Marrickville Legal Centre

10 July 2019

NCAT Statutory Review
Director, Courts Strategy
GPO Box 5341
SYDNEY NSW 2001

BY EMAIL: policy@justice.nsw.gov.au

Dear Sir/Madam

SUBMISSION ON THE STATUTORY REVIEW OF THE CIVIL & ADMINISTRATIVE TRIBUNAL ACT 2013

Marrickville Legal Centre welcomes the opportunity to contribute to the statutory review of the *Civil & Administrative Tribunal Act 2013*.

Marrickville Legal Centre (MLC) is a community legal centre that has been operating in Sydney's Inner West for forty years. The Centre operates two tenancy services in inner city Sydney, the Inner West Tenants' Advice & Advocacy Service and the Northern Area Tenants' Service. These services provide advice, advocacy and legal representation to over 2000 renters every year.

Our submission focuses on the key issues raised by our tenants and the experiences of our tenants' advocates. All case studies referred to in the submission are matters that our tenancy services have assisted with since the establishment of the NSW Civil & Administrative Tribunal in 2014.

Please do not hesitate to contact [redacted]

Yours sincerely
MARRICKVILLE LEGAL CENTRE
[redacted]

Submission – Statutory Review of the Civil & Administrative Tribunal Act 2013

Marrickville Legal Centre

About Marrickville Legal Centre

Marrickville Legal Centre (MLC) has provided legal services to vulnerable and disadvantaged members of its community for 40 years.

MLC operates two tenants' advice and advocacy services, the Inner West Tenants' Advice & Advocacy Service (IWTAAS) and the Northern Sydney Area Tenants' Service (NSATS). The combined services assist tenants across the Inner Western and Northern suburbs of Sydney, from Strathfield to Berowra.

On average, the services assist more than 2000 tenants every year, providing 2500 advices and taking on more than 300 major cases. The services' regularly represent tenants at hearings before the NSW Civil & Administrative Tribunal (the Tribunal) and provide duty advocacy services two days per week.

Summary – Recommendations

MLC supports the recommendations made by the Tenants' Union of New South Wales. In particular we echo the need for adequate funding for Tenants' Advice & Advocacy Services and the duty advocacy services that we currently provide. The presence of advocates at group list hearings in the Tribunal means fairer outcomes for tenants and the quicker resolution of the real issues in dispute.

MLC wishes to provide recommendations on the following four key issues:

Urgent matters

1. A 'duty' Member be available to hear urgent matters in specified circumstances.

Conduct of hearings

2. That a guideline be made regarding the conduct of hearings.
3. That a guideline include directions to Members on the use of interpreters at hearings.

Representation

4. That *NCAT Consumer & Commercial Division Guideline – Representation* be amended to include a tenant assisted by a tenants' advocate as a party to whom leave to represent will usually be granted.

Enforcement

5. That the Tribunal increase the frequency of its use of its powers under section 72 of the Act.
6. That section 77 of the Act be broadened to allow applications for civil penalties to be made by the person for whose benefit the order was made, with any penalty imposed payable to that person.
7. That a civil penalty fixed at a daily rate be imposed for each day of non-compliance.

1. Key issue – Urgent matters

MLC assists a significant number of residents living in boarding houses and other forms of insecure accommodation. These clients can be subject to threats of immediate eviction and lockouts by their landlords, which may result in homelessness. Such situations can raise issues about whether our clients:

i) Are tenants for the purposes of the *Residential Tenancies Act 2010* (the RT Act);

ii) Have been given reasonable written notice of termination under the *Boarding Houses Act 2012* (the BH Act).

To prevent an eviction, the client may need a determination from the Tribunal about their legal status in the property and/or whether the eviction is in accordance with the applicable law.

Currently, our service would assist a client to make an urgent application to the Tribunal seeking an interim order or stay to prevent the eviction pending a final decision by the Tribunal. That request for an urgent hearing is considered by the Registrar and the matter may be listed within 48 hours to a week. However, it is not uncommon for the eviction to occur before the matter is heard. Whilst the client, in some circumstances, will still have a claim for compensation, they will have lost their occupancy of the property and have been made homeless.

MLC appreciates that the Tribunal has a very high volume of applications and acknowledges that the majority of matters should be dealt within the standard timeframe. However, our view is that in limited circumstances applicants should be able to immediately go before a 'duty' Member who is able to determine an application for an interim order or stay pending final determination at a full hearing. The applicant should be obliged to make reasonable attempts to inform the respondent of

their intention to approach the 'duty' member, but the Member should be empowered to make 'ex parte' orders in the respondent's absence.

