

COUNCIL OF AUSTRALASIAN TRIBUNALS • SOUTH AUSTRALIA

COAT SA News

News from the Tribunals of South Australia

Issue 13



View of the State Parliament from the Members' Corridor at the new AAT premises

May 2017

Convenor (SA): Kath McEvoy • Secretary (SA): Marten Kennedy

WELCOME FROM THE CONVENER

Kath McEvoy

This is our first Newsletter for 2017. We hope it is a productive year for all our members! We will try to contribute to this through presentations that are interesting and useful for you, opportunities to raise issues of interest to you as well as meet with members of other tribunals within the State. We hope too to include in this and future Newsletters news and issues concerning our tribunals and other tribunals interstate, and some discussion of relevant case law impacting on tribunal practice and jurisdiction and legislative developments.

2017 will see new jurisdictions conferred on SACAT and SAET, and there are reports on this in this Newsletter. There are also some legislative changes relevant to jurisdictions already exercised by SACAT, and there are reports on them in this Newsletter. The AAT has now settled into its new premises at 1 King William Street, and we have some photographs for those who haven't yet been there!

COAT National is gearing up for its annual conference, to be held jointly with the NSW COAT Conference in June this year. There is some other news from COAT on which I will report further below.

We are planning presentations as the year progresses, and if any of you have any topics you would like addressed, or possible presenters, please let me or another member of the committee know.

At the end of 2016, two members of the COAT-SA Committee left the committee: Neil Rainford, a long standing member of the committee, and Cathy Cashen. We have one

new member, Cathrynne Lester. We are delighted to have Cathy as a member of the committee, and I ask any of you to consider if you would like to join the COAT-SA committee in the future.

I hope you find this Newsletter useful and informative, and I look forward to seeing you throughout the year at COAT-SA presentations.

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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.



COAT NATIONAL CONFERENCE 2017

Kath McEvoy

The Conference will be held in Sydney, in conjunction with COAT-NSW annual conference, at the International Convention Centre, Darling Harbour, Sydney, on 8-9 June 2017. The title is Tribunals: Enablers of Justice, and will explore a number of issues including both keynote addresses, sessions and workshops addressing specific practical skills and issues to support tribunal members in the delivery of justice in their tribunals. On the second day of the Conference, participants will observe a tribunal hearing in another language interpreted into English with an expert commentary and a practical discussion of the use of interpreters: this is to focus on our increasing use of interpreters at tribunal hearings and to showcase the operation of the newly developed guidelines on the best practice on the use of interpreters. This session will be chaired by Justice Melissa Perry of the Federal Court, who has been instrumental in the development of the new interpreter guidelines.

The Conference also includes a conference dinner to be held at the Australian Maritime Museum, with the guest speaker Faye Jackson, Deputy Commissioner, NSW Mental Health Tribunal, on Thursday 8 June; and the COAT AGM on the morning of Friday 9 June.

Earlybird registration is now closed, but places at the Conference and dinner are still available. The full Conference program and other details are available at the website:

<http://www.coatconference.com.au/>

COAT NATIONAL REPORT

Kath McEvoy

I remain secretary of COAT National, and the executive meets (via teleconference) every two months or so. We have two face to face meetings each year: one at the National Conference, and a full day planning day in October.

COAT National has several major projects coming to fruition soon, and it is hoped they can be launched at the National Conference.

The first is 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 I recommend it to all 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 expected that the revised version will be launched at the National Conference.

COAT National is also developing an online project for induction of new tribunal members. This project is intended to provide various tribunals with a program, which will include both generic and tailored segments, which can be repeated perhaps twice a year running over six – eight weeks, to assist with the induction of new tribunal members. COAT is developing this program independently, but with the support of an experienced online education provider assisting with the design and implementation, including development of the required software. Content for the program has been developed by COAT, and five segments have



been completed, including statutory interpretation; conducting a hearing and procedural fairness. Again, it is hoped that this will be launched at the 2017 Conference. Details of costings and other arrangements have yet to be worked out, but it is likely the courses will start in September 2017 and each will run for 2 months. The course will be online and will include live Facebook chat with tribunal leaders.

COAT National has also been working on the development of a Framework for Tribunal Excellence, based on the Framework for Court Excellence. It is expected that the document and questions will be available on the COAT website as a Microsoft Word document so that it can be easily used by individual tribunals, and that it will be available to be launched at the 2017 National Conference and/or the Registrars' Conference. The framework enables a tribunal to self-assess its independence against a number of criteria set out in the Framework.

COAT's earlier major project, the development of the Tribunal Independence in Appointments: Best Practice Guide is now complete and has been published and publicised. The Guidelines are available on the COAT National website and are available at http://www.coat.gov.au/images/Tribunal-Independence-in-Appointments_COATBestPracticeGuide-2016-Final-web-interactive.pdf.

COAT is also in the process of 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.

COAT is also proposing some changes to its Constitution which will be considered at the AGM in June. These changes are largely consequential on relevant NSW Association legislation, pursuant to which COAT

National is registered. They are not otherwise substantive changes, although they are quite extensive.

