

NCAT Policy 2 (October 2019)

Publishing Reasons for Decisions

Purpose

1. This policy sets out the practices and considerations which apply to the publication of reasons for decisions made in the various Divisions of the Tribunal and by the Appeal Panel.
2. It also indicates how a party, witness or other person involved in proceedings, who has privacy concerns regarding reasons for decision published, or to be published, by the Tribunal, can approach the Tribunal to have those concerns addressed.

Background and Legislative Provisions

3. Under s 62(1) of the *Civil and Administrative Tribunal Act 2013* (NSW) (the Act) the Tribunal (including the Appeal Panel) is to ensure that each party is given notice of any decision made in proceedings.
4. There is an express obligation to give written reasons for a decision in response to a request from a party, under s 62(2) of the Act. When such a request is made, a written statement of reasons must be given within 28 days and must, by virtue of s 62(3), set out:
 - (a) the findings on material questions of fact, referring to the evidence or other material on which those findings were based;
 - (b) the Tribunal's understanding of the applicable law; and
 - (c) the reasoning processes that led the Tribunal to the conclusions it made.The "*conclusions*" referred to in s 62(3)(c) would naturally include conclusions as to both law and fact.
5. There is also an express obligation to give written reasons in respect of many types of Guardianship Division decisions under clause 11 of Schedule 6 to the Act. A statement of reasons for the purposes of clause 11 must set out the matters referred to at s 62(3) of the Act.
6. Even though there is no other express statutory duty to give reasons set out in the Act, the Tribunal nonetheless endeavours, as a matter of good practice, to provide reasons for final or contested decisions. (Whether there is also a common law duty on the Tribunal to give reasons for some or all of its decisions - as discussed by the NCAT Appeal Panel in *Collins v Urban* [2014] NSWCATAP 17 at [43] to [64] - is not settled: see *NSW Land and Housing Corporation v Orr* [2019] NSWCA 231 (per Bell P at [54]-[55], [71]; Ward JA at [111]-[114]).

7. These reasons can be given orally at the time the decision is announced. Alternatively, the decision can be announced and written reasons can be given later or the decision may be reserved. Where the decision is reserved the written reasons are provided at the same time as the decision.
8. As well as making its reasons for decision available to the parties, the Tribunal also publishes some of its reasons for decision. This is done for numerous reasons including:
 - (a) to ensure that the Tribunal is accountable and has processes that are open and transparent: s 3(f) of the Act;
 - (b) to promote public confidence in tribunal decision-making: s 3(g) of the Act; and
 - (c) to educate and provide guidance to litigants and legal practitioners in relation to principles, procedures and practices applicable to matters within the Tribunal's jurisdiction.

Public Availability of Reasons for Decision

9. The NCAT decisions that are published can be found on the [NSW Caselaw website](#). They are also made available on other websites such as the [AustLII website](#) and the [BarNet Jade website](#).
10. In making its reasons for decision publicly available, it is the Tribunal's general practice not to include, or to remove, personal identifiers including: full residential addresses; dates of birth; anniversary dates; Medicare numbers; bank account or loan account numbers; tax file numbers; licence numbers; motor vehicle registration numbers; email addresses; some names of spouses, partners and children; and similar material, unless the information is essential to support the decision. For further information on what may be contained in published reasons for decision see [NCAT Policy 4 – Access to and Publication of Information \[PDF 51kB\]](#).
11. The relevant Divisional Head is responsible for selecting decisions for publication, where they are not published as a matter of course.
12. Because of the diversity of the jurisdictions exercised by the Divisions and the Appeal Panel, each of them takes a somewhat different approach to the publication of decisions. These different approaches are set out below.

Administrative and Equal Opportunity Division

13. The Administrative and Equal Opportunity Division routinely publishes the written reasons for decision, unless the presiding Member has made an order prohibiting or restricting publication.
14. A presiding Member may order, under s 64 of the Act, that a Division decision be published with the names of parties and certain witnesses anonymised.

15. Anonymisation of the names of parties and certain witnesses occurs in proceedings under the *Child Protection (Working with Children) Act 2012*, the *Privacy and Personal Information Protection Act 1998*, the *Health Records and Information Privacy Act 2002*, the *Victims' Rights and Support Act 2013* and other community welfare legislation within the meaning of the *Community Services (Complaints, Reviews and Monitoring) Act 1993*. In addition, anonymisation may be ordered so as not to undermine the purpose of s 65 of the Act
16. Clause 11 of Schedule 3 to the Act provides that a person opposing an order under s 64 of the Act restricting publication in relation to proceedings under Division 4 of Part 4 of the *Public Health Act 2010* has the onus of showing cause why the order should not be made.
17. Further information concerning anonymisation is available in the [Administrative and Equal Opportunity Division Guideline: Confidentiality, Privacy and Publication](#)
18. Published decisions of the Administrative and Equal Opportunity Division can be viewed on the [Caselaw website](#). Published decisions of the former Administrative Decisions Tribunal, the predecessor of the Administrative and Equal Opportunity Division, can also be viewed at that website.

Consumer and Commercial Division

19. The Consumer and Commercial Division does not, in addition to making the reasons available to the parties, routinely publish its written reasons for decision. Not the least reason for this is the very large number of decisions made in the Division. Nonetheless, a selection of the Division's reasons for decision is published.
20. The selection of reasons for publication is made by the Head of the Consumer and Commercial Division. The usual criteria applied in deciding whether particular reasons for decision should be published include:
 - (a) whether the reasons establish or consider principles that could be applied, or could be of assistance, in other proceedings;
 - (b) whether the reasons or the proceedings raise issues of general public interest or importance.
21. Published decisions of the Consumer and Commercial Division can be viewed on the [Caselaw website](#). Published decisions of the former Consumer, Trader and Tenancy Tribunal, the predecessor of the Consumer and Commercial Division, can be viewed on the [AustLII website](#).

