



Submission

Civil and Administrative Tribunal Act 2013

Statutory Review

July 2019

16 Carrington St, Lismore, 2480 PO Box 212 Lismore 2480
Administration & Legal Service 02 6621 1000 Fax 02 6621 1011
Tenants Advice & Advocacy Service 02 6621 1022 1800 649 135 Fax 02 6621 1033
Women's Domestic Violence Court Advocacy Service 1300 720 606 Fax 02 6621 1055
ABN 98 071 395 652



Contents

About NRCLC3

Summary of recommendations3

Endorsement of Tenants’ Union of NSW Submission5

Legislation5

Pre-Application5

 Services NSW5

 Short deadlines5

Application6

 Time limit6

 ASIC searches6

Pre-Hearing6

 Adjournments6

 Safety7

Hearing7

 NCAT signage7

 Information for parties7

 Representation of park operators8

 Representation by a Tenant Advocate8

 Conciliators8

 Notice of Hearing in bond matters9

 AVL Hearings9

 Procedural directions9

 Evidence10

Post-Hearing10

 Compliance with orders10

 Publication of decisions11

Survey11

About NRCLC

Northern Rivers Community Legal Centre (**NRCLC**) is accredited by the National Association of Community Legal Centres. The NRCLC is based in Lismore and provides legal services from the Queensland border south to Grafton and west to Drake. We auspice the Northern Rivers Tenants Advice and Advocacy Service (**NORTAAS**) as well as the Northern Rivers Women's Domestic Violence Court Advocacy Services (**NRWDVCAS**).

Our services works extensively with the community and our referral partners to ensure our services are targeted to those most in need of legal assistance. Our target client groups include; people experiencing financial disadvantage, Aboriginal and Torres Strait Islander people, older persons and women experiencing or at risk of family violence, and people with disabilities.

We provides information, referral, community legal education, advice, casework and advocacy to tenants in private and social housing, boarders/lodgers as well as home owners and tenants in residential land lease communities. Much of the work of NORTAAS and some of the work of the legal service involves the NSW Civil and Administrative Tribunal (**NCAT**).

Our clients are both applicants and respondents in proceedings brought under the *Residential Tenancies Act 2010 (RT Act)* or *Residential (Land Lease) Communities Act 2013 (RLLC Act)*.

In writing this submission we draw on the experiences of our staff as well as direct experiences of clients who have participated in a survey relating to their experiences in using NCAT.

Summary of recommendations

1. That the Rules be incorporated into the Regulations to bring them into line with other legislation, or that the Act and Regulations make reference to the rules where they apply.
2. Staff at Service NSW be trained to assist parties making or responding to NCAT applications.
3. The time limit for lodging applications for set aside orders and appeals be extended.
4. An alternative to Australian Post be investigated for lodging applications.
5. The time limit for lodging an application for compensation where these has been a mistake of law should be increased from 28 days.
6. Services NSW or NCAT Registry perform ASIC searches for applications rather than consumer Applicants.
7. Requests for adjournments be sent to a "duty" Member for a fast decision.
8. The Tribunal should investigate how the safety of a protected person can be strengthened at a hearing venue, where an apprehended violence order is in place, or a history of violence exists between the parties.
9. NCAT improve the street signage at all NCAT hearing locations so that parties can more easily locate the hearing room.

