

To Retirement Village Residents Association Inc

[REDACTED]

Dear [REDACTED]

Please find my response to your invitation to comment on the NCAT 5-year statutory review

The Department of Justice is conducting a review of the Civil and Administrative Tribunal Act 2013, which established the NSW Civil and Administrative Tribunal (NCAT).

The purpose of the review is to find out how well it is working, and to look at reforms that could strengthen access to justice for people in NSW.

I have been subject to NCAT action in the past couple of years and would like to include some experience relating to my case :-

[REDACTED] v [REDACTED]

Responses to the specific questions are as follows

- 1) Is it easy or difficult for people to work out whether NCAT is the right body to resolve their legal issue?

As a respondent this aspect was not in question however as a matter of principle, the process does generally provide a very effective method being cost effective and allows a person to self represent.

The situation however with its level playing field advantage, when the plaintiff is allowed to be represented by legal counsel it puts the respondents, without sufficient finances, at a disadvantage both financially and in operation.

My recommendation would be to have the process free of legal counsel so as to continue to provide a level playing field. An observation is an effective lawyer is able to more easily persuade the NCAT member to the counsel's position instead of reaching a decision purely based on the facts of the case.

- 2) Is NCAT accessible and responsive to its users' needs?

In general terms, yes. Any interaction with registry and officers is usually easy and straight forward

In my case I was assisted in applying for a subpoena which was issued, allowed me access to information which unfortunately, due to a subsequent application, could not be produced in the hearing.

The adverse effect arising from the subsequent application by the Plaintiff, the Senior Member hearing the application restricted the use of that material causing the lack of certain information being able to be presented to support the Respondent's case

This on one hand was accessibility to a user's needs but on the other, the later action proved to be unresponsive.

This proved to be a waste of process, time and effort

- 3) Are there things that NCAT could do to make it easier for people appearing in the Tribunal to understand the process and participate?

Whilst there is a good supply of information available on the internet from sources such as NCAT itself or Office of Fair Trading NSW, there is little guidance as to its application.

There is a lack of clear definitive information which defines the step by step actions particularly when a Respondent is faced with a proposition in which the Plaintiff's presentation was seen to lack comprehensive information on the basics of the case.

In the case nominated for this response, particularly relating to Section 136 of the Retirement Villages Act i.e.

"Termination on grounds of upgrade or change of use" the outcome eventually rested on the question of demolition and not ultimately on the proposition of the finished upgrade.

Accordingly termination of a contract under the Retirement Villages Act required an investigation of a proposition for which there was very little precedent or guiding information.

A number of the internet publications include, as a short hand method, flow charts which can easily define processes without infringing restrictions in information/limitations contained in "Guidance Notes" or other legislative material.

Use of Flow Charts to provide definition to the overall encompassing steps to describe the actions and processes required in either presenting or defending actions to support the method and timing of a presentation would effectively reduce the amount of time required to provide an easy understanding of the topic.

- 4) Does NCAT resolve legal disputes quickly, cheaply and fairly?

In general, based on my case, No

- a) Quickly. No. My case from submission of the application to partial resolution took just on 12 months
- b) Cheaply. No. The allowance of the plaintiff to be represented (prior to the initial hearing) and argued as to the equity of representation received little agreement.

Luckily the respondent was assisted by [REDACTED] with a pro bono legal counsel which caused a degree of cost which would not have been necessary should the case have been argued purely by both the Plaintiff and Respondent on the merits of the case as outlined in the initial "Application"

- c) Fairly. No. Changing circumstance allowed some facts to be presented by the plaintiff which, at the time, did not allow for substantial review.

The plaintiff argued the development proposal (DA) was under assessment by [REDACTED] whereas the State Planning Laws required, due to the size and cost, the proposal to be referred to the [REDACTED]

The plaintiff never advised NCAT of this function and whilst they claimed to have Demolition approval, this claim proved to be false and at the 7th July 2019, the Plaintiff still has no approval for the demolition they undertook.

The condition they claimed at the hearing of having approval by a Private Certifier was conditional on a clearance to commence work by the certifier which later was found to be not given till over three months after the Senior Member's decision in December 2017. Receipt of the clearance from the Private Certifier to demolish, was after the commencement of the unapproved Demolition.

The pertinent fact in this act was [REDACTED] over rode the ability to demolish however the Plaintiff went ahead with the action.

During the case, NCAT consistently failed to recognise the Retirement Villages Act as detailed in the "Second Readings Speeches", is legislation for "Consumer Protection" and therefore NCAT failed in the objectives of the Parliament.

An intermission in proceedings due to judicial legislative interpretation concerning development policy, required fresh legislation to enable high density development, impacted with a negative outcome to the Respondent but positive to the Plaintiff and showed NCAT was inclined to support the development strategy again at the expense of consumer protection.

In the final outcome NCAT, with the stroke of a pen destroyed the concept and safety of a Lifetime Lease contracted under the Act and enabled a precedent allowing site development at the expense of that Lease.

During the process to resolve the issues at the heart of the application to NCAT, the basic functions were misrepresented to NCAT by the plaintiff and therefore NCAT did not resolve those disputes quickly, cheaply and particularly fairly.

- 5) Should NCAT resolve some matters just by looking at the documents submitted by the parties, without a hearing in person?

The question is complicated based on the type of action required and the degree of documentation to support the action.

In the case alluded to, should the proposal be clearly defined and associated arguments from both parties be distinct in their presentation, resolution without a hearing would be more timely.

The information from either party would require more input to fully develop the argument and be more clinical in its application allowing a ready acceptance/rejection of the presentation.

In this way there would be clarity of outcome and would focus attention purely on the subject and any subsequent action

- 6) Does NCAT need additional powers to be able to enforce its decisions?

It is my belief if NCAT has made a decision which has not been appealed, the legislation should include a process to enable the decision's outcome to be enforced in a timely manner by NCAT thereby side stepping the process to another court

Conclusion

The ability to comment on the NCAT 5-year statutory review is an outcome of the observed short comings with my case being

[REDACTED] v [REDACTED]
The proceedings in my case allowed me to form the above opinions and convinced me NCAT should be more observant of the functions and reasons for which the legislation was established.

The ability for legal argument to override these basic is beyond comprehension

Yours faithfully

[REDACTED]

[REDACTED]