



THE IMPLEMENTATION OF NCAT

*Robertson Wright*¹

(September 2014)

Introduction	1
Legislative background	2
Nature of NCAT	3
Rationale for NCAT	3
Structure of NCAT	4
Internal Appeal Panel	7
Membership	8
Transitional provisions	9
Practice and Procedure	10
Conclusion – the first 6 months of operation	12
Attachment A	14

Introduction

1. On 1 January 2014 the Civil and Administrative Tribunal of New South Wales came into existence by operation of s 7(1) of the *Civil and Administrative Tribunal Act 2013* (NSW) (the Act). Under s 7(1) the Tribunal may be called ‘NCAT’.
2. NCAT takes over the work and brings together the jurisdiction of twenty-two previous tribunals or bodies in the State’s largest tribunal, comprising 4 Divisions and an internal Appeal Panel. The Tribunal is headed by a Supreme Court judge (s 13) and is managed and coordinated by a Principal Registrar (s 4(1)).
3. Government lawyers frequently appear in the Tribunal whether representing various branches of the Executive Government in merits review proceedings under the *Administrative Decisions Review Act 1997*, representing Government agencies in cases under the *Anti-Discrimination Act 1977*, appearing for the New South Wales Trustee and Guardian or the Public Guardian in proceedings in the Guardianship Division, dealing with matters relating to occupational licensing decisions or professional disciplinary matters in the Occupational Division or representing a social housing provider such as the NSW Land and Housing Corporation in social housing

¹ Justice Wright is a judge of the Supreme Court of NSW and the inaugural President of the Civil and Administrative Tribunal of New South Wales.

matters in the Consumer and Commercial Division. The contribution Government lawyers make to the efficient and smooth conduct of proceedings in the Tribunal is significant and much appreciated.

Legislative background

4. NCAT is not, however, the first attempt to create in New South Wales what is sometimes called a 'super tribunal'. In 1997 the NSW Parliament passed the *Administrative Decisions Tribunal Act 1997* (NSW) creating this State's first multi-jurisdictional tribunal with an internal Appeal Panel empowered to hear and determine appeals from decisions of the Tribunal. The logic behind this move, a logic that continues to underscore tribunal justice today, was the goal that access to justice, where appropriate, should be simple and readily available through one readily identifiable body for the benefit of all in the community and that body should reflect community standards and values. The ADT proved that this logic could be successfully implemented but unfortunately the multiplicity of tribunals and bodies that existed in New South Wales in addition to the ADT were never combined into the ADT.
5. In March 2012 the Standing Committee on Law and Justice published a report titled *Opportunities to consolidate tribunals in NSW* (the Report).² In October 2012 the NSW Government responded to the Report (the Response).³ The Response outlined how the Government intended to accept the primary recommendation of the Report to establish NCAT and framed the task with the commitment to 'providing [a] simple, quick and effective process for resolving disputes and reviewing executive action'⁴ A Steering Committee was established to guide the practical implementation of NCAT with a broader Reference Group to provide input to the Steering Committee.
6. The various legislative instruments involved in arriving at the Act in operation at commencement on 1 January 2014 are helpfully set out by Mark A Robinson SC in *New South Wales Administrative Law*:⁵

The Civil and Administrative Tribunal Act 2013 (NSW) (the "main Act") was passed by the NSW Parliament and assented to and commenced on 4 March 2013.

[...]

Later cognate acts include the *Civil and Administrative Tribunal Amendment Act 2013* (NSW) (Act No 94 of 2013) which was assented to on 20 November 2013. Schedule 1, which commenced on that day, extensively amended the *Civil and Administrative Tribunal Act 2013* (NSW). The main Act is fully operative now.

Schedule 2, which begins operation on 1 January 2014, extensively amends the "*Administrative Decisions Tribunal Act 1997*" and renames it the

² New South Wales, Standing Committee on Law and Justice, *Opportunities to consolidate tribunals in NSW*, (March 2012).

³ New South Wales, NSW Government, *Response to the Standing Committee on Law and Justice Inquiry into Opportunities to consolidate tribunals in NSW*, (October 2012).

⁴ *Id* at 1.

⁵ M A Robinson SC, *New South Wales Administrative Law*, (Vol 1, loose leaf service, as at January 2014), 1 – 2111.

“Administrative Decisions Review Act 1997” (the “Review Act”). It confers on NCAT *exclusive* jurisdiction for the review of “administratively reviewable decisions” (formerly known as “reviewable decisions”).

