Friday 08th August 2024

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Dear Ministers

RE: ADMINISTRATION OF ACTS (2001 SI 338)
Submission for Request Urgent Parliamentary Inquiry into the maladministration, systemic abuse and failures of the NSW Civil & Administrative Tribunal (NCAT) & the NSW Civil & Administrative Tribunal Act 2013 (NCAT Act):

- **FALSE ADVERTISING LEADING TO ENTRAPMENT**
- **UNLAWFUL AWARDING OF LEGAL COSTS**
- **USING BENEFICIAL LEGISLATION FOR COLLATORAL PURPOSES**
- **IGNORING STATUTORY OBLIGATIONS**

This document is the result of the legacy left by the former government, in particular Mr Mark Speakman then-NSW Attorney General; a legacy which has left a trail of trauma, deep hurt and injustice towards the people of NSW.

Indeed, Mr Speakman's legacy does not affect any individual in the employ of government, the damage caused only relates to the public.

This document is intended to inform the Ministers about matters presumed to be unknown to them whilst occurring in plain sight.

In response to an enquiry concerning the NCAT Act, on 24th February 2023 Mark Robinson SC, coauthor of '*NCAT Practice and Procedure*' stated ***QUOTE "The NCAT is complex because 34 solicitors contributed to writing the legislation. Too many cooks." UNQUOTE***.

That's quite a concession.

In addition to the NCAT Act, this submission also makes reference to the following legislation:

1. Government Information (Public Access) Act 2009 (GIPA)
2. Privacy and Personal Information Protection Act 2009 (PPIP)

These (2) two pieces of legislation enable the NCAT Act and assist the NCAT to exercise its jurisdictional powers.

Any reference to any other piece of legislation is for comparative purposes only.

I disclose I am a registered lobbyist. I am a qualified criminologist and have commenced legal studies. As such I am not legally qualified, not legally trained, and am a non-legal professional. I put forward this submission respectfully seeking an urgent parliamentary inquiry into the subject matter as a concerned member of the public.

Since my first interaction with NCAT in 2016 I have brought over (30) thirty applications concerning both GIPA and PPIP Acts, with several appeals in addition. Most of those have been successful.

At all times I have self-represented.

The tribunal has published caselaw on the issue of a right to seek redress if aggrieved:

- ***Port Stephens Council v Webb (2021) NSWCATAD 180***, at Paragraph 65:

  "She is also entitled to pursue legal remedies available to her."

Since 2016 in the context of NCAT, I have expended a great deal of scarce financial resources and time in my endeavours to access my beneficial legislation.

The same can be said of my husband Paul McEwan.

As such I trust the Ministers will agree this request for urgent parliamentary inquiry is founded on real life experiences supported by voluminous documentary evidence, evidence able to be provided to any interested party or recipient of this document on request.

I also rely upon other historical published cases of real life experiences within the NCAT.

I write to you today validly requesting an urgent parliamentary inquiry into the current maladministration of the NCAT Act 2013 by the NSW Civil & Administrative Tribunal (NCAT) and its government users, in the context of exercising jurisdiction over the GIPA and PPIP Acts.

It is expected a great deal of the caselaw precedent herein relied upon to support the submission is already known to the Ministers, but is highlighted as relevant and with the utmost of respect for information purposes.

I rely on the case of ***Council of the Law Society of NSW v DXW (2019) NSWCATAD 101***, where ex-judge of the Industrial Relations Commission Francis Marks commented:

> *56 "……They are not to be regarded as unsophisticated members of the community with limited literacy skills and a limited understanding of the statutory regimes in which they are operating……."*

I include each and every NCAT tribunal member and each and every agency external legal representative and in-house solicitor as understanding the statutory regimes in which they are operating, and as such there can be no excuse of inability or lack of resources ensuring proper statutory interpretation in this arena which is at the very bottom of the judicial ladder.

May I also firstly refer you to the ***Constitution Act 1902 No. 32, Part 2, Section 5 – General Legislative Powers***:

> *The Legislature shall, subject to the provisions of the Commonwealth of Australia Constitution Act, have power to make laws for the peace, welfare, and good government of New South Wales in all cases whatsoever – Provided that all Bills for appropriating any part of the public revenue, or for imposing any new rate, tax or impost, shall originate in the Legislative Assembly.*

In particular I draw your attention to the opening sentence of that Section 5, asking that you keep it in mind whilst considering this request for urgent parliamentary inquiry:

> *"……for the peace, welfare, and good government of New South Wales in* ***all*** *cases whatsoever" (emphasis added).*

I respectfully rely on the Constitution Act 1902 in this instance as it has complete relevance to the issues and petitioning I bring before you today, concerning the "*peace, welfare, and good government of New South Wales in all cases whatsoever"*.

I am writing to both Ministers and providing this document to interested parties on behalf of my husband Paul McEwan and myself, and on behalf of the public of NSW, concerning the current maladministration of the NCAT Act 2013 in relation to both the GIPA and PPIP Acts, administration which facilitates all NSW government agencies to act in manners detrimental to the whole of the population of NSW.

In its current form coupled with the negative attitudes agencies including NCAT Tribunal Members exhibit towards particularly self-represented parties, the NCAT Act 2013 is failing miserably resulting in deep hurt and trauma to many of the public who are not legally trained, not legally qualified, and not legally represented.

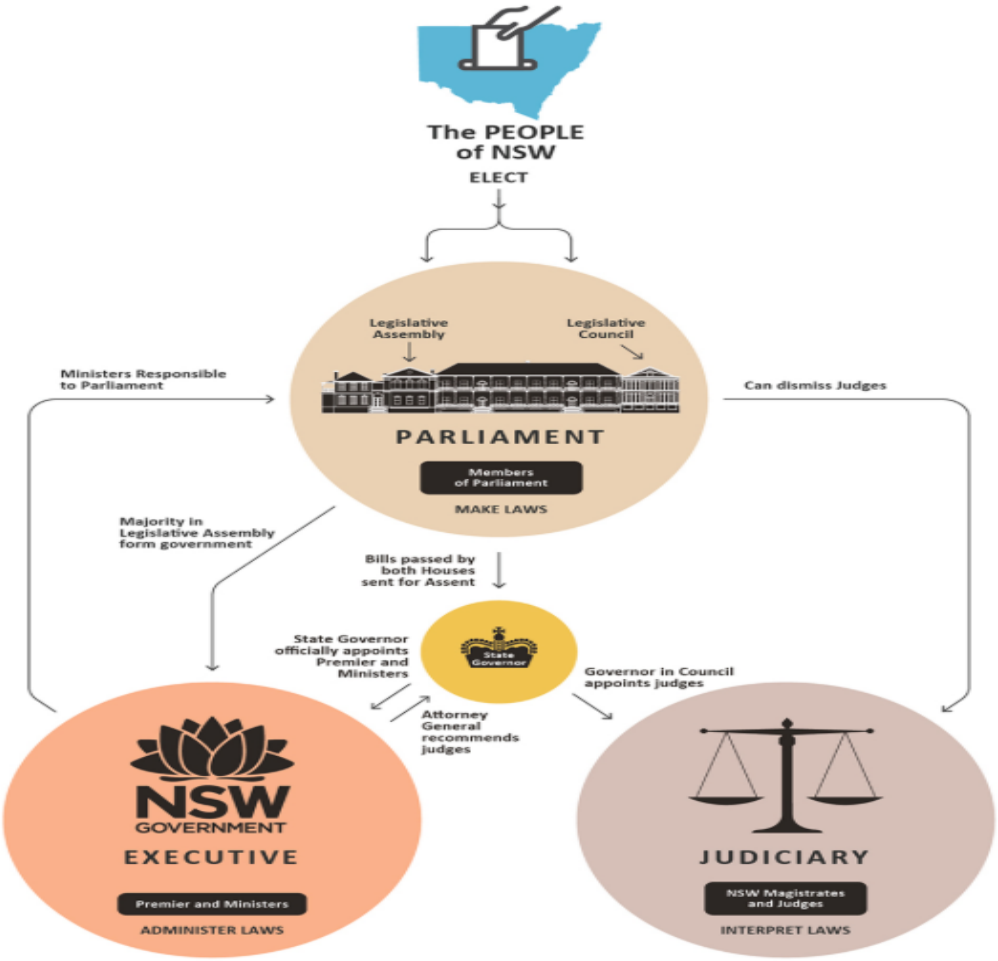
That deep hurt and trauma extends to unlawful awarding of costs in the context of both the GIPA and PPIP Acts.

