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GOING IT ALONE: THE RIGHT TO LEGAL REPRESENTATION IN NCAT

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A person involved in a strata dispute in NCAT must get permission from NCAT to be represented by a lawyer. This has created problems for many owners corporations which require legal representation in NCAT. When will NCAT give an owners corporation permission to be represented by a lawyer? What happens if NCAT refuses to allow a lawyer to represent an owners corporation – who will present the owners corporation's case? And what role can a lawyer for an owners corporation play when NCAT does not allow the lawyer to represent the owners corporation?

Introduction: The Automatic Right to Legal Representation in Litigation

In our society, it was once taken for granted that a person involved in a court case was automatically entitled to be represented by a lawyer in that case. It is still the position in some areas of law. For example, in criminal law an accused is entitled to be represented by a lawyer. This was also the position in cases involving strata disputes under the previous strata legislation. However, all of that changed with the introduction in 2014 of the NSW Civil and Administrative Tribunal (**NCAT**) and the commencement on 30 November 2016 of the *Strata Schemes Management Act 2015*.

The Dawn of a New Age: The Strata Schemes Management Act 2015

Under the regime that now exists, a party involved in a strata dispute in NCAT must obtain the permission of NCAT to be represented by a lawyer. NCAT does not always give permission for a party to be represented by a lawyer. This can create problems, especially for an owners corporation involved in litigation in NCAT which does not have a member of the strata committee or a strata managing agent available to represent it before NCAT. So, when will NCAT grant permission for a party to be represented by a lawyer? And, what happens when NCAT refuses to give permission for a lawyer to represent a party? Can that lawyer still help the party prepare its case in NCAT?

The Right to Legal Representation in NCAT

Section 45 of the *Civil and Administrative Act 2013* (**NCAT Act**) says that a party to proceedings in NCAT must present the parties' own case and is not entitled to be represented by any person including a lawyer unless NCAT grants leave for that person to represent the party. Section 45 gives NCAT a discretion to grant or refuse leave for a party to be represented by another person, including a lawyer, and also entitles NCAT to revoke any leave that has been granted. Clause 31 in the *Civil and Administrative Tribunal Rules 2014* allows a person to apply for leave to represent a party to proceedings in NCAT orally or in writing at any stage of the proceedings.



When will NCAT Grant Leave for a Party to be Legally Represented?

The NCAT legislation does not indicate the matters NCAT must take into account when deciding whether or not it will grant permission for a party to be represented by a lawyer in a case in NCAT. However, in August 2017, the Deputy President of NCAT issued a guideline explaining the circumstances that would permit NCAT to allow a party to be represented by a lawyer. The guideline says that NCAT will usually permit a party to be represented by a lawyer, relevantly, if:

- the proceedings in NCAT involve an application for a penalty to be imposed under the *Strata Schemes Management Act 2015*,
- NCAT considers that the party would be placed at a disadvantage if not represented by a lawyer at the hearing; or
- NCAT is of the opinion that representation by a lawyer should be permitted due to the likelihood that complex issues of law or fact will arise in the proceedings;
- the proceedings concern a home building dispute for more than \$30,000.

The NCAT Guideline also says that NCAT is likely to allow a party to be represented by a lawyer if the other party to the proceedings is represented by a lawyer.

Granting Permission for Legal Representation: What Else Should NCAT Consider?

There are other matters which NCAT should (but often does not) take into consideration when deciding whether or not a lawyer should be permitted to represent a party. These additional considerations include whether:

- allowing a lawyer to represent a party would enable the matter to be dealt with more efficiently, quickly or cost effectively;
- it would be unfair not to allow the party to be represented by a lawyer because the party is unable to represent himself, herself or itself effectively; and
- it would be unfair not to allow the party to be represented by a lawyer taking into account fairness between that party and the other party, for example, where:
 - a party is from a non-English speaking background or has difficulty reading or writing; or
 - where one party does not have the representative with any legal experience when the other party does so, for example, because they are legally trained or qualified.



What is Happening in Practice? When is NCAT Allowing Lawyers to Represent Parties in Strata Disputes?

The Members of NCAT are taking different approaches towards the question of whether or not it is appropriate for NCAT to grant a party leave to be represented by a lawyer in a strata dispute. Most Members of NCAT will permit a party to be represented by a lawyer where the other party is represented by a lawyer or if the NCAT Member is convinced that the proceedings involve complex issues of fact or law.

