

Data insights
in civil justice

NSW Civil and Administrative Tribunal

Overview

NCAT Part 1



Data insights in civil justice:

NSW Civil and Administrative Tribunal
Overview
(NCAT Part 1)

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Shortened forms

ABN	Australian Business Number
ABR	Australian Business Register
ACN	Australian Company Number
AEOD	Administrative and Equal Opportunity Division
AP	Appeal Panel
CCD	Consumer and Commercial Division
CMS	Case Management System
Foundation	Law and Justice Foundation of New South Wales
GD	Guardianship Division
GIPA	Government Information (Public Access) Act 2009
NCAT	New South Wales Civil and Administrative Tribunal
OD	Occupational Division
ROGS	Return on Government Services
SOA	Subject of application

Key messages

Overview

The Department of Justice NSW is seeking to optimise the use of civil court and tribunal data for evidence-based decision-making, specifically the civil divisions of the Local, District and the Supreme Court, the Land and Environment Court and the NSW Civil and Administrative Tribunal (NCAT). To facilitate this process, the Law and Justice Foundation of NSW (the Foundation) has been engaged by the Department to investigate the quality and utility of each court and tribunal’s data in informing policy and practice. The analysis reported here focuses on NCAT data.

NCAT has four Divisions – the Consumer and Commercial Division (CCD); the Administrative and Equal Opportunity Division (AEOD); the Occupational Division (OD); and the Guardianship Division (GD) – and an Appeal Panel (AP).¹ Separate reports have been prepared: one each for the CCD, the AEOD & OD (which share a data system), the GD, and the AP. This report provides an overview of key issues raised in the other four reports.

The role of NCAT

NCAT commenced operation on 1 January 2014, when 22 tribunals were consolidated into one operating entity. NCAT was established to provide a “simple, quick, and effective process for resolving disputes and reviewing administrative action”.² To achieve this, NCAT has a number of features that differentiate it from a court. These include:

- services and processes to support self-representation by parties in most matters
- plain language forms and documents
- simplified processes
- a range of dispute resolution mechanisms in addition to adjudication. Depending upon the Division and the matter, these may include conciliation, mediation, conclave, preliminary sessions (planning meetings and case conferences) and directions hearings.³

The NCAT data systems and the challenges for policy making

Having only commenced as a single operating entity in January 2014, at the time this review was undertaken (mid-2016), NCAT was operating with three discrete case management systems (CMSs): one for the CCD, one for the AEOD & OD, and one for the

¹ NCAT Annual Report 2014. http://www.ncat.nsw.gov.au/Documents/ncat_annual_report_2014.pdf.

² NCAT Annual Report 2014–2015, p.4. http://www.ncat.nsw.gov.au/Documents/ncat_annual_report_2014_2015.pdf.

³See NCAT Annual Report 2014–2015.

GD. While NCAT is working to integrate these into a single data system, the data reported here was drawn from these three separate sources.

Although the three CMSs collect broadly similar information, there are gaps as well as key differences between them in the type of information recorded about the same feature (e.g. legal or other representation of the parties). With considerable variation in *how* information is defined, recorded, stored and retrieved in each system, it is challenging, and on some questions, not possible to meaningfully compare or combine data across lists and Divisions. Some of these differences arise due to the differing administrative (and legislative) needs of each list. Other differences may reflect historical practices in the way that data has been recorded over time on the different data systems. We understand some of the issues raised in this review are already being addressed in the new system being developed.

In terms of the potential for data analysis, each CMS holds two types of data:

- data categorised in specific fields (e.g. matter type, order or classification, representation at hearing (CCD only), hearing date etc.), which can be downloaded and subject to statistical analysis ('reportable data')
- information recorded in text fields or PDF attachments. This information is accessible for the day-to-day administration of a matter, but cannot be downloaded for statistical analysis. Examples include full orders made and those attending hearings in the GD.

In this report, we focus upon the 'reportable data': the information which is in a form that can be readily subject to statistical analysis.

Comparing data across Divisions and lists

A key feature of NCAT is that it deals with a very wide variety of matters across a diverse range of lists (types of matter) and Divisions. The lists and Divisions vary significantly in the number and average length of matters. Because the CCD and two of its lists (*Tenancy* and to a lesser extent *Social housing*) dominate in terms of number of matters, overall figures tend to reflect this Division, and those two lists in particular. As a result, the unique characteristics identified in our analyses of some of the smaller lists and Divisions, risk being overlooked.

Specific data quality issues are discussed where relevant below.

Key questions

1. What types of matters are dealt with by NCAT?

More than 80% of all 71,444 NCAT matters finalised (or appeals lodged) during 2015 were CCD matters and a further 17% were GD matters. More than half (51.0%) of CCD matters were heard in the *Tenancy* list and a further 25.7% in the *Social housing* list. Together, tenancy and social housing matters made up 61.8% of all NCAT matters in the reporting period. AEOD matters – largely administrative review and discrimination matters – made up only 1.1% of all NCAT matters. OD matters (occupational issues) comprised 0.3% of all NCAT matters and appeals comprised 0.9% of all matters.

For the comparison of Divisions by the number of matters they finalise to be meaningful (to compare like with like) the base unit of measure – the matter – should be defined in the same way in each Division. However, our analysis suggests that what currently constitutes a single matter varies across Divisions – primarily around the treatment of interlocutories. In the GD, for instance, interlocutories are separate matters. In the AEOD, these fall within the one matter. This affects both the number of matters counted in a Division and the average length of time any single matter will take.

2. What are NCAT matters worth?

The monetary value of a civil claim or order sought offers *one* point against which to calibrate the cost of resolving that dispute. However, many of the orders sought at NCAT *do not* concern a monetary sum, but rather have non-monetary value to the parties. Also important is the broader social worth in the appropriate resolution of these issues and having a mechanism for doing so.⁴

In NCAT, information on the monetary value of orders *sought* is only recorded in a reportable form for four of the nine CCD lists, and for no lists in the other Divisions. There are lists for which this information is on file (e.g. the value of compensation sought for rent arrears in the *Tenancy* and *Social housing* lists) but not recorded in a unique field on the CMS. The value of orders *made* is not available in a reportable format at all. We suggest that the specific value of claims sought, and made, is recorded in a reportable format for all relevant claims, and that consideration is also given to better identifying the non-monetary value of claims and orders to ensure that such value is factored into policy discussions about the cost of civil justice.

3. Who are parties in NCAT matters?

Data on who is taking action against whom in each civil jurisdiction in NSW has key policy implications. Such information can identify areas for more efficient and tailored response to particular client groups and, if monitored on a regular basis, can also identify emerging demand and provide information to assist in Tribunal income projection.

In the vast majority of NCAT matters, applicants bring matters to the Tribunal to resolve disputes with the respondent(s). The exception is the GD, while there may be an applicant there will be no respondent but there is always a ‘subject of application’, who is the person about whom any order is sought (e.g. for guardianship or a financial management order). Any overall count of parties to NCAT matters needs to acknowledge this diversity.

To develop policies that engage appropriately with the different types of people and organisations that appear at Tribunals, more *detailed* information is required on the entity type (e.g. individual, business, local government, non-government organisation) of each party. Across all Divisions, except the GD, the only information currently gathered on the entity type of each party is whether the party is identified by the applicant on their application form as an ‘individual’ (or person) or an ‘organisation’ (or company). This is

⁴ Genn, H 2009, *Judging Civil Justice*, The Hamlyn Lectures 2008, Cambridge University Press, Edinburgh.

collected to calculate fee payments. The limitations of this information are discussed in this report.

The CCD also records ‘applicant type’ (e.g. landlord, tenant, consumer) for all matters and respondent type for *the Strata and community schemes* list. Consideration could be given to using this variable in other Divisions. However, our analysis suggests that, to better understand the types of people and organisations using courts and tribunals, more detailed information is required on entity type. With clear guidance, this information could be gathered at the application stage from applicants. An alternative approach is to more accurately record Australian Business Numbers (ABN) for all organisational parties, and then crossmatch this with data held on the Australian Business Register (ABR).

4 & 5. Party attendance and representation in NCAT matters

The scope for self-representation, its impact on the progress and outcomes of civil matters and the implications for the cost of administering justice, are questions of key policy interest. But insight into the impact of self-representation, and how this may vary by matter type, the parties involved, the jurisdiction and the type of support offered, requires detailed and accurate data on direct party participation in a matter, as well as representation status. Critically, however, neither party attendance at hearings nor the role and type of representative involved are recorded (in a reportable form) consistently, if at all, across the NCAT Divisions.

Party attendance at hearings

Noting the particular focus within NCAT on party participation in hearings without representation,⁵ party attendance is recorded for all CCD hearings (and on paper decisions) in which an order is made. While participation in CCD hearings by parties varied considerably by list, the data on matters finalised in the CCD in 2015 indicated:

- in 5 CCD lists, more than 70% of hearings were attended by both parties
- in the two largest CCD lists, only 41% of *Tenancy* hearings and 30% of *Social housing* hearings were attended by both parties
- in all CCD lists, applicants more commonly attended hearings than respondents.

Statistical data is not available for the GD (though this information is evident on case files) and is not recorded at all in the AEOD & OD.

Importantly, while the CCD records party attendance at each hearing, details of ***who*** attended as or on behalf of the party (i.e. the type of entity) is not recorded. This is relevant where the party is an organisation that has an employee (e.g. a legal officer) attending as the ‘party’, often on repeat occasions for different matters. The ‘in person’ experience of such a party differs from that of an individual appearing at the tribunal on a once-off basis and so is relevant to policy considerations around self-representation.

⁵ http://www.ncat.nsw.gov.au/Pages/going_to_the_tribunal/representation.aspx

Are parties represented and by whom?

Depending upon the Division and type of matter, a party may be represented by a legal practitioner or a non-legal agent, such as, a real estate agent on behalf of a landlord, an advocate, or a friend or relative with authorisation to act on behalf of the party. In the CCD, organisational parties can be represented by an employee, partner or agent.⁶ The breadth of possible representatives is a key issue when comparing ‘representation’ at NCAT to ‘representation’ in the civil courts, where data on representation overwhelmingly refers to legal representatives. However, the type of representative (lawyer, advocate, agent or other) is not routinely recorded on the CCD or AEOD & OD CMS, or available from the GD in a reportable form. This is a key limitation of the data.

