

Obtaining leave to appear - NSW Civil and Administrative Tribunal¹

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The Consumer and Commercial Division (the CCD) of the NSW Civil and Administrative Tribunal (the Tribunal) is the largest of the Tribunal's four divisions, receiving 53,722 of the total 65,549 claims received by the Tribunal in the 2017 to 2018 financial year.³

Having been established on 1 January 2014 for the purpose of consolidating approximately 22 previously existing New South Wales state tribunals (including the Consumer, Trader and Tenancy Tribunal, the Medical Tribunal and the Administrative Decisions Tribunal of NSW),⁴ the Tribunal received 40,000 claims in the first six months of operation.⁵

Consistently receiving in excess of 50,000 claims per annum since it was established makes the CCD one of the busiest civil jurisdictions in NSW.⁶

The CCD has wide-ranging jurisdiction conferred by 24 enabling acts. It includes claims made under Australian consumer,⁷ home building and strata schemes legislation, as well as in respect of social housing, residential tenancy, motor vehicle and retail lease claims.⁸ There is no monetary limit to the orders that can be made under certain legislation.⁹

In line with the objects of the *Civil and Administrative Tribunal Act 2013 (NSW)* (the **NCAT Act**), which include ensuring that the Tribunal is accessible and able to resolve issues 'justly, quickly, cheaply and with as little formality as possible',¹⁰ the presumption in proceedings before the Tribunal is that parties are not entitled to be represented by any person other than by leave.¹¹

Significantly, however, notwithstanding this presumption, the CCD's Representation Guideline issued in August 2017 (the **CCD Representation Guideline**) sets out the circumstances under which the Tribunal 'will usually permit a party to be represented, especially by an Australian legal practitioner.'¹²

Importantly, these circumstances include if:

- the proceedings are in the Home Building List and involve a claim or dispute for more than \$30,000;
- another party in the proceedings is, or is

to be represented by, an Australian legal practitioner;

- another party in the proceedings is a government agency;
- the Tribunal is of the opinion that the party would be placed at a disadvantage if not represented at the hearing; and
- the Tribunal is of the opinion that representation should be permitted due to the likelihood that complex issues of law or fact will arise in the proceedings.

Representation by a legal practitioner is also as of right in the CCD in certain circumstances.¹³

Being cognisant of the complexities that can arise as a result of the presumption that parties are generally not entitled to be represented other than by leave is important. As was recently observed in respect of corporate entity parties, a company is an artificial person and cannot represent itself.¹⁴ Given the curial rules that generally require proceedings by a corporation to be conducted through a solicitor or authorised director¹⁵ do not apply in the Tribunal, the consequence of section 45 of the NCAT Act is therefore that, in every case in which a company is a party to proceedings in the Tribunal, leave must be obtained for someone (who may or may not be a legal practitioner) to represent it.¹⁶

A range of matters can be relevant to the exercise of the Tribunal's discretion as to representation by a legal practitioner. The Tribunal may have regard to whether the proposed representative has sufficient knowledge of the issues to enable effective representation, has the ability to deal fairly and honestly with the Tribunal and other persons and is vested with sufficient authority to bind the party.¹⁷ While consideration of these matters is not mandatory in respect of leave being sought for representation by a legal practitioner,¹⁸ each may be relevant.

In line in particular with the objects in section 3 of the NCAT Act and the procedural matters under section 38, further relevant considerations include the capacity of the individual seeking leave to be represented to understand and effectively participate in

the proceedings in a manner which allows them a reasonable opportunity to be heard; the need to ensure that there is no material imbalance between the parties; the need to ensure that the Tribunal is accessible and responsive to the needs of all of its users; and whether it is appropriate in all the circumstances to give leave to a particular person, including a legal practitioner.¹⁹

Significantly, the ‘overriding objective’ contained in section 36(1) of the NCAT Act (to facilitate the just, quick and cheap resolution of the real issues in the proceedings) has been observed to have no application to questions of representation, given such questions are ‘incidental procedural questions’ rather than ‘the real [substantive] issues in dispute’.²⁰

Evidence of each relevant matter can be adduced²¹ and representation determined in the absence of the parties.²²

Finally, from a practical perspective, an application to be represented can be made orally or in writing at any stage of the proceedings²³ and can be granted in respect of any Australian legal practitioner or a particular practitioner.²⁴ Importantly, in making an order granting leave, the Tribunal may impose such conditions on the leave as it deems fit, including that the estimated costs of the representation be disclosed.²⁵ An order that can be made in conjunction with such an order is that, where leave is granted to only one party to be legally represented, that party will not seek an order for costs if successful, costs otherwise being available in the CCD in the circumstances set out under rule 38 of the NCAT Rules and/or section 60 of the NCAT Act.