In addition to this, Parliament has passed the *Civil and Administrative Legislation (repeal and Amendment) Act 2013* (NSW) (Act No 95 of 2013). It was assented to on 20 November 2013. It commences on or about the “establishment day” and effectively transfers the functions of the existing tribunals to NCAT, and repeals and amends legislation, consequent on the establishment of the new tribunal.

After the establishment day, we will be left with the main Act and the *Administrative Decision Review Act 1997*.

Nature of NCAT

7. It is useful to appreciate NCAT’s role and nature. NCAT’s principal functions are to review decisions of the executive on the merits, to quell disputes between citizens and between government and citizens, to assist to supervise professions and occupations and to exercise part of the *parens patriae* or guardianship jurisdiction of the State. These are all functions of government, whether of the executive or the judicial branch. If these powers were not exercised by NCAT or some other judicial and quasi-judicial body, the alternative is for those affected to take matters into their own hands, often literally, and rely on self-help.
8. Parties to proceedings before NCAT are participating in the processes of government. A corporate paradigm is not the correct or preferable paradigm to apply to NCAT when it is performing its administrative review or judicial functions. Parties to proceedings should not be thought of as consumers of tribunal services who have the right to accept or reject those services. They do not have a right to decide whether they are parties to proceedings in NCAT or not. They are bound by the decisions of NCAT as an arm of government.
9. This being so, there is a natural and fitting corollary. Because NCAT processes are processes of government, NCAT bears corresponding responsibilities as an instrument of government. The Tribunal has the primary responsibility of ensuring that it resolves matters in a manner that is just, ie procedurally fair and in accordance with law. Parties and the wider community also have the right to expect that resolution of matters should also be prompt, accessible and affordable. Furthermore, to justify the confidence of citizens in their instruments of government, NCAT should be appropriately open and accountable in its operations.

Rationale for NCAT

10. Given that there is a court system already in place, an enquiring mind might ponder the question of why it should be necessary to create a tribunal to deal with matters that could be dealt with by the courts. There are two distinct characteristics of tribunals that make it appropriate to have the functions which have been entrusted to NCAT performed by a tribunal.
11. First, tribunals such as NCAT have flexibility and informality of procedures and are not generally bound by the rules of evidence. This is particularly important when dealing with merits review of administrative decisions and with guardianship and related matters. It is also of general importance because it allows many less complex cases

or those not involving significant sums of money, to be resolved quickly and cheaply, without undue regard to legal forms or technicalities, whether by conciliation, mediation or decision.

12. Secondly, the Tribunal is in many cases required to be constituted so that professional, lay and community representatives as well as lawyers participate in the decision making process. When the work of the Tribunal involves protecting the community from unacceptable conduct of professionals, assisting or protecting individuals with an impaired decision making ability or giving effect to community standards and values in the assessment of conduct, this direct participation of those professional, lay and community representatives as well as lawyers serves to ensure that the decisions made are consonant with community and professional standards and are accepted by the community as a whole.
13. The effective administration of justice through a tribunal such as NCAT has inherent in it the tension between a great ideal: prompt, affordable and accessible justice; and, the difficulties of implementation in the real world. The importance of getting the tribunal system right cannot be understated since, for many in New South Wales, NCAT is the primary means they have of obtaining access to justice, of having their complaints and issues heard and of receiving the help that they need.
14. NCAT is carving out its position as the single, superior Tribunal for New South Wales by building upon the experience of the pre-existing tribunals in this State, as well as those outside NSW.
15. NCAT is by no means an easy or simple policy solution to the issue of how this State's tribunal system should be structured. Rather it involves a deliberate and balanced amalgamation of specialist tribunals and bodies into a single Tribunal while seeking to preserve the expertise, appropriate procedures and accumulated wisdom of those bodies through the distinct divisions of NCAT.

