

CITY OF SYDNEY LAW SOCIETY

Australian Lawyers, Australian Legal Practitioners, Solicitors and the New Super Tribunal

*Robertson Wright**

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Introduction

It is my great privilege to be able to address you tonight but I have been at a loss to know what to call you. When I first became a member of the legal profession some little time ago, it was simple – we were admitted as attorneys, solicitors and proctors of the Supreme Court of New South Wales and everyone called us solicitors.

As you know, all that has changed. Our profession is now to be governed by the Legal Profession Uniform Law (NSW). Chapter 1 of the Uniform Law came into force on 1 July 2014. That Chapter contains the definitions section, s 6(1). Under the Uniform Law, it appears that you can be referred to as:

- Australian lawyers

Under s 6(1), “**Australian lawyer** means a person admitted to the Australian legal profession in this jurisdiction or any other jurisdiction”.

Alternatively, most of you could also probably be called:

- Australian legal practitioners

Under s 6(1), “**Australian legal practitioner** means an Australian lawyer who holds a current Australian practising certificate”.

Apparently, you could not be called lawyers. In that regard, s 6(1) rather unhelpfully states:

Lawyer –

(a) in Part 4.5—see section 219; and

(b) when used alone in Chapter 5, Chapter 7, section 461 or Schedule 3—see section 261, section 369, section 461(3) or clause 1 of Schedule 3, respectively;

Those chapters, sections and schedules have not yet commenced.

I was, however, somewhat relieved to discover that I can probably call you solicitors because under s 6(1):

* President of the Civil and Administrative Tribunal of New South Wales; Judge of the Supreme Court of New South Wales.

solicitor means an Australian legal practitioner whose Australian practising certificate is not subject to a condition that the holder is authorised to engage in legal practice as, or in the manner of, a barrister only.

These provisions are apparently the result of over 30 years of experience of plain English legislative drafting.

Indeed, standing here in the precincts of the Parliament, close to the chambers where the laws of this State are made, the German Chancellor, Bismarck comes to mind. He said: "*Laws are like sausages, it is best not to see how they are made.*"

Nonetheless, it is important not to be too critical. The NSW legislature has not yet passed laws concerning legal practitioners like those made by the English Parliament. That Parliament passed an Act limiting the number of attorneys to no more than 6 in Norfolk, 6 in Suffolk and 2 in Norwich – a little harsh you might think and not exactly in line with a free and competitive market in legal services.

The reason for this was given in the preamble to the Act which said (and I don't know if you will recognise any of the characteristics of your colleagues in this):

Whereas of Time not long past within the City of Norwich, and the Counties of Norfolk and Suffolk, there were no more than six or eight Attornies at the most, coming to the King's Courts, in which Time great Tranquillity reigned in the said City and Counties, and little Trouble or Vexation was made by untrue or foreign Suits; And now so it is, that in the said City and Counties there be Fourscore Attornies, or more, the more Part of them having no other Thing to live upon, but only his Gain by the Practice of Attorneyship, and also the more part of them not being of sufficient Knowledge to be an Attorney, which come to every Fair, Market and other Places... exhorting, procuring, moving, and inciting the People to attempt untrue and foreign Suits,... whereby proceed many Suits, more of evil Will and Malice than of the Truth, to manifold Vexation and no little Damage of the Inhabitants... and also to the perpetual Diminution of all the [judges].¹

That Act² was the 7th Act passed in the 33rd year of the reign of King Henry VI, that is, in 1455. A somewhat draconian solution to problems which are surprisingly modern:

- Oversupply of lawyers,
- Poor legal training,
- Improper touting for work, and
- Vexatious litigants.

It remained on the statute books, however, for 388 years, not being repealed until 1843. It seems, though, to have been largely ignored by the many attorneys in Norwich, Norfolk and Suffolk.

¹ R E Meggery, *A Second Miscellany-at-Law*, (1973, Stevens & Sons) at 43.

² 33 Hen 6 c.7 (1455).

Of course, when that act was passed there were no solicitors, only attorneys. Solicitors came later. It is said that they appeared early in the 17th century. At some time apparently before 1635, Lord Egerton, Lord Keeper of the Great Seal, expressed the following views about solicitors:

In our age there are stepped up a new sort of people called solicitors, unknown to the records of the law, who, like the grasshoppers of Egypt, devour the whole land; I mean those which are common solicitors of causes and set up a new profession and these are devourers of men's estates by contention, and by prolonging suits to make them without end.

A somewhat harsh judgment, you might think, but it is likely that solicitors had not had sufficient time to prove their worth when those comments were made. If Lord Egerton were here tonight and if he were familiar with the work of the 7,000 solicitors practising in the Sydney CBD region, I trust he would have warmly commended you on the significant contribution you make to life, commerce and the administration of justice in this great city.

Establishment of NCAT

When reflecting on these lawmakers and politicians, it is hard not to agree with Groucho Marx's observation:

Politics is the art of looking for trouble, finding it everywhere, diagnosing it incorrectly and applying the wrong remedies.

Tonight, I suggest that one recent legislative initiative proves Groucho Marx wrong.

