



information
and privacy
commission
new south wales

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Dear Director

Statutory Review of the Civil and Administrative Tribunal Act 2013

Thank you for the opportunity to provide a submission to the Statutory Review of the *Civil and Administrative Tribunal Act 2013* (NSW) (CAT Act).

Information and Privacy Commission NSW (IPC)

The IPC is an independent statutory authority that administers legislation dealing with privacy and personal information, and access to government information held by agencies in NSW.

The Information Commissioner and the Privacy Commissioner have functions under:

- *Government Information (Public Access) Act 2009* (NSW) (GIPA Act)
- *Government Information (Information Commissioner) Act 2009* (NSW) (GIIC Act)
- *Privacy and Personal Information Protection Act 1998* (NSW) (PPIP Act)
- *Health Records and Information Privacy Act 2002* (NSW) (HRIP Act)

In supporting the exercise of the Commissioners' functions the IPC:

- promotes and protects privacy and information access rights in NSW and provides information, advice, assistance and training for agencies and individuals on privacy and information access matters
- reviews the performance and decisions of agencies and investigates and conciliates complaints relating to public sector agencies, health service providers (both public and private) and some large organisations that deal with health information
- provides feedback about the legislation and relevant developments in the law and technology.

Information access

The Information Commissioner upholds and protects information access rights. The Information Commissioner's functions include the power to:

- deal with complaints about information access
- undertake investigations, issue guidelines and other publications to assist agencies and citizens in understanding the operation of the GIPA Act

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- monitor, audit and report on agency compliance with the GIPA Act
- report and provide recommendations about proposals for legislative or administrative change.¹

Privacy

The Privacy Commissioner upholds and protects privacy rights. The Privacy Commissioner's functions include, to:

- oversee the conduct of internal reviews by agencies
- deal with complaints about privacy related matters, including to conciliate complaints
- assist public sector agencies in preparing and implementing privacy management plans
- prepare and publish guidelines relating to the protection of information and health privacy.²

The Commissioners' participation in Tribunal proceedings

The Information Commissioner and the Privacy Commissioner have the right to appear and be heard in proceedings in the Administrative and Equal Opportunity Division of the NSW Civil and Administrative Tribunal (NCAT)³ under the GIPA Act, PPIP Act and HRIP Act.

Generally, the NCAT Registry notifies the Commissioners of each new GIPA and Privacy administrative review and the Commissioners assess whether to exercise their rights to appear and be heard in the matter. The Commissioners' participation often involves providing submissions under procedural orders and attending hearings.

The purpose of the Commissioners' participation in proceedings is to assist the Tribunal to determine the correct and preferable decision under section 63 of the *Administrative Decisions Review Act 1997* (ADR Act). This role in proceedings is understood as *amicus curiae*. This is further discussed below.

We note that this review will consider how NCAT is working, as well as ideas for promoting increased access to justice before the Tribunal.

Our submission responds to most of the questions posed in review Factsheet, and is informed by observations from the Commissioners' participation as *amicus curiae* in NCAT proceedings, as well as the IPC's regulatory objectives concerning information access and privacy rights in NSW.

Is NCAT accessible and responsive to its users' needs?

Appearance by telephone

¹ GIPA Act, section 17.

² PPIP Act, section 36.

³ CAT Act, clause 9(4) of Schedule 3.

In principle, the option of appearing by phone at case management events enhances access to NCAT. We note that NCAT services a large geographic area including regional NSW. Applicants have notified IPC staff at case conferences that they were not aware they could participate in case conferences by telephone.

We note that the NCAT listing notice provides: 'Write to the Tribunal straight away if you ... want to participate by telephone because you live in a regional area or you are unable to attend for another reason.' The Administrative and Equal Opportunity Division of NCAT (AEOD) may wish to consider providing further information to parties of access options for case conferences, including appearance by telephone.