Given this is now a confirmed regular occurrence, we must assume the NCAT is acting in same manner with other pieces of legislation, with the public left unawares of these breaches unless they undertake targeted research and analysis of caselaw or become victims in the sister-divisions of the tribunal.

I submit the following headings for your assistance and our mutual reference:

1. Legislative Power v Judicial Power v Executive Power

(Image courtesy www.education.parliament.nsw.gov.au, https://education.parliament.nsw.gov.au/student-lesson/separation-of-powers/). This illustration is clearly intended for the most fundamental of educational purposes.



1.1 Legislative Power

There is no dispute legislative power is isolated to the parliament.

The parliament drafts, creates, and ascends the laws on behalf of the people of NSW.

Legislative power does not bleed into judicial power or executive power.

Legislative power does not exercise statutory interpretation or administer the law in the context of resolving the public's governmental grievances.

1.2 Judicial Power

There is no dispute judicial power is isolated to the judiciary, disclosed by its title.

The judiciary exercises statutory interpretation of the legislation, and applies the legislation in accordance with the intentions of parliament.

Judicial power does not bleed into legislative or executive power.

As Magistrate Robert Stone of Newcastle Local Court stated words to the effect in July 2021 "*I don't do what's fair, I can only administer the laws.*"

NCAT can learn a great deal from Magistrate Stone on this pertinent issue.

1.3 Executive Power

The government holds the executive power, referring to the state's whole system of law and decision-making.

The executive does not have law-making powers, however it does have powers to draft bills which the parliament considers making into law.

Executive power does not bleed into legislative or judicial powers.

1.4 Blurring the Lines of Separation

Historical evidence through caselaw shows the NSW Civil & Administrative Tribunal (NCAT) regularly and blatantly blurs the lines between the powers, leaving no clear line of separation.

NCAT is documented through caselaw to ignore enabling legislation.

NCAT is documented through caselaw to misuse its judicial powers.

NCAT is documented through caselaw to make reckless decisions to the detriment of the public, resulting in distress, trauma, and deep hurt.

There is no judicial power which supports or enables NCAT to behave in such manner.

2. What is Beneficial Legislation?

Beneficial legislation is conceptualised as an Act which provides some kind of benefit to a person, and which may remedy a perceived injustice.

The GIPA Act 2009 is a beneficial legislation. It exists to provide a benefit to the public specifically protecting a legally enforceable right to access NSW government information.

The GIPA Act 2009 is neither penal or fiscal in its construction.

Likewise, the PPIP Act 1998 is also beneficial legislation. It exists to provide a benefit to the public specifically protecting the public's fundamental right to security of personal and private information.

The PPIP Act 1998 is neither penal or fiscal in its construction.

Relevantly, the principle of a beneficial legislation was noted over (100) one hundred years ago:

> *"If legislation is beneficial in nature and its provisions are ambiguous or alternative interpretations of relevant provisions are suggested, the interpretation which gives force to the release sought as the object of the legislation or provisions, consistent with the subject matter and the fair meaning of the language of the provisions, is the one which will be adopted by the Courts*," Bull v Attorney-General (NSW) 1913 17 CLR 370.

The *Social Security Guide – Guides to Social Policy Law 1.3.1 Beneficial Administration of the Act* also describes what constitutes beneficial legislation:

> *"The characterisation of beneficial legislation arises from the fact that many provisions of the Act provides benefits to the people. The relevance of the characterisation is that it is a principle of statutory interpretation that if there is an ambiguity in a piece of legislation which is beneficial in character, then the ambiguity should be resolved in a way that is most favourable to the people the Act is intended to benefit."*

There are of course common law decisions which also rightfully discuss the issue of beneficial legislation, including:

- ***IW v City of Perth (1997) 191 CLR 1, 12*** where Brennan CJ and McHugh J, 39 per Gummow J referred to a beneficial or remedial purpose of the legislation being "fair, large and liberal", rather than "literal or technical".

NCAT itself acknowledges the term "beneficial legislation" and the existence of it in the context of both the GIPA and PPIP Acts:

- ***Pittwater Council v Walker (2015) NSWCATAD 34, at Paragraph 77***
- ***Office of Finance and Services v APV and APW [2014] NSWCATAP 88, at Paragraphs 54, 57, 58, 59, and 60***

In the context of both the GIPA and PPIP Acts, there can be no question these pieces of legislation are beneficial in nature, and it is not the intention of parliament those benefits be deprived or undermined.

3. NCAT Act 2013

3.1 False Advertising Leading to Entrapment
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5.3 Unlawfully Awarding Legal Costs

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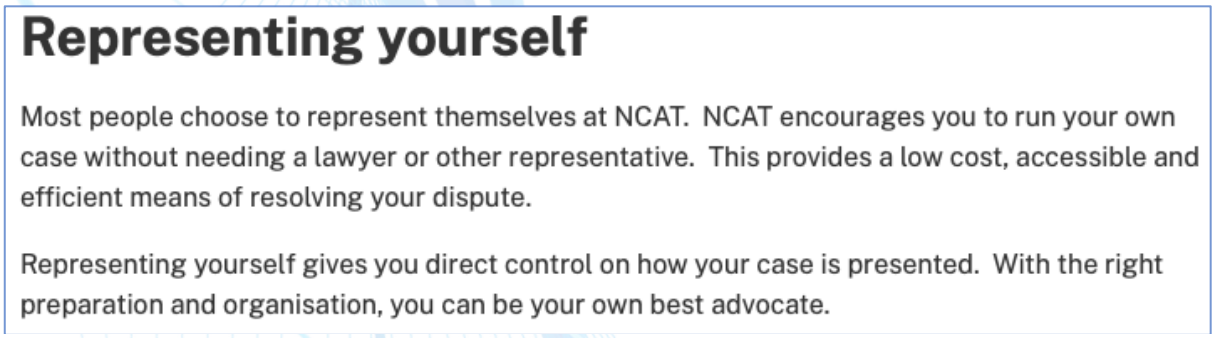
6.1 Lawful Awarding Legal Costs

7. Why is NCAT Awarding Legal Costs in the context of GIPA & PPIP?

3. NCAT Act 2013

3.1 False Advertising Leading to Entrapment

(Screenshot from https://ncat.nsw.gov.au/how-ncat-works/prepare-for-your-hearing/representation.html, Sunday 04th August 2024, 7.54pm)



Representing yourself

Most people choose to represent themselves at NCAT. NCAT encourages you to run your own case without needing a lawyer or other representative. This provides a low cost, accessible and efficient means of resolving your dispute.

Representing yourself gives you direct control on how your case is presented. With the right preparation and organisation, you can be your own best advocate.

Commentary:
This may very well be the first NCAT Trap a member of the public encounters as the world now relies on the provision of up-to-date, accurate, and relevant information available from its representative government via its websites.

This public notice encouraging the public to self-represent, particularly when it makes specific reference to acting in this way being low cost, completely neglects to disclose that in the context of GIPA & PPIP, the public are dealing with the NSW government and its agencies.

The neglect goes much further however in not disclosing that as more and more agencies seek costs against self-represented parties, and possibly even more negligent if that were possible, is the reality those costs can number in the vicinity of $30,000.00 when the Tribunal grants an agency its costs wish.

Further, no debate is necessary on the question of absence of efficiency when a self-represented party finds themself remaining within the NCAT arena many months or years after the fact, facing potential harrowing legal costs. Dragging on the uncertainty and putting self-represented parties to the test of a costs application compounds the trauma and hurt caused to trusting members of the public.

