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The Director, Courts Strategy
Department of Justice
Sydney NSW 2001

By email: policy@justice.nsw.gov.au

Dear Director

Review of the Civil and Administrative Tribunal Act 2013

Under s 92 of the *Civil and Administrative Tribunal Act 2013* (the Act) the Minister is required to review the Act and to determine whether “*the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives,*” as soon as possible within five years of commencement.

The Housing Industry Association (HIA) takes this opportunity to provide comment in relation to the Review of the Act.

HIA is the leading industry association in the Australian residential building industry. HIA supports and represents the views and interests of over 60,000 member businesses nationally. HIA members comprise a diversity of residential builders, including the Housing 100 volume builders, small to medium builders and renovators, residential developers, trade contractors, major building product manufacturers and suppliers and consultants to the industry. HIA members construct over 85 per cent of the nation’s new building stock.

Under the Act, the NSW Civil and Administrative Tribunal (NCAT) is responsible for resolving disputes regarding residential building work. As such, and given the diverse membership base, HIA is in a unique position to comment on the operation of the NCAT with many members having had personal experience in the home building division. NCAT also has jurisdiction over the *Strata Schemes Management Act 2015* and the *Building Products (Safety) Act 2017* areas HIA also has an interest.

Whilst the majority of construction is undertaken without issue or dispute, occasionally different views and disagreements develop between the homeowner and homebuilder. Such disagreements can occur during the course of construction, or in some instances years after the house is completed.

Ineffective methods for resolving disputes and dealing with consumer complaints not only affect the cash flow and business operations of affected contractors, they impact on the industry at large, may erode consumer confidence and affect its reputation.

In resolving disputes between home owners and building contractors it is important to have mechanisms that are effective, low cost and also reflect the consumer protection environment in which the builder operates.

Is NCAT meeting its objectives?

The objects of the Act are contained in s 3 of the Act. The objects of the Act of relevance to this review are:

....

- c) *to ensure that the Tribunal is accessible and responsive to the needs of all of its users, and*
- d) *to enable the Tribunal to resolve the real issues in proceedings justly, quickly, cheaply and with as little formality as possible, and*
- e) *to ensure that the decisions of the Tribunal are timely, fair, consistent and of a high quality, and*
- f) *to ensure that the Tribunal is accountable and has processes that are open and transparent, and*
- g) *to promote public confidence in tribunal decision-making in the State and in the conduct of tribunal members.*

In the last financial year there were 2,870 home building applications, with 2,864 finalisations, representing a clearance ratio of 99.8%. While these figures suggest that NCAT is meeting its objective of resolving issues, there is little information regarding whether these issues are being resolved *justly, quickly or cheaply*.

While the 2017-2018 NCAT annual report suggests that the bulk of applications are resolved '*within weeks*' of lodgement there is no further information or details provided regarding, for example, the average time between the lodgement of an application and the first directions hearing, or the average time between the lodgement of an application and the resolution of a dispute. This is the case despite one of the Presidents priorities for NCAT being to '*minimise the time between lodgement and finalisation of applications and appeals*.'¹

Also of use would be greater detail in the annual report in relation to:

- The grounds of appeals and the outcomes (in broad terms) of these matters.
- The reasons for the 123 unresolved applications lodged more than 12 months ago² in the Consumer and Commercial Division.
- The categories of disputes for home building matters.
- Procedural changes made during 2015-2016 in relation to how home building matters above and below \$30,000 should be dealt with. While anecdotally HIA has received positive feedback about these changes, it is disappointing that this approach does not seem to be measured in recent annual reports. It is therefore difficult to ascertain if these changes have assisted NCAT achieve its objectives.

Promoting public confidence

The objects of the Act require that NCAT '*promote public confidence in tribunal decision-making in the State...*' HIA interprets this to require that in carrying out its decision making function, NCAT must provide the public confidence that they are making (amongst other things) '*timely, fair, consistent and high quality*' decisions.³

Further, s 36 sets out a range of guiding principles to be applied to practice and procedure to '*facilitate the just, quick and cheap resolution of the real issues in the proceedings*'.

HIA has concerns that NCAT may not be completely fulfilling these functions. For example, the decision in *Syed Ahmad Shoaib Ali Pty Ltd v Jandson Pty Ltd; Jandson Pty Ltd v Syed Ahmad Shoaib Ali Pty Ltd [2018]* held that preliminary work (structural engineering drawings, obtaining a BASIX report, a BAL certificate, and a section 149 certificate, a pre-assessment for the CDC application and landscape/architectural services for residential building work) was in fact residential building work triggering a requirement to comply with the NSW *Home Building Act 1989*.

This decision has applied an overly broad interpretation of '*residential building work*', at odds with previous decisions, industry custom and practice and the views of the regulator.

The decision has the potential to disrupt known matters of public policy and has the undesirable consequence of undermining public confidence in NCAT.

¹ See pg.13

² See pg.39

³ See the Act s3(d)

NCAT's Powers of Enforcement

Does NCAT need additional powers to be able to enforce its decisions?

Although the language is clear, the meaning of the question is not. It could be directed at those powers that the courts currently have to enforce NCAT judgments.

NCAT is both a review tribunal and a claims tribunal in that it is able to review government decisions and also determine (consumer) claims.

At present the enforcement jurisdiction of the Tribunal extends only to proceedings for a civil penalty under this Act. In a notable departure from the Tribunal's proceedings, in such proceedings the Tribunal must observe the rules of evidence.

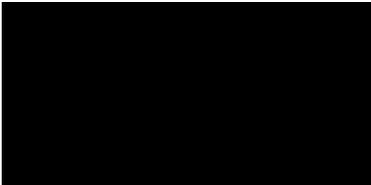
If the question is directed to enquiring whether NCAT should be given the powers that the courts have to enforce NCAT decisions, HIA would oppose any such move. Such a move would be a radical departure from the system of the administration of justice in New South Wales.

Resolving some matters on the papers

Should NCAT resolve some matters just by looking at the documents submitted by the parties, without a hearing in person?

NCAT already has the power to do this under s 50. As NCAT is already empowered to do this, HIA submits that when it is appropriate NCAT should do so. This accords with the guiding principle to be applied to practice and procedure set out at s 36 of the Act. It would appear that the practice of deciding matters without a hearing is more of a policy matter for the Tribunal than a legal question or matter.

Yours sincerely
HOUSING INDUSTRY ASSOCIATION LIMITED




Executive Director