Structure of NCAT

16. The 22 pre-existing tribunals and bodies which are now part of NCAT were:

Aboriginal and Torres Strait Islander Health Practice Tribunal	Local Land Boards
Aboriginal Land Councils Pecuniary Interest and Disciplinary Tribunal	Medical Radiation Practice Tribunal
Administrative Decisions Tribunal	Medical Tribunal
Charity Referees	Nursing and Midwifery Tribunal
Chinese Medicine Tribunal	Occupation Therapy Tribunal
Chiropractors Tribunal	Optometry Tribunal
Consumer, Trader and Tenancy Tribunal	Osteopathy Tribunal
Dental Tribunal	Pharmacy Tribunal
	Physiotherapy Tribunal

Guardianship Tribunal

Podiatry Tribunal

Local Government Pecuniary Interest
and Disciplinary Tribunal

Psychology Tribunal

Vocational Training Appeals Panel

17. NCAT does not, of course, represent the entire tribunal picture in NSW. Important roles continue to be played by other bodies, such as
 - Independent Liquor and Gaming Authority
 - Industrial Relations Commission
 - Remuneration Tribunal
 - Workers' Compensation Commission
 - Mental Health Review Tribunal
 - Motor Accidents Authority
 - Racing Appeals Tribunal
18. The 22 tribunals and bodies that have become NCAT dealt with an extremely diverse range of matters. They range from the consumer complaint relating to a muffler for a motor scooter having a value of \$90; the deregistration of a doctor for sexual misconduct with a patient; the making of orders appointing a financial manager to the estate of a person suffering from dementia; the reviewing of decisions whether to allow a person access to the records of an investigation; review of decisions of the executive government relating to state revenue and tax disputes; and claims of racial discrimination or homosexual vilification.
19. In order to reflect the diversity of the jurisdictions which have been absorbed into NCAT and the specific needs of different types of parties to proceedings in the Tribunal, NCAT is structured with 4 divisions and the Appeal Panel.
20. Each division has its own Schedule in the *Civil and Administrative Tribunal Act 2013* (NSW). These division Schedules set out the special, not to say peculiar, procedural and other provisions which apply to each Division.
21. The 4 divisions are:
 - (a) Administrative and Equal Opportunity Division – see Sch 3 to the Act ;
 - (b) Consumer and Commercial Divisions see Sch 4 to the Act;
 - (c) Occupational Divisions – see Sch 5 to the Act; and
 - (d) Guardianship Divisions – see Sch 6 to the Act.
22. Each Division is allocated functions by reference to certain enabling legislation as set out in the Division's particular Schedule to the Act. They are set out in the tables below:

Administrative and Equal Opportunity Division

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
Commission for Children and Young People Act 1998
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
lands legislation
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
*See also Schedule 3, clause 3(1)(b) which allocates additional functions to the Administrative and Equal Opportunity Division under various enabling acts.

Consumer and Commercial Division

Agricultural Tenancies Act 1990
Australian Consumer Law (NSW)
Boarding Houses Act 2012
Community Land Development Act 1989
Community Land Management Act 1989
Consumer Claims Act 1998
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

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

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 Act 2004
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
Valuers Act 2003
Veterinary Practice Act 2003
Wool, Hide and Skin Dealers Act 2004

Internal Appeal Panel

23. Under s 80(2)(a) parties may appeal as of right on a question of law from any final or ancillary decision of the Tribunal that is an internally appealable decision. They may also appeal against such decisions on any other ground by leave of the Appeal Panel. As to interlocutory decisions, which are internally appealable decisions, all appeals from these decisions require leave, under s 80(2)(b).
24. What is an internally appealable decision is set out in s 32 but this section must be read with ss 29 and 30 which define what a general decision and an administrative review decision are.

25. The effect of s 32, read with ss 29, 30 and 80, is that parties to proceedings have the ability to appeal or to seek leave to appeal to the Appeal Panel from the following decisions:
- (a) a decision of the Administrative and Equal Opportunity Division;
 - (b) a decision of the Guardianship Division;
 - (c) a decision of the Occupational Division relating to occupations licensed by State law and regulated by State authorities. (For example decisions in relation to home building, motor trade, real estate agent and other licenses administered by NSW Fair Trading; decisions in relation to security industry licenses and commercial and private inquiry agents licenses administered by the Commissioner of Police; decisions in relation to passenger transport licenses administered by Roads and Maritime Services; decisions in relation to tow truck driving and operator authorities);
 - (d) a decision of the Consumer and Commercial Division (but cl 12 of Schedule 4 to the Act restricts appeals from this division in a number of ways),
- and from:
- (e) a decision of a registrar that are declared to be appealable decisions.
26. There may be additional exclusions and variations to these appeal rights under some of the divisional schedules to the Act and in some of the specific laws giving jurisdiction to NCAT. These schedules and the enabling legislation should always be consulted when an appeal is being considered.
27. Some Divisional decisions that are not subject to an internal appeal may be appealed to the Land and Environment Court, the Supreme Court or the Court of Appeal. A decision of the Guardianship Division may be appealed either to the Appeal Panel or the Supreme Court but not to both.
28. Importantly, a party is not automatically entitled to be represented by a lawyer or another person on the hearing of an internal appeal. Leave will be required except where the party was entitled to be represented without leave at the original hearing. A party to an appeal can seek the Appeal Panel's leave for a person to represent the party on the appeal at the first directions hearing or at any later time.
29. The review of decisions by the Appeal Panel is a beneficial innovation which permits decisions as first instance to be scrutinised and, where necessary corrected, without the expense or delay involved in bringing proceedings in the District Court or the Supreme Court. This scrutiny will also be likely to assist to improve the standard of decision making and writing throughout the Tribunal.

