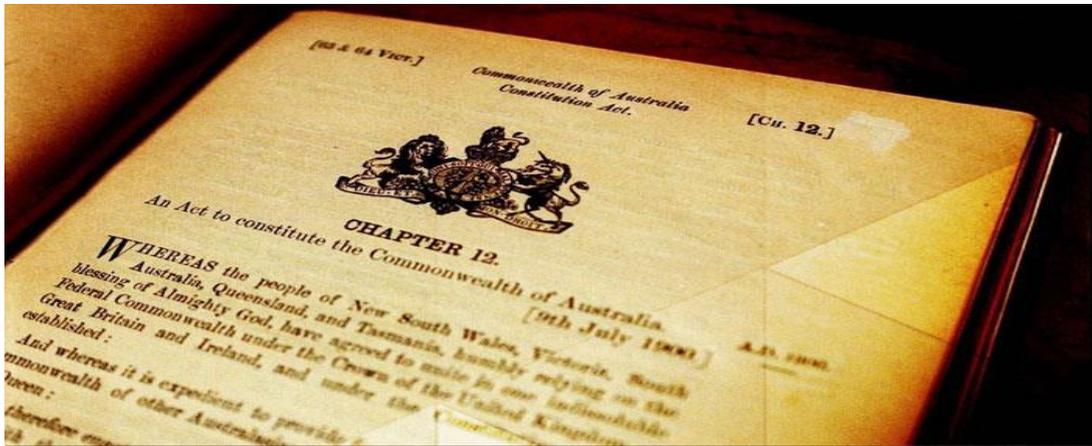


COAT SA News

News from the Tribunals of South Australia

Issue 14



The High Court have recently handed down their decision in *Burns v Corbett* [2018] HCA 15

05/18

FAREWELL FROM THE – IMMEDIATE PAST CONVENER

Kath McEvoy

I am pleased to present this report on the last 12 months to COAT-SA members.

I am sure you will all share with me the surprise at how quickly 2017 has gone. It has been a busy and successful year for COAT at both State and national level.

We have had three excellent presentations for members this year, all well attended and relevant and stimulating. In May we heard from Jan Redfern, Deputy President and Division Head of the Migration and Refugee Division, AAT. Jan's topic was *Firm but Fair: The Art of a Fair Hearing*, and it was a pleasure to hear from such an experienced tribunal member on issues that concern and interest all of us in our tribunal work. In August we heard from Justice Greg Parker, who had then just ended his time as President of SACAT, and he spoke on *Significant SACAT Decisions*, giving a good flavour of the scope of the jurisprudence which has developed in relation to SACAT matters and legislation even in the short time since its inception. In September we heard from Anna Olijnyk and Stephen McDonald with an analysis of the (relatively) recent decision of the NSW Court of Appeal *Burns v Corbett*, a decision now on appeal to the High Court and which has very significant jurisdictional implications for the "CATs", including SACAT and the Employment Tribunal, in particular with respect to circumstances where parties are resident in different states (the "diversity jurisdiction"), and which may still hold more in store for tribunals as the appeal is yet to be heard by the High Court.

In June 2017 COAT National held its annual Conference, partnering with COAT NSW's annual conference. The Conference was very successful with 264 registrants and a well received program. The papers from the Conference can be found on the COAT National website at <http://www.coatconference.com.au/conferenceproceedings.php>

The 2018 Conference will be held in Canberra, on Thursday 7 and Friday 8 June 2018. The program for the Conference and other details will be available in early 2018, but the theme will be *Toward the Horizon – Tribunals of the Future*. I am on the organising committee for this Conference and we have almost settled the program and arrangements and expect to be able to advise members of these and keynote speakers before Christmas. The program is focussed on looking forward beyond current arrangements in tribunals to foreseeable developments, anticipating future trends and challenges for the work of tribunals. I think it will be a very worthwhile conference and I hope many of you can consider attending.

On Friday 20 October 2017 COAT National held its second very successful *National Tribunal Registrars and Executive Officers Conference* in Adelaide, along with an accompanying Masterclass. The Conference theme was *Tribunal Accessibility: Meeting Community Expectations*, and it was well attended and received. Clare Byrt was the leading organiser of the Conference, ably assisted by a number of other COAT SA members along with others.

I have been closely engaged with COAT National throughout 2017. At the AGM in June I was re-elected Secretary of COAT National. In mid October I attended the COAT National Planning Day, at which we made plans for COAT National projects for 2018 and beyond. COAT National has regular



teleconferences in which I participate. COAT National just completed a revision of the COAT Practice Manual (available at <http://www.coat.gov.au/about/practice-manual-for-tribunals.html>) and this is being currently distributed to member tribunals and is also available both on line, or to purchase in hard copy. The Manual traverses a range of information and legal analysis and discussion relevant to tribunal practice and it is recommended to all tribunal and tribunal members and practitioners as a really useful and valuable resource.

COAT National launched two of its major projects at the national conference in June.

The first is the On Line Member Induction program. The first iteration of this program commenced in September, and is fully subscribed. The link to the program is at the COAT website <http://www.coat.gov.au/events/courses/details/39/new-member-induction-program.html>

This program provides an on-line interactive training program designed for recently appointed Tribunal members, led by some eminent supporters, Alan Wilson, former judge of the Supreme Court of Queensland and inaugural president of the QCAT, and Jennifer Boland a former judge of the Family Court of Australia and now Deputy President, NCAT. The course offers practical guidance on carrying out the role of a tribunal member, including preparing for a hearing; conducting a hearing; dealing with self-represented applicants, taking evidence, working with interpreters and managing proceedings; fact finding and assessing evidence; decision writing and decision making; and the rules of procedural fairness. The course runs over six weeks, and each course is limited to 15 participants. It is expected to be repeated two times in 2018.