In our view, there are rights that our clients simply cannot enforce without the possibility of immediate access to a Tribunal member. For example, occupancy principal 10 under the BH Act requires a proprietor to give a resident reasonable written notice of the termination of their occupancy agreement, but does not require a proprietor to apply to the Tribunal prior to retaking possession of the property. A resident who is given a 24 - hour eviction notice by the proprietor may be locked out of the property long before an application challenging the reasonableness of the notice period comes before the Tribunal, even if an urgent hearing has been listed. The practical effect is that our service has to advise residents in these situations where, even if they have an arguable case that they have not been given reasonable notice, that they may be locked out prior to a hearing. In those circumstances most residents choose to leave and do not make an application.

Case-study 1

Bob (name changed) contacted our service for advice on a Friday morning. He was living in a boarding house and had been told by the proprietor that because he was in arrears he would be locked out of the property that day. He had been given 24 - hours notice of the lockout and believed that it was not a reasonable amount of time for him to be able to find another place to live. He was also unclear about the claim that he had failed to pay his occupancy fee and believed that some of his payments might have been missed.

Our service gave Bob advice about his rights under the BH Act, specifically that although his proprietor could terminate the agreement they were obliged to give Bob reasonable written notice. We told Bob that an application could be made to the Tribunal under section 32 of that Act and we could ask for a determination about whether 24 hours was a reasonable amount of time. We also advised him that we

could ask for an order preventing the lockout pending determination of the application.

However, we were also obliged to tell Bob that although we would request an urgent hearing of the matter, there was no prospect of a first hearing on that day and that we could not prevent the proprietor from locking him out. Bob saw little point in making the application if it wouldn't stop the lockout and the proprietor changed the locks that night. Bob was made homeless and had to find alternative accommodation in very difficult circumstances.

The Tribunal is best placed to decide how a 'duty' member process might be implemented, however MLC suggests that applications to a 'duty' Member could be limited to:

a. Unlawful lockouts
b. Boarding house evictions
c. Declarations that a person is a tenant for the purposes of the Act, in circumstances where they are threatened with eviction
d. Utilities disconnections in residential land lease communities

Further, a Member hearing group list matters could be designated as the 'duty' Member, with applicants able to approach the member during the group list hearings. This would reduce the financial burden on the Tribunal of designating a Member solely as a 'duty' member available each sitting day.

Recommendation:

- A 'duty' Member be available to hear urgent matters in specified circumstances.

2. Key issue – Conduct of hearings

MLC acknowledges that Members work in a very high-volume forum and hear a majority of matters with unrepresented parties. In our experience, in most cases Members do a good job of eliciting relevant information from the parties and guiding them though the procedural aspects of a hearing.

However, our advocates do experience considerable variation in the conduct of hearings between different Members. Some Members take a very active role in the proceedings, whilst others leave it to the parties to make their case. This inconsistency of approach can lead to a practical unfairness, since the parties may not be aware of what matters they are expected to have addressed or what matters about which the Member is already satisfied.

We support the recommendation of the Tenants' Union that Members be provided with a guideline about the conduct of proceedings. This strikes a balance between not unduly restricting the flexibility of the Tribunal (as required by s 38 of the Act) and ensuring the parties understand what is expected of them at hearing. An explanation from the Member at the start of the hearing about the guideline and how the proceedings will be conducted would assist the parties to understand the process and promote fairer outcomes. A published guideline also would allow unrepresented parties to prepare for and run their own case, increasing access to the Tribunal for parties without legal training and who may not have received legal advice.

Interpreters

Our service is concerned that on occasions Members may proceed with hearings in the absence of an interpreter. Where a party requires the assistance of an interpreter and has informed the Tribunal of that requirement in advance, they should have the benefit of that service at the hearing. Without an interpreter, there is a real risk that the party will not understand the proceedings or be able to adequately put their case.

In some cases, Members have observed that the presence of a tenants' advocate obviates the need for an interpreter. In our view, the presence of the interpreter is still critical where a party is represented, as they need to understand the proceedings and provide instructions to their representative.

We have also observed Members questioning parties as to their English language skills, even going to the extent of querying what university degree the party is studying and giving opinions about whether they will obtain that degree.

Case-study 2

Our services assisted Francis (name changed), a tenant who is deaf, in proceedings before the Tribunal. At the first group list hearing of the matter, there was no Auslan interpreter present despite the tenant having made the Registry aware of the need or the interpreter well in advance of the hearing. The Member proceeded with the group list hearing and directed the parties to conciliation, suggesting that the tenant could write down their instructions. The advocate objected and the matter was adjourned to a further group list hearing.

Case-study 3

An advocate attended a group list hearing as a duty advocate. There were a number of matters listed in which a party had requested the assistance of an interpreter and an interpreter was present. The Member, in the course of reading through the list, asked each party who had requested an interpreter about their English language skills. The Member also asked each party if they were employed or studying at a university. At least one party told the Member that they were studying at a university, to which the Member responded that if they needed an interpreter they weren't likely to pass their degree.

