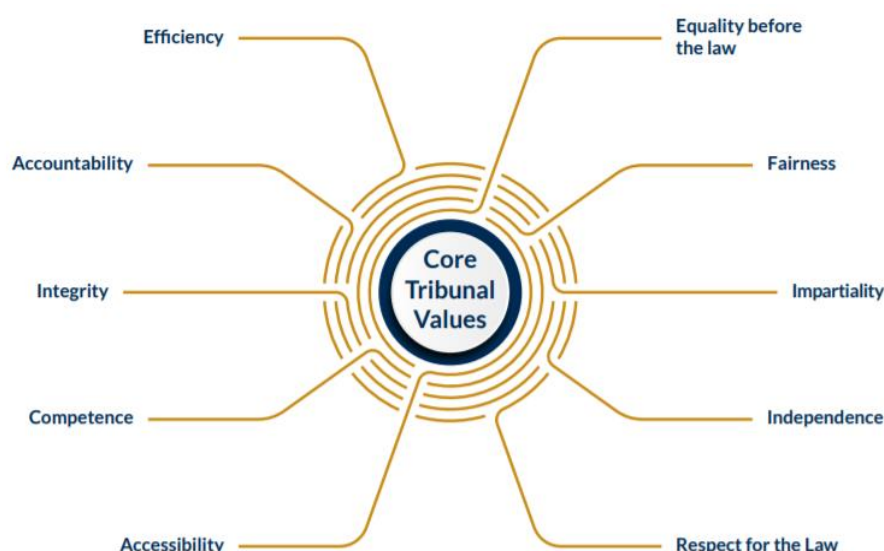
The NSW Government does not intend to pursue the consolidation of any additional bodies into NCAT at this time. Accordingly, the Review concludes that the current objective set out in s 3(a) remains appropriate. NCAT should continue to provide a single point of access for ‘most’ tribunal services. s 3(b), which provides that one of the objects of the CAT Act is to ensure that the Tribunal can exercise the full range of jurisdiction that is conferred upon it, also remains necessary and appropriate.

However, the Review notes that NCAT’s Divisional structure would permit additional jurisdiction to be added in future should the Government determine that other specialist tribunals would benefit from the economies of scale that NCAT provides, including in relation to professional development opportunities for staff and members and the Tribunal’s geographic coverage.

The remaining objectives are modelled on the Tribunals Excellence Framework

The remainder of the objects reflect best practice principles for tribunals and are modelled on the Council of Australasian Tribunals (COAT) Framework for Tribunal Excellence.¹³

Figure 2: Core Tribunal Values



Source: Tribunals Excellent Framework (2017)

¹² CAT Act, s 36(2).

¹³ https://coat.asn.au/wp-content/uploads/2018/11/Tribunals_Excelsence_Framework_Document_2017_V4.pdf

The Review considers that these objects remain relevant. They continue to align with best practice principles. Submissions to the Review also demonstrate that both individual tribunal users and organisational stakeholders want NCAT to deliver services that are accessible, informal, fair, efficient and transparent across all of its Divisions, both at the organisational level and when conducting hearings and making decisions. It is appropriate that the objects of the Act continue to align with the priorities of its users and public expectations more generally.

2.2. Are the terms of the Act still appropriate to achieve these objectives?

The Review concludes that the terms of the CAT Act generally remain appropriate to achieve the objectives of the Act.

Submissions to the Review proposed a number of discrete amendments to the Act. Some of these proposals would involve including additional detail or guidance in relation to how NCAT should administer the existing provisions of the Act, such as:

- When leave should be granted for parties to be represented by lawyers or other agents
- The procedures that should be followed by NCAT when conducting conciliations
- Appeal timeframes.

These proposals are discussed in detail in Part 3 of this report. However, as a matter of principle the Review considers that the CAT Act should not prescribe practice and procedure to any greater extent than is already the case.

As noted above, the CAT Act provides a high-level framework that enables NCAT to take a flexible and tailored approach to practice and procedure. This is essential given the breadth of NCAT's jurisdiction, which is conferred by more than 160 separate Acts and subordinate instruments.¹⁴ In these circumstances, it is important that the Tribunal continues to retain the ability to differentiate its procedures depending on matter type, application volumes, the requirements of enabling legislation and the needs of the parties.

This approach also accords with legislation that establishes and confers authority on the NSW Courts. Courts legislation is similarly high-level in nature, setting out core functions and powers with detailed practice and procedure determined by the Courts and set out in the Uniform Civil Procedure Rules.

In some cases, stakeholders proposed changes to the Civil and Administrative Tribunal Rules 2014 (**CAT Rules**) and NCAT Guidelines. Where a proposal would require NCAT to amend its Rules or Guidelines, the Review provides some commentary in Part 3 below but does not express a view on whether that change should be made. Changes to the CAT Rules and Guidelines are a matter for NCAT to determine.

Finally, the Review has also identified a number of minor or technical changes to clarify and improve the operation of the Act which were identified through discussions with stakeholders and through review of relevant NCAT Appeal Panel and Court of Appeal judgments. These amendments are discussed in Part 4 of this report.

¹⁴ A list of enabling legislation is provided in Appendix 1 of the NCAT Annual Report 2019-20, <https://ncat.nsw.gov.au/documents/reports/ncat-annual-report-2019-2020.pdf>.

3. Themes raised in submissions relating to the terms of the Act

3.1. Representation by lawyers and other agents

When is a person entitled to be represented by a lawyer or other agent?

The general position under the CAT Act is that parties are to run their own case and are not entitled to be represented by another person unless the Tribunal grants permission.¹⁵ This reflects the principle that NCAT proceedings are intended to be cheaper, faster, and more flexible compared to traditional court proceedings.

However, in some circumstances the presence of a lawyer or other representative is permitted, including where proceedings are likely to be legally technical or complex or the other party is a government agency. For example, representation by a lawyer is permitted as of right in relation to:

- Matters commenced in the Occupational Division¹⁶
- Matters commenced in the Administrative and Equal Opportunity Division¹⁷
- Internal appeals (where a person was entitled to representation without leave in the original proceedings).¹⁸

In the Consumer and Commercial Division, parties may also be represented by a lawyer if they have been granted legal assistance under Division 2 of Part 2 of the *Fair Trading Act 1987*,¹⁹ or in proceedings under the *Retail Leases Act 1994*.²⁰

When will NCAT grant permission for a person to be represented?

In other Consumer and Commercial Division proceedings and in the Guardianship Division, a person may be represented by another person if NCAT grants leave under s 45 of the CAT Act. The CAT Rules set out factors that the Tribunal must consider when deciding whether to grant leave, such as whether the representative has sufficient knowledge of the issues in dispute.²¹

The NCAT Appeal Panel has also provided guidance to Tribunal Members in relation to the factors that should be taken into account when considering applications for leave to be represented. For example, in *Rodny v Stricke*²² the Appeal Panel stated that the following considerations are relevant:

- The complexity of the issues raised for determination
- The capacity of the individual seeking leave to understand and effectively

¹⁵ CAT Act, s 45.

¹⁶ CAT Act, Sched 5, cl 27.

¹⁷ CAT Act, Sched 3, cl 9.

¹⁸ CAT Act, s 45(2)

¹⁹ Cat Act, Sched 4, cl 7

²⁰ Ibid.

²¹ Other factors include whether the proposed representative has the ability to deal fairly and honestly with the Tribunal and other persons and whether the proposed representative has sufficient authority to bind the party. See CAT Rules, R32.

²² *Rodny v Stricke* [2018] NSWCATAP 136 at [88].

participate in the proceedings in a manner which allows them a reasonable opportunity to be heard

- The need to ensure that there is no material imbalance between the parties
- The need to ensure that the Tribunal is accessible and responsive to the needs of all of its users, and
- Whether it is appropriate in all the circumstances to give leave to a particular person, including an Australian legal practitioner.

NCAT has also published non-binding Guidelines that set out when leave will usually be granted in the Consumer and Commercial Division and Guardianship Division.²³ These circumstances are similar to the considerations in *Rodny v Stricke* above, or provide practical examples of when such considerations may apply, and include where:

- The proceedings involve a claim or dispute for more than \$30,000
- Another party is a lawyer or is represented by a lawyer
- Another party is a government agency
- The party would be placed at a disadvantage if not represented
- Complex issues of law or fact will arise in the proceedings.

The Guidelines also state that NCAT will usually grant leave for a party to be represented by a non-lawyer agent in the Consumer and Commercial Division if the representative falls within certain categories. For example, the Guidelines state that landlords may generally be represented by real estate agents, government agencies may be represented by an officer, and corporations may be represented by an employee.²⁴

In relation to the Guardianship Division, the Guidelines reflect the nature of the proceedings in that Division and include:

- Whether representation will promote the principles in s 4 of the *Guardianship Act 1987* and the interests of the subject person
- Any disability or other factor that impedes the party's capacity to fully participate in the proceedings
- Fairness between the parties
- Whether representation may promote a conciliatory approach.

Should parties be entitled to legal representation in all NCAT Divisions?

Whether legal representation should be permitted as of right in the Consumer and Commercial Division

Most submissions to the Review agreed that legal representation should continue to be limited in Consumer and Commercial Division proceedings. These submissions argued that encouraging parties to engage lawyers more often may:

²³ <https://www.ncat.nsw.gov.au/ncat/how-ncat-works/prepare-for-your-hearing/representation.html>

²⁴ NCAT Guideline: *Representation in the Consumer and Commercial Division*, available at <https://www.ncat.nsw.gov.au/ncat/how-ncat-works/prepare-for-your-hearing/representation.html>

- Increase costs for the parties
- Result in unfairness where one party can afford to engage a lawyer, but other parties cannot
- Create a legalistic, formal or adversarial culture.

One submission, from the Law Society of NSW, proposed that the CAT Act should be amended to provide an entitlement to legal representation for all parties, except proceedings in the Guardianship Division (see below). As legal representation is already permitted in the Administrative and Equal Opportunity Division and Occupational Division, the effect of the Law Society's proposal would be to extend the right to legal representation to all proceedings in the Consumer and Commercial Division.

Legal representatives can play a valuable role in tribunal proceedings, including where a party is not able to effectively advocate for themselves or where complex legal issues may arise. However, most applications filed in the Consumer and Commercial Division involve lower-value claims. In these circumstances, hiring a lawyer may result in parties incurring costs that are disproportionate to the value of the dispute.

While Tribunals in some other States and Territories permit legal representation as of right in all Tribunal proceedings, including South Australia, Western Australia, and the Australian Capital Territory,²⁵ one of the objectives of the CAT Act is to ensure that NCAT is accessible and that the issues in dispute in proceedings are resolved with as little cost and formality as possible.²⁶ The Review considers that permitting all parties to be legally represented in the Consumer and Commercial Division may risk undermining these objectives. As Sir Andrew Leggatt stated in his Report on the Review of Tribunals:

“[R]epresentation not only often adds unnecessarily to cost, formality and delay, but it also works against the objective of making tribunals directly and easily accessible to the full range of potential users.”²⁷

The Review considers that the current structure of the CAT Act remains appropriate. While legal representation is not permitted as of right in the Consumer and Commercial Division, it provides the Tribunal with discretion to ensure that parties can be represented where that will promote the efficient conduct of proceedings and deliver a fair outcome.

Whether legal representation should be permitted in the Guardianship Division

The NSW Law Reform Commission's Report 145 on the Review of the *Guardianship Act 1987* (**LRC Report**) recommended that legal representation should be available as of right to a person who is the subject of proceedings in the Guardianship Division.²⁸ Both the Law Society of NSW and the Public Interest Advocacy Centre (**PIAC**) endorsed this recommendation in their submissions to the Review.

This LRC recommendation was made in the context of a broader recommendation to introduce a new assisted decision-making framework in NSW, which would fundamentally change the nature of proceedings in the Guardianship Division. The NSW Government is

²⁵ *South Australian Civil and Administrative Tribunal Act 2013*, s 56; *State Administrative Tribunal Act 2004*, s 39; *ACT Civil and Administrative Tribunal Act 2008*, s 30.

²⁶ CAT Act, ss 3(c) and 3(d)

²⁷ Leggatt, Sir A. (2001), *Tribunals for users: one system, one service*, The Stationery Office.

²⁸ <https://www.lawreform.justice.nsw.gov.au/Documents/Current-projects/Guardianship/Report/Report%20145.pdf>

currently considering its response to the LRC Report. While the current guardianship model remains in place, other guardianship stakeholders told the Review that the current provisions of the CAT Act, which provide for subject persons to be legally represented with the leave of the Tribunal, remain appropriate.²⁹

The Review agrees that the current provisions of the CAT Act remain appropriate in relation to the Guardianship Division. The requirement to seek leave from the Tribunal supports the principle that subject persons should fully participate in proceedings on their own behalf. At the same time, it provides a mechanism to ensure that people can be legally represented where they are capable of instructing a lawyer and wish to do so.

Should representation be permitted in the Consumer and Commercial Division in a broader range of circumstances?

Some submissions to the Review suggested that the CAT Act or Guidelines should provide a list of additional circumstances where representation by a lawyer or other agent is permitted as of right. For example, PIAC recommended that this should include:

- Where the party can demonstrate a disability or other impediment to their ability to represent themselves
- Where the party is a tenant and the landlord is represented by an agent
- Where the party is represented by Legal Aid NSW, a community legal service (**CLS**) or other pro bono legal service.

Two submissions suggested that legal representation should be permitted as of right in strata and consumer healthcare liability matters.³⁰ These proposals are discussed below.

Where a party cannot represent themselves due to disability or other reasons

PIAC noted in its submission that in practice NCAT does already grant leave for a party to be represented where the applicant has a disability or other impediment that prevents them from effectively representing themselves. However, PIAC noted that the process of applying for leave can be a source of significant stress to parties, particularly in residential tenancy proceedings where an adverse outcome may result in homelessness. To remedy this situation, PIAC considered that representation should be permitted as of right.

The Review acknowledges that providing a right to representation in these circumstances would provide additional certainty. However, parties would still need to provide evidence of a disability or other impediment and NCAT would still need to assess the validity of that claim. If the Tribunal is still required to assess whether the impairment prevents the party from effectively advocating for themselves, this may not materially alter the practical experience of the parties appearing before the Tribunal.

Nevertheless, the Review acknowledges that the current Guidelines on Representation do not provide certainty to prospective parties as to when leave is likely to be granted. The Guidelines state that leave will usually be granted where one party would be at a disadvantage if not represented. However, it may not be clear to prospective parties what this means. To avoid unnecessary stress for parties, NCAT may wish to consider whether the Guidelines could be revised to more clearly state that where a person has a disability

²⁹ Mental Health Coordinating Council; NSW Council for Intellectual Disability; Dementia Australia.

³⁰ Australian College of Strata Lawyers; Medical Insurance Group Australia.

or other impediment that prevents them from representing themselves, the Tribunal will grant leave for that person to be represented by someone else.

Where the party is a tenant and the landlord is represented by an agent

PIAC also suggested that tenants should be entitled to representation where a landlord is represented by an agent. In residential tenancy proceedings, NCAT's Guidelines on Representation state that the Tribunal will usually grant leave to a person to represent a party if the party is a landlord and the proposed representative is the managing agent of the property. However, a tenant will be granted leave to be represented where the Tribunal considers they would be placed at a disadvantage if not represented.

The Review notes that while tenants may be at a disadvantage in comparison to a managing agent in some proceedings, this may not always be the case. Not all managing agents are well versed in applicable law and procedure, and not all tenants are unsophisticated or vulnerable. In these circumstances, it is appropriate that the Tribunal retain discretion as to whether leave should be granted following an assessment of the circumstances of the parties.

There may, however, be some residential proceedings in which the tenant will almost always be at a disadvantage. For example, in social housing proceedings the landlord will either be a government agency or a social housing provider and is likely to have more experience in conducting tribunal proceedings. Submissions to the Review agreed that NCAT already grants leave for parties to be represented in these circumstances.³¹ Nevertheless, the Tribunal may wish to consider whether the Guidelines could provide additional assurance to prospective parties in this regard.

Where the party is represented by a legal assistance service or tenant advocate

PIAC also suggested that parties who are represented by Legal Aid NSW or another legal assistance service should be entitled to representation. The Tenants' Union of NSW considered that the right to representation should include tenants who are represented by an advocate from the Tenants' Advice and Advocacy Service.

While parties who are represented by a legal assistance service may be at a disadvantage in proceedings, this may not always be the case. Whether or not the presence of a lawyer is justified to ensure a level playing field between the parties will depend on the relative positions of the parties, and the complexity of the subject matter in dispute. For example, in some cases the other party may also be unrepresented and equally inexperienced in conducting tribunal proceedings. In these circumstances, the Review considers that NCAT should continue to exercise discretion as to whether leave to be represented by a legal assistance service should be granted.

Whether legal representation should be permitted in home building, strata and consumer healthcare liability matters

Two submissions, from the Australian College of Strata Lawyers and the Medical Insurance Group Australia, recommended that legal representation should be permitted in disputes arising under the *Strata Schemes Management Act 2015*, *Home Building Act 1989* and in consumer healthcare liability disputes. These submissions argued that these matter types are sufficiently complex to justify the appearance of a lawyer in all cases.

³¹ PIAC; Tenants' Union of NSW.

In accordance with the considerations set out in *Rodny v Stricke* and the Guidelines on Representation, the Tribunal will usually grant leave for parties to be legally represented where complex issues of law or fact are likely to arise in proceedings. While some home building, strata and healthcare liability matters may involve sufficiently complex issues to warrant legal representation, this may not always be the case. It is appropriate that NCAT continue to assess this on a case by case basis. Accordingly, the Review does not recommend that an entitlement to legal representation should be prescribed in the CAT Act in relation to these matter types.

Should the CAT Act include more guidance about when leave should be granted?

The Medical Insurance Group Australia proposed that the CAT Act should include more detailed guidance about the factors NCAT should consider when deciding whether to grant leave for a party to be represented by a lawyer or other agent. It was suggested that this should include considerations such as:

- The nature and complexity of the matter
- The time involved to prepare and hear the case
- Whether expert evidence is required
- Whether legal representation is likely to help resolve the real issues in dispute.

This would be a similar approach to that adopted in the *Queensland Civil and Administrative Tribunal Act 2009*, which provides that in deciding whether to grant leave for a party to be represented, the Tribunal may consider a list of circumstances as supporting the granting of leave.³²

However, the Review does not consider it necessary to include additional guidance in the CAT Act to govern the exercise of the Tribunal's discretion. The current guidance issued by the NCAT Appeal Panel in *Rodny v Stricke*, and contained in the NCAT Guidelines on Representation, already provide an appropriate list of factors for Tribunal Members to consider when deciding leave applications. Formalising these factors in the CAT Act would not necessarily result in any material difference in approach.

