

TABLING NOTE- FOR SUBORDINATE LEGISLATION

SUBORDINATE LEGISLATION No. 42 of 2016

NORTHERN TERRITORY CIVIL AND ADMINISTRATIVE

TRIBUNAL AMENDMENT RULES 2016

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Purpose

The Northern Territory Civil and Administrative Tribunal Rules 2016 provide for rules necessary for the operation of the Northern Territory Civil and Administrative Tribunal (NTCAT). The proposed amending rules were made by the NTCAT rules committee in accordance with section 138 of the *Northern Territory Civil and Administrative Tribunal Act*.

Summary of Key Provisions

- Rules 1 and 2 deal with preliminary matters (citation and identification of the rules being amended).
- Rule 3 provides for the repeal and replacement of rule 10 (costs).
- New rules 10(1) and 10(3) replicate current rules 10(1) and 10(3).
- New rule 10(2) replicates current rule 10(2) but includes an additional provision that sets out the circumstances the NTCAT must take into account when determining a costs order for a matter (such as the recovery of a small debt) where a failure to make an order regarding out of pocket expenses incurred by a successful party would substantially deprive the party of relief.
- New rule 10(4) provides that a fee charged for the service of process is deemed unreasonable if it exceeds the fee that the sheriff could charge.
- New rule 10(5) contains definitions necessary for the operation of rule 10(4).

Background

Following the commencement on 1 May 2016 of the *Small Claims Act 2016* and the *Justice Legislation Amendment (Small Claims) Act 2016* concerns were expressed by mercantile/debt collectors regarding recovering filing fees and process server fees. The effect of these Acts was that jurisdictional responsibility for the enforcement action in respect of debts up to \$25,000 switched from the Local Court to NTCAT.

Prior to 1 May 2016 filing and service fees were recoverable under the former Local Court's Schedule of Costs (which applied to the determination of small claims matters). Regulation 6 (of the former Small Claim Regulations) provided that a party could recover (as part of the judgment) all disbursements 'reasonably incurred' irrespective of the amount of the small claim.

The issue faced by mercantile agents under the new small claims regime is that while a mercantile agent can apply to recover the filing and service fee (and the NTCAT has the power to make a costs order in the mercantile agent's favour), such an application would be determined according to the discretion under section 132 of the *Northern Territory Civil*

and Administrative Tribunal Act and the basic rule in section 131 of the *Northern Territory Civil and Administrative Tribunal Act* that parties bear their own costs in a proceeding before the NTCAT.

In May/June 2016, the President of the NTCAT had advised that, although discretion exists to make a costs order (section 132), NTCAT has taken the view that there must be something out of the ordinary to justify departure from the usual rule. The President referred to *Dos Santos v Gallwey* [No.2] [2015] NTCAT 9 at [34 38], in which he stated that:

"In enacting the basic rule in section 131 that parties in NTCAT proceedings are to bear their own costs, the legislature must be taken to have known that there will be a party that 'wins' and a party that 'loses'...that parties involved in NTCAT proceedings are very likely to incur cost including fees and other losses and expenses routinely incurred in the context of legal proceedings (for example the cost of serving a document).

It follows that something more than success or failure in an ordinarily conducted NTCAT proceeding will need to be established by a party seeking a costs order under section 132.[they] will need to demonstrate that there is some feature of the case justifying a departure from the basic rule. The discretion to make a costs order must always be exercised according to the matters in section 132(2) of the *Northern Territory Civil and Administrative Tribunal Act* (and section 133 if applicable) and rule 10.2 of the NTCAT Rules."

Legislative Authority

Section 138 of the *Northern Territory Civil and Administrative Tribunal Act*.

NORTHERN TERRITORY OF AUSTRALIA
NORTHERN TERRITORY CIVIL AND ADMINISTRATIVE TRIBUNAL
AMENDMENT RULES 2016

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NORTHERN TERRITORY OF AUSTRALIA

Subordinate Legislation No. 42 of 2016*

Northern Territory Civil and Administrative Tribunal Amendment Rules 2016

The rules committee of the Northern Territory Civil and Administrative Tribunal, under section 138(3)(a) of the *Northern Territory Civil and Administrative Tribunal Act*, makes the following Rules.

Dated 13 October 2016

R. H. BRUXNER
President

A. MACRIDES
Member

* Notified in the *Northern Territory Government Gazette* on 23 November 2016.

1 Citation

These Rules may be cited as the *Northern Territory Civil and Administrative Tribunal Amendment Rules 2016*.

2 Rules amended

These Rules amend the *Northern Territory Civil and Administrative Tribunal Rules*.

3 Rule 10 replaced

Rule 10

repeal, insert

10 Costs

- (1) This rule applies to costs orders under Part 4, Division 6 of the Act.
- (2) For section 132(2)(d) of the Act, in deciding whether to make a costs order for a proceeding or part of a proceeding, the Tribunal must take into account:
 - (a) the extent to which a failure by a party to comply with these Rules or a direction by the Tribunal has resulted in a waste of money or time; and
 - (b) whether the failure to make a costs order for the out-of-pocket expenses reasonably incurred by a successful party would substantially deprive that party of relief.
- (3) A person seeking a costs order for a proceeding or part of a proceeding:
 - (a) may do so by making an ordinary application; and
 - (b) must include in the evidence in support of the application an itemisation of the costs and disbursements in respect of which the order is sought.
- (4) For subrule 10(2)(b), if a fee charged by a service provider for service of process and travelling allowance exceeds the sheriff fee, the excess is taken not to be reasonably incurred.

(5) In this rule:

out-of-pocket expenses means one or more of the following expenses:

- (a) the fee prescribed by the Regulations for filing an initiating application;
- (b) a fee charged by a service provider for filing a document;
- (c) a fee charged by a service provider for service of process and travelling allowance;
- (d) a fee charged by a service provider for a search to locate a person or thing;
- (e) a fee charged by a service provider for a business name search or company search.

service provider means:

- (a) the sheriff; or
- (b) a private bailiff, process server, inquiry agent or commercial agent.

sheriff, see section 4 of the *Sheriff Act*.

sheriff fee means the fee payable to the sheriff for service of process as prescribed in the Schedule, items 1 to 4, to the *Sheriff Regulations*.

successful party, for a proceeding or part of a proceeding, means a party who has substantially succeeded against another party in the proceeding or part.

4 Expiry of Rules

These Rules expire on the day after they commence.

