

# **The NSW Civil & Administrative Tribunal (NCAT) – Structure & Operation**

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November/December 2013**

## **Introduction:**

1. This paper examines the operations and structure of the soon to be established NSW Civil & Administrative Tribunal (NCAT).
2. NCAT is being established to provide a single tribunal that serves users efficiently through the simplification of procedures and the joinder of resources as well as providing one registry as a single contact point for all users.
3. Further, it is expected the establishment of a single tribunal will provide for consistency of decision-making in both first instance proceedings and appeals, thereby promoting accountability by the decision makers.
4. NCAT will formally commence operation from 1 January 2014 and will initially transition approximately 23 tribunals that are currently operating in NSW. This includes tribunals such as the Administrative Decisions Tribunal, the Consumer, Trade & Tenancy Tribunal, various health profession tribunals and numerous others. A full list of these tribunals is available at Schedule 1.
5. There are a small number of tribunals or similar bodies that will not initially be transitioned into NCAT, these include, but are not limited to the Workers Compensation Commission, Motor Accidents Authority, Independent Liquor & Gaming Authority and the Industrial Relations Commission.
6. NSW has been slower than the majority of other states in Australia to implement a "super tribunal", with Queensland, Victoria, the ACT and Western Australia all having implemented their own tribunals in recent years. The benefit is that the NCAT Reference Group has been able to visit the various other tribunals to

observe their operations and practices and from this can model NCAT on the best parts of each.

### **Legislation:**

7. NCAT is established by the *Civil & Administrative Tribunal Act 2013* (NSW) (the "**Act**"). This Act provides for the appointment of members and the basic functions and structure of NCAT.
8. Two further pieces of legislation have been enacted that amend the Act to provide the powers, and duties of NCAT. These are the *Civil & Administrative Tribunal Amendment Act 2013* (NSW) and the cognate *Civil & Administrative Legislation (Repeal & Amendment) Act 2013* (NSW).

### **Current tribunal system in NSW:**

9. At present there are between 25 and 30 individually operating tribunals or bodies that exercise functions much like that of a tribunal within NSW. These individual tribunals and their constituent members hold immense levels of knowledge and experience in their respective fields; however, due to the many different tribunals problems do arise for users.
10. The Hon. Greg Smith SC when introducing the *Civil & Administrative Tribunal Bill 2012* (NSW) made comment on the current "system":

*"Tribunals perform an invaluable role within the justice system. They provide timely, efficient and flexible points of access for citizens seeking to resolve disputes or to have a review of executive action. They are also cheaper, faster and less formal than court proceedings. But the ad hoc nature of our current tribunal system creates inefficiencies. At the moment many of the separate tribunals maintain their own infrastructure, including separate facilities and separate administrative structures."*

11. The current individual tribunal system provides completely separate services over many different areas of law and when considered collectively is no doubt complex and bewildering for the users. As such it is considered appropriate that a single tribunal with a single contact point, the Principal Registry, is put in place.

This is intended to make contact with NCAT easier for users as well as having the benefit of economy of scale for its internal operations.

12. It is expected that any deficiencies or problems that may be created from both the size of NCAT and the wide scope of the work that NCAT will undertake can be cured by a structure incorporating separate divisions providing decision making in various areas of law.

**NCAT structure:**

13. A president will head NCAT; the president will be an appointed judge of the Supreme Court of NSW. On 16 October 2013 Robertson Wright SC was appointed as a Supreme Court judge and as the inaugural President of NCAT by the Attorney General. It is noted his Honour has been appointed as a judicial member of the ADT since 2007.
14. NCAT will be made up of 4 divisions that operate individually much like the list system in the NSW District & Supreme Courts. Each division will be headed by a Deputy President with specialist knowledge of that area of practice. The divisions are:
  - a. Consumer & Commercial Division;
  - a. Administrative & Equal Opportunity Division;
  - b. Occupational Division;
  - c. Guardianship Division.
15. The benefit of having separate divisions that operate in a similar fashion to the list system is that the decision makers and practitioners can maintain specialties in law. For example, the Occupational & Regulatory Division, which will subsume a number of health professional tribunals will recognise the need for a different approach under national laws directed towards professional standards of health practitioners as against the Consumer & Commercial Division.
16. The Hon. Greg Smith SC when introducing the *Civil & Administrative Tribunal Bill 2012* (NSW) stated:

*"The structure of the New South Wales Civil & Administrative Tribunal will also provide each division with the flexibility to tailor services to meet the needs of their particular user groups. A one-size fits all approach will not be taken. Professional representation on panels will be preserved and community members will continue to play a key role in assisting tribunals to reach fair and just outcomes."*

17. The need for varying approaches of practice and procedure within individual divisions will be able to be maintained. All this can be achieved whilst ensuring consistency in the approach to decision-making across the divisions and within NCAT which in turn will promote accountability of the decision makers.
18. NCAT will have an internal appeals division. The *Civil & Administrative Tribunal Amendment Act 2013* (NSW) provides for the rules of internal appeals. The Occupational Division & the Guardianship Division will maintain some rights of appeal direct to the Supreme Court of NSW, this is because of the nature of the matters dealt with. The other divisions will have rights of appeal to the internal appeals division of NCAT.
19. Further, NCAT will be able to hear appeals from a limited number of external bodies such as appeals from the Mental Health Review Tribunal under the *Drug & Alcohol Treatment Act 2007* (NSW).
20. A Rules Committee will be established which will provide the rules for practice and procedure as well as drafting the relevant practice notes which the President will issue.
21. An Executive Director controlling corporate services and a single registry service for all 4 divisions will be established. The registry will provide a single contact point for users of NCAT with one website and one phone number. Additionally, standard forms will be used across the board, this will be vastly different to the current tribunal "system" in which different tribunals use many different forms as well as having vastly different resources and capabilities in relation to the operations of their registries. On 16 October 2013 Sian Leathem was appointed as the Principal Registrar of NCAT.

22. A table showing the proposed structure of NCAT can be found at Schedule 2.

23. Finally, the structure will allow for the transition of other tribunals or similar bodies into NCAT with ease, either by adding a division as required or incorporating that body into an existing division.

### **Membership & governance of NCAT:**

24. Appointments are made under the *Civil & Administrative Tribunal Act 2013* (NSW) and the Attorney General is responsible for appointing all legal members. Both presidential and non-presidential members will constitute the membership of NCAT.

25. Presidential Members of NCAT:

- a. On 16 October 2013 Robertson Wright SC was appointed as a Supreme Court Judge and as the inaugural President of NCAT by the Attorney General. It is noted his Honour has been appointed as a judicial member of the ADT since 2007.
- b. Each of the 4 divisions of NCAT will be headed by a Deputy President who will have knowledge and experience within the area of law of their relevant division.

26. Non-presidential members of NCAT:

- a. The non-presidential members are the principal members, senior members and general members.
- b. They will undertake such roles as hearing matters, decision-making and facilitating conciliation between parties.

27. The qualifications required for appointment as a presidential or non-presidential member are outlined within the Act and give express recognition of the need for specialised knowledge, skill or expertise in relation to the areas over which NCAT will have jurisdiction. This will assist in preserving the specialist features of existing tribunals within the divisions of NCAT.

## **Jurisdiction of NCAT:**

28. NCAT has four types of jurisdiction which are provided for in Part 3 of the Act:

- a. A general jurisdiction: which will hear a very wide range of matters each falling into one of the 4 divisions outlined above at paragraph 15;
- b. An administrative review jurisdiction: which allows members of the community to challenge administrative decisions made by governing bodies;
- c. An appeal jurisdiction: which allows for both internal appeals from the various divisions as well as some appeals from external bodies; and
- d. An enforcement jurisdiction: which allows for the Tribunal to have enforcement powers in relation to civil penalties which may be imposed.