MLC recommends that any guideline regarding the conduct of proceedings include directions to Members on the use of interpreters. That guideline should make clear

that proceedings should not continue in the absence of an interpreter, unless there are exceptional circumstances.

Recommendations:

- That a guideline be made regarding the conduct of hearings.
- That a guideline include directions to Members on the use of interpreters at hearings.

3. Key issue - Representation

The majority of landlords appearing before the Tribunal are represented by their real estate agents. Whilst not legally trained, agents are repeat users of the Tribunal and have a degree of knowledge and experience in the law and of the Tribunal's processes. The majority of tenants appearing before the Tribunal are unrepresented and are attending for the first time. This creates a power imbalance between the parties that cannot necessarily be addressed by a Tribunal Member, particularly in high-volume group list matters.

In our view, tenants' advocates play a key role addressing that power imbalance. We help tenants resolve their disputes and assist them to put their case when needed. In particular, our duty advocacy services help unrepresented tenants' at group list hearings understand the law and to negotiate with their landlord. This drives the fair and often quick resolution of the issues in dispute, as tenants who receive independent advice about their case are more likely to understand the possible outcomes and agree to a reasonable settlement.

The *NCAT Consumer & Commercial Division Guideline - Representation* includes a list of parties to whom leave will usually be given to be represented[1]. That list includes real estate agents acting on behalf of a landlord. MLC recommends that the guideline be amended to include a tenant assisted by a tenants' advocate as a party to whom leave will usually be given to be represented. This would balance the right of landlords and tenants to have their disputes resolved fairly and efficiently.

Case-study 4

A tenants' advocate appearing as the duty advocate at the Tribunal assisted a tenant in a complex matter involving termination. The matter did not resolve in conciliation and the tenants' advocate sought leave to appear before the Tribunal when the matter

[1] Para 10, *NCAT Consumer & Commercial Division Guideline – Representation* August 2017.

returned to the Member. The Member refused leave stating that it was not their policy to allow representatives at a group list hearing, despite the landlord being represented by their agent. The Member ultimately allowed the advocate to speak, without granting leave, as neither the tenant nor the agent were able to adequately explain the issues in dispute.

Recommendation:

- That *NCAT Consumer & Commercial Division Guideline – Representation* be amended to include a tenant assisted by a tenants' advocate as a party to whom leave to represent will usually be granted.

4. Key issue – Enforcement of orders

The experience of our clients and advocates is that there are inadequate consequences for parties who fail to comply with Tribunal orders. This creates considerable difficulty and frustration for tenants who do not get the benefit of orders and have few options to insist on compliance. Whilst matters can be renewed under Clause 8 of Schedule 4 to the Act, the orders sought are usually limited to a further order that the landlord do work, restore access etc and rent reduction or compensation for economic loss. Where a landlord continues to ignore orders of the Tribunal, the tenant is left with accepting the non-compliance or moving the Tribunal to consider a referral to the Supreme Court for contempt. As was demonstrated in the matter of *Bott v NSW Land and Housing Corporation*[2] it is rare that the conduct of a landlord, even where the Tribunal is satisfied that there is an arguable case that the landlord has committed a contempt, will warrant the complexity and burden of a referral to the Supreme Court.

In our view, the Tribunal should increase its use of section 72 of the Act to enforce penalties against parties who fail to comply with Tribunal orders without a reasonable excuse.

Further, we recommend establishing a regime similar to that applying under section 147 of the *Strata Schemes Management Act 2015*. That section allows an owners corporation to apply to the Tribunal for the imposition of a civil penalty, payable to the owner's corporation, for breach of a by-law.

Currently, an application for the imposition of civil penalty under the Act can only be made by the Minister or their delegate and, to the best of our knowledge, such applications are rare. Broadening the scope of the section, to allow the party most directly affected by the non-compliance to seek the imposition of a penalty, would

[2] *Bott v NSW Land and Housing Corporation (No 2)* [2018] NSWCATCD 2 at [33] – [34].

make enforcement more effective and make parties aware that there can be real consequences for failing to comply with an order. An increase in the number of applications made for civil penalties is likely to have a deterrent effect and drive compliance with Tribunal orders.

Consideration could also be given to imposing a civil penalty fixed at a daily rate payable for each day of non-compliance, with the defaulting party bearing the burden of proving that the penalty would be harsh and oppressive in the circumstances.

Recommendations:

- That the Tribunal increase the frequency of its use of its powers under section 72 of the Act.
- That section 77 of the Act be broadened to allow applications for civil penalties to be made by the person for whose benefit the order was made, with any penalty imposed payable to that person.
- That a civil penalty fixed at a daily rate be imposed for each day of non-compliance.