



# ADMINISTRATIVE REVIEW PROCEEDINGS IN NCAT

March 2017

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## Introduction

- 1 The Civil and Administrative Tribunal of New South Wales can be thought of as a large, multi-bodied beast with one head, the inverse of the Lernaean Hydra of Greek mythology<sup>2</sup> which was a large, multi-headed beast with one body. Hesiod described the Hydra unflatteringly as “grisly minded”.<sup>3</sup> An effective advocate in merits review proceedings in NCAT does not need to be a Hercules, who slew the Hydra by clubbing off its heads and cauterising the bleeding stumps with burning brands to prevent two new heads from growing where each head had been removed. Instead, the administrative review advocate will be most effective by understanding the beast that is NCAT, how it operates and how to tame it. With this knowledge, the advocate can avoid the Tribunal becoming grisly minded and can help it to come, calmly and rationally, to the correct and preferable decision.
- 2 Merits review of the type provided by NCAT, like that of its more single-minded Commonwealth sister, the AAT, has its genesis in the 1971 Kerr Committee Report.<sup>4</sup> It also draws on the experience of NCAT’s predecessor, the Administrative Decisions Tribunal.<sup>5</sup> This paper gives an overview of the

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<sup>2</sup> Pseudo-Apollodorus, *Bibliotheca* 2. 77 - 80 (trans. Aldrich).

<sup>3</sup> Hesiod, *Theogony* 313 ff (trans. Evelyn-White)

<sup>4</sup> Report of the Commonwealth Administrative Review Committee, 1971 (the Kerr Committee Report).

<sup>5</sup> The Administrative Decisions Tribunal (ADT) was established in 1998, under what was then known as the *Administrative Decisions Tribunal Act 1997* (NSW), with his Honour Judge Kevin O’Connor AM as President. Mark Robinson SC identifies the history of merits review proposals in New South Wales in a paper he delivered to the AIC Annual Summit on “Administrative Law” held in Canberra on 24 September 1998 as including, before the ADT was created: (1) the December 1972 NSW LRC Report on Appeals in Administration, LRC 16, which recommended the establishment of a Public Administration Tribunal; (2) the 1977 and 1982 Reports of the Commission Reviewing New South

administrative review jurisdiction of the Tribunal and, in particular, its essential relationship with enabling legislation and the *Administrative Decisions Review Act 1997*. The practice and procedure provisions, applicable to administrative review proceedings, are then explored in detail. At the end, I shall consider how well NCAT can be seen as fulfilling the recommendations and expectations of the authors of the Kerr Committee Report.<sup>6</sup>

## Jurisdictional and Divisional Structure of NCAT

- 3 Unlike the constitutionally constrained AAT, NCAT is a multi-jurisdictional tribunal with an Appeal Panel. It is one of the more recent State “Super-Tribunals”. NCAT’s extensive and varied workload includes not only merits review of administrative decisions in the exercise of executive power but also the exercise of judicial power and, in the Guardianship Division, the performance of functions in the *parens patriae* power or jurisdiction of the State.
- 4 NCAT has two principal functions in relation to merits review of administrative decisions. At first instance, the Tribunal, in effect, re-exercises the functions of the administrator who made the decision under review, but having regard to the material before the Tribunal. Secondly, at the appellate level, the Appeal Panel hears and determines appeals from most of the first instance decisions.
- 5 The *Civil and Administrative Tribunal Act 2013* (NSW) (NCAT Act) confers on NCAT five distinct bodies of jurisdiction in s 28(2). The two most important for the purposes of this paper are NCAT’s administrative review jurisdiction, as established by s 30, and its internal appeal jurisdiction under s 32. The internal appeals jurisdiction extends to cover most, but not all, first instance

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Wales Government Administration which expressed a preference for a tribunal following the AAT model; (3) the 1998 report of the NSW Tax Task Force which recommended a general taxation appellate body; and (4) the 1989 NSW Attorney General’s Department discussion paper on civil procedure which included consideration of an AAT type body for NSW.

<sup>6</sup> The members of the Kerr Committee and the authors of its Report were Sir John Kerr, then a judge of the Commonwealth Industrial Court and later Chief Justice of New South Wales and Governor General of the Commonwealth, Professor Harry Whitmore (a leading academic administrative lawyer) and the Commonwealth Solicitor-General, initially A. F. Mason QC (later Chief Justice of Australia), followed by R. J. Ellicott QC (later Attorney-General and Justice of the Federal Court).

administrative review decisions of the Tribunal. I shall deal with relevant aspects of the internal jurisdiction later.

6 The others jurisdictions of the Tribunal are:

- (1) External appeal jurisdiction – the Tribunal has external appeal jurisdiction over a decision made by an external decision maker if legislation provides that an appeal may be made to the Tribunal against any such decision: s 31;
- (2) Enforcement jurisdiction – the Tribunal’s enforcement jurisdiction comprises the functions of the Tribunal when dealing with alleged or apparent contempt of the Tribunal and its functions when dealing with an application for a civil penalty under s 77 of the NCAT Act (which relates to penalties for non-compliance with Tribunal orders as opposed to penalties which the Tribunal can impose in its general jurisdiction): s 33; and
- (3) General jurisdiction – the power to make decisions or exercise other functions conferred by legislation other than the NCAT Act that does not fall within the Tribunal’s administrative review jurisdiction, appeal jurisdiction or enforcement jurisdiction: s 29.

7 Given the legislative effort taken to distinguish between the different types of jurisdiction exercised by the Tribunal, it is important to note that the NCAT Act maintains and supports an appropriate differentiation of practice and procedure in the Tribunal’s exercise of its various types of jurisdiction. This is one of the reasons why NCAT operates in 4 Divisions, as well as having the Appeal Panel.

8 Section 16(1) of the NCAT Act establishes the 4 first instance Divisions as follows:

- The Administrative and Equal Opportunity Division (AEOD);

- The Consumer and Commercial Division (CCD);
- The Guardianship Division (GD); and
- The Occupational Division (OD).

9 Under s 16(3) of the Act, each Division has the functions allocated to it in the relevant Division Schedule. The Division Schedules are Schedules 3 (AEOD), 4 (CCD), 5 (OD) and 6 (GD) to the Act. In addition to the functions allocated to each Division, the Division schedules specify special constitution requirements, special practices and procedures and particular appeal rights for each Division. It is essential to bear in mind that the provisions of these Division Schedules prevail over the general provisions of the NCAT Act and the procedural rules, to the extent of any inconsistency, by virtue of s 17(3) of the Act. I shall come back to that later.

10 Each Division also has its own Division Head, who is also a Deputy President of the Tribunal, its own structure with different Lists for different types of matters, its own Divisional Registry and, most importantly, its own practice and procedure which reflect the nature of the work done in that Division. I shall also come back to that later.