Membership

30. Members of abolished tribunals whose terms extended after 31 December 2013 automatically became members of NCAT. In addition, in February 2014, 12 new Senior Members of NCAT were appointed and they were assigned to the Guardianship Division.

31. In February 2014 the first Tribunal wide call for expressions of interest in appointment to NCAT took place and this resulted in approximately 500 candidates applying to be members of the Tribunal. Some 127 appointments have already been made and a further 32 are awaiting approval for appointment before the end of 2014. A further recruitment process is currently being undertaken for appointments as the Deputy President and Head of the Occupational Division, the Principal Member in the Guardianship Division and in the order of 3 Principal Members and 3 Senior Members to serve in the Occupational Division dealing mainly with matters arising under the Health Practitioner Regulation National Law.
32. Currently, NCAT has 275 members.
33. The 4 divisions are led by highly qualified and experienced Deputy Presidents:
 - (a) The Administrative and Equal Opportunity Division with Deputy President and Local Court Magistrate Nancy Hennessy as its Head;
 - (b) The Consumer and Commercial Division with Deputy President Stuart Westgarth as its Head;
 - (c) The Guardianship Division with Deputy President Malcolm Schyvens as its Head; and
 - (d) The Occupational Division with Deputy President the Honourable Wayne Haylen QC as its Head and the Honourable acting Judge Jennifer Boland AM as List Manager of the Health Practitioner Division List.

Transitional provisions

34. Implementation of NCAT had required solutions to quite complex legislative problems. One aspect which is noteworthy are the transitional provisions which, with each passing month, become less and less relevant.
35. Bringing together a vast array of pre-existing tribunals, each enabled by different legislative schemes and governed by distinct processes and procedures, most without an internal appeal mechanism, has provided a challenge for the drafters of the various pieces of NCAT legislation. Some of the solutions adopted have been referred to above, especially the different schedules for each of the Divisions. It is also worthwhile to draw attention to the transitional provisions found in Division 3 of Schedule 1 to the Act (cll 6 to 14).
36. In summary, these provisions specify how NCAT and the Courts from which appeals against NCAT or its predecessor tribunals lie should deal with matters that had been or could have been brought in those tribunals which were abolished on NCAT's establishment. The structure of the transitional provisions is as follows.
37. Subdivision 1 "Interpretation". Clause 6 defines what are to be taken to be "*part heard proceedings*", "*pending proceedings*", "*unexercised rights*" and "*unheard proceedings*" in relation to abolished tribunals which are now to be determined by NCAT.
38. Subdivision 2, "Determination of Pending Proceedings", contains cl 7 which sets out how pending proceedings in abolished tribunals, whether unheard or part heard, are to

be dealt with by NCAT. Clause 8 deals with how pending proceedings in a Court relating to a decision of an abolished tribunal are to be dealt with, including the power to remit to NCAT instead of the abolished tribunal.

39. Subdivision 3, “Exercise of Certain Unexercised Rights”, contains cl 9 which relates to applications or appeals based upon an “*existing unexercised application or appeal right*”. Such rights are those that existed as at 31 December 2013 to apply to or appeal from a tribunal that has since been abolished. Applications can now be made to NCAT for the exercise of the same functions that could have been exercised by the relevant abolished tribunal. Clause 10 relates to appeals based upon an “*existing unexercised appeal right*” to an Appeal Panel of the ADT or to a court. It allows such appeals to be made to an Appeal Panel of NCAT or the court in question.
40. Subdivision 4, “Reviews of certain existing Orders and Renewal of certain Proceedings”, contains cl 11, which in effect provides for certain orders made by the Guardianship Tribunal to be reviewed by NCAT; and cl 12, which effectively provides for proceedings to be renewed in respect of certain CTTT decisions as if the decisions had been made by the Consumer and Commercial Division of NCAT.
41. Subdivision 5, “Allocation of Transitional Proceedings and Enforcement of existing Orders” contains cl 13 which prescribes the division of NCAT to which various types of transitional proceedings are allocated and allocates appeals to the Appeal Panel. It also sets out how the Tribunal should be constituted in those cases. Clause 14 provides that orders made by abolished tribunals are taken after 1 January 2014 to be orders of NCAT.
42. Finally, and very usefully, Division 4 of Schedule 1 contains cl 17 which seeks to ensure that nothing falls through the legislative cracks. In general terms it provides that continuing references to abolished tribunals and their functions in legislation are to read as references to NCAT.