Should the Tribunal consider fairness between the parties when granting leave for one party to be represented?

Under the considerations set out in *Rodny v Stricke*, Tribunal Members are not required to consider the impact on the other party where one side is granted leave to be represented but the other side cannot afford to do the same. A number of submissions to the Review argued that NCAT should consider the impact on the unrepresented party in these circumstances.³³ Otherwise, if one party is permitted to have a lawyer and the other party cannot afford to do the same, the unrepresented party may be at a disadvantage.

Where representation is warranted, it may be unfair to deny one party that right due to the position of the other. Further, it is not feasible to prevent some parties, such as government agencies and corporations, from being represented by someone with legal or other relevant experience. However, permitting one party to be represented when the

³² *Queensland Civil and Administrative Tribunal Act 2009*, s 43.

³³ Legal Aid NSW; Property Council of Australia; PIAC; Tenants' Union of NSW; Marrickville Legal Centre; Northern Rivers Community Legal Centre; Hunter Community Legal Centre; Carey Bay Living Residents Community; Retirement Villages Residents Association; Stephen Larsson; Ian Chesterfield; Michael Trigg; Australian Competition and Consumer Commission.

other cannot do the same may create an uneven playing field and may also expose the unrepresented party to a higher liability for costs if they are unsuccessful in the proceedings (see section 3.2 below).

While the NCAT Guidelines on Representation state that Tribunal Members should consider whether it is fair for one party to be represented if another is not in Guardianship Division proceedings, this is not a consideration where an application for leave to be represented is made in Consumer and Commercial Division proceedings. The Tribunal may wish to review the issues raised in submissions and consider whether the relevant Guidelines should be cast in equivalent terms.

3.2. When costs may be awarded

What is a costs order?

A costs order is an order made by a court or tribunal that requires one party to pay another party's legal or other costs. An award of costs is not intended to provide compensation for all losses. A party who is awarded costs will generally only recover the amount they have been charged for legal services, including:

- Fees charged by a solicitor or barrister
- Expenses paid on the client's behalf, such as filing fees, witness expenses and printing costs.

When can costs be awarded by NCAT?

In court proceedings, the general rule is that the successful party is entitled to costs (this is known as 'costs following the event'). However, NCAT is intended to operate more informally than a court and at a lower cost to parties and legal representation is not generally required. In line with this principle, s 60(1) of the CAT Act provides that each party is to pay their own costs.

This does not mean that NCAT cannot award costs in any circumstances. Section 60(2) of the CAT Act provides that NCAT may award costs if it is satisfied that there are special circumstances to warrant this. Section 60(3) provides that the Tribunal may have regard to a range of factors when determining whether there are special circumstances to warrant the awarding of costs, including:

- Whether a party has failed to comply with the guiding principle of the Act to facilitate the just, quick and cheap resolution of proceedings
- Whether a party has unreasonably prolonged proceedings or conducted proceedings in a way that unnecessarily disadvantages another party
- 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
- The nature and complexity of the proceedings.

NCAT may also make Rules about when costs may be available in proceedings.³⁴ For example, Rule 38(2) provides that costs are available in the Consumer and Commercial Division where a claim is worth more than \$30,000 or NCAT has made an order under clause 10 of Schedule 4 to the CAT Act.

Costs may also be available in the absence of special circumstances in relation to some types of matters that are heard by NCAT, including:

- Where another Act contains a specific provision governing the awarding of costs³⁵
- Where a Division Schedule contains a specific provision that applies despite s 60 of the CAT Act.³⁶

Costs are not available in any circumstances in relation to some matters, including:

- Decisions for the purposes of the *Child Protection (Working with Children) Act 2012*
- Decisions for the purposes of the *National Disability Insurance Scheme (Workers Checks) Act 2018*, and
- Administrative review decisions for the purposes of the *Victims Rights and Support Act 2013*.³⁷

Should costs be available in a broader range of circumstances?

Some submissions to the Review suggested that NCAT should be able to award costs in a broader range of circumstances, including:

- Where NCAT considers it appropriate, where both parties are represented by a lawyer, or where NCAT is the only forum in which a matter can be heard³⁸
- Where a party commences a matter and then withdraws it, or where the tribunal dismisses a matter for lack of evidence³⁹
- Where a government agency fails to comply with model litigant obligations⁴⁰
- Where a party is successful in seeking review of a decision made by the Chief Commissioner of State Revenue.⁴¹

The Review does not consider that these proposals should be implemented for the reasons outlined below.

³⁴ CAT Act, s 35; CAT Act, Schedule 7, cl 20.

³⁵ See, for example, s 175B of the *Health Practitioner Regulation National Law (NSW)* and s 108(2)(a) of the *Government Information (Public Access) Act 2009*.

³⁶ See, for example, cl 23 and cl 26 of Schedule 5 to the CAT Act.

³⁷ Clause 13 of Schedule 3 to the CAT Act.

³⁸ Office of Local Government.

³⁹ Australian College of Strata Lawyers; Medical Insurance Group Australia.

⁴⁰ National Justice Project.

⁴¹ Property Council of Australia.

Whether NCAT should award costs ‘where appropriate’ or where both parties are legally represented

The Office of Local Government suggested that NCAT should be permitted to award costs where the Tribunal considers it appropriate. Similar terminology is found in legislation establishing amalgamated Tribunals in other Australian jurisdictions. For example, SACAT may award costs where it is appropriate to do so.⁴² However, it is not clear that this provides for a lower costs threshold in practice. SACAT must still take into account a list of statutory considerations before making a costs order, which are similar in nature to the factors listed in s 60 of the CAT Act.

Nevertheless, it is possible that changing the terminology of s 60 from ‘special circumstances’ to ‘where appropriate’ may result in more costs orders being granted. The Review does not recommend amending the CAT Act to achieve this outcome. The language of ‘special circumstances’ reflects the principle that costs should be awarded only in exceptional cases. It also aligns with s 3(d) of the CAT Act, which states that one of the objects of the CAT Act is to enable the Tribunal to resolve the real issues in proceedings justly, quickly, cheaply and with as little formality as possible.

Similarly, allowing costs to be awarded where both parties are represented by a lawyer may run counter to the objective of resolving disputes justly, quickly, cheaply and with as little formality as possible by incentivising people to engage a lawyer where they may not otherwise do so.

Whether costs should be available where a dispute may only be brought to NCAT

The Office of Local Government also suggested that costs should be available where a matter may only be heard by NCAT. However, where a matter can only be determined by NCAT and cannot also be brought before a court, it does not necessarily follow that costs should be available to the successful party. In conferring exclusive jurisdiction on NCAT, the intention of Parliament will have been to lower the cost of proceedings for parties and reduce the formality of proceedings. It would not be appropriate to provide for automatic costs orders where that is the case.

As noted above, s 60 of the CAT Act is subject to any specific costs provisions that are contained in enabling legislation. If there are strong policy reasons why costs should follow the event in relation to a particular matter type, that position can be provided for in an enabling Act. However, this should not be the general position under the CAT Act.

Whether costs should be available where a matter lacks merit

The Australian College of Strata Lawyers and the Medical Insurance Group Australia proposed that costs should be awarded where a matter is dismissed for lack of evidence. The list of considerations set out in s 60(3) allows NCAT to award costs where a party is conducting proceedings in a way that constitutes an abuse of process, including by causing unreasonable delay or bringing a claim with no tenable basis.

⁴² *South Australian Civil and Administrative Tribunal Act 2013*, s 57. Costs provisions contained in other Tribunal legislation contain different formulations. VCAT may award costs where it is fair to do so (*Victorian Civil and Administrative Tribunal Act 1998*, s 109); QCAT may award costs where the interests of justice require it (*Queensland Civil and Administrative Tribunal Act 2009*, s 102); NTCAT and SAT may award costs in any circumstances after taking into account certain statutory considerations (*Northern Territory Civil and Administrative Tribunal Act 2014*, s 132; *State Administrative Tribunal Act 2004*, s 87).

The Review considers that this strikes the right balance between sending a signal to parties that there are consequences for abusing the tribunal process while also ensuring that unsophisticated litigants are not unfairly penalised.

Whether costs should be awarded for breaches of the Model Litigant Policy

The National Justice Project considered that government agencies should pay costs where they have failed to comply with model litigant obligations. While the Review agrees that government agencies should face consequences for failing to comply with the Model Litigant Policy for Civil Litigation,⁴³ s 60(3) already provides NCAT with the power to award costs in these circumstances. Some of the specific obligations placed on government agencies by the Model Litigant Policy, including to avoid unnecessary delay and minimise costs, are included in the list of considerations that may constitute special circumstances under s 60. Further, the list of considerations in s 60 is not exhaustive. NCAT may have regard to any matter that it considers relevant in determining whether special circumstances have been established.

Whether costs should be available in relation to review of decisions made by the Chief Commissioner of State Revenue

Finally, the Property Council of Australia suggested that costs should be available where a decision of the Chief Commissioner of State Revenue is successfully challenged in administrative review proceedings. The Review notes that costs do not follow the event in relation to administrative review proceedings generally. No strong justification has been identified for setting a differential position in relation to proceedings involving the Commissioner of State Revenue.

While decisions made by the Chief Commissioner of State Revenue are more likely to carry financial consequences for citizens, they are not necessarily more complex than other administrative review applications. In any event, if a decision is sufficiently complex to justify an award of costs, NCAT may already do so under the terms of s 60(3).

Where one party is represented and the other is not

Some submissions to the Review raised concerns about the impact that costs orders can have on individuals where NCAT grants leave for one party to be legally represented but the other party cannot afford to engage a lawyer.

For example, the Retirement Villages Residents Association (**RVRA**) noted that where NCAT permits a retirement village operator to be legally represented, this can have significant consequences for residents if they are unsuccessful and the Tribunal then grants an application for costs. While a corporate entity will always need to be represented by someone, costs will generally be higher where that representative is an external lawyer as opposed to an officer of the company. The RVRA suggested that where NCAT grants leave for a retirement village operator to be legally represented, the Tribunal should only award costs against the applicant if they have been clearly warned that their conduct may lead to that outcome. The Review notes that Tribunal Members would normally explain the potential outcomes to the parties during the proceedings. It is a matter for NCAT whether any additional guidance is required in relation to this issue.

⁴³ <https://www.justice.nsw.gov.au/legal-services-coordination/Documents/Model%20Litigant%20Policy%20for%20Civil%20Litigation.pdf>.

Submissions received from some individuals also raised issues in relation to the operation of Rule 38(2)(b) in proceedings relating to caravans and recreational vehicles (RVs) under the Australian Consumer Law. Rule 38(2) provides that NCAT may award costs in the absence of special circumstances where:

- a) the amount claimed or in dispute is more than \$10,000 but not more than \$30,000 and the Tribunal has made an order under cl 10(2) of Schedule 4 that a party is conducting proceedings in a way that unreasonably disadvantages another party,
- b) the amount claimed or in dispute is more than \$30,000.

Disputes involving caravans and RVs may often exceed this \$30,000 threshold. In these circumstances, submissions noted that Rule 38(2)(b) may result in self-funded retirees and pensioners of limited means being exposed to adverse costs orders. As noted above, the amount of a costs award will generally be higher where NCAT has granted leave for the respondent to be legally represented.

It is a matter for NCAT whether Tribunal Members should be required to consider the financial circumstances of the parties when deciding whether to award costs under Rule 38(2)(b). The Review notes that the financial position of one party would not normally be a relevant consideration when deciding whether to award costs. While the risk of an adverse costs order may deter unrepresented parties from bringing claims to the Tribunal, the purpose of a costs order is not to punish the unsuccessful party but rather to compensate the successful party for expenses incurred in defending a claim.

The Review also notes that the Australian Government has recently amended the Australian Consumer Law to clarify that multiple, non-major (or 'minor') failures can amount to a major failure.⁴⁴ While these reforms do not address the issues raised above in relation to costs orders, they should make it easier for consumers to obtain a remedy in respect of defective caravans and RVs. The Australian Competition and Consumer Commission also continues to focus its compliance and enforcement efforts on some caravan manufacturers.⁴⁵

3.3. When hearings are required

When are hearings required?

Section 50 of the CAT Act provides that a hearing is generally required in NCAT proceedings. That section also provides exceptions to that rule. This includes where the Tribunal:

- Considers an application for leave to appeal
- Uses a resolution process
- Is not required to hold a hearing under enabling legislation
- Makes an order dispensing with a hearing.⁴⁶

NCAT may make an order dispensing with a hearing if it is satisfied that the issues in dispute can be adequately determined by considering written submissions or other

⁴⁴ Treasury Laws Amendment (2020 Measures No. 6) Act 2020, commenced 17 December 2020.

⁴⁵ <https://www.accc.gov.au/media-release/acccs-2021-enforcement-and-compliance-priorities>

⁴⁶ CAT Act, s 50(1).

material. This is commonly referred to as making a decision ‘on the papers’. The Tribunal must also give the parties an opportunity to make submissions about the proposed order to dispense with a hearing and take any submissions received into account.

Section 50(1)(d) also allows NCAT to prescribe other circumstances in which a hearing is not required in the Tribunal Rules. Rule 36A currently provides that hearings are not required in relation to interlocutory or ancillary decisions if the parties consent, or orders staying or otherwise affecting pending applications or appeals.

Despite s 50, clause 6 of Schedule 6 to the CAT Act specifies that the Tribunal must hold a hearing in proceedings that involve the exercise of a substantive Guardianship Division function, and may only dispense with a hearing for the purposes of making an ancillary or interlocutory decision. In practice, hearings are only dispensed with in limited categories of ancillary and interlocutory decisions in the Guardianship Division (for example, decisions to appoint a separate representative).

Do the terms of s 50 remain appropriate?

Only one submission to the Review suggested that the CAT Act should contain a more explicit power to conduct proceedings on the papers, similar to provisions contained in legislation establishing amalgamated tribunals in other Australian States and Territories.⁴⁷ Otherwise, submissions generally considered that the existing terms of s 50 are sufficient to enable NCAT to dispense with hearings in appropriate circumstances.⁴⁸

Legislative provisions relating to tribunal hearing requirements in other jurisdictions are worded differently. For example, the *Queensland Civil and Administrative Tribunal Act 2009* provides that QCAT may, if appropriate, conduct all or part of a proceeding entirely on the basis of documents.⁴⁹ The *Victorian Civil and Administrative Tribunal Act 1998* provides that VCAT may conduct all or part of a proceeding entirely on the basis of documents unless a party makes a reasonable objection.⁵⁰

These provisions are less specific compared to s 50 of the CAT Act and are arguably more permissive (for example, there is no requirement for the Tribunal to make an order dispensing with a hearing). However, this does not necessarily confer a broader power on these Tribunals. In practice, VCAT and QCAT would also need to be satisfied that proceedings can be adequately determined on the papers without compromising principles of procedural fairness.⁵¹

In light of stakeholder feedback, the Review considers that s 50 already provides NCAT with sufficient power to dispense with hearings in appropriate circumstances. Further, it is not clear that reformulating s 50 would result in any practical change. On that basis, the Review does not recommend any changes to the CAT Act in relation to hearing requirements.

⁴⁷ Avant.

⁴⁸ Housing Industry Association; Health Practitioner Councils Authority; Information and Privacy Commission NSW.

⁴⁹ *Queensland Civil and Administrative Tribunal Act 2009*, s 32(2).

⁵⁰ *Victorian Civil and Administrative Tribunal Act 1998*, s 100

⁵¹ Similar provisions are contained in s 67(2) of the *South Australian Civil and Administrative Tribunal Act 2013 (SA)*, and s 60(2) of the *State Administrative Tribunal Act 2004 (WA)*

Should NCAT determine more matters on the papers within its existing powers?

Submissions to the Review expressed conflicting views on whether NCAT should determine more matters on the papers. Some submissions, including from the NSW Bar Association, Information and Privacy Commission NSW, Health Practitioner Councils Authority and Housing Industry Association, considered that NCAT already determines matters on the papers where appropriate. Submissions also agreed that hearings should continue to be required in relation to substantive Guardianship Division functions.

However, other submissions stated that there may be scope for NCAT to determine matters on the papers more often where:

- Both parties consent
- The matter is straightforward, or
- The decision being reviewed by NCAT was made on the papers by the original decision-maker (for example, a decision under the *Government Information (Public Access) Act 2009*).

For example, the Tenants' Union of NSW suggested that NCAT could determine applications for orders to pay unpaid rent on the papers in circumstances where the landlord and tenant have agreed on a repayment plan. The Tenants' Union also suggested that this 'fast-track' on the papers option could be limited to applications that do not also involve termination orders, in order to incentivise landlords to refrain from applying for such orders unnecessarily.

Other examples of matters that stakeholders suggested could be dealt with on the papers included applications in relation to break lease fees,⁵² strata title disputes,⁵³ fencing disputes and lower-value consumer disputes.⁵⁴

Submissions noted that while determining matters on the papers may be more convenient for the parties and more efficient for NCAT, this must be balanced against the Tribunal's broader objectives of openness and transparency. As Acting Judge K P O'Connor stated in *BDK v Department of Education and Communities*, "While hearings 'on the papers' can provide a simple and efficient way of disposing of cases in busy tribunals, proceeding in this way involves a clear departure from the fundamental precept of 'open justice'. One of the usual characteristics of open hearings is the provision to the parties of an opportunity to present oral submissions and argument, and to allow dialogue with the judge or tribunal member(s)."⁵⁵

The Tribunal must also be careful to ensure procedural fairness for the parties. For example, submissions cautioned that NCAT should only consider determining matters on the papers where all parties are able to fully present their case in writing. Where this is not the case, including due to unfamiliarity with tribunal procedures, English language proficiency or literacy issues, this could produce unfair outcomes. It could also result in delays if matters need to be adjourned by the Tribunal in order to obtain further information from the parties.

⁵² Estate Agents Co-operative

⁵³ Law Society of NSW

⁵⁴ LawAccess NSW

⁵⁵ *BDK v Department of Education and Communities* [2015] NSWCATAP 129 at [33].

The Review considers that it is a matter for NCAT whether any of the matters suggested by stakeholders above are suitable to be determined on the papers more often. While some of these matters can be straightforward, they can also involve disputed questions of fact which may require cross-examination of witnesses to properly determine. In these circumstances, the Tribunal is in the best position to determine whether the issues in dispute can be adequately determined based on written submissions.

