North Australian Aboriginal Justice Agency

28 March 2025

Secretary, Legislative Scrutiny Committee
Email: LA.Committees@nt.gov.au

Dear members of the Legislative Scrutiny Committee

Submission on the *Attorney-General Legislation Amendment Bill 2025*

The North Australian Aboriginal Justice Agency (NAAJA) provides high quality, culturally appropriate legal advice, representation and justice related services to Aboriginal people throughout the Northern Territory. For over 52 years NAAJA has played a leading role in policy and law reform in areas affecting Aboriginal peoples' legal rights and access to justice.

We welcome the opportunity to make this submission to the Legislative Scrutiny Committee in relation to the Attorney-General Legislation Amendment Bill 2025 (the Bill).

Part 7—clause 17

Clause 17 of the Bill proposes to amend section 132 of the *Northern Territory Civil and Administrative Tribunal Act 2014* (NTCAT Act). Section 132 of the NTCAT Act allows NTCAT to make costs orders requiring an unsuccessful party to pay the successful parties costs in relation to any fee paid under the NTCAT Act or the costs of serving a document, conducting a search or obtaining other like services. According to the Bill's explanatory statement, the purpose of clause 17 is to "make it clear that NTCAT may make cost orders in favour of a party who has been substantially successful".

For reasons set out below, NAAJA is opposed to the proposed amendment in clause 17. It expressly moves away from the legislated objectives of NTCAT set out in section 10 of the NTCAT Act. These include to "be accessible to the public", and to "keep costs to parties involved in a proceeding to a minimum".

NTCAT was created with the purpose of being an accessible forum to review administrative decisions and resolving minor legal disputes. The focus of tribunals is to avoid complex and adversarial court proceedings, in favour of simpler, less formal and more accessible processes. An essential element of enabling access to justice is removing barriers which exist in courts, including the usual position that a

1800 989 842
reception@naaja.org.au
www.naaja.org.au
ABN: 63 118 017 842

Darwin
61 Smith Street
Darwin NT 0801
Tel: 08 8982 5100
Fax: 08 8982 5190

Katherine
10 Third Street
Katherine NT 0851
Tel: 08 8972 5000
Fax: 08 8972 5050

Alice Springs
55 Bath Street
Alice Springs NT 0870
Tel: 08 8950 9300
Fax: 08 8953 0784

Tennant Creek
61 Paterson Street
Tennant Creek NT 0860
Tel: 08 8962 1332

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successful party to court proceedings is entitled to their costs. This aligns with the Australian Law Reform Commission's (ALRC) 1995 report, *Costs shifting—who pays for litigation*, which examined the impact of costs rules on access to justice. The ALRC found that the traditional 'loser pays' principle can deter individuals from pursuing legitimate claims or reviews, due to the financial risks involved.[1]

Under the current provision of the NTCAT Act, parties are to bear their own costs subject to ss. 132 and 134.[2] Under s. 132, the NTCAT *may* make a costs order but the Tribunal must consider the matters set out in s. 132(2). Those matters already include consideration of the "expectation" that a party which is substantially successful would normally recover any fees paid under the NTCAT Act or any fees paid to serve a document, conduct a search or obtain other related services. The proposed amendments in clause 17 of the Bill are clearly intended to make it easier for the tribunal to make costs orders in relation to these matters.

Administrative tribunals across Australia are each predicated on the default position that parties bear their own costs. The position in NTCAT is already out of step with other jurisdictions before these amendments. For instance:

- The New South Wales Civil and Administrative Tribunal will depart from its default position in respect of costs, only in "special circumstances". Factors to consider include:
    - "whether a party has conducted proceedings in a way that unnecessarily disadvantaged another party"
    - the "relative strengths of claims…including whether a party has made a claim that has no tenable basis in fact or law"
    - whether proceedings were "frivolous or vexatious".[3]
- The Victorian Civil and Administrative Tribunal is only empowered to make a costs order where one party causes "unnecessary disadvantage" to another party. Examples in the enabling legislation closely mirror the wording of the NSW legislation. They include:
    - "the relative strengths of the claims"
    - "failing to comply with an order or direction of the Tribunal"
    - "vexatiously conducting the proceeding".[4]
- The Queensland Civil and Administrative Tribunal may order costs "in the interests of justice" with consideration of, among other factors:
    - "the relative strengths of the claims"
    - "the financial circumstances of the parties to the proceeding".[5]

[1] Australian Law Reform Commission, *costs shifting—who pays for litigation* ALRC Report No. 75 (1995), 7, 22.
[2] NTCAT Act s. 131. Section 134 is related to costs against representatives which is not presently relevant.
[3] *Civil and Administrative Tribunal Act 2013 No 2* (NSW), s 60.
[4] *Victorian Civil and Administrative Tribunal Act 1998* (Vic), s 109.
[5] *Queensland Civil and Administrative Tribunal Act 2009* (Qld), s 102.