10. NCAT include practical information on the Notice of Hearing about what the procedure is from arrival at the hearing venue to when the hearing commences (*for example*: reporting to the sheriff, waiting in the waiting area until the list commences and their matter called, etc).
11. Greater consistency in NCAT Members following established procedure for formal hearings – opening submissions, evidence in chief, cross examination, re-examination and closing submissions.
12. Members to provide guidance at the commencement formal hearings on how the hearing will proceed in the same way that they do for the first call over hearing.
13. Leave for a professional landlords such as a park operator to be legally represented should only be given in exceptional circumstances.
14. In determining if leave for a professional landlord to be legally represented should be granted, the Member should have regard to the economic disadvantage of the Home Owner / Tenant and if they are able to also obtain legal representation or not.
15. Tenant Advocates employed by a Tenants Advice and Advocacy Service be granted an automatic right to represent tenants and home owners in the same way that real estate agents are permitted to represent landlords.
16. Conciliators be made available on call over list days in regional areas of NSW.
17. If a Member has assisted the parties with conciliation which is unsuccessful, that the matter be set down for formal hearing with another Member.
18. In residential bond matters, address for service of a tenant in bond matters cannot be the vacated residential property address unless the landlord can provide further evidence ensuring that the tenant will receive Notice of Hearing such as by sending the notice to an email address used by the tenant during the tenancy.
19. AVL or other video technology be used for NCAT hearings.
20. These factors be given additional weight by NCAT in deciding whether to allow an extension of time to comply with procedural directions or in a request for adjournment.
21. The standard time frame for providing evidence be extended to three weeks for each party.
22. All witnesses giving evidence in NCAT hearings, either at call over or formal hearing be required to be sworn in.
23. Evidence provided at formal hearing, which does not comply with procedural directions ought not to be allowed, unless the other party is provided with a copy, given time to consider its contents and opportunity to object to it.
24. NCAT be granted additional powers to enforce its own decisions.
25. NCAT specifically address the processes around rent being paid into it so that it is accessible for vulnerable people so the order can achieve its function.

26. NCAT matters where written reasons have been provided or the matter has been decided at a formal hearing be published on the NSW Caselaw website.

Endorsement of Tenants' Union of NSW Submission

We have read the Tenants' Union of NSW submission on the *Civil and Administrative Tribunal Act 2013* Statutory Review dated July 2019. We endorse the recommendations made within that submission and add the following recommendations of our own.

Legislation

The general community is often familiar with the *Civil and Administrative Tribunal Act 2013 (the Act)* and the *Civil and Administrative Tribunal Regulations 2013 (the Regulations)*, however many parties accessing NCAT do not know that there are separate *Civil and Administrative Tribunal Rules 2014 (the Rules)* that also apply. This is particularly important as NCAT is designed so that non-legally qualified parties can represent themselves.

Recommendation:

1. That the Rules be incorporated into the Regulations to bring them into line with other legislation, or that the Act and Regulations make reference to the rules where they apply.

Pre-Application

Services NSW

NCAT has no shopfront in our region. Formerly in Lismore and other locations, there was a Fair Trading office attached to or in the same building as the former Consumer, Trader and Tenancy Tribunal and the current NCAT. Parties to proceedings were able to obtain assisting in completing applications, lodge documents and obtain information in relation to their proceedings.

Since the closure of these Fair Trading offices, applications and other documents are able to be lodged at Services NSW. Clients report that staff at Services NSW are unfamiliar with receiving documents relating to NCAT proceedings and are often unsure of NCAT processes and the purpose and nature of documents being lodged. This has included urgent applications being sent to the Tamworth Registry by ordinary post which has led to delays in those urgent matters.

Recommendation:

2. Staff at Service NSW be trained to assist parties making or responding to NCAT applications.

Short deadlines

We represent clients who have no transport and no computer or internet access. Some clients do not have mobile phones. We also have numerous black spots in the Northern Rivers Region where mobile reception does not exist.

Short deadlines for lodging applications for appeal and/or set aside matters, disadvantage tenants in regional & remote areas. Especially as these applications cannot be made online, or sent by email.

Recommendation:

3. The time limit for lodging applications for set aside orders and appeals be extended.
4. An alternative to Australian Post be investigated for lodging applications.

Application

Time limit

Recently we assisted a number of home owners in a residential land lease community to make an application against the operator seeking a refund of overpaid electricity charges pursuant to section 77 of the RLLC Act. This was an untested area of law until recently and the matters in question had been waiting determination of the lead case before applications were lodged. A significant proportion of the submission in related to when the 28 day time period commenced.

Recommendation:

5. The time limit for lodging an application for compensation where these has been a mistake of law should be increased from 28 days.

ASIC searches

The requirement that Applicants obtain a copy of the ASIC extract for the Respondent can be difficult for Applicants as they did not have easy access to computers, printers and/or reliable internet due to living in isolated areas.

Recommendation:

6. Services NSW or NCAT Registry perform ASIC searches for applications rather than consumer Applicants.

Pre-Hearing

Adjournments

Requests for adjournments are currently send to the sitting Member and considered on the day of hearing. This provides no certainty to parties and an increased possibility of orders being made in their absence.

