

A New Approach to Civil Disputes
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Introduction

- 1 Dispute resolution is conceptually simple. There is only one circumstance in which disputes arise and there are only four fundamental methods of resolving disputes.
- 2 The circumstance in which disputes arise is when there is more than one person present. Not surprisingly, disputes are a constant characteristic of every human society.
- 3 Human nature is also such that once a dispute arises, it cries out to be resolved.
- 4 There are four fundamental ways in which a dispute can be resolved. The two most drastic means of resolution are:
 - (1) Withdrawal by a party from the dispute – capitulation; and
 - (2) Separation of the parties so that they both do not continue in the same society – in the most extreme case permanent exclusion from society is effected by death.
- 5 If a party attempts to impose by force one of these drastic resolutions, there are substantial risks for both parties and for society. If the attempt is successful, the prejudice to the unsuccessful party may be extreme. Consequently, most societies have encouraged less drastic means of dispute resolution.
- 6 The two less drastic means of resolving disputes are:
 - (1) The parties agreeing either to accept the resolution they have reached themselves or to accept the resolution determined by another party or process; and

(2) The parties having a resolution imposed on them by some authority in the society, usually one with power to enforce compliance with the resolution imposed.

7 If this analysis is correct, my topic today, “A New Approach to Civil Disputes”, may be thought to be misguided. It is unlikely that there are any fundamentally new approaches to resolving disputes. Murder has been a well-known dispute resolution mechanism since Cain slew Abel.² The strong forcing the capitulation of the weak is exemplified by the Athenian treatment of the island of Melos, which was a reluctant ally, during the Peloponnesian War (431 – 404 BC).³ Even 6,000 years ago, two Sumerian cities, Shirpula and Gishku, referred the boundary dispute between them to arbitration by the ruler of the city of Kish.⁴ Almost 200 years ago in Australia, on 17 May 1824 the Charter of Justice was proclaimed and the Supreme Court of New South Wales was established with comprehensive jurisdiction to hear and determine civil disputes, thus establishing a successful method of imposed dispute resolution in this country.

8 Whilst these examples may illustrate the long history of dispute resolution and whilst the writer of Ecclesiastes may be correct in saying that “there is nothing new under the sun”,⁵ I believe that there is scope for a new approach to resolving civil disputes and that the Civil and Administrative Tribunal of New South Wales has a role to play in considering the implementation of such an approach.

9 In addressing this topic, it is useful (and might be informative) to examine NCAT’s existing approach to dispute resolution more closely. Consequently, I shall first outline the structure and some of the significant features of the Tribunal, the statutory framework for dispute resolution processes in NCAT and the use of resolution processes at present. Based on that foundation, I

² Genesis 4:1–8.

³ Thucydides. *History of the Peloponnesian War*, 5.84-116.

⁴ Stephen C Neff, *Justice Among Nations: A History of International Law* (Harvard University Press, 2014), 14.

⁵ Ecclesiastes 1:9.

shall then consider how a new approach to civil dispute resolution might be formulated and implemented.

NCAT's Formation, Structure and Significant Features

- 10 NCAT has the benefit of not being ancient or even old. It is a mere babe, only 2 years and 225 days old. It came into existence on 1 January 2014. At that time, the Tribunal was the latest example of what are commonly called the CATs or the "Super Tribunals". The other Australian Super Tribunals are VCAT (1998), SAT of WA (2005), ACAT (2009), QCAT (2009), NTCAT (2014) and SACAT (2015). I believe TCAT is not far off.
- 11 The Tribunal has taken over the work and brought together the jurisdiction of 22 previous tribunals or bodies in the State's largest tribunal. It receives about 70,000 applications per year. Some matters are listed on the basis of a nominal allocated hearing time of 7 minutes per matter while others are listed for hearings of 15 to 20 days.
- 12 In order to manage the workload and to deal appropriately with the different types of matters and litigants that come before the Tribunal, there are four first instance Divisions and there is also an internal Appeal Panel. These four first instance Divisions are:
 - The Administrative and Equal Opportunity Division;
 - The Consumer and Commercial Division;
 - The Guardianship Division; and
 - The Occupational Division.
- 13 Each Division has, under s 16(3) of the NCAT Act, the functions allocated to it in the Division Schedule for that Division. The Division Schedules are Schedules 3, 4, 5 and 6 to the Act. In addition to the functions allocated to each Division, the Division schedules specify special constitution

requirements, special practices and procedures and particular appeal rights for each Division. It is important to bear in mind that the provisions of these Division Schedules prevail over the general provisions of the Act and the procedural rules, to the extent of any inconsistency, by virtue of s 17(3) of the Act. In this context the “procedural rules” include both the Civil and Administrative Tribunal Regulation 2013 (NSW) (the NCAT Regulation) so far as it deals with practice and procedure and the Civil and Administrative Tribunal Rules 2014 (NSW) (the NCAT Rules).⁶

- 14 Each Division also has its own Division Head, who is also a Deputy President of the Tribunal, its own structure with different Lists for different types of matters, its own Divisional Registry and, most importantly, its own practice and procedure which reflect the nature of the work done in that Division.
- 15 The work of each Division determines to some extent how it approaches the resolution of disputes.

Administrative and Equal Opportunity Division

- 16 In general terms, the Administrative and Equal Opportunity Division replaced part of the Administrative Decisions Tribunal (ADT) and the Charity Referees and deals with:
 - (1) Merits review of actions or decisions of the Executive Government in relation to matters such as:
 - (a) Community services, for example, working with children checks;
 - (b) State taxation and revenue;
 - (c) Privacy and access to information under the *Government Information (Public Access) Act 2009*, which replaced the previous Freedom of Information legislation;

⁶ See the definition of “procedural rules” in s 4(1) of the NCAT Act.

- (d) Firearms licensing;
 - (e) From March 2016, certain gaming and liquor licences; and
 - (f) Other executive decisions or conduct reviewable under the *Administrative Decisions Review Act 1997*;
- (2) All complaints under the *Anti-Discrimination Act 1977*.
- 17 The provisions that establish the particular procedures for matters in the Administrative and Equal Opportunity Division are found in Sch 3 to the *Civil and Administrative Tribunal Act*.
- 18 The body of enabling legislation under which proceedings may be brought in the Administrative and Equal Opportunity Division includes the following Acts:
- Agricultural Industry Services Act 1998*
 - Anti-Discrimination Act 1977*
 - Australian Oil Refining Agreements Act 1954*
 - Child Protection (Working with Children) Act 2012*
 - Combat Sports Act 2008*
 - Combat Sports Act 2013*
 - Commons Management Act 1989*
 - Community Services (Complaints, Reviews and Monitoring) Act 1993*
 - Crown Lands (Continued Tenures) Act 1989*
 - Crown Lands Act 1989*
 - Dormant Funds Act 1942*
 - Education Act 1990*
 - Government Information (Public Access) Act 2009*
 - Hay Irrigation Act 1902*
 - Local Land Services Act 2013*
 - Native Title (New South Wales) Act 1994*
 - Plant Diseases Act 1924*
 - Port Kembla Inner Harbour Construction and Agreement Ratification Act 1955*
 - Public Health Act 2010*

Victims Rights and Support Act 2013

Water Act 1912

Wentworth Irrigation Act 1890

Western Lands Act 1901

Consumer and Commercial Division

19 The Consumer and Commercial Division took over the work of the Consumer, Trader and Tenancy Tribunal (the CTTT), the retail lease jurisdiction of the ADT and the work of the Local Land Boards. It generally deals with disputes between individuals and between individuals and suppliers of goods or services. The Consumer and Commercial Division's jurisdiction extends to:

- Consumer claims (up to \$40,000);
- Residential tenancy and social housing disputes;
- Retail lease and agricultural tenancy matters (up to \$400,00 and \$500,000 respectively);
- Home building matters (up to \$500,000) and motor vehicle matters (in certain cases with unlimited jurisdiction);
- Strata and community title disputes;
- Dividing fence disputes;
- Residential park, retirement village and similar matters.

