



THE LAW SOCIETY
OF NEW SOUTH WALES

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8 March 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

The Law Society of New South Wales (NSW) is pleased to be represented on the NSW Civil and Administrative Tribunal (NCAT) Reference Group by Councillor Gary Ulman. He has asked me to pass on a number of comments regarding the discussion papers referred to below following consultation with the Law Society's Policy Committees:

- Paper 2(a): Objectives of the NCAT Act
- Paper 2(b): The use of assessors
- Paper 2(c): Representation of parties

Objectives of the NCAT Act

The recommendation made by Judge Kevin O'Conner that the NCAT Act include objectives along the lines of subsections 3(a) - (c) of the Administrative Decisions Tribunal Act is supported (set out below for ease of reference). In addition, it is suggested that consideration be given to including an objective of achieving justice between the parties, for example, by including the word "just" in subsection 3(b) as shown below.

3 Objects of Act

The objects of this Act are as follows:

- (a) To establish an independent Civil and Administrative Tribunal:
 - (i) to make decisions at first instance in relation to matters over which it is given jurisdiction by an enactment, and
 - (ii) to review decisions made by administrators where it is given jurisdiction by an enactment to do so, and
 - (iii) to exercise such other functions as are conferred or imposed on it by or under this or any other Act or law
- (b) to ensure that the Tribunal is accessible, its proceedings are efficient and effective and its decisions are just and fair,
- (c) to enable proceedings before the Tribunal to be determined in an informal and expeditious manner.

If the proposal to include specific objectives for each Division of NCAT is adopted, we would be keen to contribute to the development of these objectives, particularly for the Occupational & Regulatory Division.

The use of assessors

If provision is to be made for the use of assessors in the NCAT Act, the NCAT Project Team considers that:

- The Tribunal should be able to order parties to pay or contribute to the costs of an assessor;
- The Tribunal should be able to adopt the findings or recommendations made by the assessor without the parties' consent;
- Where the Tribunal appoints an assessor, the parties should not be able to call their own expert witness or tender any other expert report without leave, and
- The Tribunal should issue clear guidance as to when an assessor should be appointed through Rules or other directions.

The general principles outlined above appear to be workable, provided that the parties are given the opportunity to address the Tribunal in relation to the findings or recommendations made by the assessor before the Tribunal determines whether or not to adopt them. However, the Law Society shares the view of the Bar Association about the use of assessors in the Occupational & Regulatory Division.

Representation of parties

The Law Society considers it essential that the NCAT Act permits parties appearing in Tribunal proceedings to make their own decision about whether they wish to have legal representation. While Tribunals are intended to be relatively informal, quick and cheap when compared to courts, Tribunals nevertheless deal with matters of significant complexity and importance. It is not the case that restricting legal representation automatically saves time and money. To the contrary, the absence of legal representation can result in more protracted hearings with more assistance needed to guide an unrepresented person through unfamiliar procedures and avoid irrelevant issues. Further, there is a real risk of unfairness, particularly where the other party, which may be a government agency or sophisticated industry group, has appearing for it experienced officers who are familiar with the relevant practice and procedure. Preserving for parties the choice to be legally represented in tribunal proceedings would ensure more matters are dealt with expeditiously and without risk to fairness.

The Law Society supports the suggestion made by Judge O'Connor that the NCAT Act include a provision along the lines of section 71(1) of the ADT Act, set out below for ease of reference:

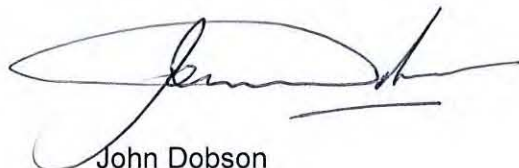
71 Representation of parties

- (1) A party to proceedings before the Tribunal may:
 - (a) Appear without representation, or
 - (b) Be represented by an Australian legal practitioner, or
 - (b1) with the leave of the Tribunal given under subsection (2), be represented by an agent who is not an Australian legal practitioner, or
 - (c) If the party is an incapacitated person – be represented by such other person as may be appointed by the Tribunal under subsection (4).

In response to the Project Team's specific request for comments about the draft provisions relating to vulnerable persons, the Law Society's Elder Law and Succession Committee has confirmed that these are satisfactory.

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

A handwritten signature in black ink, appearing to read 'John Dobson', with a long horizontal flourish extending to the right.

John Dobson
President