In our comparison of casefiles to the corresponding data files, we also noted that officers of organisations (legal officer or otherwise) were sometimes recorded on the CMS as the party and sometimes as the *representative* of the party. Again, clear and accurate information about persons participating in NCAT matters and the role they are playing is critical to any consideration of party participation and representation.

Using the samples of matters in which we coded the entity type of applicants and respondents, we were able to examine representation status by the entity type of the parties. While figures varied between Divisions and lists, and for applicants and respondents, overall, organisations (in particular government and non-government agencies) were more commonly represented than individuals.

Continuity of representation

While in the CCD, the presence (or otherwise) of a representative is recorded for every hearing, this information is not available in the AEOD & OD, and not in a readily reportable form in the GD.

However, as legal assistance services become increasingly unbundled, parties may receive some legal (or other) assistance to prepare their applications but then appear alone at hearing. Or they may prepare the matter themselves and then bring a lawyer or other representative to the hearing. While it may be challenging to record, we would suggest further consideration be given to exploring and/or tracking the types of legal (or non-legal) help that parties receive to bring, defend, progress and resolve their NCAT matters.

6. How do matters progress?

What is involved in resolving a dispute through NCAT and how does this vary by matter type, party type, representation status, Division and list? What do these differences tell us about the options and relative efficiency and effectiveness of different dispute resolution processes for certain types of matters?

To answer such questions it assists to have a common metric across Divisions and lists to describe the progress of matters, noting the different processes and procedures involved. To do this, consideration needs to be given to possible data points and what activities each

⁶ NCAT Guideline: Representation of parties Consumer and Commercial Division September 2015.
http://www.ncat.nsw.gov.au/Documents/ccd_guideline_representation.pdf

reflect. Numbers of hearings, hearing days or orders made provide some indication as to the complexity of the matter. However, these counts can mask the considerable administrative and support work that may be undertaken by registries and other staff to prepare matters so that matters resolve with *fewer* hearings or hearing days. Three options are discussed in this report:

- progress by orders (CCD)
- progress by listing type and other administrative indicators (AEOD & OD, GD)
- progress by elapsed time (CCD, AEOD & OD).

While each approach has its merits, the challenge is to find a metric which applies across the Divisions, while taking account of the unique activities and features of each.

7. How long do matters take?

The CCD and the AEOD & OD CMSs calculate the length of time from lodgement to first hearing or listing, and from lodgement to finalisation. GD CMS data can also be used to calculate the length of time between lodgement and finalisation for any new matters (excluding statutory reviews). This allows comparison of time taken across lists and Divisions. Importantly however, elapsed times reflects a range of factors over and above workload, including the relative urgency and time standards placed upon certain matter types (e.g. the urgency of an impending eviction and the resulting prioritisation of termination matters) and legislative requirements placed on the progress of certain matters (e.g. re a firearms licence). This does not prevent the analysis of elapsed time but must be factored into its reporting and any comparisons made across lists, Divisions and jurisdictions.

Thinking more broadly – and from the perspective of an individual seeking to resolve a dispute – it is vital to acknowledge that the time a case spends at NCAT may only be part of the story, with some types of matters only coming to NCAT after consideration by the original decision-making body (e.g. a government department in an *Administrative review* matter) or by another agency (e.g. NSW Fair Trading in a *Home building* matter). If, as is the case in a very small proportion of cases, the matter is not satisfactorily resolved, there may also be further action (e.g. appeal to the NCAT Appeal Panel or the Supreme Court, enforcement action in the Local Court) that follows the final order. Charts indicating the pathways and processes that different types of matters may follow into and after NCAT are provided in the CCD and AEOD & OD reports.

A key data challenge is to have metrics which appropriately acknowledge the actual length of time it takes individuals to resolve a dispute, from the time of dispute, through the various (mandatory and optional) dispute resolution mechanisms to the point of resolution.

8. How are matters finalised at NCAT and what are the outcomes?

The purpose of bringing matters to NCAT – or to any other civil jurisdiction – is to resolve a dispute or have a legally enforceable decision made. Information on what decisions are made, whether disputes are resolved, how and at what stage they are resolved, and how outcomes achieved compare to outcomes sought – is critical to our understanding of the civil justice system.

A matter can be finalised at NCAT in a number of ways. It may be:

- finalised administratively prior to hearing (CCD and AP, a small proportion of matters)
- settled by the parties at any point following lodgement (e.g. settled privately and withdrawn, or finalised as a dismissal or another order, with consent)
- withdrawn by the applicant for some other reason prior to or at hearing
- decided by a Tribunal member at hearing (or on paper).

No matter how it is finalised, the outcome is reported in the data by the category of main order made. When carefully reviewed and categorised (see analysis of AEOD, OD and GD data) or compared to the main order sought (CCD), orders made also provide some insight into whose favour a matter is resolved. But, as discussed in this report, reporting by main order made (and, in the CCD, comparing this to main order sought) is limited by a number of factors. In considering the types of outcomes sought, this report notes that the role and purpose of the Tribunal varies in significant ways between Divisions and lists. This is most stark when comparing the GD to the other Divisions. The GD aims to carefully determine outcomes that are in the best interests of the person subject to the application, rather than to resolve disputes between parties (CCD) or, for instance, to assess the merits of government decision-making (within the AEOD) or determine professional discipline matters (in OD).

Our view is that a new approach is required to ensure data is collected in an appropriate format to provide full and comparable information on when and how matters are finalised.

Conclusion and next steps

The purpose of this analysis – reported in this overview and the four supporting reports – has been to investigate the quality and utility of NCAT data to inform policy and practice. This is part of a broader project of the Department of Justice NSW to optimise the use of civil court and Tribunal data for evidence-based decision-making.

This is the first time such an investigation has been undertaken of civil court and tribunal data in NSW and the project is in its infancy. These reports are therefore a starting point rather than the final word. Issues are raised and some recommendations made but further discussion with the courts, tribunals and policy makers is warranted to both optimise the data for policy purposes but also retain realistic data collection and management practices.

Data-wise, NCAT starts on a high base. While challenged by the three separate data systems, NCAT administrative data provides insight into the range of matters dealt with at the Tribunal, the parties involved, party involvement in the processes and the extent to which they are represented, the progress of matters, how they are finalised and the outcomes achieved. However, there is room to improve the quality, clarity and relevance of this information to provide evidence for future decision-making. In the immediate term, there is opportunity to implement some change as NCAT brings its three separate data systems into one. We hope and trust that these reports help to inform this process.

Introduction

The Department of Justice NSW is seeking to optimise the use of civil court and tribunal data for evidence-based decision-making, specifically the civil divisions of the Local, District and Supreme Court, the Land and Environment Court and the NSW Civil and Administrative Tribunal (NCAT).

To facilitate this process, the Law and Justice Foundation of NSW (the Foundation) has been engaged by the Department to investigate the quality and utility of each court and tribunal's data in informing policy and practice. This analysis focuses on NCAT data. As NCAT currently operates three discrete data systems across its four Divisions and Appeal Panel, five reports have been prepared, an overview and one each concerning:

- the Consumer and Commercial Division (CCD)
- the Administrative and Equal Opportunity Division (AEOD) and the Occupational Division (OD)
- the Guardianship Division (GD)
- the Appeal Panel (AP).

This report provides an overview of the key issues arising from the other four reports.

Background to NCAT

NCAT commenced operation on 1 January 2014, when 22 tribunals were consolidated into one operating entity.⁷ NCAT was established:

...to remedy the “complex and bewildering” tribunal system in New South Wales and to provide a simple, quick, and effective process for resolving disputes and reviewing administrative action.⁸

In seeking to provide a ‘simple, quick and effective’ process for dispute resolution, NCAT has a number of features that differentiate it from a court. The most recent NCAT Annual Report indicates that among these are:

- services and processes to support self-representation by parties in most matters (p. 20)
- plain language forms and documents (p. 22)
- simplified processes (p. 15)
- a range of dispute resolution mechanisms in addition to adjudication. Depending upon the Division and the matter, these may include conciliation, mediation, conclave, preliminary sessions (planning meetings and case conferences), directions hearings and, more recently (post the review period), online dispute resolution (p. 82).

NCAT decisions are made by ‘Members’, similar to the judicial role in civil courts.

The NCAT Divisions are as follows.

⁷ See *NCAT Annual Report 2014*. http://www.ncat.nsw.gov.au/Documents/ncat_annual_report_2014.pdf

⁸ *NCAT Annual Report 2014–2015*, p. 4. http://www.ncat.nsw.gov.au/Documents/ncat_annual_report_2014_2015.pdf

The **Consumer and Commercial Division** resolves a wide range of disputes such as tenancy (private and social housing) and other residential property issues, and disputes about the supply of goods and services. The CCD dealt with 81.7% of all 71,449 applications to NCAT in the 2014–15 financial year.⁹

The **Guardianship Division** determines applications about people with a decision-making disability and who may require a legally appointed substitute decision maker. The GD deals with 17.0% of applications to NCAT.

The **Administrative and Equal Opportunity Division** reviews administrative decisions made by NSW government agencies and resolves discrimination matters. The AEOD dealt with 1.1% of applications to NCAT in 2014–15. The AEOD reviews decisions, including those about: access to information held by government, firearms licences, administrative decisions made in the community services sector, and various State taxation decisions.

The **Occupational Division** is the smallest Division (0.3% of all matters), and reviews decisions by government agencies about licensing and complaints concerning professional conduct and discipline.

In certain circumstances, and for certain decisions, parties in any Division can appeal to the internal **Appeals Panel**. The AP dealt with 0.9% of all matters lodged in 2014–15.

Within each NCAT Division matters are organised into lists. As indicated in Table 1, there are a broad range of lists within each Division.

Table 1: NCAT Divisions and lists

Division	Lists
AEOD	Administrative review Community services Revenue
OD	Administrative review Health professionals Legal and other professions
CCD	Commercial General Home building Motor vehicles Residential communities Retirement villages Social housing Strata and community schemes Tenancy
Appeals	AP lists reflect the list from which the matters arise in the Divisions
	Matter types
GD	Guardianship applications Financial management applications Statutory reviews of orders Requested reviews of orders Procedural matters (e.g. legal representation, joined as a party, adjournment) Other (e.g. clinical trials, consent for medical or dental treatment, recognition of interstate appointment)

⁹ NCAT Annual Report 2014–2015, p. 7.

Context: civil law jurisdictions in NSW

NCAT deal with around 42% of civil law matters finalised by courts and tribunals in NSW. Civil law matters may also be heard in the NSW Local, District, Supreme and Land & Environment Courts. The proportion of matters heard in each jurisdiction is identified in Table 2.