11 The distribution of applications lodged in the 2015 - 16 financial year is as follows:

	Lodgements	% of Total
Administrative & Equal Opportunity	848	1.2%
Consumer & Commercial	57,299	82.5%
Guardianship	10,384	15.0%
Occupational	323	0.5%
Internal Appeals	602	0.9%
	<b>69,456</b>	<b>100%</b>

- 12 It is an unfortunate fact of life that the jurisdictional structure of NCAT and its Divisional structure do not correspond in a neat or consistent way. For example and in general terms:
- (1) the Administrative and Equal Opportunity Division exercises both administrative review and general jurisdiction,
  - (2) the Consumer and Commercial Division exercises general and external appeal jurisdiction,
  - (3) the Guardianship Division exercises general jurisdiction,
  - (4) the Occupational Division exercises administrative review, external appeal and general jurisdiction,
  - (5) the internal appeal jurisdiction and some of the external appeal jurisdiction are exercised by the Appeal Panel, and
  - (6) the enforcement jurisdiction is exercised by the Tribunal constituted as required by s 27(1)(b) and (c) of the NCAT Act.

## **NCAT's Administrative Review Jurisdiction**

- 13 The Tribunal's administrative review jurisdiction is established by s 30 of the NCAT Act. However, the nature and content of this jurisdiction is spelt out by explicit and implicit reference to the *Administrative Decisions Review Act 1997* (NSW) (the ADR Act).
- 14 Administrative review jurisdiction is exercised by both the Administrative and Equal Opportunity Division and the Occupational Division, NCAT Act Sch 3, cl 3(1)(b) and (2)(c) and Sch 5, cl 4(2). As a matter of practicality, however, the administrative review list in the Occupational Division is managed in conjunction with the administrative review list in the Administrative and Equal Opportunity Division and Members dealing with matters in that list are assigned to both Divisions.

15 The specific nature of the Tribunal’s administrative review jurisdiction is spelt out in s 30(1), (3) and (4) of the NCAT Act in the following terms:

“(1) The *Administrative Decisions Review Act 1997* provides for the circumstances in which the Tribunal has administrative review jurisdiction over a decision of an administrator.

...

(3) An administratively reviewable decision is a decision of an administrator over which the Tribunal has administrative review jurisdiction.

(4) An administrator, in relation to an administratively reviewable decision, is the person or body that makes (or is taken to have made) the decision under enabling legislation.

...”

16 The ADR Act establishes that the Tribunal does not have general authority to review all administrative decisions. Instead, the Tribunal only has administrative review jurisdiction where enabling legislation expressly permits such a review.

17 Section 9 of the ADR Act is the provision which sets out the circumstance in which NCAT has administrative review jurisdiction. It is in the following terms:

“(1) The Tribunal has administrative review jurisdiction over a decision (or class of decisions) of an administrator if enabling legislation provides that applications may be made to the Tribunal for an administrative review under this Act of any such decision (or class of decisions) made by the administrator:

(a) in the exercise of functions conferred or imposed by or under the legislation, or

(b) in the exercise of any other functions of the administrator identified by the legislation.”

18 There are certain qualifications on this general provision in s 9(2) and (5) as well as certain extensions in s 9(3) and (4), which are not particularly relevant for the present paper.

19 What is meant by an “administratively reviewable decision” for the purposes of s 9 and other provisions of the ADR Act is found in s 7 of that Act, namely “a decision of an administrator over which the Tribunal has administrative review jurisdiction”. An “administrator” is defined in s 8 of the ADR Act which provides:

“(1) An administrator, in relation to an administratively reviewable decision, is the person or body that makes (or is taken to have made) the decision under enabling legislation.

(2) The person or body specified by enabling legislation as a person or body whose decisions are administratively reviewable decisions is taken to be the only administrator in relation to the making of an administratively reviewable decision even if some other person or body also had a role in the making of the decision.”

## The Importance of Enabling Legislation

20 As s 9 of the ADR Act makes clear, in order for there to be an administratively reviewable decision, there must be legislation enabling such a review. One example of enabling legislation which provides that applications may be made to the Tribunal for an administrative review under the ADR Act can be found in s 77 of the *Combat Sports Act 2013* (NSW). Section 77(1) of that Act is typical and provides:

### **“77 Administrative review of decisions by Civil and Administrative Tribunal**

(1) A person may apply to the Civil and Administrative Tribunal for an administrative review under the *Administrative Decisions Review Act 1997* of any of the following decisions:

- (a) a decision by the Minister under section 8 to approve or refuse to approve, or to impose, vary or revoke conditions of an approval of, an approved amateur body,
- (b) a decision under section 13 to refuse to register the person as a combatant of a specified registration class,
- (c) a decision under section 14 to impose conditions on the registration of the person as a combatant or to vary or revoke a condition, except where the condition is imposed in the interests of the person’s health or safety,
- (d) a decision under section 25 to refuse to register the person as an industry participant or promoter of a specified registration class,
- (e) a decision under section 27 to impose conditions on the registration of the person as an industry participant or promoter or to revoke or vary a condition,
- (f) a decision under section 34 to cancel the registration of a person,
- (g) a decision by the Authority to take disciplinary action under Division 4 of Part 2 in respect of the person,
- (h) a decision under section 41 to refuse to grant a permit to the person to hold a combat sport contest,
- (i) a decision under section 42 or 44 to impose conditions in respect of a permit held by the person or to vary or revoke a condition of such a permit or to revoke a permit, but only if the decision is made more than 24 hours before the scheduled start of the combat sport contest concerned,
- (j) a decision under Part 4 by the Authority to make, revoke or vary a general prohibition order in respect of the person.”

21 A shorter provision is found in s 16 of the *Deer Act 2006* (NSW) which provides:

“A person aggrieved by the decision of an authorised officer to give, amend or revoke a compliance direction under this Part may apply to the Civil and Administrative Tribunal for an administrative review under the *Administrative Decisions Review Act 1997* of that decision.”

22 Many New South Wales Acts and regulations contain similar provisions.<sup>7</sup>

23 Consequently, while NCAT does not have a general power to review any decision of an administrator, its administrative review jurisdiction covers a wide range of subject matters under many pieces of legislation.

24 If administrative review of a decision is to be sought in NCAT, it is essential to identify the enabling legislation which enables such an application to be made and empowers NCAT to review the decision.