Overall, it is clear that the operation of the CCD Representation Guideline, in conjunction with rule 32 and the matters relevant as a result of sections 3 and 38 of the NCAT Act, provide a framework of the circumstances in which the Tribunal ‘will usually permit a party to be represented, especially by an Australian legal practitioner.’²⁶

ENDNOTES

- This article is written with the approval of the Honourable Justice Lea Armstrong, President of the New South Wales Civil and Administrative Tribunal, as well as the approval of the Deputy President, Consumer and Commercial Division, Mr Stuart Westgarth. The authors would like in addition to express their gratitude to Andrew Coleman SC, part time member of the Consumer and Commercial Division of the New South Wales Civil and Administrative Tribunal, for his feedback.
- The authors are appointed as part-time members of the Consumer and Commercial Division of the New South Wales Civil and Administrative Tribunal.
- NCAT Annual Report 2017–2018, p31.
- Civil and Administrative Tribunal Bill 2013* (NSW), Explanatory note, p1-2; Robinson SC et al, *NCAT Practice and Procedure*, LBC, 2015, [1.10]–[1.20].
- NCAT Annual Report 2014, p5.
- Other than the Local Court of New South Wales, in which 76,468 civil actions were filed in the 2017 calendar year (Local Court of New South Wales Annual Review 2017, p14). By way of comparison, there were 5,921 filings in the original and appellate jurisdiction of the Federal Court of Australia in the 2017 year (Federal Court of Australia Annual Report 2017–2018, appendix 5); 4,147 filings in the Equity Division (all lists) and 3,163 filings in the Common Law Division – Civil (all lists) of the Supreme Court of New South Wales in the 2017 year (Supreme Court of New South Wales 2017 Annual Review, p51 and 48); and 4,875 civil matters registered in the District Court in the 2017 year (District Court of New South Wales Annual Review 2017, p23).
- The Australian Consumer Law, schedule 2 of the *Competition and Consumer Act 2010* (Cth).
- NCAT Act, Schedule 4, clause 3.
- See for instance the *Retail Leases Act 1994* (NSW); *Property, Stock and Business Agents Act 2002* (NSW); *Strata Schemes Management Act 2015* (NSW), section 106(5); *Dividing Fences Act 1991* (NSW); *Residential (Land Lease) Communities Act 2013* (NSW).
- Section 3(c) and (d) of the NCAT Act.
- Section 45(1) of the NCAT Act.
- Clause 11 of the CCD Representation Guideline.
- In appeals from a decision of the Tribunal to the Appeal Panel where the party had leave below (section 45(2) of the NCAT Act); in claims under the *Retail Leases Act 1994* (NSW) and where the party has been granted legal assistance under the *Fair Trading Act 1987* (NSW) (Schedule 4, clause 7, NCAT Act).
- Preston v Diaspora Holdings Pty Ltd; Diaspora Holdings Pty Ltd v Owners Corporation of Strata Plan 68608* [2019] NSWSC 651 at [234] per Parker J.
- Uniform Civil Procedure Rules 2005*, Rule 7.1(2) and (3).
- Preston v Diaspora Holdings Pty Ltd; Diaspora Holdings Pty Ltd v Owners Corporation of Strata Plan 68608* [2019] NSWSC 651 at [234] per Parker J.
- Rule 32 of the *Civil and Administrative Tribunal Rules 2014* (NSW) (the **NCAT Rules**); Clause 8 of the CCD Representation Guideline; *Rodny v Stricke* [2018] NSWCATAP 136 at [78]–[88]; *Long v Metromix Pty Ltd* [2019] NSWCATAP 8 at [15].
- Rodny v Stricke* [2018] NSWCATAP 136 at [87]; *Long v Metromix Pty Ltd* [2019] NSWCATAP 8 at [15].
- Rodny v Stricke* [2018] NSWCATAP 136 at [82], [83], [88]; *Long v Metromix Pty Ltd* [2019] NSWCATAP 8 at [15].

- Preston v Diaspora Holdings Pty Ltd; Diaspora Holdings Pty Ltd v Owners Corporation of Strata Plan 68608* [2019] NSWSC 651 at [249] per Parker J, citing *Aon Risk Services Australia Limited v Australian National University* (2009) 239 CLR 175 at [72]. Although cf *Rodny v Stricke* [2018] NSWCATAP 136 at [87]; *Long v Metromix Pty Ltd* [2019] NSWCATAP 8 at [15].

- Clause 9 of the CCD Representation Guideline.
- By way of an order pursuant to section 50(2) of the NCAT Act.
- Rule 31(1) of NCAT Rules; CCD Representation Guideline, clause 7.
- Section 45(1)(b)(ii) of the NCAT Act.
- Rule 31(2) and Rule 33 of the NCAT Rules (NSW).
- Clause 11 of the CCD Representation Guideline.