For example: We represented one client where the matter was listed for hearing where the Advocate was at a tenancy conference and no other Advocates were available to represent the client. An application for an adjournment was made in advance, with all supporting documentation provided to NCAT, including a letter from the Principal Solicitor of the Tenants Union of NSW supporting the adjournment. Consent for the adjournment was sought and obtained from the other party which was also provided.

Staff at Tamworth Registry advised that the request for adjournment was sent to the sitting Member and would be considered on the day of hearing.

The outcome was that the Member did not consider the request for adjournment, and dismissed the matter due to no appearance of the parties.

Recommendation:

7. Requests for adjournments be sent to a “duty” Member for a fast decision.

Safety

Our clients include protected persons under either an apprehended domestic or personal violence order where the defendant / person of interest is the other party in their tenancy matter (landlord or co-tenant). Having both the protected person and person of interested physically in the same waiting area with limited security staff places the safety of the protected person at risk.

Recommendation:

8. The Tribunal should investigate how the safety of a protected person can be strengthened at a hearing venue, where an apprehended violence order is in place, or a history of violence exists between the parties.

Hearing

NCAT signage

Clients attending hearings in Lismore (and other areas) frequently report that the hearing room is hard to find. In Lismore there is no signage on Molesworth Street and minimal signage on Conway Street where NCAT is located.

Recommendation:

9. NCAT improve the street signage at all NCAT hearing locations so that parties can more easily locate the hearing room.

Information for parties

Clients that we were not able to provide advice to before their first hearing advise they don't know what to do when they arrive at a hearing. It was only when the call over / list hearing commenced and the Member provided guidance on how the hearing would run, did clients know what was expected of them and what was going to happen.

This same guidance unfortunately does not occur at the beginning of formal hearings, which disadvantages unrepresented parties and those inexperienced in conducting formal hearings.

We provide advice to clients on the process of an NCAT hearing. Our own experience when representing clients and experiences expressed by self-represented clients is that formal hearings often have little structure and proceed differently from day to day and from Member to Member. Opportunities for giving oral evidence or to make submissions may not take place or take place in such a way that unrepresented parties do not understand when it is happening.

Recommendations:

10. NCAT include practical information on the Notice of Hearing about what the procedure is from arrival at the hearing venue to when the hearing commences (*for example*: reporting to the sheriff, waiting in the waiting area until the list commences and their matter called, etc).

11. Greater consistency in NCAT Members following established procedure for formal hearings – opening submissions, evidence in chief, cross examination, re-examination and closing submissions.
12. Members to provide guidance at the commencement formal hearings on how the hearing will proceed in the same way that they do for the first call over hearing.

Representation of park operators

It is our experience that many professional landlords such as operators of residential land lease communities are routinely given leave to be legally represented, when, as in the case of park operators, they are required by schedule 1 of the RLLC Act to have knowledge and understand of the laws relevant to the management of a community.

This increases the power imbalance between the parties as often the Home Owner does not understand the legislation or NCAT process and due to being reliant on statutory income, do not have the means to engage as legal practitioner.

Recommendation:

13. Leave for a professional landlords such as a park operator to be legally represented should only be given in exceptional circumstances.
14. In determining if leave for a professional landlord to be legally represented should be granted, the Member should have regard to the economic disadvantage of the Home Owner / Tenant and if they are able to also obtain legal representation or not.

Representation by a Tenant Advocate

There is no right of representation for tenants as there is for landlords who are represented by real estate agents. Tenant Advocates employed through the Tenants Advice and Advocacy Program must seek leave to represent a tenant despite being recognised as being of assistance to NCAT Members through their representation of tenants that have little or no understanding of the legal or NCAT process, or have other disadvantages such as low literacy or a disability. Many Tenant Advocates also conduct a duty advocacy service at NCAT hearing locations providing advice and assistance to tenants, leading to increased numbers of matters resolved at the first hearing, usually through consent orders.

Recommendation:

15. Tenant Advocates employed by a Tenants Advice and Advocacy Service be granted an automatic right to represent tenants and home owners in the same way that real estate agents are permitted to represent landlords.