25 As can be seen, in any merits review application or appeal there are three essential pieces of legislation which must be considered:

- (1) the enabling legislation which provides the gateway for access to administrative review;
- (2) the ADR Act which establishes how, when and by whom the administrative decision is to be reviewed; and

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<sup>7</sup> For example, similar provisions are found in the following New South Wales legislation whose short titles commence with letters from A to D: the *Aboriginal Land Rights Act 1983*, *Adoption Act 2000*, *Agricultural Livestock (Disease Control Funding) Act 1998*, *Air Transport Act 1964*, *Animal Research Act 1985*, *Anti-Discrimination Act 1977*, *Apiaries Act 1985*, *Architects Act 2003*, *Associations Incorporation Act 2009*, *Betting and Racing Act 1998*, *Births, Deaths and Marriages Registration Act 1995*, *Boarding Houses Act 2012*, *Building and Construction Industry Security of Payment Act 1999*, *Building Professionals Act 2005*, *Casino Control Regulation*, *Charitable Fundraising Act 1991*, *Child Protection (Working with Children) Act 2012*, *Children and Young Persons (Care and Protection) Act 1998*, *Children and Young Persons (Care and Protection) Regulation 2012*, *Coal Industry Act 2001*, *Combat Sports Act 2013*, *Commercial Agents and Private Inquiry Agents Act 2004*, *Community Services (Complaints, Reviews and Monitoring) Act 1993*, *Conveyancers Licensing Act 2003*, *Co-operative Housing and Starr-Bowkett Societies Act 1998*, *Criminal Records Act 1991*, *Crown Land Management Act 2016*, *Crown Lands Act 1989* and *Deer Act 2006*. That is 28 pieces of legislation.



- (3) the NCAT Act which governs the practice and procedure for the review and the existence and nature of appeal rights.

26 Having touched briefly upon the typical provisions of enabling legislation, it is appropriate now to consider the provisions of the ADR Act which apply generally to administrative review proceedings.

### The Administrative Decisions Review Act

27 By virtue of s 30 of the NCAT Act and the provision in each enabling Act conferring a right to “apply to the Civil and Administrative Tribunal for an administrative review under the *Administrative Decisions Review Act 1997*”, the ADR Act governs the application process and the administrative review functions of the Tribunal. The relevant provisions of the ADR Act are found in Ch 3, ss 48 to 66.

28 Chapter 3 of the ADR Act confers various rights on an “interested person”. This expression is defined in s 4(1) as meaning:

“a person who is entitled under enabling legislation to make an application to the Tribunal for an administrative review under this Act of an administratively reviewable decision.”

29 Who is an “interested person” in any particular case will depend, therefore, on the terms of the applicable enabling legislation.

30 It is also important to understand the process of administrative review antecedent to making an application to the Tribunal because, in many cases, certain steps in that process must occur before an application can be made to the Tribunal for review.

### *Steps Preliminary to Review by the Tribunal*

31 These preliminary steps are found in ss 48 – 52 of the ADR Act.

- 32 Section 48 generally requires an administrator who makes an administratively reviewable decision to take reasonable steps to give any interested person notice in writing of the decision and the right to have it reviewed.
- 33 Under s 49 such an administrator is generally required to give a written statement of reasons for the decision, upon written request from an interested person. Section 50 establishes certain exceptions to this requirement.
- 34 In order to prevent these steps from being, intentionally or unintentionally, frustrated, ss 51 and 52 empower the Tribunal to determine whether a relevant exception to the obligation to give reasons applies and to order an administrator to provide a statement of reasons or an adequate statement of reasons, respectively.
- 35 Subject to a contrary provision in any applicable enabling legislation, there is a further, important step that must be taken before an application can be made to the Tribunal for review of an administratively reviewable decision. This is found in s 53 of the ADR Act. That section establishes a process of internal review of administratively reviewable decisions. Section 53 covers how such an internal review application is to be made (in s 53(2)), who is to conduct the review (in s 53(3)); what material is to be considered (in s 53(4) and the reviewer's powers and functions (in s 53(5) and (5A)).
- 36 After reviewing a decision, an internal reviewer is required to notify the interested person of the outcome of the review, provide reasons for that decision on review and notify the applicant of the right to have that decision reviewed by the Tribunal (s 53(6)). An administratively reviewable decision that is affirmed, varied or set aside and substituted on review is taken to have been made by the administrator (as affirmed, varied or substituted by the internal reviewer) on the date on which the interested person is given a notice of the decision on review (s 53(8)).

37 An internal review is taken to be finalised if the interested person is notified of the outcome or if no such notice is given within 21 days of lodging the application for internal review (s 53(9)).

### *Review by the Tribunal*

38 Review of administratively reviewable decisions by the Tribunal is dealt with in ss 55 to 66 of the ADR Act.

### *Making an application*

39 Only “an interested person” can make an application for an administrative review under the ADR Act, s 55(1). The application has to be made in the time and manner prescribed by r 24 of the Civil and Administrative Tribunal Rules, s 55(2). In appropriate cases, the Tribunal can extend time to make an application, under s 41 of the NCAT Act.

40 Under s 55(3), if the interested person was entitled to seek an internal review, an application may generally not be made unless the person has duly applied for such an internal review and the review is taken to have been finalised under s 53(9). It probably will not come as a surprise that there are exceptions to this general position which are found in s 55(3) – (6).

41 Perhaps the most important exception is found in s 55(4)(b), which allows the Tribunal to deal with an application even though the applicant has not duly applied for an internal review if the Tribunal is satisfied that:

- (1) it is necessary for the Tribunal to deal with the application in order to protect the applicant’s interests; and
- (2) the application to the Tribunal was made within a reasonable time following the administratively reviewable decision of the administrator concerned.

42 Protecting the applicant's interests in these circumstances will usually involve the Tribunal considering whether to grant a stay under s 60(2).

#### Documents to be made available

43 Under s 58, the administrator whose decision is the subject of the application to the Tribunal must, within 28 days after receiving notice of the application, lodge with the Tribunal:

- (1) Any statement of reasons given to the applicant for the original decision and for the decision on any internal review, s 58(1)(a) and (a1); and
- (2) "a copy of every document or part of a document that is in the possession, or under the control, of the administrator that the administrator considers to be relevant to the determination of the application by the Tribunal" (subject to certain exceptions in s 58(7)), s 58(1)(b).

44 The Tribunal has additional powers and duties to ensure that the obligations to provide reasons and all relevant documents are complied with in a way which permits a proper review of any reviewable decision:

- (1) Section 58(2) empowers the Tribunal to direct the administrator to give an applicant a copy of the statement of reasons if the applicant has not already been given such a statement;
- (2) The period of 28 days for the provision of reasons or documents under s 58(1) can be reduced or extended by the Tribunal if it considers that a party would or might suffer hardship as a result of the 28 day period, s 58(3);
- (3) The Tribunal can also direct the administrator to provide other particular documents or classes of documents in the administrator's possession or under its control if the Tribunal considers they may be relevant to the determination of the application, s 58(4);

(4) The Principal Registrar is to grant reasonable access, including photocopy access, to the documents lodged by the administrator under s 58, s 58(5). There are, however, practical difficulties for applicants and the Registry if applicants have to come to the Registry to obtain access to these documents and copies of them. For this reason, as a matter of course, the Tribunal directs the administrator to serve copies of the s 58 documents on the applicant.

45 The obligation to disclose relevant documents and the ability of the Tribunal to direct the provision of further documents are important prerequisites to conducting a proper review of any administratively reviewable decision.

