

**General Enquiries
and Client Service**

P 1800 777 156

F 1800 839 284

**Claims and Legal
Services**

P 1800 839 280

F 1800 839 281

www.miga.com.au

miga@miga.com.au

Postal Address

GPO Box 2048, Adelaide
South Australia 5001

10 July 2019

The Director, Courts Strategy
NCAT Statutory Review
Department of Justice

Via email – policy@justice.nsw.gov.au

Dear colleagues

MIGA Submission – NSW Civil and Administrative Tribunal Review

MIGA welcomes the opportunity to contribute to the Department of Justice's statutory review of the *Civil and Administrative Tribunal Act 2013 (NSW)*.

A copy of its Submission is enclosed.

MIGA is a medical defence organisation and medical / professional indemnity insurer advising, assisting, educating and advocating for medical practitioners, medical students, healthcare organisations and privately practising midwives throughout Australia. With over 33,000 members nationally, MIGA has represented the medical profession for 119 years and the broader healthcare profession for 16 years.

You can contact Timothy Bowen, telephone 1800 839 280 or email [REDACTED] if you have any questions about MIGA's Submission.

Yours sincerely

[REDACTED SIGNATURE]



MIGA Submission

NSW Justice Statutory Review Civil and Administrative Tribunal Act 2013

July 2019

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Executive Summary – MIGA’s position

1. MIGA is broadly supportive of the NSW Civil and Administrative Tribunal (**NCAT**) framework and operation, particularly in professional disciplinary matters, but seeks a number of changes to improve efficiency and reduce costs in both professional disciplinary and consumer matters involving healthcare.
2. In professional disciplinary matters involving medical and other health practitioners, MIGA supports a range of existing NCAT frameworks and practices. Better parity in timeframes given to parties to prepare their case and other practical improvements are needed to increase efficiency and reduce costs. Greater scope to resolve matters without a hearing is also needed. Recognising this issue is outside the scope of the review, it deserves broader consideration with key stakeholders, including MIGA.
3. MIGA has significant reservations about the use of NCAT’s consumer jurisdiction for healthcare liability claims. It acknowledges that the scope of NCAT’s jurisdiction in this area is not under review. To try and address some practical issues, it proposes changes around parties’ representation, use of conciliations and awards of costs, with the intention of a fairer, more efficient jurisdiction.
4. Around guardianship matters, MIGA’s role is usually before any NCAT application is made. From its own experience advising and assisting its members and clients, it does not have concerns. It queries if there is an issue around the NCAT’s scope of inquiry in consent to treatment cases given issues that arose in one reported case. It is important to ensure sufficient evidence is gathered in these cases.

MIGA’s interest

5. MIGA is a medical defence organisation and medical / professional indemnity insurer advising, assisting educating and advocating for medical practitioners, medical students, healthcare organisations and privately practising midwives throughout Australia. With over 33,000 members nationally, MIGA has represented the medical profession for 119 years and the broader healthcare profession for 16 years.
6. MIGA’s lawyers regularly provide advice and assistance to its members and clients around a range of NCAT matters involving professional discipline, consumer claims and guardianship. It is also represented on NCAT’s Occupational Division Consultative Forum. Operating nationally, MIGA is well-placed to compare the experiences its members and clients have in NCAT as compared with similar tribunals and contexts in other Australian states and territories.
7. Through its Risk Management Program, MIGA provides education on a range of medico-legal and risk management issues around professional discipline, complaints, claims, capacity and consent to treatment.
8. MIGA’s advocacy work includes a range of issues around professional disciplinary, civil claim and guardianship, and includes
 - Stage 1, 1A and 2 reviews / inquiries on *Health Practitioner National Law (the National Law)* reforms¹
 - Federal Senate inquiries into the medical complaints process and National Law complaints²
 - Queensland Parliamentary inquiry into the Queensland Health Ombudsman’s functions³
 - NSW Law Reform Commission Review of the *Guardianship Act 1987* (NSW)⁴
 - Queensland Parliamentary inquiry into guardianship legislation reforms.⁵