20 Some of the Consumer and Commercial Division's particular rules of practice and procedure are set out in Sch 4 to the *Civil and Administrative Tribunal Act*.

21 The body of enabling legislation that is relevant to claims which may be brought in the Consumer and Commercial Division includes:

Agricultural Tenancies Act 1990
Australian Consumer Law (NSW)
Boarding Houses Act 2012
Community Land Development Act 1989
Community Land Management Act 1989
Contracts Review Act 1980
Conveyancers Licensing Act 2003 (but only in relation to Division 3 of Part 4 of that Act)
Credit (Commonwealth Powers) Act 2010
Dividing Fences Act 1991
Fair Trading Act 1987
Holiday Parks (Long-term Casual Occupation) Act 2002
Home Building Act 1989
Motor Dealers Act 1974
Motor Dealers and Repairers Act 2013
Motor Vehicle Repairs Act 1980
Pawnbrokers and Second-hand Dealers Act 1996
Property, Stock and Business Agents Act 2002
Residential (Land Lease) Communities Act 2013
Residential Parks Act 1998
Residential Tenancies Act 2010
Retail Leases Act 1994
Retirement Villages Act 1999
Strata Schemes Management Act 1996
Sydney Water Act 1994

Guardianship Division

22 The Guardianship Division replaced the Guardianship Tribunal and is principally concerned with:

- Making guardianship and financial management orders for persons over the age of 16 with impaired decision-making capacity;

- Reviewing enduring powers of attorney;
- Approving clinical trials; and
- Other matters arising under the *Guardianship Act 1987* and other legislation in relation to persons with an impaired decision-making capacity.

23 Applications in this Division are quite varied, but the two largest categories are applications for guardianship orders and applications for financial management orders, combined representing somewhat over half of all lodgements.

24 The Guardianship Division's specific procedures and requirements are set out in Sch 6 to the *Civil and Administrative Tribunal Act*.

25 The body of enabling legislation that is relevant to the work of the Guardianship Division includes:

Children and Young Persons (Care and Protection) Act 1998

Guardianship Act 1987

NSW Trustee and Guardian Act 2009

Powers of Attorney Act 2003

Occupational Division

26 Finally, there is the Occupational Division, which took over some of the jurisdiction of the ADT, replaced the 14 health practitioner tribunals as well as the two pecuniary interest and disciplinary tribunals and the Vocational Training Appeal Panel. It is therefore responsible for the professional discipline of all legal practitioners in this State as well as professional discipline and regulation of other professions, including architects, building professionals, medical practitioners and other health practitioners, surveyors and veterinarians. The Occupational Division also deals with:

- Merits review of licensing and other decisions concerning occupations regulated by the Executive Government; and
- Pecuniary interest and disciplinary matters in relation to local councils and aboriginal land councils.

27 Although the Occupational Division is the smallest of the Divisions by reference to the number of applications lodged each year, its decisions can be some of the most significant, including recommending the striking of barristers and solicitors from the roll of practitioners, deregistering doctors or depriving real estate agents of their licence to operate.

28 The particular procedures that apply in the Occupational Division are set out in Sch 5 to the *Civil and Administrative Tribunal Act*.

29 The body of enabling legislation that is relevant to the work of the Occupational Division includes:

Aboriginal Land Rights Act 1983

Architects Act 2003

Building Professionals Act 2005

Commercial Agents and Private Inquiry Agents Act 2004

Conveyancers Licensing Act 2003 (except in relation to Division 3 of Part 4 of that Act)

Fair Trading Act 1987

Health Care Complaints Act 1993

Health Practitioner Regulation National Law (NSW)

Home Building Act 1989

Legal Profession Uniform Law (NSW)

Local Government Act 1993

Motor Dealers Act 1974

Motor Dealers and Repairers Act 2013

Motor Vehicle Repairs Act 1980

Occupational Licensing National Law (NSW)

Passenger Transport Act 1990
Pawnbrokers and Second-hand Dealers Act 1996
Property, Stock and Business Agents Act 2002
Public Notaries Act 1997
Security Industry Act 1997
Surveying and Spatial Information Act 2002
Tow Truck Industry Act 1998
Veterinary Practice Act 2003
Wool, Hide and Skin Dealers Act 2004

The Appeal Panel

- 30 Above all of the Divisions sits the Appeal Panel of the Tribunal. Most decisions of the Tribunal at first instance can be appealed to the Appeal Panel. Those decisions that cannot be the subject of such an internal appeal can usually be appealed to the Supreme Court or, in a very limited number of cases, to the Land and Environment Court or the District Court.
- 31 The role of the Appeal Panel is essentially to correct errors made by the Tribunal at first instance. Given that the Tribunal deals with about 70,000 matters a year and the decision makers are human, errors occur. The Appeal Panel provides a cost effective, prompt and just mechanism for reviewing and correcting, where necessary, first instance decisions. It makes the decision makers accountable and is a very effective means of improving the quality of decision making and writing throughout the Tribunal.

Legislative Structure for Resolution of Disputes in NCAT

- 32 Having outlined the structure of the Tribunal and the types of work each of the Divisions does, I shall now turn to consider the legislative provisions which govern resolution processes in the Tribunal.
- 33 It can be accepted as a general proposition that most people come to NCAT because they have a problem and want that problem resolved. In many

cases, the means of resolving the problem may not be of paramount concern to them.

- 34 The Tribunal has wide and flexible powers to resolve disputes both by an adjudicative hearing followed by an imposed decision and other means.

Part 4 of the NCAT Act

- 35 The framework for practice and procedure to be employed in resolving disputes in the Tribunal is found in Pt 4 of the Act, ss 35 to 70. Part 4 is helpfully headed '*Practice and Procedure*'. It should be noted that under s 35 the provisions of Pt 4 are subject to enabling legislation and the procedural rules (that is, the NCAT Regulation so far as it deals with practice and procedure and the NCAT Rules made by the Rule Committee).

- 36 The guiding principle is that the procedures of the Tribunal should be applied and directed so as to facilitate the just, quick and cheap resolution of the real issue in the proceedings: s 36(1) of the NCAT Act. It is significant that it applies not just to adjudicative hearings but to all resolutions of the issues between the parties.

- 37 Section 36(3) imposes an express duty on parties, legal practitioners and other representatives to co-operate with the Tribunal to give effect to the guiding principle and to comply with orders and directions. Section 36(4) introduces a requirement of proportionality in the following terms:

“the practice and procedure of the Tribunal should be implemented so as to facilitate the resolution of the issues between the parties in such a way that the cost to the parties and the Tribunal is proportionate to the importance and complexity of the subject-matter of the proceedings.”