At the conference COAT also launched its revised *Framework for Tribunal Excellence*. The Framework is available at <http://www.coat.gov.au/images/Tribunals/Excellence Framework Document 2017 V4.pdf>

The *Tribunal Framework* is an adaptation of the *International Framework for Court Excellence*, a quality management tool developed for courts and tribunals by the International Consortium for Court Excellence and originally launched in 2008. The Tribunals Framework provides a resource for a tribunal to assess its own performance and excellence in eight areas, and it provides a model methodology for continuous evaluation and improvement of performance that is specifically designed for use by tribunals. By assessing performance (and identifying areas for improvement), the Framework can assist tribunals to deliver the quality services essential to fulfil their essential and critical role. The Framework enables a tribunal to self assess its quality against a number of accepted criteria for excellence, and has tools that enable comparisons with other like tribunals (if the tribunals so choose), or on a longitudinal basis within the tribunal.

It is hoped that COAT-SA's membership will continue to grow. We are a very active Chapter compared with some other jurisdictions. Membership provides opportunities for professional development and collegiate interaction through contact with members of other tribunals and tribunal systems, as well as participation in the work of COAT including its presentations on matters of interest to members. Please encourage your colleagues to join COAT-SA, and the COAT-SA Committee looks forward to seeing you at functions throughout 2018.



Thanks especially to the members of the COAT-SA Committee, who work hard to support and promote COAT's work, and I especially thank Katherine Bean and Jenny Russell, longstanding and active members of the Committee, who are not standing again as office bearers (Katherine was Secretary for many years, and Jenny our Treasurer), or committee members.

I have been Convener of COAT SA since November 2012, and this has been my privilege. It is now however time for someone else to take on this role and inject their energy and ideas into this role and I have not nominated for re-election to this office. In the past 5 years I have seen a positive reinvigoration of COAT in South Australia through the active participation of you its individual members, and I hope this continues.

Please let me or other Committee members know if there are matters you want COAT-SA to take up, or on which you would like a presentation or discussion. COAT-SA is keen to use its commitment to best practice, excellence and justice access for the benefit of its members and the wider community, and can only do so with your participation and assistance.

The COAT-SA Committee wishes you all the best for Christmas and for 2018, and we hope that 2017 has been happy and successful for you all.

COAT SA COMMITTEE

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Please contact any member of the committee with any tribunal related issues you would like us to address or discuss, or any suggestions for presentations.



ADR in the SAET, and other acronyms

Don Smyth

From 1 July 2017, the role of the South Australian Employment Tribunal (SAET) has been expanded to bring a number of related jurisdictions together in a single Tribunal structure. SAET now serves as a 'one stop shop' specialist employment tribunal.

While SAET was established in 2015 to deal with matters under the Return to Work scheme, its expanded jurisdiction encompasses a range of additional employment related matters, including:

South Australian employment and industrial disputes;

- regulation of industrial awards and agreements;
- health and safety related prosecutions;
- South Australian equal opportunity matters; and
- dust disease matters.

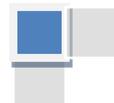
The scope of the expanded jurisdiction is reflected in the fact that SAET is now conferred jurisdiction by the following Acts:

- Construction Industry Long Service Leave Act 1987
- Dust Diseases Act 2005
- Education Act 1972
- Equal Opportunity Act 1984

- Fair Work Act 1994
- Fire and Emergency Services Act 2005
- Industrial Referral Agreements Act 1986
- Long Service Leave Act 1987
- Police Act 1998
- Public Sector Act 2009
- Return to Work Act 2014
- South Australian Employment Tribunal Act 2014
- Training and Skills Development Act 2008
- Work Health and Safety Act 2012

SAET has developed processes and practices to ensure that all matters are now dealt with in accordance with the objectives of the *South Australian Employment Tribunal Act 2014* (the SAET Act). These objectives include independence in decision-making; natural justice and procedural fairness; high-quality, consistent decision-making; and transparency and accountability. Applications are also to be processed and resolved as quickly as possible while achieving a just outcome, including by resolving disputes through the use of mediation and alternative dispute resolution procedures wherever appropriate.¹ In practice, SAET applies alternative dispute resolution procedures in a range of contexts. In its new jurisdictions, for instance, it has successfully applied conciliation / mediation to a number of matters arising out of the equal opportunity jurisdiction and external review of public

¹ *South Australian Employment Tribunal Act 2014* (SA) s 8.



sector decisions. More on this in a future edition.

From the AAT

Marten Kennedy

The following decisions of interest are extracted with permission from ‘The Review’. ‘The Review’ is a monthly newsletter produced by the Administrative Appeals Tribunal. It includes condensed versions of a range of the Tribunal’s recently published decisions.

COAT Members can subscribe to automatically receive ‘The Review’, in its entirety, via the [Administrative Appeals Tribunal website](#).

The following matters have been selected to demonstrate the diversity of the AAT’s jurisdiction.