¹ For MIGA’s involvement in the Stage 1 inquiry, see submission (www.parliament.qld.gov.au/documents/committees/HCDSDVFPC/2017/NationalLaw/submissions/012.pdf) and hearing evidence (www.parliament.qld.gov.au/documents/committees/HCDSDVFPC/2017/NationalLaw/trns-ph17July2017.pdf)

² For MIGA’s involvement in the later inquiry, see submission (www.aph.gov.au/DocumentStore.ashx?id=345cfe7e-0e40-47e2-8aaf-c04df7196d6e&subId=463893) and hearing evidence (parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22committees/commsen/f52e718c-9bc6-4226-b34d-8182f4f2af65/0000%22)

³ For MIGA’s involvement in the inquiry see submission (www.parliament.qld.gov.au/documents/committees/HCDSDVFPC/2016/PerformanceQHO/submissions/033.pdf) and hearing evidence (www.parliament.qld.gov.au/documents/committees/HCDSDVFPC/2016/PerformanceQHO/16-trns-20Oct2016.pdf)

⁴ MIGA’s last submission to the review is available at www.lawreform.justice.nsw.gov.au/Documents/Current-projects/Guardianship/Submissions%20DP/GA153.pdf

⁵ For MIGA’s involvement in the inquiry see submission (www.parliament.qld.gov.au/documents/committees/LACSC/2017/GAOLAB2017/submissions/013.pdf) and hearing evidence (<https://www.parliament.qld.gov.au/documents/committees/LACSC/2017/GAOLAB2017/trns-ph-11Oct2017.pdf>)

Healthcare professional disciplinary matters

MIGA position at a glance

MIGA supports a range of existing NCAT frameworks and processes in professional disciplinary matters involving medical and other health practitioners, particularly Occupational Division and Health Practitioner List procedures.

It seeks greater scope to dispense with inquiries / hearings where the parties have agreed on complaint particulars or facts, and propose findings and orders by consent, but recognises this would require National Law amendment and is outside the scope of the review. However it is an issue warranting further consideration.

It seeks better parity in timeframes given to parties to prepare their cases and a range of practical improvements to increase efficiency and reduce costs, including improved NCAT forms, introduction of e-filing, electronic availability of summonsed material and improved transcript availability.

(a) Where professional disciplinary matters work well

9. MIGA supports much of the NCAT framework and practice around professional disciplinary matters.
10. The following features and initiatives are important, work well and should be retained
 - The Occupational Division and Health Practitioner List
 - Bespoke listing arrangements, including use of initial directions hearings, case conferences and, as needed, further directions hearings
 - Provision of Occupational Division-specific guidance for professional disciplinary matters and health professional registration appeals
 - Requirement for expert witnesses to follow a code of conduct
 - Scope for using expert witness conclaves in appropriate matters
 - The Occupational Division Consultative Forum.
11. Although the composition of a health practitioner tribunal is set under s 165B of the National Law, which is beyond the scope of the review, MIGA strongly supports the current arrangements involving two practitioner peers as members of each tribunal.
12. MIGA has been encouraged by the improvements it has seen in NCAT operation since it began in 2014, particularly around listing arrangements and communication with parties.
13. It appreciates the leadership and work of former Occupational Division Head Judge Boland around the Health Practitioner List and the Division more generally. The degree of engagement offered by the Division's Consultative Forum is to her Honour's credit. This has been a key part of ensuring ongoing improvements in professional disciplinary and broader Division processes.

(b) Dispensing with inquiries / hearings

14. MIGA believes there should be greater scope for NCAT to dispense with an inquiry / hearing in health practitioner disciplinary matters, particularly where the parties propose orders by consent.
15. It recognises this is outside the scope of the review given the ability to do this is constrained by the National Law, not the NCAT Act, but believes this issue warrants consideration and consultation with key stakeholders, including MIGA.
16. By way of example, the Health Care Complaints Commission (HCCC) as complainant and a medical practitioner respondent may have
 - Reached agreement on a statement of facts or the practitioner has admitted the aspects of the complaint which the HCCC maintained
 - Proposed findings and orders, including any protective conditions, by consent.
17. From its experience in other states and territories, tribunal hearings in health practitioner disciplinary cases are commonly disposed of without hearing in these circumstances. MIGA believes this is an approach which should be taken by NCAT in appropriate cases.