Table 2: Finalisations for civil matters, by jurisdiction in NSW, 2014–2015

NSW civil jurisdictions	Finalisations [^]	
	N	%
NCAT (2014–2015)	72,781 [#]	41.7
Local Court (2015)	85,852	49.2
District Court (2015)	4,788	2.7
Supreme Court ⁺ (2014)	10,167	5.8
Land and Environment Court (2014)	1,032	0.6
Estimated total	174,620	100.0

Sources: Most recent annual reports or reviews available. *NCAT Annual Report 2014–2015*, p. 7; Local Court of New South Wales Annual Review 2015, p. 16; District Court of New South Wales Annual Review 2015, p. 22; Supreme Court of NSW Annual Review 2014, pp. 49 & 51; Land and Environment Court of NSW Annual Review 2014, p. 30.

+ Common law civil and equity Divisions.

This figure differs from the number of cases reported in this report due to differences in timeframe and potentially, in the way that finalised matters are selected for reporting.

To put these figures in context, it is helpful to consider both the number and range of civil legal issues which are experienced by people in NSW in a given year, and if and how these matters are resolved. Importantly, civil law issues may also be resolved *outside* of the tribunal and court system – between the parties directly; through administrative arrangements (e.g. pay by instalment arrangements with local councils) and through Ombudsmen’s offices, the Office of the NSW Small Business Commissioner and other avenues. As indicated by the Foundation’s LAW Survey (NSW), a proportion of civil law issues will not be dealt with at all.¹⁰

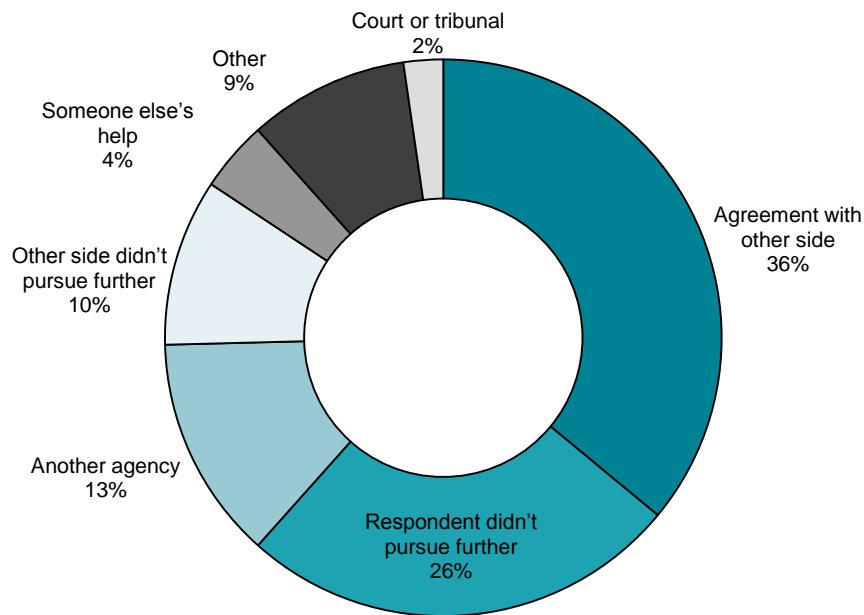
For instance, the LAW Survey asked a random sample of individuals about legal problems they had experienced in the previous 12 months and what they had done about those problems. Noting that these problems would have varied in seriousness, NSW respondents did nothing about 19% of the civil law issues experienced.

Regardless of whether respondents took any action in response to their legal problem, they were asked how they had ‘finalised’ their legal problems that were ‘now over’.¹¹ Figure 1 indicates that more than one-third (36%) of the civil law problems that had concluded were resolved through agreement with the other party. For a further 26% of concluded civil law problems, the problem ended because respondents did not pursue the matter (e.g. they agreed to the demand or did not further pursue their own claim). Only 2% were resolved in a court or tribunal.

¹⁰ Coumarelos, C, Macourt, D, People, J, McDonald, HM, Wei, Z, Iriana, R, and Ramsey, S 2012, *Legal Australia-wide survey: legal need in Australia*, Law and Justice Foundation of NSW, Sydney.

¹¹ Almost two-thirds of civil law problems (64%) were reported to be finalised at the time of interview.

Figure 1: How civil legal problems were finalised, LAW Survey (NSW)



Source: Law Survey (NSW).

Notes: n=1,924 finalised civil problems. Data was missing for 37 finalised civil problems. Family and criminal problems, and civil problems that were ongoing at the time of interview, were excluded. 'Other' includes complaint-handling bodies (1.9%), dispute resolution (1.8%) and lawyer help (1.5%).

Scope of the task

As part of a broader review of civil court and tribunal data, the Foundation was commissioned by the Department of Justice NSW to:

1. assess the content and quality (reliability, validity) of NCAT data, as evidence for the purpose of policy making, and
2. suggest any changes to data definition, collection, entry, analysis and/or retrieval that would improve the quality and utility of the data for this purpose.

Key questions addressed

Drawing upon the data reported in each of the NCAT Divisional reports, we summarise key issues relevant to the use of NCAT administrative data to answer policy relevant questions.

We commence with an overview of the NCAT data systems and the particular data challenges that arise in comparing data across the Divisions, and across jurisdictions within the civil law system. We then discuss issues specific to the following key questions that we attempted to answer for each Division using its administrative data:

1. What types of matters are heard by NCAT?
2. What are NCAT matters worth?
3. Who are the parties in NCAT matters?
4. How do parties participate in NCAT matters?
5. Are parties represented and by what types of representatives?
6. How do matters progress to finalisation?
7. How long do matters take?
8. How are matters finalised at NCAT and what are the outcomes?

The order of the questions addressed in each of the Divisional reports varied, based on the data available for each.

In this overview report we focus on the main data quality issues and overarching observations. Some key findings from each report are presented in breakout boxes. Please see the NCAT reports Parts 2–5 for detailed findings.

An overview of the methodology

Information for this analysis was drawn from the following main sources:

1. Unit record data (e.g. matter and entity) recorded on the three NCAT CMSs. For CCD and AEOD & OD, this included information on applicants and respondents, their representatives, matter types, processes, outcomes and relevant dates for all matters finalised in the NCAT Divisions between 1 January and 31 December 2015, and any appeals lodged in this period. For GD we received unit record data on matter type, lodgement date, hearing date, outcome, risk rating and self-applicant for matters finalised in the same period.
2. All or stratified samples of cases in each Division, for which the detailed entity type was coded for the first applicant and first respondent in each matter.
3. Stratified samples of electronic and paper files held by each Division of NCAT, to check the accuracy of information on the CMSs and collect relevant details that the databases do not hold.
4. Relevant documents, including legislation, NCAT guidelines for data entry and instructions relevant to NCAT Online.
5. Consultation with NCAT members and staff.

The number of records reviewed in each Division is detailed in Table 3.

Table 3: Summary of administrative data collected and matters reviewed, by Division

Division	Database	Unit record data	Classification of party entity type	Casefile analysis
CCD	CCD CMS	Data for all matters finalised in 2015 on matter type and list, parties, representation, orders, hearings and dates. n=57,653	Sample (n=1,000 matters)	200 matters lodged in 2015; 11 matters commenced before 2015 and finalised in 2015.
AEOD OD	AEOD & OD CMS	Data for all matters finalised in 2015 on matter type and list, parties, representation, orders, hearings and dates. n=1,019	All matters (n=1,019)	100 matters finalised in 2015
GD	Guardianship CMS	Data for all matters finalised in 2015 on matter type, lodgement date, outcome, hearing date, risk category n=12,161	n/a	53 matters finalised in 2015
Appeals	CCD CMS	Data for all appeals from the CCD and AEOD & OD lodged in 2015 on matter type and list, parties, representation, orders, hearings and dates. n=589	All matters (n=589)	30 matters lodged in 2015

Factors affecting data quality

As was the case for Local Court data,¹² the utility of NCAT data to answer policy questions and to accurately inform decision-making may be compromised in a number of discrete ways. In each data system, quality may be affected by:

- relevant information not being collected or recorded (e.g. on applicant and respondent entity types, representatives)
- how data or information is defined (e.g. definitions of matter types)
- how data is collected and then entered onto the NCAT databases (e.g. forms being completed and/or data entered by a range of different individuals, with varying interest and skill in data accuracy)
- how data is stored and retrieved (some information is only available on the paper files)
- the sheer amount and complexity of the data held and how the data systems have been built, documented and maintained over time to accommodate this complexity
- how data is analysed, cleaned and reported.

Differences between the three separate data systems will also impact upon the consistency, completeness and quality of the data.

¹² Forell, S & Mirrlees-Black, C 2016, *Data insights in civil justice: NSW Local Court*, Law and Justice Foundation of NSW, Sydney.

NCAT data systems

Having only commenced as a single operating entity in January 2014, at the time of this review (mid-2016), NCAT operates with three discrete case management systems (CMSs): one for the CCD, one for the AEOD & OD, and one for the GD. While NCAT is currently working to integrate these into a single data system, the data reported here was drawn from these three separate sources (Table 2, above).

First, we note that while our review is concerned with the utility of the data for policy purposes, this was *not* the purpose for which the three current CMSs were designed. Rather, each of the three databases has been designed or adapted to meet the administrative needs of the Division(s) served. As a result, each CMS varies in structure and reporting capability. The GD CMS, in particular, has quite a different structure to the other two, reflecting the primary focus of the work being the 'subject person' rather than the 'matter'. A key challenge for the current review has been to assess the current comparability of the data across the three different databases.

The specific structure and content of each CMS is detailed in the relevant report.

However, key to our interest in the use of this information for policy relevant data analysis, all three CMSs hold two broad categories of data:

- data categorised in specific fields (e.g. matter type, order or classification, representation at hearing (CCD), hearing date etc.), which can be downloaded and subject to statistical analysis ('reportable data')
- information recorded in text fields or PDF attachments. This information is accessible for the day-to-day administration of a matter, but cannot be downloaded for statistical analysis. Examples include full orders made, those attending hearings in the GD).

When discussing the data in this report we are focusing upon the 'reportable data': the information which is in a form that can be readily subject to statistical analysis.

To enhance the new NCAT-wide data system such that it may be better able to address important questions which affect policy and practice, the Foundation recommends that data capture, extraction and reporting be considered early in the development of the replacement system, and appropriate account taken of the issues raised and recommendations made in this and each of the Division/AP reports. We are advised that a number of the issues raised are already being taken into consideration in the development of the new CMS.