Practice and Procedure

43. The diversity of jurisdiction and the array of pre-existing tribunals brought into NCAT necessarily require variety in the practice and procedure in the Tribunal.
44. The general provisions relating to practice and procedure in the Act are found in Part 4, ss 35 to 70. Part 4 is helpfully headed ‘Practice and Procedure’.
45. The guiding principle that the Act and the procedural rules should be applied so as to facilitate the just, quick and cheap resolution of the real issue in the proceedings is set out in s 36 and other general principles concerning practice and procedure are set out in ss 36, 37 and 38 of the Act. The terms of ss 36 to 38 are set out in the Attachment A to this paper.
46. It is wise, however, to note the terms of s 35 and the legislative note to that section. They are:

35 Application of Part

Each of the provisions of this Part is subject to enabling legislation and the procedural rules.

Note. *The Division Schedule for a Division of the Tribunal may, in some cases, make special provision for the practice and procedure to be followed in connection with certain proceedings allocated to the Division for determination. The provisions of the Division Schedule prevail to the extent of any inconsistency with the provisions of this Part. See section 17(3).*

Section 4 (4) also provides that any provisions of this Act that are expressed to be subject to the procedural rules have effect subject to any exceptions, limitations or other restrictions specified by the procedural rules.

Enabling legislation may also make provision for matters relating to practice and procedure in relation to functions conferred on the Tribunal, including (for example) specifying periods within which applications or appeals under that legislation are to be made.

47. Under s 4(1) the expression 'procedural rules' is defined as meaning the Tribunal rules and the regulations in their application to practice and procedure of the Tribunal.
48. The regulations are found in the Civil and Administrative Tribunal Regulation 2014 (the Regulation). Since 14 February 2014 the Tribunal has also had its own rules, made by the NCAT Rules Committee under ss 24 and 25 of the Act. These are the Civil and Administrative Tribunal Rules 2014 (the Rules). Both the Regulation and the Rules are available on the NSW Legislation website under 'Regulations' as well as on the NCAT website: <http://www.ncat.nsw.gov.au/> .
49. Accordingly, the general practice and procedure provisions found in Part 4 of the Act must be read subject to any contrary provisions of any enabling legislation, the provisions of each Division Schedule to the Act, any provisions relating to practice and procedure in the Regulation and the provisions of the Rules.
50. In addition under s 26 of the Act, the President may issue procedural directions with which the Tribunal and the parties must comply. Four NCAT wide procedural directions have been made and published:
 - (a) Service and giving notice – Procedural Direction 1
 - (b) Summonses – Procedural Direction 2
 - (c) Expert witnesses – Procedural Direction 3
 - (d) Registrars' power – Procedural Direction 4

There are also Division specific procedural directions. These may all be found on the NCAT website:

http://www.ncat.nsw.gov.au/ncat/publications_and_resources/procedural_directions.html .

51. To illustrate how, for example, the Division Schedules interact with the general provisions of the Act dealing with practice and procedure, it is useful to consider the question of legal representation in the Tribunal.
52. The starting point is s 45 of the Act which states the general proposition that each party is responsible for the carriage of the party's own case unless leave is granted by the Tribunal for the party to be represented. That is not, however, the end of the matter. It is necessary to consult the Division Schedules to the Act to determine whether that general position applies in the Division in which a matter is being determined.
53. If the proceedings were in the Administrative and Equal Opportunity Division, cl 9 of Schedule 3 would be relevant. Clause 9 states that, despite s 45, a party to proceedings is entitled to be represented by an Australian legal practitioner without requiring the leave of the Tribunal except in matters arising under the *Community Services (Complaints, Review and Monitoring) Act 1993*.
54. For a matter in the Consumer and Commercial Division, cl 7 of Schedule 4 is the relevant provision and provides that, despite s 45:
 - (a) if the party has been granted legal assistance under the *Fair Trading Act 1987* a party is entitled to be represented by an Australian legal practitioner without requiring the leave of the Tribunal; and
 - (b) in proceedings under the *Retail Leases Act 1994* a party is entitled to be represented by an Australian legal practitioner or other agent without requiring the leave of the Tribunal.
55. In the Occupational Division, a party is entitled to be legally represented in any matter without the need to obtain leave by operation of cl 27 of Schedule 5.
56. In contrast, cl 9 of Schedule 6 (dealing with proceedings in the Guardianship Division) maintains the prohibition on legal or other representation without leave except in matters arising under s 175 of the *Children and Young Persons (Care and Protection) Act 1998*.
57. There are Divisional Procedural Directions and Guidelines in relation to representation which also may be of assistance but which cannot be inconsistent with those provisions of the various Division Schedules.
58. It is also wise to check the enabling legislation under which any application to the Tribunal is made, as that legislation may also contain additional provisions relating to representation and other practice and procedure issues including for example costs.

