

THE CONSUMER, TRADER AND TENANCY TRIBUNAL: INTRODUCING THE SUPER CONSUMER TRIBUNAL

Christopher Wong
 Senoir Associate
 Minter Ellison

A. INTRODUCTION

On 21 November 2001, the *Consumer, Trader and Tenancy Tribunal Act 2001* (the 'Act') was passed in New South Wales which amalgamates the Fair Trading Tribunal and the Residential Tribunal into a single consumer tribunal known as the Consumer, Trader and Tenancy Tribunal ('CTTT'). The Act essentially consolidates the legislative provisions and processes regulating the Fair Trading Tribunal and the Residential Tribunal into one structured process, whilst introducing new reforms to tighten the administration and effectiveness of the Tribunals.

B. HISTORY AND RATIONALE

The Fair Trading Tribunal and the Residential Tribunal were both set up on 1 March 1999. The Fair Trading Tribunal consolidated the separate tribunals previously established for general consumer disputes, motor vehicles, home building and certain commercial matters. The Residential Tribunal continued the functions of the previous Residential Tenancies Tribunal which dealt with a range of property and real estate matters such as residential tenancies, retirement villages, residential parks, and strata and community schemes disputes.

The establishment of the CTTT was intended to create a super consumer tribunal which acts as a purpose-built consumer trader forum to address consumer protection issues and to provide more efficient and effective outcomes for consumers in New South Wales. In this regard, the CTTT aims to:

- (a) create a more efficient and effective structure which enables advanced systems to be implemented across both Tribunals, thereby avoiding duplication of resources in the

development of IT and administrative procedures;

- (b) create a common mechanism which seeks to ensure that Tribunal decisions are consistent and of a certain quality. To this end, it contains a range of substantial and substantive reforms to make it a more effective and credible performer; and

- (c) streamline and improve Tribunal procedures and legislative clarity.

C. COMMENCEMENT

The Act was assented to on 21 November 2001. The amalgamation of the two Tribunals into the CTTT took place on 25 February 2002.

D. DIVISIONS

The CTTT will have 8 divisions as follows:¹

- (a) **General Division**—deals with consumer claims;
- (b) **Commercial Division**—deals with consumer credit claims;
- (c) **Home Building Division**—deals with matters arising from the *Home Building Act 1989*. The jurisdiction of the CTTT for these disputes is capped at \$500,000;
- (d) **Motor Vehicles Division**—deals with consumer claims that relate to motor vehicles;
- (e) **Residential Parks Division**—deals with matters relating to residential parks;
- (f) **Retirement Villages Division**—deals with matters relating to retirement villages;
- (g) **Strata and Community Schemes Division**—deals with matters relating to community land management and strata schemes management; and
- (h) **Tenancy Division**—deals with matters relating to tenancies.

E. COMPOSITION

The CTTT consists of a 4 tier tribunal membership structure as follows:²

- (a) Chairperson;
- (b) Two Deputy Chairpersons, namely:
 - (i) Deputy chairperson (Registry and Administration); and
 - (ii) Deputy chairperson (Determinations);
- (c) Senior members; and
- (d) Ordinary members.

The Chairperson will be aided by the two Deputy Chairpersons—one responsible for the Tribunal's executive functions and the other responsible for the Tribunal's financial, administrative and registry functions. Depending upon the matter in dispute, the Tribunal will comprise of a single member (in most cases) or a two or three person panel.³

F. MAIN REFORMS

The main reforms introduced by the Act relate to:

- (a) the introduction of quality control mechanisms over the powers of the Tribunal members;
- (b) the introduction of penalties for giving false and misleading information;
- (c) improving the schemes for alternative dispute resolution; and
- (d) improving the procedures of the Tribunal dispute resolution process.