Comparing data across Divisions and lists

A key feature of NCAT is that it deals with a very wide variety of matters across all the lists and Divisions. Noting that the Tribunal has authority conferred by more than 160 separate Acts and subordinate legislation,¹³ processes relevant to these diverse issues also vary considerably.

Also relevant to any overall analysis of NCAT data is the significant variation in the size of each list (see Table 4). With such variation, any NCAT-wide, or even Division-wide, discussion of the data will mask critical differences between lists: in terms of the participants, representation, processes, timing and outcomes.

Further, because the CCD and, within that, the *Tenancy* list and, to a lesser extent, the *Social housing* list dominate in size, overall figures tend to reflect this Division, and those two lists in particular. As a result, the unique characteristics identified in our analyses of some of the smaller lists risk being overlooked.

In addition, there is variation in the type and range of details recorded for matters in each list, with information relevant to and collected for some lists but not others, even within a single CMS (e.g. monetary amount sought, product code, practice code, type of respondent). This reflects the administrative needs of particular lists and an appropriate focus on requesting relevant information only. However, in any NCAT-wide, or even Division-wide analysis, this can create apparent gaps in the data and can mask missing data (data that should have been entered but was not).

Even where each system collects similar types of information: about the parties and representatives involved; about the type of matter; about the actions taken by the Tribunal to progress that matter; and about the orders made, there remains considerable variation in how this information is defined, recorded, stored and retrieved in each system. This makes it difficult, and in some cases prevents apparently like data from being meaningfully compared or combined. Table 4 provides an overview of data held on matters in each Division, which relates to the key questions asked in this review.

The 8 key questions identified will now be examined individually.

¹³ NCAT Annual Report 2014–2015, p. 8.

Table 4: Data related to this review, which is reportable for each Division from each CMS

	CCD	AEOD & OD	GD	AP
Parties: type	Person Organisation	Individual Company	No	Person Organisation
Parties: entity type	No	No	No	No
Parties: postcode	Yes	Yes	Yes	Yes
Parties: type (role)	Applicants – all lists Respondents 1 list	No	No	No
Matter type	List, Order classification (1 order)	List, Act	Matter type	List
Party attendance at hearing	Yes	No	No (on papers only)^	Yes
Entity type of party attending hearing	No	No	No	No
Representation at hearing	Yes	No	Yes, combined from two fields	Yes
Representative involved in matter	Yes	Yes	Yes	Yes
Type of representative (at hearing or in matter)	No	No	Yes, combined from two fields	No
Order made	Category of main order (1 recorded)	Yes	Yes, with description*	Yes
Consent flag	Yes	Yes	N/A	Yes
Time to first hearing	Yes (listed hearing)	Yes	Yes	Yes (listed hearing)
Time to finalisation	Yes	Yes	Yes (statutory reviews excluded)	Yes

Note: This is a summary of data collected during the review period and relevant to the questions asked in our review. There is a great deal of further information available on the CMSs, particularly in the GD.

^ availability for hearing is reportable, but not actual attendance.

* keywords also available to highlight particular issues/themes.

Specific data quality issues are discussed, where relevant, below.

1. What types of matter are heard by NCAT?

The number of matters lodged or finalised is a key metric by which the work of civil courts and tribunals are measured and compared. This is what is reported in annual reports and in the Productivity Commission's Return on Government Services (ROGS).¹⁴

But what constitutes a matter and how does this vary within and between jurisdictions? How then do the length of processes, the need for legal representation and the type of dispute resolution which may be appropriate, all vary by matter type?

Range of matters dealt with in NCAT

Divisions and lists

Looking across NCAT as a whole, matters are first differentiated by Division, with the Division names broadly describing the range of matters therein. Within Divisions, matters are distributed to lists, again depending upon the broad nature of the matter. An examination of Divisions and lists therefore gives a sound overview of the type and wide range of matters heard in NCAT.

As indicated on Table 5, more than 80% of all NCAT matters finalised during 2015 were consumer and commercial (CCD) matters and a further 17% were guardianship (GD) matters. More than half (51.0%) of CCD matters were heard in the *Tenancy* list and a further 25.7% in the *Social housing* list. Together, tenancy and social housing matters made up 61.8% of all NCAT matters in the reporting period. The most common matter types finalised in the GD during 2015 were new Guardianship applications (27.0% of GD matters), and Financial management applications (26.0% of GD matters).

AEOD matters – largely administrative review and discrimination matters – made up 1.1% of all NCAT matters. Matters concerning occupational issues comprised 0.3% of all NCAT matters and Appeals comprised 0.9% of all matters.

Orders sought

CCD matters are further defined within lists by the types of orders sought. Orders sought are grouped by 'classification', according to the primary order sought. One classification is recorded per matter. While some classifications are quite specific, others are fairly broad (e.g. 'general orders' or '≤\$30,000'). Broad classifications provide less insight into the nature and range of issue being dealt with by NCAT.

¹⁴ Case management in the GD is organised around the subject person rather than the matter. However, subject persons are still subject to applications and orders made (matters). For this reason, it remains possible and meaningful to count GD 'matters' in NCAT-wide data reporting.

Table 5: NCAT matters, by Division and list – 2015

CCD lists	Matters finalised	CCD	NCAT
	N	%	%
Tenancy	29,390	51.0	41.1
Social housing	14,800	25.7	20.7
General	5,273	9.1	7.4
Home building	3,067	5.3	4.3
Residential communities	1,582	2.7	2.2
Motor vehicles	1,448	2.5	2.0
Strata and community schemes	1,294	2.2	1.8
Commercial	746	1.3	1.0
Retirement villages	53	0.1	0.1
Total CCD	57,653	100.0	80.7
GD matter types (grouped by LJF)	Matters finalised	GD	NCAT
Guardianship applications	3,285	27.0	4.6
Financial management applications	3,166	26.0	4.4
Statutory reviews of orders	2,633	21.7	3.7
Procedural matters/directions (e.g. legal rep, join as party, adjournment)	1,426	11.7	2.0
Requested reviews/recognition of interstate orders	1,289	10.6	1.8
Others (e.g. consent for medical/ dental treatment, clinical trials)	362	3.0	0.5
Total GD	12,161	100.0	17.0
AEOD lists	Matters finalised	AEOD	NCAT
Administrative review	367	47.3	0.5
<i>Admin – GIPA</i>	148	19.1	0.2
<i>Admin – Victims</i>	81	10.4	0.1
<i>Admin – Firearms</i>	44	5.7	0.1
<i>Admin – Privacy</i>	24	3.1	0.0
<i>Admin – Guardianship</i>	20	2.6	0.0
<i>Admin – other</i>	50	6.4	0.1
Community services	152	19.6	0.2
Equal opportunity	145	18.7	0.2
Revenue	112	14.4	0.2
Total AEOD	776	100.0	1.1
OD lists	Matters finalised	OD	NCAT
Administrative review	110	45.6	0.2
<i>Admin – Home building</i>	43	17.8	0.1
<i>Admin – Passenger transport</i>	27	11.2	0.0
<i>Admin – other</i>	40	16.6	0.0
Health professionals	98	40.7	0.1
Legal and other professions	33	13.7	0.0
Total OD	241	100.0	0.3
AP lists	Matters lodged	AP	NCAT
CCD Tenancy	162	26.4	0.2
CCD Home building	143	23.3	0.2
CCD Other	239	39.0	0.2
AEOD	43	7.0	0.1
GD [^]	24	3.9	0.0
OD	2	0.3	0.0
Total AP[^]	613	100.0	0.9
Total NCAT	71,444	-	100.0

Sources: Reports on the CCD, AEOD & OD and GD.

[^] The AP report only counts 589 appeals, as the 24 GD appeals reported above were not available for inclusion in the analysis for that report. Although AP matters are lodged, not finalised, the total number will be similar.

In the AEOD & OD, matters can also be classified by the statutory jurisdiction under which they are brought, such as the *Government Information (Public Access) Act 2009* (GIPA) which identifies freedom of information requests within the *Administrative review* list.

In the GD, matters are organised by matter type, again based on the type of order sought.

A simple count of matters, as provided here, provides one indication as to the distribution of the workload across NCAT. However, as discussed below, not all matters are alike: not only in their matter type (or focus issue) but in their complexity, the pathways they follow, the procedures involved and in their very definition as a ‘matter’.

What is a matter?

Table 3 above indicates the relative number of matters within each list. However, for this comparison to be meaningful (to compare like with like), the base unit of measure – ‘the matter’ – should be defined the same way in each Division.

Generally speaking, a matter is an application to the Tribunal for a decision to be made (although in the GD some matters such as statutory reviews do not involve applications). However, the analysis of the NCAT data has indicated that the scope of what is included within a single matter varies across NCAT Divisions, as well as between NCAT and other jurisdictions.

One source of variation appears to be the treatment of what may be ‘interim’, interlocutory or other orders in some lists (or Divisions), but separate (related) matters in others. For instance, in the GD interlocutories – such as an application for leave for legal representation – are counted/recorded as separate matters which can be linked to related substantive matters. By way of contrast, matters in the AEOD & OD (as is the case with the Local Court) often include any interlocutories arising within the one matter, though not always. In the CCD, a matter arises from an application for an order. An application for a new order, even if related to an existing issue, will be a new matter – e.g. an application to set aside the previous decision. Any cross-claim will also be a separate application and therefore counted as a discrete matter.¹⁵ This variation between Divisions may both reflect the different approaches required for different types of matters as well as the varying historical practice.

While there will be reasons for the differences, they nevertheless need to be taken into consideration in any review across Divisions or jurisdictions (e.g. ROGS), which either combines data, or alternatively compares counts of matters (and the average length of time that individual matters take). While it is, on one hand, obvious that a professional disciplinary matter will take longer and be more involved than a tenancy matter, this can be overlooked when these matters are reduced to numbers on a page.

¹⁵ Related files are noted on the CMS. A matter is related if ‘the dispute involves the same contract/agreement’.

2. What are NCAT matters worth?

The monetary value of a civil claim or order sought offers *one* point against which to calibrate the cost of resolving that dispute. However, many orders sought at NCAT *do not* concern a monetary sum but rather have non-monetary ‘value’ to the parties. Also relevant is the broader social ‘worth’ of the appropriate resolution of these issues and having a mechanism for doing so.¹⁶ So while the monetary value of claims is important, it is only one of a number of factors against which the cost of the civil justice system must be considered.