The Consumer and Commercial Division has published guidance about when telephone hearings are available. This includes where an applicant is located more than 200km or 2 hours from the NCAT hearing venue:

https://www.ncat.nsw.gov.au/Pages/cc/Dispute_resolution/Hearing_process/ccd_telephone_hearings.aspx

https://www.ncat.nsw.gov.au/Documents/ccd_factsheet_telephone_hearings.pdf

Providing such information will assist applicants in accessing review rights in the NCAT, which is significant where the right of administrative review is fundamental to the operation of information access and privacy legislation in NSW.

Are there things that NCAT could do to make it easier for people appearing in the Tribunal to understand the process and participate?

We think there is scope for parties in GIPA and privacy matters to be better informed about the role of the Commissioners in proceedings.

The Information Commissioner and the Privacy Commissioner participate in proceedings for the administrative review of information access and privacy matters.⁴ The Commissioners' respective enabling legislation gives them a statutory right to appear and be heard in any proceedings before the Tribunal⁵.

The NCAT has previously examined the Information Commissioner's role under section 104(1) of the GIPA Act as one involving 'assistance' on 'issues of construction, the applicable law and applicable policies and guidelines': *Black v Hunter New England Local Health District* [2011] NSWADT 295 at [53]. The Tribunal also stated (at [53]):

... the Information Commissioner's role when exercising her rights under section 104(1) of the GIPA Act is not one that requires consideration of, or argument on the merits of the application before the Tribunal.

The Tribunal in *Hurst v Wagga Wagga City Council* [2011] NSWADT 307 at [55] observed that the Information Commissioner is not a party to the Tribunal review and went on to say that when conducting a review the Information Commissioner makes recommendations, which can then be considered by the agency on reconsideration under section 93 of the GIPA Act. 'The decision then made is that of the agency, not that of the Information Commissioner. If there is then a Tribunal review, it is the applicant and the agency that are parties to that review: not the Information Commissioner. The fact

⁴ CAT Act, clause 9(4) of Schedule 3.

⁵ GIPA Act, section 104(1) and (2); PPIP Act, section 55(6) and (7).

that the Information Commissioner is not a party to such proceedings, reinforces the point that the legislature did not intend the Information Commissioner's role in Tribunal review to be one in which that office would argue the merits.'

We note that the NCAT often affirms this position by procedural orders which state that the Information Commissioner has a right to appear in the matter but is not a party to the proceedings. Such order is important as it makes clear to the parties that the Commissioner is not a party and her external review report is not the decision under administrative review.

The Tribunal in *FM v Vice-Chancellor, Macquarie University* [2003] NSWADT 78 at [8] explains *amicus curiae* with respect to the Privacy Commissioner:

An amicus, or 'friend of the court' intervenes in accordance with common law principles, to put submissions to a court, not as a party, but in order to assist the court. The amicus is a disinterested by-stander who is able to assist the court by providing relevant information that may not otherwise be available.

In *FM* (at [10]-[13]), the Tribunal confirmed that the Privacy Commissioner's role as *amicus* is merely advisory, in accordance with her statutory functions under the PPIP Act. The Tribunal also stated that because the Tribunal is a creature of statute, any role akin to *amicus curiae* must be derived from statute.

The function of *amicus curiae* has been defined in the Commonwealth jurisdiction as being to assist a court by drawing attention to some aspect of the case which might otherwise be overlooked.⁶ This can include a submission on law or relevant fact.⁷

The Commissioners' appearance as *amicus curiae* gives the right of full participation in proceedings, which also includes the obligations to comply with procedural orders and other relevant processes. This participation relies on the Commissioners being informed of all orders and amendments to orders which impact on the Commissioners' compliance with procedural directions of the NCAT and in fulfilling their role to assist the Tribunal. It is important that NCAT and the parties provide/ serve details of orders, variations of orders, submissions and evidence in matters where the Commissioners have exercised their right to appear and be heard. The Tribunal may wish to make clear to parties this service requirement through its procedural directions.

Currently, the NCAT provides information on the Commissioners' participation in proceedings through the Registry's listing notice. The NCAT website also links to the IPC's homepage through its webpage on the 'Steps in a government information access matter'⁸ and 'Steps in a privacy matter.'⁹ These assist people to understand and participate in administrative review proceedings in GIPA and privacy matters.

⁶ *Bropho v Tickner* (1993) 40 FCR 165, 172 (Wilcox J).

