Review of the role of the NSW Civil and Administrative Tribunal in Tenancy Disputes

December 2024

The NSW Civil and Administrative Tribunal is the key site for resolution of tenancy disputes. The Tribunal should be well-regarded and well-experienced.
The recommendations from the Tenants' Union of NSW and informed by Tenants Advice and Advocacy Services and renters will assist the Tribunal in delivering on its guiding principles.

TENANTS' UNION
OF NEW SOUTH WALES

About the Tenants' Union of NSW

The Tenants' Union of NSW is the peak body representing the interests of tenants in New South Wales. We are a Community Legal Centre specialising in residential tenancy law and policy, and the main resourcing body for the state-wide network of Tenants Advice and Advocacy Services (TAASs) in New South Wales. We have long-standing expertise in renting law, policy and practice. We train tenants' advocates, lawyers and community workers in the use of its provisions, we consult with government and industry peaks on related matters, and we conduct litigation in the public interest on specific questions arising from the legislation itself.

The TAAS network assists more than 35,000 tenants, land lease community residents, and other renters each year. This includes provision of advice and assistance in relation to the principles, procedures and practices applicable to tenancy dispute resolution processes in NSW, the primary forum for dispute resolution being the NSW Civil and Administrative Tribunal (NCAT or the Tribunal).

Through our work and the tenant advocate network we train, resource, and support, we have assisted thousands of tenants across various Tribunals, beginning with the Residential Tenancies Tribunal in 1988. Collectively, we estimate having participated in approximately 45,000 cases in the NSW Civil and Administrative Tribunal (NCAT). In doing so, we have provided not only strong advocacy for tenants but also professional and expert contributions to the Tribunal's work.

We actively engage in several consultative committees and value the opportunity for engagement and collaboration these provide. While this submission focuses on ways the Tribunal could improve its practices in relation to the tenancy disputes, we want to emphasise our overall support for the Tribunal model. We offer these recommendations with the aim of making the model as effective as possible, even when constrained by issues within the laws and broader systems it administers. We look forward to continuing our work with NCAT and the Department of Justice to strengthen how the civil justice system supports housing policy in NSW.

We have previously provided relevant submissions and raised similar issues to previous consideration:

- NSW Parliament: *Inquiry into opportunities to consolidate tribunals in NSW* (2011)
- Department of Justice: *Justice for everyday problems: Civil Justice in NSW*' (2017)
- Department of COmmunities and Justice: *NSW Civil and Administrative Tribunal Statutory Review* (2019)
- Law Reform Commission: *Open Justice Review – Court and tribunal information* (2021)

Finally, we note the current review approach involves consultation with only a limited number of key stakeholders. We are concerned that this approach will miss an important opportunity for direct engagement with end users to allow them to feed into the review and help inform review recommendations. We conducted a brief survey for renters who have attended the Tribunal, and throughout this submission we share a selection of quotes. These quotes are not intended to represent the full range of views, but highlight the areas of improvement. We hope the review may still consider how they can directly engage with end users.

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Summary of recommendations

Application processes

- NCAT should revisit the findings and recommendations of the digitisation project and its application to current technical and possibilities, with fresh stakeholder engagement
- NCAT should be funded to implement the digitisation project as needed, in particular:
    - Improve accessibility and rectify current access to justice issues by allowing all TAAS advocates access to the portal to assist tenants with application process, specifically lodgement of application forms and filing evidence.
    - Simplify application processes, allowing easier online or in-person lodging options for urgent matters.
- Review current procedures regarding provision of evidence in residential land lease community matters to account for regional location of residents

Case management practices

- Clarify guidelines around virtual hearings to make it easier for renters, especially those in remote locations or with special needs, to apply and transition between virtual and in person hearings.
- Where hearings are moved, travel should be limited to no more than 1 hour by public transport.
- NCAT should explore with other government departments and tiers of government the use of other facilities which may be appropriate for hearing use.
- NCAT should redistribute hearing times more evenly throughout the day.
- NCAT should explore options to allow parties to nominate preferred hearing times and dates, ensuring flexibility without delaying proceedings.
- Continue to use best endeavours to ensure Members retain carriage of a matter to completion of the dispute within the Consumer and Commercial Division
- In rare instances the original Member is no longer available or appropriate to hear the matter, ensure replacing Member is given sufficient time to prepare for the hearing and documents already served are provided.
- NCAT should review its Guidelines on Representation to explicitly set out that as a standard circumstance leave to represent will be granted in cases where the party is a renter, and representation is being provided by an advocate from a Tenants' Advice and Advocacy Service, including where the advocate is a Australian legal practitioner.

Inclusive practice

- Consider requiring consent for publication of victim survivor details on public hearing lists in matters involving applications made under Div 3A, Pt 5 of the Residential Tenancies Act 2010 (NSW)
- Consider inclusion of a tick-box on standard application forms for parties to indicate they are impacted by DV, or are aware that a party may be impacted by DV,

and do not wish to have their details on public hearing lists.

- NCAT should re-adopt previous practice of evaluating the applicant's claim and where a cause of action is expressed, amending the application to ensure consistency with the applicable law. Members should avoid dismissing a case where a valid claim is clear but is expressed otherwise than with the strict language of the relevant Act.
- NCAT publish a Plain Language Guideline, outlining the principle that plain language be used wherever possible to remove barriers to communication and so make the law more accessible.
- NCAT model best practice regarding gender inclusive language and publish guidelines setting out expectations regarding gender inclusive practice and use of language

Problems with conciliation

- Increase resources to ensure dedicated Conciliators are available at all registries, minimising Member involvement in the conciliation process.
- Introduce guidelines and a Code of Conduct for Conciliators at NCAT
- Introduce general procedural direction for conciliation, including implementation of clearer protocols for Members to confirm agreement terms with each party before finalising orders, especially to prevent parties from unintentionally agreeing to detrimental terms.
- Make available and provide training for Members on digital tools like speech-to-text, this could help allow faster and more accurate documentation of conciliation and Tribunal outcomes.

Member conduct

- Make the NCAT Member Code of Conduct easily accessible to all participants to enhance accountability.
- Implement an independent and external process of audit and review of Tribunal hearings.
- Ensure the NCAT complaint handling process requires appropriate communication with complainants.
- Implement or improve current cultural competency training for Members, that covers Aboriginal-specific issues, the nature and dynamics of domestic violence, and training on trauma-informed practice.
- Appoint Aboriginal Members and Conciliators with relevant cultural backgrounds to enhance understanding and support for Aboriginal renters.

Adequate access to advice and advocacy supports

- NCAT highlight to the NSW Government the significant value the presence of TAAS provides at the Tribunal. The advice and advocacy support offered by TAAS not only benefits renters and improves fairness overall, but delivers significant time and cost savings for the Tribunal .
- Additionally, NCAT should specifically acknowledge the value of the duty advocacy service provided by TAAS, and recommend the Government allocate

dedicated funding to support this service. This should include support at the Aboriginal Tenancy List.

- NCAT should review current communications to ensure residential parties are aware of the availability and role of the Tenants' Advice and Advocacy Services.

Enforcement of orders

- NCAT should more actively use its enforcement powers under the Civil and Administrative Tribunal Act, particularly section 71, to address cases where parties make misleading statements to undermine Tribunal orders.
- Establish a formal referral protocol for NCAT to refer matters to Fair Trading for investigation and possible enforcement action, including penalties, where the breach meets a significance threshold.

Publication of decisions

- Change the approach taken in the current NCAT policy on publishing reasons for decisions to:
  - require publication of all decisions for which there are written reasons. These should be made available in a timely manner.
  - introduce a presumption in favour of publication of reasons for decisions in all residential tenancy matters at the NCAT's Consumer and Commercial Division and the Appeal Panel.
- Failing implementation of the above, require NCAT's Consumer and Commercial Division to publish an appropriate 'minimum percentage of reasons for decisions' each year.
- Publish standardised, wider, consistent and more transparent policies of decision release as a guide for the public on how the Division Head of NCAT's Consumer and Commercial Division will determine why certain decisions with reasons are being published.

Data collection

- That the Quarterly Management Reports currently provided to the Consultative Committees by the Consumer and Commercial Division of NCAT be made accessible to the public as an immediate start.
- That deidentified attendance, representation and orders made by the Consumer and Commercial Division of NCAT also be published at least with annual release of this level of data.
- That the data management software of NCAT be upgraded, with additional investment if needed, in order to facilitate greater data collection and analysis.

The Aboriginal Tenancy List

- Conduct a formal evaluation of the Aboriginal List, engaging ATAAS and other key service providers. Focus on targeted consultations with a broad but specific range of stakeholders to gather meaningful insights on positive outcomes, overall effectiveness and ongoing resourcing needs.
- The Tribunal collect and regularly publish data in relation to the Aboriginal Tenancy List.

Fees

- NCAT adopt a fee scale to reflect seriousness, and funding source, of eviction proceedings for Residential Tenancies, Social Housing and Residential Communities lists (residential lists).
- NCAT allow for the lodgement of repayment plans for rent arrears payment plans, where termination and vacant possession orders do not form part of the application form.
- NCAT prepare a form for lodgement which ensures orders are effective and appropriate in the circumstances.
- NCAT generally adopt a practice of allowing identification of parties to be carried out in a flexible manner. If a person presents to the Tribunal, can be identified as the relevant party and accepts the jurisdiction, this should be sufficient to begin proceedings.
- NCAT specifically adopt an information-sharing protocol with NSW Fair Trading to gain the operator details from the Residential Land Lease Communities register which NSW Fair Trading is required to hold and make available.
- NCAT should explore bulk-billing arrangements with ASIC and make access available in the hearing to applicants where necessary for identification purposes. This avoids any need for adjournment if a party is not properly identified before the hearing.
- Reduced fees become available to applicants assisted by a service funded under the Tenants' Advice and Advocacy Program.

Preliminary/background comments

The role of the NSW Civil and Administrative Tribunal in the resolution of disputes in tenancy is an important one.

The structure of tenancy regulation in NSW is predominantly one of regulated contracts, with the Tribunal the site for resolution of contractual disputes. Necessarily then, the Tribunal needs to be a place of high repute where all stakeholders feel comfortable attending and can expect to receive a just outcome in a timely manner. The Tribunal's guiding principle aligns with this, seeking to deliver "just, quick and cheap resolution of the real issues" in cases.

The NCAT represents an evolution of the use of civil tribunals in rental disputes following from its predecessors - the Residential Tenancies Tribunal, the Consumer, Trader and Tenancy Tribunal. For more than 40 years we have supported the use of Tribunals rather than courts on the basis that tenancy disputes would not be best served remaining in the courts system because the guiding principle and its consequential practices can provide a more responsive, less intimidating process. However, a tension has grown at the heart of the Tribunal that can work to limit its success. Many of the issues we raise in this submission relate to this tension.

Moving from the Consumer, Trader and Tenancy Tribunal to the NCAT in particular came with a shift in responsible Ministers - from the Fair Trading Minister to the Attorney-General. We have observed that this shift, along with the internal Appeal Panels, has solidified an increasingly legalistic approach to resolution. However, the Tribunal does not have the traditions and safeguards of the Courts system - a Tribunal Member is not bound by precedent of the Tribunal or indeed their own decisions; decisions are not transparently published nor often witnessed by other legal practitioners; applicants are able to use applications without risk of costs orders.