Information on the monetary value of orders sought is only recorded in a reportable form, for 4 of the 9 CCD lists, and for no lists in the other Divisions. The 4 CCD lists (*General*, *Home building*, *Motor vehicle* and *Commercial* (dividing fences only) lists) together covered just 18% of all CCD matters in 2015 (see Box 1).

Box 1: Median values of orders sought in lists with value recorded in a reportable form

List	Median value
CCD General list	\$1,885
CCD Home building list	\$9,748
CCD Motor vehicles list	\$6,300
CCD Commercial (dividing fences only)	\$2,790

While there were orders *sought* in other CCD lists which had monetary values (e.g. in *Tenancy* and *Social housing*), these were recorded in the orders but not in a format reportable from the CCD CMS database. The value of orders *made* is not recorded in a reportable form in any Division.

We suggest the monetary value of claims sought and made be recorded in a reportable format for *all relevant* claims. To complement this data, consideration could also be given to better identifying the non-monetary value of claims and orders to ensure that such value is factored into policy discussions about the cost of civil justice. This may be through ad hoc research (perhaps by application of the willingness to pay method employed by economists), some monitoring data or a combination of both.

Costs

The general rule in NCAT is that each party pays his or her own costs and, accordingly, costs orders were rarely reported in the data. As costs are most commonly assessed (or agreed) outside of NCAT, the quantum is not recorded on the CMS.

¹⁶ Genn, H 2009, *Judging Civil Justice*, The Hamlyn Lectures 2008, Cambridge University Press, Edinburgh, p. 17.

3. Who are the parties in NCAT matters?

Information about who is taking action against whom in each civil jurisdiction in NSW has key policy implications. For what types of matters are individuals taking action against other individuals, or businesses against businesses? What types of businesses? How frequently and for what types of matters are government agencies (local, state or commonwealth) taking action or subject to civil or administrative action? In which jurisdictions – and within NCAT, which Divisions and lists – are different entity types active? Insight into these issues can identify areas for more efficient and tailored responses to particular client groups and, if monitored on a regular basis, can also identify emerging new demand and provide information to assist in Tribunal income projection.

The parties

In most NCAT matters the parties are described as applicants and respondents. Usually, there will be at least one of each and in some matters there will be multiple applicants and respondents. However, in the GD there are no respondents in any matters, no applicants in some matters (e.g. statutory reviews) and an additional and, arguably, the most important party, the subject of application (SOA). The SOA is the person about whom the guardianship matter relates. GD matters may also involve a range of other parties, including spouses, carers and the Public Guardian and NSW Trustee (if the latter two are appointed), that cannot neatly be described as ‘applicants’ or ‘respondents’. This complexity and variation has implications for data analysis and reporting. For instance, any overall reporting of parties in NCAT matters needs to take account of there being:

- more matters with applicants than matters with respondents
- matters with no applicant and no respondent
- matters with multiple applicants and respondents (who may be of different entity type)
- SOAs and other parties who are key parties in matters but are not applicants or respondents.

However, a simple count of those involved does not address the key questions above. What is needed is clear information about who the parties are and what they are seeking from each other.

Entity types

Person vs organisation

Reflecting issues raised in our NSW Local Court report¹⁷ there is limited information collected about the type of entities involved as parties in all NCAT Divisions. Across all Divisions except the GD, the only information on the entity type of each party is whether the party is identified by the applicant on their application form as an ‘individual’ (or person) or an ‘organisation’ (or company).

This information is primarily collected for the purpose of fee payment. Any error made by the applicant in identifying themselves or the respondent as a person or organisation will be reflected in the data. And there is room for error as, in the absence of clear guidelines, the difference between who is a ‘person’ and who is an ‘organisation’ is not clear. This is particularly the case when:

- the entity is a single person, small or unincorporated business
- there are varying fee arrangements for different entity types (that is, some organisations that only pay a standard fee and so may identify as individual).

To have meaning for policy purposes, any entity categorisation needs to have clear and mutually exclusive categories that reflect entity type alone (rather than also being influenced by factors such as different fee structures). For this reason, a separate approach may be required to monitoring the type of entities using the Tribunal. In addition, to better understand the types of people and organisations using courts and tribunals, more *detailed* information is required on entity type.

Detailed entity type

One approach to better recording the types of parties involved in NCAT matters is to have applicants or their representative select from a more detailed list of entity types, which may include (with more or less detailed levels of differentiation):

- Commonwealth government or agency
- State government or agency
- Local government
- Not-for-profit organisation
- Business (by size or type)
- Individual
- Other.

Any categories created need to be applicable across all courts and Tribunals.

¹⁷ Forell, S & Mirrlees-Black, C 2016, *Data insights in civil justice: NSW Local Court*, Law and Justice Foundation of NSW, Sydney.

ABN

Another approach is to capture the ABN or ACN for organisational entities.¹⁸ One potential benefit of recording all ABNs for organisations is that data matching with the ABR would enable the consistent classification into categories of entities involved as parties in any jurisdiction. This would require that ABN be a compulsory field for all parties that have an ABN. At the time of this review, ABN was not a compulsory field for organisations in any of the NCAT CMSs.

Applicant and respondent type

In the CCD, the role of the applicant (recorded as ‘applicant type’) is recorded on the CCD CMS. The data is drawn from the application form. Depending upon the list, applicant types include landlord, Housing NSW, tenant, consumer, trader, home owner, lot owner etc. Respondent type is recorded for *Strata and community schemes* list matters only.

Information on the role of parties is unique to the CCD and provides valuable information about those using the Tribunal in this Division and for what purpose. Consideration could be given to collecting this information for respondents in the CCD and, potentially, for applicants (and respondents) in the other Divisions. Alternatively, more detailed categories could be added to the ‘entity type’ categories discussed above.

¹⁸ An ABN is issued to all businesses, including those registered as companies, but also to sole traders, partnerships, trusts and non-profit organisations. An ACN is issued only to businesses whose structure is registered as a company and is a unique identifier for each company.

4 & 5. Party attendance and representation in NCAT matters

Tribunals ... are intended to provide a low cost alternative to the courts by creating a forum where self-representation is the norm, and where parties generally bear their own costs irrespective of the outcome.¹⁹

The scope for self-representation, its impact on the progress and outcomes of civil matters and the implications for the cost of administering justice, are questions of key policy interest. But to understand the impact of self-representation, and how this may vary by matter type, the parties involved, jurisdictions and the type of support offered, requires detailed and accurate data on direct party participation in a matter, as well as representation status. Party attendance and representation at hearings are therefore key data points.

The data available

Table 6 indicates the data recorded for matters in each NCAT Division about party attendance at hearings and representation (either at hearings or more broadly).

Table 6: Information on each NCAT CMS on party attendance and representation at hearing

Division	Information on party attendance at hearings	Information on representation
CCD	Attendance by parties at each hearing (values: applicant, respondent, both parties, no parties) No information on party type (individual, officer of organisation, in-house lawyer)	Representation at each hearing (applicant represented, respondent represented, both parties represented, no representation) No information on type of representative (legal, advocate, agent, other)
AEOD & OD	Not recorded on CMS	Representative noted for each party in each matter, but not for each hearing. No information on type of representative (legal, advocate, agent, other)
GD	Parties in attendance listed in PDF appendix to 'reasons for decision' on CMS. Not in statistically reportable format on CMS	Application for leave for representation recorded as a matter. Order made re representation will relate to subsequent proceedings.
AP	Attendance by parties at each hearing (values: applicant, respondent, both parties, no parties) No information on party type (individual, officer of organisation, in-house lawyer)	Representation at each hearing (applicant represented, respondent represented, both parties represented, no representation) No information on type of representative (legal, advocate, agent, other)

¹⁹ ¹⁹ Productivity Commission 2014, *Access to justice arrangements*, Inquiry Report, no. 72, Productivity Commission, Canberra, p.14.

As indicated in Table 6, neither party attendance at hearings, nor the role and type of representative involved, are recorded in a consistent manner, if at all, across the NCAT Divisions. For instance:

- In the AEOD & OD, a representative (which may be a lawyer, advocate, agent, friend or another representative) is recorded on the CMS for each party in each matter (as it is in the Local Court). However, the attendance of parties or representatives at each hearing is not recorded on the CMS. In the CCD and AP, party attendance and representative attendance is recorded separately and for each hearing, resulting in more comprehensive information about the participation of parties in CCD matters. However, as discussed in the CCD report, the quality of the information on party attendance and representation is compromised by a number of factors (summarised in Box 2).
- For all substantive matters in the GD, detailed information is recorded of persons attending the hearing, in the appendix of the 'Reasons for Decision'. While this is available as a PDF on the CMS, it is not reportable.

Box 2: Factors affecting quality of attendance and representation data in the CCD

The quality of the information on party attendance and representation in the CCD is compromised by:

- limitations in the completeness and accuracy of information recorded on paper at the hearing, about party and representative attendance at CCD hearings (which is the source for the information recorded on the CMS)
- no information being recorded on the CMS about the type of person attending for the party or representing the party
- a resulting lack of transparency *in the data* about the use of officers attending hearings on behalf of organisational parties (e.g. legal officers for government agencies, employees of businesses) and whether they are 'parties' or 'representatives'.

Overall, the variation between Divisions in the detail, type and way of recording information about party attendance and representation means that it is not possible to report consistent information about party attendance and representation across the Tribunal. Particular challenges are discussed below.

Party attendance at hearings

An indication of the active participation of parties in their own matters is their attendance at hearings. In the CCD, party attendance is recorded for all hearings (and on paper decisions) in which an order is made. Noting that participation in CCD hearings by parties varies considerably by list, the data on matters finalised in the CCD in 2015 indicated:

- in 5 CCD lists, more than 70% of hearings were attended by both parties
- in the two largest lists, only 41% of *Tenancy* hearings and 30% of *Social housing* hearings were attended by both parties
- in all lists, applicants more commonly attended hearings than respondents.

While statistical data was not available, our analysis of GD files indicated that for new substantive matters and reviews there was very high attendance at hearings by applicants, the SOA and other interested persons (most often health professionals and family members) at GD hearings (whether in person or by telephone).

There was no information recorded on the CMS on party attendance at matters in the AEOD & OD. Attendance at hearings can be recorded on the paper hearing form, but as this prioritises the recording of representatives over the parties, it cannot be used as a source of information on whether the parties themselves attended the hearing. Our analysis of 100 casefiles indicated that the parties and/or their representatives attended in most matters.

