

NCAT Consent Orders and Lessons from Aboriginal Housing Office v Harrison

If you are fortunate enough to resolve your dispute with the consent of the other party, then you will need the assistance of the NCAT to make the consent orders. In this article, we will discuss what consent orders are, how they work, and what you need to do to write them properly. We will draw on the recent case of Aboriginal Housing Office v Harrison [2021] NSWCATAP 97 to provide you with some guidance on how to navigate the consent order process at the NSW Civil and Administrative Tribunal (NCAT).

NCAT's Obligation to Facilitate "Just Quick and Cheap Resolution"

The NCAT has a statutory obligation to facilitate the "quick and cheap resolution of the real issues in proceedings". This guiding principle is enshrined in section 36(1) of the Civil and Administrative Tribunal Act 2013 (NSW) (NCAT Act). Further, section 38(4) requires the Tribunal to "act with as little formality as the circumstances of the case permit and according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms".

In the case of Aboriginal Housing Office v Harrison [2021] NSWCATAP 97, the Tribunal emphasised that its obligation is to facilitate a quick and cost-effective resolution of disputes. The Tribunal is not bound by technicalities or legal forms, but rather is guided by the substantial merits of each case.

NCAT has the power to make orders consistent with the terms of an agreement reached by the parties, even if that agreement is not in writing. The caveat being that the orders must be within the powers of the Tribunal.

Case Analysis with Case Extract

Key Fact/Chain of Reasoning	Extract
The Tribunal had the power to make orders by consent without complying with Section 59 of the NCAT Act	"s 59 of the NCAT Act does not prevent the Tribunal making orders at a hearing where the parties provide oral consent."

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<p>Section 59 grants additional powers to the Tribunal to resolve disputes and does not regulate the hearing process</p>	<p>"Section 59 must be interpreted in a manner that seeks to give effect to the guiding principle: s 36(2)(b) NCAT Act...the landlord's construction of the legislation inappropriately seeks to confine the powers of the Tribunal to make orders at a hearing."</p>
<p>Section 59 contemplates an agreement being reached between the parties outside the hearing process</p>	<p>"s 59 enables the Tribunal to make orders in respect of agreements reached outside a formal hearing. However, it is not a precondition or procedure to be followed in order to enliven the power of the Tribunal to make orders to which the parties provide consent at a hearing."</p>
<p>Written and signed agreements are a means to record the terms of an agreement and consent thereto to enable the Tribunal to exercise its order making powers</p>	<p>"Seen in this light, the requirements for writing and signing by the parties is nothing more than a means to record the terms of an agreement and consent thereto in order to enable the Tribunal to exercise its order making powers in circumstances where there might be no hearing."</p>
<p>No relevant error had been disclosed and the specific performance order was valid</p>	<p>"Having regard to the factual matters conceded at the hearing it was clearly open to the Tribunal to make the orders which it did, and no relevant error has been disclosed. Consequently, this ground of appeal fails."</p>

The Powers of the Tribunal Under Section 48O

For Building Claims, which is the expertise of this law firm, the relevant legislation is the Home Building Act 1989 (NSW). This legislation provides the NCAT with broad powers to make orders in determining a building claim. These powers are outlined in Section 48O of the Act, which specifies that the Tribunal may make one or more of the following orders:

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- An order that one party to the proceedings pay money to another party or to a person specified in the order, whether by way of debt, damages or restitution, or refund any money paid by a specified person.
- An order that a specified amount of money is not due or owing by a party to the proceedings to a specified person, or that a party to the proceedings is not entitled to a refund of any money paid to another party to the proceedings.
- An order that a party to the proceedings do any specified work or perform any specified service or any obligation arising under this Act or the terms of any agreement, or do or perform, or refrain from doing or performing, any specified act, matter or thing.

Importantly, Section 48O also provides that the Tribunal can make an order even if it is not the order that the applicant asked for. In other words, the Tribunal has broad discretion to make any order it considers appropriate in the circumstances of the case.

Section 48O(1)(c) is particularly relevant to building disputes, as it empowers the Tribunal to order a party to do any specified work or perform any specified service or obligation arising under the Home Building Act or the terms of any agreement. This can include ordering a builder to rectify defective work or complete unfinished work.