Garnett and Comcare (Compensation) [2018] AATA 160

Tribunal: Deputy President Gary Humphries and Member Dr Bernard Hughson

The applicant sustained a workplace injury while employed by the Civil Aviation Safety Authority (CASA) as a result of repetitive computer and telephone work. Comcare accepted liability in October 2008 for a condition of Chronic Pain Syndrome and paid the applicant compensation under sections 24 and 27 of the Act for 10 per cent permanent impairment for neck and right shoulder pain. Sections 16, 19 and 29 of the Act provide compensation for; medical treatment obtained in relation to the injury; the incapacity for work of the applicant; and household assistance, respectively.

Comcare submitted that the symptoms the applicant suffered from, if any, are not sufficient to entitle her to any benefits under these sections. Comcare provided covert video evidence of the applicant undertaking daily tasks that they suggest should have been impossible for her given her condition. The Tribunal also heard from the applicant and a number of medical specialists who assessed her.

The Tribunal had to consider the question of the applicant’s credibility. The Tribunal was not satisfied, based on the evidence provided, that the applicant had been wholly truthful. The Tribunal did not consider the level of incapacity to which the applicant testified was consistent with evidence received. The inconsistencies between what the applicant told Comcare, various doctors and the Tribunal about her condition, on the one hand, and the evidence of the surveillance material on the other, as well as her presentation in the witness box, suggested a measure of embellishment in her account.

Despite these doubts about the reliability of the applicant’s evidence, the Tribunal was not convinced that the evidence reached the level necessary to satisfy the conclusion that the applicant had ceased to suffer all effects of her condition. The medical professionals who provided evidence all claimed that her condition required continuing treatment. The Tribunal noted that although the evidence painted a somewhat blurred picture in this regard, it was found on the balance of probabilities that treatment for pain relief is, to some extent, treatment in relation to her accepted condition of chronic pain syndrome and is reasonable to obtain in the circumstances.

The Tribunal did not conclude that the applicant was entitled to compensation due to incapacity under section 19.

Dalla (Migration) [2018] AATA 128

Tribunal: Deputy President Jan Redfern and Member Rania Skaros

Section 109(1) of the Migration Act 1958 allows the Minister to cancel a visa if the visa holder has not complied with section 102, along with other sections. It was alleged that the applicant provided incorrect information on his passenger card, explicitly prohibited by section 102.

The applicant arrived in Australia in January 2011 on a Student visa and was granted a Temporary Work visa on 30 April 2015. On a flight out of Australia in August 2015 the applicant marked 'no' on the outgoing passenger card in response to the question 'are you taking out of Australia AUD \$10,000 or more in Australian or foreign currency equivalent?' The applicant was subject to a baggage search at the airport and more than AUD \$24,000 was found. The applicant acknowledged he provided incorrect information in his outgoing passenger card.

The Tribunal had to first determine whether the outgoing passenger card qualified as a passenger card for the purposes of section 102 and if so, whether the question formed part of the passenger card. After considering the definition of 'passenger card' for the purposes of Subdivision C of Division 3 of Part 2 of the Act, the Tribunal found it was.

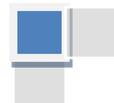
Secondly, the Tribunal determined whether or not the power to cancel the visa under section 109 only applied to the cancellation of visas that were granted on the basis of the incorrect information that was supplied. The Tribunal found that the text and purpose of the relevant legislation did not restrict the power of cancellation under section 109 to incorrect information upon which a visa is granted.

Thirdly, the Tribunal considered whether or not the applicant in fact did not comply with section 109. The applicant claimed he unintentionally provided incorrect information as he did not know the exact amount of money he was carrying, although he was aware that it was more than AUD\$10,000. The Tribunal found section 102(b) does not require intention or knowledge and therefore the applicant didn't comply with section 109.

Lastly, and most critical to the decision, was the question of whether the discretion to cancel the visa should be exercised.

As part of that process, the Tribunal considered the applicant's present circumstances. In particular, the fact that the applicant had pleaded guilty to serious offences, was convicted of those offences and was serving a period of parole at the time of the decision. The Tribunal noted the sentencing judge's finding that the applicant had a character of a 'relatively low moral standard'. This was found as a matter that weighs heavily in favour of cancellation. The fact that the applicant was a valued employee and may have employment for a period if the cancellation of his visa was set aside was favourable to the applicant. However, given the applicant held a temporary work visa and the uncertainties regarding his employment the Tribunal assessed this matter as neutral or marginally in favour of the applicant. The Tribunal gave some weight in the applicant's favour to the difficulties he may face in returning to Lebanon.

The Tribunal concluded that the visa should be cancelled after considering all the relevant circumstances, stating that while a number of the matters weighed in the applicant's favour, those matters were outweighed by the factors that favour cancellation.



Dune and Simmons (Child support) [2018] AATA 335

Tribunal: Member Peter Jensen

On 11 January 2018, the Administrative Appeals Tribunal set aside a decision made by an objections officer of the Department of Human Services – Child Support and substituted revised percentages of care for the parties to the application.

Mr Simmons and Miss Dune are the parents of a child who was born in 2003. This decision concerned the percentage of care of the child between 5 June 2017 and 31 August 2017. Mr Simmons was paying child support to Miss Dune and he submitted that from 1 March 2017 the child was not in the care of either parent. This would be a ‘terminating event’ under subsection 12(2AA) of the Child Support (Assessment) Act 1989 which would mean child support would no longer need to be paid. Miss Dune submits that she had been providing full-time care of the child from 5 June 2017. Centrelink accepted this for family tax benefit purposes and the Department of Human Services – Child Support accepted this fact for child support purposes. However, the Department recorded her as providing full time care from 12 July 2017 because Miss Dune delayed in advising of the change in care within a reasonable period.[1] Mr Simmons objected to the Department’s decision and an objections officer allowed his objection, terminating the child support case. This decision was the subject of the review by the Tribunal.