29. NCAT has an interrelationship with the Supreme Court of New South Wales in relation to review and judicial review of administrative decisions. Under s34 of the Act should there be adequate provision for such reviews within NCAT then the Supreme Court may refuse to conduct the review and may remit it to NCAT for such a hearing. It is noted that the word "may" as opposed to "must" is used so there is no obligation on the Supreme Court to do so.

## **Forms & pleadings within NCAT:**

30. NCAT will have two types of forms which are used in all of the 4 divisions:

- a. Application which act as originating applications to commence proceedings in NCAT & the necessary reply.
- b. Administrative forms that relate to interlocutory proceedings or administrative processes.

31. The application is the initiating process, the proposed respondent uses a reply and these two forms act as the pleadings in the matter.

32. A set of standard administrative forms will be used from 1 January 2014 though a review of the forms that are used will take place later in 2014.

33. NCAT has identified that initially it expects to simply "rebrand" application forms from existing tribunals as the application forms themselves are generally more complicated. Following this the forms to be developed will likely be separate for each division, this is due to the different requirements of the matters within those divisions and the practice and procedure therein.
34. It is expected that a specific form will be developed for internal appeals to the Appeal Division and appeals from external bodies.

### **Rules of practice & procedure within NCAT:**

35. The rules having regard to practice and procedure within NCAT can be found in Part 2, Division 5 of the Act. The *Uniform Civil Procedure Rules 2005* do not apply to any matters heard by the tribunal. The rules found in this division are general rules only and apply to NCAT proceedings as a whole. Rules in relation to the 4 individual divisions of NCAT or specific classes of matters are discussed below.
36. Alongside this certain Schedules of the Act relate specifically to the separate divisions. Within each Schedule there are rules particular to practice within that division. These rules may relate to representation of parties when appearing in the particular divisions of NCAT, the rules for internal appeals from that division, the composition of the division, the division's functions that may be special to the general functions of NCAT or other matters. It is noted that the amending bill makes provision so that any schedule overrides the general provisions of the Act, this further allows for specialty of practice within each of the 4 divisions.
37. Under s35(1) of the Act there is a very broad power to make regulations which give effect to the practice and procedure within NCAT.
38. The Tribunal Rules (made by the Rule Committee) can also provide for the rules of practice and procedure. These rules will make reference to particular divisions or particular classes of matters, drafting rules this way can allow specialization in particular areas of practise.

39. Finally, informal practice directions can be drafted, in the form of practice notes, to allow for flexibility and speedy responses to changing circumstances.

40. The hierarchy of instruments which provides rules for practice and procedure within NCAT is as follows:

- a. The *Civil & Administrative Tribunal Act 2013* (NSW).
- b. The various schedules relating to particular divisions of the *Civil & Administrative Tribunal Act 2013* (NSW).
- c. Regulations (statutory instruments).
- d. Tribunal Rules drafted by the Rule Committee.
- e. Practice directions drafted as Practice Notes and dispensed by the President or Deputy Presidents.

#### **The rules of evidence in NCAT:**

41. NCAT is not bound by the rules of evidence except in relation to proceedings in its Enforcement Jurisdiction and any proceedings for the imposition by the Tribunal of a civil penalty. There are exceptions to this found in the schedules to the Act. For example in the Occupational Division under Division 4 the rules of evidence apply to proceedings concerning a question of professional misconduct against lawyers.

#### **Further important points when practising in NCAT:**

42. NCAT is a no costs jurisdiction; under s60 of the Act each party to proceedings is to pay their own costs. There are some exceptions to this outlined in s60 of the Act (which is still awaiting enactment) and this section requires there be "special circumstances" to do so. Some examples of this may be the actions of a party that unnecessarily disadvantaged another party or unreasonably prolonged the proceedings, the relative strengths of the claims of a party or the nature and complexity of the proceedings. NCAT has the power to consider by whom costs are to be paid and to what extent, further NCAT may order that costs are assessed in accordance with the *Legal Profession Act 2004* (NSW).