18. NCAT's ability to dispense with an inquiry / hearing in health practitioner disciplinary matters is limited to circumstances involving a complaint being admitted in its entirety (s 165 of the National Law), or where it is not in the public interest to continue with an inquiry / hearing in one of the following circumstances
 - The complainant fails to comply with NCAT requirements
 - The practitioner ceases to be registered, or
 - The complaint is withdrawn (see Schedule 5D, cl 12 of the National Law).
19. Where the HCCC, in consultation with the relevant professional council, has reached agreement with a respondent on proposed findings and orders, including protective conditions there is rarely, if ever, utility in proceeding to inquiry / hearing. The paramount consideration under s 3A of the National Law of ensuring protection of the public is fulfilled. There is no compelling reason why a tribunal would offer a greater level of public protection than the collective wisdom of the HCCC and relevant professional council considering the matter together. This is an approach which works well elsewhere in Australia, and should be introduced in NSW. In addition to ensuring public protection, it improves efficiency, reduces cost and ensures appropriate use of NCAT resources.

(c) Timeframe parity

20. MIGA has concerns about NCAT expectations around timeframes for filing and service of replies to applications, evidence and other documents by respondent medical and other health practitioners.
21. The Occupational Division Guideline for Professional Discipline Matters contemplate
 - A respondent practitioner filing and serving a reply within 21 days of service of the application
 - Listing a matter for hearing within 3 months of filing of an application by the HCCC.Consequently this normally leads to both parties being given 4 to 6 weeks to file and serve their evidence and other documents, HCCC first and respondent practitioner 4 to 6 weeks afterwards.
22. These expectations are unrealistic and manifestly unfair in a range of cases where
 - The time the HCCC has had prior to filing an application to prepare its case – this is usually a number of months, sometimes over a year, involving a lengthy investigation process and further time to consider whether to file an application
 - Normally the HCCC's case, including evidence and other documents, is ready by the time of filing its application, but it is still generally given further time to file and serve evidence and documents
 - Although the respondent practitioner is normally informed of the progress of the HCCC's investigation and decision whether to prosecute, may see some material relied on and have a chance to respond this is rarely, if ever, the full brief of evidence put by the HCCC to an NCAT hearing
 - A timeframe of 6 weeks to review the applicant's case, and to file and serve evidence and other documents is often insufficient for a respondent practitioner given
 - o The invariable complexities of matters
 - o The number of 'individual cases' involved in a matter – often a practitioner's management of multiple patients is under consideration, involving a wide range of actions in their care and treatment of those patients
 - o The time it invariably takes to obtain instructions, prepare a reply, and obtain both expert and other evidence in such cases.
23. In light of these practical realities MIGA recommends changes to expectations around Occupational Division listing and arrangements for filing and serving of evidence in health practitioner matters.
24. A more reasonable expectation would be to list a matter for hearing within 6 months of application being filed, with a respondent practitioner having 6 weeks to file and serve a reply to the HCCC's application, and 12 weeks to file and serve their evidence and other documents.
25. MIGA believes this approach would better provide parity in timeframes provided to the HCCC and respondent practitioners, and consequently fairness afforded to those practitioners.
26. The public remains protected as professional councils can suspend a practitioner or impose conditions on their practice at any time if appropriate to do so on public protection grounds, or if otherwise satisfied it is in the public interest to do so (s 150, National Law). Consequently allowing further time before hearing does not create a risk to the public.