- 38 Once again, this requirement for proportionality applies to all of the Tribunal's processes for resolving issues.

39 In addition to this general guidance, s 37 expressly deals with alternative dispute resolution, but only as an example of a wider concept “resolution processes”. Section 37 of the NCAT Act is short and simple. It provides:

“37 Tribunal to promote use of resolution processes

(1) The Tribunal may, where it considers it appropriate, use (or require parties to proceedings to use) any one or more resolution processes.

Note. See section 59 for the power of the Tribunal to give effect to a settlement reached by the parties following the use of a resolution process.

(2) A **resolution process** is any process (including, for example, alternative dispute resolution) in which parties to proceedings are assisted to resolve or narrow the issues between them in the proceedings.”

40 It will be noted that the section uses the expression “resolution processes”. Because of s 37(2), a “resolution process” means “any process (including, for example, alternative dispute resolution) in which parties to proceedings are assisted to resolve or narrow the issues between them in the proceedings”. Thus, “resolution processes” include but are not limited to traditional ADR.

41 The Tribunal can use resolution processes with the agreement of the parties but it can also require the parties to participate in such processes.

42 Section 38(1) establishes great flexibility for the Tribunal in the following terms:

The Tribunal may determine its own procedure in relation to any matter for which this Act or the procedural rules do not otherwise make provision.

43 The other provisions of s 38 make provision in respect of processes which are more focused upon adjudicative hearings than other resolution processes. Those provisions can be summarised as follows:

(1) Generally, the Tribunal is not bound by the rules of evidence except in proceedings in exercise of its enforcement jurisdiction, proceedings for the imposition of a civil penalty and professional discipline proceedings

concerning legal practitioners or notaries.⁷ In addition, even though the Tribunal is not required to apply the rules of evidence, s 128 of the *Evidence Act 1995* (NSW) (which concerns the privilege against self-incrimination) is taken to apply to evidence given in the Tribunal: s 38(2) and (3);

(2) The Tribunal is also required to take such measures as are reasonably practicable:

(a) to ensure that the parties to the proceedings before it understand the nature of the proceedings,

(b) if requested to do so—to explain to the parties any aspect of the procedure of the Tribunal, or any decision or ruling made by the Tribunal, that relates to the proceedings, and

(c) to ensure that the parties have a reasonable opportunity to be heard or otherwise have their submissions considered in the proceedings

- s 38(5)(a), (b) and (c); and

(3) Finally, the Tribunal is 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 any proceedings: s 38(6)(a).

44 The remainder of Pt 4 deals primarily with adjudicative hearing processes except for s 59 which specifies the Tribunal's powers when the parties reach an agreement to resolve their issues.

45 If the parties can reach agreement, by themselves or assisted in some way by the Tribunal through a resolution process, enforceability of that agreement may be essential to making the resolution effective. The Tribunal is

⁷ Sch 5, cl 20 of the NCAT Act.

empowered to make orders that give effect to any settlement reached by agreement between the parties. In this regard, s 59 provides:

“59 Powers when proceedings settled

(1) The Tribunal may, in any proceedings, make such orders (including an order dismissing the application or appeal that is the subject of the proceedings) as it thinks fit to give effect to any agreed settlement reached by the parties in the proceedings if:

- (a) the terms of the agreed settlement are in writing, signed by or on behalf of the parties and lodged with the Tribunal, and
- (b) the Tribunal is satisfied that it would have the power to make a decision in the terms of the agreed settlement or in terms that are consistent with the terms of the agreed settlement.

(2) The Tribunal may dismiss the application or appeal that is the subject of the proceedings if it is not satisfied that it would have the power to make a decision in the terms of the agreed settlement or in terms consistent with the terms of the agreed settlement.”

46 It should be noted that when considering whether to make orders under s 59, the Tribunal must take into account the interests of any vulnerable person (whether or not a party to the proceedings) as a consequence of r 37 of the NCAT Rules. That rule provides:

“37 Matters that may be taken into account when exercising settlement powers

(1) When deciding whether to make orders to give effect to a settlement reached by parties to proceedings, the Tribunal is to take into account the interests of any vulnerable person (whether or not a party to the proceedings) if the Tribunal considers that:

- (a) the person may be directly affected by the orders because the person is a party to, or the subject of, the proceedings concerned, and
- (b) it is appropriate to do so in the circumstances.

(2) Nothing in this rule limits the matters to which the Tribunal may have regard when deciding whether to make orders to give effect to a settlement.

(3) In this rule:

vulnerable person means:

- (a) a minor, or
- (b) a person who is totally or partially incapable of representing himself or herself in proceedings before the Tribunal because the person is intellectually, physically, psychologically or sensorily disabled, of advanced age, a mentally incapacitated person or otherwise disabled.”

- 47 As would be expected, the Tribunal can only make orders giving effect to an agreement between the parties if it has power to make a decision in terms that give effect to the agreement. This reflects the common law: *Thomson Australia Holdings Pty Ltd v Trade Practices Commission* (1981) 148 CLR 150 at 163.
- 48 Where there has been a dispute as to the Tribunal's powers, the Tribunal is bound to consider whether it is satisfied that it has power to make the order and to make that decision reasonably in the sense referred to in *Minister for Immigration and Citizenship v Li* [2013] HCA 18: see *S & G Homes Pty Ltd t/as Pavilion Homes v Owen* [2015] NSWCATAP 190 at [67]. Whether the Tribunal is satisfied it would have the power to make a decision in the terms of, or consistent with, the agreed settlement has been held to be a relevant consideration (in the *Minister for Aboriginal Affairs v Peko Wallsend Ltd* sense): *S & G Homes Pty Ltd t/as Pavilion Homes v Owen* [2015] NSWCATAP 190 at [32].
- 49 The grounds for setting aside consent orders are the same as those for setting aside the agreement on which it is based, for example, illegality, misrepresentation, nondisclosure of a material fact where disclosure is required, duress, mistake, undue influence, abuse of confidence or the like: *Harvey v Phillips* (1956) 95 CLR 235 at 243-4, as cited in *Docherty v Ballouk* [2016] NSWCATAP 126.

Schedule 1 to the NCAT Regulation

- 50 Schedule 1 to the NCAT Regulation provides further elaboration on the Tribunal's resolution processes. A full copy of Sch 1 to the NCAT Regulation can be found as Attachment 1 to this paper.
- 51 One particular type of resolution process receives special treatment in that schedule. That is mediation. It is not entirely clear why mediation was singled out for this attention but it may be because mediation is the most formal of the resolution processes that the Tribunal uses and a structure for the conduct of mediations is required to be spelt out.

52 Sch 1, Pt 1, cll 1 and 2, of the NCAT Regulation provide some general statements concerning resolution processes in the Tribunal and set out the protection afforded to mediators, conciliators, other facilitators and participants in such resolution processes.

53 In particular, cl 2(1) provides:

“(1) A mediator, conciliator or other person facilitating a resolution process to which parties to proceedings have been referred by the Tribunal under section 37 of the Act has, in the exercise of his or her functions as such, the same protection and immunity as a member has in the exercise of his or her functions as a member.”