However, many strata disputes do not involve complex issues of fact or law and, for that reason, in many strata cases, NCAT refuses to give a party, typically an owners corporation, permission to be represented by a lawyer. And often, an unrepresented party complains that it would be unfair to allow the other party, often an owners corporation, to be represented by a lawyer and NCAT agrees.

This can create substantial problems because the party without the right to have a lawyer represent its interests in NCAT then needs to find a person who is willing and able to present its case in NCAT and often an owners corporation will not have a member of the strata committee or a strata managing agent who is able to effectively present its case.

Why NCAT Should Allow Lawyers

It has long been accepted that there are many benefits in permitting lawyers to be involved in legal proceedings. In 1994, the Chief Justice of Australia, Sir Anthony Mason, made the following observation in *The State of the Judicature* (1994) 68 ALJ 125 at 127:

...[T]he exclusion of lawyers neither enhances nor accelerates the course of justice. If my long experience of reading the transcripts of proceedings ... has any lesson to offer, it is that the presentation of cases by non-lawyers does not lead to clarity and speedy hearings; on the contrary, it is more likely to lead to confusion and to long, drawn out proceedings due to the failure of non-lawyers to identify the true issues clearly.

Chief Justice Mason went on to make the following observation in the same passage:

No doubt lawyers are a nuisance – they habitually find unexpected defects in legislation and administrative and other decisions by those who exercise power. But that is no reason for excluding lawyers.

In *Giannarelli -v- Wraith* (1988) 165 CLR 543, Chief Justice Mason outlined some of the benefits of having lawyers involved in proceedings when he made the following observation:

In selecting and limiting the number of witnesses to be called, in deciding what questions will be asked in cross-examination, what topics will be covered in address and what points



of law will be raised, [the lawyer] exercises an independent judgment so that the time of the Court is not taken up unnecessarily, notwithstanding that the client may wish to chase every rabbit down its burrow.

Debunking the Old Myth: Allowing Lawyers is Unfair

In some cases, NCAT refuses to give a party permission to be represented by a lawyer because the other party is not represented by a lawyer and complains that it would be unfair to allow a lawyer to present the first party's case. This is a myth that has been debunked long ago. In 1953, Justice Wright of the Commonwealth Court of Conciliation and Arbitration made the following observation in *The Waterside Workers Award 1936* (1953) 77 CAR 74 at 76:

My approach to the question of representation by counsel is, I must confess, strongly influenced by the knowledge – expressly stated by them to have been shared by almost every judge of this Court since its inception – that the work of the Court, and the attainment of its objects, are substantially assisted by the participation of advocates professionally trained in forensic skills. That applies, in my opinion, just as much to the marshalling of facts as to the elucidation of questions of law. In the present case, and in a greater number in the past, [the representative of a party] has based his objection on the contention that [he is] placed at a disadvantage in the Court by having to oppose lawyers. In my opinion, and according to my experience in this and other Courts, that is an untenable view which should have been abandoned long ago. In such circumstances, this Court takes special care to ensure that lay advocates suffer no disability or disadvantage.

More recently, Deputy President Sams of the Fair Work Commission remarked in *Applicant -v- Respondent* [2014] FWC 2860 at [18] that:

Invariably, I have found the skills and expertise of an experienced industrial legal practitioner will be more of a help than a hindrance, particularly bearing in mind a legal practitioner's professional obligations to the Commission and Courts.

Indeed, the Deputy President went on to remark at [21] that:

In my view, balancing fairness between parties is as much a case of courtroom management, as it is a case of legislative mandate. With the greatly increased exposure of all courts and tribunals to self-represented litigants, with all of the well known difficulties this brings, the appearance of a focused, experienced and sympathetic legal practitioner is, more often than not, a welcome relief.



The Problem of Unrepresented Litigants

The problems caused by unrepresented litigants are well known. In NCAT, parties who are not represented by lawyers often raise irrelevant issues, rely on voluminous documents, many of which are not relevant, and do not raise relevant issues adequately or at all. Indeed, often unrepresented litigants offer NCAT little assistance in determining their case. This often results in cases in NCAT taking longer to decide than they should and costing the other party more time and money responding to the case of the unrepresented litigant than can be justified.

Indeed, in *Cachia -v- Hanes* (1994) 79 CLR 403, the High Court of Australia said at [22]:

Whilst the right of a litigant to appear in person is fundamental, it would be disregarding the obvious to fail to recognise the presence of litigants in person in increasing numbers is creating a problem for the Courts ... it would be mere pretence to regard the work done by most litigants in person in the preparation and conduct of their cases as the equivalent of work done by qualified legal representatives. All too frequently, the burden of ensuring that the necessary work of a litigant in person is done falls on the Court administration or the Court itself.

