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Statutory review of the *Civil and Administrative Tribunal Act 2013*

Thank you for the opportunity to provide input into this review.

Avant is Australia's largest medical defence organisation, providing professional indemnity insurance and legal advice and assistance to more than 78,000 healthcare practitioners and students around Australia.

We provide comments based on our extensive experience representing and assisting medical practitioners in the occupational division of the NSW Civil and Administrative Tribunal (NCAT), in disciplinary proceedings brought against them under the *National Health Practitioners Regulation National Law* as it applies in NSW. As a national organisation we represent and assist medical practitioners in civil and administrative tribunals in other states in territories around Australia.

Based on this experience, our suggestions to improve timeliness and reduce costs are:

- NCAT could refine its case management processes in the occupational division.
- The *Civil and Administrative Tribunal Act 2013* should be amended to give specific power to NCAT to conduct proceedings remotely or on the papers.
- The *Civil and Administrative Tribunal Act 2013* should be amended to clarify the power of the tribunal to expand and clarify NCAT's powers to deal with and dispense with proceedings.
- The *Civil and Administrative Tribunal Act 2013* should be amended to include alternative dispute resolution processes to encourage greater use of alternative dispute resolution in NCAT.

Costs, practice and procedure

In our experience, there has been a significant increase in the costs associated with matters before NCAT.

The guiding principle to be applied to matters before the Tribunal is to facilitate just, quick and cheap resolution of the real issues in proceedings (section 36 *Civil and Administrative Tribunal Act 2013 (NSW Act)*). Section 36(4) provides that the practice and procedure should be implemented so as to facilitate the resolution of the issues between the parties in such a way that the cost to the parties and the Tribunal is proportionate to the importance and the complexity of the subject matter of the proceedings.

We suggest that consideration be given to applying case management principles in the occupational division with a view to narrowing the real issues in dispute. This would allow proceedings to be streamlined, thereby reducing both the cost and duration of proceedings. For example, summonses have increased considerably in the health practitioner occupational division, increasing the volume of documentation, length of hearings, and cost, both to the parties and the tribunal. Greater scrutiny of the purpose and scope of summonses at an interlocutory stage would assist in applying section 36.

Another mechanism for facilitating the just, quick and cheap resolution of proceedings is by conducting hearings remotely or on the papers. Civil and administrative tribunals in other jurisdictions have specific powers to conduct proceedings in this way.¹ We suggest that the NSW Act be amended to include a similar power.

There are other ways that matters can be dealt with more efficiently within the tribunal. The National Law envisages that proceedings do not have to be conducted by means of a full open hearing. For example, the National Law provides that an inquiry need not be held if a respondent admits to the complaint.² The National Law also recognises that a tribunal may decide not to conduct an inquiry, or may at any time terminate an inquiry or appeal, if, for example, the practitioner is no longer registered.³

We consider that it is not always necessary for there to be admissions before the Tribunal can decide a full inquiry or any inquiry is not called for, in the public interest, and a hearing may be dispensed with or otherwise limited by agreed statements.

¹ *Queensland Civil and Administrative Tribunal Act 2009 (Qld)* sections 32; *Victorian Civil and Administrative Tribunal Act 1998 (Vic)* section 100; *State Administrative Tribunal Act 2004 (WA)* section 60; *South Australian Civil and Administrative Tribunal Act 2013 (SA)* section 67.

² *Health Practitioner Regulation National Law (NSW)* section 65

³ *Health Practitioner Regulation National Law (NSW)* Schedule 5D.12(1)(a)(ii)

It would be useful to clarify the powers of the tribunal to deal with and dispense with proceedings. For example, section 55 of the NSW Act gives power to NCAT if the applicant (i.e. the 'complainant' in the occupational division) applies to withdraw the application). However, the Tribunal has no power to dismiss proceedings on the application of the respondent. We suggest that section 55 be broadened to expand and clarify NCAT's powers to deal with and dispense with proceedings.

Alternative dispute resolution

Our view is that alternative dispute resolution should be used in the occupational division in NCAT, to facilitate the just, quick and cheap resolution of proceedings in accordance with the guiding principles in section 36.

Our experience in other states is that matters are frequently determined through mediation and consent orders and the tribunals have power to make orders to effect an agreed settlement.⁴

In NSW, the only relevant legislative power is the power of the Tribunal to make orders to effect an agreed settlement (see section 59 of the Act). While the equivalent tribunals in other jurisdictions have a similar power,⁵ that power is supported by alternative dispute resolution processes built in to the legislation.⁶ We suggest that NCAT be amended to mirror the provisions in other jurisdictions.

The Tribunal may be concerned that by allowing settlement by agreement, the deterrent effect of a published decision in the occupational division will be lost. This can be overcome by adopting a practice similar to that which occurs in Western Australia whereby the orders of the Tribunal effecting the agreed settlement includes an agreed statement of facts, and agreed sanction. If a sanction cannot be agreed, a hearing could proceed to determine the appropriate outcome or final orders based on agreed facts. This would result in significant savings in time and costs.

Further input

We would welcome the opportunity to participate in a roundtable discussion to expand on these points and further explore ways in which NCAT could resolve disputes more quickly, cheaply and fairly, in the occupational division.

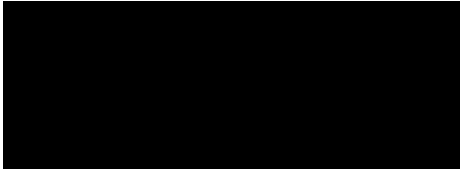
⁴ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) sections 84-86; *Victorian Civil and Administrative Tribunal Act 1998* (Vic) section 93; *State Administrative Tribunal Act 2004* (WA) section 56; *South Australian Civil and Administrative Tribunal Act 2013* (SA) section 52.

⁵ See above note 2

⁶ See for example *Queensland Civil and Administrative Tribunal Act 2009* (Qld) Part 6; *Victorian Civil and Administrative Tribunal Act 1998* (Vic) sections 83-92; *State Administrative Tribunal Act 2004* (WA) sections 52-55; *South Australian Civil and Administrative Tribunal Act 2013* (SA) sections 50-51.

Please contact me on the details below if you require any further information or clarification of the matters raised in this submission.

Yours sincerely



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