Northern Territory Civil and Administrative Tribunal Amendment Bill 2018

Darwin Community Legal Service

Further Submission to the Economic Policy Scrutiny Committee
11 July 2018

Summary of DCLS response

The foundation for our original and subsequent submissions is that the NTCAT was formed to dispense accessible justice and that justice requires a fair hearing. The amendments impact both principles and therefore require serious consideration.

The Department of Attorney-General and Justice (DAGJ) seeks to emphasise that service provisions and the requirements of an initiating application are to remain the same even though a new power to make default decisions is being introduced. The potential for miscarriage of justice is heightened where the voracity of a claim is not tested and the process is not open to substantiation at hearing.

The Tribunal's objective of access to justice is facilitated by keeping costs to parties involved in a proceeding to a minimum insofar as is just and appropriate, with the usual presumption that the parties bear their own costs. An **expectation** that costs follow the decision, even if at this stage it is limited to the recovery of certain fees, is contrary to the presumption and may open the floodgates for further exceptions.

We are sympathetic to the resource constraints and workload of the NTCAT, but reiterate our position that the changes will impact most on those who are most disadvantaged.

Default Decisions

The reasoning behind the introduction of a default decision making power seems to be the "administrative and judicial resources of the tribunal are better devoted to matters in which all parties to the dispute are actively engaged".[1] However the role of the Tribunal is to facilitate access to justice and in doing so overcome some of the obstacles to active engagement; including remoteness, English as a second or other language, homelessness, poor literacy and other elements of disadvantage and vulnerability.

Are you less entitled to a hearing if there are impediments to active engagement, or would access to justice be best served by recognising and responding to the impediments?

The evidentiary basis behind the assumption that defendants who do not appear in matters before the NTCAT are "refusing" to appear has not been provided. The matters that come to DCLS do not indicate a conscious refusal to appear, but rather a lack of understanding of the process or a lack of communication of service. We suggest that the problem of non-appearance may be better addressed by reviewing the requirements for service to be affected in fact, and for communications to be appropriately tailored to enhance a defendant's understanding of the process.

A common example of the situations where a defendant may fail to appear is in relation to a "debt" incurred by an Aboriginal person living on a remote community. The recent hearing of the Banking Royal Commission served to illustrate some of the examples where contracts have been entered into as a result of misleading conduct and unfair practices, often involving cold calling people at the community office and subsequently signing them up to a contract for a car or funeral insurance without any consideration for their capacity to pay or

[1] The Hon Natasha Fyles, Attorney-General, Hansard Debates, 10 May 2018, NT Legislative Assembly

the appropriateness of the service offered. These unscrupulous salespeople, often based interstate, then commission a debt collector to pursue amounts owed (in the case of funeral insurance a debt accrued when the Federal Government stopped direct debit premiums being deducted from welfare payments and contracts were cancelled because the company could not find the 6000 people that entered into them!). The minimalist requirements for service mean that all is required is for documents to be sent to or left at the community office. The defendant might not live there anymore, might be in a regional town seeking medical treatment, might have moved for family reasons, or might not know it is at the community office. Further they may not be aware of outstanding payments in the first place.

Given the realities of the Northern Territory, it is hard to argue that If an alleged debtor fails to deny an obligation for a debt that it is reasonable for NTCAT to assume that the monetary amount is, in fact, owing. It is important to stop and consider at this point the consequences that may be suffered by the party against whom a default decision could be made – judgment debt, fines, withdrawal of services, inability to secure housing and employment, and ultimately imprisonment.

DAGJ make reference to the default decision making power proposed as 'no different in substance from the default judgment power that Courts have for many years exercised in relation to debts and liquidated claims'. It is important to emphasise that NTCAT is a Tribunal, not a Court, and it was established as a Tribunal for the specific purpose of dispensing accessible justice. It's processes and powers are different because its objectives are different, and it does not and should not have the functions and powers of a Court. The Attorney General, the Hon Natasha Fyles MLA, sought to distinguish the NTCAT from a court in introducing the bill by saying "The amendments proposed in this legislation do not, we believe, make NTCAT like a court."[2]

It is notable that the administrative tribunals of other jurisdictions, such as Victoria and NSW, do not have default decision making powers and they operate in a context where remoteness, language and disadvantage are not significant factors.

DCLS maintain that should the Act be amended to enable a default decision making power there are important aspects that must be satisfied, which are fundamental underpinning principles of administrative law – those of natural justice and procedural fairness. If there is to be a default decision making power, then DCLS proposes the following safeguards:

- Substantiation of the debt, evidence of the understanding of the defendant in relation to the relevant obligation, and proof that the defendant had knowledge that a debt was owed.
- Proof that the defendant was served and understood the obligation to attend proceedings and what options were available to do so.
- A review of the new provisions after 6 and 12 months of operation to consider the nature of these decisions are made and the social impact and circumstances of defendants against whom orders are made.

The EPSC reference the provisions that apply in the QCAT and this seems a good starting point for ensuring the NTCAT objectives are upheld.

Service

DAGJ has drawn attention to the minimal requirements for service under the *Interpretation Act* and under Reg 3 (4) of the NTCAT Regulations, which provides that NTCAT **may** rather than must, require proof of service. The discussion of default decision making has shone a light on the issue of service and may provide an opportunity to review these provisions to better support access to justice and attendance at hearings.

[2] Op cit

Re-opening proceedings

DAGJ seek to rely on the provisions for re-opening matters to address potential injustice resulting from default decision making. The provisions seem to exacerbate the issue proposed to be addressed by these provisions; ie the drain on resources of the NTCAT; and would be better served by requiring applicants to both substantiate claims and provide proof of service in the first instance and eliminate the grounds for a further hearing.

Our clients, who are mainly those who suffer financial and other disadvantage, are unlikely to initiate proceedings in the first place and the onus should not be on them to enter into legal proceedings to correct an injustice. It is further noted that there is no clear process in the Bill to allow for a decision made by default to be set aside and further amendment is required if this provision is to be implemented.

Costs

If such a broad power to award costs is to be introduced there needs to be further clarification as to the costs that will be encompassed by these orders. This will provide certainty to the members of the Tribunal in the exercise of the power, as well as to the parties to any application, and will alleviate any concern that an application for costs, regardless of what the cost is related to, is merely a rubber-stamping exercise.

DCLS submits that the current provisions in Rule 10 adequately provide for orders of costs in line with the objectives of the Act.

However, if the amendment were to be pursued there should legislative guidance as to what a reasonable cost is, and the cost should also be required to be proportionate and using the wording from DAGJ, also unavoidable. Specific provisions in the Rules should outline the kind of disbursements allowed and prescribed amounts to ensure certainty and consistency of application. The QCAT provisions provide some initial guidance.

Kate Kelly
Community Solicitor
Darwin Community Legal Service