It is usually the case that the involvement of lawyers assists NCAT decide the real issues in dispute far more quickly, efficiently and cost effectively than would be the case without lawyers.

What Role can a Lawyer Play when NCAT Refuses to Permit a Party to be Legally Represented?

The main role of a lawyer in any case before NCAT is to present his or her party's case to NCAT at the final hearing. However, typically a lawyer does much more than that when representing a party in NCAT. For example, the lawyer will provide legal advice to the party, prepare the party's evidence and submissions and decide what questions will be asked of the other party's witnesses in any cross-examination. But what role can a party's lawyer play in an NCAT case when NCAT does not give that party permission to be represented by a lawyer? Does that mean the lawyer simply cannot present the party's case at the final hearing? Or is the lawyer completely prohibited from providing any assistance to the party?

There is no clear cut answer to this question. However, a recent decision of the Full Bench of the Fair Work Commission has cast doubt on the ability of a lawyer to play any role, or any real role, in a case where the party the lawyer is act for has been refused permission to be represented by the lawyer.

Section 596 of the *Fair Work Act 2009* requires a person to obtain permission from the Fair Work Commission to be represented by a lawyer in a case before the Commission. In *Fitzgerald -v- Woolworths Ltd* [2017] FWCFB 2797, the Full Bench of the Fair Work Commission said the following at [44]:



... We consider that section 596 is not confined to permission for courtroom advocacy, and indeed appears to have been drafted in a way that ... was intended to put beyond doubt that all aspects of representation in connection with a matter were to be encompassed.

The Full Bench considered that the types of matters that were covered by a decision to permit a party to be represented by a lawyer in proceedings before the Commission included not just appearing as an advocate at the final hearing but, also, preparing to appear as an advocate, negotiating for a party with an opponent to settle a case, giving legal advice, preparing or advising on documents to be used by a party in relation to their case and any other work that is from time to time commonly carried out by barristers.

A Scary New Reality?

If the decision of the Fair Work Commission in the *Fitzgerald* case is applied by NCAT, then it means that a lawyer for a party will essentially have no role to play in an NCAT case where that party is not given permission to be represented by the lawyer in the case. It could also mean that the other party is entitled to ask for an order by NCAT directing that the other party's lawyer play absolutely no role in the case whatsoever. For example, this could prevent a lawyer preparing any evidence or submissions in the case, trying to settle the case or even preparing speaking notes for the representative of the party to rely on at the final hearing.

Indeed, this is exactly what happened at a recent hearing in NCAT where an owners corporation was refused permission to be represented by a lawyer at the hearing. There, the NCAT Member refused to allow the strata managing agent of the owners corporation to rely on any submissions or speaking notes that had been prepared by the lawyer. This meant that the strata manager was forced to represent the owners corporation at the final hearing without any assistance whatsoever from the lawyer and could not even refer to the submissions and speaking notes which had been prepared by the lawyer. This was, frankly, a disastrous outcome for both the owners corporation and the strata manager concerned.

Conclusion

The right for a party involved in a strata dispute in NCAT to be represented by a lawyer is no longer automatic. Indeed, there is no guarantee that a party will be given permission by NCAT to be represented by a lawyer. And, if NCAT does not give a lawyer permission to represent a party, the role that lawyer can play in the case may be extremely limited.

In our experience, Members of NCAT are dealing with applications for permission for parties to be represented by lawyers in strata disputes in varying ways. Some NCAT Members will grant permission for parties to be represented by lawyers in almost any case whereas many other members will not. This places parties involved in NCAT cases who wish to be represented by lawyers in a difficult position, not



knowing whether they or their lawyers will be presenting their case to NCAT. This tends to undermine that party's confidence in NCAT and create difficulties for that party in finding someone (who is not a lawyer) who can effectively present their case. In our view, these difficulties are an unnecessary impediment to the quick and efficient resolution of strata disputes in NCAT.

The longstanding experience of the courts and tribunals shows that more often than not the involvement of lawyers, as opposed to unrepresented litigants, results in the real issues in dispute being resolved by the court or tribunal in a more efficient and cost effective manner. For those reasons, there should be a compelling reason why a party should not be permitted to be represented by a lawyer in a strata dispute in NCAT.

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About JS Mueller & Co

JS Mueller & Co has been servicing the strata industry across metropolitan and regional NSW for over 30 years. We are a specialist firm of strata lawyers with in depth and unmatched experience in, and comprehensive knowledge of strata law and levy collection.

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