I can report from the discussions at the COAT Planning Day last October that SA has a very active Chapter compared with some other jurisdictions, some of which have decided not to have a separate Chapter.

AROUND THE JURISDICTIONS

SACAT

SACAT – New Jurisdictions

Clare Byrt

Chris Byron-Scott

Thursday 30 March 2017 marked SACAT's two full years of operation. SACAT is now truly up and running and is delivering efficient, fair, accessible and speedy decision making and dispute resolution across a diverse jurisdiction in a high volume and challenging environment.

Given the nature and purpose of SACAT, its jurisdiction is regularly changing and expanding and this is likely to continue.

On 11 December 2016, SACAT was conferred additional review jurisdictions under the *First Home and Housing Construction Grants Act 2000* (FHHCG Act) and the *Freedom of Information Act 1991* (FOI Act).

Under the FHHCG Act, SACAT now has jurisdiction to review decisions of the Treasurer on an objection in relation to the following:

- First home owner grants;
- Housing construction grants; and
- Seniors housing grants.



If the Commissioner of State Taxation has made a decision about a first home owner grant, or a housing construction grant or a seniors housing grant, and an applicant is dissatisfied with that decision, the applicant must first lodge a written notice of objection with the Treasurer before coming to SACAT. SACAT cannot hear a review under the FHHCG Act until the Treasurer has determined an objection.

An application for review of a decision must be lodged within 60 days after the notice of the decision on the objection is given.

Under the FOI Act, SACAT will have the power to review the following determinations:

- Determinations made by the Ombudsman or Police Ombudsman on review;
- Determinations made by an agency following internal review; and
- Determinations that are not subject to internal review.

'Determinations' are decisions that have been made about requests to access documents ('FOI applications') or requests to amend records.

Where a person is aggrieved by an agency's determination, and that person has gone through the internal review process (or there was no right to internal review), that person can choose to apply to the Ombudsman/Police Ombudsman or go directly to SACAT for an external review. However, if an application for review of a determination has been made to the Ombudsman or Police Ombudsman, SACAT cannot review the matter until that application has been decided.

Commencing a review with SACAT bars any right to apply for a review by the Ombudsman or Police Ombudsman.

An application for review of a determination must be commenced:

- within 30 days after notice of the determination is given to the person or agency, or
- if notice of the determination was not given, within 30 days after the determination is due.

On 3 April 2017, SACAT was conferred both original and review jurisdiction under the *Housing Improvement Act 2016*.

Under these changes SACAT was given a broad jurisdiction to deal with "housing improvement tenancy disputes" - which is:

- a dispute between parties or former parties to a residential tenancy agreement (including residential parks and rooming houses) about matters arising under the *Housing Improvement Act*; and
- any matter that may be the subject of an application under the *Housing Improvement Act* to SACAT.

In housing improvement tenancy disputes, SACAT will have the power to make orders for ejection, for enforcement of an ejection order by a Tribunal bailiff, for compensation for loss and inconvenience as well as a range of general orders under section 38 and exemptions under section 50 of the *Housing Improvement Act*.

Applications of this kind are in the original jurisdiction and will be handled by SACAT's Housing & Civil Stream. There is a right to seek a SACAT Internal Review from such original jurisdiction decisions.

SACAT was also conferred jurisdiction to review decisions made by the Housing Improvement Branch (which is a part of the Department for Communities and Social Inclusion) to make a range of orders, including housing assessment orders, housing

improvement orders, housing demolition orders as well as being able to issue a rent control notice and notices to vacate.

Applications of this kind are under the review jurisdiction and will be handled by SACAT's Administrative & Disciplinary Stream. An application for review of a decision must be lodged within 28 days from the date that the order or notice was issued. There is no right to seek a SACAT Internal Review in relation to review jurisdiction matters.

The *Mental Health (Review) Amendment Act 2016* which will impact the work of the Community stream is planned to commence on 5 June 2017. SACAT is anticipating the jurisdiction under the *Firearms Act 2015* will commence in the second half of 2017. We are also looking forward to the planned broad expansion of our jurisdiction in the Administrative & Disciplinary stream in to the future.

Table One, annexed to this newsletter, sets out the current jurisdiction of SACAT as of May 2017.

Amendments to the Mental Health Act 2009

Cathrynne Lester

The *Mental Health Act 2009* ensures that people with severe mental illness receive a comprehensive range of recovery-oriented services for their treatment, care and rehabilitation. Changes to the Act via the *Mental Health (Review) Amendment Bill 2016* have been passed by both houses of Parliament and is awaiting assent (proclamation is likely 2 July 2017). The amendments are a result of a review conducted by the Chief Psychiatrist considering issues identified in the first four years of operation of the Act.

The key areas of change that affect members of SACAT relate to definitions, internal review rights and significant changes regarding level 1 community treatment orders and inpatient treatment orders. Perhaps the most noticeable changes appear to be the extended length of orders that can be made by authorised health professionals, medical practitioners and psychiatrists and the inclusion of the criterion of 'decision-making capacity' when considering applications for community and inpatient treatment orders by the Tribunal.

