Level 2, Winlow House, 75 Woods St Darwin
GPO Box 3180 Darwin NT 0801
phone: 8982 1111
freecall: 1800 812 953
fax: 8982 1112
email: info@dcls.org.au
website: www.dcls.org.au
ABN: 42 840 626 724

DARWIN COMMUNITY LEGAL SERVICE

15 February 2018

Robert Bradshaw
Director, Policy Coordination
Department of the Attorney-General and Justice
8th Floor Old Admiralty Towers
The Esplanade
Darwin NT 0800

Via email to: Policy.AGD@nt.gov.au

Dear Mr Bradshaw,

Draft Northern Territory Civil and Administrative Tribunal Act Amendment Bill 2018- NTCAT Costs Orders and Default Decision

The Darwin Community Legal Service (DCLS) has reviewed the proposed draft bill and is concerned that the changes have the potential to undermine the intent and purpose of the NT Civil and Administrative Tribunal (NTCAT), and to unfairly impact access to justice for disadvantaged members of our community.

Background

The Darwin Community Legal Service provides advice and legal assistance in several areas that are within the NTCAT's jurisdiction. We assist clients with casework services and representation in an effort to address barriers to justice faced by the marginalised members of the community. Many of our clients have multiple intersecting disadvantage, like language and literacy, health, housing and financial problems, and those clients are most likely to be represented by our Service in the NTCAT. Our Service also assists many clients to self-represent in the NTCAT, if they have some level of English literacy and some comprehension and ability to navigate the process.

The NTCAT as a no-costs jurisdiction

DCLS assists clients with advice about making or defending applications to the NTCAT on a daily basis. It is very important for our clients that barriers to justice are minimised, especially the risks of disproportionate costs being awarded against them if they are unsuccessful. Due to the NTCAT being a no-costs, informal and expeditious jurisdiction, it allows inexperienced lay people to self-represent in order to exercise and enforce their legal rights. The NTCAT has been effective in providing a low-cost forum where financially disadvantaged people can seek justice and has enhanced the accessibility of legal remedies in the NT.

Proposed new sub-section 132(1) (ba) Tribunal may make costs order
This provision changes the current position where an order for the losing party to pay the filing fees and costs of disbursements is only made in circumstances where the failure to so would lead to the successful party being substantially deprived of the remedy they have been awarded. The change would make such an order the normal, expected outcome. It is DCLS' view is that Rule 10 (2)(b) is currently adequate to address out of pocket expenses on a case by case basis.

DCLS does not object to the change to allow application fees under the NTCAT Act to be recovered from the unsuccessful party, because this could also benefit many of our clients who apply to the Tribunal seeking a vindication of rights and smaller monetary amounts. However, DCLS considers there needs to be a limited ability for costs to be awarded, ensure a capping on costs recoverable is in place and that a reference to *reasonableness* ought to be incorporated into the proposed sub-section 132(1) (ba)(i).

DCLS is concerned that making other disbursements, such as service and search fees, recoverable by the successful party could inadvertently create a barrier to access to justice. Many of our clients are inexperienced in legal proceedings and do not feel confident in guessing what the outcome of their proceeding may be, even when they feel sure that they have been legally wronged. For financially disadvantaged defendants, threats of orders for the other side's disbursements can have the effect of scaring vulnerable litigants from potentially not proceeding with their claim, or settling, and agreeing to pay money as a risk management strategy, even where they have no legal cause to do so.

DCLS is strongly of the view that the limitation to "necessary" disbursements in proposed sub-section 132(1) (ba)(ii) is important and should remain, and emphasise the need to incorporate a reference to *reasonableness* in providing for a costs award relating to necessary disbursements. Our Service also considers that any such award should be limited to costs that are *proportionate*, as well as necessary and reasonable.