54 Clause 2 establishes that any statement or admission made for the purposes of a s 37 resolution process, other than a mediation, is not admissible in legal proceedings, without the consent of the person who made the statement or admission. Clause 2(2) provides:

“(2) Any statement or admission made before the Tribunal or any person at a meeting or other proceeding held for the purposes of a resolution process to which parties have been referred by the Tribunal under section 37 of the Act is not admissible in the proceedings in which the referral was made, or in any other legal proceedings before a court or other body, unless the person who made the statement or admission consents to its disclosure in the proceedings.”

55 Part 2 of Sch 1, cll 3 – 13, makes more elaborate provisions concerning mediations where the Tribunal has referred the parties to mediation under s 37. A mediation is defined in cl 4 as follows:

“a structured negotiation process in which the mediator, as a neutral and independent party, assists the parties to a dispute to achieve their own resolution of the dispute.”

56 A mediator may be agreed to by the parties or appointed by the Tribunal: cl 6 of Sch 1. A person appointed as a mediator may be a listed mediator, a registrar, a member or any other person that the Tribunal considers to be qualified to act as the mediator.

- 57 Each party to proceedings that have been referred for mediation have duty to participate in good faith in the mediation: cl 7, Sch 1.
- 58 Unless the Tribunal decides to bear the costs itself, the parties are to bear the costs of the mediation in such proportions as they may agree among themselves or, failing agreement, in such manner as may be ordered by the Tribunal: cl 8, Sch 1. The “costs of mediation” is defined in subcl (2) to include the costs payable to the mediator.
- 59 Clause 10 provides that the same privilege with respect to defamation as exists with respect to judicial proceedings and a document produced in judicial proceedings exists with respect to:
- (a) a mediation session, or
 - (b) a document or other material sent or produced to a mediator, or sent to or produced at the Tribunal or the registry of the Tribunal, for the purpose of enabling a mediation session to be arranged.
- 60 This privilege extends only to a publication made at a mediation session or in a document or other material sent or produced to a mediator, or sent to or produced at the Tribunal for the purpose of enabling a mediation session to be arranged.
- 61 Clause 11 provides for confidentiality in mediations and that a mediator may disclose information only in one or more of the following circumstances:
- “(a) with the consent of the person from whom the information was obtained,
 - (b) in connection with the administration or execution of this Part, including clause 9 (2),
 - (c) if there are reasonable grounds to believe that the disclosure is necessary to prevent or minimise the danger of injury to any person or damage to any property,
 - (d) if the disclosure is reasonably required for the purpose of referring any party or parties to a mediation session to any person, agency, organisation or other body and the disclosure is made with the consent of the parties to the

mediation session for the purpose of aiding in the resolution of a dispute between those parties or assisting the parties in any other manner,
(e) in accordance with a requirement imposed by or under a law of the State (other than a requirement imposed by a subpoena or other compulsory process) or the Commonwealth.”

Deployment of Resolution Processes in the Tribunal

62 Having examined the possibilities available under the NCAT legislation, it is useful now to consider what actually happens in the Tribunal.

63 The “resolution processes” as defined in s 37 which are currently deployed in relation to proceedings in the Tribunal include:

- Conciliation
- Meditation
- Expert Conclaves
- Expert Assessment
- Online Dispute Resolution
- Preliminary Sessions, including preliminary conferences, planning meetings and case conferences
- Directions Hearings
- Group List Hearings (which incorporate conciliation)

64 In addition, early neutral evaluation, expert determinations and other processes might also be, but are not currently, used.

65 Of course, it can be argued that “resolution processes” in the widest sense includes not only those referred to in the preceding paragraphs but also adjudicative hearings and imposed decisions, appeals and set aside applications.

66 As might be expected given their different roles and jurisdictions, each of the Divisions of NCAT employs different resolution processes. To understand why, it is necessary to have regard to the different factors which operate in each of the Divisions. The disputes that come before some Divisions lend themselves more readily to resolution processes other than an adjudicative hearing and imposed decision than the types of disputes that come before other Divisions. The way in which resolution processes are used in each

Division will be considered by looking at each Division, in order of the number of applications dealt with annually by the Division.

Consumer and Commercial Division

67 In the case of the Consumer and Commercial Division, by far the largest of the Divisions at NCAT, the driving force is the volume of work and the overwhelming concern is proportionality in the resolution of disputes, as required by s 36(4) of the Act. Consequently, processes in this Division, from group lists with conciliation to online lodgements, have been adopted to ensure that disputes and issues can be resolved on a large scale, promptly and cost effectively.

Group lists and Conciliation

68 One of the most effective forms of dispute resolution in the Consumer and Commercial is the use of group lists.

69 Group lists typically involve approximately six matters in a one hour list and between eight and ten matters in a two hour list before a single Member. The hearing of the matters listed in this way typically begins with the Member briefly explaining to all the parties assembled together in a hearing room what is to happen during the group listing. After that explanation, the parties are given the opportunity to resolve their matter by conciliation.

70 The Tribunal has a number of small conference rooms available around the hearing room which the parties can use. There is also available a conciliator, who is a Member or employee of the Tribunal. The conciliator assists the parties in each matter to explore their issues and options for resolution. As practised in the Consumer and Commercial Division, conciliation is a specialised form of resolution process similar to an informal, simplified mediation but under strict time constraints. If the parties come to an agreement as a result of the conciliation process, the Member conducting the group list may give effect to the agreement by making orders, under s 59(1) of the Act. On average, over two thirds of matters group listed are resolved at

this stage by agreement. Matters that are not resolved in this way will either be finally heard and determined by the Member conducting the group list, if there is sufficient time and the parties are ready to proceed, or the Member will conduct a short directions hearing and fix the matter for further directions or a final hearing as a special fixture on a future date, depending on the circumstances.

- 71 The group listing method is an extremely effective means of managing the Consumer and Commercial Division's high volume lists.

Conciliation More Broadly

- 72 In the Consumer and Commercial Division conciliation is not limited to group lists but is also used in matters specially fixed for hearing. The Consumer and Commercial Division's Procedural Direction 3 concerns conciliation and hearing by the same Member. A Member may become involved in conciliating proceedings in order to give effect to the Tribunal's duty to promote the use of resolution processes and to resolve the real issues in proceedings justly, quickly, cheaply and with as little formality as possible.

- 73 Procedural Direction 3 contemplates that conciliation and hearing by the same Member may occur, particularly in regional areas, and sets out a procedure to be followed:

- (1) First, the Member hearing the list will explain the conciliation process to the parties and establish with the parties that there are no serious impediments to attempting to resolve the matter by conciliation.
- (2) During the conciliation, the Member may facilitate discussions to assist resolution but will not provide legal advice or opinion to the parties.
- (3) If the parties reach an agreed settlement, the Member will establish that the agreed settlement is one which is within the powers of the Tribunal to make. The Member will also confirm the agreement is voluntary and that the parties understand the agreement. The Member

will explain to the parties that the agreed settlement will be made into legally binding orders as it thinks fit to give effect to the agreed settlement reached by the parties.