#### [Effect of pending applications on administratively reviewable decisions](#)

46 Sections 60 – 62 of the ADR Act deal with the effect of a pending application for review in the Tribunal on the reviewable decision. Generally, an application for review does not affect the operation of a decision unless the Tribunal stays the operation of the decision, s 60(1) and (2). Thus, if an applicant wishes to maintain the status quo, an application for a stay must be made to the Tribunal.

47 Certain restrictions on when the Tribunal can grant a stay are found in s 61.

48 How and on what conditions a stay order takes effect is dealt with in s 62.

#### [The Tribunal's function in determining a review application](#)

49 The Tribunal's function when reviewing an administratively reviewable decision is set out in s 63. It is worthwhile quoting that section in full:

“(1) In determining an application for an administrative review under this Act of an administratively reviewable decision, the Tribunal is to decide what the correct and preferable decision is having regard to the material then before it, including the following:

- (a) any relevant factual material,
- (b) any applicable written or unwritten law.

(2) For this purpose, the Tribunal may exercise all of the functions that are conferred or imposed by any relevant legislation on the administrator who made the decision.

(3) In determining an application for the administrative review of an administratively reviewable decision, the Tribunal may decide:

- (a) to affirm the administratively reviewable decision, or
- (b) to vary the administratively reviewable decision, or
- (c) to set aside the administratively reviewable decision and make a decision in substitution for the administratively reviewable decision it set aside, or
- (d) to set aside the administratively reviewable decision and remit the matter for reconsideration by the administrator in accordance with any directions or recommendations of the Tribunal.”

50 The principal task of the Tribunal on an administrative review is, therefore:

- (1) to decide what is the “correct and preferable decision”;
- (2) in the exercise the functions of the administrator who made the decision under review and sometimes this includes limitations of significance;<sup>8</sup>
- (3) having regard to the material before the Tribunal not the material before the administrator and, generally, the law as at the time of the review.<sup>9</sup>

51 The language of “correct and preferable” decision echoes, albeit not exactly, the early comments of the Full Court of the Federal Court of Australia concerning the effect of s 43 of the *Administrative Appeals Tribunal Act 1975* (Cth) (the AAT Act) which is equivalent to s 63 of the ADR Act. Section 43(1) of the AAT Act relevantly provided only as follows:

- “(1) For the purpose of reviewing a decision, the [AAT] may exercise all the powers and discretions that are conferred by any relevant enactment on the person who made the decision and shall make a decision in writing-
- (a) affirming the decision under review;
  - (b) varying the decision under review; or
  - (c) setting aside the decision under review and-
    - (i) making a decision in substitution for the decision so set aside; or

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<sup>8</sup> See for example the reasoning of Basten JA in *Kocic v Commissioner of Police, NSW Police Force* (2014) 88 NSWLR 159; [2014] NSWCA 368 at [66]-[77].

<sup>9</sup> For an analysis of the principles that apply when there is a change in the law between the original decision and the review see the Appeal Panel’s decision in *Cavaleri v Director General, Department of Trade and Investment, Regional Infrastructure and Services* [2014] NSWCATAP 13 at, for example, [45]-[57].

(i) remitting the matter for reconsideration in accordance with any directions or recommendations of the Tribunal.”

52 In *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at 589, Bowen CJ and Deane J said at 129:

"The question for the determination of the Tribunal is not whether the decision which the decision-maker made was the correct or preferable one on the material before him. The question for the determination of the Tribunal is whether that decision was the correct or preferable one on the material before the Tribunal. The Act offers little general guidance on the criteria and rules which the Tribunal is to apply in the performance of its task of reviewing administrative decisions which are subjected to its surveillance. Even in a case such as the present where the legislation under which the relevant decision was made fails to specify the particular criteria or considerations which are relevant to the decision, the Tribunal is not, however, at large. In its proceedings, it is obliged to act judicially, that is to say, with judicial fairness and detachment. In its review of an administrative decision, it is subject to the general constraints to which the administrative officer whose decision is under review was subject, namely, that the relevant power must not be exercised for a purpose other than that for which it exists (*Water Conservation & Irrigation Commission v Browning* (1947) 74 CLR 492498, 499-500, 504 at 496,), that regard must be had to the relevant considerations, and that matters 'absolutely apart from the matters which by law ought to be taken into consideration' must be ignored: *R v Cotham* [1898] 1 QB 802 at 806; *Randall v Northcote Corp* [1910] 11 CLR 100-110 at 109; *Shrimpton v Commonwealth* (1945) 69 CLR 613 at 620; *R v Anderson*; *Ex parte Ipec-Air Pty Ltd* (1965) 113 CLR 177 at 189 ; [1965] ALR 1067 at 1071."

53 In this regard and others, the ADR Act, enacted 22 years after the AAT Act, demonstrates the development of administrative law over that period. The general principles stated by the Full Court continue to apply in respect of reviews under the ADR Act. However, s 63 now expressly requires the Tribunal to make “the correct and preferable decision”.

54 There is some debate about the difference between the phrases “correct or preferable”, as it appears in *Drake*, and “correct and preferable”, as it appears in s 63 of the ADR Act. If there is a difference, and it is not certain that there is, NCAT is legislatively required to determine what the correct and preferable decision is. Somewhat surprisingly, given the terms of s 63, the Second Reading Speech contained the statement:<sup>10</sup>

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<sup>10</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 29 May 1997, 9602-9605.

“The tribunal will need access to all relevant documentation in order to reach the **correct or preferable** decision about the matter before it.” (emphasis added)

55 This could be seen as support for the contention that there is no real difference between the two expressions.

56 In carrying out the function of determining the correct and preferable decision, the Tribunal is empowered to affirm the decision, vary the decision, set aside the decision and make a substitute decision, or set aside the decision and remit the matter for reconsideration by the administrator, s 63(3) of the ADR Act.

57 Section 64 deals with the question that concerned the Kerr Committee of what role government policy should play in the Tribunal’s decision. At par 299 of the Kerr Committee Report, the following is found concerning the role and composition of the proposed tribunal:

“The Committee’s view that such a Tribunal would be mainly concerned with review as to fact-finding and improper or unjust exercise of discretionary power is inherent in what we have said. So too is the view that the jurisdiction would still be workable although matters of government policy may be involved. This policy can be explained to the Tribunal by written or oral evidence and, of course, a representative of the department or instrumentality will be a member of the Tribunal. ...”<sup>11</sup>

58 Section 64 provides in part:

“(1) In determining an application for an administrative review under this Act of an administratively reviewable decision, the Tribunal must give effect to any relevant Government policy in force at the time the administratively reviewable decision was made except to the extent that the policy is contrary to law or the policy produces an unjust decision in the circumstances of the case.

...

(5) In this section:

Government policy means a policy adopted by:

(a) the Cabinet, or

(b) the Premier or any other Minister,

that is to be applied in the exercise of discretionary powers by administrators.”

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<sup>11</sup> Kerr Committee Report, p 89.