3.4. Dismissal of proceedings

When can NCAT dismiss proceedings?

Section 55(1)(b) of the CAT Act provides that NCAT may dismiss proceedings at any stage if it considers the proceedings to be frivolous, vexatious or otherwise misconceived or lacking in substance. The Tribunal may also dismiss proceedings:

- If a party withdraws the application or appeal
- If a party fails to appear, or
- If it considers that there has been a want of prosecution.⁵⁶

While differently expressed, NCAT's powers of dismissal are consistent with the powers of courts and other tribunals both in NSW and in other Australian jurisdictions. For example, the Uniform Civil Procedure Rules provide the NSW Courts with summary dismissal powers in relation to proceedings that are frivolous or vexatious, disclose no reasonable cause of action, or are an abuse of process.⁵⁷ Similar formulations which include the phrase 'abuse of process' are contained in tribunal legislation in other States and Territories.⁵⁸

However, as O'Connor AJ stated in *BDK v Department of Education and Communities*, while "[s]ection 55(1)(b) does not have a generic catch-all category of 'abuse of process' to pick up conduct in relation to the issuance and pursuit of proceedings ... the intent of the provision ... is to seek to give the Tribunal a broad power to deal with abuses of its processes, and for them to be interpreted and applied in a power which captures any kind of abuse of process, that can reasonably be seen to fall within their compass."⁵⁹

NCAT also has powers under enabling legislation to dismiss proceedings or refuse to hear matters. For example, the Tribunal has specific powers to dismiss applications under the *Strata Schemes Management Act 2015*.⁶⁰ The Tribunal also has specific powers under the *Government Information (Public Access) Act 2009 (GIPA Act)* to manage unmeritorious applications filed under that Act. For example:

- Section 109 states that NCAT may refuse to review a decision made by an agency if it is satisfied that the application for review is frivolous, vexatious, misconceived or lacking in substance

⁵⁶ CAT Act, s 55.

⁵⁷ Uniform Civil Procedure Rules, Rule 13.4(1).

⁵⁸ See for example: *Victorian Civil and Administrative Tribunal Act 1998*, s 75(1) *Queensland Civil and Administrative Tribunal Act 2009*, s 47(1); *South Australian Civil and Administrative Tribunal Act 2013*, s 48(1); *State Administrative Tribunal Act 2004*, s 47(1).

⁵⁹ *BDK v Department of Education and Communities* [2015] NSWCATAP 129 at [62] and [66].

⁶⁰ See, for example, ss 72, 187 and 242.

- Section 110 states that NCAT may order that a person is not permitted to make an access application to an agency without first obtaining the approval of NCAT if a person (or any other person acting in concert with that person) has made at least 3 applications in the previous 2 years that lack merit.

Applications under the *Government Information (Public Access) Act 2009*

Two submissions to the Review, which requested confidentiality, suggested that NCAT should have additional powers to dismiss or decline to hear applications under the GIPA Act where:

- The applicant is engaging in conduct designed to harass, cause delay or detriment or achieve another wrongful purpose, or
- An application lacks merit.

Conduct that is designed to harass, cause delay or detriment, or achieve another wrongful purpose

These submissions raised concerns about behaviour by applicants that amounts to abusive or bullying conduct towards other parties or towards Tribunal Members and officers. Where such conduct occurs, the submissions stated that NCAT should be empowered to dismiss an application whether it has merit or not. It was suggested that expanding s 55 of the CAT Act to include where an applicant has engaged in conduct that is 'designed to harass, cause delay or detriment, or achieve another wrongful purpose' could achieve this objective.

While the CAT Act does not define the term vexatious, it does have an established meaning at common law. For example, in *Attorney-General v Wentworth*⁶¹ Roden J stated that proceedings will be vexatious if:

- They are instituted with the intention of annoying or embarrassing the person against whom they are brought
- They are brought for collateral purposes, and not for the purpose of having the court adjudicate on the issues to which they give rise
- Irrespective of the motive of the litigant, they are so obviously untenable or manifestly groundless as to be utterly hopeless.

The term 'collateral purpose' captures proceedings that are brought to harass, cause delay or detriment, or achieve another wrongful purpose. A proceeding may be vexatious even if the litigant is exercising an available legal right if it can be shown that the predominant purpose for which the matter has been commenced and/or maintained is an improper or collateral purpose.⁶² However, this involves a balancing exercise by the court or tribunal to determine whether the collateral purpose outweighs any legitimate purpose.⁶³ In conducting this exercise, courts and tribunals will focus on the purpose for which the proceedings are brought and not the conduct of the parties generally.

⁶¹ (1998) 14 NSWLR 481 at [491]

⁶² *William v Spautz* [1992] HCA 34

⁶³ *BDK v Department of Education and Communities* [2015] NSWCATAP 129

According to the submission, including a specific power to dismiss proceedings where an applicant has engaged in improper conduct would therefore broaden the circumstances in which NCAT may strike out proceedings. However, the Review notes that where an applicant has a legal right to bring a claim before the Tribunal, it will always be necessary to balance whether any improper conduct meets an appropriately serious threshold to justify striking out that claim. The rule of law ordinarily requires that a person should have access to courts and tribunals in order to invoke their jurisdiction.⁶⁴ This is a right that should not be denied lightly.

While amending s 55 of the CAT Act would allow the Tribunal to consider a broader range of factors, it may therefore not result in matters being dismissed (especially where an applicant has a valid claim). The Review therefore does not recommend amending s 55 in this way. However, the Review acknowledges that harassment or other improper conduct by applicants, particularly where such conduct continues over a long period of time, is a serious issue that can affect the mental health and wellbeing of agency staff, as well as Tribunal Members and officers.

As this issue has only been raised in relation to applications made to the Tribunal under the GIPA Act, the Review considers that the Department of Communities and Justice should consider whether ss 109 and 110 of the GIPA Act, which are intended to restrain improper conduct by applicants, are operating as intended and identify opportunities to strengthen these provisions.

Recommendation 1

That the Department of Communities and Justice consider opportunities to strengthen provisions in the *Government Information (Public Access) Act 2009* that are aimed at restraining applicants who engage in improper conduct.

Applications that lack merit

One submission⁶⁵ suggested that, in relation to reviews of decisions made by government agencies under the GIPA Act, applicants should be required to seek leave from NCAT before filing an application with the Tribunal. It proposed that leave should only be granted where a Tribunal Member considers the application has a realistic chance of success.

As this proposal would require an amendment to the GIPA Act, the Review considers that it falls outside the scope of this report. However, the Review notes that there is no evidence that a high proportion of applications under the GIPA Act are without merit. Of the 167 GIPA Act matters finalised by the Tribunal in 2019–20, 86 were dismissed (51.5%).⁶⁶ However, this does not mean that these matters lacked merit or had no realistic chance of success.

For example, in some cases the applicant may obtain access to at least some of the information sought in the original application through negotiation even if NCAT ultimately finds in favour of the agency and dismisses the application in relation to the remaining aspects of the agency's decision. Where a matter is dismissed in full, this does not mean

⁶⁴ *Attorney-General (Cth); ex parte Skyring*, per Kirby J at [8]

⁶⁵ Confidential.

⁶⁶ Data provided by NCAT Principal Registry.

the application should not have been brought. As noted above, the right of individuals to invoke the jurisdiction of courts and tribunals is a fundamental aspect of the rule of law and requires applicants to be given the fullest opportunity to present their case. If a leave requirement were to be introduced, it is therefore likely to be interpreted narrowly.

Where there is a legitimate basis for a claim, introducing a leave requirement could therefore create an unnecessary administrative barrier for claimants and impose a significant workload burden on the Tribunal. If a respondent agency considers that an application lacks merit, it can already apply to have the matter dismissed under s 55(1)(b). Otherwise, the Review considers that applicants should be given the opportunity to fully present their case to the Tribunal.

As noted above, s 110 of the GIPA Act already enables NCAT to restrain a person from making access applications to an agency where they have already made three applications in the previous two years that lack merit. Where a restraint order is granted, a person cannot make an access application to an agency under the GIPA Act without leave from the Tribunal. This is intended to provide a targeted mechanism to prevent unmeritorious applications from progressing to NCAT, without placing an undue administrative burden on applicants who have legitimate claims.

Other proceedings that are misconceived or lacking in substance

The Caravan and Camping Industry Association (**CCIA**) suggested that NCAT should assign Tribunal Members or officers to screen out applications that do not have any merit at an early stage. This would include matters:

- Where NCAT does not have authority to hear the matter or make the order/s sought
- Where the applicant does not have legal standing to bring the claim
- That are otherwise lacking in substance.

The CCIA stated that in some cases the Tribunal may deal with arguments about whether applications should be dismissed for lack of merit or want of jurisdiction at the substantive hearing. This can result in respondents spending time and money preparing for a full hearing in case the Tribunal does not dismiss the application and proceeds to deal with the substantive matter.

The Review notes that NCAT staff may only refuse to accept an application on limited grounds. This would include, for example, where the application is substantially incomplete or is not accompanied by a required filing fee, or where a party has failed to fulfil a mandatory pre-filing requirement such as mediation. However, registry staff do not have legislative authority to refuse applications. Nor would it be appropriate to give registry staff such authority. Whether or not a matter should be dismissed for lack of merit or want of jurisdiction may involve complex legal questions that should properly be determined by a legally qualified Tribunal Member.

It is a matter for NCAT whether there is any benefit in allocating a Tribunal Member to review applications for lack of jurisdiction or lack of merit at the point of filing. However, the Review notes that given the high volume of applications made to NCAT each year, particularly in the Consumer and Commercial Division, this would be resource intensive. Further, in many cases it would still be necessary to schedule a hearing to hear arguments from the parties. Where this is the case, initial review by a Tribunal Member may not deliver any efficiencies.

3.5. Enforcement of NCAT orders

Enforcement tools available under the CAT Act and enabling legislation

The CAT Act sets out a suite of enforcement tools that may apply where a party fails to comply with an order:

1. **Certified money orders** – where a money order is made by the Tribunal and is not complied with, a party may request that NCAT issue a certificate that can be registered as a judgment debt in a court of competent jurisdiction (usually the Local Court) and enforced.
2. **Civil penalties** – where an order is not a designated order, failure to comply with an order made by the Tribunal without reasonable excuse may result in a monetary penalty of up to \$11,000 for individuals and \$22,000 for corporations.⁶⁷
3. **Criminal penalties** – failure to comply with a designated Tribunal order without lawful excuse is an offence and may result in a maximum penalty of 100 penalty units for a corporation, or in any other case 50 penalty units or imprisonment for 12 months (or both).⁶⁸ Designated orders include non-publication orders made under s 64 of the CAT Act, as well as certain orders made under s 108 of the *Anti-Discrimination Act 1977* and s 42 of the *Guardianship Act 1987*.
4. **Contempt** – a person may be guilty of contempt of the Tribunal if the person does, or omits to do anything without reasonable excuse, that would be a contempt of court. This includes conduct such as swearing at or abusing a Tribunal Member, refusing to answer questions or give evidence, or disobeying orders.

In the Consumer and Commercial Division, clause 8 of Schedule 4 to the CAT Act also provides that NCAT may give leave to a party to renew the proceedings if an order is not complied with. If proceedings are renewed, the Tribunal may make any other order that it could have made when the matter was originally determined. In practice, this clause is often used to convert an order to provide goods and services (such as an order requiring a tradesperson to fix building work) into a money order so that a party may conduct the work themselves and seek reimbursement.

Enabling legislation may also contain specific enforcement provisions in relation to particular application types. For example, the *Residential Tenancies Act 2010* empowers NCAT to issue warrants for possession where a tenant fails to vacate premises after a termination order has been granted.

Whether NCAT should be able to enforce its own money orders

Some submissions stated that NCAT should be able to enforce its own money orders when a party fails to comply. Stakeholders noted that registering money orders with the Local Court in order to take enforcement action can be confusing and time-consuming for people who do not have any prior experience with the court process.

The Review does not support giving NCAT the power to enforce its own money orders. The ability to enforce its own orders is an essential element in the exercise of judicial

⁶⁷ CAT Act, s 72(3) and s 77(3)

⁶⁸ CAT Act, s 72(1).

power and is therefore one of the fundamental characteristics that separates a court from a tribunal.⁶⁹ For this reason, money orders made by amalgamated tribunals in other States and Territories must also be enforced in a court of competent jurisdiction.⁷⁰ It would also be unnecessarily duplicative to set up parallel enforcement processes within NCAT when this system already exists in the NSW Courts.

However, the Review acknowledges that from a user perspective the current enforcement process can be administratively burdensome. While guidance material is available on the LawAccess NSW website to help people understand the steps they need to take,⁷¹ and certified money orders can be filed with the courts online, there would be benefit in making the process more user-friendly (particularly for self-represented parties).

NCAT is currently part of the NSW Courts and Tribunal Digital Reform Project. This project includes work to the Tribunal's legacy case management systems into a single, tribunal-wide case management system, which is expected to be completed in 2022. As the new case management system will be the same platform used by NSW Courts, this may create opportunities to streamline the enforcement process, minimise the steps required to be performed by parties and create a more user-friendly online experience. For example, certified money orders could be transferred electronically to the Courts and registered at the request of a party.

Recommendation 2

Once NCAT has transitioned to its new case management system, the Department of Communities and Justice should review opportunities to streamline the enforcement of NCAT money orders in order to enhance user experience.

Whether NCAT should refer potential breaches of legislation to NSW Fair Trading

The Tenants' Union of NSW encouraged NCAT to consider a more active partnership with NSW Fair Trading in relation to potential breaches of enabling legislation. For example, where evidence before NCAT indicates a breach of the law has occurred, the Tribunal could direct NSW Fair Trading to investigate, issue a show cause notice, or issue a penalty notice.

The Review does not consider it would be appropriate for NCAT to direct NSW Fair Trading in this way. NCAT is an independent body and it is not its role to intervene in disciplinary decisions made by a government regulator. Further, s 91 of the CAT Act already provides that the President may provide reports to any Minister administering legislation that confers jurisdiction on NCAT in relation to any matter:

- That is of importance to the administration of the CAT Act or any matter falling within its jurisdiction
- That is in the public interest generally.

⁶⁹ *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245.

⁷⁰ See for example: *Victorian Civil and Administrative Tribunal Act 1998 (Vic)*, s 121; *Queensland Civil and Administrative Tribunal Act 2009*, s 131; *South Australian Civil and Administrative Tribunal Act 2013*, s 381; *State Administrative Tribunal Act 2004*, s 85.

⁷¹

https://www.lawaccess.nsw.gov.au/Pages/representing/Local_courts_small_claims/owed_money/after_court/Enforcing_NCAT_orders.aspx#Step2:RegisterthecertifiedorderwiththeLocalCourt%C2%A0

The Review considers that this section is sufficient to allow the Tribunal to refer potential breaches of the law to the relevant Minister. In relation to matters falling within the remit of NSW Fair Trading, the relevant Minister could then request an investigation.

Non-compliance with specific performance orders

A number of submissions to the Review raised concerns about the difficulty of enforcing orders that require a party to take, or refrain from taking, a particular action, especially in relation to orders made by NCAT's Consumer and Commercial Division. These types of orders are known as specific performance orders. Examples include:

- Orders that require a landlord, tradesperson or other relevant person to make repairs or rectify defective work
- Orders that require a person to provide access to a property, or refrain from entering a property, during certain times.

Where a party fails to comply with such an order, the CAT Act provides a number of options. In the Consumer and Commercial Division, a party may:

- Apply to renew the proceedings under clause 8 of Schedule 4 to the CAT Act and seek different orders
- Pursue the matter as a civil penalty or contempt proceeding.

Stakeholders made a number of comments and suggestions about these provisions, which are discussed below.

Whether NCAT should be empowered to convert orders to money orders in a broader range of matters under the *Retirement Villages Act 1999*

The Retirement Village Residents Association suggested that, where a retirement village operator fails to comply with a Tribunal order to undertake repairs or maintenance within a reasonable timeframe, a resident should be able to pay for the work themselves and then apply to NCAT to have the original order converted into a money order.

Where an order is not complied with, a party may apply to renew proceedings and seek different orders under clause 8 of Schedule 4 in relation to any proceedings in the Consumer and Commercial Division. However, a party may only apply for orders that the Tribunal could have made when the matter was originally determined.⁷²

Under the *Retirement Villages Act 1999*, residents may only carry out capital maintenance or capital replacement and then seek reimbursement from the operator where the maintenance or replacement is urgent and the operator has been given a reasonable opportunity to carry out maintenance or replace the item.⁷³ In relation to non-urgent repairs, the Tribunal may only order that the landlord carry out specified maintenance or replace the item.⁷⁴ Where an order in relation to non-urgent repairs is not complied with, NCAT therefore does not have legislative power to convert the order into a money order (as it could not have made such an order when the matter was originally determined).

⁷² CAT Act, Schedule 4, clause 8(4)(a).

⁷³ *Retirement Villages Act 1999*, s 95(3).

⁷⁴ *Retirement Villages Act 1999*, s 96.

Allowing residents to make repairs and seek reimbursement where there has been an unreasonable delay in complying with a Tribunal order more generally would therefore require an amendment to the *Retirement Villages Act 1999*. As that Act is the responsibility of the Minister for Better Regulation and Innovation, the Review has referred this proposal to the Department of Customer Service for further consideration.

Whether independent auditors should be appointed to monitor compliance with NCAT orders in relation to strata disputes

The Owners Corporation Network suggested that NCAT should appoint independent auditors to oversee compliance with orders issued under the *Strata Schemes Management Act 2015 (Strata Act)*, particularly in relation to repairs and maintenance. The Owners Corporation Network also considered that auditors could be used to audit strata scheme management in order to:

- Support NSW Fair Trading investigations into breaches of the Strata Act and inform the conduct of mediations
- Assist the Tribunal to make decisions regarding the appointment of compulsory strata managing agents, and report on the performance of that manager.

The Review notes that it is not generally the role of a tribunal to appoint an auditor to oversee compliance with its orders. Auditing and compliance activities would normally be the role of a regulator, in this case, NSW Fair Trading. As this proposal relates to the Strata Act, it has been referred to the Department of Customer Service for consideration.

Whether penalties for disobeying tribunal orders should be imposed more often

Some submissions to the Review, particularly from individuals, stated that the criminal and civil penalties available under ss 71 and 72 of the CAT Act should be imposed more frequently where a party fails to comply with an order.