- (4) If a matter is not resolved by conciliation the Member will advise the parties that the conciliation process has been concluded.
- (5) The Member will ask the parties whether they are ready to proceed to have their matter heard.
- (6) Since the Member has taken part in the conciliation of the matter, the Member will ask the parties if they object to the Member proceeding to determine the matter. The Member will, in considering the objections raised, determine whether he or she will conduct the hearing or adjourn the matter to a later date before another Member.
- (7) If the matter is ready to proceed to hearing and the Member decides to continue to hear the matter, the Member will outline to the parties that:
 - (a) proceedings are no longer private and confidential and, where recording equipment is available, will be recorded;
 - (b) any statements that were made or any concessions given in conciliation cannot be raised at the hearing unless both parties agree;
 - (c) information about any settlement offers made in conciliation by either party cannot be raised during the hearing;
 - (d) the inability to informally resolve the dispute by conciliation will not affect the outcome of the hearing.
- (8) When the hearing begins the Member will enquire of the parties whether there is agreement about any facts and issues so that only those issues still in dispute need to be determined at hearing.

Mediations

- 74 Matters in the Consumer and Commercial Division that are not group listed are usually listed initially for directions so that they can be prepared for hearing. One option that may be considered at a directions hearing is whether the matter is suitable for reference to a formal mediation. This option is most often used in larger home building matters, where the Tribunal's jurisdiction extends to claims of up to \$500,000, and similar higher value matters. Mediations can be ordered at any point during proceedings where a Member makes the assessment that mediation would be appropriate or beneficial.

Online Dispute Resolution

- 75 In early 2015, the Consumer and Commercial Division ran a pilot of an online dispute resolution (ODR) platform, by means of which parties could conduct structured negotiations through an online portal, before the matter was listed for any formal hearing.
- 76 Parties who elected to participate accessed the ODR pilot via a secure, 24 hour per day, 7 days per week online portal that allowed the parties in dispute to exchange information about their dispute in a structured way without the need to meet or attend NCAT in person. The ODR process was structured so as to assist parties to focus on the issues they wished to have resolved and to lead them to outcomes which would be acceptable to both sides so that, where possible, a negotiated agreement could be reached. Where agreement was reached, the parties could seek an enforceable order from the Tribunal to give effect to their agreement. Where agreement was not reached, or if either party chose to withdraw from the ODR process, the dispute was listed for hearing before the Tribunal and was determined in the usual way
- 77 The pilot showed that such a mechanism can operate to fill a gap in the dispute resolution process by helping applicants in consumer claims overcome difficulty in approaching suppliers, sometime large corporations, by allowing consumers to do so in their own time and on their own terms in order

to discuss resolution of their issues. On the other hand, the suppliers themselves benefitted from early and effective contact with consumers giving them the opportunity of avoiding the time and expense involved in responding to the first contact at a hearing in the Tribunal.

Conclaves of Experts

- 78 Another resolution procedure is the holding of conclaves of experts, especially in home building matters. These are meetings, often onsite, of the parties' experts without the parties being present and are facilitated by a 'conclaving' Member. The purpose of these conclaves is to reach agreement on, or narrow, the factual issues in dispute.
- 79 Conclaves of experts in appropriate cases often result in a substantial reduction in the number of factual matters in issue. This reduces the time spent in hearings and saves costs for both the parties and the Tribunal.

Other processes

- 80 The Consumer and Commercial Division provides a number of further instances where resolution processes are deployed. Under various pieces of enabling legislation the parties are required to have attempted mediation before proceedings can be commenced. For example, before an application can be made to the Tribunal concerning a strata or community scheme dispute, mediation must have taken place.
- 81 Section 125 of the *Strata Schemes Management Act 1996* provides:

"125 Principal registrar to be satisfied that mediation has been attempted before accepting application

- (1) The principal registrar must not accept an application for an order under this Chapter unless:
- (a) mediation under Part 2 or otherwise has been attempted but was unsuccessful, or
 - (b) the principal registrar considers that mediation is unnecessary or inappropriate in the circumstances, or
 - (c) the application is for any of the following:
 - (i) an order under section 162 for the appointment of a strata managing agent,

- (ii) an interim order under section 170 or stay of the operation of an order under section 180,
- (iii) a variation or revocation of an order under section 171 (2), 190 or 191,
- (iv) an order under section 182 (authorising certain acts during initial period),
- (v) an order for allocation of unit entitlements under section 183,
- (vi) an order under Part 6.

(2) (Repealed)

(3) If a matter is appropriate for mediation and mediation has not been attempted, the principal registrar must inform the applicant that the applicant should arrange for mediation of the matter.

(4) The applicant may apply to the Director-General for mediation of the matter in accordance with Part 2 or may make other arrangements for the mediation of the matter.

(5) If the principal registrar accepts an application for an order, the principal registrar must deal with the application under Part 3”.

82 Similarly, s 64 of the *Community Land Management Act 1989* (NSW) provides:

“64 Principal registrar to be satisfied mediation has been attempted before accepting application

(1) The principal registrar must not accept an application for an order under this Part (other than an order under Division 6A) unless satisfied that:

- (a) mediation was attempted but was unsuccessful, or
- (b) the matter the subject of the application is not appropriate for mediation.

(2) A matter to which an application relates is not appropriate for mediation unless:

- (a) it involves a dispute or complaint, and
- (b) each person (other than the applicant) involved in the dispute or against whom the complaint is made agrees to have the matter mediated.

(3) If a matter is appropriate for mediation and mediation has not been attempted, the principal registrar must inform the applicant that the applicant should arrange for mediation of the matter.

(4) The applicant may apply to the Director-General for mediation of the matter in accordance with Division 2 or may make other arrangements for the mediation of the matter.

(5) If the principal registrar accepts an application for an order, the principal registrar must deal with the application under Division 2A.”

83 In addition, expert assessment is required to be considered in certain cases. When there is a dispute concerning conveyancing costs, the Tribunal must determine whether the subject matter of the dispute should be assessed by an independent expert. This is one of only two provisions in New South Wales that incorporates expert determination.⁸ Section 44 of the *Conveyancers Licensing Act 2003* (NSW) provides:

“44 Attempts to resolve costs dispute

(1) The Tribunal may, on notification of a costs dispute, take any action that it considers necessary to resolve the dispute.

(2) On notification of a costs dispute, the Tribunal must determine whether the subject-matter of the dispute should be assessed by an independent expert and may, if it considers it appropriate, refer the dispute to an independent expert for assessment.

(3) An independent expert may be selected from a panel of experts approved by the President of the Tribunal.

(4) An independent expert to whom a costs dispute is referred under this section must prepare a written report on the dispute and provide a copy of it to the parties and to the Tribunal within the time limit specified by the Tribunal.

(5) Nothing in this section prevents the Tribunal using (or requiring the use of) resolution processes under the Civil and Administrative Tribunal Act 2013 to resolve a costs dispute.”

Guardianship Division

84 The approach to the resolution of disputes or issues in the Guardianship Division, which is the second largest Division by number of applications, is driven by entirely different principles. This Division is under the express statutory duty to observe the principles in s 4 of the *Guardianship Act 1987* (NSW).⁹ Because the overriding concern is the interests and welfare of the

⁸ New South Wales Law Reform Commission, *Dispute resolution: frameworks in New South Wales*, Consultation Paper No 16 (2014) 29.