We note that the residential disputes at NCAT are funded from a combination of the interest earned on tenants bonds, and on the trust accounts of real estate agents - a combination mainly of rents and property sale deposits - totalling $27 million in 2023-24. Filing fees are not disclosed in Annual Reports but a conservative estimate is at least a further $2-3 million is collected in filing fees in residential matters. This suggests that the Tribunal is heavily subsidised in running these matters. In particular we question whether it is just for tenants to be funding their own evictions. The practices of the Tribunal do not always reflect the significant contribution that renters are making to its practice, with increasing barriers to participation and specialised services funded by the same source not respected as the professional organisations they are.

Changes to filing fees may offer opportunities to increase the resources available to the Tribunal, but we also recommend that NSW Government seriously consider both project-based funds to lift the digital experience and increasing the budget separately to contributions from Rental Bond Board and Property Stock and Agents Act for the Tribunal to facilitate an improved experience for all users.

This review was an election promise of the now Government, in recognition of the frustration that many people were reporting. It ought not be an exercise in avoiding improvements but an opportunity to consider real reform to deliver on the Tribunal's guiding principle and purpose, and increase its standing in the community.

Application processes

If you made the application yourself, how easy did you find it to complete and lodge the application?

"Relatively easy, however, found out later that I should've applied for a different claim as well. It would help to have less legal language used for this part"

"easy, but I'm a lawyer so familiar with what is required."

"could be easier with normal human language rather than law language"

"Difficult - I had to relodge my claim after a staff member told me on the phone I was at risk of having my case dismissed (I later found out this was not true)"

"The guidelines on how to apply were really very detailed and difficult esp if not educated"

"Difficult; we were unable to set up a profile and had to try multiple times, it took about 6 weeks for us to even lodge."

Lodging applications and evidence

Renters can face significant barriers in making an application to NCAT. Advocates note an inconsistency in experience for renters in terms of their ability to lodge an application and evidence online, in particular when lodging an application for an urgent hearing. There can be mixed messages, incorrect information or obstruction from registry staff, which can lead to delays and confusion. It is also not always clear for renters whether they are able to lodge documents at local Services NSW offices, as there continues to be inconsistent practice in relation to this.

The Tenants' Union was one of a number of stakeholders engaged in a digitisation project with the Tribunal in 2019 which had a clear focus on the user experience, and allowed for consideration of the particular. We were disappointed in 2023 to learn that, apparently for cost-saving measures, the digitisation project had been rolled into the NSW Courts system. The Courts system is not designed for the same purpose as the Tribunal, with a very low rate of self-represented parties. We do not believe this move was an appropriate one, and was made without genuine consultation with stakeholders with significant difficulties for internal and external stakeholders as a result.

The Online Registry System remains inaccessible to stand alone Tenants' Advice and Advocacy Services (TAAS) that are not part of a community legal centre. While advocates have worked closely with tenants to assist via the tenant logging in, this work-around is cumbersome, and does not allow access to fee waiver options or concessions. There is an urgent need to ensure all TAAS are able to access the online registry system via registration as a representative organisation, to allow advocates to represent a party (renter) they are supporting to lodge applications and evidence.

We consider this an access to justice issue, as some tenants face significant barriers to either using online processes or accessing limited face-to-face options. TAAS are funded by the government to assist renters navigating the Tribunal processes and are currently unable to perform this role. The Tribunal can not be considered to be facilitating its purpose of quick, easy access to justice whilst this issue remains unresolved.

Since digitisation, Tribunal procedure allows evidence to be submitted electronically by parties. However, the online portal does not allow the party who uploaded evidence to later view the evidence they have submitted. Nor can the tenant, for example, see the evidence submitted by the landlord (the other party). The tenant must also separately send the required documents via email to the landlord as the other party, or in some instances when required by the Tribunal to send hard copies of the documents.

This is inconsistent with the courts in NSW where it is now common practice that once evidence has been submitted electronically via an online portal, this provides access to the relevant documents not only for the court but for both parties.

Improvements are required regarding expectations for amendments to applications and requesting adjournments to reduce confusion. Parties should generally be permitted to amend their application where it clarifies their original claim. A Duty Member who can determine adjournment requests rather than waiting for a decision on the hearing day, where pressure to refuse adjournment may be felt, could assist in addressing consistent practice.

Recommendations

- NCAT should revisit the findings and recommendations of the digitisation project and its application to current technical and possibilities, with fresh stakeholder engagement
- NCAT should be funded to implement the digitisation project as needed, in particular:
    - Improve accessibility and rectify current access to justice issues by allowing all TAAS advocates access to the portal to assist tenants with application process, specifically lodgement of application forms and filing evidence.
    - Simplify application processes, allowing easier online or in-person lodging options for urgent matters.

Provision of evidence - Residential Land Lease Community matters

Resident Advocates representing land lease community residents in regional areas feel disadvantaged by current procedures regarding the provision of evidence. The Tribunal is currently issuing a standard direction in the ‘Notice of conciliation and hearing’ requiring the applicant’s documents to be submitted in hard copy within 14 days of the issuing of the notice. Normal post takes an average of seven days from a regional area and express post takes four days. When weekends are taken into account, applicants effectively have two or three days to organise all of their evidence into a format prescribed by the Tribunal.

During regular operations regional resident advocates report Tribunal Members insisting on unreasonable timeframes for submitting evidence that does not properly take regional postage into account. Resident advocates raised the timing of decisions as an issue close

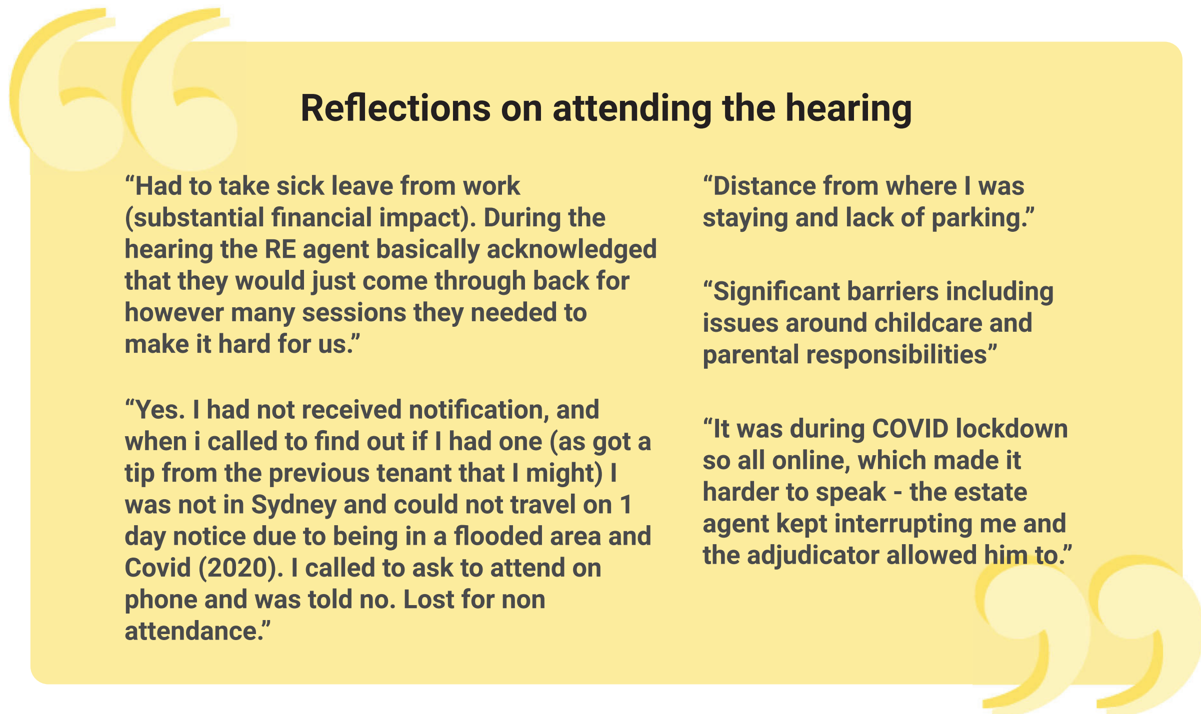
to public holidays. One advocate had a reserved decision handed down immediately before Christmas when all support services were closed (as was NCAT). Given the limitation period for an appeal is 14 days NCAT should consider whether this is appropriate practice.

Other issues experienced by resident advocates in regional areas include: Tribunal Members not having the file (including evidence); Members not having read the file prior to hearing; evidence being lost by the Tribunal and the parties being berated by the Member for not submitting their evidence; and registry staff not understanding Tribunal processes and therefore being unable to answer questions.

Recommendations

- Review current procedures regarding provision of evidence in residential land lease community matters to account for regional location of residents

Case management practices



Scheduling practice including location, and in person vs virtual hearing

Scheduling practices, particularly in regional areas, can create significant barriers for renters to attend and participate in hearings.

We understand from the experiences of advocates and other users that NCAT has a guideline that when hearings are moved there is an attempt to ensure the hearing is no more than 2 hours travel away from the original hearing. However this travel is judged by car – presenting an issue with users who do not own or are otherwise unable to travel by private car. Public transport options may not exist. This creates severe disadvantage for users of the tribunal and inadvertently denies them access to justice.

We understand the Tribunal prefers using local courts due to the lower room costs associated with using Department of Justice facilities. We believe there may be other options available, including public libraries, local government rooms and others, which NCAT could explore the use of to ensure parties are able to attend in person whenever possible.

The option to request an online hearing is of great benefit for those tenants who face logistical challenges, such as transportation issues or long travel times, which can make attending in person difficult. We have, however, been told that some tenants are receiving notice of a hearing and location too late to submit a request to attend by telephone or video, and/or can struggle to provide the evidence required especially when overseas at the time of hearing. Some advocates in regional NSW have also reported they struggle to move a matter back to a face-to-face hearing after it is allocated to an 'online hearing' for the initial listing, even where there is some complexity to the matter, and both parties agree they would prefer the matter to be heard in person.

Recommendations

- Clarify guidelines around virtual hearings to make it easier for renters, especially those in remote locations or with special needs, to apply and transition between virtual and in person hearings.
- Where hearings are moved, travel should be limited to no more than 1 hour by public transport.
- NCAT should explore with other government departments and tiers of government the use of other facilities which may be appropriate for hearing use.

Hearing Times

Users and advocates have raised concerns about hearing times, noting they often occur at inconvenient hours for those with parenting responsibilities, travel challenges, or long commutes. Analysis indicates that 9:15 a.m. is the most common time for residential hearings, accounting for nearly a quarter (23%) of all such hearings. In comparison, later times are less frequent, with 11:15 a.m. representing 13%, 1:15 p.m. 16%, and 2:15 p.m. 14% of residential hearings. A greater proportion of hearing times at later dates would facilitate easier attendance by more tribunal users.