3.2 Object of Act

The objects of this Act are—

(a) to establish an independent Civil and Administrative Tribunal of New South Wales to provide a single point of access for most tribunal services in the State, and

(b) to enable the Tribunal—

(i) to make decisions as the primary decision-maker in relation to certain matters, and

(ii) to review decisions made by certain persons and bodies, and

(iii) to determine appeals against decisions made by certain persons and bodies, and

(iv) to exercise such other functions as are conferred or imposed on it, and

(c) to ensure that the Tribunal is accessible and responsive to the needs of all of its users, and

(d) to enable the Tribunal to resolve the real issues in proceedings justly, quickly, cheaply and with as little formality as possible, and

(e) to ensure that the decisions of the Tribunal are timely, fair, consistent and of a high quality, and

(f) to ensure that the Tribunal is accountable and has processes that are open and transparent, and

(g) to promote public confidence in tribunal decision-making in the State and in the conduct of tribunal members.

Commentary:

(a) Is not disputed

(b) Is mostly not disputed

(b) (iv) is disputed. "to exercise such other functions as are conferred or imposed on it" does not give the tribunal free reign, and it most certainly does not permit the tribunal to make any decision or take any action that is outside of its jurisdiction when considering the enabling legislation for the particular case.

(c) Is disputed. The tribunal does not ensure it is accessible and responsive to the needs of all of its users. It does ensure it is accessible and responsive to the needs of its governmental users, but neglects to ensure those same rights / mandates are equally distributed to the public which is also a user.

(d) Is disputed. The tribunal uses this clause of the legislation to support the punishment of its public users. The tribunal does not use this clause of the legislation to support the punishment or accountability of its governmental users, which neglects to ensure equal application of this clause of the legislation.

(e) Is disputed. Decisions can take as long as 2-years which cannot qualify as timely; decisions concerning costs are completely unfair; decisions lack consistency; decisions which denigrate and criminalise valid access applicants do not exemplify a high quality. In relation to an example of absence of a timely decision, the current case of ***Webb v Dept of Communities & Justice*** NCAT Matter No: 2023-00125842 (heard on 09th October 2023) is still outstanding despite numerous enquiries as to its delivery status, as at the date of this document.

(f) Is disputed. The tribunal is not accountable, particularly the President remains completely inaccessible to the public. Processes are not open and transparent and are mostly discovered during an access-to-information or privacy journey where they are proven to be unreliable.
(g) Is disputed. The public currently has no confidence in the tribunal's decision-making, nor in the tribunal members' ability to be impartial and in accordance with the legislation.

In this regard, the Objects of the Act are not fully or properly upheld by the tribunal.

3.3 Definition: Enabling Legislation

Section 4 Definitions refers to enabling legislation specifically:

enabling legislation *means legislation (other than this Act or any statutory rules made under this Act) that—*

(a) provides for applications or appeals to be made to the Tribunal with respect to a specified matter or class of matters, or
(b) otherwise enables the Tribunal to exercise functions with respect to a specified matter or class of matters.

Commentary:
The definition states specifically "*other than this Act or any statutory rules made under this Act.*"

This understandably refers to the NCAT Act, Rules and Regulations.

So the enabling legislation excludes the NCAT Act itself, as it is termed "*other Act*" for the purpose of clarity.

This definition makes clear both the GIPA and PPIP Acts are enabling legislation for the purpose of conferring jurisdictional powers on the tribunal by application of the NCAT Act 2013.

3.4 General Jurisdiction

Section 29 General Jurisdiction is very clear:

(1) The Tribunal has general jurisdiction over a matter if—
(a) legislation (other than this Act or the procedural rules) enables the Tribunal to make decisions or exercise other functions, whether on application or of its own motion, of a kind specified by the legislation in respect of that matter, and
(b) the matter does not otherwise fall within the administrative review jurisdiction, appeal jurisdiction or enforcement jurisdiction of the Tribunal.

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Note—
The general jurisdiction of the Tribunal includes (but is not limited to) functions conferred on the Tribunal by enabling legislation to review or otherwise re-examine decisions of persons or bodies other than in connection with the exercise of the Tribunal's administrative review jurisdiction.

(2) The Tribunal also has the following jurisdiction in proceedings for the exercise of its general jurisdiction—

(a) the jurisdiction to make ancillary and interlocutory decisions of the Tribunal in the proceedings,

(b) the jurisdiction to exercise such other functions as are conferred or imposed on the Tribunal by or under this Act or enabling legislation in connection with the conduct or resolution of such proceedings.

Commentary:
Again the legislation makes clear it is "*other*" legislation that enables the tribunal to make decisions.

And this section repeatedly refers to enabling legislation as the prerequisite for conferring powers of jurisdiction on the tribunal.

So without the enabling legislation of both the GIPA and PPIP Acts, in the context of this submission, the tribunal is prevented from exercising any powers whatsoever.

Despite this clear roadmap for presiding tribunal members, and over-zealous government solicitors, the tribunal is evidenced to regularly exercise its powers absent of the enabling legislation which is what agencies have come to expect.

3.5 Expectations v Reality

The public commences its GIPA journey in particular, on the expectation the agency's Notice of Decision accompanying their Application for Administrative Review, contains the issues for consideration before the tribunal.

That is a reasonable expectation.

At no time whatsoever is there any disclosure that should an Access Applicant choose to exercise their rights of review they face the potential the agency will engage a high-profile experienced legal team, that the agency is able to broaden the parameters of the original decision, and that all that extra work and engagement costs money; money the agency may plan to recoup.

We will discuss the issue of legal costs further in this document.

However, it is now caselaw that agencies are not limited to defending or justifying their GIPA decisions on the same grounds as the original decision-maker:

- ***Fisher v Goulburn Mulwaree Council (2019) NSWCATAD 34, at 10***
- ***Meldru v Wollondilly Shire Council (2017) NSWCATAD 292, at 7***

Applicants will not be aware the goal posts have moved until NCAT proceedings have commenced and they receive agency submissions.

There can be no dispute both NCAT and agencies maintain the upper hand, with knowledge they do not share with the public, and with due disclosures of the rules of the game completely absent, which has been categorised as unconscionable conduct by the High Court of Australia in CBA v Amadio:

- ***Commercial Bank of Australia v Amadio (1983) 151 CLR 447; (1983) HCA 14***

(1) ……"unconscionable conduct" is usually taken to refer to the class of case in which a party makes unconscientious use of his superior position or bargaining power to the detriment of a party who suffers from some special disability or is placed in some special situation of disadvantage…….

(12) the jurisdiction of courts of equity to relieve against unconscionable dealing ……. is long established as extending generally to circumstances in which (i) a party to a transaction was under a special disability in dealing with the other party with the consequence that there was an absence of any reasonable degree of equality between them and (ii) that disability was sufficiently evident to the stronger party to make it prima facie unfair or "unconscientious" that he procure, or accept, the weaker party's assent to the impugned transaction in the circumstances in which he procured or accepted it. Where such circumstances are shown to have existed, an onus is cast upon the stronger party to show that the transaction was fair, just and reasonable…….

(22) ……. if A having actual knowledge that B occupies a situation of special disadvantage in relation to an intended transaction, so that B cannot make a judgment as to what is in his own interests, takes unfair advantage of his (A's) superior bargaining power or position by entering into that transaction, his conduct in so doing is unconscionable. And if, instead of having actual knowledge of that situation, A is aware of the possibility that that situation may exist or is aware of facts that would raise that possibility in the mind of any reasonable person, the result will be the same.

3.6 Public Hearings

Section 49 Hearings to be open to the public states:

(1) *A hearing by the Tribunal is to be open to the public unless the Tribunal orders otherwise.*
(2) The Tribunal may (of its own motion or on the application of a party) order that a hearing be conducted wholly or partly in private if it is satisfied that it is desirable to do so by reason of the confidential nature of any evidence or matter or for any other reason.