59 Such policies can be established by the Premier or a Minister certifying that a policy was Government policy in relation to a particular matter and the Tribunal must take judicial notice of it, s 64(2) and (3). An example of a different manner of establishing Government policy is referred to by the Court of Appeal in *Altaranesi v Administrative Decisions Tribunal* [2012] NSWCA 19. In that case the appellant argued that the Appeal Panel had failed to have regard to Government policy. The Court said at [90]:

“The appellant refers to The NSW FOI Manual dated August 2007. That Manual states that it contains statements ‘of Government policy relating to FOI’ which must be followed by Government agencies. Specifically, it states that where a sentence or paragraph in ‘this Manual is bolded and underlined, and the word [policy] appears at the end of it, that sentence or paragraph reflects a policy determined by the Department of Premier and Cabinet, which must be observed by all agencies’.”

60 Unfortunately for the appellant in that case, the material relied upon was not bolded, underlined and the word policy did not appear at the end of material.

61 Sections 65 and 66 deal with the Tribunal’s power to remit a decision for reconsideration and the effect of administrative review decisions, respectively.

62 In order to understand the Tribunal’s practice and procedure in carrying out its review function conferred by s 63 of the ADR Act, it is necessary to turn to the NCAT Act.

## Administrative review practice and procedure in NCAT

### The Guiding Principle and the approach to matters of practice and procedure

63 The general framework for practice and procedure in the Tribunal is found in Pt 4 of the NCAT Act, ss 35 to 70. Part 4 is helpfully headed “*Practice and Procedure*”. Some of these provisions are more general in nature but others have the effect of rendering the procedure of the Tribunal in administrative review proceedings quite different from that in adversarial civil proceedings that involve the exercise of judicial power.

### *The Guiding Principle and other general procedural provisions*

64 As in the Supreme Court and other Courts of this State, the guiding principle is that the NCAT Act and the procedural rules should be applied so as to facilitate the just, quick and cheap resolution of the real issue in the proceedings: s 36(1) of the Act.

65 Section 36(3) imposes an express duty on parties, legal practitioners and other representatives to co-operate with the Tribunal to give effect to the guiding principle and, for that purpose, to participate in the processes of the Tribunal and to comply with directions and orders.

66 Section 36(4) introduces a requirement of proportionality in the following terms:

“the practice and procedure of the Tribunal should be implemented so as to facilitate the resolution of the issues between the parties in such a way that the cost to the parties and the Tribunal is proportionate to the importance and complexity of the subject-matter of the proceedings.”

67 It is significant that the cost to the Tribunal as well as to the parties is mentioned in this subsection.

68 Section 38(1) is a useful provision to note when appearing in the Tribunal. It states:

“The Tribunal may determine its own procedure in relation to any matter for which this Act or the procedural rules do not otherwise make provision.”

69 Informality, where circumstances permit, is mandated in s 38(4). In addition, under s 38(5)(a), (b) and (c) respectively, the Tribunal is also required to take such measures as are reasonably practicable:

- (1) to ensure that the parties to the proceedings before it understand the nature of the proceedings,

- (2) if requested to do so — to explain to the parties any aspect of the procedure of the Tribunal, or any decision or ruling made by the Tribunal, that relates to the proceedings, and
- (3) to ensure that the parties have a reasonable opportunity to be heard or otherwise have their submissions considered in the proceedings.

### *Evidence and evidentiary matters*

70 Four provisions are particularly relevant in relation to evidence and witnesses: ss 38(2) and (6)(a), 46 and 48.

#### *The Tribunal is not generally bound by the rules of evidence*

71 For the purpose of administrative review matters, s 38(2) of the NCAT Act provides that the Tribunal is not bound by the rules of evidence “and may inquire into and inform itself on any matter in such manner as it thinks fit”.

72 The fact that the Tribunal is not bound by the rules of evidence in administrative review matters does not, however, lead to a fact finding free-for-all for a number of reasons. First, the Tribunal remains subject to the rules of natural justice, s 38(2). In this context, the comments by French CJ in *Kostas v HIA Insurance Services Pty Limited* should be borne in mind:<sup>12</sup>

“The exercise of the Tribunal's freedom from the rules of evidence should be subject to the cautionary observation of Evatt J in *R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott* that those rules “represent the attempt made, through many generations, to evolve a method of inquiry best calculated to prevent error and elicit truth”. It is a method not to be set aside in favour of methods of inquiry which necessarily advantage one party and disadvantage another. On the other hand, that caution is not a mandate for allowing the rules of evidence, excluded by statute, to ‘creep back through a domestic procedural rule’.” (footnotes omitted)

73 Secondly, although the Tribunal is not generally bound by the rules of evidence, s 38(3) provides that s 128 of the *Evidence Act 1995* (NSW) is taken to apply to evidence given in the Tribunal. Consequently, the Tribunal can grant certificates under s 128 where requiring witnesses to answer when

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<sup>12</sup> (2010) 241 CLR 390; [2010] HCA 32 at [17].

otherwise it might lead to them incriminating themselves or exposing themselves to a penalty.

- 74 Thirdly, the Tribunal's mode of proceeding must serve its function. That function implies a rational process of decision-making according to law. A decision based on no information at all, or based on findings of fact which are not open on information before the Tribunal, is not compatible with a rational process, *Kostas v HIA Insurance Services Pty Limited* (2010) 241 CLR 390; [2010] HCA 32 at [16].
- 75 Fourthly, although the principle stated in *Briginshaw v Briginshaw* (1936) 60 CLR 336 at 362-3, and embodied in s 140 of the *Evidence Act 1995* (NSW), does not apply as part of the rules of evidence, the general approach to fact finding encapsulated in those principles is applicable by analogy in administrative review proceedings in the Tribunal: *Bronze Wing International Pty Ltd v SafeWork NSW* [2017] NSWCA 41 at [126] - [127].

#### The Tribunal may proceed inquisitorially

- 76 The other significant provisions concerning evidence and witnesses are ss 38(6)(a), 46 and 48.
- 77 These sections are particularly important in administrative review matters, because of the nature of the function conferred on the Tribunal by s 63 of the ADR Act which is quite different from the function of a Court or Tribunal determining an ordinary civil dispute between two parties.
- 78 Section 38(6)(a) provides that:
- “The Tribunal:  
(a) is to ensure that all relevant material is disclosed to the Tribunal so as to enable it to determine all of the relevant facts in issue in any proceedings, ...”
- 79 In administrative review proceedings, the parties do not determine the facts in issue, as is the case generally in ordinary, adversarial civil litigation. In an administrative review under the ADR Act, the Tribunal is to determine what

the correct and preferable decision is in the exercise of the functions of the administrator who made the decision under review, on the material before the Tribunal. The functions of the administrator and the nature of the particular decision in question will determine what the relevant factual issues are. Consequently, in order to comply with the obligation to ensure that all relevant material is disclosed to the Tribunal to enable it to make the necessary factual findings, the Tribunal can, with due regard to the rules of natural justice and practicality, conduct administrative review proceedings, in whole or in part, inquisitorially in appropriate cases.