⁷ *Levy v Victoria* (1997) 189 CLR 579, 604 (Brennan CJ).

⁸

<https://www.ncat.nsw.gov.au/Pages/administrative_equal_opp/aed_your_matter/aeod_privacy_gipa/stepsinaccess.aspx>

⁹

<https://www.ncat.nsw.gov.au/Pages/administrative_equal_opp/aed_your_matter/aeod_privacy/steps_privacy_matter.aspx>

This information could be updated to provide further detail about the Commissioners' role as *amicus curiae* in NCAT proceedings. We think this would assist parties to understand our role and would also ensure that we appropriately served and notified of matters in proceedings.

The NCAT may wish to amend its listing notice to include this information. We suggest the following further information could be included in the notice:

- The Information Commissioner and the Privacy Commissioner have a right to appear and be heard in Tribunal proceedings in relation to reviews of GIPA Act decisions, or the conduct of an agency under NSW Privacy legislation
- The Tribunal notifies Information Commissioner and the Privacy Commissioner of all applications lodged under the GIPA and Privacy legislation, and the Commissioners then decide whether to appear and be heard in the proceedings
- The Commissioners appear in proceedings to assist the Tribunal in deciding the correct and preferable decision and do not appear on behalf of or at the request of a party
- Where the Commissioner appears, their legal representative will attend the proceedings on their behalf
- If the Tribunal makes orders to file and serve evidence or submissions, these should be served on the Commissioner by email at: ipcinfo@ipc.nsw.gov.au.

Does NCAT resolve legal disputes quickly, cheaply and fairly?

Listing of multiple matters by same applicant with same respondent

Our staff have at times observed GIPA and privacy matters involving the same applicant being listed for case conference on different dates and before different Senior Members. In these matters, there are often overlapping and related issues. Accordingly, we suggest that case conferences involving the same parties be listed at the same time or consecutively on the same date and be before the same NCAT member. This in our view would ensure multiple, related matters are managed consistently and facilitate the just, quick and cheap resolution of the real issues in the proceedings: section 36, CAT Act.

Status of case conferences and continuity of member

Case Conferences provide an invaluable opportunity for parties to discuss and confine the issues in dispute. In GIPA and privacy matters, the Senior Member determines the appropriate procedural orders in light of whether the matter is suitable for mediation, whether the decision should be remitted for reconsideration by the agency or should proceed to hearing. Ideally, the presiding member is the same throughout the process so that there is continuity in the way cases are managed to finality.

The intention of Parliament in enacting the GIPA Act was for all discretions it confers to be exercised so as to facilitate and encourage, promptly and at the lowest reasonable cost access to government information (section 3(2)(b) of the GIPA Act). This aligns with the object of the CAT Act under section 3(d).

In a recent GIPA matter where the Information Commissioner appeared and was heard, the matter was listed for hearing before a tribunal member with no prior involvement in the case management. On the day of the hearing, the member took the view that the decision should be remitted to the agency to reconsider its decision, where the applicant had narrowed the scope of the access application. The change in approach to case management meant that parties prepared for a hearing that did not take place. The issues in dispute were not resolved by the new decision and the matter is to proceed to hearing at a future date.

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

We consider that some GIPA and privacy matters are suitable for determination on the papers. The CAT Act relevantly provides the Tribunal with the power to dispense with a hearing (section 50(2)), based on the requirement that the issues for determination can be adequately determined. The CAT Act also currently provides an opportunity for natural justice in such circumstances by requiring the Tribunal to afford the parties an opportunity to make submissions about the proposed order to dispense with a hearing (section 50(3)).

The underlying consideration is whether there is a risk of displacing a person's access to justice through the Tribunal resolving a matter without oral argument and examination of witnesses at hearing. The principle of natural justice requires the party to be given the opportunity to be heard or be able to answer questions directly from the Tribunal or even witnesses.

This is particularly relevant to proceedings which involve an unrepresented litigant who is unable to clearly and concisely identify the facts or issue in dispute by way of written submissions. The Tribunal is required to be satisfied that the correct and preferable decision can be made without the opportunity for oral argument, but may also consider the issue of whether the first instance decision may be appealed.