Commentary:
This section uses the word "*public*".

A party to proceedings is not a public person.

A party to proceedings enjoys a unique position within the tribunal review process.

First and foremost a party to proceedings is generally either an Applicant or Respondent.

An Applicant in the sense that the individual has enlivened an application for review under either GIPA or PPIP.

A Respondent in the sense that the individual has received an application under either GIPA or PPIP naming them as the respondent.

However, the tribunal is repeatedly on the record ejecting the individual party to the proceedings, treating that individual as a member of the public when they are not.

Regardless, a party to proceedings is able to participate in any confidential session afforded an agency-party under a confidentiality order.

The provision of exclusive confidential sessions to agency-parties has proven to be prejudicial and undermines the review processes, where unchallenged material put to the tribunal is not tested, but is given credibility by presiding members without any evidence of proof.

Examples of such cases include, but are not limited to:

- ***McEwan v Port Stephens Council (2017) NSWCATAD 269***
- ***Webb v Port Stephens Council (2017 NSWCATAD 271***

These cases would eventually result in extreme trauma and criminalisation of the applicants, where they were both left unquestioned about the evidence put to the Tribunal, and where it would eventuate the Respondent Council was proven to provide false and misleading information to the tribunal.

Mr McEwan has since reading his caselaw in March 2017, suffered ongoing suicide ideation which continues to be treated.

It was due to the tribunal's neglect to test the so-called evidence that initially resulted in caselaw using terminology including "molestation of a person" and making reference to the Crimes, Domestic and Personal Violence Act 2007, all of which was totally inapplicable and unfounded.

3.7 Unlawfully Awarding Legal Costs

There can no question of a judicial action being unlawful if it is not legislated.

At minimum, it is an error in law, and is an act outside of the jurisdictional powers of, in this instance the NCAT.

This is clearly the case when the NCAT exercises its powers to award costs absent of the enabling legislation providing that mechanism.

The problem here is there is no record within the NCAT Annual Reports of cases where it awards costs, so this information is unknown to the parliament to which NCAT reports.

Further, if costs were recorded and reported to parliament, only those awarding lump sums would be so.

Those final cost totals for cases where NCAT orders costs "as agreed or assessed" disappear into an abyss.

From that point of ordering costs "as agreed or assessed" NCAT effectively wipes its hands of the costs issue, leaving parties to literally fight it out in true David against Goliath style.

In this regard, I refer to the only legislated mechanism for the awarding of costs within each of the GIPA and PPIP Acts respectively.

Concerning the GIPA Act 2009, the only mechanism for awarding of any costs of any kind remain with Section 108 2 (a):

> *NCAT may on the application of an agency make an order allowing the agency further time to decide an access application if the decision that is the subject of NCAT administrative review is a decision the agency is deemed to have made because the access application or internal review concerned was not decided within time (referred to in this section as a deemed refusal decision).*
> *(2) Such an order may be made subject to such conditions as NCAT thinks fit, including either of the following conditions—*

(a) a condition that if a decision is made to provide access to the information concerned during the further time allowed, any charge that would otherwise be payable in connection with providing that access is to be reduced or waived and the applicant for the NCAT administrative review may apply to NCAT for an order that the applicant's costs in proceedings on the NCAT administrative review are to be paid by the agency,

(b) a condition permitting the agency to impose processing charges for work done in connection with the access application (as if the application had been decided within time).

(3) If an agency makes a reviewable decision (the subsequent decision) on an access application following a deemed refusal decision on the application and while the deemed refusal decision is the subject of NCAT administrative review, NCAT may on application by the applicant deal with the application for NCAT administrative review as if it were an application for review of the subsequent decision.

Commentary:
This clause makes clear the mechanism for costs only applies for the benefit of the applicant, and not for the benefit of the agency.

In this regard, the awarding of costs against an Applicant in GIPA review proceedings is precluded by the legislation.

Again, and despite the parameters of the NCAT Act 2013 and the jurisdictional powers it gives to presiding tribunal members, the enabling legislation in this instance the GIPA Act 2009 does not enable it to do so.

Despite the tribunal not having jurisdictional powers to award costs to a NSW government agency in GIPA proceedings, the tribunal has done just that, as repeatedly evidenced in the following cases:

- ***Webb v Port Stephens Council (2023) NSWCATAD 137***

  Council racked up a bill claiming $20,914.85.

  The tribunal unlawfully awarded costs against the applicant in the sum of $7,000.00.

  The unrepresented party embraced and accepted the published advertisements of the NCAT which falsely asserted *"'self-representation' provides a low cost, accessible and efficient means of resolving your disputes."*

- ***McEwan v Port Stephens Council (No. 2) (2022) NSWCATAD 308***

  Council racked up a bill claiming $11,841.00.

  The tribunal unlawfully awarded costs "as agreed or assessed" which resultantly totalled a sum that would eventually exceed $15,000.00.

The unrepresented party embraced and accepted the published advertisements of the NCAT which falsely asserted *"'self-representation' provides a low cost, accessible and efficient means of resolving your disputes."*

The additional case of ***McEwan v Port Stephens Council (No. 2) (2023) NSWCATAP 386*** saw an unsuccessful cost application, but the distress, trauma and uncertainty this case caused the applicant Mr McEwan cannot be overstated.

NCAT has additionally and unlawfully awarded costs including but not limited to;

- ***Zonnevylle v Secretary, Department of Education (2023) NSWCATAP 117***

  The Department claimed costs totalling $6,162.50.

  The Tribunal unlawfully awarded costs in a lump sum of $5,000.00.

- ***Zonnevylle v Minister for Educaiton & Early Childhood Learning (No. 2) (2022) NSWCATAP 87***

  The Department claimed costs totalling $7,800.00.

  The Tribunal unlawfully awarded costs in the lump sum of $5,000.00.

- ***Zidar v Department of Justice (No. 4) (2018) NSWCATAP 266***

  The Department claimed costs totalling $7,000.00.

  The tribunal unlawfully awarded costs as independently assessed "in default of agreement."

- ***Wojciechowska v Commissioner of Police, NSW Police Force (No. 2) (2023) NSWCATAP 104***

  The Department claimed it incurred costs totalling $9,133.45.

  The tribunal unlawfully awarded costs in a lump sum of $7,309.76.

Additionally, the NCAT's published Guidelines – Costs, available on the NCAT website, https://ncat.nsw.gov.au/how-ncat-works/after-the-hearing/legal-costs.html, states at Point 5:

> 5. *The Tribunal can order a person to pay someone else's costs, even if there are no special*
> *circumstances, if a particular law gives the Tribunal a choice or discretion about who pays*
> *costs. Those particular laws are:*

a) section 42(1)(b) of the Payroll Tax Rebate Scheme (Jobs Action Plan) Act 2011
b) section 46(1)(b) of the Regional Relocation Grants (Skills Inventive) Act 2011
c) section 44(1)(b) of the Small Business Grants (Employment Incentive) Act 2015
d) section 29(1)(b) of the First Home Owner Grant (New Homes) Act 2000
e) section 52(3) of the Health Records and Information Privacy Act 2002, but only if the Tribunal dismisses the complaint because it is frivolous, vexatious misconceived or lacking in substance or the Tribunal is satisfied that the applicant does not wish to proceed with the complaint
f) section 108(2)(a) of the Government Information (Public Access) Act 2009 in particular
circumstances relating to delayed decisions
g) the Dormant Funds Act 1942.

In this regard the NSW Civil & Administrative Tribunal concedes it is precluded by law from awarding legal costs in the context of the GIPA Act 2009.

The fact NCAT has considered any case for costs at all in the context of GIPA, including those where applications were dismissed, is outside of its jurisdiction to do so.

No information concerning the awarding of legal costs was locatable within the NCAT mandatory annual reports in the context of the GIPA Act 1998.

