

Comments on the review Civil and Administrative Tribunal Act 2013
by the Australian College of Strata Lawyers

The College makes the following comments/recommendations on the current form of the Act in response to the review being undertaken of this Act by the Department of Justice.

	Relevant provision of Act and Regulation	Comments
1.	Section 24. Rule committee of Tribunal	(1) Consider amending the structure of the committee to include a user representative to give a different perspective to the rules to be considered.
2.	Part 4, Division 4. Conduct of Proceedings	(1) Section 38(2) states the Tribunal is not bound by the rules of evidence, may inquire into and inform itself of any matter as it feels fit subject to the rules of evidence. This manner of informing itself as it sees fit may not be equitable to all parties. (2) It is suggested this provision should be amended to include the obligation on the Tribunal to act in a manner that is substantially and procedurally fair. (3) This division deals with when hearings are required. (4) Where there is a jurisdictional challenge, the current practice is to address it at final hearing. This is unsatisfactory. It means that each party's resources will be expended in preparing for a full hearing when resolution of a jurisdictional issue may save considerable costs if a jurisdictional challenge is upheld. The Act or the rules should specifically provide for an interlocutory hearing where there is a jurisdictional challenge.
3.	Section 45. Representation of parties See also Part 7, Division 2 of the Rules, and Chairperson Directions, Representation	(1) This section relates to the representation of parties in proceedings before the Tribunal. Specifically, the requirement to obtain leave for legal representation. (2) It is submitted that in the majority of cases in the home building and strata schemes divisions of the Consumer and Commercial Division relate to cases of considerable monetary value or involving important legal issues. (3) The Chairpersons Direction on Representation dated August 2017 addresses circumstances in instances where appearance ought to be granted leave.

		<p>(4) It is suggested disputes relating to the <i>Strata Schemes Management Act 2015</i> ought not require leave in the same manner as disputes arising under the <i>Retail Leases Act 1994</i>, see Chairpersons Directions, Representation, August 2017.</p> <p>(5) It is submitted legal representation can assist the Tribunal in refining the issues in dispute, and assist in achieving the guiding principle, being to facilitate the just, quick and cheap resolution of the real issues in dispute.</p> <p>(6) This submission also impacts upon section 60 of the Act in relation to costs. It appears to be a practice of Tribunal Members to require legal practitioners to make an undertaking the party which is represented will not seek any order for costs as a condition to obtaining leave for representation. This practice does not appear to have any legislative framework and impacts upon the rights of the represented party to obtain legal representation and to seek costs, if warranted, in the proceedings. This practice should end.</p>
4.	Section 62. Tribunal to give notice and provide written reasons on request	<p>(1) This relates to the provision of written reasons on request.</p> <p>(2) In certain proceedings of the Tribunal it is of assistance to applicants and respondents to view previous decisions made in matters. To determine whether applications ought to be made, or alternatively, the form of defence to be adopted. This assists in the just, quick and cheap resolutions of the real issues in the proceedings.</p> <p>(3) Decisions of the Tribunal, specifically in the Consumer and Commercial Division, ought to be publicly available on appropriate forums. It should be the consistent practice to publish decisions within a week after the decision is delivered to the parties.</p>
5.	Part 6, Division 2. Internal appeals	<p>(1) The constitution of the appeal panel is commonly becoming 2 persons. There is no reference in Schedule 4 of the Act as to how the appeal panel should be constituted in the Consumer and Commercial Division. It is suggested a similar provision to clause 13 of Schedule 6 should be inserted into Schedule 4 prescribing, either a single member or 3 member, appeal panel.</p>
6.	Part 6, Division 3. Appeals from Tribunals to Courts	<p>(1) Section 82(3) determines the appropriate appeal court is dependent upon the constitution of the Tribunal which made the decision to be appealed.</p> <p>(2) It is considered it would more appropriate to have all appeal matters dealt with the one appropriate appeal court being the Supreme Court.</p>

7.	Schedule 4 – Part 3. Functions of division	<p>(1) This part refers to the functions allocated to the Consumer and Commercial Division.</p> <p>(2) The provisions of the <i>Strata Schemes Development Act 2015</i> in relation to strata management statements is not included in these functions. Specifically, I refer to Part 6, Division 1, of the Act.</p> <p>(3) The only manner in which a strata management statement dispute may arise in the Tribunal is a dispute between contiguous strata schemes. Consideration should be given to including Part 6 Division 1 of the Development Act within the jurisdiction of the Tribunal.</p>
8.	Section 60. Costs See also clause 38 of the Rules and Chairpersons Directions, Costs.	<p>(1) Unless clause 38 of the Rules applies, the Act requires a party to pay its own costs, except where the Tribunal is satisfied special circumstances warrant the awarding of costs.</p> <p>(2) This ability to award cost should be broadened to prevent parties abusing the NCAT process by brining applications and then withdrawing or discontinuing proceedings without penalty.</p> <p>(3) Consideration should be given to introducing a provision whereby costs are payable by the applicant on discontinuance, at least after the first directions hearing, unless special circumstance can be shown as to why such costs are not payable.</p> <p>(4) See comments above regarding the required undertaking on costs to obtain leave for representation.</p>