80 The ability to proceed inquisitorially is also supported by ss 46 and 48 of the NCAT Act. Section 46 provides in part:

- “(1) The Tribunal may:
  - (a) call any witness of its own motion, and
  - (b) examine any witness on oath or affirmation or require evidence to be verified by a statutory declaration, and
  - (c) examine or cross-examine any witness to such extent as the Tribunal thinks proper in order to elicit information relevant to the exercise of the functions of the Tribunal in any proceedings, and
  - (d) compel any witness to answer questions which the Tribunal considers to be relevant in any proceedings.
- (2) If the Tribunal decides to call a person as a witness under subsection (1) (a), the Tribunal may:
  - (a) seek to procure the voluntary attendance of the witness before it by notifying the person in such manner as it thinks appropriate in the circumstances, or
  - (b) issue a summons (or direct a registrar to issue a summons) to compel the attendance of the person before it.
- (3) Nothing in subsection (1) enables the Tribunal to compel a witness to answer a question if the witness has a reasonable excuse for refusing to answer the question.”

81 The Tribunal’s power to call a witness in s 46(1)(a) is reinforced by the power to issue a summons to compel the person to attend in s 46(2)(b). Further, the Tribunal can also direct under s 48(1)(b) that a summons be issued to attend and give evidence or produce documents or both.

82 These express powers in ss 46 and 48 to call witnesses of its own motion, to elicit information from them and to issue summons to compel their attendance

or the production of documents provide the mechanisms whereby the Tribunal can conduct proceedings wholly or partly on an inquisitorial basis. In all of this, however, it must also be borne in mind that the Tribunal is also expressly required to apply the rules of natural justice, s 38(2).

- 83 The ability and requirement to proceed inquisitorially should not be pushed to extremes.<sup>13</sup> At a practical level, the Tribunal can and should rely on the fact that it is the parties to the administrative review proceedings who have knowledge of the relevant facts and circumstances. The parties should take responsibility for putting all relevant factual material before the Tribunal. In addition, State Government agencies are bound by the Model Litigant Policy for Civil Litigation.<sup>14</sup> In these circumstances, the Tribunal is not required routinely to engage in inquisitorial activity. Moreover, where further enquiry is necessary, the Tribunal will often proceed by requesting the parties to provide further specific information, witnesses or documents.

#### *No onus of proof in administrative review matters*

- 84 The nature of the administrative review function conferred by s 63 of the ADR Act and the obligation in s 38(6) can also be seen as providing a foundation for the principle that in administrative review proceedings neither party bears a legal or formal onus of proof.
- 85 The Appeal Panel, relying on a number of High Court authorities in relation to Commonwealth tribunals, held, in *Wilson v Commissioner of Police, New South Wales Police Force* [2015] NSWCATAP 248 at [19], that:

“No party has a formal onus of proof [in proceedings for administrative review under the ADR Act brought] under [s 75 of] the *Firearms Act*. *Bushell v Repatriation Commission* [1992] HCA 47; (1992) 175 CLR 408 at 425; *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* [2006] HCA 53; (2006) 231 CLR 1 at [39]- [40]. There is a practical onus on the party who raises a specific fact for consideration to prove the existence of that fact: *Re Holbrook and Australian Postal Commission* (1983) 5 ALN N 46.”

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<sup>13</sup> An example where a tribunal went too far can be found in *R v The Optical Board of Registration and Ors* (1933) SASR 1.

<sup>14</sup> Premier's Memorandum M2016-03-Model Litigant Policy for Civil Litigation (issued on 1 July 2016).

- 86 This proposition has been accepted without being doubted by the Supreme Court and Court of Appeal in *Bronze Wing International Pty Ltd v SafeWork NSW* [2017] NSWCA 41, see for example at [122] and [127]. It has also been applied in other administrative reviews contexts in the Tribunal, see for example *CKU v Children's Guardian* [2017] NSWCATAD 36 at [27].
- 87 As the Appeal Panel noted in the passage from *Wilson v Commissioner of Police, New South Wales Police Force* quoted above, although there is no formal, legal onus on any party in merits review proceedings, if a party wishes to rely on a specific fact, it is usually incumbent upon the party to put evidence before the Tribunal to support such a finding of fact being made.

### *Parties to administrative review proceedings*

- 88 Rule 27 of the Civil and Administrative Tribunal Rules 2014 (the NCAT Rules) governs who is a party to administrative review proceedings. It provides as follows:

“The parties to proceedings for [an] ... administrative review decision are:

- (a) the applicant, and
- (b) if an order or other decision is sought from the Tribunal in respect of a person or body (other than the applicant)—the person or body in respect of whom the order or other decision is sought [that is the administrator], and
- (c) if the Attorney General or another Minister intervenes in the proceedings under section 44 of the Act—the Attorney General or Minister, and
- (d) any other person who is made a party to the proceedings by the Tribunal under section 44 of the Act, and
- (e) any other person required to be joined or treated as a party to the proceedings by a Division Schedule for a Division of the Tribunal, enabling legislation or the procedural rules.”

- 89 Under s 44, the Tribunal has a very wide power as to who should be joined as a party. Section 44(1) provides:

“The Tribunal may order that a person be joined as a party to proceedings if the Tribunal considers that the person should be joined as a party.”

- 90 This power of joinder in s 44(1) is to be read in conformity with the power of removal under s 44(2), so that a party who is a "proper or necessary party"

ought to be joined in the proceedings, *Commissioner of Police, New South Wales Police Force v Fine* (2014) 87 NSWLR 1; [2014] NSWCA 327 at [38].

### *Representation in administrative review proceedings*

91 Section 45(1) of the NCAT Act establishes the general proposition that parties are to have the carriage of their own case and may be represented only with leave. It terms are quite clear:

“(1) A party to proceedings in the Tribunal:  
(a) has the carriage of the party’s own case and is not entitled to be represented by any person, and  
(b) may be represented by another person only if the Tribunal grants leave:  
(i) for that person to represent the party, or  
(ii) in the case of representation by an Australian legal practitioner—  
for a particular or any Australian legal practitioner to represent the party.”

92 There is nothing in the remainder of s 45 that would indicate that legal practitioners do not generally require leave to represent a party in administrative review proceedings. Nevertheless, that is the case.

93 How that comes about is a peculiarity of the NCAT legislation. It has already been noted that the provisions of the Division Schedules prevail over the general provisions of the NCAT Act by virtue of s 17(3) which provides:

**“17 Division Schedule for a Division of Tribunal**

...  
(3) The provisions of a Division Schedule for a Division of the Tribunal prevail to the extent of any inconsistency between those provisions and any other provisions of this Act or the provisions of the procedural rules.  
...”

94 In addition, it must be borne in mind that s 35, which is the first section in Pt 4 of the NCAT Act, provides:

“Each of the provisions of this Part [*Part 4 Practice and Procedure*] is subject to enabling legislation and the procedural rules.”