G. QUALITY CONTROL MECHANISMS

This reform is intended to create a framework of consistency, quality and efficiency in the decision making process of the Tribunal. The mechanisms include:

- (i) Performance Agreements⁴—all members are required to enter

into performance agreements with the Chairperson (or in the case of the Chairperson, the Minister) and to comply with a code of conduct established for members by the Chairperson. Tribunal members are also required to comply with any procedural directions of the Chairperson;

- (ii) Peer Review Panel⁵—the education, training and disciplinary aspects of the Tribunal's operations will be overseen by a new independent Peer Review Panel. The functions of the Panel will be to review matters referred to it by the Chairperson, Director General or Minister, and to provide appropriate advice on these referrals. This important reform seeks to address the unsatisfactory position in the past where aggrieved parties in Tribunal proceedings could do little more than complain to the Chairperson about behaviour, attitudes or perceived shortcomings of Tribunal members;

- (iii) Chairperson Qualifications⁶—the Chairperson will also be the Chief Executive Officer of the Tribunal. He or she will be required to have suitable legal qualifications as well as other appropriate demonstrated skills eg. experience in administration and effective communication in the conduct of high-volume case management; and

- (iv) Expert Assessors⁷—the Tribunal will be able to enlist the assistance of expert assessors in specialised areas of dispute such as home building, real estate and motor vehicle matters.

H. FALSE AND MISLEADING INFORMATION

To control the incidence of a party causing mischief by engaging in untruths and misrepresentations, any person giving false and misleading information may be

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liable to a maximum penalty of \$5,500 or 12 months imprisonment or both.⁸

I. ALTERNATIVE DISPUTE RESOLUTION

A core component of the Act is the CTTT's powers to promote conciliation at an early stage.⁹ The Act effectively prescribes two tiers of alternative dispute resolution as follows:

(a) In relation to home building disputes, a Building Disputes Unit has been established as a consequence of Section 48D of the *Home Building Act 1989* (see Annexure). This section requires that any dispute should be assessed for its appropriateness to be referred to independent expert determination; and

(b) If the dispute is not resolved, the CTTT may require the parties to attend a preliminary conference before any Tribunal proceedings with a view to ascertaining whether determination of a disputed issue may be implemented.¹⁰ The CTTT may order the parties to attend mandatory mediation or neutral evaluation.¹¹ The costs of mediation or the neutral evaluation, including those payable to the mediator or neutral evaluator, are payable by the CTTT (except as otherwise provided by the Regulations).¹² If an issue is successfully determined, this has the effect of a tribunal decision.

The CTTT has powers to give effect to any agreement arising out of a settlement, mediation or neutral evaluation, and any CTTT orders in this regard are enforceable as a Tribunal order.¹³

J. PROCEDURES AND PENALTIES

The penalty for failure to comply with any Tribunal order is a maximum fine of 50 penalty units

(currently \$5,500) or 12 months imprisonment, or both.¹⁴ The exception to this is any orders relating to the payment of money.¹⁵ A money order made by the CTTT is enforceable as a judgment provided its particulars are certified by the Registrar and this certificate is filed with a court of competent jurisdiction.¹⁶ The rationale is that the CTTT does not have the same enforcement powers which a court has, and its penalties are limited to the above.

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Procedural directions may be issued by a tribunal member or the Chairperson for the conduct of proceedings.¹⁸ Directions of the Chairperson will take precedence over those of tribunal members. Tribunal proceedings may also be conducted by the telephone, audio visual and other means of communication in cases where geographical or urgency issues arise.¹⁹

K. APPEALS

Prior to the Act, rehearings of a Tribunal decision were conducted *de novo* so that time was spent rehearing parts of a matter which were not disputed. This placed an increasing strain on Tribunal resources. To address this problem, the Act provides that a decision of the CTTT may be reheard or appealed against as follows:

(a) a complete rehearing on questions of both law and fact, but only if:

(i) the claim is not more than \$25,000,²⁰ and

(ii) substantial injustice has been caused to the applicant because.²¹

(A) the CTTT's decision was not fair and equitable; or

(B) the tribunal's decision was against the weight of the evidence; or

(C) significant new evidence has arisen that was not reasonably available at the time the proceedings were completed; or

(b) appeal to the Supreme Court on a point of law only.²² Any appeal in this regard is subject to the Supreme Court Rules and therefore requires leave of the Court.