43. Legal practitioners in most instances need leave to appear in NCAT; s45 of the Act. However in certain types of matters a division schedule will provide that within certain divisions of NCAT legal practitioners can appear without leave. This is exemplified in the Occupational Division in which parties appearing are entitled to be represented by an Australian Legal Practitioner.
44. The Act will provide for the facilitation of the just, quick and cheap resolution of the real issues in proceedings which mirrors s56 of the *Civil Procedure Act 2005* (NSW). Practitioners should take note of the use of the comma between the words "just" & "quick".
45. Additionally the Tribunal will promote the use of resolution processes to attempt to assist the parties to come to an agreement without the intervention of NCAT. The Tribunal may refer the parties to mediation or some other form of alternative dispute resolution where it considers it appropriate.
46. When proceedings have settled, under s59 of the Act, NCAT can only make such orders if the terms of the settlement are consistent with the powers of the Tribunal. That is, a settlement cannot be agreed to and then approved by NCAT which causes certain things to be done which are outside its powers.
47. Further, under s38 of the Act, NCAT is given an inquisitorial power. The section relevantly states that "*the tribunal may inquire into and inform itself on any matter in such manner as it thinks fit, subject to the rules of natural justice.*" The members of NCAT have a power to inquire into any relevant matter without that matter being raised by parties to the proceedings. Further, under s46(1) of the Act, the Tribunal also has the power to call witnesses of its own motion and examine that witness on oath or affirmation or require them to give evidence by statutory declaration.
48. NCAT may, at its own motion or at the request of either party, refer questions of law to the Supreme Court for the opinion of the Court. The President must consent in writing and the Court has the jurisdiction to hear and determine any question of law. It is noted however that the Court may decline to hear the question and may refuse to exercise its jurisdiction.

## **Remedies, penalties and orders:**

49. Because of the diverse jurisdiction of NCAT it has a very wide range of remedies available for different matters; descriptions of which are beyond the scope of this paper. Depending on the types of proceedings, and in which division the proceedings are being heard, various orders can be made which may relate to the conduct of the matter and how it is to be heard as well as the final orders which may be made by the Tribunal or the remedies available to the parties.

50. The *Civil & Administrative Legislation (Repeal & Amendment) Act 2013* (NSW) amends the various legislative provisions which relate to tribunals which are to be subsumed by NCAT. The remedies available for certain proceedings can be found under these legislative provisions.

51. As outlined NCAT has an enforcement jurisdiction that allows for the Tribunal to have enforcement powers in relation to monetary penalties which may be imposed should an order of the Tribunal be contravened.

## **Publication of NCAT Decisions:**

52. Publication of decisions of NCAT, both at first instance and from the internal appeals decision, will be found on the CaseLaw website:  
[www.caselaw.nsw.gov.au](http://www.caselaw.nsw.gov.au).

## **Resolution of proceedings concerning abolished existing tribunals & appeals:**

53. The finalisation of pending matters & appeals in, and from, the tribunals to be transitioned is provided for in Schedule 1, Part 2, Division 3, Subdivision 4 of the *Civil & Administrative Tribunal Act 2013* (NSW).

54. For any unheard proceedings before existing tribunals which have been commenced, but not heard, by that tribunal by the establishment date (1 January 2014 or such later date as fixed by proclamation) the proceedings are taken on, and from, that day to have been commenced in NCAT.

55. If an existing tribunal has a matter which is part heard, but not determined, before the establishment day of NCAT the persons who are hearing the matter are to continue to hear and determine the matter sitting as if they are NCAT. Those persons have the powers, whilst sitting as NCAT, to exercise all of the functions that the existing tribunal had immediately prior to the establishment day. Those persons are taken to have been duly appointed to NCAT for the purposes of determining the matter.

56. For any appeal of a decision of an existing tribunal which was instituted before the establishment day, and has not been finally determined by the court before the establishment day, must be determined as if NCAT had not been enacted. That is, the appeal should continue as per the previous procedure and any rules, regulations or other law that would be relevant to the proceedings would continue to operate as if NCAT did not exist.