Guardianship Division

22. In addition to the duty under s 62 of the Act to give written reasons when requested, as noted earlier, cl 11 of Schedule 6 to the Act requires a written statement of reasons to be given in relation to most decisions made in the

Guardianship Division. The Guardianship Division does not, however, routinely publish its written reasons for decision in addition to making them available to the parties.

23. Nonetheless, to assist persons appearing before the Guardianship Division and to explain the workings of the Division to the public, significant decisions concerning particular aspects of the Division's jurisdiction and decisions from applications which represent the majority of applications before the Division are published. Having regard to the purpose which underlies s 65 of the Act, these reasons are published in an anonymised or de-identified form.
24. The selection of reasons for publication is made by the Head of the Guardianship Division.
25. Published decisions of the Guardianship Division can be viewed on the [Caselaw website](#). Published decisions of the former Guardianship Tribunal, the predecessor of the Guardianship Division, can be viewed on the [AustLII website](#).

Occupational Division

26. The usual practice of the Occupational Division is to publish its written reasons for decision, unless the presiding Member has made an order prohibiting or restricting publication.
27. In addition to non-publication orders that can be made under s 64 of the Act, under cl 28 of Schedule 5 to the Act, confidential information concerning certain professionals is not required to be disclosed. Furthermore, the presiding Member in proceedings under the Health Practitioner Regulation National Law (NSW) may direct that certain names, specified evidence or the subject matter of a complaint not be disclosed. It is common in the Occupational Division to anonymise the names of patients of respondents in proceedings under the Health Practitioner Regulation National Law (NSW).
28. Published decisions of the Occupational Division can be viewed on the [Caselaw website](#). Published decisions of the former Administrative Decisions Tribunal and the Medical Tribunal, predecessors of the Occupational Division, can also be viewed at that website. Published decisions of the former health practitioner tribunals, now incorporated into NCAT, are also available on the [AustLII website](#).

Appeal Panel

29. The usual practice of the Appeal Panel is to publish its written reasons for decision, unless the presiding Member has made an order prohibiting or restricting publication. These decisions can be viewed on the [Caselaw website](#).
30. The restrictions and prohibitions on publication which applied in the Division in which the original decision was made will generally be continued in any relevant reasons for decision of the Appeal Panel in relation to that decision.

Restrictions on Publishing or Disclosing Reasons or Proceedings

31. As noted above, ss 64 and 65 of the Act contain provisions relating to disclosure and non-disclosure.
32. Under s 64 of the Act, the Tribunal may, if satisfied that it is desirable to do so by reason of the confidential nature of any evidence or matter or for any other reason, make orders:
 - (a) prohibiting or restricting the disclosure of the name of any person (whether or not a party to proceedings in the Tribunal or a witness summoned by, or appearing before, the Tribunal),
 - (b) prohibiting or restricting the publication or broadcast of any report of proceedings in the Tribunal,
 - (c) prohibiting or restricting the publication of evidence given before the Tribunal, whether in public or in private, or of matters contained in documents lodged with the Tribunal or received in evidence by the Tribunal,
 - (d) prohibiting or restricting the disclosure to some or all of the parties to the proceedings of evidence given before the Tribunal, or of the contents of a document lodged with the Tribunal or received in evidence by the Tribunal, in relation to the proceedings.
33. Section 65 of the Act provides that a person must not, except with the consent of the Tribunal, publish the names or identifying information of those involved in proceedings:
 - (a) in the Guardianship Division and related internal appeals,
 - (b) for a decision for the purposes of the community welfare legislation within the meaning of the *Community Services (Complaints, Reviews and Monitoring) Act 1993* (including an internal appeal against such a decision),
 - (c) other such proceedings as may be prescribed by regulation.
34. For information about access to information contained in published decisions of the Tribunal see *NCAT Policy 4 – Access to and Publication of Information*.

Privacy Considerations

35. Except in Guardianship Division matters or where an order has been made under s 64 of the Act restricting publication or where there is some other legislative restriction on publication, the names of parties and witnesses are not usually considered to be private and may be referred to in published decisions. In matters in the Administrative and Equal Opportunity Division, Consumer and Commercial Division, Occupational Divisions and the Appeal Panel, parties' names are also generally published on the Tribunal hearing lists.

36. As explained above, in order to reduce the risk of identity theft the Tribunal in its published documents minimises the use of, or anonymises, personal identification information apart from names.
37. If a party, witness or other person involved in proceedings has privacy concerns regarding information which may be publicly disclosed by the Tribunal, that person should immediately raise those concerns with the Tribunal and, where appropriate, make an application for an order under s 64 of the Act to prohibit the publication of the private or confidential information.
38. Where possible, such an application or any request to have information anonymised should be in writing and supported by evidence as to why the information is private or confidential and why it should not be disclosed.
39. Such applications and requests should be made:
 - (a) if during a hearing, to the Member presiding at the hearing, or
 - (b) otherwise to the Principal Registrar:
 - (i) by email to ncatenquiries@ncat.nsw.gov.au (with *Attention: Principal Registrar* in subject line), or
 - (ii) by letter posted to the following address:

The Principal Registrar
Civil and Administrative Tribunal of New South Wales
Level 9 John Maddison Tower
86-90 Goulburn Street
SYDNEY NSW 2000

Armstrong J
President
October 2019