L. TRANSFER

The CTTT may either of its own motion or by agreement of the parties order that proceedings be transferred to a court that has jurisdiction in the matter, and to continue before the court as if they had been instituted there.²³

Conversely, if proceedings have been instituted in the court in relation to a matter for which the CTTT has jurisdiction, the court may of its own motion, on the application of a party or by agreement of the parties, order that the proceedings be directed to the Tribunal and to continue as if the proceedings had been instituted there.²⁴

M. CONCLUSION

While one can certainly appreciate the underlying rationale behind the new reforms under the Act, the question remains as to whether the merging of two effectively separate Tribunals dealing with discrete matters will ultimately translate into more effective and efficient administration of justice for the consumer. On the face of it, the merger appears to be motivated by resource driven factors more than anything else. While this will no doubt save costs for the Tribunal in the long run, fears have been expressed that a

single streamlined Tribunal may be more likely to crack under the burden of doubled workloads. It therefore remains to be seen whether the pooling of resources between the two Tribunals will indeed result in cheaper speedier and more just outcomes for the consumer.

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ANNEXURE

Building Disputes Unit (BDU)

Consumer, Trader and Tenancy Tribunal (CTTT)

1. Established under section 48D of the *Home Building Act 1989*. The BDU commenced operations on 1 January 2002.
2. Promotes an early intervention process aimed at assisting the parties to settle disputes.
3. The BDU consists of 6 case coordinators and 1 administration officer.
4. Handles all building claims ie residential buildings goods and services, insurance disputes, statutory warranties under the *Home Building Act* etc.
5. Basic procedure:
 - (a) applicant must complete a Notification of Dispute and submit to a local CTTT centre or Registry of CTTT;
 - (b) within 48 hours of submission, a case coordinator will contact the parties to discuss the claim. Options for resolution are canvassed, namely:
 - (i) independent expert determination;
 - (ii) mediation;
 - (iii) neutral evaluation; or
 - (iv) activities of case coordinator.
6. The dispute resolution process is at the BDU's costs. Usually, a technical expert's report would be commissioned. Where there is an existing expert assessment, the option for mediation may be canvassed.
7. A panel of experts may be established. Currently, the panel consists of part time members of the CTTT (accredited mediators). Later, the BDU may call for

expressions of interests for full-time experts.

8. The BDU process is a mandatory first step. Parties may not commence tribunal proceedings without first going through the BDU process, otherwise they will be referred back to the BDU.
9. Observations:
 - (a) contractual provisions for dispute resolution may need to be amended to reflect the BDU's involvement in the preliminary process; and
 - (b) there is, however, no compunction on a party to agree to any of the methods of dispute resolution suggested by the BDU. In this sense, there is no obligation to act in good faith on a party to attempt to genuinely resolve the matter. Note, however, that section 59(1) of the *Consumer Trader & Tribunal Act 2001* empowers the CTTT to order a party to attend mandatory mediation or neutral evaluation. However, again, the obligation to act in good faith is not in the Act. This is contrasted with similar provisions on mandatory mediation and neutral evaluation regulating the Federal, Supreme and District Courts which contain such an obligation.

REFERENCES

1. Schedule 1 of the Act — Divisions of the Tribunal.
2. Section 6(1).
3. Section 11(1).
4. Section 9 and Schedule 3 section 1.
5. Section 9 and Schedule 3 section 2.
6. Section 8.
7. Sections 16 & 17.
8. Section 7.
9. Section 54.
10. Section 55.
11. Section 59(1).
12. Section 60(1).
13. Sections 54(2), 61(1) & 52(1).
14. Section 52(1).
15. Section 52(2).
16. Section 5.
17. Section 28(2).
18. Section 29.
19. Section 38.
20. Section 68(13).
21. Section 68(2).
22. Section 67.
23. Section 23(1).
24. Section 23(2).