Concerning the PPIP Act 1998, the only mechanism for awarding of any costs of any kind remain with Section 55 (2) (a):

(1) If a person who has made an application for internal review under section 53 is not satisfied with—
(a) the findings of the review, or
(b) the action taken by the public sector agency in relation to the application,
the person may apply to the Civil and Administrative Tribunal for an administrative review under the Administrative Decisions Review Act 1997 of the conduct that was the subject of the application under section 53.
(1A) A person (the applicant) who is aggrieved by the conduct of a Minister (or a Minister's personal staff) constituting a contravention of section 15 (Alteration of personal information) may apply to the Civil and Administrative Tribunal for an administrative review under the Administrative Decisions Review Act 1997 of the conduct.
(2) On reviewing the conduct of the public sector agency concerned, the Tribunal may decide not to take any action on the matter, or it may make any one or more of the following orders—
(a) subject to subsections (4) and (4A), an order requiring the public sector agency to pay to the applicant damages not exceeding $40,000 by way of compensation for any loss or damage suffered because of the conduct,
(b) an order requiring the public sector agency to refrain from any conduct or action in contravention of an information protection principle or a privacy code of practice,

(c) an order requiring the performance of an information protection principle or a privacy code of practice,
(d) an order requiring personal information that has been disclosed to be corrected by the public sector agency,
(e) an order requiring the public sector agency to take specified steps to remedy any loss or damage suffered by the applicant,
(f) an order requiring the public sector agency not to disclose personal information contained in a public register,
(g) such ancillary orders as the Tribunal thinks appropriate.
(3) Nothing in this section limits any other powers that the Tribunal has under Division 3 of Part 3 of Chapter 3 of the Administrative Decisions Review Act 1997.
(4) The Tribunal may make an order under subsection (2) (a) only if—
(a) the application relates to conduct that occurs after the end of the 12 month period following the date on which Division 1 of Part 2 commences, and
(b) the Tribunal is satisfied that the applicant has suffered financial loss, or psychological or physical harm, because of the conduct of the public sector agency.
(4A) The Tribunal may not make an order under subsection (2) (a) if—
(a) the applicant is a convicted inmate or former convicted inmate or a spouse, partner (whether of the same or the opposite sex), relative, friend or an associate of a convicted inmate or former convicted inmate, and
(b) the application relates to conduct of a public sector agency in relation to the convicted inmate or former convicted inmate, and
(c) the conduct occurred while the convicted inmate or former convicted inmate was a convicted inmate, or relates to any period during which the convicted inmate or former convicted inmate was a convicted inmate.
(5) If, in the course of an administrative review, the Tribunal is of the opinion that the chief executive officer or an employee of the public sector agency concerned has failed to exercise in good faith a function conferred or imposed on the officer or employee by or under this Act (including by or under a privacy code of practice), the Tribunal may take such measures as it considers appropriate to bring the matter to the attention of the responsible Minister (if any) for the public sector agency.
(6) The Privacy Commissioner is to be notified by the Tribunal of any application for an administrative review. The Privacy Commissioner has a right to appear and be heard in any proceedings before the Tribunal in relation to an administrative review.
(7) The Information Commissioner is to be notified by the Tribunal of any application for a review under this section that concerns the provision of government information by an agency (within the meaning of the Government Information (Public Access) Act 2009). The Information Commissioner has a right to appear and be heard in any proceedings before the Tribunal in relation to such a review.

Commentary:
This clause makes clear the mechanism for costs only applies for the benefit of the applicant, and not for the benefit of the agency.

In this regard, the awarding of costs against an Applicant in PPIPA review proceedings is precluded by the legislation.

Additionally, the NCAT's published Guidelines – Costs, available on the NCAT website, https://ncat.nsw.gov.au/how-ncat-works/after-the-hearing/legal-costs.html, states at Point 5:

> 5. *The Tribunal can order a person to pay someone else's costs, even if there are no special circumstances, if a particular law gives the Tribunal a choice or discretion about who pays costs. Those particular laws are:*
> *a) section 42(1)(b) of the Payroll Tax Rebate Scheme (Jobs Action Plan) Act 2011*
> *b) section 46(1)(b) of the Regional Relocation Grants (Skills Inventive) Act 2011*
> *c) section 44(1)(b) of the Small Business Grants (Employment Incentive) Act 2015*
> *d) section 29(1)(b) of the First Home Owner Grant (New Homes) Act 2000*
> *e) section 52(3) of the Health Records and Information Privacy Act 2002, but only if the Tribunal dismisses the complaint because it is frivolous, vexatious misconceived or lacking in substance or the Tribunal is satisfied that the applicant does not wish to proceed with the complaint*
> *f) section 108(2)(a) of the Government Information (Public Access) Act 2009 in particular*
> *circumstances relating to delayed decisions*
> *g) the Dormant Funds Act 1942.*

In this regard the NSW Civil & Administrative Tribunal concedes it is precluded by law from awarding legal costs in the context of the PPIP Act 1998.

Again, and despite the parameters of the NCAT Act 2013 and the jurisdictional powers it gives to presiding tribunal members, the enabling legislation in this instance the PPIPA Act 1998 does not enable it to do so, but is evidenced to have occurred in the following case:

- ***FHH v Port Stephens Council (No. 2) (2023) NSWCATAP 282***

  This case totalled a sum that would eventually exceed $28,000.00.

  This was achieved by the Respondent engaging in deliberate and covert manifestly excessive advocacy which saw legal experience in excess of (101) one hundred and one years, by the engagement of (6) six solicitors and a vexatious Senior Privacy Officer.

  This number of solicitors against an unrepresented party who embraced and accepted the published advertisements of the NCAT which falsely asserted *"'self-representation' provides a low cost, accessible and efficient means of resolving your disputes."*

In this case the Costs Assessor would identify over-charging >30%, comprising (88) eighty-eight identified unwarranted leger entries, inclusive of:

- Duplication of leger entry
- Time claimed for the attendance was not reasonable having regard to the work described. Item has been adjusted to a reasonable time
- Scope of work claimed is not within the scope of the costs order
- Legal education unreasonable as solicitors expected to already have knowledge
- Unreasonable charges disallowed
- Administrative attendance disqualified

No information concerning the awarding of legal costs was locatable within the NCAT mandatory annual reports in the context of the PPIP Act 1998.

This is the kind of collateral damage identified the result of NCAT unlawfully awarding costs in the context of PPIP, compounded by the fact the tribunal does nothing to interrogate or validate the content of a leger incidentally Sworn by solicitors on Affidavit that the content is true and accurate.

On its own, the swearing of an affidavit knowing the content is not true and accurate is an offence.

Any reasonable person would agree such behaviours constitute corrupt conduct.

3.8 Unjust Enrichment

Firstly, agencies have the benefit of in-house solicitors well-capable of acting in the lowest level of the judiciary, NCAT. These are not chargeable.

Administrative law is not complicated and in recent years has been rewritten in a way that ensures, for the most part, the general public may navigate it.

Additionally, it is reasonable to expect those government employees who occupy roles in administrative law decision making, also have some fundamental knowledge of the applicable laws, at least to the same level of the public. These are not chargeable.

It therefore stands to reason both those making administrative decisions and those in-house solicitors having carriage to defend those decisions are well-equipped for the task of any administrative review, particularly against a self-represented party.

If that is not the case, that staff and in-house solicitors are not well-equipped then they are not suitable for their respective publicly-funded roles.

And yet we see voluminous evidence of agencies engaging external solicitors including the Crown Solicitor for these basic cases. These are chargeable.

Secondly, external legal fees are presumed tax deductable but are evidenced being claimed as a financial loss through the NCAT.

Yet agencies do not provide any evidence of any financial loss, they simply submit a leger of accounts with their costs applications.

This leaves agencies in the privileged position that, should they choose to relieve departmental decision makers and in-house solicitors of their day-to-day duties, they are able to spend unlimited amounts of public monies on external legal teams, knowing beforehand those expenses will be recovered through their following tax lodgement.

This can only mean those costs applications lodged with NCAT are decidedly punitive in nature, as agencies have no costs to recover.