(d) Other practical issues

27. MIGA considers the following are important initiatives which would improve the efficiency and cost of professional disciplinary matters in the Occupational Division

- **NCAT forms / precedents**
 - A number of the NCAT forms / precedents used, particularly the Application and Reply to Application, are unsuitable, lacking sufficient room to detail invariably complex applications and replies
 - There is no NCAT form for consent orders / short minutes of order
 - It would be helpful to develop forms along the lines of those used under the *Uniform Civil Procedure Rules* in civil cases.
- **Introduction of e-filing**
 - At present, parties are required to file documents at the NCAT registry
 - This poses significant burdens and costs, particularly where 5 paper copies and 4 USB sticks of documents relied on must be physically filed in professional disciplinary matters – this increases to 7 copies for professional registration appeals
 - MIGA understands that there are budgetary and resourcing issues around extending JusticeLink or other online lodgement arrangements to the Occupational Division or NCAT more broadly, but believes this is an initiative which should be given priority by the NSW Government given the imposition and costs it involves.
- **Availability of summonsed material via electronic means**
 - MIGA understands there was an intention to trial making summonsed material available to parties electronically, as used in the Supreme Court
 - It believes this is an initiative which should be given priority in professional disciplinary cases, which can involve summonses of multiple sets of voluminous material.
- **Inquiry / hearing transcript**
 - MIGA understands NCAT can request inquiry / hearing transcript when a matter lasts three days or longer
 - Even when available transcript provision is sometimes delayed, and transcript is not always available before the next day's hearing
 - It can be difficult to conduct and determine a complex matter lasting more than a day without prompt transcript availability
 - Despite budgetary constraints, MIGA believes priority should be given to ensuring transcript is available the following day in all health practitioner disciplinary hearings lasting longer than a day.

Consumer healthcare liability matters

MIGA position at a glance

MIGA has significant reservations about the use of NCAT's consumer jurisdiction for healthcare liability cases. It acknowledges that the scope of NCAT's jurisdiction in this area, which is provided under the *Fair Trading Act 1987* (NSW), is not up for review.

To try and go some way towards addressing these issues, it proposes a number of changes in consumer healthcare liability cases around parties' representation, use of conciliations and awarding of costs, with the intention of a fairer, more efficient jurisdiction.

28. On a recurring basis, MIGA sees matters brought against its members and clients by their patients in NCAT's Consumer Division involving issues of liability for care and treatment in a healthcare setting.
29. Although considered to be matters relating to service guarantees under the Australian Consumer Law, they are effectively matters focusing on whether due care and skill was provided by a medical or other health practitioner, or by the staff of a healthcare organisation, as professionals.
30. Such claims are inevitably complex, normally requiring expert evidence.
31. They are not claims well-suited to NCAT's Consumer Division jurisdiction, with parties representing themselves.
32. MIGA finds that these matters often involve self-represented litigants who may have strong views about their entitlement to damages or other remedies, but who do not appreciate what is required to maintain such a case, including expert evidence indicating a departure from an expected level of due care and skill.
33. This can lead to a case being dismissed, but only after final hearing when significant time and cost have been incurred by the respondent and NCAT.
34. Alternatively, it can lead to an applicant seeking legal advice at some advanced point during the matter, subsequently withdrawing their application and looking to commence proceedings in another jurisdiction. This leaves the respondent to bear the costs incurred.
35. Although MIGA acknowledges that NCAT's jurisdiction in these matters is not the subject of this review as it has been bestowed by the Australian Consumer Law (NSW) and the *Fair Trading Act 1987* (NSW), it considers this unsatisfactory state of affairs warrants a number of changes to ensure a fairer, more efficient jurisdiction.

(a) Representation

36. Under s 45 of the NCAT Act, there is no right to legal representation in consumer healthcare liability matters.
37. In MIGA's experience, NCAT's granting of representation in these matters is inconsistent and difficult to predict. This is an unsatisfactory state of affairs.
38. Busy professionals can be expected to take significant time out of their practice to undertake tasks which they are very unfamiliar with. This can involve commitments of up to a day for a conciliation and subsequent group / directions listing, and up to a day for later hearing. Added to this is the time required to prepare a case for hearing. This amount of time impost can impede community access to healthcare.
39. Although the insurance cover provided by MIGA to its members and clients will generally extend to cover these claims, without a right to legal representation it is unable to take all appropriate steps to protect its insured's interests.
40. As set out above, the complexities of these matters mean that applicants often do not appreciate the evidence required to support such claims.
41. Other civil claim jurisdictions where healthcare liability claims are brought provide a right of legal representation. Matters involving professional discipline in NCAT's Occupational Division, which can have comparable complexity, have a right to legal representation under s 165J of the National Law.