Conclusion – the first 6 months of operation

59. NCAT, in its short life so far, has built upon the foundation laid by the ADT as a multi-jurisdictional tribunal with an internal appeal level. It also draws upon the vast experience of the many members of the ADT, the CTTT, the Guardianship Tribunal, the Health Practitioner Tribunals and numerous other tribunals and review bodies.

60. In the first 6 months of operation, NCAT has received a total of approximately 40,000 applications and finalised over 41,000 proceedings (including proceedings pending from the pre-existing tribunals and bodies). There have been approximately 250 internal appeals lodged.
61. NCAT is required to deal with an enormous load of applications and appeals each year. It will be able to manage this task, achieve its aims and provide just, prompt and cost effective resolution of cases, with the co-operation and participation of legal practitioners in appropriate matters. Whilst not every matter in NCAT requires or deserves the involvement of legal practitioners, solicitors and counsel play a vital role in ensuring that NCAT functions effectively. Given the very significant parts of NCAT's jurisdiction which directly concern decisions or conduct of the Executive Government, Government lawyers will be likely to be welcome and important participants in NCAT's processes.

36 Guiding principle to be applied to practice and procedure

- (1) The **guiding principle** for this Act and the procedural rules, in their application to proceedings in the Tribunal, is to facilitate the just, quick and cheap resolution of the real issues in the proceedings.
- (2) The Tribunal must seek to give effect to the guiding principle when it:
 - (a) exercises any power given to it by this Act or the procedural rules, or
 - (b) interprets any provision of this Act or the procedural rules.
- (3) Each of the following persons is under a duty to co-operate with the Tribunal to give effect to the guiding principle and, for that purpose, to participate in the processes of the Tribunal and to comply with directions and orders of the Tribunal:
 - (a) a party to proceedings in the Tribunal,
 - (b) an Australian legal practitioner or other person who is representing a party in proceedings in the Tribunal.
- (4) In addition, 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.
- (5) However, nothing in this section requires or permits the Tribunal to exercise any functions that are conferred or imposed on it under enabling legislation in a manner that is inconsistent with the objects or principles for which that legislation provides in relation to the exercise of those functions.

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.

38 Procedure of Tribunal generally

- (1) 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.
- (2) The Tribunal is not bound by the rules of evidence and may inquire into and inform itself on any matter in such manner as it thinks fit, subject to the rules of natural justice.
- (3) Despite subsection (2):
 - (a) the Tribunal must observe the rules of evidence in:
 - (i) proceedings in exercise of its enforcement jurisdiction, and
 - (ii) proceedings for the imposition by the Tribunal of a civil penalty in exercise of its general jurisdiction, and

(b) section 128 (*Privilege in respect of self-incrimination in other proceedings*) of the [Evidence Act 1995](#) is taken to apply to evidence given in proceedings in the Tribunal even when the Tribunal is not required to apply the rules of evidence in those proceedings.

Note. Section 67 also prevents the compulsory disclosure of certain documents in proceedings in the Tribunal that would, in proceedings before a court, be protected from disclosure by reason of a claim of privilege.

(4) *The Tribunal is to act with as little formality as the circumstances of the case permit and according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms.*

(5) *The Tribunal is 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, and*
- (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.*

(6) *The Tribunal:*

- (a) *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, and*
- (b) *may require evidence or argument to be presented orally or in writing, and*
- (c) *in the case of a hearing—may require the presentation of the respective cases of the parties before it to be limited to the periods of time that it determines are reasonably necessary for the fair and adequate presentation of the cases.*