⁹ Section 4 provides:

It is the duty of everyone exercising functions under this Act with respect to persons who have disabilities to observe the following principles:

- (a) the welfare and interests of such persons should be given paramount consideration,
- (b) the freedom of decision and freedom of action of such persons should be restricted as little as possible,
- (c) such persons should be encouraged, as far as possible, to live a normal life in the community,
- (d) the views of such persons in relation to the exercise of those functions should be taken into consideration,

person the subject of the application (the subject person), this Division has a distinctive case management system that involves Tribunal officers actively preparing matters, contacting parties and collecting evidence within a framework where matters are triaged and prioritised by reference to an assessment of the degree of risk to the subject person. The provisions of the *Convention on the Rights of Persons with Disabilities*,¹⁰ especially Article 12, are also influential in some aspects of case management in this Division. The scope for assisting the parties to reach a resolution of their issues is more limited in this Division where the person who is subject of the application has, because of the nature of the jurisdiction, impaired decision making capacity.

85 That does not mean, however, that informal resolution processes including, for example, discussions facilitated by a Member or registry staff cannot be used, where appropriate, to find a resolution acceptable to all parties and in the interests of the subject person. Indeed, proceedings in the Division are conducted on a generally non-adversarial model and orders may be the subject of discussion or, even in some cases, negotiation facilitated by the Members during the hearing of the matter.

Administrative and Equal Opportunity Division

86 In the Administrative and Equal Opportunity Division, merits review matters form the bulk of the work. Under s 63(1) of the *Administrative Decisions Review Act 1997*, the Tribunal's role is to decide "*what the correct and preferable decision is*". This has to be done in a context where there is a duty, under s 38(6)(a) of the NCAT Act, to "*ensure that all relevant material is disclosed to the Tribunal*". Consequently, case management and resolution processes in the Administrative and Equal Opportunity Division tend to focus on ensuring two things. First, that by the end of the extensive prehearing processes, either the matter has been resolved or the real matters that still

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- (e) the importance of preserving the family relationships and the cultural and linguistic environments of such persons should be recognised,
 - (f) such persons should be encouraged, as far as possible, to be self-reliant in matters relating to their personal, domestic and financial affairs,
 - (g) such persons should be protected from neglect, abuse and exploitation,
 - (h) the community should be encouraged to apply and promote these principles.

¹⁰ Opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008).

remain in issue are clearly identified and, secondly, that all material relevant to those issues is before the Tribunal. Similar processes are also used in anti-discrimination cases. Thus, in the Administrative and Equal Opportunity Division, resolution processes are important in resolving as many of the real matters in issue as possible and, where they cannot be resolved, to ensure that those issues are clearly identified and the evidence is focused upon those issues.

87 The preparation of matters and the deployment of resolution processes are generally managed in the Administrative and Equal Opportunity Division through planning meetings (in GIPA and privacy matters), case conferences (in anti-discrimination cases) or directions hearings (in merits review matters).

88 These meetings, conferences or hearings are tailored to the particular needs of the various streams of work and the types of litigants who are usually involved in such matters. They involve substantial, active management by the Member conducting the process. Each stream has a Member's checklist of steps and matters to be covered and directions that may be made at the meeting, conference or hearing. The principal purposes sought to be achieved by these processes are:

- (1) Assisting the parties to resolve issues and, for issues not resolved, clearly identifying those issues;
- (2) Ensuring that all relevant evidence is put before the Tribunal but is confined to any remaining issues in dispute;
- (3) Ensuring that the parties, and especially unrepresented litigants, understand the nature of the proceedings, how the Tribunal will proceed and what they have to do in order to present their cases effectively at the final hearing. This latter part of the process can also assist parties to resolve their issues because they have a fuller understanding of the nature of their issues, the evidence required and the legal principles to be applied.

89 In order to ensure that resolution is achieved as early as possible, matters may be referred to a formal mediation as part of the preparatory phase, especially in anti-discrimination, GIPA and privacy matters. Mediations are used both to resolve proceedings in their entirety and to narrow the issues really in dispute. The AEOD's Procedural Direction 8 outlines the procedures that the AEOD will follow when conducting mediations. The following types of matters may be referred to mediation:

- (1) complaints under the *Anti-Discrimination Act 1977*;
- (2) applications under the *Government Information (Public Access) Act 2009*, the *Privacy and Personal Information Protection Act 1998* and *Health Records and Information Privacy Act 2002*; and
- (3) applications for review of decisions under the *Children and Young Persons (Care and Protection) Act 1998*.

90 The Procedural Direction also outlines circumstances where it may not be appropriate to refer a matter to mediation, including where:

- (1) "a party does not have the intellectual, physical or psychological capacity to meaningfully engage in the process. However, the Tribunal can appoint a person to represent someone who is totally or partially incapable of representing him or herself in mediation. That person would normally be a "best interest" representative, that is, a representative who is not bound to act on the instructions of the incapacitated person"; and
- (2) "There is a history of sexual harassment, violence or extreme animosity between the parties, including a restraining order such as an Apprehended Violence Order between two or more parties. In those cases one or more parties may feel intimidated by being in the same room as another party. In these cases a mediation may be held if the parties are separated throughout the mediation."

91 As well as mediations, it is quite common in the Administrative and Equal Opportunity Division for there to be multiple case conferences, planning meetings and directions hearings to ensure that the issues are as confined as possible and the matter is fully prepared for hearing.

92 In the case of unrepresented litigants in some streams the Tribunal assists the parties to resolve their issues by having a duty solicitor from Legal Aid available onsite to advise on matters raised at the planning meeting, case conference or directions hearing. Whilst these solicitors do not generally appear or act as advocates for those parties, they help to ensure that litigants can make informed decisions concerning the resolution of issues.

Occupational Division

93 The Occupational Division is the smallest by the number of applications lodged. The most significant part of the work of the Occupational Division is professional discipline and regulation. The relevant enabling legislation in many cases establishes the priority for the Tribunal in this area. Under s 3A of the Health Practitioner Regulation National Law (NSW), “*the protection of the health and safety of the public must be the paramount consideration*”. In the Legal Profession Uniform Law (NSW), ss 3(c) and 260(b) similarly establish the objective of the Law as being “*the protection of clients of law practices and the protection of the public generally*”. Not dissimilar provisions appear in other enabling legislation. Hence, the protection of the public and the protection of those who are clients or patients of the professionals in question significantly influence how proceedings in the Division are conducted. It is generally not possible in these matters to resolve proceedings by agreement. Nonetheless, resolving as many factual and legal issues as possible and limiting any hearing to what is truly in dispute are what resolution processes are principally directed to in this Division.

94 Directions hearings and case conferences, like those in the Administrative and Equal Opportunity Division, are used as an opportunity for the Member and the parties’ representatives to explore actively how legal or factual issues

can be resolved or narrowed. They are also used to ensure that all necessary lay, expert and documentary evidence will be before the Tribunal but that evidence will be confined to the real issues in dispute. In addition, at the case conference, arrangements may be put in place both for confining the extent of any disputes between expert witnesses and for concurrent expert evidence at the hearing. All of these resolution processes serve to ensure that the proceedings in the Occupational Division are as confined and as efficient as possible.

Present Approach to the Deployment of Resolution Processes

- 95 This review of resolution processes in NCAT demonstrates that the Tribunal employs many such processes in the way that it conducts its activities. The Tribunal does so because it recognises that these resolution processes assist it to achieve its objective of facilitating the just, quick and cheap resolution of the real issues in proceedings before it.
- 96 You will probably have observed, however, that the resolution processes used in the Tribunal tend to be deployed in the context of hearing a matter or preparing a matter for hearing.