Conciliators

In the Northern Rivers and other regional, rural and remote areas there are no Conciliators to assist parties to reach an agreement at call over hearings. Tenants and home owners in regional NSW are disadvantaged because of this. Having the Member act as both Conciliator and Member is problematic as “negotiations discussed during conciliation cannot be repeated in the hearing room unless both parties agree”¹. There is often a power imbalance between the parties and often the weaker party may be pressured into making an agreement that they do not want and is to their disadvantage or fully understand.

¹ NCAT Conciliation Fact Sheet

Recommendation:

16. Conciliators be made available on call over list days in regional areas of NSW.
17. If a Member has assisted the parties with conciliation which is unsuccessful, that the matter be set down for formal hearing with another Member.

Notice of Hearing in bond matters

In matters where a landlord has made an application for the bond, there is a presumption that the vacated tenant has received the Notice of Hearing. This is not always the case, particularly where the tenancy address is the only contact details given for the tenant when they have already vacated the property.

We regularly hear from tenants that a decision was made in their absence because they did not receive a Notice of Hearing despite providing a forwarding address to the landlord or real estate agent. In most instances, these tenants had been communicating with the landlord or real estate agent via email and that email address had not changed.

Recommendation:

18. In residential bond matters, address for service of a tenant in bond matters cannot be the vacated residential property address unless the landlord can provide further evidence ensuring that the tenant will receive Notice of Hearing such as by sending the notice to an email address used by the tenant during the tenancy.

AVL Hearings

Access to NCAT hearings is an important issue for our clients. The use of phone hearings is not always suitable for Aboriginal clients or other vulnerability such as disability. Clients with hearing impairment are often not able to take part in their matters because they often miss much of what is said or there is no Auslan interpreter available.

NCAT hearings are often held in court houses with AVL capabilities. This is a resource that could be utilised to a greater extent to provide access to clients that cannot attend in person where attendance by telephone is not appropriate.

Recommendation:

19. AVL or other video technology be used for NCAT hearings.

Procedural directions

We are located in a regional, remote and rural area that does not have regular or effective public transport. Distance and lack of transport are significant reasons why our clients cannot attend NCAT hearings or meet some deadlines set by NCAT.

Additionally, the postal rule set out in section 76 of the *Interpretation Act 1987* provided that service is effected on the seventh working day after the document was posted. It is our experience that it often takes more time than this for documents to be received through Australia Post.

This creates difficulties in complying with procedural directions where ordinarily procedural directions for exchange of evidence are made for the Applicant to supply documents in two weeks and the Respondent to supply their documents two weeks after that. Due to the delays with Australia Post, this often means that the Respondent needs to reply to evidence that they only received two or three days prior.

Recommendation:

20. These factors be given additional weight by NCAT in deciding whether to allow an extension of time to comply with procedural directions or in a request for adjournment.
21. The standard time frame for providing evidence be extended to three weeks for each party.

Evidence

We have observed a regular practice during NCAT hearings that parties are not required to swear an oath or give an affirmation before giving evidence.

Similarly, we have also observed a regular practice of parties being allowed to provide documents during a formal hearing that were not provided either as required by procedural directions for exchange of evidence or at the beginning of the formal hearing. These documents are often handed directly to them Member, without the other party being given the opportunity to see it first and make any submission or objection to it being received as evidence. This does goes against the rules of procedural fairness.

Recommendations:

22. All witnesses giving evidence in NCAT hearings, either at call over or formal hearing be required to be sworn in.
23. Evidence provided at formal hearing, which does not comply with procedural directions ought not to be allowed, unless the other party is provided with a copy, given time to consider its contents and opportunity to object to it.

Post-Hearing

Compliance with orders

There are few remedies available for parties who have an order made in their favour that another party does not comply with, particularly in relation to compensation and/or repairs.

If an award of compensation to a party is not paid, they must incur additional costs and delays obtain a certified copy of the money order and register it with the Local Court in order to enforce the NCAT order.

In repair matters, where a landlord refuses to carryout repairs as ordered, a tenant can seek an order that their rent be paid into NCAT until such time as there are sufficient money to pay for the repairs. Until recently this was effective and did not further disadvantage tenants, however due to a recent change in NCAT Registry processes this process is no longer effective and requires tenants to pay additional costs and be out of pocket.