The task before the Tribunal was to determine whether a terminating event occurred. The Tribunal considered evidence provided by both parties to determine whether the child in fact wasn’t in the care of either parent.

Miss Dune gave sworn evidence that the child was in her physical care every night from 5

June 2017 to 30 August 2017. The child’s Youth Justice Service Centre caseworker provided a written letter that confirmed the child had resided with Miss Dune from 5 June 2017 to 4 September 2017. The caseworker also provided a chronology of contact with the child and Miss Dune which is consistent with Miss Dune’s evidence that he remained in her full-time care until at least the end of August 2017.

Mrs Simmons, representing Mr Simmons in the matter, submitted Miss Dune had not provided physical care every night in that period. She said that the child resided in various locations, including with friends and his sister, and this was evidenced by social media communications and police contact with them. Mrs Simmons provided some photos and social media records in an attempt to show that the child was not in the care of Miss Dune at particular times, some late at night. The Tribunal stated this evidence shed almost no light on the more substantial issue of whether the child was in Miss Dune’s general full time care.

Mr Simmons and Mrs Simmons provided other evidence which also raised suspicions about whether the child remained in Miss Dune’s full-time care. The Tribunal stated it was required to make findings of fact on the balance of probabilities, based on the evidence that was provided and decided that a mere suspicion, without more, is an insufficient basis upon which to make such a finding.

Based on the evidence, the Tribunal found that a terminating event did not occur prior to 31 August 2017. The Tribunal set aside the decision under review and, in substitution, decided to record Miss Dune as providing 100% care and Mr Simmons as providing 0% care to the child from 12 July 2017.



Names used in all child support decisions are pseudonyms so as not to identify involved individuals as required by subsections 16(2AB)-16(2AC) of the *Child Support (Registration and Collection) Act 1988*.

SACAT Expansion

Clare Byrt

The Tribunal continues to receive a steady stream of administrative review applications in the public housing area, freedom of information area and the firearms licensing area.

The Statutes Amendment (SACAT No 2) Act 2017 vests the South Australian Civil and Administrative Tribunal with a number of new jurisdictions which commenced over a range of dates beginning with 22 December 2017 and continuing throughout 2018.

The vast majority of these will be review jurisdictions regarding decisions of various government bodies, including the Environmental Protection Authority, the Chief Inspector of Stock, and the Superannuation Board. The scope of reviewable decisions under the new legislation varies from Act to Act, from the very specific (see eg: *Environment Protection Act s 103V*) to the very broad (see eg: *Co-operatives National Law (South Australia) Act 2013 s 9*).

The Amendment also grants SACAT a disciplinary jurisdiction along with further original jurisdictions.

Of significance to the state of South Australia and SACAT was the conferral of a jurisdiction under the Children and Young Persons (Safety) Act which commenced in a limited fashion on 26 February 2018, but will expand

in October 2018, which vests a new right of review in relation to decisions of the Minister relating to children or young people under the guardianship of the Minister.

The Tribunal also expects to be conferred a review jurisdiction under the *Dog and Cat Management Act 1995* on 1 July 2018. The jurisdiction is to be conferred from the District Court of South Australia.

A list of current administrative review jurisdictions is [available here](#).

SACAT Decisions of interest

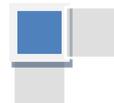
Barbie Johns

The nature of the obligation under Section 39(1)(c) SACAT Act

Section 39 SACAT Act sets out the basic principles to be applied in Tribunal hearings. Section 39(1)(c) requires the Tribunal to act according to equity, good conscience and the substantial merits of the case and without regard to legal technicalities and forms.

The correct application of Section 39(1)(c) SACAT Act was recently considered in the matter of *Kinglsey & Thorne v Living Choice Woodcroft Pty Ltd* [2017] SACAT 16 (11 September 2017). That matter involved a dispute in a retirement village. Justice Parker made the following statements about the nature of the obligation under Section 39(1)(c):-

“122... ... the Court must exercise its judgement according to its good conscience and according to what it considers to be the substantial merits of the case as to whether the respective common law or statutory criteria have been met. It permits resort to a common sense judgement in all the circumstances.



However, the court's judgement cannot be merely arbitrary. It must still apply the common law principles.

....

The section therefore has a useful function, but it does not, as was suggested in the course of the petitioner's argument, allow the court to create new law....

124. I am bound by the decision of the Full Court in Featherstone v Tully. That decision is not inconsistent with the view of the Queensland Court of Appeal in the Townsville City Council case. Thus, the effect of the authorities is that the equity, good conscience and substantial merits formula requires that any relevant judicial discretions must be exercised flexibly so as to do justice between the parties in accordance with the substantial merits of the case. However, the statutory formula does not authorise departure from relevant common law principles and statutory provisions or from the terms of a valid contract. While it is unnecessary to decide the point in this case, it also appears to me that the statutory formula operates to confer an equitable jurisdiction on the Tribunal that it would not otherwise have.

