THE LAW SOCIETY
OF NEW SOUTH WALES

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Phillipa Hetherton
Director, Courts, Access to Justice and Regulatory
Policy, Reform and Legislation Branch
Department of Communities and Justice
GPO Box 31
Sydney NSW 2001

By email: policy@justice.nsw.gov.au

Dear Phillipa,

Review of the Civil and Administrative Tribunal Act 2013

Thank you for the opportunity to make a submission to the *Civil and Administrative Tribunal Act 2013* Statutory Review. We apologise for the delay in finalising the submission. The Law Society's Indigenous Issues, Litigation Law & Practice, Elder Law, Capacity & Succession, Business Law, Property Law, Employment Law, Public Law, Human Rights, Ethics and Costs Committees contributed to this submission.

1. The need to seek leave to engage legal representation

The NSW Civil and Administrative Tribunal (NCAT) was established to provide citizens seeking to resolve disputes or to have a review of executive action with services that are cheaper, faster and less formal than court proceedings.[1] The Law Society appreciates that this objective underpins the requirement to seek leave to be legally represented in NCAT proceedings.

However, with the exception of the Guardianship Division which has some distinctive considerations outlined below, we request the Department consider amending the *Civil and Administrative Tribunal Act 2013* (NSW) (the Act) to remove the general requirement to seek leave. We consider this could help streamline matters, reduce the burden on parties of conducting proceedings, and reduce the Tribunal's overall workload. In our view, parties should have the right to choose to engage legal representation where matters are sufficiently complex or serious. Our reasons for this position are set out below.

- Due to the requirement to seek leave, the question of legal representation is often not determined until the first directions hearing of a proceeding, even if a written request for legal representation is sent to the Tribunal well before the first directions hearing. Both solicitor and client must be prepared to appear at the directions hearing, in case leave to be legally represented is not granted, which can add significantly to the time and costs expended on the matter, especially if a party is regionally-based. Even in the types of matters where leave is rarely refused, the need to seek leave adds an unnecessary step to the proceedings.

[1] NSW, *Parliamentary Debates*, Legislative Assembly, 22 November, 2012 (G. Smith).

- The need for a party to appear personally at a hearing can impose unreasonable demands on their time, finances and skills. For example, in matters involving Owners Corporations in the Consumer and Commercial Division, strata committee members who are usually unpaid volunteers often find it difficult to take time off work to represent the Owners Corporation at a hearing, or to prepare legal submissions and affidavits for a hearing. Strata managing agents (as non-lawyers) may lack the time, resources and expertise required to prepare and represent an Owners Corporation at a Tribunal hearing, and may be reluctant to do so, due to limitations on the terms of their appointment.

- It is not unusual for parties to have limited English literacy and/or oratory skills and a limited understanding of the Australian legal system. A party should not have to explain in an open hearing, in the presence of other parties, that they cannot read or write in English, or do not understand legal terminology or the provisions of an Act or Regulation. Our members report that they regularly see parties placed in this position.

- Legal practitioners are best placed to prepare and present factual and legal material to the Tribunal in a manner that efficiently directs the Tribunal's attention to the relevant issues. Legal representation removes the need for Members to spend time sifting through irrelevant material, or providing detailed directions to parties, as can occur where parties represent themselves. In our view the involvement of a legal practitioner is conducive to the early resolution of matters.

- Encouraging parties to seek legal representation at an early stage may reduce the need for NCAT to resolve jurisdictional issues. One regionally-based practitioner has reported having six matters in the last 12 months where the clients engaged him after having commenced or having attempted to commence NCAT proceedings. In each case he advised them that NCAT did not have jurisdiction to hear the matter. We understand also that while the Guardianship Division is generally known as the appropriate forum for making or reviewing decisions about substitute decision-making, if an issue arises as to whether proceedings should be commenced in the Supreme Court, legal advice is generally required.

- An individual's lack of legal representation can have public interest implications. For example, decisions in the Administrative & Equal Opportunity Division can have a precedential effect in that they influence the way in which public agencies interpret statutory provisions. This can influence the future conduct of government. In such cases legal representation for the individual is necessary to ensure the individual's case is argued effectively.

- Our members report that where neither party is legally represented, there can be a power imbalance between the parties which disadvantages one party. This can be the case, for example, in tenancy matters or in building matters, where a first-time NCAT user appears against an experienced advocate who appears regularly and has developed expertise in such matters.