In March 2012 the Standing Committee on Law and Justice of the Legislative Council of New South Wales published a report titled *Opportunities to consolidate tribunals in NSW*.³ That Committee had gone looking for trouble and had found it: the then current tribunal system in NSW was said to be "*complex and bewildering*" inhibiting access to justice and failing to meet the needs of the people. The Committee recommended as one option to address these problems the creation of a super Tribunal.

In October 2012, the Government accepted⁴ the recommendations and decided to establish the Civil and Administrative Tribunal of New South Wales. The Government's decision included a commitment to providing "a simple, quick and effective process for resolving disputes and reviewing executive action"⁵. I believe, in this perhaps rare case, the diagnosis of the politicians was correct and the remedy to be applied was the appropriate remedy.

³ New South Wales, Standing Committee on Law and Justice, *Opportunities to consolidate tribunals in NSW*, (March 2012).

⁴ New South Wales, NSW Government, *Response to the Standing Committee on Law and Justice Inquiry into Opportunities to consolidate tribunals in NSW*, (October 2012) (The Response)

⁵ The Response at 1.

The formation of this 'super Tribunal' represents one of the most significant changes made to the administration of civil justice in New South Wales since the foundation of the Supreme Court in 1824. (You might expect me to say that, given my role as inaugural President of NCAT.)

Nonetheless, in recognition of the significant role you, as solicitors, play in the administration of civil justice in NSW, I should give you some account of how the implementation of NCAT has progressed.

On 1 January 2014 the Civil and Administrative Tribunal of New South Wales came into existence.

What are some of the significant features of NCAT?

1. Simplicity

As a result of the formation of NCAT, instead of facing a bewildering array of tribunals, boards and other bodies, there is one Tribunal to go to, one telephone number to contact and one website to visit. Some of that may sound trivial for lawyers but for individuals who have no experience of the law, it is very significant.

The Tribunal has taken over the work of 22 previously existing tribunals and bodies. Those 22 pre-existing tribunals and bodies were:

- The Administrative Decisions Tribunal
- The Consumer Trader and Tenancy Tribunal
- The Guardianship Tribunal
- The 14 Medical and other health practitioner disciplinary Tribunals
- The 2 Local Council and Aboriginal Land Councils Pecuniary Interest and Disciplinary Tribunals
- The Charity Referees, the Local Land Boards and the Vocational Training Appeals Panel

2. Appropriate Differentiation of Practice and Procedure and Case Management

To manage the workload and to deal appropriately with the different types of matters and litigants that come before the Tribunal there are 4 Divisions making decision at first instance.

Each Division has its own Division Head who is also a Deputy President of the Tribunal, its own structure, its own Divisional Registry and, importantly, its own procedures which reflect the nature of the work done in that Division. In the NCAT legislation each Division has its own schedule that makes specific provision for that Division.

Although there is one Tribunal, the Divisional structure allows appropriate differentiation of practice and procedure and case management.

The 4 first instance Divisions are:

- The Administrative and Equal Opportunity Division, which deals with:
 - Merits review of actions or decisions of the Executive, except for those related to occupations; and
 - Complaints under the *Anti-Discrimination Act 1977*.
- The Consumer and Commercial Division, which deals with all the matters that would have come before the former Consumer Trader and Tenancy Tribunal (CTTT), together with:
 - Retail lease, and
 - Dividing fence disputes.
- The Guardianship Division, which deals with all the matters that would have come before the former Guardianship Tribunal
- The Occupational Division, which should be of particular interest to legal practitioners since it deals with:
 - Professional discipline of legal practitioners and other professions, including architects, surveyors, veterinarians, medical practitioners and other health practitioners;
 - Merits review of licensing and other decisions concerning occupations; and
 - Pecuniary interest and disciplinary matters in relation to local councils and aboriginal land councils.

What role can legal practitioners play in the Tribunal?

The answer to this question illustrates how practice and procedure varies according to the Division in which the matter is being heard.

The starting point is s 45 of the *Civil and Administrative Tribunal 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.

Thus, you can appear with leave in any matter. That is not, however, the end. There are special rules for each Division in the Schedules to the Act that allow legal representation without leave either generally or in specific types of matters.

In summary, in the Administrative and Equal Opportunity Division and in the Occupational Division you can appear without leave in virtually all matters.

In the Consumer and Commercial Division and the Guardianship Division, you will need leave to appear in virtually all matters.

3. Membership that is Broadly Based and Flexible

NCAT currently has 275 members, including the President, Deputy Presidents, Principal, Senior and General Members.

Legal Members must be lawyers of at least 7 years' standing.

Not all the Members are lawyers. The Senior and General Members include those with relevant professional or occupational qualifications or experience, as well as experts in particular fields and those who can represent the community or a relevant section of the community.

All Members are assigned to a particular Division. Notwithstanding this, there is also flexibility. Members can be cross-assigned by the President to other Divisions so that expertise can be deployed across the Tribunal, as required.