125. The effect of s 39(1)(c) is that the Tribunal must give effect to the contracts entered by Mr Thorne and Ms Kingsley with LC. Those contracts must be construed in accordance with the ordinary principles of contract law. For that reason I consider that Mr Thomas did not err in the approach that he adopted to the interpretation of the provisions in the licence agreement covering unreasonable interference with the right of quiet enjoyment."

The question of costs in Tribunal proceedings

Her Honour Justice Hughes recently considered an application for costs in the matter of the *South Australian Housing Trust v Brady and Milera* [2018] SACAT 2 (5 January

2018). The tenants sought an order for costs against the Trust. The application related to the costs of being legally represented in the Tribunal.

The Trust had initially brought an application for vacant possession against the tenants on the basis of their failure to pay rent. The tenants were residing in premises situated on a parcel of land owned by the Aboriginal Lands Trust (the ALT) at Davenport. The land was leased to a Community council which in turn entered into periodic tenancy agreements with tenants for individual properties. In 2015 there was an arrangement between the relevant Minister, the ALT and the Trust for the Trust to take over the landlord functions of the tenancies. The Trust proceeded to negotiate individual tenancy agreements accordingly, but no such tenancy agreement was ever entered into with the tenants Brady and Milera.

After the application was made to the Tribunal, there were three directions hearings with the matter being adjourned to allow the parties an opportunity to try to resolve the dispute. Ultimately the Trust withdrew its application.

Both parties had been represented by lawyers, which is unusual for an application of this type in the Tribunal. Section 57 of the SACAT Act provides that each party is to bear their own costs unless the Tribunal orders otherwise or there is a specific statutory provision which applies. Section 57 allows the Tribunal to make an order for costs if it considers it is appropriate to do so after taking into account various factors. In addition there are special costs provisions which apply when proceedings have been dismissed or struck out.

The tenants submitted that the Trust had withdrawn its application because the Trust could not be certain that it was entitled to issue a notice of breach. The Trust submitted that



the possibility of a procedural irregularity was being investigated and subject to that issue being resolved, it may well be that the Trust would initiate further proceedings of the same type at some point in the future. Her Honour found that the proceedings were not misconceived.

The debate between the parties in relation to the substantial application related to a question as to whether proper consents had been granted leading up to the creation of the tenancies by the Trust. Her Honour considered these issues in light of deciding whether or not the complexity of the matter and the parties' conduct suggested that an order for costs would be appropriate.

Justice Hughes found that a consideration of the mandatory factors in Section 57(2)(a) and (b) supported a finding that no costs would be awarded. She found that the issue of the complexity of the matter did not warrant the disturbance of the overarching principle that parties bear their own costs. Her Honour found that there was no evidence that the Trust had knowingly exploited an advantage unfairly or otherwise acted inappropriately. Accordingly the application for costs was dismissed.

Efficiency measures at SACAT

Clare Byrt

The *Statutes Amendment (SACAT No 2) Act 2017* (the Act) passed both Houses of Parliament on 14 November 2017 and was assented to by the Governor on 28 November 2017.

The Act makes amendments to 42 pieces of legislation to confer jurisdiction on SACAT as part of our third stage of expansion. The Act confers various administrative and review functions previously exercised by the Administrative and Disciplinary Division of the District Court, the Magistrate Court and the Supreme Court.

The Act also makes a number of miscellaneous amendments to the *South Australian Civil and Administrative Tribunal Act 2013*, and to pieces of legislation currently within our jurisdiction. These amendments are aimed at improving the efficiency with which SACAT is able to deal with certain matters and addresses the anomalous application of some provisions. These amendments, aimed at improving SACAT's operation and efficiency, commenced on 14 December 2017.

The SACAT Act had not been amended since SACAT commenced operations on 30 March 2015.

Some of the major changes to the *South Australian Civil and Administrative Tribunal Act 2013* are:

- Provides for a registrar who is authorised in writing, in addition to a legally qualified member, to make an order dismissing or striking out all, or any part, of any proceedings for want of prosecution;



- Extends the right to bring an application for a review of a SACAT decision where a person had a reasonable excuse for being absent from hearings or conferences;
- Creates an offence of knowingly giving false or misleading information to the Tribunal when making an application for a waiver or reduction of fees;
- Improves the operation of internal reviews, including that a stay may be granted by a legally qualified member in addition to a Presidential member.
- Provides for the appointment of an alternative guardian at the same time as a guardian to avoid the need for an urgent appointment in the event of death, absence or incapacity of an appointee;
- Limits the persons who may seek a variation or revocation of a guardianship order or administration order;
- Removes the requirement for the Office of the Chief Psychiatrist to send SACAT all mental health forms relating to short term treatment orders by health professionals.

The amendments under the Act relating to tenancies/housing matters removed the right for a party to bring an application to vary or set aside an order under the *Residential Tenancies Act 1995* or the *Housing Improvement Act 2016*. The right to make an application to vary or set aside an order remains in retirement village and residential parks matters.

In relation to the Community Stream jurisdictions, amendments were made to the *Advance Care Directives Act 2013*, the *Guardianship and Administration Act 1993* and to the *Mental Health Act 2009*. Some of the major changes that commenced on 14 December 2017 were:

- Amends the definition of 'eligible person' under the *Advance Care Directives Act 2013* to a person who satisfies SACAT (as well as currently the Public Advocate) that they have a proper interest;
- Allows SACAT on its own motion to remove substitute decision makers, and extends the definition to those who are in such default of their powers that they are not fit to continue under the *Advance Care Directives Act 2013*;

SACAT will be assessing the practical impact these amendments have had on our functions, particularly the efficiencies for our Registry staff and our Tribunal members.