We understand that the Tribunal's "Consumer and Commercial Division Guideline" provides seven circumstances in which a party will "usually" be permitted to be represented. Those circumstances include proceedings in the Home Building List that involve a claim or dispute for more than $30,000, where the application is for a penalty to be imposed under the *Strata Schemes Management Act 2015* or the

Community Land Management Act 1989.[2] We understand that in cases where the amount is above the $30,000 threshold, leave is rarely refused. In these cases we recommend removing the need for the parties to seek leave in disputes over a certain amount. Using such a threshold may be appropriate in other Divisions.

Guardianship matters

Notwithstanding the general comments above, the Law Society is of the view that special rules should apply in the Guardianship Division. We endorse the NSWLRC's recommendation that "the person to whom an application relates should be able to have their legal representative — if they have one — appear before the Tribunal without seeking the Tribunal's leave"[3] but that this right should be limited to the subject person and not extend to other interested parties.[4]

Giving a person the right to make life decisions on behalf of another is a significant and serious matter, often with profound and long-term consequences. It is common that the person who is the subject of the application (the subject person) will not have sought the Order. They may also be experiencing mental illness or cognitive or other impairment, and may rely heavily on a relative or carer in their interaction with others.

In these circumstances it is crucial that the subject person have the right to be represented by a genuine advocate (such as a legal representative) rather than a relative or carer who may not represent their wishes or may not have the skills to properly represent the person before the Tribunal. It is therefore particularly important that they also have access to legal assistance, regardless of means.

However, for a variety of reasons (including costs) the subject person may choose to engage a relative or other person to assist them, or may appear personally. This can place them in an acutely vulnerable and disadvantaged position and for this reason we agree with the NSWLRC's recommendation that the Tribunal retain its power to determine whether other parties should be legally represented.[5]

2. Online Registry and E-Court

We note that while "NCAT Online" provides certain online registry services, its current functionality is limited. It allows parties to lodge an application online but not to file any attachments.

There is presently no way of electronically filing documents with NCAT. Parties' submissions are not accepted by email, and parties must physically attend the registry or post documents. Nor can parties seek copies of documents filed or view Orders made on previous occasions.

There is a growing demand amongst NCAT users for online registry services. In 2017-2018, 61.6% of all NCAT applications were lodged online,[6] and in the January to March quarter of 2019, in the Consumer and Commercial Division, 15,300 applications - over 80% - were lodged online.[7] To further the objective of resolving

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[2] NSW Civil & Administrative Tribunal, *Consumer and Commercial Division Guideline: Representation*, cl 11.
[3] NSW Law Reform Commission, Report 145: *Review of the Guardianship Act 1987* (May 2018), 255 [16.35].
[4] Ibid, 256 [16.35].
[5] Ibid, 257 [16.41].
[6] NSW Civil & Administrative Tribunal, *Annual Report 2017-2018*, p 8.
[7] NSW Civil & Administrative Tribunal, *Consumer and Commercial Division Quarterly Management Report*, January to March 2019.

proceedings informally, quickly and cheaply we support the incorporation of a fully functioning online registry. Such a system would reduce the time and expense associated with attending in person to file documents and view Orders.

We note also that there is no E-Court system, and that all directions hearings and return of summons hearings are done in person. Noting the uptake of the online lodgment system, we consider there would be appetite for online participation in most Divisions. We recommend the development of a functioning online Tribunal, either through integration of NCAT systems or through incorporation of JusticeLink and the E-Court Systems presently utilised by the Courts in NSW. The use of these systems should be optional and access to them should be available to all parties.

3. Conduct of hearings on the papers vs live hearings

In our view, conducting hearings on the papers would be appropriate in some, but not all, circumstances.

In general terms we consider that hearings on the papers would be more appropriate in matters where the parties have a reasonable opportunity to obtain legal assistance to prepare the papers, but in other circumstances where the parties prepare the papers themselves, hearings on the papers would be less likely to deal adequately with the issues. In our view, if unrepresented parties do not have the opportunity to be heard, and if Members are unable to ask questions about matters arising from self-prepared papers, Members will be less likely to elicit all the information relevant to decision-making. The result may be an increase in the number of appeals against decisions.