Indeed the NCAT repeatedly quotes the following case when determining costs applications:

- ***Oshlak v Richmond River Council (1998) HCA 11***:

  "…….an order for costs is intended to compensate the successful party: it is not intended to be punitive in nature."

However, agencies are already compensated through the tax deduction system.

As such, claiming compensation in these circumstances easily qualifies as unjust enrichment.

Tribunal members are evidenced to operate private enterprise businesses, where they charge fees for services, such as ex-judge of the Industrial Relations Commission Francis Marks who provides mediation services.

It is totally reasonable to expect Francis Marks and other tribunal members operating private enterprise business(es) put their hands up to claim any tax deduction available to them; no person would knowingly turn their back on financial refunds regardless of whether or not they are a solicitor.

In this regard, the tribunal's insistence costs are not punitive is decidedly misleading and nothing more than a feeble excuse for acting in such manner to the serious detriment to the public they serve.

3.9 Confidential Hearings and Materials

The reference and commentary at Point 3.5 Public Hearings is applicable for this issue.

The NCAT Act 2013 Section 64 gives the tribunal powers to withhold records and parts of hearings from a party and the public.

Such an order is also used by the tribunal to silence a self-represented party and to protect the identity and evidence given by government employees, in contradiction to the GIPA Act 2009 Schedule 4, 3(b).

In the case of a self-represented party, such an order stifles the party's ability to seek counsel from wherever and from whomever they choose, which is prejudicial and procedurally unfair.

The granting of a Section 64 wish to agencies prevents public scrutiny, accountability, and denies the opposing party the right to interrogate evidence put to the tribunal in a confidential session.

Section 64 has multiple detrimental impacts on a self-represented party as it is not applicable to agency personnel or agency records.

3.10 Denial of procedural fairness

This section comprises a non-exhaustive list of instances where the tribunal blatantly denies procedural fairness, knowing it is an arduous task for a self-represented party to bring any appeal further to the particular case at hand:

i. Vetting the public's requests for access to its Audio Visual Links for attending hearings; this vetting extends to the interested public wanting to attend open hearings remotely (*in my own situation the tribunal has refused my access to an AVL despite knowing I undertake a 300-klm round trip from my home, and incur additional expenses such as premium tolls, premium parking, fuel, and wear and tear on my vehicle, accommodation and meals*).
ii. Denying access to AVL facilities in hearing to unrepresented party, whilst providing AVL link to agency personnel in the same proceedings
iii. Providing AVL link to agency personnel when all participatory costs are recoverable
iv. Denying right to appeal: stating the right can be taken up at the end of proceedings, and on receipt of the tribunal's decision, in circumstances where exercising that right would be superfluous at that point in time, but only relevant in the midst of proceedings
v. Imposing time-lines for submissions which are not viable for unrepresented parties
vi. Neglecting to afford due refunds
vii. Refusing to address agency misconduct in the exercise of the GIPA Act 2009
viii. Refusing to address agency misconduct in the exercise of the PPIP Act 1998
ix. Hearing substantive matters within the Appeal Panel division when they are not appeals; usurping internal appeal rights by default
x. Readily accepting late submissions and evidence from well-resourced agency participants whilst denying the public the equality to do so
xi. Taking excessive time to issue decisions; there are currently numerous cases which have approached the 2-year time frame from hearing to publication.
xii. Obstructing legitimate cross-examination of agency personnel

Each of these are easily able to be evidenced through case records should the Ministers desire it.

None of these actions align with the Object of the NCAT Act 2013, or the publication referenced above which is "*to ensure that the Tribunal is accessible and responsive to the needs of **all** of its users" (emphasis added).*

3.11 Deflecting instructions

In 2017 I enquired of the registry the process for reporting breaches of the NCAT Act 2013 Section 71 – False or Misleading Statements.

The registry responded in writing that reports for false and misleading statements in the context of tribunal proceedings were to be reported to NSW Police who would then compile a Brief of Evidence, onforwarded to the Department of Public Prosecution.

Following the registry's direction I did compile a report for NSW Police.

Six (6) months later NSW Police informed me "*we don't do perjury, this is a matter for NCAT, you need to take it up with them because that's where all this happened."*

The combination of Section 71, above, and Section 76 – Proceedings for Offences hold absolutely no value to the general public.

And with the realisation no tribunal member has any interest in reporting offences, this leaves the public with nowhere to go.

3.12 Refusing / Obstructing Questions of Law

The public are those who regularly seek answers to questions of law, statutory interpretation, be brought before the NSW Supreme Court (NSWSC) under the NCAT Act 2013 Section 54 – References of questions of law to Supreme Court.

Clearly this is due to the public's ongoing frustration in obtaining the correct statutory interpretation with both the tribunal and opposing agencies.

This is compounded by solicitors such as the Crown Solicitor who is on the record stating "*the applicant has not engaged with the statutory construction of the legislation*," 08th August 2022.

Section 54 makes clear a party can request a question of law be raised with the NSWSC.

However, that section goes on to state that such a request can only proceed with the consent of the President of NCAT.

With the current status quo the President is not seen, heard of, or accessible to any member of the public, and where all enquiries are vetted, self-represented parties are unable to exercise their right on this issue, leaving this clause of the legislation having no value whatsoever which is prejudicial to self-represented parties.

4 GIPA Act 2009

4.1 Object of Act – Beneficial Legislation

By its own definition and description, the GIPA Act is beneficial in nature, conceded in the tribunal's own caselaw:

- ***Pittwater Council v Walker (2015) NSWCATAD 34, at Paragraph 77.***

4.2 Expected Costs to Applicants

Currently the GIPA Act 2009 sets the initial agency application fee at $30.00. Some agencies choose to impose processing fees, whilst some do not.

This appears to be a discretionary decision for each agency, particularly given evidence in the case where several agencies were asked for the exact same information and only one imposed processing fees.

As such, this variable cannot be accurately stated.

However, we do know an Internal Review with the agency costs $40.00. And we do know the IPC does not impose any fee for service.

The NCAT charges (at the date of this document) $124.00 for an Application for Administrative Review.

There is also the potential appeal cost of $506.00.

In this regard, it is easy to believe the published propaganda on the NCAT website, stated at Page 9 above, where NCAT waves a flag of fairness, equity, accessibility, and most importantly affordability.

It is negligent of NCAT not to duly disclose, right alongside that propaganda, that despite the mostly affordable application fees, an Access Applicant should realistically expect their request for administrative review to cost them anywhere from $7,000.00 to $30,000.00.

With all the propaganda suggesting access to justice should be available to every member of the public, it is undoubtedly clear, there is a significant portion of the public who will not be able to afford access to any justice within the NCAT arena.

Indeed the sum of $506.00 may in some circumstances constitute a wage.

This effectively and completely prices the public out of its beneficial legislation. However, there is now decision after NCAT decision which evidences a member of the public should expect to face agency legal costs approaching $30,000.00 for endeavouring to access their beneficial legislation.

4.3 No Executive Powers

The GIPA Act 2009 Section 110 (1) (b) uses the term "*concert*" to describe those members of the public who consult with each other for the purpose of exercising their right to access beneficial legislation.

This term is not only repugnant but aligns with the use of the term within the Crimes Act 1990 Section 93X.

What this does, very effectively with the inclusion of the term "*concert*", is criminalise the public's consulting together for the purpose of exercising their right to access beneficial legislation. It categorises those endeavours as offensive to the NSW government and most importantly NCAT.

It denies the public's democratic right to seek out and discuss legislative processes.