Relevant changes have been made to the SACAT website www.sacat.sa.gov.au and to our online forms.

COAT National Report

Kath McEvoy

I have again been elected Secretary of COAT National. The COAT Executive meets (via teleconference) every two months or so, and we have two face to face meetings each year: one at the National Conference, and a full day planning day in October. The next planning Day is on 19 October this year and I will be attending.

COAT National launched two of its major projects at the national conference in June.

The first is the On Line Member Induction program. The first iteration of this program has just commenced in September, and is fully subscribed. The link to the program is at the COAT website <<http://www.coat.gov.au/events/courses/details/39/new-member-induction-program.html>>

This program provides an on-line interactive training program designed for recently appointed Tribunal members. The course is led by Justice Alan Wilson, former judge of the Supreme Court of Queensland and inaugural president of the QCAT, and Hon. A/Judge Jennifer Boland a former judge of the Family Court of Australia and now Deputy President, NCAT. The course offers practical guidance on carrying out the role of a tribunal member, and covers the following topics:

- preparing for a hearing
- conducting a hearing, including dealing with self-represented applicants, taking evidence, working with interpreters and managing proceedings
- fact finding and assessing evidence



- decision writing and decision making
- the rules of procedural fairness

Participants are able to choose to work through modules of interest; selecting on line resources; view videos featuring experienced tribunal members discussing key topics; participate in online discussions in a collegiate and supportive environment; and obtain practical guidance from experienced tribunal members.

It is hoped to be able to offer the online course on a number of occasions. The course runs over six weeks, and each course is limited to 15 participants.

At the conference COAT also launched its revised *Framework for Tribunal Excellence*, and this was well received at the heads of tribunal meeting. The Framework is available at http://www.coat.gov.au/images/Tribunals/Excellence/Excellence_Framework_Document_2017_V4.pdf

The *Tribunal Framework* is an adaptation of the *International Framework for Court Excellence*, a quality management tool developed for courts and tribunals by the International Consortium for Court Excellence and originally launched in 2008. The Tribunals Framework provides a resource for a tribunal to assess its own performance and excellence in eight areas, and it provides a model methodology for continuous evaluation and improvement of performance that is specifically designed for use by tribunals.

By assessing performance (and identifying areas for improvement), the Framework can assist tribunals to deliver the quality services essential to fulfil their essential and critical role. The Framework takes a whole of tribunal approach to achieving tribunal excellence, rather than simply relying on a limited range of performance measures which only capture



aspects of tribunal activity. The Framework enables a tribunal to self assess its quality against a number of accepted criteria for excellence.

COAT National has also engaged in a revision and update of the COAT Manual, which has been available on the COAT website. The Manual has been updated so it is current, and it is hoped that as well as a version on the website a hard copy will be available in the future. The Manual traverses a range of information and legal analysis and discussion relevant to tribunal practice and it is recommended to all tribunal and tribunal members and practitioners as a really useful and valuable resource. The current version is available on the COAT website at <<<http://www.coat.gov.au/about/practice-manual-for-tribunals.html>>>. It is planned that hard copies will be available to all member tribunals and also available for sale to individual members.

COAT is also still updating and redeveloping its website, and it is hoped when this is complete that it will be a useful tool for the conduct and publicising of State and Territory activities, as well as providing information for members.

The other news from COAT National is that Justice Kerr, who has been Chair of COAT National for the past three years, resigned from this position when his term as President of the AAT ended. The new President of the AAT is Justice David Thomas, formerly of the Queensland Supreme Court and President of QCAT, and presently the COAT National Treasurer. Justice Kerr was a committed and active Chair of COAT National and his work for COAT was productive and much appreciated. The new COAT National Chair, elected at the COAT AGM in June is Anne Britton, a senior member of NCAT and former member of the AAT. Anne has been an active

COAT National member for many years and will be an excellent Chair.



Other News

CASES OF INTEREST:

[Burns v Corbett \[2018\] HCA 15](#)

RECENT PRESENTATIONS:

SIGNIFICANT SACAT DECISIONS –PARKER J 22 SEPTEMBER 2017

Justice Parker was the inaugural President of SACAT and first presented this paper to the Law Society when he was still President. This re-presentation was arranged because the initial seminar with the Law Society clashed with our original arrangements with Jan Redfern, and it provided a good opportunity to farewell him as well as note and discuss the very significant achievements in terms of the law which were achieved under his leadership in the short time since SACAT's inception in March 2015. Justice Parker was an active and generous, COAT member during the period of his Presidency and spoke to us on several occasions. At this presentation Justice Parker provided a full copy of his detailed paper.