#### **Review of certain existing orders and renewal of certain proceedings:**

57. Certain orders under the *Guardianship Act 1987* (NSW) and renewal of certain proceedings before the Consumer, Trade & Tenancy Tribunal are extended to before the establishment day so that they are taken to be made by NCAT.

#### **Orders of existing tribunals:**

58. How orders of existing tribunals are to be transitioned is also provided for in Schedule 1, Part 2, Division 3, Subdivision 5 of the *Civil & Administrative Tribunal Act 2013* (NSW).

59. Any orders of existing tribunals made under other legislation are taken on, and from, the establishment day to be an order made by NCAT under the corresponding provision of that legislation, as amended, or the corresponding provision of the *Civil & Administrative Tribunal Act 2013* (NSW).

60. Any application for an order to an existing tribunal under another Act and not determined before the establishment day is to continue to be dealt with as if

made under the *Civil & Administrative Tribunal Act 2013* (NSW) but only if there is a corresponding provision under which the order could be made.

**Amendments to existing legislation:**

61. The *Civil & Administrative Legislation (Repeal & Amendment) Act 2013* (NSW) will amend all current legislative provisions in NSW which refer to the various tribunals which are being subsumed into NCAT. It commences on or about the establishment day, 1 January 2014.

62. The Hon. Greg Smith SC when introducing the *Civil & Administrative Legislation (Repeal & Amendment) Bill 2013* (NSW) on 30 October 2013 stated:

*"While the Civil & Administrative Legislation (Repeal & Amendment) Bill 2013 (NSW) is largely machinery in nature, it is extremely important. This bill will ensure that the NSW Civil & Administrative Tribunal is authorised to exercise the jurisdiction of the existing tribunals when it commences on 1 January 2014. This will ensure that tribunal users do not experience a break in service when the NSW Civil & Administrative Tribunal commences."*

63. For example this bill will do such things as repeal the *Consumer, Trader & Tenancy Tribunal Act 2001* and the *Consumer, Trader & Tenancy Tribunal Regulation 2009*. Its schedules relate to the various pieces of legislation which are to be amended and which will be consolidated into NCAT.

**Conclusion:**

64. The establishment of NCAT brings with it a new phase of tribunal practice in NSW.

65. NCAT will maintain specialty in law through the structure outlined above, whilst having a single registry as the contact point for the users. It is anticipated this combination will promote accessibility for NCAT users.

66. The structure of NCAT will allow for consistency of decision-making over different areas and across the divisions of NCAT. This, in turn, will promote accountability by those who make the decisions.

67. The provision of an internal appeals division will see users being given access to a cost and time effective appeals process and in the majority of appeals will remove the need for the users to leave the jurisdiction of NCAT to access the court system.

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## **Schedule 1**

### **Tribunals to be transitioned to NCAT**

- **Administrative & Equal Opportunity Division:**
  - Administrative Decisions Tribunal
  - Victims Compensation Tribunal (Note: subsumed into the ADT in mid November 2013)
  - Aboriginal Land Councils Pecuniary Interest & Disciplinary Tribunal
  - Charity Referees
  - Local Land Boards
- **Consumer & Commercial Division:**
  - Consumer, Trader & Tenancy Tribunal
- **Guardianship Division:**
  - Guardianship Tribunal
- **Occupational Division:**
  - Vocational Training Appeals Tribunal
  - Local Government Pecuniary Interest & Disciplinary Tribunal
  - Aboriginal & Torres Strait Islander Health Practice Tribunal
  - Chinese Medicine Tribunal
  - Chiropractors Tribunal
  - Dental Tribunal
  - Medical Radiation Practice Tribunal
  - Medical Tribunal
  - Nursing & Midwifery Tribunal
  - Occupational Therapy Tribunal
  - Optometry Tribunal
  - Osteopathy Tribunal
  - Pharmacy Tribunal
  - Physiotherapy Tribunal
  - Podiatry Tribunal
  - Psychology Tribunal

## Schedule 2

# The Structure of NCAT