Data on party attendance, particularly when it highlights issues such as the differential participation in tribunal matters by applicants and respondents, can inform policy discussion around the support for party participation in tribunal proceedings.

The types of parties attending

While the CCD records party attendance at each hearing, details of *who* (the type of entity) is attending as the party is not recorded. Our casefile analyses indicated that this information is important to understanding party participation in hearings. Parties to NCAT matters can be individuals, businesses, non-government agencies or government agencies. When an individual attends a hearing, they do so in their own capacity. An organisational party attending a hearing 'in person', may be the owner or employee of a business, or an officer or legal officer of an agency, acting in their professional capacity. Officers of organisations may be 'repeat players' in the Tribunal setting, with vastly different experience and skill than 'one-shotters'²⁰ – individuals who may only once bring a matter to NCAT or be subject to such action. This variation in the base legal capability of parties is again relevant to the 'in person' experience and the impact of self-representation for the party and for the Tribunal.

We suggest that information about *who* (what type of entity) the attending party is (the named party, an employee, a legal officer) is therefore a critical data point to inform policy and practice, in a jurisdiction where self-representation is encouraged and the capability of different types of parties to self-represent may vary.

Are parties represented and by whom?

Depending upon the Division and type of matter, a party can be represented by a legal practitioner or a non-legal agency, such as a real estate agent on behalf of a landlord, an advocate, or a friend or relative with authorisation to act on behalf of the party. In the CCD, organisational parties can be represented by an employee, partner or agent.²¹ The breadth of possible representatives is a key issue when comparing 'representation' at NCAT to

²⁰ Galanter, M 1974, 'Why the haves come out ahead: speculations on the limits of social change', *Law and Society Review*, vol. 9, pp. 95–160.

²¹ NCAT Guideline: Representation of parties Consumer and Commercial Division September 2015. http://www.ncat.nsw.gov.au/Documents/ccd_guideline_representation.pdf

‘representation’ in the civil courts, where data on representation overwhelmingly refers to legal representatives.

Type of representative

While the CCD and AEOD & OD CMSs record whether each party was ‘represented’ the *type* of representative is not recorded. It is therefore not possible to separately identify from the data whether people were represented by a lawyer, an agent, an advocate, an officer of their organisation or even a friend or relative. Our casefile analyses indicated that parties were rarely represented by lawyers in the CCD but legal representation at hearings was more common in the AEOD & OD.

In the GD, a party or the SOA can apply for leave to be legally represented; however, this request comprised only 2% of the matters finalised in 2015. If granted, leave to be represented usually applies to other matters pending at the Tribunal at that time. The GD itself can also appoint a ‘Separate Representative’ for an SOA who is totally or partially incapable of representing himself or herself. This was a similarly infrequent application type which comprised only 3% of the matters finalised in 2015.

The capacity to identify type of representative is important, particularly given the intensity of policy interest in issues of representation (legal and otherwise), unbundled service delivery and supporting claimants through civil processes. It would provide evidence on the different types of representatives used for different matters and how representative type may interact with Tribunal processes and outcomes. Information on type of representative would also enable comparison of rates of *legal representation* across jurisdictions within the civil law system.

Officers of organisations: parties or representatives?

In our comparison of casefiles to the corresponding data files in the CCD and AEOD & OD, we noted that officers of organisations (legal officer or otherwise) were sometimes recorded on the CMS as the party and sometimes as the *representative* of the party. Sometimes it was very unclear from the casefile in which role the person was appearing, or should have been appearing. Again, clear and accurate information about persons participating in NCAT matters and the role they are playing is critical to any discussion on party participation and representation.

Of note, in the GD, the relationship to the SOA is recorded for all parties attending a hearing.

Analysis of representation by entity type

Using the samples of matters in which we coded the entity type of applicants and respondents, we were able to examine representation status by the entity type of the parties (e.g., individual, business, non-government organisation, government organisation). While figures varied between Divisions and lists, and for applicants and respondents, it was clear that organisations (particularly government and non-government agencies) were more commonly represented than individuals. For instance, in the CCD, while only 18.6% of individual applicants were represented, more than one-third (35.1%) of organisational

applicants were represented. Looking at respondents, 6.7% of individuals but 16.6% of organisations were represented (see CCD report).²²

The brief analysis presented here can only be undertaken on the whole dataset with some key changes to the current data, including:

- a) further defining the entity type of parties (e.g. government, business, non-government or not-for-profit organisation)
- b) clarifying the role of who is appearing for each of the parties (particularly organisations), either, as the party or as the party's representative.

With greater clarity around *who* is attending hearings on behalf of parties (that is individuals, officers, advocates, agents, lawyers), it would also be possible to assess what factors (e.g. list, order classification, party entity type, organisational status, claim amount etc.) may, independently of other factors, affect the likelihood of applicants and respondents being represented at hearings and the impact of different types of representation on how long cases take, and their outcomes. These are questions of considerable policy interest.

Continuity of representation

As noted above, in the CCD, the presence (or otherwise) of a representative is recorded for *every* hearing. This enables analysis of the ongoing involvement of a representative in a matter from first to last hearing.

By contrast in the AEOD & OD (which tend to have matters which run for longer periods of time), it is not possible, from the data, to track the involvement of a representative in a matter. This because the involvement of a representative is noted on the CMS for the matter, but not for each listing or hearing within that matter.

In the GD, the involvement of a representative in any particular hearing can be assessed from the file, but less directly from the CMS data

As legal assistance services becoming increasingly unbundled, parties may receive some legal (or other) assistance to prepare their applications but then appear alone at hearing. Or they may prepare the matter themselves and then bring a lawyer or other representative to the hearing. While it may be challenging to record, we would suggest further consideration be given to exploring and/or tracking the types of legal (or non-legal) help that parties have to bring, defend, progress and resolve their NCAT matters.

²² As noted above in the discussion on party attendance and participation in hearings, while some 'organisations' were *not* formally represented (e.g. by a lawyer, agent, advocate or other representative), they would have an officer appearing as the party on their behalf. In the case of an organisation that appears regularly at the Tribunal, this may be an officer with repeat experience in appearing at the Tribunal.

6. How do matters progress to finalisation?

What is involved in resolving a dispute through NCAT? How do parties come together in the tribunal setting and how does this vary by matter type, party type, representation status, Division and list? What do these differences tell us about the options and relative efficiency and effectiveness of different dispute resolution process for certain types of matters?

To answer such questions it assists to have a common metric across Divisions and lists to describe the progress of matters, noting the processes and procedures involved. To do this, consideration needs to be given to possible data points and what activities each reflect. Numbers of hearings, hearing days or orders made provide some indication as to the complexity of the matter. However, these counts can mask the considerable administrative and support work that may be undertaken by registries and other staff to prepare matters so that they resolve with fewer hearings or hearing days (see Box 1, earlier).

Noting that data for this review was drawn from three separate databases, a different approach was used in each Division report prepared for this review, to describe progress to finalisation. This provides the opportunity here to discuss various options including:

- progress by orders
- progress by listing type and other administrative indicators
- progress by elapsed time.

Progress by orders

CCD

In the analysis of CCD data, we examined variation in the number and types of orders made, to understand the progress of matters and to differentiate between the level of activity in different lists. We focused on orders because each order was linked to a hearing or reflected a decision made on paper. The data on this order mode (hearing/on paper) was complete. Each order also had a flag to indicate whether it was a ‘final order’ (rather than a procedural order). In this way we could see the progress of matters through procedural orders towards one or more final orders. We were also able to review party involvement in these hearings, as attendance data was linked to these same orders and hearings (see attendance at hearings earlier).

A review of the progress of matters by order clearly differentiated between relatively short and straightforward matters, such as *Tenancy* and *Social housing* list matters and longer, more complex matters. Our data indicated, for instance that around 75% of all *Tenancy* and *Social housing* list matters were finalised in a single order. By way of contrast, only 13% of *Retirement village* list matters and 40% of *Home building* list matters were finalised in a

single order. Indeed 22% of all *Home building* matters took 4 or more orders to reach finalisation (in contrast to less than 2% of *Tenancy* matters).

However, while orders gave a useful overview and point of comparison within the CCD, any activities that were recorded separately to and not linked to the order data were *not* included in the analysis. For instance, conciliations are recorded as ‘listings’ and are therefore missing from the data above. (In the CCD Division report we reported on conciliations separately to orders). The analysis of progress by orders therefore misses the range of activities that may have been involved in progressing a matter through NCAT. It may be that these other activities made a material difference to the number of orders required to resolve a matter.

AEOD & OD

The outcomes of hearings in AEOD & OD are captured as orders in the CMS. Some of these are clearly interim/interlocutory orders such as ‘leave granted’, ‘adjournments’, ‘stays’ and ‘decision reserved’. Some are final outcomes, such as ‘decision set aside’ and ‘settled-dismissed’. For others, it was less clear, in particular ‘application refused’, ‘orders-other’ and ‘decision issued’. The final flag, which could allow pre-finalisation orders to be distinguished from final orders, did not appear to be used consistently enough for this purpose.

GD

In our GD sample of 50 cases, the vast majority of matters were heard and resolved by an order at the first planned hearing regarding that matter. However, various file notes and documents sighted in our GD casefile analysis evidenced the extent of preparatory work undertaken by Tribunal officers to ensure the smooth progress of matters at hearing (see Box 3). Again, a risk in only counting hearings, hearing days or orders is that the value and impact of this preparatory work is lost.

Box 3: Administrative tasks in the GD

The GD report describes the work of the Tribunal to prepare hearings to run smoothly and effectively. Activity includes:

- triaging and conducting risk and complexity assessments of all new substantive matters (not interlocutory matters)
- contacting parties regarding hearing attendance
- preparing information, and
- ensuring any requirements (security, interpreters, teleconference) are organised for the hearing to successfully progress.

Progress by events or listings

An alternative way to assess case progress is to monitor *all* the activity on a case. Event data is available in all Divisions and is the most comprehensive, generally recording all action on a file, from lodgement to storage after the case is closed. But as its purpose is entirely administrative, it is understandably not held in a readily reportable format.

An alternative is listing data, which in the CCD and AEOD & OD mainly comprises events of which the parties need to be informed, such as preparatory meetings, hearings, conclaves, mediations and conciliations, though also some administrative activity (such as recording returns of summons).