95 The term “enabling legislation” is defined in s 4(1) of the Act as follows:



**“enabling legislation** means legislation (other than this Act or any statutory rules made under this Act) that:

- (a) provides for applications or appeals to be made to the Tribunal with respect to a specified matter or class of matters, or
- (b) otherwise enables the Tribunal to exercise functions with respect to a specified matter or class of matters.”

96 The “procedural rules” are defined in s 4(1) to mean each of “the Tribunal rules” and “the regulations in their application to practice and procedure of the Tribunal”. The Tribunal rules are made by the NCAT Rule Committee under ss 24 and 25 of the NCAT Act and are the Civil and Administrative Tribunal Rules 2014. The only regulation is the Civil and Administrative Tribunal Regulation 2013.

97 Thus, when dealing with questions relating to practice and procedure in the Tribunal, it is essential to consider not only the Practice and Procedure Part of the Act, Pt 4, but also:

- (1) the relevant enabling legislation;<sup>15</sup>
- (2) the relevant Division Schedule in the Act;
- (3) the Civil and Administrative Tribunal Rules 2014; and
- (4) the Civil and Administrative Tribunal Regulation in its application to practice and procedure.

98 Each of these prevails over the terms of Pt 4 to the extent of any inconsistency. It might be observed at this point that there is a certain labyrinthine quality in this approach to legislative drafting. The administrative review practitioner requires the skill of Theseus not to lose the thread.

99 The general proposition found in s 45 of the Act that there is no representation without leave is, therefore, not the end of the matter. The Division Schedules contain provisions dealing with representation. In short, in the Administrative

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<sup>15</sup> For these purposes, both the Act which entitles a person to make an application for administrative review under the ADR Act and the ADR Act itself are “enabling legislation”.

and Equal Opportunity Division and in the Occupational Division legal representatives can appear without leave in all matters except proceedings under the *Community Services (Complaints, Reviews and Monitoring) Act 1993* (NSW) (see the NCAT Act, Sch 3, cl 9 and Sch 5, cl 27).

100 Notwithstanding the right to representation without leave in most cases, many applicants for review are self-represented.

#### *Pre-hearing processes in administrative review matters*

101 Administrative review matters are listed for one or more directions hearings in order to prepare them for hearing. Given the nature of the proceedings and the typical applicants, pre-hearing case management tends to focus on two things:

- (1) ensuring, as far as possible, that all the relevant material is before the Tribunal at the hearing; and
- (2) assisting the parties, and especially unrepresented litigants, to understand the nature of the proceedings, how the Tribunal will proceed and what they have to do in order to present their cases effectively at the final hearing.

#### *Hearings in administrative review proceedings*

102 Section 50(1) states the general proposition that a hearing is required for proceedings in NCAT. In the case of administrative review proceedings, there will be a hearing unless the Tribunal makes an order dispensing with a hearing. It can make such a dispensing order, under s 50(2), if the Tribunal is satisfied that the issues for determination can be adequately determined in the absence of the parties by considering written submissions or any other documents provided to the Tribunal.

- 103 Before dispensing with a hearing, however, the Tribunal must afford the parties an opportunity to make submissions on whether or not there should be hearing and must take those submissions into account, s 50(3).
- 104 Under s 49(1) of the NCAT Act, hearings are to be open to the public unless the Tribunal orders otherwise. An order closing a hearing to the public can be made if the Tribunal is satisfied that it is desirable to conduct a hearing wholly or partly in private by reason of the confidential nature of any evidence or matter or for any other reason, s 49(2). The need to close the Tribunal to the public does arise from time to time in administrative review matters that involve, for example, the Tribunal receiving sensitive material such as criminal intelligence or evidence concerning child sexual abuse. Even in these matters, the Tribunal usually only excludes the public from that part of the hearing that involves the sensitive material and otherwise proceeds in public.
- 105 A less restrictive alternative is for the Tribunal to conduct the hearing in public but make orders restricting the disclosure or publication of names of parties or witnesses, evidence or reports of the proceedings, as appropriate, under s 64 of the NCAT Act.

#### *Costs in administrative review proceedings*

- 106 The awarding of costs is another area where it is dangerous to have regard only to Pt 4 of the NCAT Act. Section 60, which is in Pt 4, provides in subs (1):

“Each party to proceedings in the Tribunal is to pay the party’s own costs.”

- 107 Subsection (2) then states:

“The Tribunal may award costs in relation to proceedings before it only if it is satisfied that there are special circumstances warranting an award of costs.”

- 108 Section 60(3) goes on to provide a non-exhaustive list of circumstances that can constitute special circumstances for the purposes of subs (2).

109 Having regard only to these provisions, the situation might appear to be clear: costs can only be awarded if the Tribunal is satisfied that there are special circumstances warranting an award. Unfortunately, the situation is not so clear.

110 As has been seen above in relation to representation, because of ss 17(3) and 35 of the NCAT Act, in addition to s 60, it is necessary to consider,:

- (1) the enabling legislation;
- (2) the relevant Division Schedule;
- (3) the NCAT Rules; and
- (4) the NCAT Regulation to the extent that it deals with matters of practice and procedure.

111 In administrative review matters, enabling legislation sometimes confers on the Tribunal a general power to award costs. For example, certain revenue statutes appear to give the Tribunal an unfettered costs power, see for example the *First Home Owner Grant (New Homes) Act 2000*, s 29, the *Payroll Tax Rebate Scheme (Jobs Action Plan) Act 2011*, s 42, the *Regional Relocation Grants (Skills Incentive) Act 2011*, s 46 and the *Small Business Grants (Employment Incentive) Act 2015*, s 44.<sup>16</sup> This is so notwithstanding that the general position in revenue administrative review matters is that s 60 continues to apply by virtue of s 101(2)(b) of the *Taxation Administration Act 1996*.

112 A relevant Division Schedules for administrative review matters is Sch 3. It also contains special costs provisions that override s 60.

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<sup>16</sup> For example, s 29 of the *First Home Owner Grant (New Homes) Act* provides:

“(1) On an administrative review, the Civil and Administrative Tribunal may:

- (a) confirm, vary or reverse the original decision, and
- (b) make any further orders as to costs or otherwise as it thinks fit.

2) Subsection (1) does not limit the generality of Division 3 of Part 3 of Chapter 3 of the *Administrative Decisions Review Act 1997*”.

- (1) Clause 12 of Sch 3 establishes that, despite s 60, the Tribunal has an unfettered power to award costs in proceedings under the *Dormant Funds Act 1942* (NSW); and
- (2) Clause 13 of Sch 3 provides that despite s 60, the Tribunal may not award costs in proceedings under the *Child Protection (Working with Children) Act 2012* (NSW) and the *Victims Rights and Support Act 2013* (NSW).<sup>17</sup>

113 The NCAT Rules also contain special provisions relating to costs, rr 38 and 38A. Rule 38 only applies to costs in the Consumer and Commercial Division and thus has no application in administrative review proceedings. Rule 38A can, however, apply in internal appeals concerning administrative review decisions. In effect, r 38A provides that if some cost provision other than s 60 applied at first instance, the Appeal Panel is to apply that same cost provision to the costs of the internal appeal.