The current process requires that the tenant required to pay their rent by personal cheque or bank cheque which must be then sent to the Registry for them to deposit into their trust account. In most cases, tenant do not have a cheque account so cannot use this method without opening a new bank account specifically for this purpose and transferring money into it. Bank cheques require the tenant to pay an additional \$10 per cheque in order to pay their rent this way.

Neither of the above methods are suitable for tenants who are already experiencing multiple disadvantages. *For example:* we have assisted an older Aboriginal tenant [REDACTED] for many years through different Consumer, Trader and Tenancy Tribunal (as it was then known) as well as NCAT matters.

■■■■'s landlord continually failed to carry out repairs to the rental property as ordered by NCAT which left ■■■■ and her family in danger of injury due to the worsening condition of the property.

In previous hearings, orders were made that rent be paid to NCAT. ■■■■ set up a debit from her bank account which went into the nominated bank account of NCAT, were the money accumulated to a sufficient amount that repairs could be carried out.

At the most recent hearing, orders were made again that rent be paid into NCAT. Due to changes with Registry processes, this order was ineffective as ■■■■ does not have a cheque account and being on statutory income, could not afford to pay an additional \$10 per rental payment for a bank cheque. Amongst many health issues, ■■■■ is also illiterate and due to her age suffers from memory issues which resulted in ■■■■ both not knowing if cheques were made out to the correct person and forgetting to post them to NCAT for deposit.

What was once a simple process for ■■■■ is now one that is an additional cause of stress and financial burden when she was not the one to breach the terms of the residential tenancy agreement.

Recommendations:

24. NCAT be granted additional powers to enforce its own decisions.
25. NCAT specifically address the processes around rent being paid into it so that it is accessible for vulnerable people so the order can achieve its function.

Publication of decisions

Decisions from NCAT hearings are published infrequently on the NSW Caselaw website. Our everyday work advising clients about the law is hampered without knowledge of how NCAT is deciding matters.

Recommendation:

26. NCAT matters where written reasons have been provided or the matter has been decided at a formal hearing be published on the NSW Caselaw website.

Survey

We conducted a survey of a random sample of clients to obtain feedback on their experiences in using NCAT. Below are the questions that we asked and a summary of our client's responses to them.

How did you find out you needed to go to NCAT?

The majority of our clients learnt of NCAT by referral from other agencies such as Department of Fair Trading, NRCLC and Legal Aid. Very few clients were independently aware of the ability to have their dispute heard by NCAT.

This raises the issue whether NCAT is easily accessible to the general public, unless they have a referral or prior knowledge of its existence.

Was it easy to find and fill out the forms?

Our clients were mixed in their response to the application process with the majority stating the forms were easy to find. However almost half of our clients surveyed found the forms difficult to fill out and found the forms confusing and time consuming.

Did NCAT help you through the process? How?

Very few client's surveyed found NCAT helpful through the process. Most clients felt that they were left on their own to try and navigate the NCAT system.

Did you feel that your problem was resolved quickly?

The responses to this question may have been greatly influenced by the matters the clients were trying to resolve. Taking this into account, the majority of respondents felt the process was reasonably quick. Most were finalised within the 2-9 month timeframe.

Did you feel that it was affordable?

80% of our clients surveyed found NCAT affordable.

Did you feel that the outcome was fair?

Most of our clients felt the result was fair.

Would it have been easier if NCAT just looked at the documents without hearing you in person?

Most of the clients interviewed felt the process is better to be heard in person rather than informally determined as it gave them the opportunity to feel empowered throughout the dispute resolution process.

How did you find the whole process and how could it have been easier?

Some of our clients, especially those with literacy issues, found that the process was inaccessible as they could not easily complete the required paperwork. Others struggled meeting the timeframes set by NCAT and stated that they did not really understand the NCAT process. A number of clients also stated there needed to be an explanation of the NCAT hearing process to be given prior to attending NCAT so that it was not viewed as a hostile and daunting process.

Ken Beilby
Principal Solicitor
Northern Rivers Community Legal Centre
July 2019