



THE LAW SOCIETY
OF NEW SOUTH WALES

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15 April 2013

NCAT Project Team
Department of Attorney General and Justice
Level 14, 10 Spring Street
SYDNEY NSW 2000

By email: ncat@agd.nsw.gov.au

Dear Sir/Madam

Discussion paper 4(b) – Constitution requirements

Following consultation with the relevant policy committees, the Law Society of New South Wales is pleased to provide the comments below regarding discussion paper 4(b) which relates to the constitution of tribunal panels.

NCATs President should have discretion regarding which individual members are allocated to hear matters. However, the President will be bound by the requirements contained in division schedules.

It is agreed that the President should have discretion regarding which individual members are allocated to hear matters in the first instance. However, as previously submitted, the constitution of the appeal tribunal should be enshrined in legislation for transparency and consistency across NCAT.

The proposal that the President be bound by the requirements contained in divisional schedules is also agreed.

The Tribunal is to be constituted by at least one member.

Consideration should be given to allocating either one or three members to a hearing. Where two members are allocated, on a division of opinion, the opinion of the senior member prevails and this effectively makes the second member redundant.

When making decisions about which particular members to allocate to a matter, the President should be required to have regard to:

- **The degree of public importance or complexity of the subject matter,**
- **The need for members to have special knowledge, expertise or experience,**
- **If the proceedings relate to NCAT's administrative review jurisdiction – the nature and status of the office of the administrator who made the decision being reviewed,**

- Any provision of the Act or another Act that may be relevant,
- Any other matters the President considers appropriate.

Should the President be required to take any other factors into consideration when constituting the tribunal?

It is agreed that the NCAT Act should provide guidance to the President regarding the factors that should be taken into account when deciding which individual members to allocate to a matter. The proposed list of factors appears to be adequate, subject to the following amendment:

The need for members to have **relevant** special knowledge, expertise **and** experience.

The Tribunal should be constituted by at least one member. Should the NCAT Act set a maximum limit on the number of members that can be allocated to a hearing?

It would be appropriate for the NCAT Act to set a maximum limit on the number of members that can be allocated to a hearing. A maximum limit of three would be suitable in most matters. However, in guardianship matters the existing maximum limit of five should be retained.

Should existing constitution requirements be altered in some jurisdictions?

As previously submitted, section 24 of the *Administrative Decisions Tribunal Act 1997*, which currently requires a non-judicial member to be on the appeal panel, should not be retained because most appeals are on questions of law and a non-judicial member does not decide on questions of law (see section 78(2)). Appeal panels in NCAT should comprise an unequal number of three judicial members so that in the event of division of opinion, a majority opinion determines the outcome.

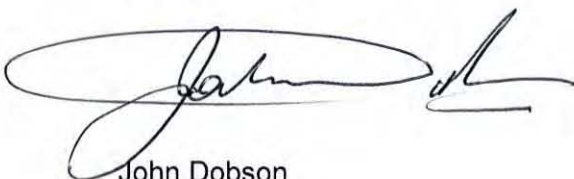
In which jurisdictions should existing constitution requirements be preserved?

Section 51 of the *Guardianship Act 1987*, which provides that the Guardianship Tribunal should be constituted by no fewer than three members and no more than five members (including at least one legal member, one professional member and one community member), should be retained.

The existing constitutional requirements for professional discipline matters, as set out in Part 3 of Schedule 2 to the *Administrative Decisions Tribunal Act 1997*, should also be retained.

If you have any questions in relation to this letter please contact Chelly Milliken, Legal Policy Advisor, on 9926 0218 or chelly.milliken@lawsociety.com.au

Yours sincerely



John Dobson
President