Additionally, users report fewer opportunities to request specific dates, creating further difficulties. With the implementation of online applications, it should now be feasible to allow parties to nominate preferred dates. Offering some choice in hearing times, within practical limits, could also be beneficial.

Recommendations

- NCAT should redistribute hearing times more evenly throughout the day.
- NCAT should explore options to allow parties to nominate preferred hearing times and dates, ensuring flexibility without delaying proceedings.

Multiple members hearing a matter

To ensure matters are heard and decided fairly, the Member who begins hearing evidence should also conclude the hearing and make the decision. We understand this is the Tribunal's preferred approach, but that there are still quite often exceptions. In such cases, the replacement Member should be given sufficient time and resources to fully understand the case, including access to recordings of prior hearings. Care should be taken by the Tribunal to ensure parties are not burdened with bringing the new Member up to speed. This is not conducive to efficient hearings and reduces the time available to the Member to hear and consider the parties’ respective cases.

Recommendations

- Continue to use best endeavours to ensure Members retain carriage of a matter to completion of the dispute within the Consumer and Commercial Division
- In rare instances the original Member is no longer available or appropriate to hear the matter, ensure replacing Member is given sufficient time to prepare for the hearing and documents already served are provided.

Representation

Currently, NCAT guidelines outline circumstances where representation is generally permitted. Landlords are typically allowed to be represented by their real estate agent. To ensure fairness and efficient Tribunal hearings, renters should also have the option to be represented by a Tenants' Advocate. We recommend that the guidelines make clear that leave will usually be granted for representation by an advocate from a Tenants' Advice and Advocacy Services. The guidelines currently are explicit about granting leave for representation by real estate agents, strata managers and park managers who often act as representatives for the other parties in residential matters. While we are not aware of cases where Tenants' Advocates who are not Australian legal practitioners have been denied representation, formal recognition would provide clarity and consistency.

We are aware of instances in which advocates who are Australian legal practitioners have been refused permission (granted leave) to represent a renter at Tribunal. We believe representation by an employee of the Tenants' Advice and Advocacy Program (TAAP) for tenants is appropriate, including by an employee who is an Australian legal practitioner. The Program defines priority groups and services assess the need as part of determining whether to offer representation services. The TAAP is funded by the NSW Government and have been assessed for their skill and appropriateness to provide services. It would be inconsistent for the Tribunal to decline to allow representation.

Recommendation

- NCAT should review its Guidelines on Representation to explicitly set out that as a standard circumstance leave to represent will be granted in cases where the party is a renter, and representation is being provided by an advocate from a Tenants' Advice and Advocacy Service, including where the advocate is a Australian legal practitioner.

Inclusive practice

Reflections on barriers to attending the hearing

"Yes, I live with disability and paid a very expensive car parking fee because I didn't have an option to catch public transport in."

"I was denied the ability to have a support person present by a very stern Member which significantly impeded my confidence and my nervousness got the best of me for the majority of the 4 hour hearing. I complained to the Tribunal about this conduct but the response letter from the Policy and Executive Division was dismissive and did not refer to the support person matter at all."

"It was difficult because of my mental health as it is not like a physical disability and people think that I'm not going to be affected by the decision of what is being ruled at tribunal"

"Yes my anxiety was through the roof. It was held at local court house which is an intimidating location. Plus had previous personal trauma which was dealt with at that court house. The intimidating location on top of the natural nervousness from the experience on top of the power imbalance from R/E & LL to tenant was just overall extremely unnerving"

Appropriate support for victim-survivors of Domestic Violence

Improvements are required to the Tribunal's current policy and practice in relation to the application process, as well as the accessibility of the supports available via the NCAT Domestic Violence Protocol.

Advocates have expressed concerns regarding the privacy and safety of victim-survivors when their personal information is included on NCAT public hearing lists in tenancy matters related to domestic violence. There is a heightened risk that the exposure of such sensitive details could compromise the safety of victim survivors. The public display of personal information may also discourage survivors from seeking the legal support they need, as they may fear retaliation or further harm. To protect their well-being, it is necessary for measures be implemented which safeguard privacy of victim survivors and ensure that their safety is not jeopardised in the course of legal proceedings.

NCAT's Domestic Violence Protocol sets out a range of useful and appropriate supports available for participants who have experienced or are experiencing domestic violence. While the protocol advises that NCAT staff and Tribunal Members will manage all matters relating to service of a DV termination in a way that ensures the victim's safety and privacy, it is still on the victim-survivor to request or activate the other supports set out in the Protocol (e.g. the onus is on the victim-survivor to ask for the Tribunal to arrange a separate waiting area, or request to provide evidence online or via a remote evidence room to avoid a perpetrator). We suggest that the protocol be inverted, with NCAT responsible

for offering all available supports set out in the Protocol for matters relating to DV termination, and/or where the tenant has otherwise indicated they are impacted by DV.

Recommendations

- Consider requiring consent for publication of victim survivor details on public hearing lists in matters involving applications made under Div 3A, Pt 5 of the *Residential Tenancies Act 2010* (NSW)
- Consider inclusion of a tick-box on standard application forms for parties to indicate they are impacted by DV, or are aware that a party may be impacted by DV, and do not wish to have their details on public hearing lists.

Legality of process and procedure, plain language communication

Applicants have reported to us being dissuaded from making applications by the current application forms, and even Members in hearing, which require applicants to identify the correct section number of the relevant Act even where the applicant has a clear cause of action identified. This has been a change in practice since the Consumer, Trader and Tenancy Tribunal. We believe it works to reduce access to justice and should be reviewed. We also believe it is inconsistent with section 38(4) which directs the Tribunal with as little formality as circumstances of the case permits.

We wholly support the principle that the respondent must be able to know the case against them, but we do not consider this incompatible with a clear statement from the applicant of their grievance.

We believe it reasonable to expect that Members should be expert in the legislation relevant to the list they sit, and therefore able to translate a plain language application to the more formal language of the Act, and assess the plain language application for its legal merit. It is reasonable to expect a higher standard from tenant advocates, real estate agents and other professional representatives – we do not believe it reasonable to expect it of self-represented applicants.

We note that minor errors are routinely modified during the hearing and proceed on that basis. We are not aware of cases where a real estate agent or landlords who use the wrong section number are wholly prevented from pursuing their claim.

Generally we are concerned that NCAT has become increasingly formal over the years. The language used at the Tribunal, and particularly when communicating decisions, can be overly complex and overwhelming for everyday people, especially where any additional language barrier exists. Better guidelines around the use of plain language are required to make Tribunal proceedings and communications more accessible, particularly for renters from CALD community backgrounds. This would be in line with principles and policies adopted in relation to the use of plain language for the drafting of NSW legislation. It would reflect that clear communication is considered a core competency for Tribunal Members, emphasising the use of clear, concise and plain language during hearings and in written decisions.

The Tribunal also has an opportunity to model best practice and adopt gender inclusive language and practice. This might include, for example, the Member identifying their pronouns whenever introducing themselves, using gender neutral language where possible to avoid misgendering a party, and respectfully correcting one party where they

may be misgendering another at hearings, etc. As reference, the NSW Law Society has a useful Best Practice Guidance on gender inclusive language.

Recommendation

- NCAT should re-adopt previous practice of evaluating the applicant's claim and where a cause of action is expressed, amending the application to ensure consistency with the applicable law. Members should avoid dismissing a case where a valid claim is clear but is expressed otherwise than with the strict language of the relevant Act.
- NCAT publish a Plain Language Guideline, outlining the principle that plain language be used wherever possible to remove barriers to communication and so make the law more accessible.
- NCAT model best practice regarding gender inclusive language and publish guidelines setting out expectations regarding gender inclusive practice and use of language

Problems with conciliation

Reflections on conciliation

"mediation had a focus on settling the matter without much interest on fairness or even what my concerns were. it didn't meet my expectations."

[No conciliator present]
"The forced mediation is HORRIBLE. If they were already reasonable people, you wouldn't be in that situation in the first place. Without [Tenant Advocates] assistance, mediation is simply an experience where you are verbally bullied into submitting to the R/E"

"I was berated by the person who was assigned to assist me negotiate."

"Felt bullied both by attend real estate agent and also not heard by mediator who just wanted resolution. Kept looking at watch, interrupting conversation (both me and agent). I had done a lot of preparation and had so much documentation and agent did not even know or care about the tenants right so her claim was shut down pretty quickly bit I was told in no uncertain terms that I must "concede" or "offer" something which translated to money. As a 74 year old pensioner this seemed inequitable as mediator stated their claim was unrealistic."

"I thought the conciliation was rushed... I have been a conciliator in both the industrial and human rights jurisdictions and in both there was an assigned conciliator who knew the case. The conciliator at NCAT didn't have any information on my case and only asked a few questions. She seemed to mostly want to get the session over. I made a mistake and the conciliator went back to NCAT member and made it clear she was very unhappy with me for getting something wrong. Given the stress of being there I thought that was both unfair and unhelpful; it definitely didn't put me at ease."

"the mediator attempted to bully me into a resolution for the Agent/landlord. It was almost as if he was thriving off the opportunity to push me into agreeing on an outcome for the landlord."

[No conciliator present]
"Very stressful. Was bullied by the representative from the landlord when we spoke separately."

"Conciliators should check that the parties understand, and take the time to make an agreement in such a way to be fair to both parties in the dispute. Through my experience I am totally disillusioned with a so call fair system for those whom represent themselves according to the RLLC Act."

Lack of Conciliators

Conciliation is encouraged as a way for parties to resolve their disputes and avoid proceeding to hearing. As much as possible Conciliators should be made available, helping to ensure a conciliation process in which parties are making informed decisions about their case as well as encouraging negotiated outcomes.

However, we are aware that the conciliation resources of NCAT are stretched thin. In practice, Conciliators are not always available at all registry locations, or are not available on all hearing days. In regional locations there are generally no Conciliators available to assist parties.

Where there is no Conciliator, Members will often step in to conciliate. The Tribunal's guideline regarding Conciliation and Hearing By the Same Member outlines that both parties must consent. In practice many renters will not feel comfortable to withhold

consent, and may not be fully aware of the distinction between conciliation and hearing. This can lead to significant confusion for parties.

We also believe this creates a significant issue in relation to the private and confidential nature of the negotiation process, one that is very hard to overcome in instances where the Member goes on to hear the substance of the matter and make a determination. While both parties are asked whether they have any objections to a Member going on to hear the matter, it is often difficult for a renter to raise an objection despite concerns.

Conciliator Conduct

We consider the neutrality of the Conciliator to be very important, and understand the role of the Conciliator in conciliation processes at NCAT to be largely facilitative rather than advisory or determinative. Feedback from renters and advocates suggests that in some areas, Conciliators can become very familiar over time with other parties' representatives (landlords' agents). Overly familiar behaviour can give the perception of bias that a Conciliator favours one party over the other. Conciliators must carefully maintain a balance between professionalism, courtesy, and avoiding over-familiarity to ensure both parties have confidence in their neutrality.