The Review acknowledges that it can be extremely frustrating when another party does not comply with a Tribunal order. However, the imposition of a civil penalty may have significant financial consequences. In the case of designated orders to which criminal offence provisions apply, the penalty may even include imprisonment. For this reason, the CAT Act provides that only the following persons can commence proceedings for civil or criminal penalties:

- The Minister
- A person with the written consent of either the Minister or another person or body authorised by the Minister for that purpose.⁷⁵

Civil penalty proceedings can be heard by NCAT.⁷⁶ However, proceedings for criminal offences must be commenced in the Local Court.⁷⁷

Most submissions which commented on the need for greater application of civil penalty provisions related to disputes about strata schemes. The Review notes that the **Strata Act** has recently been amended to permit individuals to commence proceedings for pecuniary penalties. From 1 July 2021, s 247A of the Strata Act enables individuals and owners

⁷⁵ CAT Act, s 75.

⁷⁶ CAT Act, s 77.

⁷⁷ CAT Act, s 76.

corporations to apply to the Tribunal to impose a pecuniary penalty for contravention of a Tribunal order made under that Act. This may resolve stakeholder concerns in this area.

Marrickville Legal Centre also suggested that individuals should be permitted to apply to the Tribunal for a civil penalty where an order is not being complied with, and that any penalties imposed should be payable to those individuals. The Review does not consider that individuals should be authorised to bring civil penalty proceedings under the CAT Act generally. The maximum civil penalty amount that can be imposed by the Tribunal under the CAT Act (\$11,000 for individuals and \$22,000 for corporations) is up to four times the maximum penalty available under the Strata Act (50 penalty units or \$5,500). This is a significant financial penalty. It is appropriate that decisions to bring such proceedings are made following an independent assessment of the party's conduct by the Attorney General, or a person with the written consent of either the Minister or another person or body authorised by the Minister for that purpose.

The Tenants' Union of NSW also commented that NCAT should deal with non-compliance with Tribunal orders as contempt more often, particularly in relation to non-compliance with orders for repairs and maintenance.⁷⁸ However, contempt by breach of an order will normally be regarded as a civil contempt. This means that it is generally the responsibility of the party to bring an application. Courts and Tribunals, or the Attorney General, will not play a more active role in proceedings unless a contempt "involves deliberate defiance or ... if it is contumacious": *Witham v Holloway* (1995) 183 CLR 525 at 530.

Non-compliance with court and tribunal orders is a serious issue that can undermine public confidence in the administration of justice. However, as the Victorian Law Reform Commission recently concluded in its Report on Contempt of Court, contempt is also an exceptional power that should only be used where other mechanisms are ineffective or have failed.⁷⁹ In many cases, there may be other enforcement mechanisms which can be used. For example, where a landlord fails to comply with an order to make repairs, the Tribunal may also make orders:

- That the tenant's rent be reduced until the repairs are done
- To compensate the tenant for losses.⁸⁰

The Review acknowledges that this may not provide an adequate incentive to all landlords. Nevertheless, given the civil nature of NCAT's jurisdiction it is appropriate that civil and criminal penalty proceedings and contempt proceedings be pursued as a last resort.

Whether maximum civil penalties should be increased

In its submission to the Review, PIAC also suggested that the maximum civil penalty available under the CAT Act could be increased, particularly in relation to corporations. Marrickville Legal Centre suggested that a daily penalty should be available for each day of non-compliance, in order to encourage more parties to comply with Tribunal orders. Both of these comments related to residential tenancy proceedings, particularly non-compliance with orders for repairs and maintenance.

⁷⁸ Tenants' Union of NSW.

⁷⁹ https://www.lawreform.vic.gov.au/wp-content/uploads/2021/07/VLRC_Contempt_of_Court_report_forWeb.pdf, p. 116.

⁸⁰ *Residential Tenancies Act 2010*, ss 45 and 187(1).

As noted above, the maximum civil penalty amount that can be imposed by the Tribunal under the CAT Act is \$11,000 for individuals and \$22,000 for corporations. The maximum penalty for corporations is slightly higher than the equivalent monetary penalty that can be imposed on individuals by the ACT Civil and Administrative Tribunal (\$4,000), and broadly similar in relation to corporations (\$20,000).⁸¹ In other States and Territories, criminal penalties apply for failure to comply with non-monetary tribunal orders. Maximum financial penalties are not consistent between jurisdictions and currently range from approximately \$10,000⁸² to \$50,000.⁸³

While the maximum civil penalty is intended as a deterrent, it must also be proportionate to the value of disputes typically heard by NCAT. Further, it is not clear that increasing the maximum penalty would necessarily influence the behaviour of respondents. Given this proposal was raised in relation to non-compliance with repairs and maintenance orders, particularly in relation to social housing providers, the Review considers that it may be more appropriate for relevant agencies, such as the Registrar of Community Housing, to explore other mechanisms to promote compliance and best practice in this area.

Whether appeal pathways against civil penalties should be streamlined

One submission to the Review, from the Australian College of Strata Lawyers, noted that the CAT Act currently provides alternate appeal pathways depending on how the Tribunal is constituted when hearing a civil penalty application. Section 82(3) of the CAT Act provides that:

- If the Tribunal is constituted by one or more senior judicial officers,⁸⁴ an appeal against a decision to issue a civil penalty may be made to the Supreme Court
- If the Tribunal is not constituted by or with any senior judicial officers, an appeal against a decision to issue a civil penalty may be made to the District Court.

This submission stated that it would be more appropriate for all appeals to be dealt with in the same forum to ensure consistency. The Review acknowledges that the current appeal pathways do diverge. However, this is necessary to reflect the hierarchy of judicial officers in NSW. Where a decision is made by a Tribunal Member who is a District Court, Supreme Court or Land and Environment Court Judge, it is appropriate for an appeal against that decision to be heard by an appropriately constituted superior court (either the Supreme Court or Court of Appeal).

In order to provide consistency, all appeals against civil penalty decisions would therefore need to be heard by the Court of Appeal. This may not be justified based on the complexity of some civil penalty proceedings or the maximum penalties that apply (for example, the maximum monetary penalty that can be imposed in relation to breach of by-laws under the *Strata Schemes Management Act 2015* is \$5,500).

⁸¹ ACT Civil and Administrative Tribunal Regulation 2009, cl 5.

⁸² *Victorian Civil and Administrative Tribunal Act 1998* (Vic), s 133; *State Administrative Tribunal Act 2004* (WA), s 95(1).

⁸³ *South Australian Civil and Administrative Tribunal Act 2013*, s 89.

⁸⁴ 'Senior judicial officer' means a Judge of the District Court, Supreme Court or Land and Environment Court, see CAT Act, s 82(5).

3.6. Appealing decisions made by NCAT

When can a decision made by NCAT be appealed?

Prior to NCAT's establishment, a number of decisions made by tribunals in NSW could only be appealed to the courts. Some decisions could not be appealed at all, although they could be subject to judicial review by the Supreme Court of NSW. To ensure more equitable access to a more timely and cost-effective appeal mechanism, the CAT Act established an internal Appeal Panel within NCAT.

The Appeal Panel can review the vast majority of decisions made by NCAT's Divisions. Under s 80(2)(b) of the CAT Act, the general position is that an appeal may be made to the Appeal Panel:

- As of right on any question of law
- With the leave of the Appeal Panel on any other grounds.

Clause 12 of Schedule 4 to the CAT Act places restrictions on when leave may be granted under s 80(2)(b) in relation to decisions made by the CCD. In relation to CCD decisions, the Appeal Panel may only grant leave if it is satisfied that the applicant may have suffered a substantial miscarriage of justice because:

- The initial decision was not fair or equitable
- The initial decision was against the weight of evidence
- Significant new evidence has arisen that was not reasonably available at the time of the initial proceedings.

A small number of decisions cannot be appealed to the internal Appeal Panel but may still be appealed to a court. These matters include:

- Decisions made by the Occupational Division relating to professional discipline, which must be lodged directly with the Supreme Court of NSW or Land and Environment Court of NSW⁸⁵
- Decisions relating to contempt or civil penalty proceedings, which must be lodged with the District Court of NSW or Supreme Court of NSW⁸⁶
- Decisions made under NCAT's external appeal jurisdiction.⁸⁷

Decisions made by the Appeal Panel can be appealed to the Supreme Court of NSW under s 83 of the CAT Act, with the leave of the Court.

Should the Act specify how the Appeal Panel is to be constituted in CCD appeals?

Section 27 of the CAT Act provides that the Appeal Panel should either consist of:

- One member who is an Australian lawyer, or
- Two or more members, one of whom must be a lawyer.

⁸⁵ Part 6 of Schedule 5 to the CAT Act.

⁸⁶ Section 32(3)(c) and (d)

⁸⁷ Section 32(3)(b) of the CAT Act.

This means that the particular number of members assigned to hear an appeal is a matter for the President to determine, unless a Division Schedule specifies how the Appeal Panel must be constituted in respect of a specific matter type. For example, Schedule 6 provides that when hearing appeals from decisions made by the Guardianship Division, the Appeal Panel must be constituted of 3 members, 2 of whom must be lawyers.⁸⁸

The Australian College of Strata Lawyers noted that the Appeal Panel is commonly constituted by two members when hearing appeals from decisions made by the Consumer and Commercial Division. It proposed amending Schedule 4 of the CAT Act to specify that the Appeal Panel must be constituted with either one or three members in relation to these appeals in order to:

- Reduce the risk of the Appeal Panel reaching an impasse
- Encourage proper canvassing of the issues.

The Review notes that, although rarely invoked in practice, s 57(3) of the CAT Act provides for situations in which a panel is equally divided in opinion. In this situation, the opinion that prevails is:

- On a question of law, the opinion of the member who is an Australian lawyer (or the member with the greatest seniority who is an Australian lawyer)
- On any other question, the opinion of the presiding member.

It is therefore not considered necessary to specify Appeal Panel constitution requirements in the CAT Act in relation to CCD matters to avoid the risk of deadlock.

It is acknowledged that the more junior member of a two-member Appeal Panel could subconsciously defer to the opinion of the more senior member to avoid an impasse. However, there is no evidence that this is more than a theoretical issue. The presence of two members on an Appeal Panel also has benefits. For example, it enables discussion and debate and provides more junior Tribunal Members with an opportunity to undertake appellate work. While the presence of a third Appeal Panel member could encourage even more rigorous debate, it would also substantially increase the cost of appeal proceedings and could lead to delay.

The Review considers that the President is in the best position to determine whether the complexity of an appeal warrants the allocation of one, two or three members to an Appeal Panel. Accordingly, no change is recommended to Appeal Panel constitution requirements in relation to Consumer and Commercial Division decisions.

Should the timeframe for making internal appeals be longer?

Some submissions to the Review raised concerns regarding the timeframes for making an internal appeal, which are located in the CAT Rules:

- Rule 25(4)(c) provides that internal appeals must be lodged within 28 days
- Rule 25(4)(b) provides that internal appeals relating to decisions made in 'residential proceedings' must be lodged within 14 days.

⁸⁸ CAT Act, Clause 13 of Schedule 6

In both cases, time starts to run from the day on which the appellant was notified of the decision or given reasons for the decision (whichever is later). NCAT may also extend the deadline for lodging an appeal.

Setting out the timeframes for appeal in the CAT Rules, rather than in the CAT Act, reflects the principle that matters of procedure should generally be determined by the Tribunal. It also accords with the approach taken in NSW Courts, where appeal timeframes are set out in the Uniform Civil Procedure Rules.

Whether or not the CAT Rules should be amended in response to stakeholder feedback is therefore a matter for the NCAT Rule Committee to consider. However, the Review makes the following comments in relation to the issues and proposals raised in submissions.

The 28-day timeframe in Rule 25(4)(c)

Submissions stated that it can be difficult to obtain legal advice within 28 days to determine whether an appeal is worth pursuing.⁸⁹ However, a 28-day appeal timeframe is common to civil proceedings in most NSW courts and tribunals. For example, the Uniform Civil Procedure Rules provide that appeals against decisions made by a court in NSW must be filed within 28 days from the day the decision is given.⁹⁰ Appeal timeframes for amalgamated tribunals in other Australian jurisdictions are also typically 28 days.⁹¹

It is acknowledged that the 28-day timeframe can effectively be shorter for appellants who live in regional or remote areas, or who may otherwise find it difficult to attend an NCAT location in person. This is not an issue where a party elects to receive notice of a decision via email. Where a notice is sent via post, the timeframe to appeal will not start to run until the notice is received. Rule 13(4) of the CAT Rules provides that, unless the contrary is proved, a document is only taken to be received at the end of the seventh working day after the date it was posted.

However, where a party is not able to attend an NCAT Registry or Service NSW location in person to file an appeal, postal delivery timeframes will take up a proportion of the appeal timeframe. Depending on origin and destination and the level of congestion in the delivery network, Australia Post currently endeavours to deliver regular post within 2 to 4 business days and priority post within 1 to 2 business days.⁹²

The Review notes that extensions of time can be sought from NCAT, including where an appeal deadline is missed due to postal issues. The Department is also implementing a digital reform program that will enable online filing of NCAT appeals, which is expected to be delivered in 2022. While not all applicants will be able or willing to use online services, this will ensure that most people are able to make use of the full 28-day appeal timeframe. The Department's digital reform program is discussed in more detail at section 4.1.

The 14-day timeframe in Rule 25(4)(b)

Submissions also pointed out that the issues outlined above are exacerbated in residential proceedings, where appellants have 14 days to appeal a decision to the Appeal Panel.⁹³

⁸⁹ Northern Rivers Community Legal Centre; Tenants' Union of NSW; Legal Aid NSW

⁹⁰ Uniform Civil Procedure Rules 2005, Rules 50.3

⁹¹ See, for example: *South Australian Civil and Administrative Tribunal Act 2013*, s 70; *Victorian Civil and Administrative Tribunal Act 1998*, s 148; *Queensland Civil and Administrative Tribunal Act 2009*, s 143; *State Administrative Tribunal Act 2004*, s 105.

⁹² See <https://auspost.com.au/business/shipping/domestic-shipping/delivery-speeds-and-coverage>.

⁹³ Mary Preston; Northern Rivers Community Legal Centre; Legal Aid NSW.

For the purposes of the CAT Rules, residential proceedings mean proceedings allocated to the CCD arising under the:

- *Boarding Houses Act 2012*
- *Residential (Land Lease) Communities Act 2013*
- *Residential Parks Act 1998*
- *Residential Tenancies Act 2010*
- *Retirement Villages Act 1999*.⁹⁴

The Review notes that the 14-day timeframe for appeals in residential proceedings is intended to provide finality and certainty in circumstances where a longer appeal timeframe may adversely affect private property rights or other interests. For example, where unpaid rent, site fees or other contributions are continuing to accrue, extending the appeal timeframe may result in further financial loss to the landlord or operator.

Whether there is merit in changing the appeal timeframe for residential proceedings is a matter for the NCAT Rule Committee to consider. The Review notes that other States and Territories provide a longer timeframe to appeal tenancy and related decisions. For example, parties have 28 days to seek leave to appeal a tenancy decision to the QCAT Appeal Panel or ACAT Appeal Panel.⁹⁵ Parties also have 28 days to appeal tenancy decisions made by VCAT, SACAT and NTCAT, although appeals from these Tribunals lie to the superior courts.⁹⁶

When should time to appeal start running?

Two submissions suggested that changes should be made to the CAT Rules in relation to when time to appeal should start running.⁹⁷

Where written reasons are requested

The Caravan and Camping Industry Association NSW suggested that, where an appellant receives oral reasons for a decision at hearing and then later requests written reasons, the appeal timeframe should not start running until those written reasons are received. While an appellant may amend their specific grounds for appeal after an appeal is lodged, the submission states that requiring appeals to be filed before written reasons are available may result in:

- Appeals with limited or no prospects of success being lodged
- Appellants paying legal costs and filing fees for appeals that will ultimately be withdrawn.

The Review acknowledges that requiring a party to lodge an appeal without the benefit of full written reasons may result in some appeals being withdrawn once those reasons are made available. However, this must be balanced against the principle that Tribunal decisions should provide certainty and finality. If the appeal clock did not start running until

⁹⁴ Civil and Administrative Tribunal Rules, Rule 3(1).

⁹⁵ *Queensland Civil and Administrative Tribunal Act 2009*, s 143(3); ACT Civil and Administrative Tribunal Procedures Rules 2020, r 94.

⁹⁶ *Victorian Civil and Administrative Tribunal Act 1998*, s 148(2)(a); *South Australian Civil and Administrative Tribunal Act 2013*, s 70(2); *Northern Territory Civil and Administrative Tribunal Act 2014*, s 94(3).

⁹⁷ Caravan and Camping Industry Association; Legal Aid NSW

written reasons were requested and received, this would extend the appeal timeframe by a significant margin (up to 84 days compared to the current 28 days, or up to 70 days compared to the current 14 days in residential proceedings).⁹⁸

On balance, the Review does not consider that any change should be made to the appeal timeframes in relation to receipt of written reasons. Allowing parties to amend specific grounds of appeal where written reasons are requested provides a mechanism to ensure that appellants and respondents can fully argue their case on appeal, without unduly extending the overall appeal timeframe.

Where a set aside application is lodged

In some circumstances, NCAT can set aside a decision it has made. For example, the CAT Regulation states that NCAT can set aside a decision:

- If all of the parties to the proceedings consent
- If the decision was made in the absence of a party and NCAT is satisfied that the absence resulted in the party's case not being adequately put to the Tribunal.

An application to set aside a decision must be made within 7 days of the decision being made. Making an application to set aside a decision does not prevent a party from appealing the same decision, provided the set aside application is filed first.⁹⁹

Legal Aid NSW suggested that where a set aside application is lodged, time to appeal should not start running until the set aside application is determined. Legal Aid considered that this would avoid parties incurring costs preparing an appeal where a set aside application is successful.

As this proposal relates to the CAT Regulation, it is not within the scope of this Review. Matters relating to the CAT Regulation will be considered during the staged repeal and remake of the CAT Regulation, which is due to be completed on or before 1 September 2022. However, the Review notes that if time to appeal did not start running until a set-aside application was determined, parties may be incentivised to lodge set-aside applications in order to obtain more time to appeal. This could lead to delays in the progress and finalisation of appeals.

3.7. Member qualifications and terms of appointment

What qualifications are NCAT members required to have?