- The South Australian Civil and Administrative Tribunal,[6] the Tasmanian Civil and Administrative Tribunal[7] and the State Administrative Tribunal of Western Australia[8] all operate from a general rule of each party bearing their own costs unless otherwise provided.

- In the federal jurisdiction, the legislation governing the Administrative Review Tribunal is more complex, however the relevant explanatory memorandum confirms that the "Tribunal is by default a no-costs jurisdiction."[9]

Like other jurisdictions, NTCAT has a default setting wherein "parties bear their own costs".[10] However, we submit that the current qualifications to that default setting offer a far wider scope to make costs orders than equivalent legislation elsewhere in Australia. For example, factors that NTCAT "must take into account", include:

- "the need to ensure that…parties are not disadvantaged by proceedings that have little or no merit; and"[11]

- "the expectation that a party who has substantially succeeded against another party would normally recover…any fee paid".[12]

We submit that the above factors clearly point decision makers *towards* making costs orders. We submit that the sole factor that NTCAT must consider in this context which weighs *against* a costs order is "the main objectives of the tribunal that are relevant to simplifying proceedings…and to keeping costs to parties…to a minimum".[13] Conspicuously, there is no mention of matters like "unnecessary disadvantage", the "relative strengths of claims", the "financial circumstances of parties to the proceedings", or whether matters are "frivolous or vexatious".

NAAJA has assisted clients in matter before the tribunal where NTCAT has ordered costs against clients who have little to no means of paying them, undermining its status as an accessible form of justice.

Despite NTCAT having fewer protections against costs orders than equivalent tribunals across the country, it exists within a tradition of civil and administrative tribunals that aim to offer low-cost and accessible justice. This is imperative, as the court system can appear bewildering and prohibitively expensive for large portions of the community.

Accordingly, we urge the committee to recommend that clause 17 as currently proposed be removed in its entirety. Instead, we encourage the committee to consider recommendations to amend clause 17 to constrain cost orders to exceptional circumstances or cases where the conduct of a party causes unnecessary disadvantage to another party, in line with provisions in other jurisdictions. We refer to examples of legislation across the country above, for example in NSW, Queensland and Victoria.

Progressing with clause 17 of the Bill in its current form would undermine the vision of NTCAT as an accessible forum for resolving civil and administrative claims. It risks creating unnecessary barriers to accessing justice which undermine NTCAT's purpose of being accessible and affordable for members of the public.

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[6] *South Australian Civil and Administrative Tribunal Act 2013* (SA), s 57.
[7] *Tasmanian Civil and Administrative Tribunal Act 2020* (Tas), s 120.
[8] *State Administrative Tribunal Act 2004* (WA), s 87.
[9] Explanatory memorandum to the *Administrative Review Tribunal Bill 2023* [728], <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2Fr7117_ems_776b21f8-b9fa-4028-a9a1-b8e582e6d857%22>.
[10] *Northern Territory Civil and Administrative Tribunal Act 2014* (NTCAT Act), s 131.
[11] NTCAT Act, s 131(2)(b).
[12] NTCAT Act, s 131(2)(ba).
[13] NTCAT Act, s 131(2)(a).

Part 9—clause 23

Clause 23 of the Bill proposes to add sections 18A and 18B to the list of provisions at section 7(5) of the *Residential Tenancies Act 1999* (NT) (**RTA**). Section 7(5) of the RTA exempts certain provisions from the *Housing Act 1982* (NT) (**HA**). As NAAJA understands it, the overall consequence of clause 23 is that landlords that gather information pursuant to sections 18A or 18B, are not required to comply with the requirements regarding keeping or destroying certain information.

In NAAJA's view, social housing tenants should not be treated differently to private tenants. The rights and duties should apply equally. We submit that more information is required before changing how social housing tenants are treated as compared to private tenants.

We note that the explanatory memorandum sheds very little light on the purpose or intent of this provision, or the mischief it is trying to remedy.

Please contact us if you require further information or if you would like a representative of NAAJA to appear before the committee.

Yours sincerely

Anthony Beven
Acting chief executive officer