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Tony Sievers
Chair
Economic Policy Scrutiny Committee
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Via email: EPSC@nt.gov.au

Dear Mr Sievers

Thank you for your letter dated 25 June 2018 in regards to the Inquiry into the Northern Territory Civil and Administrative Tribunal Amendment Bill 2018 that the Economic Policy Scrutiny Committee is conducting.

Please find attached the response to the questions raised by the Economic Policy Scrutiny Committee in your letter.

Don't hesitate to contact my office on 89365610 if you require any further information.

Yours sincerely

NATASHA FYLES

2 JUL 2018

NORTHERN TERRITORY GOVERNMENT

ECONOMIC POLICY SCRUTINY COMMITTEE
Written Questions

Northern Territory Civil and Administrative Tribunal Amendment Bill 2018

Department of the Attorney-General and Justice

Proposed Section 101A Default Decisions

1. Several submissions recommended that the amendment be altered to include a requirement that before the Tribunal makes a default decision it must be satisfied that the initiating application and supporting documents have been served.

   a. *How does the amendment, in the context of current legislative arrangements for service of documents, ensure that default decisions are only implemented in cases where a party has been successfully served with the application?*

   NTCAT, like a Court, may only exercise jurisdiction against someone who has been served.

   The statutory provisions governing service of documents for NTCAT purposes are contained in section 25 of the Interpretation Act and in the rule set out in the answer to question (c). Service can be personal but can include:

   - *Sending it by prepaid post addressed to the recipient at the recipient's address. Such a document is taken to be served when it would have been delivered in the ordinary course of post.*
   - *By sending it to the recipient by fax; or a document served under subsection (1)(c) is taken to be served when it was sent to a current fax number of the recipient.*
   - *By leaving it, addressed to the recipient, at the recipient's address with someone who appears to be at least 16 years old and appears to live or be employed there.*

   In any matter (i.e. under the current NTCAT Act) where a respondent does not file a response to an initiating application, NTCAT will insist that the applicant proves that the application was served before proceeding to further hearing of the matter. Nothing about the introduction of the power to make default decisions changes that quite basic duty that applies to all courts and tribunals exercising these kinds of functions.

   b. *Section 50(5) of the Queensland Civil and Administrative Tribunal Act (QCAT) requires the applicant to prove that the respondent has been given a copy of the application before a decision by default can be made. Is there any reason why such a clause could not be recommended for inclusion in the NTCAT Amendment Bill?*

   For the reason in (a) above, it not necessary that the legislation spell out that the applicant to prove that the respondent has been given a copy of the application.

In respect of the Queensland provisions it can be noted that they do not operate so as to require that the applicant prove that the respondent has literally been "given" a copy of the application. Queensland Civil and Administrative Tribunal Rule 39 spells out that the word "given" has much the same meaning as "service" is generally used in these matters. Thus, in Queensland, "giving" includes sending the application to the relevant address, faxing it to an appropriate fax number, sending it to an appropriate email address or leaving it at the relevant address with a person over 18 years who is living or working at the address.

c. *The Explanatory Statement notes that "the hearing would deal with such matters as ensuring that the relevant papers have been served".*

   i. *What evidence must the Tribunal require as proof that documents had been served?*

   By NTCAT Rule 3(5):

   (5) For [the NTCAT Act] and these Rules, a document is served on a person if the person required to serve it:

   (a) brings the document to the person's attention; or

   (b) serves the document in a way allowed by section 25 of the *Interpretation Act* or section 109X of the Corporations Act 2001 (Cth); or

   (c) serves the document in a way directed by the Tribunal.

   NTCAT cannot proceed in a respondent's absence unless it is satisfied, having regard to the evidence, that the applicant has complied with Rule 3(5).

   An applicant may choose to prove service by means of documentary or oral evidence (or both).

