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SUBMISSIONS IN RESPECT TO NCAT REVIEW

UNWILLINGNESS OF TRIBUNAL TO TRAVEL

I have had some experience of the Tribunal resisting listing in the closest location to my mother, or myself as an applicant in Guardianship proceedings.

I do not have the personal experience to agitate a position that reflects an overall failure by the Tribunal in terms of accommodating regional listings, but I have heard anecdotal comments by other regionally located legal practitioners, that suggest a policy of not listing all appropriate matters in the country in order to save funds may exist.

It would be interesting to see data on the location of applicants in respect to listing venue in order to see if the Tribunal is adequately meeting its access and equity obligations in respect to regional applicants.

OBLIGATION TO ASSIST TRIBUNAL

The *Commonwealth Administrative Appeals Tribunal Act 1975* contains subsection 33(1AA). This section imposes an obligation upon the decision maker to assist the Tribunal in reaching the correct and proper decision.

> ***33****(1AA)* ***Decision-maker must assist Tribunal*** *In a proceeding before the Tribunal for a review of a decision, the person who made the decision must use his or her best endeavours to assist the Tribunal to make its decision in relation to the proceedings.*

Such a model, or perhaps a role of Counsel assisting, would I submit be preferable to the current model, which sees the Departmental Advocate slavishly representing the Departmental line.

Some may say that the Model Litigant Principle provides adequate protection to the Public. I disagree. In a recent audit, the Auditor General criticized the NSW Firearms Registry for not monitoring and applying recent Tribunal and Court decisions. This

creates a situation where slavish defence of a ‘Departmental line’ may not be appropriate, but becomes the norm in a competitive outsourced environment where law firms are, competing for instructions and operating under an over-riding practical need to keep their instructing officer on side.

Additionally, I am aware for example of Firearms matters where mental health has been improperly raised in respect to an unrepresented party, under circumstances that suggest a desire to intimidate the party may have been the purpose, and another matter where Public Interest Immunity was argued to seek to prevent access to documentation involving wrong doing by a Police Officer that suggest Lawyers acting on behalf of the Registry are prepared to move significantly beyond propriety.

STATEMENT OF ISSUES AND STATEMENT OF FACTS AND CONTENTIONS.

NCAT lacks procedures analogous to the Commonwealth Administrative Appeals Tribunal’s Statements of Issue and Statements of Facts and Contentions that help parties develop areas of similarity and difference and that also helps prevents ‘trial by ambush’.

The practice of relying upon the last decision of the Respondent in the S58 documents is flawed, because quite often the ‘theory of the case’ often changes when legal representation is applied to a matter.

Having worked as Senior Advocate (Review) for the Department of Veteran’s Affairs and also as a Senior Solicitor handling Comcare matters for the Australian Government Solicitor, I consider with respects, the model of the Commonwealth AAT is, while not perfect, more efficient at generating a quick and efficient outcome, than the adversarial model used by NCAT, because the AAT system forces advocates to focus their minds upon the correct and preferable decision, rather than just the slavish defence of the Departmental line.

It does this by enabling legal officers to challenge their instructing officers in respect to Statements of Issue and Facts and Contention rather than simply seeing the matter proceed toward hearing. Indeed, this model often sees the position of a Department on a particular point challenged in a Preliminary Conference.

SECRET EVIDENCE

I recently ran a matter before the Tribunal where the s58 document referred to mental health issues which we addressed with reports, and in which I then received correspondence advising me that notwithstanding this, the Office of General Counsel intended to rely upon secret or suppressed evidence.

I had no idea what this evidence was. It was hard for me to frame an argument opposing such evidence because obviously, the nature of such evidence means that I do not know what I am opposing.

Such evidence is therefore an affront to justice.

I cannot say too much about that particular matter because a decision is outstanding.

That secret evidence may be led is clear from *K-generation P/L v Liquor Licencing Court (2009) HCA 4, from Minister of Citizenship v Kumar (2009) HCA 10.* And from the Civil and Administrative Tribunal Act 2013 at s64.

However, where such evidence is adduced, it is hard to see how its usage gives rise to an outcome that can be considered 'just' within the framework of adversarial proceedings as a fundamental element of the common law right to a fair trial is missing.

Where a Tribunal admits secret evidence, the Tribunal should operate inquisitorially, with a Legal Officer funded by the Respondent performing a Counsel assisting roll.

There should I submit be a panel of three where a Tribunal chooses to admit suppressed evidence with the agency seeking to adduce secret evidence meeting the expense, for the following reasons:

- *To discourage its usage other than under the most appropriate of circumstances.*
- *Address in some way the potentially contaminating effect of a Tribunal making into making a pre-judgement of the ultimate issue in these proceedings when deciding to admit such evidence.*
- *Apply significant restraint must be applied to its use, for while the denial of procedural fairness and natural justice may facilitate the quick and cheap disposal of proceedings in some cases, is it is hard to conceive how evidence suppressed from a party can, in the context of an adversarial proceeding,*

possibly satisfy the requirement that a resultant decision be seen- and said, to be 'Just'.

There are I submit strong public interest arguments against use of such evidence by Courts and Tribunals lest it place the administration of justice on a slope that leads back to the days preceding Long Parliament's abolition of the Star Chamber with *the Habeas Corpus Act* in 1640.

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