As already noted, in the CCD most matters are resolved at the first listing, which will usually be a hearing before Tribunal members. We did not, therefore, separately report on listings in our CCD report as our initial assessment of the CCD listing information was that further refinement may be required of the data categories used (e.g. to be sure they are mutually exclusive) and to ensure complete data, in order to make the best use of this information for policy purposes.

In AEOD & OD, on the other hand, matters rarely finalise at first listing as matters are commonly first listed for some type of preliminary meeting where a Tribunal member can manage the progression of a case. Some matters must commence with a leave hearing. Adjournments are also relatively common in AEOD & OD (82% of matters had at least one) and are another indicator of (or lack of) case progress.

Although potentially a combination of listing and order would shed the most light on case progression, in practice this is not straightforward as dates of listings and orders do not necessarily align precisely enough to facilitate the direct linking of an order to a listing event.

GD staff advise that a review of correspondence in, file notes, event history and the document summary provides an indication of the work taken by the registry staff. However, while this information can be gathered from the files and in the CMS as lists with dates, it is not available in a reportable form for analysis.

Other options in future might include factoring in the complexity and risk ratings for GD matters.

Overall, to describe progress by listing across NCAT, further work would be required to ensure that listing information across all the Divisions is complete, comparable and defined in mutually exclusive categories.

7. How long do matters take?

Progress by elapsed time

The third measure of progress we have used is the elapsed time between the date a case is lodged and the date of first hearing (CCD and AP) or listing (AEOD & OD), and between the lodgement data and the finalisation date.²³ The latter is the date of decision or final order. Our assessment is that lodgement date and finalisation date are well recorded, though first listing/hearing dates sometimes appear to be entered incorrectly (as evidenced by those where the listing date preceded the lodgement date). As well as providing a benchmark against which the impact of new procedures can be assessed, information on how long cases may take to reach various stages provides clients with a better understanding of the likely experience of bringing a matter to the Tribunal.

However, elapsed time will also reflect a range of factors, including the relative urgency and time standards placed upon certain matter types (e.g. the urgency of an impending eviction and the resulting prioritisation of termination matters) and legislative requirements placed on the progress of certain matters. This does not prevent the analysis of elapsed time but must be factored into its reporting and any comparisons made across lists, Divisions and jurisdictions.

Thinking more broadly, from a whole system perspective, however, it is also important to take into consideration that the time a case spends at NCAT may only be part of the story, with some types of matters only coming to NCAT after consideration by the primary decision-making body (e.g. a government department in an *Administrative review* matter) or by another agency (e.g. NSW Fair Trading in a *Home building* matter). If, as is the case in a very small proportion of cases, the matter is not satisfactorily resolved, there may be also further action (e.g. appeal to the NCAT Appeal Panel or the Supreme Court, enforcement action in the Local Court) that follow the final order. Diagrams indicating the pathways and processes that different types of matters may follow into and after NCAT are provided in the CCD and AEOD & OD reports.

A key data challenge (also relevant to the civil justice system more broadly) is to have metrics which appropriately acknowledge the actual length of time it takes to resolve a dispute, from the time of dispute, through the various (mandatory and optional) dispute resolution mechanisms to the point of resolution.

What is a 'new' matter?

Another factor relevant to the length of time a matter takes to resolve is a shared understanding of what constitutes a 'matter' – as the base unit of measure. As discussed earlier, an NCAT matter commences with an application for an order. If one dispute involves several different types of orders, including orders such as a stay/set aside order or

²³ We did not have the relevant data in time to complete these analyses for the GD.

a renewal order, a dispute may actually run over several matters (e.g. original application, application to set aside or application for renewal, appeal). If there is a cross-claim, this is also a separate matter. An internal appeal is also a discrete matter.

Two issues arise. First, there are challenges in comparing the length of time it takes to resolve an NCAT matter to how long it takes to resolve matters in other jurisdictions, because the nature of what constitutes a matter differs (see discussion about ‘what is a matter’ under question 1). We are not comparing like with like when assessing timeframes.

The second issue is that to accurately gauge, *from the client’s perspective*, the length of time it takes to finalise a dispute from the time it is lodged in NCAT, we would need to measure the length of time from the lodgement of the first application related to that dispute to the finalisation of the last related application related to that dispute. While the CCD and AP CMS records include related matters, we have not yet tested whether this information could be used to link files and better gauge the length of time matters actually take to conclude, from the client’s perspective.²⁴

²⁴ If the matter then moves to the Local Court for enforcement or the Supreme Court for appeal, it will have a new matter number in that jurisdiction.

8. How are matters finalised at NCAT and what are the outcomes?

The purpose of bringing matters to NCAT – or to any other civil jurisdiction – is to have a legally enforceable decision, usually – but not always – involving the resolution of a dispute between two parties. However, not all matters are finalised by Tribunal members making a decision at a hearing, though this is more common than the judiciary deciding matters in the Local Court.²⁵ In practice, many applications finalise before reaching hearing. Information about the stages where matters finalise is important for understanding how Tribunal procedures can affect dispute resolution outside of the formal hearing process and in identifying potential barriers to progressing matters for some types of applicants.

Information on the types of outcomes achieved, including the nature of the decisions made, whether disputes are resolved, how they are resolved and in whose favour, is critical to our understanding of the civil justice system.

How matters are finalised

After an application has been submitted, there are various points at which a matter can finalise. These can broadly be categorised into:

- administratively before hearing (CCD and AP)
- settlement between parties before or at hearing
- withdrawal (without settlement) by the applicant before or at hearing
- decided at hearing by Tribunal member(s).

The point at which matters finalise would appear to have quite different implications for the parties involved and for the administration of dispute resolution – and for this reason should be distinguishable in the data. In particular, being able to identify when and how parties settle matters provides insight into dispute resolution in the ‘shadow of the law’ and how the formal system may encourage settlement at certain points.

While the current dataset does provide a degree of insight, there are important limitations, particularly when considered across the whole Tribunal, due to the different approaches and terminology used in each CMS.

Administratively, before hearing

In a very small proportion of cases, an application may be rejected prior to formal hearing for administrative reasons, such as failure to pay the correct fee or complete the

²⁵ Forell, S & Mirrlees-Black, C 2016, *Data insights in civil justice: NSW Local Court*, Law and Justice Foundation of NSW, Sydney

appropriate application form. In CCD and AP these matters can be dismissed administratively.

GD separately identifies matters that finalise for administrative reasons. In AP, matters dismissed for non-payment of fees can be separately identified. In CCD, we could not with confidence separately identify these matters from other types of dismissal (e.g. by a Tribunal member). In AEOD & OD, matters will not be accepted and lodged if conditions for lodgement (e.g. fee payment) are not met, so such matters do not appear in the data.

Settlement between parties before or at hearing

Settlement can be facilitated by the act of bringing the action, by the discussions in preliminary meetings, by conciliation or mediation meetings and by the prospect of a full hearing. While the processes vary between Divisions and some lists, generally speaking, parties can settle a matter which has been lodged at the Tribunal, in a number of ways. They may:

- Settle privately and the applicant may withdraw the matter prior to a hearing – with or without achieving any of what they set out to do. (In the GD, applications can only be withdrawn with leave from the Tribunal). In these cases (apart from GD), there is no obligation on the part of applicants to explain why they have withdrawn and/or failed to pursue the matter by failing to appear. As discussed below, this may appear in the data as a form of ‘withdrawal’ (depending upon the Division).
- Settle privately and agree to dismissal orders ‘by consent’ made by the Tribunal (‘at hearing’ in the data) or on papers. This may appear in the data as a ‘dismissal’ with settlement/ consent.
- Use Tribunal processes to reach agreement and have legally enforceable consent orders made by the Tribunal to reflect that agreement (dismissal and/or another order such as money order) ‘at hearing’ or on paper.

The way these finalisations are recorded varies between Divisions. All Division CMSs, apart from the GD CMS, have a ‘consent flag’. This is a separate field indicating whether the matter was finalised with consent or without consent between the parties. If used consistently and appropriately, the consent flag can be matched with:

- withdrawal outcomes to identify matters settled *prior* to hearing, and
- dismissal or any other orders detailed on the CMS, to identify matters settled ‘at hearing’ or on paper.

In the AEOD & OD and the AP, there are also particular orders indicating settlement (‘settled-dismissed’, and ‘consent orders’ in AEOD & OD; ‘dismissed-by consent’ in AP).

However, there are several limitations to accurately identifying settlement (at different stages). First, cases in which parties settle privately before a hearing, but do not tell the Tribunal the reason for withdrawal (and therefore will not have a consent flag), would be missed in this analysis.

Second, our analysis indicated an insufficient degree of overlap between the settled/ consent orders, and the application of the consent flag – raising concerns about the

reliability of either the consent flag or the outcome categories applied in the AEOD & OD and AP. The CCD CMS only records broad order categories such as ‘dismissal’, ‘withdrawal’, ‘money order’, ‘work order’, which themselves do not indicate settlement. Because the orders themselves do not indicate consent, we cannot assess from the data the accuracy of the application of the consent flag to these orders.

Is ‘settlement’ relevant across all Divisions?

One broader challenge to reporting ‘settlement’ or ‘consent’ across NCAT is that the notions of consent and settlement do not apply equally in each Division and list. As indicated above, the purpose of the GD is to resolve matters in the best interest of the SOA. While there may be significant differences of opinion among the parties involved in the matter (applicant, SOA and other interested persons), the interests of the SOA take precedence over the need to reach agreement between the parties. ‘Consent’ therefore does not strictly apply, although in practice interested parties would need to consent to take on the role of guardian or financial manager.

Nor does the idea of consent or settlement meaningfully apply to some matters in the AEOD & OD. One example is an appeal against a negative ‘working with children check’ which prevents the applicant from any employment with people under age of 18. The application to the Tribunal is for it to review the decision of the Children’s Guardian. While the department can review its own decision [or the applicant’s circumstances may change] the applicant and the department cannot come to a compromise position involving a change to the legislative criteria which applies.

Withdrawal without settlement, prior to or at hearing

While some matters may be withdrawn as a result of a private settlement, applicants may also withdraw for a range of other reasons. All Divisions record withdrawals as a separate outcome and all (except GD) have a consent flag which can theoretically be used to separate withdrawals that arise from a settlement, from other reasons for withdrawal.

In the AEOD & OD, there is also an outcome of ‘withdrawn-dismissed’. This includes matters withdrawn without settlement.

In AP these matters are identified as ‘dismissed-withdrawn’.