   Once again, the situation for proof of service as regards the proposed default decision power is no different from what already applies in undefended NTCAT proceedings.

   ii. *Could the Tribunal make a default decision against a respondent who had not received the papers because their address was out-of-date?*

   Technically this is possible, but no more possible in relation to default decisions than in existing NTCAT proceedings (or indeed in the Courts, where the Interpretation Act provisions regarding service also apply). (See also answer to question (c)(ii) regarding appeal and re-opening rights in such circumstances).

   iii. *Where a default decision on the wrong person results in that person being placed on a black list or other defaulting credit report, what mechanisms are in place to ensure the ancillary correction of such databases.*

Such a decision is no more or less possible in NTCAT than in the Courts and will be no more likely as a result of the introduction of the proposed default decision power. In the unlikely event such a decision was made, the affected party has ample appeal rights within and outside NTCAT. Specifically, as a result of consultations by the Department of the Attorney-General and Justice corning a draft of this Bill the final version of the Bill includes an amendment to section 80 that spells out that NTCAT can re-open proceedings where a default decision was made under proposed section 101A (see clause 4 of this Bill).

d. *The Northern Australian Aboriginal Justice Agency (NAAJA) noted that there is no definition in the current Act or Bill that defines what is meant by "respond" as set out in Section 101A(1) and recommends that:*

   i. *The Bill be amended to provide "greater clarity on when a party is deemed to have failed to respond to an application".*

   ii. *That in order to ensure that a failure to respond is not due to language and literacy issues, that a failure to respond is only deemed to have occurred if a party does not attend a substantive hearing*

   Can you please provide comment on NAAJA's recommendations.

   [as to paragraph i]

   A difficulty arises from the fact that the NTCAT Act does not contain detailed provisions regarding what would be termed 'pleadings' in the Courts. The relevant provisions are in the NTCAT Rules, which refer to an initiating application (Rule 5) and a response (Rule 6). These are broadly equivalent to a statement of claim and a defence.

   The existing draft of the default decision provision is intended to pick up the reference in the rules to a 'response'. It is not clear that 'greater clarity' is necessary; however, the default decision provision could perhaps refer specifically to a failure by a party to file and serve a response in terms of the rules. (It can be noted here that when NTCAT issues an initiating application it attaches orders that identify the timeframes with which the response is to be provided to NTCAT and to the applicant.)

   [as to paragraph ii]

   The introduction of a requirement such as proposed in paragraph (ii) of the NAAJA submission would defeat the purpose of a power to make default decisions. The aim of the provision is to remove the need and associated cost of a substantive hearing.

2. All submissions commented that the standard of proof required in the initiating application needs to be improved if default decisions can be made on the paperwork alone. Currently, neither the Act, Rules or prescribed application form specify the type of evidence that should be included in the application, nor is the applicant required to provide supporting documentation.

The concern described involves a basic misconception as to the role of an initiating application.

The initiating application performs the same role as a statement of claim in a court proceeding. It identifies the facts asserted in support of a claim and the relief that is sought. An initiating process (whether in a Court or NTCAT) should never include a requirement for evidence or a 'standard of proof'.

The default decision power proposed is no different in substance from the default judgment power that Courts have for many years exercised (and at an administrative level) in relation to debts and liquidated claims.

a. *Section 33(2) of the QCAT Act, associated Rules 7 and 10, and the prescribed application form include a range of provisions to ensure that the evidence used in default decisions is of a high standard. Was any consideration given to incorporating similar provisions in the Bill? If not, why not?*

Neither section 33(2) of the QCAT Act, nor Rules 7 and 10 of the QCAT Rules, have anything to do with default decisions (let alone the 'evidence used' in default decisions). That is:

- *Section 33(2) merely provides that the application must "state the reasons for the application";*
- *Rule 7 merely states operational matters such as the need for the application to be in the "approved form" and that it must contain an address for service; and*
- *Rule 10, in relation to debts, merely states that the application must contain a statement of the amount claimed (including interest), the filing fees, how the amount is worked out and how it came to be owing.*

In any case, for NTCAT the equivalent requirements (relating to initiating process) exist by virtue of the combined operation of NTCAT Rule 3 and the approved form for an initiating application (which incorporates requirements for stating the grounds of an application).