A New Approach to Civil Dispute Resolution

- 97 Focusing on this last observation, I want to suggest that there is a new approach to civil dispute resolution which ought to be considered.
- 98 Let me start this part of the paper with a question: What is the primary function of a Tribunal such as NCAT?
- 99 If the Tribunal's primary function is to provide adjudicative hearings and imposed decisions, then other processes which serve to resolve or limit the disputes or issues in the Tribunal can legitimately be seen as truly "alternative dispute resolution" processes. Viewed in this way, ADR is, at most, a means of reducing the workload of the Tribunal so that it does not waste time and resources conducting unnecessary hearings and making unnecessary

decisions. This is not an unworthy objective. It is certainly true that the use of ADR can allow a Court or Tribunal to become more efficient, in this sense.

100 There is, however, another approach. This approach is based upon trying to answer the question: What do people want when they come to the Tribunal?

101 Experience indicates that people come to the Tribunal when they have a problem which they cannot, at that time, resolve themselves. They may have a problem because:

- (1) The vacuum cleaner or the new car they bought does not work as it should;
- (2) The Commissioner for Fair Trading has refused to grant them the licence they need;
- (3) The home owned by their mother needs to be sold so that she can afford to move into a nursing home but she has dementia;
- (4) The building work on their new home or block of strata units was defective and has to be repaired at considerable expense;
- (5) Their complaint of racial discrimination in breach of the Anti-Discrimination Act has not been able to be resolved at the Anti-Discrimination Board;
- (6) Their tenant has not paid rent for 2 months and they want to regain possession and relet the premises to someone who will pay rent.

102 It seems to be likely that what most of the people who come to the Tribunal want is to have their problem resolved. How the problem is resolved is less important to them than having it resolved quickly, at least expense and fairly. In many cases, if the problem can be resolved without an adjudicative hearing and imposed decision, all those involved in the problem will be content.

103 This suggests that the Tribunal's primary function could be seen not as providing adjudicative hearings and imposed decisions but rather as resolving the problems coming within the Tribunal's jurisdiction at the earliest possible time with the least expense and in a manner that the parties accept as fair. If this is correct, resolution processes in the Tribunal are not merely an alternative to an adjudicative hearing but rather are the heart of what the Tribunal should be doing.

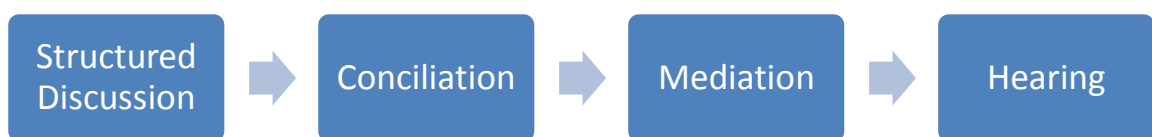
104 The practical ways in which this approach could be implemented in the context of NCAT would appear to include:

- (1) Resolution processes being applied from the very beginning of a claimant's engagement with the Tribunal;
- (2) Resolution processes being applied in an ascending scale of assistance and formality so that, on commencement of proceedings, the resolution process to be applied would be the one involving the least participation by the Tribunal and parties would only move on to the next process, in appropriate cases, if the earlier process proved unsuccessful in resolving the matter. For example, as soon after lodgment of a claim as possible, the parties would be given an opportunity to participate in an online structured discussion without facilitation. If that was unsuccessful after a sufficient but short period, a facilitator could review the online discussion and suggest to the parties (online, by telephone or at a meeting in person) further steps that might be taken. If that was unsuccessful, the facilitator could act as a conciliator for the parties. If that was unsuccessful the facilitator could refer the matter for a formal mediation. If the mediation did not lead to a resolution, the matter could then be listed for a final, adjudicative hearing;
- (3) Not all dispute resolution processes being utilised in all matters. For example, in tenancy matters, the resolution processes might be limited to online structured discussion followed by conciliation as part of a

group list whereas a large home building dispute might be required, if appropriate, to go through an online structured discussion, facilitation, a conclave of experts and a mediation.

- (4) The Tribunal's forms and preparation of matters being structured so that at any particular stage the information (both as to the parties, the nature of the case and the evidence) necessary for the next resolution process is obtained and provided to the Tribunal and other parties, without the need for any preparation to be repeated. For example, for the structured discussion stage the parties would identify themselves, their contact details, the legal basis for their claims, the resolution sought or types of orders claimed and a short statement of the facts giving rise to the claims. That information would be added to as the matter went through any further processes so that if a matter had progressed to a mediation but was not resolved, it would be immediately be able to be listed for final hearing.

105 Expressed diagrammatically, a matter that ended in a hearing might be required to travel along the path below, only moving from one step to the next if it was not resolved at the earlier step.



106 Thus, adopting this approach, the Tribunal could focus its procedures and resources on resolving the problem brought before the Tribunal, wherever possible, at the earliest possible time, by the most appropriate and cost effective resolution process. Only those matters that could not be resolved without an adjudicative hearing would be determined by an imposed decision.

107 This would allow the Tribunal to appropriate the well-known and widely accepted benefits of traditional forms of ADR:¹¹

- (1) Greater satisfaction among participants than proceeding to hearing in litigation;
- (2) Quicker and cheaper resolution of disputes;
- (3) Privacy and confidentiality (compared to a public hearing);
- (4) The possibility of outcomes not available in litigation (for example, an organisation could make changes to its policies or procedures); and
- (5) Even if a resolution was not achieved without a hearing, the possibility of narrowing the issues in dispute so that the hearing itself is quicker and cheaper.

108 In addition, deployed as an integral part of the Tribunal's handling of particular disputes or issues, the Tribunal's resolution processes could allow the resources of the Tribunal to be used most efficiently. The steps necessary to prepare a matter for hearing would be incorporated into the preparation required for each type of resolution process, but only if and when it became necessary. The higher cost hearing and decision writing aspects of the Tribunal's work would be limited to only those matters that could not be resolved earlier by other, lower cost resolution processes.

109 The proper deployment of the full range of resolution processes could play a significant role in the Tribunal's achieving its statutory objective of resolving the real issues in proceedings justly, quickly and cheaply and with as little formality as possible.

110 Treating a formal hearing with an imposed decision as, in essence, only the last resort if a resolution cannot be achieved by other processes does not

¹¹ New South Wales Law Reform Commission, *Dispute resolution: frameworks in New South Wales*, Consultation Paper No 16 (2014) 2.

involve a vastly different way of thinking about the work of the Tribunal but it does involve a change in emphasis, especially in the deployment of resolution processes, preparation of matters and in the allocation of resources within the Tribunal.

- 111 NCAT, with the introduction of its new tribunal-wide digital case management system, is seeking to put itself in a position where it can implement its case management, practice, procedure and resolution processes in such a way as to meet the needs of those who come before it by resolving their problems fairly, as soon as possible and as cost effectively as possible.

