



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: JD:CM:700773
Direct line: 02 9926 0218

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NCAT Project Team
Department of Attorney General and Justice
Level 14, 10 Spring Street
SYDNEY NSW 2000

By email: ncat@agd.nsw.gov.au

Dear Sir/Madam

Discussion paper 4(a) – Early dispute resolution

Following consultation with the relevant policy committees, the Law Society of New South Wales is pleased to provide the comments below regarding discussion paper 4(a) which relates to early dispute resolution.

NCAT's legislation should contain a clear overarching principle that reflects the need to:

- **Resolve matters without the need for determination wherever appropriate, and**
- **Ensure that matters that do proceed to determination have been narrowed to the real issues in dispute.**

It is agreed that NCAT's legislation should contain a clear overarching principle. The proposed wording set out above appears to be adequate.

NCAT's legislation should specify that the Tribunal may use mediation and conciliation but should not be limited to those options.

It is submitted that NCAT's legislation should specify that the Tribunal may use:

- mediation and conciliation, and
- any other dispute resolution procedures that are agreed by the parties.

The term 'alternative' dispute resolution should not be adopted, to reflect the fact that early resolution will be a core function of the Tribunal.

The term 'alternative' dispute resolution is widely understood and it would be appropriate for this wording to be used in NCAT's legislation. If this wording is not adopted, then 'early' dispute resolution would be a suitable alternative.

To ensure that NCAT has tools available to encourage compliance with the Tribunal's efforts, the NCAT Act should give the Tribunal the power to:

- **Order parties to participate in dispute resolution with or without their consent,**
- **Make orders where a party does not attend a dispute resolution process, including:**
 - **Striking out the application,**
 - **Striking out the absent party from proceedings, and**
 - **Making an order for costs against the absent party.**

It is submitted that participation in dispute resolution procedures should not be mandatory in guardianship matters and would not be appropriate for professional discipline matters. Flexibility is needed in relation to other matters as dispute resolution may not be suitable in all cases. It is suggested that the NCAT Act include an equivalent to section 68(1) of the *Retail Leases Act 1994* which is set out below for ease of reference.

68 Disputes and other matters must be submitted to mediation before proceedings can be taken

- (1) A retail tenancy dispute or other dispute or matter referred to in section 65(1)(a1) may not be the subject of proceedings before any court unless and until the Registrar has certified in writing that mediation under this Part has failed to resolve the dispute or matter or the court is otherwise satisfied that mediation under this Part is unlikely to resolve the dispute or matter.

It is further submitted that the Tribunal's power to impose sanctions against a party who does not attend a dispute resolution procedure should be discretionary not mandatory.

What other legislative provisions are needed to support the Tribunal to resolve matters prior to hearing? For example, should a party require leave to reinstitute proceedings where a matter has been struck out due to their failure to attend a dispute resolution process?

It is suggested that consideration be given to the following matters to support the early resolution of disputes:

- Dispute resolution procedures should be easily accessible even by those parties that are most disadvantaged,
- Participation in early dispute resolution processes should not involve extra costs for the parties,
- Once parties file, there should be a triage system which directs cases to the appropriate places,
- Registry staff and members should be trained to assess matters over the phone and in person, and to identify which matters are not suitable for early dispute resolution processes,
- There should be adequate information available on the NCAT website – many of the services can be delivered and supported through electronic means,
- Those conducting mediation should be accredited under the National Mediator Accreditation Scheme,
- Mediation should be conducted by appropriately trained Tribunal staff as well as external qualified mediators,
- Compulsory conferences should be undertaken by trained Tribunal members rather than mediators,
- VCAT Practice Note 4 is comprehensive and accessible – NCAT should adopt a similar format.

If you have any questions in relation to this letter please contact Chelly Milliken,
Legal Policy Advisor, on 9926 0218 or chelly.milliken@lawsociety.com.au

Yours sincerely

A handwritten signature in black ink, appearing to read 'John Dobson', with a large loop at the start and a horizontal line at the end.

John Dobson
President