We have observed that in GIPA and privacy matters unrepresented applicants may not be able to represent their position and arguments effectively by way of written submissions. In these circumstances a hearing on the papers may not be appropriate.

However, there are circumstances where in the interests of just, quick and cheap resolution of matters the parties would benefit from the determination on the papers. For example where the parties have sufficiently identified the information subject to the review decision and are able to adequately articulate the facts, evidence and law without the requirement for oral evidence or cross-examination.

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

Formal mechanism for notification of third parties

The Information Commissioner has observed an increase in access applications for third party personal and business information held by government agencies. This has given rise to consultation under section 54 of the GIPA Act and the increased exercise of third party related review rights.

IPC staff have observed that in various cases, third parties who have been consulted under section 54 and object to release of their information (third party objectors) are not being notified of the review to the Tribunal. Such third parties have the right to appear and be heard under section 104(3) of the GIPA Act. An example of this was in *Scenic NSW Pty Ltd v Office of Environment & Heritage* [2019] NSWCATAD 7, which was finalised before third party objectors were notified of the review. The decision was set aside on appeal on 22 May 2019 and procedural fairness for the third party objector was a live issue. In some cases, it is not until the end of the case management process that the question is being considered as to whether third party objectors ought to be notified.

Under the *Freedom of Information Act 1982* (Cth) (FOI Act) at the Commonwealth level, external merit review at first instance is undertaken by the Australian Information Commissioner. Where review is sought in respect of a decision to refuse access to a document to which a consultation requirement equivalent to section 54 applies, the respondent agency or minister must 'as soon as practicable, take all reasonable steps to notify the affected third party for the document of the application' (section 54P of the FOI Act).

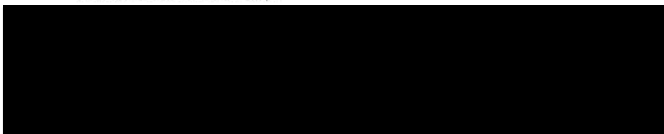
The FOI Act also requires agencies to notify affected third parties of a subsequent application for review to the Administrative Appeals Tribunal (section 60AA). There are exceptions to the requirement to give notice, for example, where it would endanger the life or physical safety of any person (sections 54Q(3) and 60AB(3)). We attach the relevant provisions (**Attachment A**).

A requirement for agencies to notify third party objectors, with whom they have already corresponded in the course of consultation, would enable third parties to consider whether to exercise their statutory right to be heard in a timely way. This could minimise delays in the resolution of proceedings where third parties are not notified at an early stage of an opportunity to participate and make submissions under clause 9(4) of Schedule 3 of the CAT Act.

Contact details

We hope that these comments will be of assistance. If you have any questions regarding these comments, please contact Sarah Wyatt, Assistant Director, Legal Counsel & Regulatory Advice on 1800 472 679 or by email at ipcinfo@ipc.nsw.gov.au.

Yours sincerely



NSW Information Commissioner
CEO Information and Privacy Commission
Open Data Advocate



NSW Privacy Commissioner

Part VII Review by Information Commissioner

Division 4 IC review applications

Section 54P

- (c) sending by electronic communication to an electronic address specified by the Information Commissioner.

54P IC review applications—requirement to notify affected third parties*Scope*

- (1) This section applies if:
- (a) an agency or Minister decides not to give access to a document to which a consultation requirement applies under section 26A, 27 or 27A; and
 - (b) an IC review application is made for an IC review of that decision.

Requirement to notify

- (2) The agency or Minister must, as soon as practicable, take all reasonable steps to notify the affected third party for the document of the application.

Note 1: For *affected third party*, see section 53C.

Note 2: The agency or Minister is not required to give notice if the Information Commissioner orders that it is not appropriate to do so in the circumstances (see section 54Q).

- (3) The agency or Minister must, as soon as practicable, give a copy of the notice to the Information Commissioner.