Section 13 of the CAT Act sets out the qualifications that a person is required to hold in order to be eligible for appointment to NCAT:

Category	Required qualifications
President	A judge of the Supreme Court of NSW
Deputy President	An Australian lawyer of at least 7 years' standing, or a person who holds, or has held, judicial office in Australia

⁹⁸ Section 62(2) of the CAT Act provides that parties have 28 days to request a statement of written reasons, and that NCAT then has 28 days to provide that statement. Under this proposal, the appellant would then have either 28 days or 14 days to lodge an appeal under R25.

⁹⁹ CAT Regulation, cl 9(5)

Principal / Senior Member	An Australian lawyer of at least 7 years' standing, or a person who has special knowledge, skill or expertise in relation to one or more classes of matters*. *In practice, a Principal or presiding Senior Member would generally hold legal qualifications.
General Member	A person who has special knowledge, skill or expertise, or is capable of representing the public (or a particular organisation, body or group of persons) in relation to one or more classes of matters.

In some cases, Division Schedules make special provision for members to have particular skills, expertise or qualifications. For example, some members of the Guardianship Division are required to:

- Have experience in assessing or treating persons to whom the *Guardianship Act 1987* relates, such as a doctor, psychologist or social worker
- Have experience with persons to whom the *Guardianship Act 1987* relates.¹⁰⁰

In the Occupational Division, some members are required to practise in the occupation to which a disciplinary matter relates. For example, when exercising functions under the *Architects Act 2003* a panel must include a member who is an architect.

The qualification requirements for NCAT members are broadly consistent with requirements for members of similar tribunals in other Australian States and Territories. For example, the President of VCAT, QCAT and the Western Australian State Administrative Tribunal must also be a Supreme Court judge.¹⁰¹ The President of SACAT must be a Supreme Court or a District Court judge.¹⁰²

While the membership of other tribunals varies in terms of title and structure, most other tribunals also require non-presidential members to hold substantial legal qualifications and or judicial positions. For example, VCAT requires vice presidential members to be County Court judges¹⁰³ and requires deputy presidents to be lawyers with at least 5 years standing.¹⁰⁴ VCAT senior members must be either lawyers with 5 years standing or hold specialised skills or knowledge relevant to VCAT's jurisdiction.¹⁰⁵

Should the CAT Act prescribe additional qualification requirements?

The Review considers that the qualification requirements prescribed in the CAT Act remain appropriate. Given the breadth of NCAT's jurisdiction, it is important that the Act supports the Tribunal to recruit members with legal expertise, as well as members with specialist expertise in particular subject matters.

One submission to the Review from an individual suggested that all NCAT members should be required to have at least 7 years' experience as an Australian lawyer, in addition to holding any other required qualifications. The Review does not recommend amending

¹⁰⁰ CAT Act, Schedule 6, cl 1(2)

¹⁰¹ Victorian Civil and Administrative Tribunal Act 1998 s 10(1); Queensland Civil and Administrative Tribunal Act 2009 s 175(1); Western Australia State Administrative Tribunal Act 2004 s 108(3)

¹⁰² South Australian Civil and Administrative Tribunal Act 2013 s 10(1)

¹⁰³ Victorian Civil and Administrative Tribunal Act 1998 s 11(2)

¹⁰⁴ Victorian Civil and Administrative Tribunal Act 1998 s 12(2)

¹⁰⁵ Victorian Civil and Administrative Tribunal Act 1998 s 13(2)

the CAT Act in this way. Where expertise is required in relation to a specific subject matter, requiring members to hold relevant qualifications and be an Australian lawyer of at least 7 years' standing may unduly limit the pool of eligible applicants. It would also be inconsistent with existing provisions that require specialist and non-legal expertise, including in relation to health practitioner discipline and guardianship proceedings.

The NSW Council for Intellectual Disability suggested that additional skills should be prescribed for members who hear matters in the Guardianship Division, such as the ability to communicate with people with dementia or other conditions that may result in a guardianship application. While this is an important skillset for members of the Guardianship Division to possess, the Review does not recommend making this kind of 'soft skill' a legislative requirement. The member recruitment process should be sufficient to identify and recruit members with appropriate communication skills and additional training can be provided if necessary.

Is it appropriate to appoint members part-time or for limited periods?

NCAT members may be appointed for a term of up to 5 years¹⁰⁶ ('term members') or may be appointed for the purposes of specific proceedings¹⁰⁷ ('occasional members'). Term members may be appointed on a part-time or a full-time basis.¹⁰⁸

Two submissions to the Review raised concerns regarding the appointment of part-time and occasional members.¹⁰⁹ One submission considered that allowing members to be appointed on a part-time basis increases the risk of conflicts of interest arising, as part-time members may be employed elsewhere.¹¹⁰ Another submission stated that lack of tenure, especially for occasional members who are appointed on a case-by-case basis, may reduce consistency and lead to idiosyncratic decision-making.¹¹¹

It is acknowledged that part-time and occasional appointments can increase the risk of conflicts of interest arising. However, the Review considers that the existing provisions authorising part-time and occasional appointments remain appropriate as:

- The breadth and diversity of NCAT's jurisdiction necessitates the appointment of part-time and occasional members
- NCAT has appropriate mechanisms in place to mitigate risks, and
- Provisions enabling the appointment of occasional members are generally only used in health professional discipline proceedings and are otherwise rarely used.

Part-time members

Part-time appointments provide flexibility where workload in a particular subject matter area or geographical location is not sufficient to justify a full-time appointment or where the Tribunal requires flexibility to respond to fluctuations in workload volume. While part-time members may also be employed elsewhere, the NCAT Member Code of Conduct explicitly requires all members to:

¹⁰⁶ CAT Act, s 10 and cl 2, Schedule 2.

¹⁰⁷ CAT Act, s11

¹⁰⁸ CAT Act, s 10(5)

¹⁰⁹ Gurjit Singh; the Hon David Shoebridge MLC

¹¹⁰ Gurjit Singh

¹¹¹ The Hon David Shoebridge MLC

- Advise parties of any matter or circumstance which might give rise to bias or conflict of interest, or the perception of bias or conflict of interest, and
- If they are engaged in another occupation, profession or business, to ensure that those activities do not conflict with or undermine the discharge of their responsibilities as a member.¹¹²

The Code of Conduct also states that where part-time Members have a professional practice in addition to being Members of the Tribunal, they cannot:

- Appear before the Tribunal as a representative of a party or other person
- Advise individuals or bodies concerning Tribunal proceedings or potential proceedings involving those individuals or bodies
- Act for or against, or provide services to, individuals or bodies who are litigants before them in the Tribunal.

Breaches of the Code of Conduct may result in corrective action being taken by the President, including requiring members to undertake training, not allocating work to the relevant member, or recommending to the Attorney General that a member not be reappointed at the expiry of their term.¹¹³ Serious misconduct may result in a member being removed from office by the Governor.¹¹⁴

Occasional members

The Review acknowledges that occasional members may not have access to the same training and professional development as other tribunal members, which could create a risk of inconsistency in decision-making. However, the appointment of occasional members also enables NCAT to bring in specialist expertise where a particular matter requires it. For example, in the Occupational Division the appointment of occupational members is intended to ensure that panels include people who are practising members of the occupation to which the disciplinary matter relates. Without the use of occasional members:

- It may be more difficult to ensure current knowledge of professional standards on disciplinary panels
- Maintain required levels of expertise given the volume of applications may not justify specialised skillsets in some areas of NCAT's jurisdiction.

The Review also notes that occasional members will generally only be appointed as part of a multi-member panel, which provides accountability and limits the risk of idiosyncratic decisions being made. Further, where an occasional member is appointed for their specialist expertise in a particular occupation, they will never be the presiding member on a panel.

Terms of appointment

The Review does not consider that there is a strong rationale for providing members with tenure. While judges are appointed until the statutory age of retirement at age 75,¹¹⁵ the

¹¹² https://ncat.nsw.gov.au/documents/policies/member_code_of_conduct.pdf.

¹¹³ https://ncat.nsw.gov.au/documents/policies/member_code_of_conduct.pdf

¹¹⁴ CAT Act, Schedule 2, CI 7

¹¹⁵ *Judicial Officers Act 1986*, s 44.

nature of NCAT's jurisdiction requires additional flexibility to shift the member base according to fluctuations in application volumes over time.

For example, application numbers may reduce in some areas over time due to dispute resolution initiatives or the withdrawal of government grants and rebates. Conversely, application numbers may increase in other areas of the Tribunal due to increases in jurisdictional limits or the conferral of new subject matter.

Whereas judges appointed to courts tend to be appointed based on their general knowledge of the law and legal principles, NCAT members are more likely to be appointed for their specific expertise in particular subject matter areas. Placing limits on terms of appointment is justified in these circumstances to ensure that member expertise continues to align with broader workload trends. Mechanisms are in place to ensure that 5-year terms of appointment do not compromise the independence or impartiality of the Tribunal. NCAT has in place a robust system to advertise for new members and appraise the performance of existing members.

4. Other proposed changes to the CAT Act

4.1. Legislative amendments identified during the review

A number of discrete legislative amendments to the CAT Act were identified during the course of the statutory review, which the Review considers should be progressed. These amendments are intended to:

- Make minor and technical amendments to clarify the operation of certain provisions
- Improve the efficiency of Tribunal proceedings
- Make specific amendments to the Occupational Division and Guardianship Division Schedules.

The proposed amendments have been subject to preliminary consultation with stakeholders, including the Law Society of NSW, NSW Bar Association, Office of the Legal Services Commissioner, Legal Aid NSW and organisations that represent the interests of persons who are subject to proceedings in the Guardianship Division.

4.2. Minor and technical amendments

Whether the term 'any report of proceedings' in s 64 of the CAT Act includes sound recordings and transcripts

Description

Section 64(1)(b) of the CAT Act provides that 'any report of proceedings' may be subject to an Order prohibiting or restricting publication if the Tribunal is satisfied that it is desirable to do so by reason of the confidential nature of any evidence or matter, or for any other reason.

However, it is not beyond doubt whether the word 'report' includes transcripts and sound recordings. In particular, it could be argued that the word 'report' applies to written records only. For the avoidance of doubt, this amendment would clarify that 'any report of proceedings' includes transcripts and sound recordings and that these records can therefore be subject to Orders under s 64.

Stakeholder views

Stakeholders did not raise any concerns about this proposal.

Review conclusion

The Review recommends that this amendment proceed. The amendment will limit the scope for technical legal argument that transcripts and sound recordings cannot be subject to Orders under s 64. This will help to ensure that confidential information is protected, including the identity of parties, in appropriate circumstances.

Recommendation 3

That the NSW Government amend the CAT Act to clarify that the term 'any report of proceedings' in s 64 of the CAT Act includes sound recordings and transcripts.

Whether NCAT should be able to amend an Order administratively where it does not reflect a party's full legal name

Description

Section 63 of the CAT Act currently allows the President or a presiding member to direct the Registrar to alter the text of a notice or statement if satisfied that there is an obvious error in the text. Examples of obvious errors include clerical or typographical errors, an accidental slip or omission, or a defect of form.

In some cases, it may be brought to the Tribunal's attention that an Order does not accurately reflect a person's full legal name. However, there is doubt as to whether the terms of s 63 permit such an Order to be altered without conducting a hearing or making an order to dispense with a hearing under s 50(2). This can lead to unnecessary delay and risk, particularly in proceedings before the Guardianship Division where a financial institution is unable to act on an Order. This amendment would clarify that the Tribunal may alter an Order administratively to reflect a party's full legal name.

Stakeholder views

Stakeholders did not raise any concerns about this proposal.

Review conclusion

The Review recommends that this legislative amendment proceed. The amendment will reduce unnecessary delay and better protect the interests of parties, particularly in relation persons who are subject to Orders in the Guardianship Division.

Recommendation 4

That the NSW Government amend the CAT Act to clarify that the Tribunal may amend an Order to ensure that it reflects a party's full legal name administratively without complying with the requirements of s 50.

Whether the scope of NCAT's obligation to ensure that all relevant material is disclosed in proceedings should be clarified

Description

Section 38(6)(a) of the CAT Act required NCAT 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 the proceedings. However, placing an absolute obligation on NCAT to ensure the disclosure of all relevant information does not reflect the adversarial nature of some aspects of the Tribunal's jurisdiction. In adversarial proceedings, it is the responsibility of the applicant to bring evidence to support their case.

The terms of s 38(6)(a) may also create scope for technical legal argument on appeal as to whether NCAT has taken all steps to uncover relevant material. In practice, NCAT directs parties to exchange all relevant information at the commencement of proceedings. However, it is not realistic to expect the Tribunal to identify whether or not this has occurred in every case.

This amendment would clarify that the duty imposed by s 38(6)(a) is not absolute. Section 28(5)(b) of the now repealed *Consumer, Trader and Tenancy Tribunal Act 2001* may be an appropriate alternative, which provided that the Consumer, Trader and Tenancy Tribunal was to ensure, as far as practicable, that all relevant material was disclosed.

Stakeholder views

Legal Aid NSW raised concerns that this amendment could result in Tribunal Members taking a more passive role in proceedings, to the detriment of self-represented parties. No concerns were raised by other stakeholders.

Review conclusion

The Review recommends that this legislative amendment proceed. It is unlikely that the amendment will result in any change to the way in which Tribunal Members conduct proceedings. As noted above, NCAT currently satisfies its obligation under s 38(6)(a) by directing the parties to exchange all relevant information. This practice will continue. The amendment will simply clarify that the obligation imposed by s 38(6)(a) is not absolute. For example, it will provide that the Tribunal is to take reasonable or practicable steps.

Recommendation 5

That the NSW Government amend the CAT Act to clarify the scope of the Tribunal's obligation in s 38(6)(a) to 'ensure all relevant material is disclosed' in proceedings.

Whether unredacted decisions provided to parties for personal use may be published or broadcast to a wider audience

Description

Section 65 of the CAT Act prohibits the publication of names or identification of persons involved in certain classes of proceedings, including proceedings in the Guardianship Division. Section 65(3) provides that this does not prohibit the publication or broadcasting of an 'official report of the proceedings that includes the name of any person the publication or broadcasting of which would otherwise be prohibited'.

Section 65(3) is intended to ensure that NCAT can provide the parties to the proceedings with a copy of an unredacted decision, as the redacted version may be more difficult to understand once names have been anonymised. However, s 65(3) is not intended to permit those parties to on-publish the unredacted decision to a broader audience, including via social media. While the Tribunal has the power to make a separate order under s 64 to prohibit the publication or disclosure of any report, the Tribunal cannot make an order under s 64 that is inconsistent with s 65.

This amendment would make it clear that s 65(3) does not permit parties who receive an unredacted copy of a Tribunal decision to publish that decision to a broader audience.

Stakeholder views

Stakeholders did not raise any concerns about this proposal.

Review conclusion

The Review recommends that this legislative amendment proceed. While the Tribunal should continue to provide unredacted decisions to parties affected by guardianship and community welfare proceedings in order to ensure that they understand the decision that has been made, it is important to ensure that parties understand it is not permissible to then on-publish that decision to a broader audience.

Providing legislative clarity that unredacted decisions provided for personal use cannot be published or broadcast to a broader audience will better protect the confidentiality of proceedings in relation to guardianship and community welfare legislation and the privacy of the individuals who are subject to such proceedings.

Recommendation 6

That the NSW Government amend the CAT Act to clarify that, in proceedings where the publication of names or identification of persons is prohibited, parties may not on-publish an unredacted decision that has been provided for their personal use.

Whether failure to comply with a summons is a contempt of the Tribunal

Description

Section 73(2) of the CAT Act provides that a person is guilty of contempt of the Tribunal if the person does or omits to do any thing that, if the Tribunal were a court of law having power to commit for contempt, would be contempt of that court unless the person establishes that there was a reasonable excuse for the act or omission.

Failure to comply with a subpoena without lawful excuse is a contempt of court under Uniform Civil Procedure Rule 33.12. However, there is some uncertainty as to whether this means that failure to comply with a summons issued by NCAT under s 48 of the CAT Act is a contempt of the Tribunal. This amendment would clarify that failure to comply with a summons issued by the Tribunal without reasonable excuse is a contempt of the Tribunal.

Stakeholder views

Stakeholders did not raise any concerns about this proposal. Legal Aid NSW noted that, in its opinion, failure to comply with a summons is already capable of constituting contempt under s 73(2).

Review conclusion

The Review recommends that this legislative amendment proceed. While it is arguable that failure to comply with a summons is already capable of constituting contempt of the Tribunal, this amendment would put that position beyond doubt and limit any technical argument to the contrary.

Recommendation 7

That the NSW Government amend the CAT Act to clarify that failure to comply with a summons can be dealt with as a contempt of the Tribunal.

4.3. Amendments to support the efficient conduct of proceedings

Whether the President should be empowered to reallocate a matter where it defaults to the Administrative and Equal Opportunity Division

Description

Currently, clause 3(b) of Schedule 3 to the CAT Act provides that any function of the Tribunal that is not specifically allocated to an NCAT Division by an enabling Act or a Division Schedule is to be heard in the Administrative and Equal Opportunity Division (AEOD). However, the AEOD may not always be the most appropriate Division to hear a matter. For example, in some cases the subject matter may be better suited to the procedures, or skills and qualifications of members, of a different Division.

Where clause 3(b) operates to allocate a matter to the AEOD by default, this amendment would enable the President to direct that the matter be allocated to a different Division where that is appropriate.

Stakeholder views

Stakeholders did not raise any concerns about this proposal.

Review conclusion

The Review recommends that this legislative amendment proceed. It will provide the Tribunal with more flexibility to ensure that matters are heard by the most appropriate Division. This will also benefit parties by ensuring that all matters are dealt with by the Division with the most appropriate skill and expertise.

Recommendation 8

That the NSW Government amend the CAT Act to allow the President to reallocate matters to a different Division where a matter defaults to the Administrative and Equal Opportunity Division under the terms of Schedule 3, clause 3(b).

Whether the President should be able to reconstitute the Tribunal in a broader range of circumstances

Description

Section 52 of the CAT Act currently provides that the President may replace a Tribunal Member who is hearing a matter after proceedings have commenced if the Member becomes unavailable, ceases to be a member, or ceases to hold a required qualification. This amendment would provide the President with a broader power to reconstitute the Tribunal where:

- Additional members need to be appointed where it becomes apparent that the factual or legal issues in dispute are more complex than anticipated
- The President is satisfied that it is otherwise in the interests of justice to do so.

This amendment would also include provision to ensure that any Orders previously made by the Tribunal survive the reconstitution.