Justice Parker's paper largely addressed the nature of internal review and the review jurisdiction under the *SACAT Act*. He commenced however with a description of the operations and functioning of SACAT. In addition to its original jurisdiction of the former Residential Tenancies Tribunal, the Guardianship Board and the Housing Appeal Panel, SACAT has obtained some additional jurisdiction relating to FOI, First Home grants, Housing improvement, in relation to firearms, opium producers, and political lobbyists. It is expecting to receive a much broader increment to its jurisdiction in the

future, legislation now introduced into Parliament to transfer the work of the Administrative and Disciplinary Division of the District Court. Some further jurisdiction now in the Magistrates Court and the Supreme Court is also expected to be transferred to SACAT in time, as well as functions from the Health Practitioners Tribunal and the Legal Practitioners Tribunal. Much of this work is expected to be exercised in the Administrative and Disciplinary Stream of SACAT. SACAT's jurisdiction with respect to its diverse subject matters is *original* (section 33, making a primary decision, such as in relation to tenancy disputes pursuant to the *Residential Tenancies Act*); a *review* jurisdiction (section 34, empowering SACAT to examine the original decision the subject of the application by way of a rehearing, and to reach the correct and preferable decision on the matter); and *internal review* (section 70, essentially, an appeal conducted within SACAT of decisions made in the exercise of SACAT's original jurisdiction).

Justice Parker then discussed some of the decisions made concerning the interpretation and application of the review provisions in sections 34 and 70 of the *SACAT Act*.

Re AKS [2016] SACAT 19 concerned the operation of section 70 and the nature of the internal review provided for in that section. In that decision Parker P (as he then was) asserted that it was clear from the terms of section 70 and the nature of SACAT that the process to be followed was quite different to that adopted by a court in considering an appeal de novo. He concluded that section 70 required SACAT to conduct a review on the merits when exercising jurisdiction under section 70; this conclusion took into account the nature of the tribunal, as a body exercising administrative rather than judicial power; the rules of evidence do not apply; proceedings are relatively informal, and many parties are not legally represented; and most importantly, the

Tribunal is required to reach the correct and preferable decision, and “that obligation must not be frustrated by overly strict insistence on compliance with the principles applied by appellate courts...”. In addition, the Tribunal has powers quite different to those of a court hearing an appeal, namely the power to quash or vary a decision without having identified an error of law on the part of the first instance decision maker, if it does not consider that a preferable decision was made.

Justice Parker suggested that with the transfer of the District Court Administrative and Disciplinary jurisdiction to SACAT there might follow some fundamental changes to the rights of the parties as a consequence of the *SACAT Act* review provisions. For the District Court to interfere with a decision appealed to it under its current jurisdiction, the appellant must show some error in the decision (the outcome) or decision making process relating to the decision appealed: this is clear from *Commissioner for Consumer Affairs v McMurray* [2017] SASCFC 16, where Hinton J concluded, “the error asserted must demonstrate convincingly that had the original decision maker proceeded correctly it would have arrived at a different conclusion” before the impugned decision can be altered by the Court. However, in a section 70 review before SACAT the Tribunal is required to give “appropriate weight” to the agency’s decision, but may depart from it if this is considered not to be the correct or preferable decision. A decision is not likely to be “correct” if it entails an error of law or fact; and will not be “preferable” if a discretion has been inappropriately exercised.

With this interpretation of section 70 it seems likely that SACAT has much greater scope to uphold a review or internal review than would the district Court because of the obligation under the SACAT Act to arrive at the “correct or preferable decision”, and accordingly it may

be much easier for an appellant to succeed before SACAT than before the District Court.

Justice Parker also referred to cases where the Supreme Court had considered the principles to consider in permitting an appeal from SACAT to the Court; and the operation of the *functus officio* principle within SACAT.

Justice Parker’s presentation and paper provided a valuable insight into the rapid development of jurisprudence applying to SACAT’s operation, and some significant differences which SACAT’s establishment accord parties before it.

BURNS V CORBETT – ANNA OLIJNYK AND STEPHEN MCDONALD 19 SEPTEMBER 2017

This was a joint presentation with the Australian Institute of Administrative Law, and the Australian Association of Constitutional law. It was well attended with more than 40 very engaged and interested attendees. It was organised by COAT-SA and held at the SACAT premises. The case under discussion raises issues of acute significance to state tribunals in relation to federal jurisdiction, in particular with respect to the diversity jurisdiction, where parties are resident in different states.

Burns v Corbett [2017] NSWCA 3 is a decision of the NSW Court of Appeal from February 2017. It is presently on appeal to the High Court. The case concerned complaints made by Mr Burns to the Anti-Discrimination Board of NSW about statements made by Ms Corbett and another person, Mr Gaynor, which he asserted vilified homosexuals and were contrary to the NSW *Anti-Discrimination Act*. At the relevant time Mr Burns was resident in NSW, while Ms Corbett was a resident of



Victoria and Mr Gaynor a resident of Queensland. The complaint against Ms Corbett was upheld in the Anti-Discrimination Board, and her appeal to NCAT was dismissed. In an action against Ms Corbett in the Supreme Court for contempt in failing to comply with the orders, Ms Corbett maintained that there had been no jurisdiction to make the orders against her as she was a resident of Victoria. The matter was removed to the Court of Appeal. The sole issue the Court of Appeal considered in the judgment of Leeming JA (for the Court) was whether NCAT could hear and determine a dispute arising under the *Anti-Discrimination Act 1977* (NSW) between a resident of NSW and a resident of Victoria.

The Court of Appeal held that NCAT did not have jurisdiction to hear and determine a dispute between residents of different states, as such a dispute came within the diversity jurisdiction referred to in section 75(iv) of the Constitution. The diversity jurisdiction is part of the original jurisdiction of the High Court, but which is then subject to section 77, which enables the Commonwealth Parliament to invest “any courts of a state” with federal jurisdiction. Made pursuant to section 77, section 39 of the *Judiciary Act 1903* does invest “Courts of a State” with federal jurisdiction including the diversity jurisdiction. State courts, when they determine disputes between residents of different states, are exercising federal jurisdiction, and have no state jurisdiction in relation to such disputes, as this is removed by section 39.