One example of a category of matter that may be suitable to conduct on the papers is strata title disputes. We recommend consideration be given to reinstating the system of adjudication of strata title disputes in the form that existed under the former *Strata Schemes Management Act 1996*. The ability of lot owners and Owners Corporations to have disputes resolved on the papers, without the need for an appearance before the Tribunal, would provide a cheaper, faster and less formal way of enabling the parties to set out the nature of a dispute and the relevant facts, law and Orders sought.

Ideally, an adjudication process would require an applicant to file and serve their documents first, with the respondent or respondents then having an opportunity to file and serve documents in reply, in order to ensure procedural fairness.

The Law Society would support the introduction of a right of appeal from an adjudicator's decision to the Tribunal on the grounds of error of law, and with leave in relation to other matters. In our view adjudicators should not have the power to make costs orders.

In relation to Guardianship matters, we endorse the NSWLRC finding that determining matters on the papers is not appropriate in that Division:

> [D]ecisions "on the papers" may result in substantial prejudice to one or more parties because it is difficult for the Tribunal to assess in advance without seeing the parties, the capacity of the parties to provide effective written submissions and other material.[8]

[8] NSW Law Reform Commission, Report 45: *Review of the Guardianship Act 1987* (May 2018) 255 [16.27].

It is important in Guardianship applications for Members to interact personally with the subject person (even when they are represented) in order to assess their understanding of the proceedings and the decision.

4. Summons

Section 48 of the Act allows the Tribunal to issue a summons, which is similar to a subpoena. We recommend the introduction of certain processes which, by way of comparison, operate in the Supreme Court relation to subpoenas:

1. a system for producing documents electronically;
2. a Return of Summons list, general access Orders, and a "book" outside for seeking adjournments;
3. a system for issuing notices to produce, which we consider would reduce the costs for seeking production under a summons; and
4. a clear procedure for objecting to a summons.

In relation to the Guardianship Division we recommend the Division make greater use of directing the Registrar to issue a summons. This would assist in providing documentary evidence that may support the Division's decision-making.

5. Directions, Orders and Reasons

We consider that Directions, Orders and Reasons for decisions should be made available to the parties shortly after they are made, as this enables the parties to action the Tribunal's decisions promptly. Ideally, this would take place electronically.

6. Enforcement powers

In our view the Act does not provide the Tribunal with adequate powers to enforce its decisions. We recommend that the civil penalty jurisdiction of the Tribunal be expanded to enable the Tribunal to impose civil penalties on persons or corporations that fail to comply with its Orders and that such penalties be of an amount to deter non-compliance with Orders.

In the Consumer and Commercial Division, for example, if an owner is ordered to remove an animal from a strata scheme, or to reinstate wall to wall carpet and underlay in his/her Lot, or to reinstate other internal building works done without approval of the Owners Corporation, there is no power available to the Tribunal to enforce its decision.

In the case of an Owners Corporation that is ordered by the Tribunal to repair an item of common property, but that fails to comply with the Order, a Lot owner is faced with committing further time and effort to seeking an Order that a compulsory strata manager be appointed to exercise all powers of the Owners Corporation, and the hope that once appointed, the compulsory strata manager will comply with the earlier Order made by the Tribunal.

7. Support for Aboriginal tenants

The Law Society is working with Aboriginal support services to explore ways of developing better support for Aboriginal tenants, particularly social housing tenants. Our members report that Aboriginal tenancy and support services are scarce and geographically scattered, making them difficult for tenants to access. Low funding levels (which constrain staff, time and travel) limit the capacity of these services to provide advocacy and support at NCAT hearings. As a result, in some cases Aboriginal tenants fail to protect their legal rights in the Administrative Equal

Opportunity or Consumer & Commercial Division. Typically, for example, the response to an eviction notice is simply to vacate the premises.

While these issues are not squarely within the scope of the Review, the Law Society recommends consideration be given to developing procedures and structures that better accommodate Aboriginal tenants and their support services. While removing the need to seek leave for legal representation would assist, further measures to improve access to justice may be of benefit.

We invite NCAT to work with us and with Aboriginal support services towards developing coordinated solutions to these issues.

Thank you again for the opportunity to make a submission. We look forward to working with the Department and the Tribunal to ensure matters within its jurisdiction are dealt with as fairly and efficiently as possible.

If you have queries about this letter please contact Sue Hunt, Principal Policy Lawyer, by email to sue.hunt@lawsociety.com.au or by phone on (02) 9926 0218.

Yours faithfully,

Elizabeth Espinosa
President