Our casefile analysis indicated that withdrawals that occurred early on in a case were generally provided with some explanation by the applicant (in writing, or noted on the file), such as that their application for a concession fee had failed or that they were expecting the respondent to settle). However, again, as applicants are not *required* (except in GD) to provide reasons for wishing to withdraw it is entirely feasible that a larger proportion of withdrawals than the consent flag would indicate are as a result of having reached settlement with the respondent.²⁶

²⁶ In CCD the consent flag was only applied to approximately 5% of all CCD withdrawals in our data, we do not know the reasons behind the other 95% of withdrawals (potentially including settlements outside the Tribunal). In AP, it was applied to 15.6% of withdrawals.

Box 4: Recording reasons for withdrawal

Given the value of understanding the extent to which applicants have reached resolution, we would encourage NCAT to develop a pro forma (perhaps online) for applicants to record in tick box format their reason for withdrawal, and where this is due to some form of settlement, the extent to which the terms of the settlement match their original claim. This type of information could also highlight any administrative barriers that are dissuading some types of client from pursuing claims through NCAT.

By decision of a member

It is surprisingly difficult to identify for certain from the CCD CMS data where a Tribunal Member decided the outcome of a matter. It could be argued that any order in which there is no consent, must be an order made by the member. Similarly, any order made at a hearing must be by a member. However, it is not possible to tell from the data what proportion of those orders which are *not* flagged as being by consent *and* not made at hearing (that is 'on paper') (10.4% of all final orders in the CCD) were made by a Tribunal Member, and what proportion were administrative e.g. dismissal for non-payment of fees, for instance).

In AEOD & OD, all matters are finalised by Members either on the papers or at a hearing, as withdrawals require a Tribunal order of withdrawn-dismissed or settled-dismissed. Finalisations that were the result of Tribunal Members making a decision regarding the matter could theoretically be identified through final orders, such as affirmed and dismissed, used in combination with the consent flag to exclude those matters that were agreed between the parties. However, our analysis indicates that the consent flag may not be used consistently enough for this purpose.²⁷

In GD the majority of matters (87%) are resolved by a decision/determination at hearing. Hearings can be in person or by phone. Matters are only rarely finalised prior to hearing, and when they are this is often to record that the SOA is deceased.

In AP, the categories of final order are probably the clearest, with separate categories, for example for the outcomes of dismissed-after hearing and dismissed-leave to appeal refused. There is less differentiation of the allowed outcomes, but in principle these could be used in combination with the consent flag to identify outcomes that required a Tribunal decision.

²⁷ In AEOD & OD, only just over half of the consent orders had a consent flag. Decision varied was the next most common order to have a consent flag.

Box 5: An alternative approach to recording consent

We suggest that more specific categories of dismissal and withdrawal are developed (like those in the AP), The aim is to ensure that outcomes involving a decision of a member can be differentiated from those which are a result of a settlement or of an administrative reason.

The consent flag remains a useful tool, but to ensure it is consistently applied, it may be better automated from the specific order made (which indicates consent or otherwise), rather than relying on manual activation by the member.

Table 7 summarises the various ways that different types of finalisations are recorded across the Divisions.

Table 7: To what extent can different types of finalisation be identified from CMS data in each NCAT Division?

	Administrative reasons	Settlement	Withdrawal without settlement	Decision by member (no settlement/ consent)
CCD	Not reliably (But could be approximated with combination of dismissal order, no consent, and no hearing)	Yes Consent flag (if reliable)	Yes (Withdrawal not due to settlement approximated with use of the consent flag, if reliable)	Not reliably (But could be approximated with a combination of hearing mode (at hearing); order type and consent flag (no consent))
AEOD & OD	No (We are advised such matters are not registered in the CMS as they are not treated as lodged)	Not reliably (Consent orders and settled-dismissed outcomes OR final order + consent flag. However each approach gives a different count)	No (An unknown portion of withdrawn-dismissed)	Yes. Can be approximated with selecting final orders (excluding withdrawn-dismissed and settled-dismissed) without a consent flag.
AP	Yes (Dismissed – non-payment of fees)	Not reliably (Dismissed-by consent OR final order + consent flag. However each approach gives a different count.)	Yes (Dismissed-application withdrawn)	Yes. (Can be approximated from final order types (excluding withdrawals and dismissal for non-payment of fees) without a consent flag).
GD	Yes (Deceased; administratively closed etc.)	Not applicable	Yes (Application withdrawn)	Yes. Final order types.

Note: Very few matters are finalised administratively.

What are the outcomes achieved?

At the most basic level, outcomes can be reported by the category of main order made.²⁸ When carefully reviewed and categorised (see the AEOD & OD and GD reports) or compared to the main order sought (CCD) orders made also provide insight into in whose favour a matter is resolved.

Outcomes achieved by the parties

NCAT's role is to assist the parties in coming to agreement or to determine the just and fair outcome in the matter – in whoever's favour that might be. The outcome *for each of the parties* involved is a separate issue. Within the processes provided by NCAT, the applicant may achieve the outcome they originally sought wholly or in part, they may not achieve that outcome, or the parties may come to an agreement and/or compromise.

The outcomes achieved by parties that can be identified in the data, include some or all of the orders applied for being made by the Tribunal Member (CCD and GD); an administrative decision set aside, varied or remitted for review (AEOD); a practitioner reprimanded or suspended (OD); or an appeal allowed (AP).

Agreement or settlement is indicated in the data by orders by consent (CCD and AEOD & OD) made at hearing, and withdrawals and dismissals involving settlement or consent (CCD, AEOD & OD and AP). However, in addition, an unknown proportion of withdrawals (that aren't identified in the data as involving settlement or consent) are probably due to the parties coming to a mutually acceptable agreement. This could be at least partially accounted for if all applicants were required to provide reasons for withdrawing (see Box 4).

In AEOD & OD, the utility of the CMS data is currently somewhat limited by the failure to record what the decision was for a significant proportion of matters: only that a decision had been made. There are also some types of outcome recorded that do not indicate in whose benefit the outcome was. This is particularly an issue in OD where it is necessary to know the role of the applicant (i.e. as a regulatory authority pursuing a practitioner or a practitioner reviewing the decision of the authority) to understand in whose benefit the outcome was. Related to this, where an individual seeks review of the decision of a licensing body and achieves a variation in the decision but conditions against them are still imposed, it is often the conditions that are recorded as the outcome, rather than the achievement of the variation.

In CCD, the consequence of the outcome for each party may be best assessed by comparing orders made to orders sought. However, in the CCD, only one classification/order sought and one order made per matter are reported.²⁹ This can mean that where there were two (or more) orders made (e.g. in the CCD *Tenancy* or *Social*

²⁸ While some order categories may be relevant across all lists, many order types (e.g. a termination order) may only be relevant to specific lists. There are also some types of order which concern procedures (e.g. ex parte hearings; decision reserved) rather than outcomes.

²⁹ While the specific orders made are retrievable on the CMS in a PDF copy of the orders provided to the parties, the reportable data in CCD is reduce to a single broad category per matter, based on the main order made. While this makes reporting more manageable, information is lost and inaccuracies arise in the analysis.

housing lists for termination *and* for payment of unpaid 'rent/water', the second (and subsequent) order will not be reported. It also blurs the comparison of orders sought and orders made, because the primary order made may relate to the unrecorded secondary order sought. To better identify the extent to which orders sought are achieved there needs to be:

- specific and meaningful categories for *orders sought*, that indicate the outcome for the parties
- the same specific and meaningful categories for orders made
- more than one order sought and order made recorded for each matter (e.g., orders for termination of a lease and compensation for rent arrears). This also ensures that secondary orders commonly made are not 'lost' in the data³⁰
- if only one main order sought and one main order made can be recorded on the CMS, then a matching hierarchy for selecting which orders sought/made are recorded should be employed.

Unlike the other Divisions in which opposing parties seek to resolve a dispute between them, the GD is focused on meeting the needs of the SOA. There is never a 'respondent' and in some cases, there is not even an applicant. The only consistent party is the SOA. Although it is possible to count the number of applicants that succeed or fail, ultimately, all GD orders are carefully determined outcomes that are in the best interest of the SOA

Dismissal and withdrawal

Noting that the role of the Tribunal is to assist the parties to come to an agreement or to determine the just and fair outcome, for various reasons, the applicant will not always achieve what they sought, either because they withdraw for reasons other than they came to a settlement or their matter is dismissed prior to (e.g. for administrative reasons, such as non-payment of fees) or at a hearing. The latter will include the Tribunal finding no merit in the claim. Currently, the Divisions capture this information in different ways and not all with the granularity necessary to understand the reasons for these types of outcome.

The precise terminology to reflect the reasons for dismissal vary considerably between Divisions. In the AEOD & OD, examples of dismissals by the Tribunal at hearing include: the original decision that the applicant was seeking to overturn being 'affirmed'; and, leave for the case to progress being denied. In AP, such outcomes include: dismissed-after hearing; application misconceived; extension of time refused; and no grounds for appeal. In the GD, all dismissals following hearing are described as application dismissed. In the CCD, they are dismissals without consent – and these can be separately identified using the consent flag. However, to fully appreciate the range of reasons for dismissal we would suggest considering more detailed categories for dismissal (such as dismissed-after hearing; dismissed-by consent; dismissed-non-appearance) that AP adopted during the period covered by our review.

³⁰ Matters are finalised in the CCD, AEOD and OD and AP by way of a 'final order'. However, the data indicated that there were matters which had multiple 'final orders' (on different dates).

Conclusion

The purpose of this analysis – reported in this summary and the four supporting reports – has been to investigate the quality and utility of NCAT data to inform policy and practice. This is part of a broader project of the Department of Justice NSW to optimise the use of civil court and Tribunal data for evidence-based decision-making.

This is the first time such an investigation has been undertaken of civil court and tribunal data in NSW and the project is in its infancy. These reports are therefore a starting point rather than the final word. Issues are raised and some recommendations made, but further discussion with the courts, tribunals and policy makers is warranted to both optimise the data for policy purposes but also retain realistic data collection and management practices.

Data-wise, NCAT starts on a high base. While challenged by the three separate data systems, NCAT administrative data provides insight into the range of matters dealt with at the Tribunal, the parties involved, party involvement in the processes and the extent to which they are represented, the progress of matters, how they are finalised and the outcomes achieved. However, there is room to improve the quality, clarity and relevance of this information to provide evidence for future decision-making. In the immediate term, there is opportunity to implement some change as NCAT brings their three separate data systems into one. We hope and trust that these reports help to inform this process.