42. MIGA considers that there should be a right of legal representation in Consumer Division matters involving claims arising out of the provision of healthcare.
43. If our view at paragraph 42 above is not adopted, r 32 of the *Civil and Administrative Tribunal Rules 2014* (NSW) (**the NCAT Rules**) should be amended to provide a range of factors which NCAT should consider in determining whether to grant leave to a party to have legal representation. Alternatively the rule could be repealed and this issue dealt with by an appropriate NCAT guideline.
44. At present, the factors outlined in r 32 focus on non-lawyer representatives, such as degree of expertise, authority and ethics. These are not issues for a lawyer. Instead, factors to consider should include the nature of the matter, complexity of issues in dispute, likely time involved to prepare and hear the case, use of expert evidence, extent to which the grant of legal representatives is likely to assist with efficiently resolving the real matters in dispute and any other relevant considerations in the circumstances.
45. The Guardianship Division's Guideline on Representation provides a more suitable starting point than r 32 for the development of appropriate guidance.

(b) Use of conciliations by default

46. Conciliations are normally required in Consumer Division cases involving healthcare liability.
47. In appropriate cases, conciliations can be useful for narrowing the issues in dispute, or even resolving a matter.
48. In healthcare liability cases brought in NCAT's Consumer Division involving self-represented litigants with strong views about their entitlement to a remedy, conciliations are usually of limited benefit.
49. MIGA proposes that instead of requiring the parties to participate in conciliation, that NCAT raise a referral to conciliation prior to the first directions hearing with the parties. If there is no objection, a referral can be made. If there is an objection, NCAT can consider whether referral to conciliation is appropriate in the circumstances, based on the views put forward by the parties.

(c) Costs

50. MIGA believes there should be greater scope for award of costs in favour of a successful party in NCAT Consumer Division matters involving healthcare liability.
51. Section 60 of the NCAT Act provides a presumption that each party pay their own costs, unless NCAT is satisfied special circumstances exist. Under r 38 of the NCAT Rules, there is scope to award costs where there are questions of unreasonable disadvantage in cases involving claims of between \$10,000 to \$30,000. There is also broader discretion in cases involving claims of more than \$30,000.
52. Cases can be withdrawn by applicants, essentially for lack of evidence or for not wanting to press them, leaving the respondent without a costs order in their favour, as would normally follow in similar circumstances in the Local, District and Supreme Courts. Similarly, a matter could be reinstated without any provision for costs of the earlier matter.
53. MIGA considers in Consumer Division healthcare liability matters there should be greater scope for NCAT to award costs where a case is withdrawn (unless by consent), or if a case is dismissed following hearing for lack of evidence.

Guardianship matters

MIGA position at a glance

MIGA has not directly encountered concerns in NCAT guardianship matters.

It queries if there is an issue around the NCAT's scope of inquiry in certain capacity cases. It is important to ensure there is appropriate degree of inquiry in those cases.

54. MIGA's role in guardianship matters usually involves advising its members and clients on issues of capacity, consent and substitute decision-making under the *Guardianship Act* within a healthcare decision-making context. This normally occurs before any NCAT application is made.
55. Where an NCAT application has been made, in MIGA's own experience the NCAT processes appear to work well.
56. It queries whether the situation in *Application of a Local Health District; Re a Patient Fay* [2016] NSWSC 624, particularly the observations of the Supreme Court at [87] to [90], represented a one-off issue of concern, or something warranting a closer consideration as to the appropriate nature and degree of inquiry by NCAT in capacity and consent to treatment cases more broadly.
57. It is important in any NCAT guardianship matter involving capacity to consent to treatment, or consent by a substitute decision-maker where a patient lacks capacity to consent, that all tribunals have the scope, time and ability to conduct a full and thorough inquiry into the matter at hand.