54Q IC review applications—circumstances in which not giving notice is appropriate

- (1) This section applies in relation to a document to which a consultation requirement applies under section 27 or 27A.
- (2) An agency or Minister is not required to notify an affected third party for the document under subsection 54P(2) if:
- (a) the agency or the Minister applies to the Information Commissioner for an order that it would not be appropriate to

Section 54R

notify the affected third party in the circumstances covered by subsection (3); and

(b) the Information Commissioner makes the order.

Note: For *affected third party*, see section 53C.

- (3) The circumstances covered by this subsection are whether notifying the affected third party would, or could reasonably be expected to, do any of the following:
- (a) prejudice the conduct of an investigation of a breach, or possible breach, of the law, or a failure, or possible failure, to comply with a law relating to taxation;
 - (b) prejudice the enforcement or proper administration of the law in a particular instance;
 - (c) disclose, or enable a person to ascertain, the existence or identity of a confidential source of information, or the non-existence of a confidential source of information, in relation to the enforcement or administration of the law;
 - (d) endanger the life or physical safety of any person;
 - (e) cause damage to the security, defence or international relations of the Commonwealth.

54R IC review applications—withdrawal

- (1) An IC review applicant may, in writing, withdraw the IC review application at any time before the Information Commissioner makes a decision under section 55K.
- (2) If the IC review application is withdrawn, it is taken never to have been made.

Subdivision B—Time limits

54S IC review applications—time limits

Access refusal decisions

- (1) An IC review application in relation to a decision covered by subsection 54L(2) (access refusal decisions) must be made within

60 Procedure in Tribunal—parties

- (1) This section applies for the purposes of this Part and of the application of the *Administrative Appeals Tribunal Act 1975* in relation to proceedings under this Part.
- (2) A decision given by a person on behalf of an agency is taken to have been given by the agency.
- (3) The parties to a proceeding before the Tribunal for a review of a decision are as follows:
 - (a) the person who applied to the Tribunal for a review of the decision under section 57A;
 - (b) the person who made the request or application in respect of which the decision was made;
 - (c) the principal officer of the agency, or the Minister, to whom the request or application was made;
 - (d) any other person who is made a party to the proceeding by the Tribunal under subsection 30(1A) of the *Administrative Appeals Tribunal Act 1975*.

60AA Procedure in Tribunal—requirement to notify affected third parties

Scope

- (1) This section applies if an application is made to the Tribunal under section 57A for the review of a decision not to give access to a document to which a consultation requirement applies under section 26A, 27 or 27A (whether the decision is made by the Information Commissioner, an agency or a Minister).

Requirement to notify

- (2) The agency to which, or the Minister to whom, the request was made for access to the document must, as soon as practicable, take all reasonable steps to notify the affected third party for the document of the application to the Tribunal.

Section 60AB

- Note 1: For *affected third party*, see section 53C.
- Note 2: Notice is not required to be given in certain circumstances (see section 60AB).
- Note 3: The affected third party may apply to be made a party to the proceeding by the Tribunal under subsection 30(1A) of the *Administrative Appeals Tribunal Act 1975*.

60AB Procedure in Tribunal—circumstances in which not giving notice is appropriate

- (1) This section applies in relation to a document to which a consultation requirement applies under section 27 or 27A.
- (2) An agency or Minister is not required to notify an affected third party for the document under subsection 60AA(2) if:
- (a) the agency or the Minister applies to the Tribunal for an order that it would not be appropriate to notify the affected third party in the circumstances covered by subsection (3); and
 - (b) the Tribunal makes the order.

Note: For *affected third party*, see section 53C.

- (3) The circumstances covered by this subsection are whether notifying the affected third party would, or could reasonably be expected to, do any of the following:
- (a) prejudice the conduct of an investigation of a breach, or possible breach, of the law, or a failure, or possible failure, to comply with a law relating to taxation;
 - (b) prejudice the enforcement or proper administration of the law in a particular instance;
 - (c) disclose, or enable a person to ascertain, the existence or identity of a confidential source of information, or the non-existence of a confidential source of information, in relation to the enforcement or administration of the law;
 - (d) endanger the life or physical safety of any person;
 - (e) cause damage to the security, defence or international relations of the Commonwealth.