Proposed Section 132 amended (Tribunal may make costs orders)

3. This amendment introduces an expectation that a successful party can recover fees that are necessary and reasonable for the conduct of a matter.

   a. *To what extent does the introduction of this expectation conflict with the NTCAT's objectives as set out in Clause 10 of the NTCAT Act, particularly clause 10 (b)?*

   The alteration effected by proposed section 132 applies only to certain (unavoidable) out of pocket expenses incurred by a successful party. It has no application, for example, to the costs of retaining legal representation (which will continue to be subject to the usual rule that parties bear their own costs).

   As to the NTCAT's objects, including accessibility, it is difficult to see how an expectation for recoverability of unavoidable expenses associated with taking proceedings in NTCAT has any negative impact on those objects. It may just as well be asked whether the non-recoverability of filing fees (and like expenses) by a successful party is a barrier to accessibility.

4. The Darwin Community Legal Service (DCLS) expressed concerns that the awarding of costs may reduce the accessibility of NTCAT as a forum for dispute resolution, as disadvantaged groups may be unwilling to take on the increased level of risk in relation to costs and charges.

   a. *What consideration was given to the potential for the proposed amendment to reduce the accessibility of NTCAT as a forum for dispute resolution?*

   b. *What mechanisms are in place to ensure that low income earners will not be disadvantaged by the proposed amendment?*

   Once again, it is emphasised that the proposed amendments do not concern costs generally. The 'increased level of risk' relates only to which party (the winner or the loser) is to bear unavoidable expenses of coming to NTCAT.

5. THE DCLS commented that the wording of s.132(2)(ba)(ii) is ambiguous and recommended changing the phrasing from "… if it was necessary and reasonable to make or respond to an application;" to "if the fee paid was necessary and reasonable to respond to ...", or "if the service paid for was necessary and reasonable to respond to...".

   a. *What impact would DCLS's proposed amendment have on the operation of the Bill?*

   There is no ambiguity.

Moreover, the proposed amendment would completely change the effect of the Bill. Read literally the suggested amendment removes the reference to costs incurred in making the application such that the provision would only deal with the costs of the respondent. The effect would be to limit recoverable costs to those incurred by a respondent.

6. NAAJA commented that costs orders are not appropriate in all situations and that exceptions should be made for adults under guardianship and for tenants who have been evicted.

   a. *As currently drafted, does NTCAT have the discretion to make exceptions of this nature?*

   Costs orders will always remain a matter for NTCAT's discretion.

   That said, it is not accepted that either of the exceptions proposed could or should be applied across the board. The mere fact that an adult is under guardianship or that a tenant has been evicted says nothing about the particular circumstances of a matter. (By way of illustration, NTCAT has dealt with many tenancy matters where the defaulting tenant has substantial means but has chosen to stop paying rent because of a change in their employment circumstances).

7. NAAJA considered that the word "expectation" in s.132 (ba) suggests that awarding costs is the default position and recommends that a note be included in the explanatory memorandum to the effect that awarding such costs will be considered by the Tribunal but there is no guarantee that such costs will be awarded.

   a. *Can you clarify for the Committee whether the s.132 amendment represents a change in the default position?*

   b. *What effect would the inclusion of a note in the explanatory memorandum (as proposed by NAAJA) have on the operation of the legislation?*

   The point of the amendment is to create an exception to the usual rule as to costs in NTCAT proceedings. The effect of the amendment, if passed, will be that fees of the specific nature referred to in section 132(2)(ba) will ordinarily be awarded to the successful party (if they are sought). As already noted, any costs order remains a matter for NTCAT's discretion. A note such as suggested is unnecessary.