Resource and time constraints can also lead to rushed negotiations, with renters and advocates reporting this can lead on occasion to Conciliators placing undue pressure on renters to settle. Time constraints can limit the opportunity for a Conciliator to ensure that both parties understand the agreement, its implications for both parties, and the consent of both parties.

Addressing inefficiencies during conciliation process

There can also be delays once negotiations have been finalised, including delays in the documentation of orders following conciliation because of the need for a Member to transcribe order. Available digital tools are being underused, perhaps because of a lack of awareness or availability of training on how to use such tools.

Recommendations

- Increase resources to ensure dedicated Conciliators are available at all registries, minimising Member involvement in the conciliation process.
- Introduce guidelines and a Code of Conduct for Conciliators at NCAT
- Introduce general procedural direction for conciliation, including implementation of clearer protocols for Members to confirm agreement terms with each party before finalising orders, especially to prevent parties from unintentionally agreeing to detrimental terms.
- Make available and provide training for Members on digital tools like speech-to-text, this could help allow faster and more accurate documentation of conciliation and Tribunal outcomes.

Member conduct

How did the process of applying and attending the tribunal generally compare to your expectations?

"Very frustrating. The member wasn't very interested in what I had to say"

"It turned out easier than I thought and the judge we had was fair and understanding to our case which I found unexpected."

"The Member was too hurried although I understood on telephone from the Registry that I was allotted more than 3 hours for the hearing."

"I was shocked at how bias and one sided the Member was and my feeling was that the Tribunal was there to support the real estate industry and the landlord but not the tenant "

"I found the process much more stressful and complicated than I thought it would be."

"More or less as expected, in that it was very time-consuming."

"More formal than expected, reliance on technical legal jargon and process"

"I was shocked by the amount of evidence required and found that there was not a lot of solid guidance on precisely what evidence was required."

"Pointless. The system seems to favour the owner/agent and regardless of 300 pages of evidence proving the property was below standard of living from day one and entered into condition report and beyond it was all dismissed and ignored."

"Normal but faced very rude member already prejudiced against my case. Favoured real estate agent instead all through the hearing."

"The chair was immediately biased towards the agent and owner (misread information provided, focused on claims by owner, declined to be advised as to clarifying information provided to the tribunal but wished to focus on 'material presentation' issues that were frankly minor and irrelevant. I've been in court frequently (part of my profession) and was appalled by the lack of consideration and blatantly poor standard."

"It was a disgrace and a travesty of justice. We invested a huge amount of time in making a written submission prior to the hearing, as per NCAT guidelines, but when we arrived, the official in charge had not even seen it. He then claimed that this was par for the course for NCAT ("what did we expect?"). He did have the landlord's submission, however, which he used to cast doubt on our case, and proceeded to make us "negotiate" with the landlord."

"The tribunal member nearly missed hearing our case. It was as if we were unimportant."

"Yes. The Member was rude. Did not allow an opportunity to go through the full case. As a result the Order passed was unfair."

How did the process of applying and attending the tribunal generally compare to your expectations?

very intimidating even though I prepared very well. Was spoken at with legalise that I couldn't respond to. Was misrepresented by the estate agent and also didn't have space to actually speak and articulate what I was arguing and why.

Downright disappointed to the bias shown by the Tribunal towards legal representation for the respondent. NCAT members should be made aware of their own policy regarding conciliation guidelines and assist parties to come to an agreement especially when up against a solicitor and where an operator has always been represented and never held to account for never adhering to the RLLC Act in any way. Order's are made and completely disregarded even when ordered to pay the applicant.

Terrible. Arduous process, their online platform is very buggy and broken, had no option to attach supporting documents, an expensive fee to lodge, and unclear expectations set regarding information needed (the tribunal person asked a bunch of things that weren't mentioned online and also that are hard to attain, such as info on the age of the house etc).

The whole process from preparing for the hearing and understanding our rights as tenants was very stressful. A lot of preparation went into writing our report to submit prior to hearing. I didn't like the fact that we had two separate representatives of the tribunal residing over our case. We had a preliminary hearing to see if we could come to a compromise with the agent over wear and tear items in the case but the agent refused to work with us. In Our preliminary hearing was conducted with understanding of our position as renters by the tribunal representative but the actual hearing conducted on another day was conducted by a different representative which I felt didn't make me feel confident enough to speak up for myself and my case.

Another point, it seems like the representative didn't even read our report that we submitted because he was asking us why we were there it seemed like he didn't know the particulars of a case. So I'm left wandering why did we have submit a report prior to the hearing.

Tenant advocates and their clients have consistently reported concerns about the behaviour and conduct of some Members of the Tribunal. They report Members who behave in a rude and impatient way towards the parties, often experienced by parties or advocates as intemperate comments and obvious exasperation from the Member.

The 'NCAT Member Code of Conduct' (the Code) sets out the standards expected of Tribunal Members when performing their statutory functions and provides "information by reference to which to assess Members' conduct". Paragraphs 16 - 18 refer to "Respect for persons" and require Members to conduct proceedings in a manner that is patient, courteous and respectful of all participants.

In our view, the behaviour and conduct of some Members of the Tribunal does not meet the standards required under the Code. Tenant advocates across the TAAP network speak with many hundreds of tenants who have appeared in Tribunal proceedings and they themselves appear as representatives in Tribunal hearings. Concerns about the way in which a Member conducted themselves in a hearing is a recurring theme of advocates' experiences and discussions with their clients.

It is of particular concern in those matters involving culturally and linguistically diverse (CALD) renters who already may experience difficulties understanding and engaging with the Tribunal processes, and for renters experiencing domestic violence who can find the Tribunal processes to be re-traumatising. Advocates report insensitivity and sometimes poor understanding of the impacts and circumstances of domestic violence by Tribunal Members, reflected in their behaviour towards parties and sometimes in decisions made. ATAAS advocates report Tribunal Members can demonstrate poor awareness and cultural understanding when hearing matters for Aboriginal renters. This is especially in relation to Members' understanding of the complex dynamics of communities and families and how this impacts on sustaining tenancies, as well as how this may impact Aboriginal advocates providing advocacy and advice support at Tribunal.

The concerns above are distinct from advocate and client views about the legal result of the proceedings. Both advocates and clients have felt that they were not listened to, that the Member did not speak to them in a respectful manner and that the hearing was conducted in an atmosphere of impatience even when the result of the hearing was favourable to them.

We have also received feedback from renters and advocates that the behaviour of some Members is biased, in a way that can directly impact proceedings. Some examples shared with us include:

- routinely providing landlords or their agents more time to talk and present evidence during a hearing,
- providing advice to landlords regarding the law during or immediately following a hearing, including advice about how to evict the renter,
- inappropriately discouraging renters from continuing with hearing proceedings, warning renters in a heavy handed manner of the time required and inappropriately threatening costs.

The *NCAT Act Statutory Review Report* (the Review) discussed concerns about the conduct of Members that had been raised in submissions to the Review. Whilst it acknowledged the importance of Members' conducting proceedings in a patient and respectful manner, it focussed on the number of formal complaints made against Members as the metric to assess the extent of the problem and encouraged parties to use the complaints process to raise their concerns. Although the number of formal complaints made against Members is a relevant statistic, reliance on that data alone obscures the barriers that parties and advocates face in making complaints against Members. Parties may not make complaints about Member conduct because:

- They may not be aware that they can make a complaint or be aware of the distinction between being able to complain about a Member's conduct and appealing the outcome of the hearing on legal grounds.
- They may not know that a Member's conduct is an issue about which they can raise concerns. As most parties are not repeat users of the Tribunal, they may perceive their experience of the Tribunal as 'normal' or just the way things are done.
- Tribunal Members are figures of authority and parties may be reluctant to be perceived as challenging that authority by making a complaint.

Tenant advocates may not make complaints because they are constrained by their obligations to act in their client's best interests and on the client's instructions. A tenant's best interests may not be served by an advocate potentially damaging their relationship with a Member that they will likely have to appear before again and a complaint can only be made if the client instructs an advocate to do so.

In the experience of advocates, where a complaint has been made they do not always receive an acknowledgement of the complaint, or subsequent communication to indicate how the complaint is being handled, outcomes of the complaint and the reasons for this. An effective complaint handling process should include:

- initial acknowledgement of complaint
- a sharing of anticipated timeframes and next steps, and
- final outcome of the complaint, any recommendations or actions taken, reasoning for the decision, and
- any relevant options for further review.

This would help improve transparency, and ensure greater confidence in the complaints process.

As the Code of Code notes, the Tribunal is a workplace and every person in that workplace, including parties and representatives in proceedings, should be safe and secure. This view of the Tribunal as a workplace also suggests that it is insufficient for the Tribunal to rely on complaints being made by users as a means of ensuring safety and respect. The Tribunal has an active obligation to make sure that its workplace is safe and should take measures to ensure that Members are complying with the Code.

The Tribunal should consider introducing an independent and external process of audit and review. This would complement measures such as regular training and anonymous surveys of user experiences. Such a model could, for example, include a process of peer review, alongside informal and unannounced audits of Tribunal hearings. Audits would be undertaken with the aim of:

- assessing the everyday experience of parties at Tribunal
- monitoring alignment of behaviour and practice with the Member Codes of Conduct;
- highlighting any areas in which improvements can be made;
- providing general feedback on Tribunal process and practice.

Members should be required to attend and regularly refresh cultural competency training that covers Aboriginal-specific issues, the nature and dynamics of domestic violence, and training on trauma-informed practice. Training should also address impartiality and respectful conduct. This would help ensure sensitivity and a standardised approach across cases.

As the 2021 statutory review report noted, the manner in which a Member conducts a hearing will shape not only the parties' experience of the Tribunal processes but their perception of whether the proceedings have been fair and just. Conduct by Members that does not meet the standards of the Code undermines the Tribunal's guiding principle of ensuring the just, quick and cheap resolution of disputes and the public's confidence in the administration of justice.

Recommendations

- Make the NCAT Member Code of Conduct easily accessible to all participants to enhance accountability.
- Implement an independent and external process of audit and review of Tribunal hearings.
- Ensure the NCAT complaint handling process requires appropriate communication with complainants.
- Implement or improve current cultural competency training for Members, that covers Aboriginal-specific issues, the nature and dynamics of domestic violence, and training on trauma-informed practice.
- Appoint Aboriginal Members and Conciliators with relevant cultural backgrounds to enhance understanding and support for Aboriginal renters.

Adequate access to advice and advocacy supports

Were there any barriers or challenges to attending the hearing?

"Landlord funded by government (Community Housing Provider), represented by several staff and had own internal legal department. So tenants should at least be able to access government funded representation, to assist in preparing the case, if not to provide support and representation during the hearings. "

"Local TAAS service to offer community education sessions as most tenants do know and don't have the confidence and knowledge to initiate NCAT proceedings."

"I had Tenants Advocacy help me in the lead up but not at the Hearing. "

"I couldnt have done it without the support from the Tenancy Union.

Seriously, I was so confused about my rights and the process, but the staff at the tenancy union were so patient with my questions and so clear in explaining the process, as well as providing amazing resources to help us. I am eternally grateful to the Tenancy union."