Further, DCLS is concerned that gradual changes like these can encroach on the NTCAT's functions as a no-cost less formal jurisdiction, and not keeping within the original intention when transferring the small claims jurisdiction from the local court to the Tribunal. The benefits of having a no-costs jurisdiction, where parties bare their own costs, include increased access to justice and increased ability for self-represented persons to understand the costs and risk of litigation before they commence or respond to it. Having proceedings that are easy to understand and navigate is an important part of building public confidence in the justice system. The information presented in the Consultation Paper does not justify the inclusion of this cost regime, nor does it support the principle of access to justice, by providing a forum that is accessible, expedient, flexible and adaptable to cater for self-represented litigants, conceivably a primary design of a tribunal. Our concern is that to move away from a 'no costs' regime would open the floodgates and usher in further changes that recreate a court structure within a tribunal environment.

Proposed new section 101A: default decisions
In cases where a defendant to a small claims matter does not appear, the NTCAT's current practice is to deal with the matter on the papers and to provide short form reasons. The

NTCAT's 2015-2016 annual report (para 78) says this is a problem "in a context where it is not uncommon for dozens, if not hundreds, of debt recovery actions to be commenced at the same time [...] the potential for unnecessary costs and delay [...] is patent" and calls for "a power, exercisable in clearly understood circumstances, to make orders in the nature of a default judgment".

DCLS believes that the desirability of a default judgment power needs to be balanced against the desirability of Tribunal oversight of matters to ensure that orders are only granted where the applicant has a case, and there are good grounds for the orders sought to be made. The Service considers that in many cases it is not appropriate for final orders to be made on application alone unsupported by evidence. While DCLS accepts that the required level or proof may be lower where the defendant does not appear, we do not consider that the non-appearance of the defendant ought to result in a free "windfall" judgment for the applicant, allowing them to claim any amount they assert they are owed without having to prove that the debt (or other cause of action) exists.

Our Service has particular concerns because a number of our clients face disadvantages which can make it difficult for them to appear at the Tribunal, such as homelessness, health problems, or cultural issues. The class of persons who have attributes that make them less likely to appear in the NTCAT should not be a class of persons against whom unsubstantiated claims can easily be made. It is rarely recalcitrance, and usually broader disadvantage that contributes to the failure to appear. As far as is possible, claims against those who fail to appear should be subject to some level of tribunal oversight, such as a review on the papers and short form reasons.

DCLS does not consider that the proposed new section 101A is appropriate for inclusion into the NTCAT Act. In order for the risks of unfair outcomes to be minimised, the circumstances in which a default judgment could be made without considering the merits of claim should be restricted to ensure the power is not too wide. This could involve the Applicant establishing that valid service was effected, and that there was a reasonable chance the absent party understood the nature of the proceedings, in addition to evidence produced to establish a claim that is considered on the papers. Safeguards should also be included, the circumstances should be limited and the availability of review and reopening options in the aftermath of default decisions should be widened. For example, the time frame allowed to reopen a matter decided by default judgment should be increased to minimise the chance of unfair and unproved claims attaching to people who were prevented from attending the tribunal due to socio-economic problems or health challenges. The experience of our Tenancy Advice Service, whilst not in Small Claims, that without untested evidence, claims made for example by landlords for repairs or cleaning costs without providing the tenant an opportunity to respond to or rectify the situation would pass unchallenged and an order made to this effect. Further the amendment affecting Small Claims alone, would create a disparity in the rights and remedies of parties as compared to parties in other jurisdictions of the NTCAT.

DCLS supports the principle established by the President of NTCAT, who indicated that in the ordinary course, the requirement for a hearing and written reasons for decision are fundamental to the achievement of NTCAT's outcomes and that a default judgement power,

if introduced, should be exercisable in clearly understood circumstances. The efficiencies of entering a default judgement in the matter of undefended debt recovery claims should be balanced against the challenges of remoteness, culture and language in the Northern Territory justice system (NTCAT annual report, 2015-2015, paras 76-79).

The Darwin Community Legal Service is pleased to provide our responses to the Consultation Paper and proposed draft bill. We would be very happy to meet with your Department to further discuss the issues we have raised in our submission.

Yours sincerely

Nicki Petrou
Principal Solicitor