

THE DEMISE OF THE GUARDIANSHIP TRIBUNAL AND THE RISE OF THE NSW CIVIL AND ADMINISTRATIVE TRIBUNAL

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On 26 October 2012, the NSW Attorney-General, Greg Smith, announced the establishment of a new tribunal, the NSW Civil and Administrative Tribunal or NCAT, to replace twenty-three existing tribunals, including the Guardianship Tribunal and the Administrative Decisions Tribunal. This was in direct response to the recommendations of the Standing Committee on Law and Justice's March 2012 report *Opportunities to Consolidate Tribunals in NSW*.¹

The *Civil and Administrative Tribunal Act 2013* (NSW) was assented to on 4 March 2013. It establishes the NSW Civil and Administrative Tribunal (NCAT) on 1 January 2014, or a later day fixed by proclamation.²

The establishment of NCAT will inevitably bring changes to the structure and procedures which currently apply in the Guardianship Tribunal, although the government has indicated that it will preserve the 'unique and essential features of existing tribunals'. The functions currently exercised by the Guardianship Tribunal will be exercised by NCAT's guardianship division,³ although the relevant legislation to achieve this has not yet been introduced into Parliament.

It appears that NCAT's guardianship division will be located within the Guardianship Tribunal premises at Balmain in the short to medium term. The June 2013 issue of 'NCAT News' indicates that it is proposed to renew the lease of the Guardianship Tribunal premises for another four years.

Currently, the Guardianship Tribunal has a president and a deputy president and ninety part-time members.⁴ The new guardianship division of NCAT will consist of a division head, who will be a president or deputy president of the Tribunal,⁵ and other members allocated to the division.⁶ Current members of the Guardianship Tribunal will be transferred to the guardianship division of NCAT.⁷ The President and Deputy President of the Guardianship Tribunal will become a deputy president and a senior member of NCAT respectively.⁸

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¹ Legislative Council Standing Committee on Law and Justice, Parliament of New South Wales, *Opportunities to Consolidate Tribunals in NSW* (2012).

² *Civil and Administrative Tribunal Act 2013* (NSW) s 7(2).

³ The division is established by *Civil and Administrative Tribunal Act 2013* (NSW) s 16(1).

⁴ NSW Civil and Administrative Tribunal, *NCAT News* (April 2013) Issue 3, 2. This newsletter and other material concerning the reference group and Project team are located on the NCAT website at <http://www.tribunals.lawlink.nsw.gov.au/tribunals/index.html>.

⁵ *Civil and Administrative Tribunal Act 2013* (NSW) s 14(1).

⁶ *Civil and Administrative Tribunal Act 2013* (NSW) sch 6 cl 2.

⁷ *Civil and Administrative Tribunal Act 2013* (NSW) sch 1 cl 5.

⁸ *Civil and Administrative Tribunal Act 2013* (NSW) sch 1 cl 5(1).

The Guardianship Tribunal's hearings are mostly conducted by three member panels⁹ consisting of a legal member, a professional member and a community member.¹⁰ The Government has announced that NCAT's divisions will retain specialist members and that the minimum composition requirements for professional members will be preserved.¹¹ The NCAT Reference Group has also supported the guardianship division having multi-member panels.¹² This awaits legislative implementation.

The *Civil and Administrative Tribunal Act* does not provide for the procedure or functions of the Tribunal, or make provision for the composition of the tribunal in its various divisions. It contains only a very broad statement that 'the Tribunal has such jurisdiction and functions as may be conferred or imposed on it by or under this Act or any other legislation'.¹³ A second NCAT Bill will focus on the powers and functions of NCAT.¹⁴ The second NCAT Bill is planned for the second half of this year and, according to the June 2013 issue of NCAT News, the bill is at an advanced stage.

It is proposed that procedural matters will be dealt with by schedules to the *Civil and Administrative Tribunal Act*, regulations, tribunal rules and practice directions.¹⁵ There are schedules to the Act concerned with each Division of NCAT, but the Guardianship Division Schedule, Schedule 6, currently specifies only the type of members comprising that Division. There is provision for the schedules to deal with special requirements for the constitution of the Tribunal when exercising functions of the Tribunal allocated to the Division, special requirements in relation to the powers of, and the practice and procedure to be followed by, the Tribunal in relation to proceedings in the Division and special requirements regarding appeals from decisions made by the Tribunal in the Division.¹⁶ This means that the Guardianship Division Schedule and other schedules may be amended to deal with these matters.

There is also provision for a rule committee to make rules which 'are as flexible and informal as possible'.¹⁷ The rules may provide for practice and procedure and different rules may be prescribed for different divisions of NCAT.¹⁸ This means that specialist rules may be developed for the guardianship division. The President of NCAT may also issue practice notes.¹⁹

It is unclear what the appeal structure will be under NCAT, and whether appeals to the Supreme Court will be available from decisions of the guardianship division.²⁰ At present,

⁹ NSW Civil and Administrative Tribunal, *NCAT News* (April 2013) Issue 3, 2; *Guardianship Act 1987* (NSW) s 51(1).

¹⁰ *Civil and Administrative Tribunal Act 2013* (NSW) s 51(1).

¹¹ New South Wales, *NSW Government Response to the Standing Committee on Law and Justice Inquiry into Opportunities to Consolidate Tribunals in NSW* (October 2012), 5.

¹² NSW Civil and Administrative Tribunal, *NCAT Reference Group Minutes* (27 March 2013) 4.

¹³ *Civil and Administrative Tribunal Act 2013* (NSW) s 28.

¹⁴ NSW Civil and Administrative Tribunal, *NCAT Reference Group Minutes* (7 February 2013) 3.

¹⁵ NSW Civil and Administrative Tribunal Reference Group, *Schedules, Subordinate Legislation and Practice Directions*, Discussion Paper No 6(b) (2013).

¹⁶ *Civil and Administrative Tribunal Act 2013* (NSW) s 17(2)(e)-(g).

¹⁷ *Civil and Administrative Tribunal Act 2013* (NSW) s 24(2).

¹⁸ *Civil and Administrative Tribunal Act 2013* (NSW) s 26(2), (3).

¹⁹ *Civil and Administrative Tribunal Act 2013* (NSW) s 27.

²⁰ The Project team has recommended that concurrent appeal rights to the Supreme Court be preserved (NSW Civil and Administrative Tribunal Reference Group, *Appeals*, Discussion Paper No 3(a) (2013) 4). The

appeals may be made from any decision of the Guardianship Tribunal to the Supreme Court on a question of law²¹ and from certain decisions of the Guardianship Tribunal to the Administrative Decisions Tribunal.²² The *Civil and Administrative Tribunal Act* does not contain any provision for an appeal panel, similar to that which currently exists within the Administrative Decisions Tribunal. However, the Government has stated that there will be an internal appeals mechanism²³ and there is agreement within the Reference Group that this should occur.²⁴ It is likely that an appeal panel will be established by the next NCAT Bill.

members of the Reference Group could not agree about whether there was a need for an appeal to the Supreme Court (NSW Civil and Administrative Tribunal, *NCAT Reference Group Minutes* (7 March 2013) 2).

²¹ *Guardianship Act 1987* (NSW) s 67(1).

²² *Guardianship Act 1987* (NSW) s 67A.

²³ New South Wales, *NSW Government Response to the Standing Committee on Law and Justice Inquiry into Opportunities to Consolidate Tribunals in NSW* (October 2012) 5.

²⁴ NSW Civil and Administrative Tribunal, *NCAT Reference Group Minutes* (7 March 2013) 2, item 4.