Stakeholder views

Stakeholders did not raise any concerns about this proposal.

Review conclusion

The Review recommends that this legislative amendment proceed. The amendment would ensure that the President can more flexibly allocate resources to ensure the efficient resolution of matters. Similar powers are contained in equivalent Acts establishing Tribunals in other jurisdictions. For example, s 19D of the *Administrative Appeals Tribunal Act 1975 (Cth)* provides that the President of the Administrative Appeals Tribunal may reconstitute a panel before a hearing commences if the President considers doing so is in the interests of achieving the expeditious and efficient conduct of the proceedings.

Recommendation 9

That the NSW Government amend the CAT Act to broaden the President's power to reconstitute the Tribunal to align with provisions contained in equivalent legislation in other Australian jurisdictions.

Whether NCAT should be required to issue written reasons on request in minor procedural matters

Description

Section 62 of the CAT Act states that any party may, within 28 days of being notified of any decision, request the Tribunal provide a written statement of reasons for that decision. This amendment would prescribe a list, either in the CAT Act or in the CAT Regulation, of minor procedural decisions for which written reasons are not required.

Stakeholder views

Legal Aid NSW and NSW Trustee and Guardian considered that written reasons should continue to be provided on request in relation to any decision made by the Tribunal, as even minor decisions can have significant impacts in certain matters such as tenancy and

guardianship. The Law Society of NSW supported the proposal but noted that the decisions for which NCAT does not need to provide written reasons on request should be prescribed in the CAT Act or CAT Regulation. No concerns were raised by other stakeholders.

Review conclusion

The requirement to issue written reasons on request is intended to promote transparency and accountability in Tribunal decision-making. However, this must also be balanced against the guiding principle of the CAT Act, which is to ensure the just, quick and cheap resolution of the real issues in dispute. Requiring NCAT to issue written reasons where requested for minor procedural decisions (for example, standard directions) imposes a resourcing burden on Tribunal Members and prevents the Tribunal from focusing its available resources on the efficient resolution of the substantive issues in proceedings.

On balance, the Review recommends that this legislative amendment proceed. Further consultation with stakeholders will occur in drafting to ensure that the matters for which written reasons are not required are considered minor and procedural in nature to ensure that the rights and interests of parties are not adversely affected.

Similar provisions are contained in equivalent Acts in other Australian jurisdictions. For example, s 122(4) of the *Queensland Civil and Administrative Tribunal Act 2009* provides that the general right to written reasons does not include specified decisions, such as decisions relating to the joinder of proceedings, amendment of time limits, or directions for the speedy and fair conduct of proceedings.

Recommendation 10

That the NSW Government amend the CAT Act to provide that the Tribunal is not required to issue written reasons on request in respect of a limited number of minor procedural decisions.

4.4. Amendments relating to the Occupational Division

Clarify how the Tribunal should be constituted when determining administrative review proceedings under the *Legal Profession Uniform Law (NSW)*

Description

Clause 18(1) of Schedule 5 to the CAT Act provides that, when conducting a hearing into a complaint under the *Legal Profession Uniform Law (NSW)* (LPUL), NCAT must be constituted by:

- In the case of a complaint against a barrister:
 - One judicial member, one professional member who is a barrister, and one general member, or
 - Two professional members who are barristers and one general member.

- In the case of a complaint against a solicitor:
 - One judicial member, one professional member who is a solicitor, and one general member, or
 - Two professional members who are solicitors and one general member.

Clause 18(2) provides that, when exercising any of its other Division functions for the purposes of the LPUL, NCAT is to be constituted by any one or more judicial or professional members.

It is arguable that administrative review proceedings brought under s 314 of the LPUL and s 126 of the *Legal Profession Uniform Law Application Act 2014* (**LPUL Application Act**) are hearings into complaints. However, this is not beyond doubt. There is therefore some uncertainty as to whether the Tribunal should be constituted in accordance with clause 18(1) or clause 18(2) when hearing these matters.

This amendment would amend clause 18 to clarify whether administrative review applications brought under s 314 of the LPUL and s 126 of the LPUL Application Act are 'hearings into complaints'.

Schedule 5 will also be amended to clarify that references to the LPUL include references to the LPUL Application Act. While proceedings are commenced under the LPUL, the LPUL Application Act confers some functions on the Tribunal (such as the ability to extend the time for making a disciplinary application or to allow early withdrawal of disciplinary proceedings with leave of the Tribunal). This amendment would clarify that the Occupational Division's functions include both Acts.

Stakeholder views

Stakeholders did not raise any concerns about this proposal.

Review conclusion

The Review recommends that this legislative amendment proceed. The amendment would provide clarity in relation to constitution requirements in legal profession discipline matters and put beyond doubt that the Tribunal may exercise functions under both the LPUL and the LPUL Application Act.

Recommendation 11

That the NSW Government amend the CAT Act to clarify:

- a) how the Tribunal is to be constituted when determining administrative review proceedings under the *Legal Profession Uniform Law (NSW)*
- b) that references to the *Legal Profession Uniform Law* include the *Legal Profession Uniform Law Application Act 2014*.

4.5. Amendments relating to the Guardianship Division

Clarify how the Tribunal is to be constituted when determining requests to withdraw applications in the Guardianship Division

Description

Clause 4 of Schedule 6 to the CAT Act requires that substantive Division functions of the Guardianship Division must generally be heard by a 3-member panel. A 'substantive Division function' is defined in clause 1 of Schedule 6 to mean a Division function other than an interlocutory or ancillary decision, or a Division function exercised by a registrar. However, Schedule 6 does not specify whether an application to withdraw a matter under clause 10 of Schedule 6 is a substantive Division function, or an interlocutory or ancillary decision.

While a request to withdraw an application would normally be considered an interlocutory decision, it is arguable that such an application in the Guardianship Division is more substantive in nature. This is because the Tribunal is required to consider under clause 10 whether granting the withdrawal is in the best interests of the subject person. This amendment would clarify that requests to withdraw applications are interlocutory decisions.

Stakeholder views

Stakeholders did not raise any concerns about this proposal.

Review conclusion

The Review recommends that this legislative amendment proceed. This amendment would ensure that applications to withdraw proceedings in the Guardianship Division can be dealt with quickly and efficiently.

Recommendation 12

That the NSW Government amend the CAT Act to provide that the Tribunal may be constituted with 1 or 2 members, rather than 3 members, when determining a request to withdraw an application from the Guardianship Division under Schedule 6, clause 10.

Clarify how the Tribunal is to be constituted when determining applications under s 46A of the *Guardianship Act 1987*

Description

As noted above, clause 4 of Schedule 6 to the CAT Act requires that substantive Division functions of the Guardianship Division must generally be heard by a 3-member panel. Clause 4(2) sets out a list of specific substantive Division functions that may instead be exercised by the Tribunal when constituted with 1 or 2 members. This list includes the review of guardianship orders made under the *Guardianship Act 1987* (**Guardianship Act**). However, it does not include applications under s 46A of the *Guardianship Act*.

Applications under s 46A of the Guardianship Act are applications for NCAT to authorise a guardian to override a person's objection to major or minor medical treatment. As orders under s 46A are regularly sought in the context of review proceedings, this can create inefficiencies as the Tribunal will generally be constituted with a single member and must adjourn and reconvene with 3 members to determine the s 46A application. Approximately one matter per week is adjourned for this reason.

This amendment would allow the Tribunal to hear s 46A applications when sitting with a single member where an application is made as part of review proceedings, thereby eliminating the need to adjourn the matter. The amendment would also allow the Tribunal to hear s 46A applications when sitting as a 1 or 2-member panel where the matter is urgent, to avoid delays where treatment is time critical.

Stakeholder views

NSW Trustee and Guardian did not object to determining s 46A applications with fewer than 3 members but considered that such applications should be determined by a 2-member panel due to the serious nature of overriding a person's objection to medical treatment. No concerns were raised by other stakeholders.

Review conclusion

A decision to override a person's objection to medical treatment is a serious matter. However, delays associated with adjourning a matter in order to re-constitute the Tribunal with additional members may also have adverse consequences for the subject person. On balance, the Review recommends that this amendment proceed.

The Tribunal should have discretion to be constituted with either a 1-member or 2-member panel. This will ensure that s 46A applications can be determined more efficiently where an application is made as part of review proceedings. It will also facilitate a more expeditious outcome where treatment decisions are time critical.

The Review notes that section 46A applications do not include the use of chemical restraints. The use of medications primarily to control behaviour, rather than to treat a diagnosed medical condition, is a matter which requires the consent of a guardian with authority to decide about the use of restrictive practices if the person is unable to provide consent. The use of medication in these circumstances is not categorised as only requiring consent to medical treatment (see HZC [2019] NSWCATGD 8).

Recommendation 13

That the NSW Government amend the CAT Act to provide that the Tribunal may be constituted with 1 or 2 members, rather than 3 members, when determining applications under s 46A of the *Guardianship Act 1987* where:

- a) the application is urgent, or
- b) the application is made as part of review proceedings.

Whether NCAT should observe the principles in section 4 of the Guardianship Act when exercising all of its Guardianship Division functions

Description

Clause 5 of Schedule 6 to the CAT Act places a duty on the Tribunal to adhere to the principles outlined in section 4 of the Guardianship Act when exercising its functions under that Act. These principles place duties on any persons exercising functions under the Guardianship Act when handling matters concerning persons with disabilities, including for example, a duty to observe the principle that the welfare and interests of such persons should be given paramount consideration and that their views should be taken into consideration.

The Guardianship Division also exercises functions under other Acts, including the *Children and Young Persons (Care and Protection) Act 1998*, *NSW Trustee and Guardian Act 2009* and *Power of Attorney Act 2003*. This amendment would extend the Tribunal's duty to observe the principles of s 4 of the Guardianship Act to any function exercised by the Guardianship Division, not just its functions under the Guardianship Act.

Stakeholder views

Stakeholders did not raise any concerns about this proposal.

Review conclusion

The Review recommends that this legislative amendment proceed. While the Guardianship Division places a focus on the rights and interests of persons who are subject to proceedings when exercising all of its Guardianship Division functions, the amendment would codify that practice.

Recommendation 14

That the NSW Government amend the CAT Act to provide that the Tribunal, when exercising any of its Guardianship Division functions, is under a duty to observe the principles in s 4 of the *Guardianship Act 1987*.

Whether NCAT should have an explicit power to dispense with notice of hearing requirements in the Guardianship Act where a matter is urgent

Description

The Guardianship Act provides that NCAT is to serve a notice of hearing in various proceedings under that Act, including applications for guardianship orders (s 10(1A)) and financial management orders (s 25I(4)). In some instances, the Tribunal may need to dispense with formal service requirements. For example, this may occur where the Tribunal is satisfied that there is a real, material and imminent risk of harm to the person who is the subject of the application.

Where this occurs, provisions in the Guardianship Act provide that a failure to serve notice does not vitiate the decision of the Tribunal (see for example s 10(2) and s 25I(5)). However, the Tribunal does not have an explicit power to dispense with notice requirements in urgent circumstances. This amendment would give the Tribunal an explicit

power to dispense with notice requirements where the Tribunal is satisfied that there is a real, material and imminent risk of harm.

Stakeholder views

Stakeholders did not raise any concerns about this proposal.

Review conclusion

The Review recommends that this legislative amendment proceed. While the existing provisions of the Guardianship Act do not prevent the Tribunal from dispensing with notice of hearing requirements in urgent circumstances, it would be preferable for the Tribunal to have an explicit power to do so.

Recommendation 15

That the NSW Government amend the CAT Act to provide that the Tribunal may dispense with requirements to serve notice of hearing under the *Guardianship Act 1987* in circumstances where the delay associated with compliance may create a real, material and imminent risk of harm to the person who is the subject of an application.

5. Issues raised by stakeholders in relation to Tribunal operations

5.1. Online services

Access to online filing and exchange of documents

A number of submissions to the Review suggested that NCAT should make greater use of digital technology in order to:

- Improve accessibility
- Alleviate problems that parties may experience meeting deadlines, for example, where they live in remote areas and must rely on postal service to lodge documents
- Provide certainty about lodgement of documents and whether they have been received by the other parties, which may reduce the number of purely administrative interactions with the Tribunal
- Reduce the environmental footprint associated with Tribunal processes.

For example, various stakeholders including the Law Society of NSW, NSW Bar Association, Legal Aid NSW, Caravan and Camping Industry Association and Owners Corporation Network, suggested that NCAT should have an Online Registry that enables parties to file documents, exchange information and view documents and orders

electronically. Some stakeholders further suggested that NCAT should implement an e-Summons portal, similar to the NSW Subpoena Response system used in NSW Courts.¹¹⁶

As noted at section 3.5, the Department is currently delivering a NSW Courts and Tribunal Digital Reform Project. As part of this project, NCAT intends to launch a new NCAT Online Registry which will provide access to online filing across all Divisions by the end of 2022. The NCAT Online Registry will allow parties to file documents and access a digital case file, including documents filed by other parties. It will also include e-summons functionality. Further information about the NCAT Online Registry will be made available on the NCAT website and provided to stakeholders throughout 2022.

Telephone and Audio-Visual Link (AVL) hearings

Submissions to the Review generally supported the use of telephone and AVL hearings by NCAT for straightforward matters, such as directions hearings, to minimise delays and expenses for parties.¹¹⁷

For example, the Caravan and Camping Industry Association (**CCIA**) recommended that all directions hearings should be conducted via telephone or video link upon request unless a matter is complex. The CCIA considered that this should be available to all parties and not just those who live more than two hours from an NCAT location or who cannot attend in-person for health or other reasons. However, stakeholders also noted that telephone hearings can be problematic in certain situations, such as where:

- One or more parties experiences technological issues
- Not being able to see the other parties may create a disadvantage (for example, during conciliations and other alternative dispute resolution processes)
- One or more parties has a hearing impairment or other impairment that may make it difficult to engage in the process.

The Tenants Union and the Northern Rivers Community Legal Centre both suggested that AVL should be explored as an alternative to telephone hearings, as video technology provides a greater level of interaction and engagement. The Office of Local Government also suggested that AVL should be explored for short hearings and resolution processes.

Other stakeholders suggested that there should be greater clarity as to when a matter will be heard via telephone or AVL, and the procedures that should apply. For example:

- Legal Aid NSW stated that the process for requesting a telephone hearing can be cumbersome and it is not always clear when a request will be granted
- The Information and Privacy Commission recommended that additional information should be provided by the Administrative and Equal Opportunity Division as to when parties will be able to access telephone hearings
- The Health Care Complaints Commission recommended greater clarity around procedures for the taking of evidence from witnesses remotely to ensure vulnerable witnesses are supported.

¹¹⁶ Health Care Complaints Commission; Medical Insurance Group Australia Pty Ltd.

¹¹⁷ Caravan & Camping Industry Association NSW; Office of Local Government; Community Housing Industry Association.

The Review notes that these submissions were received in 2019, prior to the COVID-19 pandemic. In response to the pandemic and in line with public health advice, NCAT has ceased in-person hearings for extended periods of time and conducted proceedings by video link or telephone wherever possible. Additional AVL facilities have also been made available for proceedings, particularly in the Administrative and Equal Opportunity Division and Occupational Division.

NCAT will re-commence in-person hearings when possible, having regard to any continuing constraints arising from the COVID-19 pandemic. As part of this process, NCAT will consider which types of proceedings, including interlocutory steps, are better suited to AVL or telephone hearings. If AVL and telephone hearing procedures remain unclear, stakeholders should provide feedback to NCAT directly via <https://ncat.nsw.gov.au/ncat/about-ncat/feedback-and-complaints.html>.

5.2. Support services

The need to provide effective support and guidance to self-represented parties was also a common theme raised in submissions.

Submissions were generally positive about the measures taken by NCAT to ensure that the Tribunal is an accessible forum. For example, stakeholders commented positively on the Tribunal's practice of publishing plain English fact sheets and videos on its website, as well as the efforts of registry staff and Tribunal Members to ensure that self-represented parties understand the proceedings and are able to fully participate.

However, some submissions (particularly from Community Legal Centres and other legal assistance services) suggested that more should be done to support self-represented parties, particularly those who may find it especially difficult to engage with the Tribunal or understand its procedures, such as:

- Aboriginal and Torres Strait Islander (**ATSI**) people
- People who are culturally and linguistically diverse,
- People who live in regional or remote areas of NSW.

Guidance material on the NCAT website

A number of submissions made suggestions about additional guidance material that could be published on the NCAT website, including in relation to:

- What evidence is required by the Tribunal and how best to present it¹¹⁸
- Instructions on how to complete application forms¹¹⁹
- Practical information about attending hearings in person, such as where to park and where to wait upon arrival¹²⁰
- Processes and policies regarding case management, conciliation, hearings and orders in relation to proceedings under the *Residential Tenancies Act 2010*¹²¹

¹¹⁸ Legal Aid NSW; Hunter Community Legal Centre.

¹¹⁹ LawAccess NSW.

¹²⁰ Northern Rivers Community Legal Centre; Samaritans.

¹²¹ Real Estate Institute of NSW

- Applications regarding Working With Children Checks under the *Child Protection (Working with Children) Act 2012* and *Anti-Discrimination Act 1977*.¹²²
- The role of the Information and Privacy Commissioners in proceedings under the *Government Information (Public Access) Act 2009* and *Privacy and Personal Information Protection Act 1998*.¹²³

Some submissions also commented that the NCAT website should be more accessible and user friendly. For example, Samaritans suggested that the website should be revised to maximise accessibility, including by ensuring information is in plain English, minimising menus, and giving 'language and disability support' higher prominence.

The Review notes that NCAT has re-designed and re-launched a new website since these submissions were received. The new website may address concerns raised in relation to accessibility, as well as more specific suggestions for website content. For example, additional information about evidence and witness statements has been made available¹²⁴ together with links to more detailed guidance on the LawAccess NSW website on how to prepare witness statements.¹²⁵ NCAT has also published information about Working With Children Checks, anti-discrimination complaints, and tenancy proceedings.¹²⁶

NCAT will continue to review and update the information on its website to ensure it is accurate and provides useful guidance for tribunal users. If stakeholders identify information that is out of date, or continue to have suggestions for additional support material, they should provide feedback directly to NCAT via <https://ncat.nsw.gov.au/ncat/about-ncat/feedback-and-complaints.html>.

Face to face support for unrepresented parties

In-hearing support by Tribunal Members

A number of submissions, including from PIAC, the NSW Bar Association and Marrickville Legal Centre, spoke positively about the time and effort spent by Tribunal Members and registry staff to clearly explain tribunal processes and procedures to unrepresented parties.