Resourcing of Tenants' Advice and Advocacy at Tribunal

Tenants' Advice and Advocacy Services (TAAS) are essential to the Tribunal system, providing vital support to renters, boarders and lodgers and residents in Residential Land Lease Communities. In 2022/2023, 38,892 applications were made for matters relating to residential tenancies at the NSW Civil and Administrative Tribunal (the Tribunal). Most renters facing the Tribunal would have missed out on crucial information and advice.

TAAS assisted approximately 39,000 renters in 2023/2024. Advocacy work on behalf of renters includes representing the tenant at the Tribunal or other dispute resolutions, or commonly in negotiations intended to avoid formal dispute resolution. More than 4,200 cases of assistance were dedicated directly to this purpose.

Advocates use their detailed experience to help renters understand the real-world implications of their cases and negotiate solutions, often resolving issues before they reach the Tribunal.

Over half of all applications to the Tribunal in 2022/23 were seeking eviction (19,846 applications). 68% of landlord applications relating to tenancies in the private rental market and 66% of applications made by social housing landlords were for eviction. Previous research undertaken by the Tenants' Union has demonstrated the significant impact when advocates are available to support renters including improved success at the conciliation stage, and prevention of eviction. Our findings indicated that where support was provided by an advocate at Tribunal in the period 2023/2024:

- **Conciliation Success:** Advocates resolved 50% of cases they supported at the conciliation stage, avoiding the need for a full hearing.

- **Eviction Prevention**: Advocates prevented eviction or homelessness in 55% of eviction cases, which made up 40% of their caseload. For Aboriginal or Torres Strait Islander clients, eviction was prevented in 65% of cases.

- **Duty Advocacy:** In 45% of cases, advocates provided duty advocacy without prior client interaction. Despite the complexity and higher conflict (e.g., 50% were eviction cases), advocates resolved 40% of these at conciliation.

TAAS advocates improve fairness and efficiency in the Tribunal and broader conflict resolution systems while delivering significant savings to the Tribunal and Government. This is particularly the case where duty advocacy services can be provided by TAAS. There is currently no dedicated funding for duty advocacy, forcing services to divert resources from phone advice and casework to meet demand. This is particularly relevant at the Aboriginal list where ATAAS services, Members and users report the value of ATAAS and TAAS advocates being present.

We note recent changes in New York and other American cities where tenants have a right to be represented in all eviction proceedings with significant success in ensuring the just resolution of these matters.[1] This represents another avenue should high rates of eviction applications continue to be a feature of the experience of the Tribunal.

Recommendations

- NCAT highlight to the NSW Government the significant value the presence of TAAS provides at the Tribunal. The advice and advocacy support offered by TAAS not only benefits renters and improves fairness overall, but delivers significant time and cost savings for the Tribunal .
- Additionally, NCAT should specifically acknowledge the value of the duty advocacy service provided by TAAS, and recommend the Government allocate dedicated funding to support this service. This should include support at the Aboriginal Tenancy List.

Appropriate referral to free tenancy advice and advocacy support

NCAT should review its material relating to tenancy to ensure the availability of TAAS is included wherever relevant, including notice of hearings and orders. We particularly recommend this, and the Legal Aid Appeals Service details be placed on appeal forms.

We encourage Members to provide, or refer to Tribunal registry staff to provide contact information for local TAAS to renters who they determine require assistance and advice.

Recommendation

- NCAT should review current communications to ensure residential parties are aware of the availability and role of the Tenants' Advice and Advocacy Services.

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[1]Office of Civil Justice, 2018, "Universal Access to Legal Services" Annual reports available at: https://www1.nyc.gov/site/hra/help/legal-assistance.page and information available at https://www.nyc.gov/site/hra/help/legal-services-for-tenants.page

Enforcement of orders

Reflections on enforcement

It went very well the Tribunal could see that the real estate agent was making false claims. Award in my favour & told the agent to pay my court costs. The real estate agent never ended up paying the court costs though.

Was in my favour for compensation but owner refused to pay. He had stated he would repair damaged kitchen floor tiles that had leaked for 18 months

This landlord does it to all his renters. There should be a blacklist to punish landlords that purposefully wast the tribunals time with 'benefit of doubt' awarded to tenants first up, and with damages payable by the landlord for wasting time.

NCAT technically has no legal power to enforce the law. This is ridiculous. The victim 'me 'actually need to pay for local court for $100 to chase back the bond money owed. Second, the law doesn't jail the landlord who breaks the law. Which means that everyone can do such illegal acts because they think they can get away with it or just a small amount of fine. They earns heaps and pay a little punishment as investment cost. How effective the legal system?

NCAT does not enforce orders and they water down the legislation in favor of the legally represented respondent. The average person with no legal background is wasting their time and money on applications.

Strengthening enforcement by NCAT

Tenants face challenges with NCAT's enforcement of orders, particularly when landlords and agents fail to comply. A common reason renters hesitate to apply to NCAT is the lack of effective enforcement for many behavioural or work orders.

Renters feel they have little recourse if NCAT orders are not honoured. For example, a landlord ordered to complete repairs by the Tribunal often faces little to no consequences for failing to comply. In contrast, renters who breach orders frequently face eviction. While renters may apply for economic loss claims to increase pressure on the landlord to undertake work—resulting in enforceable monetary orders—many issues, such as repair delays or breaches of privacy and access, are more stressful or inconvenient than financially costly.

Currently, NCAT can issue penalties under sections 71 and 73 of the *Civil and Administrative Tribunal Act* in limited circumstances. Greater use of these provisions, particularly section 71, is warranted when it becomes clear that a party has misled the Tribunal about their intent to comply with orders.

Recommendation:

- NCAT should more actively use its enforcement powers under the *Civil and Administrative Tribunal Act*, particularly section 71, to address cases where parties make misleading statements to undermine Tribunal orders.

Enforcement Beyond the Civil and Administrative Tribunal Act

A potential way to improve enforcement is by combining the resources of NCAT and Fair Trading. We are aware predecessor Tribunals used their discretion more frequently to refer matters to the Secretary of Fair Trading for investigation of potential breach. A similar practice could be reintroduced.

Based on evidence and complaints raised during a hearing, a Tribunal Member could:

- Refer to Fair Trading NSW for possible investigation of potential breaches of the relevant Act.
- Refer to Fair Trading NSW suggesting they may wish to issue a show cause notice or equivalent.
- Refer to Fair Trading NSW suggesting they may wish to issue the relevant penalty notice based on evidence presented at the Tribunal.

We recommend that consideration be given to establishing a mandatory reporting system for NCAT to refer cases of landlord or agent non-compliance to Fair Trading (FT), for cases where the breach meets an appropriately determined 'significance threshold'.

Recommendation

- Establish a formal referral protocol for NCAT to refer matters to Fair Trading for investigation and possible enforcement action, including penalties, where the breach meets a significance threshold.

Publication of decisions

Few decisions related to tenancy, social housing, and residential communities are published by the NCAT Consumer and Commercial Division. Under NCAT Policy 2, the Division explains it does not routinely publish reasons for decisions, citing the high volume of cases. Instead, only a selection deemed "significant" or "representative" is published, as determined by the Division Head. However, the criteria for these selections are unclear, and requests for publishing specific decisions are often declined without adequate explanation.

In relation to matters heard by the NCAT Appeal Panel the policy states it is the usual practice of the Panel is to publish written reasons for decision, unless the presiding Member has made an order prohibiting or restricting publication.

Publishing decisions is essential for ensuring transparency, accountability, and public confidence in the fairness and consistency of the Tribunal's processes. This holds not only for decisions of the Appeal Panel, but also those of the Consumer and Commercial Division.

Since the establishment of NCAT in 2014 there has been a clear move away from publishing decisions about tenancy and social housing matters in the Consumer and Commercial Division. Only a very small fraction of matters heard have a decision with reasons published. Significantly less than 1% of decisions relating to tenancy matters in the Consumer and Commercial Division are regularly published (ranging from 0.02% - 0.11%, average: 0.06% since the Tribunal's establishment in 2014). The Appeal Panel has published slightly more than a quarter of decisions relating to tenancy and social housing matters (ranging from 22.0% - 34.6%, average: 28.5% since 2016 when information was first made available regarding numbers of tenancy and social housing matters being heard by the Panel).

In relation to publishing decisions about matters relating to residential communities the Tribunal has only been marginally more effective. The number of decisions published by the Consumer and Commercial Division has been again generally less than or just over 1% of all decisions (ranging from 0.31% to 1.83%, average: 0.65%). The Appeal Panel has published around two thirds of decisions about residential communities (ranging from 54% - 100%, average: 68%).

The next page displays published reasons for decisions and matters heard on tenancy and social housing matters at NCAT, 2014 – 2024 published on NSW caselaw website and NCAT ANnual reports[2]

[2] Numbers indicate published reasons available on NSW Case Law website relating to decisions made by either the Consumer and Commercial Division of NCAT or the NCAT Appeal Panel that cite the following legislation for the financial years 2014/15 – 2023/2024: *Residential Tenancies Act 2010; Boarding Houses Act 2012; Boarding Houses; Landlord and Tenant Act 1899 Regulation 2013; and Residential (Land Lease) Communities Act 2013.*

	CONSUMER & COMMERCIAL DIVISION		APPEAL PANEL	
	Tenancy, social housing, boarding houses	**Residential Land Lease Communities**	**Tenancy, social housing, boarding houses**	**Residential Land Lease Communities**
Decision published				
2014/15	37	7	56	2
2015/16	34	3	77	5
2016/17	21	3	66	3
2017/18	12	6	52	6
2018/19	7	8	52	3
2019/20	14	1	44	9
2020/21	12	1	97	5
2021/22	42	3	112	8
2022/23	50	5	87	7
2023/24	30	5	50	3
Matters heard				
2014/15*	49,309	2,227	Not available	Not available
2015/16*	44,008	644	Not available	Not available
2016/17*	42,552	240	191	1
2017/18	42,134	397	197	7
2018/19	42,985	696	236	8
2019/20	43,394	888	183	14
2020/21	41,404	312	337	9
2021/22	41,630	456	361	8
2022/23	44,759	273	284	13
2023/24	40,448	306	*** Not yet available	*** Not yet available

*Numbers are tenancy and social housing applications lodged in Division, subsequent figures (from 2017/2018) refer to tenancy and social housing matters finalised through the Division.

Even without the restrictions of a binding decision from a superior court, being able to see and argue for the applicability of a particular line of reasoning will create more transparent decision-making processes and encourage quality decisions. This applies not only to decisions made by the Appeal Panel relating to tenancy, social housing matters, and residential communities, but also those made by the general Consumer and Commercial Division. The Appeal Panel has taken on a clear function of leading the decision-making and it is appropriate that this be preserved, but many decisions are not subject to appeal. Further, Appeal Panel decisions are more illuminating of appeal law than substantive tenancy law.

A baseline of transparency around publication is required to enhance accountability. We believe the current approach taken by NCAT in relation to the Consumer and Commercial Division is not reaching an appropriate baseline. We suggest reconsideration of the approach by NCAT's Consumer and Commercial Division is required, and recommend this new approach be one in which there is a presumption in favour of publication of reasons for decisions. Failing this, we recommend that NCAT's Consumer and Commercial Division be required to publish an appropriately determined minimum percentage of reasons for decisions each year.