The question these considerations beg, of course, is what is the situation when a dispute between the residents of different states comes before a state tribunal? Neither section 77 nor section 39 of the *Judiciary Act* address the jurisdiction of tribunals. Most state tribunals are not courts in the Chapter 111 sense: SAET can be constituted as a court; and QCAT is a

court of record. However, SACAT is not a court and cannot therefore exercise Chapter 111 judicial power, and it was accepted in *Burns v Ransley* that NCAT was not a court and so could not exercise such power either: so it could not exercise the federal jurisdiction established in section 39. They can exercise the judicial power of the states though, as there is no separation of powers at state level, so perhaps the state could invest its tribunals with state judicial power. In *Burns v Ransley* Leeming AJ did not accept that the states were necessarily prohibited from investing state tribunals with the types of jurisdiction referred to in sections 75 and 76 (including the diversity jurisdiction), but he did accept that any state law which did so would be inconsistent with section 39 of the *Judiciary Act*. The outcome was that NCAT lacked the jurisdiction to determine a dispute between residents of different states.

In their presentation Anna and Steve canvassed the complex constitutional arguments concerning this issue, which is of acute interest to state tribunals. How does a state tribunal determine a dispute between a landlord and tenant where the tenancy is in SA but the landlord resides interstate? One possibility is that the tribunal determines the dispute but not in a final and authoritative manner, without the exercise of judicial power, perhaps with the registration of the orders in a court for their enforcement: with respect to a matter within the diversity jurisdiction, this has not found favour as a way of overcoming the judicial power problem. Anna and Steve suggested the solution might be in the hands of the Commonwealth parliament: this possibility however must await at least the outcome of the High Court’s determination.

The practical result of the constitutional ramifications of diversity jurisdiction, judicial power and state tribunals is more than inconvenient: it undermines the fundamental

purpose of the establishment of tribunals to determine quickly and fairly common disputes which justice requires be able to be determined with a minimum of time and cost, for all parties. The provision of accessible, efficient justice becomes frustrated. Watch this space!

STOP PRESS:

The High Court delivered its judgment in *Burns v Corbett* [2018] HCA 15 on 18 April 2018. More to follow.

SAVE THE DATE:

SACAT's Expanding Jurisdiction

Since it opened in March 2015, the SA Civil and Administrative Tribunal continues to grow. The Honourable Justice Judith Hughes, President of SACAT, will provide an update on the additional jurisdictions conferred upon SACAT since its inception, and more planned for the foreseeable future.

30 May 2018 5:30 – 7:00, The Law Society of SA, Level 10, 178 North Terrace Adelaide

Register [here](#)

2018 COAT National Conference

The COAT National Conference will be held in Canberra on Thursday 7 and Friday 8 June 2018. The Conference Program has been released, and can be accessed at this link - <http://www.coatconference.com.au/resources/2018%20COAT%20National%20Conference%20Program.pdf>, and the full Conference website is at <http://www.coatconference.com.au/>

Earlybird registration closes on **Friday 6 April**, with a \$220 discount on the full registration costs. On line registration is available at <http://coatconference.com.au/register.php>

The 2018 Conference focuses on Tribunals of the Future, and there are a number of sessions which address this important issue in a innovative ways, as well as a number of “skills development” sessions that will be of broad interest.

Some outstanding features of the Conference include the following. Former Chief Justice French will provide the opening keynote address, speaking about Tribunals and the Rule of Law, drawing on work of the Judicial College on access to justice. Professor Genevieve Bell, 2017 Boyer Lecturer, from ANU, will speak about “Being Quick, Cheap and Just in a Digital Age”. Denise Carlton, the Chief Demographer with the Australian Bureau of Statistics, will speak about some of the demographic issues highlighted by the most recent Census and their implications for the work of tribunals, including population distribution, the structure of households, and aging populations. These issues will be followed up in some subsequent concurrent sessions. There will also be a number of sessions on tribunals and security issues, including national security matters; personal security matters and confidential information and their implications for procedural fairness; and the security of data kept and used by tribunals. There will be a keynote address on this broad topic (by Tom Howe QC, Chief Counsel Dispute Resolution, AGS), followed by a number of concurrent sessions exploring discrete areas of security. The final keynote will be on the perennially interesting and significant topic of Governments and tribunals, discussing matters including independence, appointments and reappointments. This should be a lively final



session with a panel including two former attorneys general!

“Skills” sessions will discuss a number of areas, including some ongoing and familiar, but always topical, matters: litigants in person; conflicts of interest; communication issues; giving ex tempore decisions, technology and tribunals.

This year’s Conference promises to be stimulating and relevant to the work we all do on our tribunals, providing many opportunities for networking and food for thought. As a member of the organising committee for the Conference I have been really impressed and pleased at the development of the program, and I think there is much in it for all of us to enjoy and learn from.

The COAT National AGM will also be held at the Conference, on Friday 8 June.

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Newsletter Editor: COAT SA Secretary, Marten Kennedy, with gratefully acknowledged assistance from Mr Seamus Brand, Associate to Hughes J (SACAT) for proof-reading and layout of this issue. Thursday 3 May 2018