However, some submissions noted that some Tribunal Members may take a less active role. As a result, it may not always be clear to parties how a hearing will be run, including when it will be appropriate to make submissions or present evidence. To avoid inconsistency, Marrickville Legal Centre suggested that guidelines could be issued to Tribunal Members to clarify their responsibilities in relation to self-represented parties (including the need to explain how the hearing will be conducted).¹²⁷

¹²² Legal Aid NSW

¹²³ Information and Privacy Commission NSW

¹²⁴ <https://ncat.nsw.gov.au/ncat/how-ncat-works/prepare-for-your-hearing/evidence-and-witnesses.html>

¹²⁵

https://www.lawaccess.nsw.gov.au/Pages/representing/lawassist_readingwritinghome_wysk/lawassist_affidavits_wysk/Instructions-for-preparing-a-witness-statement-for-NCAT.aspx

¹²⁶ <https://www.ncat.nsw.gov.au/ncat/case-types/administrative-review-and-regulation/working-with-children-checks.html>; <https://www.ncat.nsw.gov.au/ncat/case-types/anti-discrimination.html>; <https://www.ncat.nsw.gov.au/ncat/case-types/housing-and-property/tenancy.html>

¹²⁷ Hunter Community Legal Centre also noted that Tribunal Members should explain how proceedings will be conducted at the commencement of any formal hearing.

Legal Aid NSW suggested that the CAT Act should place an obligation on Tribunal Members to ensure that vulnerable participants understand what is happening in the proceedings and can participate equitably. For example, Legal Aid suggested that at the commencement of any hearing involving an unrepresented party, the Tribunal Member should be required to:

- Explain the process and procedures, the subject matter, and all potential outcomes of the hearing
- Ask each party whether they have received advice in relation to their matter
- Where appropriate, refer a party for advice.

The Review notes that section 38(5) of the CAT Act already provides that the Tribunal is to take such measures as are reasonably practicable to ensure that the parties to proceedings understand the nature of those proceedings and to ensure that the parties have a reasonable opportunity to be heard or otherwise have their submissions considered in the proceedings.

The steps that should be taken by Tribunal Members in order to meet the Tribunal's obligation under section 38(5) will depend on the nature of the subject matter and the respective positions of the parties. The Review considers that the current terms of s 38(5) provide the Tribunal with flexibility to conduct hearings in a way that is tailored to the matter at hand. If additional training or guidance is required to ensure that Tribunal Members take a consistent approach, this should be addressed through the issuing of Guidelines or through additional member training rather than legislative amendment.

Referral of parties to support services

A number of submissions, particularly from Community Legal Centres and other legal assistance providers, also commented on the need to connect tribunal users with advocacy and advice services as early as possible. For example:

- Samaritans recommended that the Tribunal inform parties about community legal services and other support services at an early stage
- Similarly, the Tenants Union of NSW suggested that NCAT should review its communications material to ensure that parties are aware of the availability and role of the Tenants' Advice and Advocacy Services
- Legal Aid NSW suggested that NCAT should refer parties to specialist Aboriginal Tenancy Advocates or legal representatives where appropriate
- The Carey Bay Living Residents Committee suggested that an advice service should be available for residents of retirement villages
- The Council for Intellectual Disability stated that Guardianship Division staff should proactively link people with support services, rather than only provide information about those services.

The Review notes that information about support services is available on the NCAT website at <https://www.ncat.nsw.gov.au/ncat/help-and-support/get-legal-help-and-advice.html>. Tailored information is also provided in relation to particular matter types. For example, NCAT's tenancy webpage includes a link to the Tenants Advice and Advocacy

Service website¹²⁸ and the retirement villages webpage contains links to the Retirement Village Residents Association and Seniors Rights Service.¹²⁹

NCAT may wish to consider whether there are further opportunities to provide targeted information about support services via the communications material that is sent to parties during proceedings. For example, fact sheets could be included when sending notices of hearing or other information to the parties, or content added to existing information, setting out contact information and web links.

A number of submissions commented that additional funding should be made available to enable more people to access free legal advice and assistance. The Review acknowledges that CLCs and other community legal services play an important role in promoting access to justice, including in relation to NCAT proceedings. However, funding for such services is beyond the scope of this Review.

Duty lawyer services

Some stakeholders, including Hunter Community Legal Centre and Legal Aid NSW, also considered that duty lawyers should be available in certain lists or locations. A duty lawyer is a free lawyer who is available at court or tribunal locations to provide advice, assistance and representation to people who are not in a position to represent themselves, including due to language barriers, cultural background, or physical or mental health issues.

The Review notes that while NCAT can accommodate the provision of duty lawyer services (for example, by providing duty lawyers with access to facilities availability), it is not the Tribunal's role to source or provide legal advisory services to parties directly. The provision of such services falls within the remit of legal assistance providers, such as Community Legal Centres and Legal Aid NSW.

If legal assistance providers have proposals for duty lawyer services in particular matter types or locations, they should contact NCAT to discuss how this might operate in practice. For example, the Review understands that Marrickville Legal Centre is currently in discussions with NCAT to offer a duty lawyer service in relation to certain consumer disputes and strata matters.

Support for Aboriginal and Torres Strait Islander people

Legal assistance providers, including Legal Aid NSW and PIAC, suggested that NCAT should provide more targeted support for ATSI people, including:

- An Aboriginal Engagement Officer(s)
- An Aboriginal-specific contact centre
- Recruitment of ATSI Tribunal Members
- Promotion of NCAT to the ATSI community through culturally appropriate communications material and attendance at events
- Cultural competency training for Tribunal Members and Registry staff.

Legal Aid NSW considered that these measures should be supported by an overarching Aboriginal Inclusion Plan and Aboriginal employment strategy.

¹²⁸ <https://www.ncat.nsw.gov.au/ncat/case-types/housing-and-property/tenancy.html>

¹²⁹ <https://www.ncat.nsw.gov.au/ncat/case-types/housing-and-property/strata-and-community-living/retirement-villages.html>

The Review notes that NCAT is seeking to increase the percentage of staff who identify as Aboriginal or Torres Strait Islander as part of the Department of Communities and Justice (DCJ) Aboriginal Employment Strategy 2019–2022.¹³⁰ This includes initiatives such as targeted recruitment and Aboriginal-focused traineeships. The DCJ Aboriginal Employment Strategy also includes goals to support the retention and career progression of Aboriginal employees, and to build a workplace environment that supports and values Aboriginal people and culture. When the Attorney General seeks expressions of interest for Tribunal Members, ATSI applicants are also encouraged to apply.

Both Legal Aid NSW and PIAC also suggested that NCAT should consider hearing tenancy matters involving ATSI people on dedicated ‘list days’. This would make it easier to organise the presence of relevant services to provide support and representation where required.

The Review notes that NCAT is currently working with the Department’s Aboriginal Services Unit to develop a support model for Aboriginal people who appear in the Consumer and Commercial Division’s Social Housing List. The new support model is expected to commence as a pilot in 2022. Further information will be provided to stakeholders when the pilot is at a more advanced stage.

Support for people who are culturally and linguistically diverse

Some concerns were also raised by stakeholders in the Consumer and Commercial Division in relation to the provision of interpreters by NCAT. For example, Marrickville Legal Centre noted that in some cases Tribunal Members have proceeded to hear matters without an interpreter where one has been requested. In some cases, this was because the tenant was represented by a tenant advocate. However, Marrickville Legal Centre noted that the parties should still be able to understand the proceedings whether they are represented or not.

Marrickville Legal Centre suggested that, in order to avoid these kinds of issues in future, the Tribunal should issue guidance to Tribunal Members clarifying that where an interpreter is requested proceedings should not continue in the absence of an interpreter unless there are exceptional circumstances. It is a matter for NCAT to determine whether such guidelines are necessary. However, the Review notes that the NCAT Member Code of Conduct already requires Tribunal Members to be aware of and address appropriately barriers such as language and cultural background.¹³¹ If stakeholders identify instances of non-compliance with the Code of Conduct, they should provide feedback to the Tribunal so that this can be addressed.

Other stakeholders, including Community Housing Industry Association, also suggested that the Tribunal should publish support materials in as many community languages as possible, particularly in relation to tenancy disputes.

Support for people with disability

Guardianship stakeholders, including the NSW Council for Intellectual Disability (NSWCID) and Dementia Australia, were generally positive about the measures that are taken by NCAT’s Guardianship Division to ensure people with disability, their families and carers can participate in proceedings. NSWCID noted that while there is scope to improve accessibility, NCAT should ensure that its other Divisions are as responsive and accessible as the Guardianship Division.

¹³⁰ <https://www.justice.nsw.gov.au/Documents/aboriginal-employment-strategy.pdf>

¹³¹ https://ncat.nsw.gov.au/documents/policies/member_code_of_conduct.pdf

These stakeholders also noted that despite NCAT's efforts to provide an inclusive and accessible forum, awareness of the Tribunal is low. They suggested that more information should be provided about NCAT's role when an individual receives a diagnosis or an initial Aged Care Assessment, to encourage them to nominate substitute decision-makers at an early point. The Review agrees that it may be helpful to provide people with information about NCAT at an early stage and has passed this suggestion onto relevant agencies for consideration, including NSW Trustee and Guardian and the Ministry of Health.

5.3. Use of resolution processes

Section 37 of the CAT Act provides NCAT with a broad power to use, or require parties to use, resolution processes to resolve matters without conducting a formal hearing. Resolution processes are defined as any process, including alternative dispute resolution, in which the parties are assisted to resolve or narrow the issues between them.¹³² These processes may include, for example, mediation, conciliation and expert conclaves.¹³³

Submissions to the Review supported the use of resolution processes by NCAT and encouraged the Tribunal to make greater use of these processes where appropriate. Stakeholders were particularly supportive of the use of alternative dispute resolution in the Consumer and Commercial Division in order to:

- Avoid the cost and time of a formal hearing, and
- Achieve more effective and mutually satisfactory outcomes for parties.¹³⁴

Some suggestions were made regarding the role of conciliators in the Consumer and Commercial Division. Operational issues were also raised in relation to the availability of conciliators and the circumstances in which matters should be referred to conciliation. These matters are discussed below.

Proposals in relation to the role of conciliators

Legal Aid NSW proposed amending the CAT Act to:

- Provide that conciliators must take steps to ensure that all parties understand the processes and procedures of the Tribunal and the conciliation process
- Provide conciliators with discretion to refer parties to advice and information services, and to recommend conciliations are adjourned to allow this to occur
- Require a conciliator to be present throughout the duration of the conciliation in social housing matters.

The Review does not consider that these are matters for inclusion in the CAT Act, as they are either already captured under the terms of the Act or relate to NCAT practice and procedure. Under the framework of the CAT Act, matters relating to practice and procedure are generally a matter for the Tribunal to determine.

¹³² CAT Act, s 37.

¹³³ See NCAT Annual Report 2019-20, 'Appendix 7' for a description of each type of resolution process, <https://ncat.nsw.gov.au/documents/reports/ncat-annual-report-2019-2020.pdf>.

¹³⁴ Tenants Union of NSW; Northern Rivers Community Legal Centre; Real Estate Institute of New South Wales Limited; Caravan and Camping Industry Association NSW.

As noted in section 5.2 above, s 38(5) of the CAT Act already requires NCAT to take such measures as are reasonably practicable to ensure that the parties understand the nature of those proceedings. In practice, Tribunal Members and conciliators explain the conciliation process and answer any questions the parties may have.

Further, while conciliators cannot provide legal advice, they may already suggest information and advice services to parties where appropriate. There is no need to codify this in the CAT Act. A party may request an adjournment from the Tribunal in order to seek legal advice, but the conciliator is not an advocate for either party and it is not their role to recommend that this occur. More information about the conciliation process and the role of conciliators is available on the NCAT website.¹³⁵

Under NCAT's conciliation model, a conciliator may look after several matters at the same time. Whether or not conciliators should be present throughout the duration of a conciliation is an operational matter for the Tribunal. However, the Review notes that this could have significant resourcing implications and may not necessarily deliver better outcomes for the parties. Although the presence of a conciliator may help to address power imbalances between the parties to some extent, it would not necessarily prevent a tenant from agreeing to an unfavourable outcome. Conciliators can help to identify issues and suggest options and solutions. However, it is not their role to identify whether a solution is in the interests of either party or to make decisions on their behalf.

The Review considers that linking parties to information and advice at an early stage would provide greater protection for parties, including tenants in social housing matters. The support services that are available to parties are discussed further in section 5.2.

Availability of conciliators in the Consumer and Commercial Division

In some NCAT locations¹³⁶, a separate conciliator will generally be available to assist the parties during the conciliation process.¹³⁷ This person will be different to the Tribunal Member who conducts the hearing if the matter is not resolved. However, due to differences in application volumes and listing practices, separate conciliators are not available in all locations.¹³⁸

NCAT has issued guidelines setting out the practice that is to be followed where a separate Tribunal Member or conciliator is not available.¹³⁹ The parties may be asked to attempt to resolve the dispute on their own. Alternatively, a Tribunal Member may facilitate discussions between the parties. If settlement is not reached, the same Tribunal Member may only proceed to hear the matter after giving the parties an opportunity to object. After considering any objections, the Tribunal Member may determine to conduct the matter or may adjourn it so that it can be heard by a different Member.

The Review acknowledges that it may be problematic for the same Tribunal Member to act as conciliator and decision-maker in some circumstances. While there is no legislative

¹³⁵ <https://www.ncat.nsw.gov.au/ncat/how-ncat-works/resolve-a-case-by-agreement/conciliation.html>

¹³⁶ Separate conciliators are normally available in Sydney, Parramatta, Penrith, Campbelltown, Liverpool, Wollongong, Gosford, and Newcastle and may also be available in other locations depending on application levels.

¹³⁷ https://ncat.nsw.gov.au/documents/guidelines/ccd_guideline_conciliation_and_hearing_same_member.pdf

¹³⁸ Ibid.

¹³⁹ Ibid.

requirement for confidentiality in the NCAT conciliation process, if the parties have concerns about a Member's ability to conduct the hearing impartially after acting as conciliator it may limit their engagement with the conciliation process.

However, the Review notes that it will not always be inappropriate for the same Tribunal Member to proceed to hear the matter. For example, where no evidence has been discussed and no concessions have been made during the conciliation, the Tribunal Member's impartiality will not necessarily have been compromised and there may be no need to adjourn the matter. The Tribunal will continue to monitor workload trends and make separate conciliators available where this is justified. However, in locations where application volumes are low, it will not be economical to make a separate conciliator available to the parties.

Referral of matters to conciliation in the Consumer and Commercial Division

Some submissions to the Review suggested circumstances in which conciliation should not be required by NCAT's Consumer and Commercial Division, including:

- Where the parties are unwilling to engage in a constructive negotiation¹⁴⁰
- Where the parties have not received support or advice to assist them to determine an appropriate outcome¹⁴¹
- Where one party has a clear legal entitlement and should not be expected to compromise¹⁴²
- Where there is no legitimate dispute.¹⁴³

The Medical Insurance Group Australia (MIGA) stated that NCAT should give the parties an opportunity to object to conciliation and then conduct a directions hearing where an objection is received.

The Review considers that NCAT is best placed to determine when it is appropriate to refer parties to conciliation. While conciliation will not be successful if the parties are not willing to engage in the process constructively, it may often be the case that initially reluctant parties do reach agreement once discussions commence. If parties are not referred to conciliation in these circumstances, opportunities to resolve matters by mutual agreement would be lost. Providing parties with an opportunity to object and then conducting a hearing to consider those objections could also create significant delays.

It will not always be clear that a matter lacks merit or that one party has a clear legal entitlement when a matter is referred for conciliation. If a matter is successfully conciliated in these circumstances, a Tribunal Member will review the agreement before making Orders and will check that the parties understand it. This provides some protection where a party may have unduly compromised their rights. However, the Review notes that the Consumer and Commercial Division is a high-volume environment. NCAT cannot be expected to conduct a detailed examination of agreed settlements in these circumstances.

¹⁴⁰ Medical Insurance Group Australia; Australian Prudential Regulation Authority.

¹⁴¹ Australian Prudential Regulation Authority.

¹⁴² Estate Agents Cooperative; Australian Competition and Consumer Commission.

¹⁴³ Caravan and Camping Industry Association NSW.

5.4. The conduct of tribunal members

Some submissions raised concerns about the behaviour of tribunal members

Some submissions made to the Review, especially by individuals, made comments about the way that tribunal members behaved during hearings. For example, in some cases members were perceived as being rude or disrespectful. Some stakeholders commented that the member hearing their case was unprepared or did not fully consider the evidence that was submitted by the parties. Concerns were also raised regarding the expertise of some members in relation to particular legislative topics.

There is no evidence that poor behaviour by members, or lack of expertise, is a systemic issue. Data published by NCAT, set out in Table 3 below, indicates that while the volume of complaints has risen slightly in recent years, the numbers remain low as a proportion of total applications filed. It should also be noted that the statistics set out below capture all complaints made to the Tribunal in each reporting period, which may also include complaints about tribunal decisions and procedures.

Table 3: Complaints received by NCAT

Year	Complaints	% of total applications
2019-20	352	0.52%
2018-19	408	0.59%
2017-18	351	0.53%
2016-17	279	0.42%
2015-16	314	0.45%
2014-15	318	0.45%

Source: NCAT Annual Reports¹⁴⁴

However, the Review acknowledges that instances of inappropriate conduct can impact on public perception of how NCAT operates even if such instances are relatively uncommon.

Research conducted by Dame Hazel Genn in the United Kingdom has highlighted the importance of member behaviour in influencing the experience of tribunal users.¹⁴⁵ For example, parties are more likely to feel that they have been taken seriously and that the decision was fair if the tribunal member clearly explained the process, allowed them to present their case, and actively listened.¹⁴⁶

Tribunal users should make a complaint if they are dissatisfied to ensure that conduct issues can be addressed

Under s 20 of the CAT Act, the President is responsible for the performance management of tribunal members. It is appropriate that these functions rest with the President given NCAT's status as an independent tribunal. The President has published a Code of Conduct that all members are required to follow,¹⁴⁷ which requires all members to:

¹⁴⁴ <https://ncat.nsw.gov.au/ncat/about-ncat/annual-reports.html>

¹⁴⁵ https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Tribunals/tribunals_spring_2006.pdf, pp.10–17.

¹⁴⁶ Ibid.