Staged implementation of a minimum threshold of publication

Towards this, we recommend all decisions for which there is a written statement of reasons should be published and made available in a timely manner. This policy change could be implemented immediately and relatively easily. However, given the clearly insufficient number of decisions with reasons currently being published, it is likely that even with implementation of such a change the percentage of decisions being published would fall below what we consider would be an appropriate 'minimum threshold'.

We understand that implementation of a requirement for publication of a minimum percentage of reasons for decisions may need to be staged and be accompanied by additional resourcing of the Consumer and Commercial Division. We would suggest requiring a starting baseline of 5% of decisions in the NCAT Consumer and Commercial Division regarding tenancy, social housing matters, and residential communities, with this threshold rising incrementally each year to 25%, to be then reviewed and assessed again as to whether this is striking the right balance.

Further consideration is also required in relation to how the Division might ensure they meet an appropriate 'minimum threshold'. Standardised, wider, consistent and more transparent policies of decision release should be published as a guide for the public on how the Division Head has determined why certain decisions with reasons are being published (i.e. beyond simply the current 'significant', or 'representative'). In addition to the Division meeting a minimum threshold for publication, each Tribunal Member should be required to also publish a minimum percentage of reasons for decisions.

We understand limited resourcing restrictions may be currently restricting the capacity of the Tribunal to publish reasons for all decisions, particularly those relating to tenancy and social housing matters heard in the Consumer and Commercial Division. We acknowledge the Tribunal may require additional funding to meet the threshold standards we recommend. However, we would strongly suggest cost should not override and degrade the access, transparency and accountability provided by publication of decisions with reasons.

We believe the current statutory prohibitions set out in Civil and Administrative Tribunal Act (specifically, at Division 6: Information disclosure, sections 64 – 70) are appropriate, and our recommendations above do not or should not imply any weakening of the protections and discretion in relation to restrictions outlined in the Act. Where it may usefully facilitate the publication of further reasons for decisions, we would support further protections or discretion allowing anonymisation or de-identification of decisions to protect vulnerable people involved in Tribunal proceedings.

Recommendations

- Change the approach taken in the current NCAT policy on publishing reasons for decisions to:
    - require publication of all decisions for which there are written reasons. These should be made available in a timely manner.
    - introduce a presumption in favour of publication of reasons for decisions in all residential tenancy matters at the NCAT's Consumer and Commercial Division and the Appeal Panel.
- Failing implementation of the above, require NCAT's Consumer and Commercial Division to publish an appropriate 'minimum percentage of reasons for decisions' each year.
- Publish standardised, wider, consistent and more transparent policies of decision release as a guide for the public on how the Division Head of NCAT's Consumer and Commercial Division will determine why certain decisions with reasons are being published.

Data collection

NCAT Policy 3 Provision of statistical data sets out the circumstances in which statistical data might be provided to external bodies and individuals and establishes procedures for dealing with requests for the supply of such data.

The amount of data relating to residential matters published by NCAT has significantly reduced relative to its predecessor tribunal (the Consumer, Trader and Tenancy Tribunal). Currently basic statistical data on the Tribunal's workload and performance is made available in the NCAT Annual Reports which are tabled in Parliament and published on their website. Data is also made available to advocates and others within the TAAP network via NCAT Quarterly Management Reports distributed to members of NCAT Consultative Committees.

We have appreciated that the Tribunal has been open to additional requests for data concerning the applications made. We have used this data to produce the NCAT Snapshot, which is an analysis of who is using the Tribunal and why. From this analysis, we can see the different rates of applications between different housing providers, the ratios of tenant-initiated vs landlord-initiated applications, and monitor changes in the types of applications being made over time.

In addition to the above, we have requested breakdowns of applications for terminations and repairs, broken down by postcode and applicant. We have used this data to produce the NCAT Evictions Map, which provides an analysis of which geographical areas have particularly high rates of landlord-initiated termination applications.

We have previously highlighted the limitations on statistical data currently made available regarding applications, orders, and outcomes.[3] Specifically, we identified the following gaps in data provision in the Quarterly Management Reports.

For example, the reports do not currently provide data on:

- attendance by parties at hearing
- representation of parties at hearing
- orders made (determination, negotiated outcome, dismissal, withdrawal, adjournment)
- orders sought vs orders made
- orders made with reference to data on attendance and representation of parties.

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[3] Tenants' Union of NSW (2019) *Submission: Civil and Administrative Tribunal Act 2013 Statutory Review* accessed at https://www.tenants.org.au/reports/submission-civil-and-administrative-tribunal-act-2013-statutory-review on 11th December 2024
Tenants' Union of NSW (2021) *Submission: Law Reform Commission's Open Justice Review – Court and tribunal information* accessed at https://www.tenants.org.au/reports/submission-open-justice-review on 11th December 2024

While the level of detail indicated above may not necessarily be best provided through Quarterly Management Reports or open data, we believe annual reporting of such data, at a minimum, should be made available. While we acknowledge the possibility of this data – in particular orders made - misleading participants, we believe the benefits outweigh this concern. It will allow better planning, education for participants and, because we believe the rate of conciliated outcomes to be relatively high where both parties attend, this may encourage participants to negotiate further. Providing regular and more detailed data on applications and outcomes allows external stakeholders to better plan the allocation of resources and provide best possible advice to parties.

A number of changes have arisen in the data presented in the NCAT quarterly management report since the digitisation changes around October 2023. We have lost crucial detail from the social housing list. Prior to October 2023 the social housing list provided application breakdowns by the following applicants

- Housing NSW, Community Housing, Aboriginal Housing, Tenant, Occupant, Other party

This has now become:

- Landlord, Tenant, Other

We can conclude that the applicant types: Housing NSW, Community Housing and Aboriginal Housing have been merged into Landlord. Historically, community and aboriginal housing providers have used the Tribunal at a far greater rate than Housing NSW. Due to this change, we are no longer able to monitor these different use rates.

Regarding NCAT application types, the list has lost crucial detail. For example, previously, the social housing list had 24 detailed and specific application types, such as:

- Abandonment of residential premises
- Goods left in residential premises
- Mortgagee repossession
- Security and safety
- Termination - breach (s 87)
- Termination - non-payment of rent
- Termination - 105E

This has now been reduced to the following far more generic 10 application types:

- Bonds
- General orders
- Rent and other payments
- Repairs
- Termination non-payment of rent

- Termination other
- Other
- Renewal
- Reinstatement
- Set aside/Vary decision

The loss of detail makes tracking the prevalence of different legal issues difficult, especially since there has been no information provided on how the old application types map to the new, simplified set.

We are aware the Law and Justice Foundation is undertaking a similar analysis for the purposes of this review.

The current limitations on data collection and reporting hampers analysis and debate in areas from homelessness prevention, social housing policy and practice, the effectiveness of current regulation of the private rental market, and appropriate funding of advice and advocacy services.

The current limitations prevent us from being able to assess the effectiveness of specific laws and processes, and to identify the need for law reform and where more support may be needed for NCAT users. This is especially important for minority groups that tend to be disproportionately impacted by specific laws and face extra challenges accessing help. Therefore, the addition of data on demographics particularly on Aboriginal and Torres Strait Islander people's engagement with the Tribunal would be useful to assess the impact of laws and service delivery on this group and areas for reform.

The lack of outcomes and decisions reporting also diminishes advocates' capacity to give clients good guidance as to likely outcomes and recommend courses of action. A key strength of TAAS is the advice and information about the Tribunal that they provide tenants to assist them in weighing up the various factors impacting upon their decisions. Legal analysis of the case, likely outcomes both legal and interpersonal and financial are all relevant to decisions. Ensuring tenants are well informed about the Tribunal process and previous outcomes results in a high rate of negotiated outcomes which are less costly for all parties. This is only possible where advocates have access to accurate and timely data on the likely range of outcomes and past experiences.

Recommendations

- That the Quarterly Management Reports currently provided to the Consultative Committees by the Consumer and Commercial Division of NCAT be made accessible to the public as an immediate start.
- That deidentified attendance, representation and orders made by the Consumer and Commercial Division of NCAT also be published at least with annual release of this level of data.
- That the data management software of NCAT be upgraded, with additional investment if needed, in order to facilitate greater data collection and analysis.

The Aboriginal Tenancy List

Adapting to suit the needs of Aboriginal and Torres Strait Islander people

The Aboriginal Tenancy List of the Consumer and Commercial Division is available for renters and landlords who identify as Aboriginal and/or Torres Strait Islander. The Aboriginal Tenancy List provides an opportunity for Aboriginal renters to connect with other support services and advocates from Aboriginal Tenants' Advice and Advocacy Services (ATAAS), and allows extra time for conciliation and hearings with dedicated Members who have experience specifically of the list. The establishment of the List is a good example of how our legal system can adapt to better accommodate cultural and socio-economic specific needs.

There are a number of features of the list which have been noted as overwhelmingly positive, including:

- the beginning of each session of the list with an Acknowledgment of Country
- greater flexibility and patience exhibited by Tribunal Members, who explain the hearing process and throughout the hearings check in to ensure parties are understanding proceedings
- catering to Aboriginal and Torres Strait Islander ways of being, with a more informal hearing room allocated which is able to accommodate extended family and children.
- a Tribunal Conciliator is made available at the List and more time is allowed for the conciliation process.
- the availability of wrap-around support services for the renters attending, including tenant advocates, a financial counsellor, and staff from Centrelink.

Advocates have reported very positive outcomes from the List including a significant number of renters at the List being able to sustain their tenancies, establish realistic payment plans, and successfully get orders for repairs. They have also heard feedback from renters that the experience at the List is less overwhelming, more of a 'good' or positive experience.

Given these positive outcomes and user feedback, the Tribunal should give serious consideration to how these features - or elements of them such as a variety of support services and supported engagement particularly in eviction matters - may be adapted and introduced across the whole Tribunal.

An interview with an Aboriginal Tenant Advocate about their experience, December 2024

Q: From your perspective, what's different about the experience of the Aboriginal Tenancy List?

The experience for renters is so different than the mainstream NCAT list. First, the Members have shown they are more sensitive to Aboriginal cultural and family dynamics. They also have

more understanding that many of the tenants may face issues in terms of poor literacy or domestic violence, or have experienced the stolen generation or a family member's death in custody. They stick to the Act, but have a more sympathetic ear. Additionally, the Members ask the landlords if the tenant has been referred to a Aboriginal Service to assist them engage with support and advocacy.

The Members have really embraced the listing, and where there are particularly complex matters that come in, they take time to unpack what the issue is and how the Tribunal will address this for the tenant, and actually both parties.

Having the option of a virtual hearing for the list is also really important for many tenants who can't make it into the Tribunal because of transport. That's about distance, but also about the transport costs - the train or bus fare to get in.