The case of Aboriginal Housing Office v Harrison highlights the Tribunal's powers to make orders and the importance of interpreting legislation in a manner that gives effect to the guiding principle of facilitating the "just quick and cheap resolution of the real issues in proceedings."

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Table of Key Points from the Harrison Case

Point	Extract from Case
1. NCAT has additional powers to resolve disputes	Paragraph 86
2. NCAT must facilitate just, quick, and cheap resolution	Paragraph 91
3. Consent can be given orally at a hearing	Paragraph 92
4. Section 59 should be interpreted to give effect to guiding principle	Paragraph 94
5. Section 59 does not regulate hearing process	Paragraph 95
6. NCAT's powers are not limited to orders made at a hearing	Paragraphs 96-98

Understanding Section 59 of the NCAT Act

Section 59 of the NCAT Act provides the Tribunal with the power to make orders to give effect to any agreed settlement reached by parties in proceedings. The section requires that the terms of the agreement be in writing, signed by or on behalf of the parties, and lodged with the Tribunal.

The Harrison Case dealt with the interpretation of section 59. The landlord in this case argued that the section prevented the Tribunal from making any orders at a hearing where the parties provide oral consent. However, the presiding members disagreed and held that section 59 does not prevent the Tribunal from making orders at an oral hearing where the parties provide oral consent.

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The presiding members noted that section 59 does not regulate the hearing process and must be interpreted in a manner that seeks to give effect to the guiding principle of facilitating a just, quick, and cheap resolution of the real issues in proceedings. The presiding members also emphasised that the NCAT Act, the rules, and regulations do not suggest that matters about which there is agreement cannot be dealt with at a hearing in the absence of a written agreement signed by the parties or that any consent must be in writing.

In *Owners of "Shin Kobe Maru" v Empire Shipping Company Inc* [1994] HCA 54; (1994) 181 CLR 404, the High Court stated that it is inappropriate to read provisions conferring jurisdiction or granting powers to a court by making implications or imposing limitations that are not found in the express words. Therefore, the presiding members held that the landlord's construction of the legislation inappropriately seeks to confine the powers of the Tribunal to making orders at a hearing.

Implications of the Case Decision for Homeowners with Building Claims

The case of *Aboriginal Housing Office v Harrison* has significant implications for homeowners with building claims.

In light of the case decision, homeowners with building claims can seek to settle their dispute with the builder by verbal agreement and the Member making orders to give effect to the agreement. The Tribunal can make orders at the hearing based on the parties' oral agreement, even if it is not in writing. This saves time, effort, and costs associated with lengthy hearings, while facilitating the "just quick and cheap resolution of the real issues in proceedings."

Tips for Writing Consent Orders at NCA

Notwithstanding the Harrison Decision, it is best to document the agreement for the Consent Orders in writing and sign the consent orders.

Writing consent orders and signing consent orders is an important aspect of the NCAT process and parties may benefit from mitigating appeals such as the Harrison case by following section 59 of the NCAT Act. The act of writing the agreement will help the parties be on the same page. The parties signing the orders may bring a feeling of finality to the dispute.

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Here are some tips to help you draft consent orders that are clear, concise, and comprehensive:

1. Use clear and concise language: Consent orders should be written in simple and straightforward language. Avoid using legal jargon or complex terminology that may be difficult for the other party or the Tribunal to understand.
2. Ensure that the orders are comprehensive: Consent orders should cover all aspects of the settlement, including any [payment](#) amounts, timelines, and other obligations. The orders should also specify the consequences of non-compliance.
3. Include relevant details: Consent orders should include relevant details such as the parties' names, the date of the settlement, and the Tribunal's case number.
4. Get legal advice: If you are unsure about how to draft consent orders, it is always best to seek legal advice. A lawyer can help you understand your rights and obligations and ensure that the consent orders are legally binding.

By following these tips, you can ensure that your consent orders are clear, comprehensive, and legally binding.

Free Consultation with a Construction Law Specialist

If you are a homeowner with a building claim and require assistance with resolving your dispute and drafting appropriate NCAT orders, our firm regularly represents clients in NCAT proceedings and can assist you with your matter. We have extensive experience in building and construction disputes and can provide you with effective legal advice and representation to help you achieve a successful outcome. We offer a free 15-minute phone consultation to homeowners with a dispute that exceeds \$30,000.

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