### NCAT's Internal Appeal Jurisdiction

114 As was noted at the outset, NCAT not only has jurisdiction to determine administrative review matters at first instance it also has jurisdiction to hear appeals in respect of most administrative review decisions made in the Tribunal. This internal appeal is intended to be the principal means of challenging such decisions, as it evident from s 34 of the NCAT Act.

115 NCAT's internal appeal jurisdiction is described in s 32 and, once again, is relatively simple on the surface. NCAT has internal appeal jurisdiction over any decision made by the Tribunal in proceedings for an administrative review

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<sup>17</sup> As to costs in Victims Support matters, there appears to be a legislative conflict. Clause 13 of the Victims Rights and Support Regulation 2013 provides:

“Costs and expenses payable with respect to proceedings before the Civil and Administrative Tribunal under the Act relating to victims support are to be determined in accordance with section 60 of the *Civil and Administrative Tribunal Act 2013*.”

The Victims Rights and Support Regulation 2013 falls within the definition of “enabling legislation” in s 4(1) of the NCAT Act. The effect of this cl 13 of the Regulation is, however, unclear. Clause 13 of Sch 3 is in a Division Schedule of the NCAT Act. It is only the provisions of Pt 4 of the NCAT Act which are said, in s 35, to be “subject to enabling legislation”. Section 17(3) by which Division Schedules prevail over other provisions of the NCAT Act is not in Pt 4. Clearing out these legislative Augean Stables, may require a Herculean effort.

decision, as well as decisions made in proceedings for a general decision or and any declared decision of a registrar, s 32(1).

116 That simple, general statement is, however, subject to a number of exceptions, primarily in s 32(3) and in the Division Schedules. For the purposes of administrative review decisions, the most important exceptions to NCAT's appeal jurisdiction are those listed in cl 15(b) to (g) of Sch 3 to the NCAT Act.<sup>18</sup>

117 In general terms, if there is no right of appeal to the Appeal Panel, an administrative review decision can be appealed to the Supreme Court or the Land and Environment Court.<sup>19</sup>

118 The nature of an appeal to the internal appeal panel is dealt with in s 80 of the NCAT Act. That section provides:

“(1) An appeal against an internally appealable decision may be made to an Appeal Panel by a party to the proceedings in which the decision is made.

(2) Any internal appeal may be made:

(a) in the case of an interlocutory decision of the Tribunal at first instance—with the leave of the Appeal Panel, and

(b) in the case of any other kind of decision (including an ancillary decision) of the Tribunal at first instance—as of right on any question of law, or with the leave of the Appeal Panel, on any other grounds.

(3) The Appeal Panel may:

(a) decide to deal with the internal appeal by way of a new hearing if it considers that the grounds for the appeal warrant a new hearing, and

(b) permit such fresh evidence, or evidence in addition to or in substitution for the evidence received by the Tribunal at first instance,

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<sup>18</sup> The administrative review decisions excluded from NCAT's internal appeal jurisdiction listed in cl 15(b) to (g) are:

“(b) a Division decision for the purposes of the *Child Protection (Working with Children) Act 2012*,

(c) (Repealed)

(d) a Division decision for the purposes of the lands legislation [see definition in cl 1(1) of Sch 3],

(e) a determination of the Tribunal for the purposes of Part 7 of the *Native Title (New South Wales) Act 1994*,

(f) an administrative review decision for the purposes of section 21 of the *Plant Diseases Act 1924*,

(g) an administrative review decision for the purposes of section 51 of the *Victims Rights and Support Act 2013*.”

<sup>19</sup> NCAT Act Sch 3 cll 17 and 18 and note, to the extent relevant, Sch 5 cl 29.

to be given in the new hearing as it considers appropriate in the circumstances.”

119 The internal appeal right, therefore, can be seen as an appeal by way of rehearing on any question of law, as of right, and on any other ground, by leave. Notwithstanding this, there is also the option provided by s 80(3) to conduct a new hearing, or a hearing de novo, with or without fresh, substitute or additional evidence, if the Appeal Panel considers the grounds of appeal warrant such a new hearing.

## Conclusion

120 The conceptual underpinnings of administrative review by NCAT are based on the recommendations of the Kerr Committee Report of 1971 and the experience of the Commonwealth AAT and the New South Wales ADT. The Kerr Committee recommended:

- (1) the introduction of an obligation for decision makers to provide a statement of findings of fact and reasons at the request of a person affected by the decision;
- (2) the introduction of an obligation to disclose relevant documents; and
- (3) the establishment of a general merits review tribunal.<sup>20</sup>

121 These recommendations have been given full effect to in the provisions of the ADR Act and the NCAT Act that have been referred to above.

122 Furthermore, when performing its administrative review functions, NCAT can legitimately be said to have all the attributes that the Kerr Committee envisaged for a general merits review tribunal (as summarised by Professor Robin Creyke).<sup>21</sup> NCAT:

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<sup>20</sup> Kerr Committee Report, pp 112 – 116.

<sup>21</sup> Robin Creyke, “Tribunals – ‘Carving out the philosophy of their existence’ the challenge for the 21<sup>st</sup> century” (2012) (71) AIAL Forum, 19, 22.

- (1) has jurisdiction across administrative decision making generally not just in respect of particular areas of decision making;
- (2) is mainly concerned with review as to fact-finding and improper or unjust exercise of discretionary power;
- (3) has the same powers as the initial decision maker;
- (4) includes expert, independent members;
- (5) works quickly, informally, efficiently and cheaply;
- (6) has the benefit of the decision maker's relevant documents and reasons for the initial decision;
- (7) has procedures attuned to the particular jurisdiction and free of the restrictions inherent in the adversary process; and
- (8) resolves disputes by way of a hearing.

123 The challenge for NCAT is to ensure that its multi-jurisdictional, multi-Divisional structure does not lead to an inappropriate homogenisation of practice and procedure throughout the Tribunal. One consequence of such homogenisation could be the loss or compromise of essential elements of effective merits review of administrative decisions.

124 The challenge for any practitioner coming to administrative review proceedings in NCAT is to master the complexity that stems from the multi-bodied nature of the Tribunal: 5 bodies of jurisdiction exercised in 4 Divisions and the Appeal Panel. This involves understanding the relevant enabling legislation, the ADR Act, the general provisions of the NCAT Act, the Divisions Schedules, the NCAT Rules and the NCAT Regulation. It is prudent to remember that the Tribunal, while multi-bodied, is not hydra-headed. Careful consideration of the legislative labyrinth will produce superior results for the willing advocate rather than attempts to club the Tribunal about the head.