What is really important and reassuring for tenants is the support that is available on the day. Many of the tenants are in a really hard -sometimes crisis- situation. The tenant can access support at the listing, and it really makes a difference. They are actually being able to save and then sustain their tenancy through the wrap-around support and advocates.

When GSATS are at the listing, a GSATS advocate will go and greet the tenant when they arrive. Advocates help the tenant navigate the process. They tell them where they have to go, then we'll engage them with Centrelink or Salvos or whoever they need to see.

Centrelink is there to give the info on the day, and they can give it there and then. Welfare Rights [Centre] is there as well, and so if there is a dispute or problem for the tenant with Centrelink, they are able to talk to them, give advice about a complex situation. Salvos assists a lot with money care reports. Every one of those reports done I believe has saved a tenancy, they help the tenant to get a realistic payment plan in arrears cases.

Q: So, this more hands-on and easy access approach is helping tenants navigate their cases with less fear and more confidence?

Yes. As an example. Salvos and the assistance they are providing with the Money Care reports. The tenants tell us that they are actually very reluctant to talk to a financial counsellor or advisor, especially in the past because it is very foreign. For us blackfellas seeing a financial counsellor that is not something we would generally feel comfortable to do. But once the tenant does it at the listing - it is life changing. First it helps set out the realistic payment plan, but it also helps them manage their finances better in the long term.

The way it is done makes it easy to understand - using graphs and visuals. So after the counsellor goes through every bit of costs and also their income, the tenant sees a colour that is dominating their finances and thinks, "Why am I spending so much money on this?". They understand their spending better, and they can set up a realistic repayment plan.

Q: And does conciliation look different at the Aboriginal Tenancy List in your experience?

Before or at mainstream NCAT the tenants are often walking into conciliation on the day with only what's in front of them, they don't have all the required evidence or information they might need. They are then having to negotiate - and later at NCAT it might be finalising orders and

SPOs - without that critical information. But because there is an advocate there to help the tenant knows better what is needed, and then services there are able to assist with evidence and information on the day and it's a really different outcome.

When the landlord or other party arrives we'll actually go and greet them too and let them know we are keen to come up with a solution around the issue. Sometimes an informal talk about it starts at that point, so that we are ready to go when the conciliator arrives.

Q: What difference does it make having a tenant advocate available?

The GSATS advocates in some ways are acting as interpreters. We talk to them in a black way, and use black language. It means we are breaking down formal language into everyday terms that tenants can easily understand and helping them understand the process. A lot of Aboriginal tenants have real caution with engaging with mainstream services, especially because of previous bad experience.

"We skip to Aboriginal listing because we know we'll make a difference on the day."

Some of the tenants will go to mainstream NCAT but just give up, do what the other party wants because they just don't know what their rights are or how to be confident asserting them. Many tenants who we have supported tell us they would never have gone to NCAT if there wasn't an Aboriginal Tenancy List.

The list is less clinical, more culturally safe. Having the List and having a tenant advocate available - it really helps to reduce the fear, so they'll be present, they'll attend. And that often means we're helping to save their housing.

Challenges to delivering and expanding the Aboriginal Tenancy List

The Aboriginal Tenancy List is currently centralised in terms of the location of face-to-face hearings and the provision of support services, which are generally metro-focussed supports. Face to face hearings are available for everyone at the Sydney CBD registry, and support services are available in person. Where an Aboriginal renter is located regionally or remotely, the hearing is held online and they are required to attend online. This can limit the effectiveness of the advocacy and support, particularly in remote and regional areas.

The Aboriginal List very quickly expanded beyond the idea of what was initially proposed as a pilot phase in Penrith, and the location was moved to the Sydney CBD. This was a decision made independently by the Tribunal, without prior and engaged consultation with appropriate advocacy and support services to ensure their availability and ongoing capacity to provide support - an essential feature of the success of the List.

This has created significant challenges forATAAS in providing effective support. ATAAS prioritise face-to-face advocacy support where possible. This is to acknowledge that online services are often not engaged with by Aboriginal renters who need help and the challenges to provide support in the online context are significant. Regional ATAAS have nonetheless also sought to ensure tenant advocates are available, and this is presenting a significant resource challenge for the services.

The caseload of the Aboriginal Tenancy List has also significantly increased, with two concurrent hearing rooms now operating on each List day. The ATAAS (and generalist TAAS) are not funded to manage the increased demand but despite this have continued to support renters at the List. The increase in caseload has also restricted the number of cases in which supports such as financial counsellors can assist without adjournment. This can have material impacts on the outcomes of the case, for instance allowing disputed arrears to increase.

There needs to be greater consultation with service providers prior to a change in List days and practice to ensure services have capacity, and where they do allow them appropriate lead in time to allocate and better manage their time and resources. This could be facilitated by regular, such as quarterly, meetings to discuss the operation of the List and consideration of changes by the group ahead of time. We are aware that the Aboriginal List has a reference group but membership of this group is not publicised and does not include representation from TAAS.

Serious consideration must also be given to how - or whether - barriers can be overcome for Aboriginal renters in regional and remote areas. They are currently attending the List virtually, which can limit their experience and access to many of the positive features of the List. There are a range of views amongst advocates about the best way to ensure the list delivers on its potential across the state. While virtual access can still facilitate access to the support services, clients and advocates have reported that engaging with the list virtually can be disconcerting, and not conducive to the supportive environment we know can be the experience of the Aboriginal list. Further discussion, in particular with Aboriginal people and service providers, will assist in coming to a productive way forward.

This may not necessarily be overcome by holding Aboriginal lists regionally. It is a real challenge for Aboriginal renters to travel to attend the List - and would still likely be required for most of the regional Aboriginal renters, even if in person list hearings could be run from one or two key regional registry locations. It is also worth noting that support services for Aboriginal renters who are required to travel to attend will still not be a service local to them, so may be less likely to be able to assist or be taken up by the renter.

We suggest there may be a need to slow down the expansion of the Aboriginal Tenancy List, to allow time for adjustments to resources and service delivery methods and meaningful engagement with support services, in particular ATAAS, in areas where lists may be located. We also recommend a formal evaluation of the Aboriginal List, to document the positive features and outcomes at the list, and focus on addressing challenges including how going forward the list can better support regional needs.

Collection and sharing of data regarding the Aboriginal Tenancy List

The collection and publication of data on the outcomes of the Aboriginal Tenancy List would provide valuable insights into the resources needed for effective service delivery. If it is not possible to publish, the sharing of data with engaged support services would be useful. In addition to assisting services with appropriate resource allocation, this would help to identify systemic issues that contribute to tenancy disputes, potentially preventing otherwise viable tenancies from ending.

Recommendations

- Conduct a formal evaluation of the Aboriginal List, engaging ATAAS and other key service providers. Focus on targeted consultations with a broad but specific range of stakeholders to gather meaningful insights on positive outcomes, overall effectiveness and ongoing resourcing needs.
- The Tribunal collect and regularly publish data in relation to the Aboriginal Tenancy List.

Role of Indigenous Liaison Officers

One proposal we consider worth further exploration is the delegation of an Indigenous Liaison Officer for the Aboriginal list at NCAT.

Designated Indigenous Liaison Officers specifically for NCAT, could be focused on tenant support, connection to services, and coordination of the Aboriginal list. If introduced we would need to ensure they are based locally to the List locations. Advocates are aware that in other courts and Tribunals where officers exist they can face challenges because of being overburdened with other duties, and are not always based locally which makes connection (with clients and services) trickier.

While our preferred model is an Indigenous Liaison Officer, there may be a useful coordinating function held within the NCAT Registry who can act as a contact point for services, clients, and coordinating practical concerns for list days, such as holidays and significant cultural days, and monitoring the case load generally.

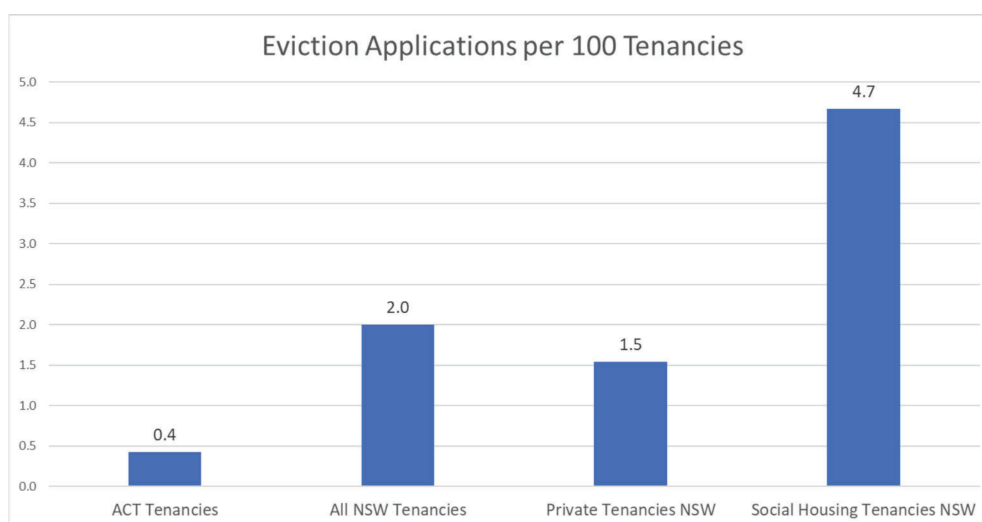
Fees

Fees for evictions

Tenancy applications are heavily subsidised. In general, we support this position in service of a low-cost jurisdiction to resolve disputes. However it is important to acknowledge that most of the cost burden of subsidy is paid by tenants through the interest earned from their bonds held in trust by the Rental Bond Board, and the portion of money held in real estate agent trust accounts that is rent. It appears inequitable that they are asked to heavily subsidise all applications – a large proportion of which are made up of landlord initiated evictions. Many of these applications are a result of the landlord's (or their agent's) failure to take adequate steps to resolve disputes before making a formal application for a hearing. All evictions can be seen as a failure to resolve a dispute.

The majority of applications to the entire Consumer and Commercial division are for rent arrears evictions. Data provided by NCAT and displayed in our NCAT Snapshot shows 40% of applications to the Residential Tenancies and Social Housing lists are recorded as rent arrears evictions.[4] Social housing providers and even private market landlords often express to advocates that the eviction is not the desired outcome – a payment plan is. However, once a person is applying to the Tribunal, there is an incentive to put as many orders as possible on the one form because it attracts only one application fee.

There appears also to be a misunderstanding about the costs of returning for possession orders if a repayment plan is not followed, and the likelihood of obtaining possession orders where not sought previously.



Source: ACAT Annual Review 2021-2022, NCAT Quarterly Management Reports (2021-22), ABS Census 2021, NSW Fair Trading

We believe the interests of all parties, and the purpose of the Tribunal, can be better served by encouraging dispute resolution which holds the continuation of the home and the relationship as the preferred outcome. Increasing the application fee specifically for rent arrears eviction matters would encourage a landlord or their agent to enter into negotiations for a repayment plan before making an application to the Tribunal for eviction. The material benefit of continuing a tenancy that can be saved is significant for

[4] https://www.tenants.org.au/reports/ncat-snapshot

all parties, including landlords and agents. There is also the very significant social benefit of avoiding a potential exit into homelessness.