There is no mechanism within the enabling legislation, the GIPA Act 2009, supporting the making of orders concerning the subject of consort / concert, despite its reference in the legislation

Despite not having any powers to consider the making of such an order concerning 'consort / concert', NCAT is documented to do just that. This disgraceful abuse of position and power for the benefit of a NSW government agency evidenced in caselaw, was rightfully overturned on bias, with the Applicant expending a substantial amount of additional time and resources for the pleasure of ex-judge of the NSW Industrial Relations Commission Francis Marks:

- ***Webb v Port Stephens Council; Webb v Port Stephens Council; Port Stephens Council v Webb (2020) NSWCATAD 81***
  Orders:
  (1) Telina Webb is not permitted to make an access application to Port Stephens Council under the provisions of the Government Information (Public Access) Act 2009 whether solely on her own behalf or acting jointly or in concert with any other person without first obtaining the approval of the NSW Civil and Administrative Tribunal.

- ***Webb v Port Stephens Council (2020) NSWCATAP 152***
- ***Port Stephens Council v Webb (2021) NSWCATAD 180***

Francis Marks, as with other so-minded tribunal members, published damaging and disparaging caselaw that remains in the public arena permanently, which is a total abuse of position and power.

The public should not be expected to clean up the mess left by punitive tribunal members, at great cost to the public, and causing unquantifiable deep hurt, trauma and financial cost.

Likewise, the current form of government is described as democratic not dictatorial, and as such the public and our government should be very concerned there are those within our community who act to dictate the very conversations to take place.

4.4 Ignoring Reporting Obligations

There are a number of clauses within the GIPA Act 2009 which support the public's bringing agency misconduct in the exercise of their statutory obligations to the attention of the tribunal.

These sections are identified as:

- Section 116 – Offence of acting unlawfully
- Section 117 – Offence of directing unlawful action
- Section 118 – Offence of improperly influencing decision on access application
- Section 119 – Offence of unlawful access
- Section 120 – Offence of concealing or destroying government information

With this smorgasbord of offence-options any reasonable person would form the view that agency misconduct in the exercise of their statutory obligations is considered to be a serious matter and one which the tribunal and / or IPC takes very seriously.

Not so.

A simple search on the caselaw website using terms such as "*gipa section 116*, etc" returns hundreds upon hundreds of results.

The NCAT Annual Reports are not capable of reporting on these issues because NCAT tribunal members have at all times turned a blind eye to any misconduct, including serious corrupt conduct.

As such, there is not one single report originating from any NCAT member to the IPC as the legislation permits.

Not one since the inception of the NCAT Act 2013.

This can only be construed as total complacency, lack of interest, total indifference, and dereliction of duty on the part of presiding members in response to the valid and evidenced concerns of the public as they endeavour to access their beneficial legislation.

Example:
Speaking from personal experience I have repeatedly detailed the unconscionable conduct, if not unlawful and corrupt conduct, of one Mr Tony Leslie Wickham of Port Stephens Council to the NCAT.

Mr Wickham is no doubt by the date of this document infamous within the NCAT, and yet NCAT has not made a single report about his GIPA activities.
Mr Wickham has occupied the following conflicting roles within Council for many years, mostly in parallel to one another:

- Executive Officer
- Governance Manager
- Senior Right to Information Officer
- Privacy Officer
- Complaints Handling Officer
- Code of Conduct Coordinator
- Joint Custodian of Secondary Employment

Mr Wickham is also noted on the Organisation Chart as having full authority over Legal Services.

Any reasonable person would form the picture Mr Wickham has a tight reign over the compactus, responding to any enquiry or request for information; at minimum being fully informed of who's asking for what at any given point in time.

My husband's and my first interactions with Mr Wickham originate from a Development Application for a privacy screen and swimming pool fence enclosure.

Sounds simple enough and very straightforward.

However, when an objector to the development approached Tony Wickham directly and enquired how he could conceal and protect his open access information objecting submission, Tony Wickham informed him in writing he could use, among other clauses of the GIPA Act 2009, Section 14 3(f) which states information can be prevented from public release if release of the document would:

> *(f) expose a person to a risk of harm or of serious harassment or serious intimidation*

Mr Wickham was fully informed there was no risk of harm from my husband or I.

But to go further with his reassurances and unlawful agreement in breach of the legislation Mr Wickham also stated in writing "*Nothing's to get past me. Staff are already doing this but just to make sure,*" and just to reassure you I have your back "*if the Commissioner makes enquiries Council will respond on your behalf.*"

This simple corrupt action, the written disclosure of manipulating the outcome of GIPA Applications, by an arrogant government employee who personally and deliberately compromised the entire GIPA process, would reverberate through Council DA Reports, Land & Environment Court records, and into the NSW judiciary.

Of course, this relates to just one family; my husband and I.

It is not plausible Mr Wickham's actions have been isolated to one case and one favour.

A short while later the Commissioner did in fact come calling, as Mr Wickham had unlawfully refused to accept a Formal Access Application from my husband for the Objecting Submissions.

And to his word Tony Wickham did respond to the IPC on behalf of his unlawful agreement counterpart falsely stating apprehended violence orders had been issued against my husband and I, that police had been called to our neighbourhood due to disturbances involving us, that we had personally attacked staff, and that open access information had been withheld from us because we presented a serious risk to public safety.

None of this was true. It never was. It never will be.

Tony Wickham was the architect of this false and misleading claim.

Tony Wickham would thereafter weaponise his false and misleading letter providing it to a number of secondary NSW government agencies as well as NCAT.

As at the date of this document my husband and I have no certainty just how far Tony Wickham's false and misleading document and allegations have travelled.

This matter has been repeatedly reported to NCAT with tribunal members continually turning a blind eye to corruption, and continually stating such information about GIPA offences are irrelevant to proceedings.

In doing so each and every informed tribunal member has ignored their obligations as officers of the court.

It is negligent and reckless as this gives the whole of the population of right to information and privacy officers in the state of NSW the clear message they have nothing to be concerned about when sitting at the NCAT bar table or being called to give evidence, no matter how serious and damaging their actions.

Ministers, this is just one example of what the public continues to endure with NCAT.

Any number of the GIPA Act 2009 Offence Sections is readily applicable to this rogue government employee Tony Leslie Wickham.

And let me be very clear, Tony Wickham's unlawful agreement to conceal and protect open access information mandated for release is still in place since its inception in March / April 2012.

There is no glossing this over; this is a conspiracy agreement designed, intended and implemented to completely undermine the GIPA Act 2009.

It will remain in place until it either expires or a law enforcement agency intervenes.

Additionally, Tony Wickham expected his false and misleading letter to the Commissioner be protected under the GIPA Act 2009 Exempt Information clause, but thankfully Council solicitor Carlo Zoppo had an apparent crisis of conscience and provided an unredacted copy of the letter to me personally.

The combination of the NCAT Act 2013 Section 64, the breach of Section 49, and the GIPA Act 2009 Exempt Information Clause, enabled the covering up of corrupt conduct.

4.5 Misleading Information

On 19th September 2023 during an NCAT hearing, a first-time NCAT Applicant seeking a review of a GIPA Determination, questioned member Stephen Montgomery about concerns the hearing was not going in a manner consistent with his understanding of the decision-making protocols, and he was very concerned his matter might endure an unnecessary appeal based on that. Mr Montgomery informed the Applicant words to the effect, "*If you're not happy with my decision you can appeal. You can take it all the way to High Court if you like!*"

This was decidedly reckless, irresponsible and misleading of Mr Montgomery who was well aware there is no right of appeal to the High Court under the circumstances, and who was well aware that the appeal process through the Appeal Panel and potentially onto the Supreme Court would cause the first-time applicant unquantifiable cost and distress.

Tribunal members clearly have no interest whatsoever about the impact their decisions cause the public they serve.

4.6 Unlawfully Awarding Legal Costs

There is no mechanism within the GIPA Act 2009, in its capacity as enabling legislation, which facilitates the awarding of legal costs against an applicant; applicants are generally members of the public who seek to access their beneficial legislation.

It is not only reasonable to expect, but natural to assume, that those exercising statutory functions under the GIPA Act and those exercising jurisdictional powers in accordance with the enabling legislation to do so, are fully informed about the constraints preventing the awarding of legal costs.

Presently, self-represented parties have faced unlawful legal fees reaching as high as $30,000.00.