Conclusion

- 112 Disputes and dispute resolution may be conceptually simple. Actually resolving disputes remains, however, complex and a challenge for all human societies.
- 113 One of the hallmarks of civilisation is that disputes between individuals, corporations and governments can be resolved peacefully, efficiently and justly. NCAT is committed to playing a significant role in this respect for many people in New South Wales.
- 114 To give an indication of how significant a role this might potentially be, let me provide you with just one statistic. In the 2015-16 financial year the NCAT website received 2,250,492 page views.
- 115 There are no doubt many reasons why a person would visit the NCAT website but it is likely that many of those more than 2¼ million visits were from people concerned about how to resolve a civil dispute.

ATTACHMENT 1

Schedule 1 Resolution processes

Part 1 Introduction

1 Application of Schedule

- (1) The purpose of this Schedule is to set out the practice and procedure in connection with the use of resolution processes to which parties to proceedings have been referred by the Tribunal under section 37 of the Act.
- (2) However, nothing in this Schedule:
 - (a) requires the use of a resolution process mentioned in this Schedule in proceedings unless the Tribunal refers the parties to the process under section 37 of the Act in accordance with any applicable requirements of the Act and the procedural rules for such a referral, or
 - (b) prevents or limits the use of resolution processes (whether or not they are mentioned in this Schedule).

2 Protection from liability and inadmissibility of statements and admissions

- (1) A mediator, conciliator or other person facilitating a resolution process to which parties to proceedings have been referred by the Tribunal under section 37 of the Act has, in the exercise of his or her functions as such, the same protection and immunity as a member has in the exercise of his or her functions as a member.
- (2) Any statement or admission made before the Tribunal or any person at a meeting or other proceeding held for the purposes of a resolution process to which parties have been referred by the Tribunal under section 37 of the Act is not admissible in the proceedings in which the referral was made, or in any other legal proceedings before a court or other body, unless the person who made the statement or admission consents to its disclosure in the proceedings.
- (3) Subclause (2) does not apply with respect to proceedings in which the parties have been referred for mediation under section 37 of the Act.

- 1 **Note.** Part 2 makes special provision with respect to disclosures made in connection with mediation sessions.

Part 2 Mediation

3 Application of Part

This Part applies if the Tribunal refers parties to proceedings for mediation under section 37 of the Act.

4 Definitions

In this Part:

listed mediator means a person whose name appears on a list compiled under clause 5.

mediation means a structured negotiation process in which the mediator, as a neutral and independent party, assists the parties to a dispute to achieve their own resolution of the dispute.

mediation session means a meeting arranged for the mediation of a matter.

mediator means a person to whom the Tribunal has referred a matter for mediation.

5 Listed mediators

- (1) The President may compile a list or lists of persons considered by the President to be suitable to be mediators for the purposes of this Part.
- (2) Different lists may be compiled for different types of matters or to take account of any other factors.
- (3) A person may be included in a list under this clause only if:
 - (a) the person consents to being included in the list, and
 - (b) the person agrees to comply with the provisions of this Part.
- (4) The President may amend or revoke any list compiled under this clause for any reason that the President considers appropriate.

6 Who may act as mediator

- (1) The mediation for proceedings that have been referred by the Tribunal for mediation is to be undertaken by:
 - (a) a mediator agreed to by the parties, or
 - (b) a person appointed as the mediator by the Tribunal.
- (2) A person appointed under subclause (1) (b) may be:
 - (a) a listed mediator, or
 - (b) a registrar, or
 - (c) a member, or
 - (d) any other person that the Tribunal considers to be qualified to act as the mediator.
- (3) Without limiting subclauses (1) and (2), the Tribunal may refer proceedings or part of proceedings for mediation under the *Community Justice Centres Act 1983*.

7 Duty of parties to participate

It is the duty of each party to proceedings that have been referred for mediation to participate, in good faith, in the mediation.

8 Costs of mediation

- (1) Unless the Tribunal decides to bear the costs itself, the costs of mediation are to be borne by the parties to the proceedings in such proportions as they may agree among themselves or, failing agreement, in such manner as may be ordered by the Tribunal.
- (2) In this clause:

costs of mediation includes the costs payable to the mediator.

9 Agreements and arrangements arising from mediation sessions

- (1) Without limiting section 59 of the Act, the Tribunal may make orders to give effect to any agreement or arrangement arising out of a mediation session.

- (2) On any application for an order under this clause, any party may call evidence, including evidence from the mediator and any other person engaged in the mediation, as to the fact that an agreement or arrangement has been reached and as to the substance of the agreement or arrangement.
- (3) This Part does not affect the enforceability of any other agreement or arrangement that may be made, whether or not arising out of a mediation session, in relation to the matters the subject of a mediation session.

10 Privilege

- (1) In this clause, *mediation session* includes any steps taken in the course of making arrangements for the session or in the course of the follow-up of a session.
- (2) The same privilege with respect to defamation as exists with respect to judicial proceedings and a document produced in judicial proceedings exists with respect to:
 - (a) a mediation session, or
 - (b) a document or other material sent or produced to a mediator, or sent to or produced at the Tribunal or the registry of the Tribunal, for the purpose of enabling a mediation session to be arranged.
- (3) The privilege conferred by subclause (2) extends only to a publication made:
 - (a) at a mediation session, or
 - (b) in a document or other material sent or produced to a mediator, or sent to or produced at the Tribunal or the registry of the Tribunal, for the purpose of enabling a mediation session to be arranged, or
 - (c) in circumstances referred to in clause 11.
- (4) Subject to clause 9 (2):
 - (a) evidence of anything said or of any admission made in a mediation session is not admissible in any legal proceedings before any court or other body, and
 - (b) a document prepared for the purposes of, or in the course of, or as a result of, a mediation session, or any copy of such a document, is not admissible in evidence in any legal proceedings before any court or other body.
- (5) Subclause (4) does not apply with respect to any evidence or document:
 - (a) if the persons in attendance at, or identified during, the mediation session and, in the case of a document, all persons specified in the document, consent to the admission of the evidence or document, or
 - (b) in proceedings commenced with respect to any act or omission in connection with which a disclosure has been made as referred to in clause 11 (1) (c).

11 Confidentiality

- (1) A mediator may disclose information obtained in connection with the administration or execution of this Part only in one or more of the following circumstances:
 - (a) with the consent of the person from whom the information was obtained,
 - (b) in connection with the administration or execution of this Part, including clause 9 (2),
 - (c) if there are reasonable grounds to believe that the disclosure is necessary to prevent or minimise the danger of injury to any person or damage to any property,
 - (d) if the disclosure is reasonably required for the purpose of referring any party or parties to a mediation session to any person, agency, organisation or other body and the disclosure is made with the consent of the parties to the mediation session for the purpose of aiding

in the resolution of a dispute between those parties or assisting the parties in any other manner,

(e) in accordance with a requirement imposed by or under a law of the State (other than a requirement imposed by a subpoena or other compulsory process) or the Commonwealth.

(2) Nothing in subclause (1) permits a mediator to refuse to comply with a requirement of a kind referred to in subclause (1) (e).

12 Directions by mediator

A mediator may, by order, give directions as to the preparation for, and conduct of, the mediation.

13 Mediation otherwise than under this Part

This Part does not prevent:

- (a) the parties to proceedings from agreeing to and arranging for mediation of any matter otherwise than as provided by this Part, or
- (b) a matter arising in proceedings from being dealt with under the provisions of the *Community Justice Centres Act 1983* without having been referred under section 37 of the Act.