In part, this high rate of applications for evictions appears to be a result of the cheap application rate. The ACT Civil and Administrative Tribunal charges a higher fee for eviction applications[5] and has a significantly lower rate of applications[6]. There is no evidence that tenants in NSW default on their rent at a higher rate than tenants in the ACT.

Increasing the application fee to reflect the seriousness of the matter would not inhibit a landlord's ability to enforce their contractual right where they deemed it appropriate and necessary. It is worth noting that NSW Civil and Administrative Tribunal costs will remain an income tax deduction for landlords and not for tenants.

To encourage dispute resolution and the continuation of viable tenancies, the Tribunal should consider lodging repayment plans from parties where eviction is not being actively sought. This should be seen as analogous to conversion of consent orders, but without the cost of putting on and attending hearings.

The repayment plan should be lodged with appropriate evidence to confirm they will be effective and appropriate orders – at minimum a copy of the tenancy agreement, and rent ledger showing an amount of rent arrears. Further consideration should also be given to how the form:

- ensures signatures are verified; and
- ensures that parties are entering into the agreement with appropriate capacity and consent to make such an agreement, particularly for parties with cognitive impairment, or who are not fluent in English.

These are issues that are live even within the hearing room. There will always be cases which need to be heard fully, or where conciliation is the most likely outcome but where physically being in the same room is a necessary condition to negotiation. This proposal is not intended to avoid the need for this type of dispute resolution, but to facilitate the fair, quick and cheap resolution of those cases where it is not.

This proposal will save all parties, and the Tribunal, significant costs. The Macarthur Real Estate Engagement Plan across 2012-2014 estimated the added direct cost to a real estate agent of seeking vacant possession over a repayment plan was $214[7] In Schedule 1 we have made some small adjustments to calculate the savings in 2019, and compare the costs for seeking a repayment plan without hearing. A real estate agent, or property manager-equivalent position in social housing providers can save significant costs under our proposal. The savings to a landlord of avoiding eviction is worth even more than this -

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[5] ACT Civil and Administrative Tribunal, 2024, "Summary of ACAT fees 2023-2024 (effective 1 July 2024)" accessed at https://www.acat.act.gov.au/__data/assets/pdf_file/0005/2517656/ACAT-fees-2024-25.pdf

[6] ACT Civil and Administrative Tribunal, 2018, "2017-18 Annual Review" accessed at https://www.acat.act.gov.au/__data/assets/pdf_file/0005/1362947/ACAT-Annual-Review-2017-18.pdf

[7] Real Estate Engagement Project, 2014 "Cost of Eviction". Accessed at http://reep.org.au/wp-content/uploads/2014/03/Cost-to-Real-Estate-Agents-of-evicting-tenants.pdf. TUNSW modifications in Schedule 1.

in our experience it is the most reliable way to recover the unpaid rent and avoid vacancies.

Recommendation:

- NCAT adopt a fee scale to reflect seriousness, and funding source, of eviction proceedings for Residential Tenancies, Social Housing and Residential Communities lists (residential lists).
- NCAT allow for the lodgement of repayment plans for rent arrears payment plans, where termination and vacant possession orders do not form part of the application form.
- NCAT prepare a form for lodgement which ensures orders are effective and appropriate in the circumstances.

Fees for residential land lease communities

Residential land lease community residents are increasingly being asked to pay for an ASIC search, regardless of whether the other party presents to the Tribunal. Ensuring the accurate identity of the other party is not a cost onus for park operators, for landlords or for other tenants. In those cases where there is a discrepancy between named applicant and appropriate party in non-parks matters, this is rectified during the hearing by amendment. The requirement of an ASIC search for residential land lease community residents has become a de facto higher application fee for this class of applicant.

This appears to us to be inequitable and a barrier to justice for residential land lease community residents who may be on income support. Their hearing fee is reduced in recognition of their limited means, but the requirement for the ASIC search increases their fee from $15 to an effective $32.

Residential land lease communities have an obligation to be registered under the *Residential (Land lease) Communities Act 2013*. Under section 19 of that Act the register is required to make public information that we believe would be adequate to ensure effective orders are issued by the Tribunal.[8] This should be the primary method used – if there are deficiencies with the register, this is a regulatory matter for discussion between relevant government departments.

In the same way a copy of a residential tenancy agreement is sufficient to identify the parties in the majority of residential tenancy applications and is presented for the first time at a hearing, a copy of a site agreement should be sufficient in the majority of residential land lease communities applications.

In situations where further evidence to the identification of the parties is required, then we appreciate the ASIC search and additional costs may be justified. In such circumstances the Tribunal should consider making access to ASIC searches available during hearings.

[8] https://www.legislation.nsw.gov.au/#/view/act/2013/97/part3/sec19

Recommendation:

- NCAT generally adopt a practice of allowing identification of parties to be carried out in a flexible manner. If a person presents to the Tribunal, can be identified as the relevant party and accepts the jurisdiction, this should be sufficient to begin proceedings.
- NCAT specifically adopt an information-sharing protocol with NSW Fair Trading to gain the operator details from the Residential Land Lease Communities register which NSW Fair Trading is required to hold and make available.
- NCAT should explore bulk-billing arrangements with ASIC and make access available in the hearing to applicants where necessary for identification purposes. This avoids any need for adjournment if a party is not properly identified before the hearing.

Fee reductions

We note that the fees guideline allows for complete fee waivers, and that applicants assisted by community legal centres are entitled to reduced fees. We recommend that this reduction be extended to applicants assisted by a Tenants' Advice and Advocacy Service. As explored in other sections of this submission, Tenants' Advice and Advocacy Services are funded by the same government and assessed for their competence and compliance with priority groups of the program. Just as applicants in receipt of a grant of legal aid or assistance from a community legal centre, applicants receiving representation from any Tenants' Advice and Advocacy Service should be entitled to reduced fees.

Recommendation:

- Reduced fees become available to applicants assisted by a service funded under the Tenants' Advice and Advocacy Program.

Appendix

The NCAT Experience Survey, aimed at tenants, was designed to gather insights into their experiences at NCAT (New South Wales Civil and Administrative Tribunal). It was distributed via email newsletters, and social media platforms and ran over a one week period. The response group was therefore self-selecting and present a range of views of the Tribunal. The survey included a mix of question formats, such as Likert scale, multiple-choice, demographic, and open-ended questions, covering various aspects of attending a hearing or conciliation at the Tribunal. In total, we received 215 responses, providing valuable data for analysis. We intend to develop the responses into a fuller report in 2025, but present this initial dataset for the purpose of this submission and a selection of quotes throughout the submission.

Demographics:

How old were you at the time of your Tribunal hearing?	Responses	Percentage
Null	1	0.5%
18-30	34	15.8%
30-40	31	14.4%
40-50	52	24.2%
50-60	39	18.1%
Over 60	58	27.0%

What is your gender identity?	Responses	Percentage
Female	124	57.7%
Male	81	37.7%
I do not identify as either male or female	5	2.3%
Not Stated	5	2.3%

What is your estimated annual household income?	Responses	Percentage
Not Stated	6	2.8%
Less than $41,600	91	42.3%
$41,600 - $77,999	44	20.5%
$78,000 - $129,999	47	21.9%
$130,000 - $181,999	15	7.0%
More than $181,999	12	5.6%

What proportion of your weekly income (after tax) do you spend on rent costs?	Responses	Percentage
Not Stated	12	5.6%
Up to 20%	16	7.4%
20%-30%	61	28.4%
30%-50%	78	36.3%
Over 50%	48	22.3%

Do you have a disability?	Responses	Percentage
Not Stated	3	1.4%
No	123	57.2%
Yes	89	41.4%

Results

How confident do you feel about your understanding of the legal reasons for the outcome or decision made at NCAT?	3.5
If your case was heard by a Tribunal Member, how confident are you that the Tribunal Member understood your case - your story.	3.1
How confident did you feel generally in participating in the hearing/NCAT process?	3.0
How comfortable do you feel communicating in English at NCAT?	4.8
Responses	215

Who represented you at NCAT? Other may include e.g. Legal Aid solicitor, private solicitor, friend or family, or other support	N/A	Other Represen-tation	Self Represen-tation	Tenant Advocate
How confident do you feel about your understanding of the legal reasons for the outcome or decision made at NCAT?	3.5	3.1	3.5	3.4
If your case was heard by a Tribunal Member, how confident are you that the Tribunal Member understood your case - your story.	3.0	1.8	3.1	4.0
How confident did you feel generally in participating in the hearing/NCAT process?	3.4	2.5	3.0	3.2

How comfortable do you feel communicating in English at NCAT?	4.7	4.7	4.8	4.4
Responses	19	11	169	16

If you attended the tribunal, were you given the opportunity to negotiate or 'conciliate' the dispute?	N/A	No	Yes
How confident do you feel about your understanding of the legal reasons for the outcome or decision made at NCAT?	3.4	2.9	3.7
If your case was heard by a Tribunal Member, how confident are you that the Tribunal Member understood your case - your story.	2.3	2.2	3.4
How confident did you feel generally in participating in the hearing/NCAT process?	2.9	2.8	3.1
How comfortable do you feel communicating in English at NCAT?	4.6	4.8	4.7
Responses	16	50	149

Did you have assistance from a staff member of the Tribunal (such as a member or a dedicated conciliator) during the negotiation or conciliation session? (not including your own representative, or duty advocates)	N/A	No	Yes
How confident do you feel about your understanding of the legal reasons for the outcome or decision made at NCAT?	3.7	3.2	3.7
If your case was heard by a Tribunal Member, how confident are you that the Tribunal Member understood your case - your story.	3.9	2.5	3.7
How confident did you feel generally in participating in the hearing/NCAT process?	3.4	2.8	3.2
How comfortable do you feel communicating in English at NCAT?	4.9	4.8	4.6
Responses	36	105	74

Did you find the negotiation process useful to resolve the dispute?	N/A	No	Yes
How confident do you feel about your understanding of the legal reasons for the outcome or decision made at NCAT?	3.2	3.2	4.0
If your case was heard by a Tribunal Member, how confident are you that the Tribunal Member understood your case - your story.	2.7	2.9	4.3
How confident did you feel generally in participating in the hearing/NCAT process?	3.0	2.7	3.6
How comfortable do you feel communicating in English at NCAT?	4.8	4.7	4.8
Responses	49	102	64

What was the nature of the matter?	Tenant Termin-ation	Eviction	Rent	Bond	Repairs	Tenant Compen-sation
How confident do you feel about your understanding of the legal reasons for the outcome or decision made at NCAT?	3.4	3.0	3.4	3.7	3.6	3.0
If your case was heard by a Tribunal Member, how confident are you that the Tribunal Member understood your case - your story.	3.1	2.4	3.5	3.4	2.8	1.0
How confident did you feel generally in participating in the hearing/NCAT process?	3.0	2.7	3.0	2.9	3.0	1.8
How comfortable do you feel communicating in English at NCAT?	4.9	4.8	4.7	4.7	4.7	5.0
Responses	19	38	46	51	52	4