5 PPIP Act 1998

5.1 Object of Act – Beneficial Legislation

The Office of the NSW Information & Privacy Commissioner refers to the PPIP Act 1998 at https://www.ipc.nsw.gov.au/privacy/nsw-privacy-laws/ppip:

> *The Privacy and Personal Information Protection Act 1998 (PPIP Act) outlines how New South Wales (NSW) public sector agencies manage personal information and the functions of the NSW Privacy Commissioner.*

By its own definition and description, the PPIP Act is beneficial in nature, conceded in the tribunal's own caselaw:

- ***Office of Finance and Services v APV and APW [2014] NSWCATAP 88, at Paragraphs 54, 57, 58, 59, and 60.***

Presently, self-represented parties have faced unlawful legal fees reaching as high as $30,000.00.

5.2 Expected Costs to Applicants

There is currently no cost to an aggrieved individual for seeking a Review of Conduct under the PPIP Act 1998 Section 53.

If an administrative review is sought with NCAT thereafter the cost is $124.00 as at the date of this letter.

There is also the potential for an appeal at the cost of $506.00.

However, there is now decision after NCAT decision which evidences a member of the public should expect to face agency legal costs approaching $30,000.00 for endeavouring to access their beneficial legislation.

5.3 Unlawfully Awarding Legal Costs

There is no mechanism within the PPIP Act 1998, in its capacity as enabling legislation, which facilitates the awarding of legal costs against an applicant.

Applicants are generally members of the public who seek to access their beneficial legislation.

It is not only reasonable to expect, but natural to assume, that those exercising statutory functions under the PPIP Act and those exercising jurisdictional powers in accordance with the enabling legislation to do so, are fully informed about the constraints preventing the awarding of legal costs.

Presently, self-represented parties have faced unlawful legal fees reaching as high as $30,000.00.

6 Comparative Legislation: Residential Tenancies Act 2010

6.1 Lawfully Awarding Legal Costs

The *Residential Tenancies Act 2010* states at *Section 208 Costs in Court Proceedings* states:

> *If a court in any proceedings is of the opinion that, having regard to the subject-matter of the proceedings, the taking of the proceedings was not warranted in the circumstances of the case because this Act makes adequate provision for the enforcement by the Tribunal of the rights concerned, the court, unless it is of the opinion that it would be unjust to do so, must order the plaintiff to pay the defendant's costs in such amount as the court determines.*

This enabling legislation, the Residential Tenancies Act 2010 s208, gives the tribunal jurisdictional powers to award legal costs, whilst there is no such clause in either the GIPA or PPIP Acts.

7 Why is NCAT Awarding Legal Costs in the context of GIPA & PPIP?

7.1 NCAT uses costs to dissuade applicants from endeavouring to access beneficial legislation

7.2 NCAT uses costs to punish the public for endeavouring to access beneficial legislation

7.3 NCAT uses costs decisions to publicly denigrate and criminalise applicants

7.4 NCAT uses costs decisions to publicly identify and single out 'problematic' applicants for the benefit of the whole of the state's population of right to information and privacy officers

7.5 NCAT uses costs decisions as legal road maps on how to respond to applicants who choose to exercise their legislated beneficial administrative review rights

7.6 NCAT uses costs decisions to send the clear message to the public of what they can expect when endeavouring to access beneficial legislation

7.7 NCAT uses costs decisions to create a perpetual moral panic about those members of the public seeking access to their beneficial legislation

Closing:

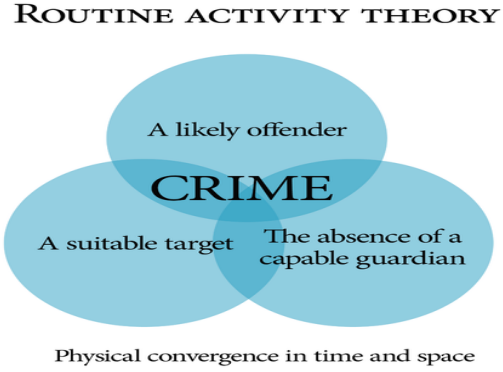
So how is all this able to occur in plain sight and without apparent oversight, intervention, or conscience?

Such actions are able to occur when decision-makers are absent of any guardianship, which is clearly the case with NCAT tribunal members; compounded by the legislated fact tribunal members enjoy immunity for their actions; they do not take the judicial oath unless they are magistrates or judges.

This is all in a day's work for so-minded tribunal members and is explainable through Routine Activities Theory.

In this regard, and most regrettably, the Crime Triangle referred to at www.crimepervention.nsw.gov.au is completely relevant under the circumstances, specifically referencing Routine Activities Theory.

We need to be very frank here; the public sees the breaching of legislation by those administering it as offensive, and a great number of the public are certainly offended.



The Crime Triangle associated with Routine Activity Theory is dependent upon three irreplaceable elements: a suitable target, the absence of a capable guardian, a motivated offender.

In the context of the NCAT acting outside of its jurisdictional powers, the suitable targets will always be the trusting public.

The absence of a capable or suitable guardian, particularly when tribunal members enjoy immunity, has germinated a culture of intolerance and punishment towards that same trusting public in particular those who choose to self-represent, which indelibly motivates, leaving members in the unenviable category of offender.

The theory suggests that individuals are able to commit offences in the normal daily activities of organisation workplace duties.

In this instance the workplace is the NSW Civil & Administrative Tribunal.

The public is not able to access the NCAT President.

NCAT responds to valid complaints from the public by rejecting and procrastinating applications, obstructing applicant access to products and services, and unlawfully imposing costs.

NCAT's published decisions also denigrate applicants.

None of these actions aligns in any way with the object of the Act.

None of these actions reinforces the parliament's intention of its beneficial legislation, with the Routine Activities Theory providing a credible academic explanation as to why these actions occur.

Ministers, this legislation comes under your watch.

Your legislation is hurting the public, in some instances immeasurably, where some suffer ongoing symptoms of PTSD and suicide ideation.

There can no question the intention of parliament is not that the NCAT Act 2013 or the NCAT itself hurt the public in any way whatsoever in the context of GIPA and PPIP.

You serve the public and the public naturally expects you to serve and protect their interests, particularly their legislated interests which are in place for their benefit.

This request for an urgent parliamentary inquiry into the current operation of the NCAT Act 2013 by the NSW Civil & Administrative Tribunal could not be more valid or critical.

I look forward to the Ministers' prompt forthcoming notification of its course of action, inclusive of your invitations to your most valuable stakeholders to participate and be heard within this conversation.

I ask the Ministers to ensure my husband and I are provided the opportunity to be heard.

Thank you for your very kind assistance and service as I leave you with this final factual scenario reminder courtesy of the NSW Civil & Administrative Tribunal, which is only one case:

In 2015 my husband Paul McEwan requested open access information mandated for release free of charge; objecting submissions to an exempt development. The agency refused to provide the documents in their entirety. At the time he did not know why, only that an allegation he posed a risk of harm had been made.

He ended up with NCAT's deplorable case law of September 2017 where terminology directed at him included reference to the Crimes, Domestic and Personal Violence Act 2007 and that he posed a serious risk of harm likened to molestation of a person.

The allegations against him, the false and misleading statements provided by a deceitful government employee who gave a favour to a colleague, were never tested by the tribunal.

During proceedings Mr McEwan was denied his right to cross-examine his own summonsed witness, and was excluded from the (3) three facilitated confidential sessions on the day where the false allegations were freely made. His witness participated in those sessions.

The resultant caselaw decision was transferred to me, his wife, by default of 'guilty by association'.

It would take my husband (4) four years in the NCAT arena to finally be completely vindicated with a member rightfully stating in 2021 "there is not a scintilla of evidence the applicant posed the risk claimed."

But the originating caselaw remains in perpetuity and he continues to suffer daily because of it.

And having overcome those false and misleading allegations, he and his wife now faces costs awarded outside of the legislation totalling approximately $40,000.00 for simply endeavouring to access their beneficial legislation.

Yours Sincerely

Telina Webb