¹⁴⁷ https://ncat.nsw.gov.au/documents/policies/member_code_of_conduct.pdf.

- Make unbiased, impartial decisions and give all parties the opportunity to put forward their positions
- Conduct proceedings in a manner that is patient, courteous and respectful of all parties, witnesses, representatives, staff and others
- Perform their duties independently and free from external influence
- Demonstrate respect for all aspects of the law
- Be diligent and timely in the execution of their duties, and take reasonable steps to maintain and enhance their skills and knowledge
- Act honestly and truthfully.

Breaches of the code of conduct may result in performance management, including requiring members to undertake specified actions such as additional training or coaching/mentoring.¹⁴⁸ The President may also recommend to the Attorney General that the member not be reappointed at the conclusion of their term. In very serious cases, the President may recommend that the Governor remove the member from office.¹⁴⁹

However, the President is only in a position to address allegations of poor behaviour where those issues are brought to the Tribunal's attention. The Review encourages parties to contact NCAT when they have concerns about the behaviour of a member. Further information about the complaints process is available at <https://ncat.nsw.gov.au/ncat/about-ncat/feedback-and-complaints.html>.

5.5. Publication of data and decisions

User groups would like additional data to inform service planning

A number of organisations who made submissions to the Review noted that they would benefit from receiving access to additional information about who is using NCAT and how their matters progress through the Tribunal. A range of information was sought, including:

- Attendance of parties at hearing
- Whether parties are represented
- Outcomes data, such as orders sought by parties and the orders made
- Time to first hearing, time to finalisation, and time to delivery of written reasons
- Demographic data about tribunal users, including Aboriginal or Torres Strait Islander (ATSI) status.

In most cases, the organisations that commented on this issue provide legal assistance services, such as Legal Aid NSW, NSW Bar Association, Tenants Union of NSW and PIAC. They noted that the information sought would help them target services to areas of highest need and educate potential applicants and respondents about possible outcomes.

For example, information about ATSI status may help legal assistance services to provide culturally appropriate services, including staff and support material, in particular locations. Information about which matter types or locations have high volumes of self-represented

¹⁴⁸ Ibid.

¹⁴⁹ CAT Act, Schedule 2, cl 7(2).

parties may influence where duty lawyer services or other discrete forms of legal assistance are targeted.

Operational data is provided by NCAT via annual reports and user forums

Some operational data is already published in the NCAT Annual Report, including at the division and list level.¹⁵⁰ This data includes:

- Number of applications lodged
- Proportion of applications lodged online
- Number of applications finalised
- Clearance ratio
- Number of hearings held.

NCAT also provides additional operational data to user groups at Divisional Consultative Forums in the form of Quarterly Management Reports. Submissions to the Review spoke positively about the value of these reports and suggested that NCAT should consider publishing them online to make them accessible to a wider audience.

NCAT's digital transformation project is an opportunity to review data collection and reporting practices

The Review acknowledges that additional operational data would provide benefits for stakeholder groups, especially in relation to service delivery planning. However, there are limitations on the data that can currently be extracted from NCAT's case management systems and publicly reported. In 2016, the Law and Justice Foundation of NSW (LJF) reviewed the quality and usefulness of NCAT data for policy purposes.¹⁵¹ It found that the kinds of information requested by stakeholders above is not always captured by existing case management systems and, where it is captured, may not always be in a reportable format (that is, it cannot be easily analysed).

As part of the NSW Courts and Tribunal Digital Reform Project mentioned in section 3.5 above, NCAT has been working to integrate its legacy case management systems into a single, tribunal-wide system. This project is expected to be completed in 2022. Once this project is complete, NCAT intends to review the type and accuracy of data that is collected and consider opportunities to improve data collection and publication practices.

However, the Review notes that it may not always be possible to publish the range of information requested by stakeholders. For example, demographic information can only be collected on a voluntary basis and there may be limited opportunities to request such information from respondents (who may not attend hearings or interact with the Tribunal). Nor may it be possible to collect and publish the full range of data requested by stakeholders due to the complexity and specificity of the information sought.

Publication of decisions in the Consumer and Commercial Division

Submissions received in relation to the Consumer and Commercial Division requested that NCAT publish more decisions to promote transparency, improve member decision-making and help parties with similar matters understand the outcomes that may be achieved by

¹⁵⁰ <https://ncat.nsw.gov.au/ncat/about-ncat/annual-reports.html>

¹⁵¹ [http://www.lawfoundation.net.au/ljf/site/templates/reports/\\$file/NCAT_Overview_2016.pdf](http://www.lawfoundation.net.au/ljf/site/templates/reports/$file/NCAT_Overview_2016.pdf)

approaching the Tribunal.¹⁵²

Table 4 below demonstrates that the proportion of decisions published by the Consumer and Commercial Division is lower, particularly in comparison to the Appeal Panel, Administrative and Equal Opportunity Division and Occupational Division. The proportion of decisions published in the Consumer and Commercial Division was especially low in 2019–20. This was caused by administrative issues, including issues associated with the COVID-19 pandemic, which created a backlog of decisions for publication. The Tribunal advises that publication volumes will return to pre-pandemic levels in future.

Table 4: Published decisions as a percentage of total finalisations*

Division	2017-18	2018-19	2019-20	2020-21
Appeal Panel	47%	47%	43%	45%
Administrative & Equal Opportunity	38%	39%	39%	43%
Occupational	73%	69%	52%	75%
Guardianship**	0.44%	0.32%	0.49%	0.27%
Consumer & Commercial	0.15%	0.21%	0.06%	0.11%

* Total finalisations include matters for which written reasons are generally not produced or published, for example, where a matter is withdrawn by the applicant. If these matters were subtracted from the total finalisation count, the publication rate in most Divisions would be higher.

** Limited decisions are published by the Guardianship Division due to the sensitive nature of proceedings and legislative requirements for confidentiality. Decisions are only published where necessary to highlight emerging or novel areas of law and names are anonymised.

Source: NSW Caselaw website

The Review acknowledges that, given the volume of decisions made by the Consumer and Commercial Division, it may not be possible to achieve a similar publication rate to the Administrative and Equal Opportunity and Occupational Divisions.

In the Administrative and Equal Opportunity and Occupational Divisions, decisions are more likely to be reserved and written reasons issued in a form suitable for publication on the NSW Caselaw website. A higher proportion of Appeal Panel decisions are also published for this reason. In comparison, decisions in the Consumer and Commercial Division are more commonly delivered ex tempore (orally) and written reasons will not always be requested by the parties.

Further, the majority of decisions made by the Consumer and Commercial Division relate to tenancy and social housing proceedings. Decisions in these matters are comparatively short and relate to findings of fact, for example, that a tenancy agreement has been breached or that rental arrears are owed. Decisions of this nature may be of limited educational value to prospective parties.

Nevertheless, the Tribunal may wish to consider whether there are opportunities to increase the publication rate in the Consumer and Commercial Division in response to concerns raised by stakeholders. While it may not be possible to achieve a publication

¹⁵² Tenants Union of NSW; Caravan & Camping Industry Association; Australian College of Strata Lawyers; Northern Rivers Community Legal Centre.

rate comparable to the Administrative and Equal Opportunity and Occupational Divisions, maximising the publication rate would align with the objects of the CAT Act to promote public confidence in Tribunal decision making.

One submission to the Review, from the Property Council of Australia, also suggested that NCAT should publish the names of cases that are being appealed to the NCAT Appeal Panel, or to the Supreme Court, on its website. This is a matter for the Tribunal to consider. However, the Review notes that NCAT may not always be notified when a matter is appealed to the Supreme Court unless the Tribunal is named as a party. It is not clear what value publishing all applications made to the NCAT Appeal Panel would provide. NCAT already publishes the vast majority of Appeal Panel decisions on the NSW Caselaw website. It also distributes an Appeal Panel Decisions Digest on a regular basis, which provides summaries of key decisions and hyperlinks to the NSW Caselaw website.

5.6. Case management and evidentiary requirements

A number of submissions to the Review made comments about the way in which the Tribunal manages proceedings, including in relation to:

- Listing practices
- Evidence requirements, and
- The issuing of summonses.

As these are operational matters and do not require any amendments to the CAT Act, the Review makes no comment about how they should be addressed. Where issues were raised by multiple stakeholders, these are summarised below for NCAT's consideration. If stakeholders remain concerned about these and other operational issues, they can also proactively provide feedback via the NCAT website at <https://ncat.nsw.gov.au/ncat/about-ncat/feedback-and-complaints.html>

Listing practices

Availability of duty members for urgent matters

A number of submissions to the Review, including from the Tenants Union of NSW, Marrickville Legal Centre, NSW Bar Association and the Owners Corporation Network, suggested that the Tribunal should review its procedures relating to urgent applications.

In particular, Marrickville Legal Centre and the Tenants Union of NSW recommended that a 'duty member' (for example, the Tribunal Member allocated to hear group list matters on a given day) should be able to determine applications for interim orders and stays in relation to urgent matters that may arise under the *Boarding Houses Act 2012*, *Residential Tenancies Act 2010* and *Residential (Land Lease) Communities Act 2013*, such as:

- Unlawful lockouts
- Declarations that a person is a tenant for the purposes of eviction proceedings under the *Boarding Houses Act 2012*
- Applications to prevent the disconnection of utilities.

The Owners Corporation Network and NSW Bar Association also supported the assignment of a 'duty member' to hear urgent strata applications and to conduct directions hearings in relation to urgent interlocutory or ancillary decisions respectively.

Submissions noted that while NCAT generally lists urgent matters within one week, in some cases even a short delay may result in adverse consequences, such as an eviction, before the application can be heard.

Continuity of members and related or overlapping matters

Some submissions, including from the Information and Privacy Commission of NSW, Tenants Union of NSW, and Affiliated Residential Park Residents Association (**ARPRA**), suggested that NCAT should endeavour to ensure that the same Tribunal Member deals with a matter while it progresses through the Tribunal. Where the same parties are involved in related matters, these submissions suggested that applications should also be consolidated and listed before the same Member where possible.

Both the Tenants Union of NSW and ARPRA also suggested that the Tribunal should be able to accept joint applications in a broader range of circumstances. This would include, for example, where:

- Multiple residents in a residential land lease community wish to challenge a communal charge
- A dispute arises under the *Boarding Houses Act 2012* or *Residential Tenancies Act 2010* in relation to communal areas.

In such circumstances, submissions considered that permitting joint applications would avoid the need for applicants to pay separate application fees and enable the dispute to proceed more efficiently through the Tribunal.

The Review notes that NCAT already has power to consolidate proceedings.¹⁵³ However, this power relates to applications that have already been lodged with the Tribunal. The power to accept joint applications in the manner suggested by stakeholders would need to be conferred by enabling legislation.¹⁵⁴

The *Residential (Land Lease) Communities Act 2013* and *Residential Tenancies Act 2010* are administered by the Department of Customer Service, and the *Boarding Houses Act 2012* is jointly administered by the Department of Customer Service and Department of Communities and Justice. The Review notes that these Departments may wish to consider whether joint applications should be authorised under these Acts in relation to disputes that affect multiple residents.

Summonses

Some submissions to the Review, including from the Law Society of NSW, Legal Aid NSW and the Tenants Union of NSW, suggested that NCAT should consider making improvements to the summons process. In particular, the Law Society of NSW suggested that NCAT consider adapting certain procedures which currently operate in the Supreme

¹⁵³ CAT Act, s 25 and schedule 7

¹⁵⁴ For example, s 71 of the *Residential (Land Lease) Communities Act 2013* currently enables one or more affected home owners to make a collective application to the Tribunal to challenge a by notice increase in site fees.

Court of NSW, such as:

- A system for producing documents electronically
- A Return of Summons list
- A system for issuing notices to produce to reduce the cost of seeking production under a summons
- Clear procedures for objecting to a summons.

Legal Aid NSW also suggested that NCAT should adopt a more streamlined process for return of summons. In particular, it suggested that Registrars should grant access orders to summonsed material in the absence of the parties where no objection has been raised rather than requiring parties to appear on all occasions.

The Review notes that the new NCAT Online system discussed above at section 5.1 will include functionality for electronic production of summonsed material. A Return of Summons List also operates in the Administrative and Equal Opportunity Division, which is the Division in which the vast majority of summonses are issued.

Expert evidence

Some submissions to the Review noted that it is not always clear when NCAT's Procedural Direction on Expert Evidence applies in proceedings. Procedural Direction 3 on Expert Evidence states that it applies to:

- Proceedings in which the rules of evidence apply
- Proceedings in the Consumer and Commercial Division involving claims under the *Home Building Act 1989* with a value greater than \$30,000
- Proceedings in the Occupational Division for a "profession decision"
- Any other proceedings in which the Tribunal directs that the Procedural Direction is to apply.

This issue was raised most commonly in relation to disputes regarding motor vehicles. Submissions stated that NCAT appears to require expert evidence by a qualified mechanic in these matters, even though the Procedural Direction does not apply in the absence of a direction from the Tribunal.¹⁵⁵

For example, some individuals stated they did not know the Procedural Direction applied but were criticised by Tribunal Members for presenting evidence in the wrong format or for not providing the full curriculum vitae of the mechanic relied upon. If NCAT requires detailed and specific information in support of claims, submissions argued that this should be made clear to the parties upfront.

However, Legal Aid NSW and the Australian Competition and Consumer Commission also noted that the application of expert evidence requirements in motor vehicle claims can be problematic for consumers, as it can be difficult to find an appropriately qualified mechanic who is willing to:

¹⁵⁵ Australian Competition and Consumer Commission; Legal Aid NSW.

- Provide a report against a dealership or manufacturer (particularly in regional areas where it may be difficult to find a mechanic or auto-electrician who does not have an existing business relationship with the respondent)
- Write a report that meets the Tribunal's standards for expert evidence.

In many cases, the cost of obtaining expert evidence may outweigh the value of the claim.

Legal Aid NSW suggested that an industry-funded expert panel could be created to assist the Tribunal in these matters. The panel would include experts in both metropolitan and regional areas who could examine and test motor vehicles and provide reports either for free or at a subsidised rate based on the amount of the claim. Legal Aid NSW also suggested that this panel should operate in combination with a specialised motor vehicle list, with Tribunal Members selected on the basis of their technical expertise.¹¹

The establishment of an industry-funded expert panel is a matter for the Department of Customer Service to consider. However, the Review notes that NSW Fair Trading already has staff members who can provide inspection reports on motor vehicles. While the Review heard that the Tribunal may not consistently accept the qualifications of the staff completing these reports as sufficient for the purposes of expert evidence,¹⁵⁶ this is a matter that can be considered further by the Tribunal.

In relation to expert conclaves, the Owners Corporation Network also suggested that the Tribunal should develop guidelines to set out the process for conducting conclaves as well as the format of the joint report to be issued. The Owners Corporation Network stated that the quality of such reports are currently dependent on the expertise and agreement of the experts, and may not always contain the information necessary to resolve the dispute.

¹⁵⁶ NSW Fair Trading.

Appendix 1: Submissions to the Review¹⁵⁷

1	Confidential	27	Avant
2	Ken and Julie Murphy	28	Suzie Wilson
3	Michael Trigg	29	Allan Dernee
4	Rob Andrews	31	Danijel Livancic
5	Simon Munslow	32	Mary Preston
6	Carolyn Stoltenberg	33	Andrew Burgess
7	Gurjit Singh	34	Deirdre Webster
8	Peter Blanshard	35	LawAccess NSW
9	Estate Agents Co-operative	36	John Tozer
10	E. Brennan	37	Affiliated Residential Park Residents Association
11	Neil Smith	38	Liquor and Gaming NSW
12	P. Da Costa	39	Health Professional Councils Authority
13	Jan Newland	40	Samantha Brown
14	Brian Bavin	41	G. Hockley-Brown
15	Mental Health Coordinating Council	42	Housing Industry Association
16	Ian Littler	43	Samaritans
17	Joanne Brown	44	The Hon David Shoebridge MLC
18	Carey Bay Living Residents Committee	45	Faye Combe
19	Ian Chesterfield	46	Richard Best
20	Lorraine Beattie	47	Christine Lloyd
21	Confidential	48	Hugh Bell
22	Dannielle Mulhern	49	Greg Smith
23	James Ansoul	50	D. F. Ryder
24	Confidential	51	Dementia Australia
25	Luca Amorosi	52	Caravan & Camping Industry Association NSW

¹⁵⁷ A total of 94 submissions were received. In some cases, multiple submissions were received from the same individual.

53	Information and Privacy Commission NSW	79	NSW Bar Association
54	Property Council of Australia	80	Department of Industry
55	Office of Local Government	81	Law Society of NSW
56	Confidential	82	NSW Council for Intellectual Disability
57	Brian and Angela McBride		
58	Australian Centre for Disability Law		
59	Owners Corporation Network		
60	Community Housing Industry Association		
61	Medical Insurance Group Australia Pty Ltd		
62	Tenants Union of NSW		
63	Retirement Village Residents Association		
64	Office of the Legal Services Commissioner		
65	Department of Communities and Justice Office of General Counsel		
66	Public Interest Advocacy Centre		
67	Health Care Complaints Commission		
68	Marrickville Legal Centre		
69	Real Estate Institute of NSW		
70	Caitlin McCue		
71	Isaac Chalik		
72	Australian College of Strata Lawyers		
73	Northern Rivers Community Legal Centre		
74	National Justice Project		
75	Australian Competition and Consumer Commission		
76	Legal Aid NSW		
77	Stephen Larsson		
78	Hunter Community Legal Centre		

Appendix 2: NCAT's constituent tribunals

1. Administrative Decisions Tribunal
2. Consumer, Trader and Tenancy Tribunal
3. Guardianship Tribunal
4. Medical Tribunal
5. Nursing and Midwifery Tribunal
6. Dental Tribunal
7. Occupational Therapy Tribunal
8. Osteopathy Tribunal
9. Chiropractors Tribunal
10. Optometry Tribunal
11. Podiatry Tribunal
12. Physiotherapy Tribunal
13. Pharmacy Tribunal
14. Psychology Tribunal
15. Aboriginal and Torres Strait Islander Health Practice Tribunal
16. Chinese Medicine Tribunal
17. Medical Radiation Practice Tribunal
18. Charity Referees
19. Local Land Boards
20. Local Government Pecuniary Interest and Disciplinary Tribunal
21. Aboriginal Land Councils Pecuniary Interest and Disciplinary Tribunal
22. Vocational Training Appeal Panel
23. Victims Compensation Tribunal