4. An Independent Tribunal

The independence of the newly formed super Tribunal is essential to assuring all litigants that civil justice will be administered impartially and fairly. Members may be appointed for terms of up to 5 years and are eligible for reappointment: cl 2 of Sch 2 to the Act. Importantly, a Member has, in the exercise of functions performed as a Member, the same protection and immunities as a Judge of the Supreme Court: cl 4 of Sch 2 to the Act. The Governor may remove a Member, other than the President, from office for incapacity, incompetence or misbehaviour: cl 7(2) of Sch 2 of the Act.

One significant feature of NCAT is that the President must be a Supreme Court Judge. In this, NCAT is unlike any of its predecessors. By making it mandatory that the President be a judge of the Supreme Court (which court is required to exist under Chapter III of the Australian Constitution⁶) and by the other provisions already referred to, the Parliament can be seen as emphasising:

- The independence of the Tribunal from the Executive Government; and
- The very significant role that the Tribunal has to play in the administration of civil justice in this State.

5. Internal Appeal Mechanism

To provide a readily accessible, timely and cost effective review of first instance decisions, NCAT has its own Appeal Panel.

Almost all decisions at first instance are appealable to the Appeal Panel. Generally, a dissatisfied party can appeal:

⁶ *Forge v Australian Securities and Investments Commission* [2006] HCA 44; 228 CLR 45 at [57].

- as of right on question of law, and
- by leave on any other ground.

Note that the Appeal Panel is an innovation for the Consumer and Commercial Division. The internal appeal mechanism now allows decisions at first instance to be corrected, where necessary, without the expense or delay involved in bringing proceedings in the District Court or the Supreme Court. The scrutiny afforded by internal appeals is an essential element of NCAT's strategy to improve the standard of decision making and writing throughout the Tribunal.

Rationale for NCAT

At this point I expect that the enquiring minds among you might be asking: Given that there is a court system already in place, why is it necessary to create a tribunal to deal with matters that could be dealt with by the courts?

Let me suggest that there are three distinct characteristics of tribunals that make it appropriate to have the functions that have been entrusted to NCAT performed by a tribunal.

First, tribunals such as NCAT have flexibility and informality of procedures and are not generally bound by the rules of evidence. This allows NCAT to be responsive to the nature and subject matter of the proceedings before it. In this way, many less complex cases and those not involving significant sums of money can be resolved quickly and cheaply, without undue regard to legal forms or technicalities, in a manner proportionate to the subject matter of the claim.

Secondly, the Tribunal can be, and often is, constituted with professional, expert and community Members in addition to lawyers. This serves to ensure that:

- Decisions are consonant with professional and community standards – for example, in professional disciplinary matters;
- Decisions reflect community values – for example, in discrimination and vilification matters; and
- Proceedings are more efficiently conducted by reducing the need for expert or professional evidence because of the presence of professional or expert members on the Tribunal hearing the matter.

Thirdly, in a large number of simple matters the Tribunal offers litigants the opportunity to present their own cases, without disadvantage and without the need to retain legal practitioners to act on their behalf.

Conclusion

If you wanted to summarise how NCAT works, you could say that it is almost the exact opposite of the tribunal which was the subject of a decision by Mr Justice

Eve in *Law v Chartered Institute of Patent Agents*⁷. In that case, his Lordship described the tribunal as follows:

[The tribunal is] selected by the [government department] but it is not necessarily composed of individuals with any judicial or other appropriate qualifications. The [tribunal] conducts its investigation in private; it has no power to compel the attendance of witnesses or to insist on the production of documents; it cannot administer an oath, and has apparently no rules of procedure to guide it; it communicates no findings or decisions to the parties; it makes a report to the [department] which is conclusive as to the facts, but of which no copy is furnished to accuser or accused; and on this report the [department] exercises the powers conferred upon it, and there is no appeal. A late Lord Justice – one of great learning and wide experience – Lord Justice Farwell – once stated that he could not trust the whole bench of bishops to do justice under such conditions. With a respect for the episcopate as profound as that of the Lord Justice I entirely adopt his language. I share to the full his distrust of justice administered by a tribunal sitting in private, unassisted and untrammelled by the salutary rules regulating procedure, uncontrolled by the invigorating and corrective criticism provoked and stimulated by publicity, and finally wrapping up its findings in a secret communication to the department which appointed it.⁸

In reforming the tribunal system in NSW and creating NCAT, the politicians may have looked for trouble and found it, but I suggest their diagnosis was sound and the remedies apposite. If the NCAT legislation can be compared to a sausage, it is far from the wurst.

To assess the significance of NCAT, one might pose the question: Does NCAT matter to the people of NSW?

The numbers speak for themselves. For the 10 months since 1 January 2014:

- NCAT has received 63,220 applications and appeals and has finalised 66,655 matters;
- The NCAT website has received 2.082 million hits.

NCAT affects and makes a difference for many.

Can I encourage you, as Australian Lawyers, as Australian Legal Practitioners or as Solicitors to continue to contribute to the work of the Tribunal, but not by being named as a respondent in proceedings in the Legal Practitioner List of the Occupational Division?

⁷ [1919] 2 Ch 276 at 293.

⁸ R E Meggery, *Miscellany-at-Law*, (1955, Stevens & Sons) at 235.