Under the changes, authorised health professionals will now be able to make a level 1 community treatment order for 42 days (previously 28 days). The amendments will also remove the requirement of automatic review by SACAT of these orders. Level 2 Inpatient treatment orders, which currently have a maximum duration of 42 days, may be extended by a psychiatrist or authorised medical practitioner for a further 42 days. The Tribunal must review the circumstances involved in the making of an order to extend a level 2 inpatient treatment order.

The inclusion of 'decision making capacity' relating to the appropriate treatment of the person's mental illness will be a criterion for the making of all community and inpatient treatment orders. Upon considering applications for community and inpatient treatment orders in the future, the Tribunal will not only have to be satisfied the person has a mental illness, but also make a finding regarding that person's decision-making capacity. Other noteworthy changes to the Act include that the review of community and inpatient treatments orders will no longer be within the original jurisdiction of SACAT. Reviews of these orders will be under SACAT's review jurisdiction. Appeals of reviews of these orders will be before the Supreme Court, however, only with leave of the Court.



SAET

Expansion of SAET Jurisdictions

Jenny Russell

The SA Employment Tribunal will soon take on some further jurisdictions. The Tribunal commenced operating on 1 July 2015 to resolve workers compensation disputes under the new Return to Work scheme, which replaced the previous Workers Compensation scheme. Remaining Workers Compensation Tribunal matters were transferred to SAET on 5 March 2016. On 8 December 2016, the *Statutes Amendment (South Australian Employment Tribunal) Act* was assented to. The Amending Act expands the SAET's jurisdiction to resolve disputes, and provide other services, in relation to other employment and discrimination related legislation. The Amending Act will commence on 1 July 2017.

Various pieces of legislation are being amended concurrently such that they confer jurisdiction on SAET to resolve disputes and provide certain other relevant services. Those acts are:

- *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*
- *Training and Skills Development Act 2008*
- *Work Health and Safety Act 2012*

Each relevant amended Act (conferring Act) refers certain application types to SAET and in some cases prescribes some detail on how matters are to be handled by SAET.

The Tribunal will now deal with such matters as applications for resolution of disputes under the *Training and Skills Development Act*, applications for obtaining or revoking work health and safety permits under the WHS Act, grievances under the *Public Sector Act* and referrals of complaints under the *Equal Opportunity Act*. The Tribunal will also have conferred upon it jurisdiction to deal with disputes currently handled by the Industrial Court and Commission and which arise under the *Fair Work Act*, such as contracts of employment, enterprise agreements and awards, unfair dismissal claims and industrial disputes.

SAET members are comprised of Presidential Members, whose primary role is to adjudicate matters that cannot be resolved by alternative dispute resolution, Commissioners who facilitate parties through a range of approaches, including conciliation, to try to achieve an agreed settlement, and Supplementary Panel Members who will be appointed on a sessional basis to be available to contribute to the adjudication of certain types of Tribunal matters. Panel members will generally be nominated from a relevant employer and employee body, as specified in a conferring Act, or because of their expertise in particular matters e.g., equal opportunity discrimination matters.

The SAET Act also establishes a part of the Tribunal as a "Tribunal in court session", which is known as the South Australian Employment Court. This enables SAET, as one body, to operate with two parts: firstly the Tribunal, which exercises administrative powers such as an arbitral function, and secondly the Court, in which judicial members



(i.e. Judges and Magistrates) exercise judicial powers.

AAT

Complaints and the Reconstitution of the Tribunal - 1419015 (Practice and Procedure) [2016] AATA 3075

Alexander Chan

In Case 1419015, President Kerr considered when it was appropriate for the President of the AAT to exercise the power to reconstitute the Tribunal under section 19D of the AAT Act.

The applicant in Case 1419015 sought the review of a decision to refuse the granting of a Partner visa. The applicant's case was that her relationship had broken down following domestic violence. One day after the hearing was held, the applicant was involuntarily admitted to a hospital as a result of a suicide attempt. Shortly thereafter, the applicant's representatives sent a letter of complaint addressed to the AAT and outlined allegations of unsympathetic behaviour of the Senior Member involved. For instance, it was alleged that the Senior Member made no attempt to explain the applicable Regulations to the applicant, conducted the hearing in an overly technical manner and repeatedly asked insensitive questions about domestic violence. The case was originally managed as a complaint but was subsequently referred to President Kerr and managed as a request for the reconstitution of the Tribunal under section 19D of the AAT Act.

President Kerr held that the relevant portion of section 19D that empowered the President to reconstitute the Tribunal had to be section 19D(2)(a)(iii), which states that a direction to reconstitute the Tribunal may be made if the

member, or one of the members, who constitutes the Tribunal for the purposes of the proceeding is 'directed ... not to take part in the proceeding'. Such a power did not allow the President to freely replace a decision maker with another. When read in its proper statutory context, it was clear that the power was intended to be exercised with restraint. Subsections (5) and (6) make it clear that the power is not to be exercised unless the President is satisfied it is in the interests of justice to do so.

President Kerr's view was that it would not ordinarily be in the interests of justice for the President to exercise this power in respect of alleged conduct by a Tribunal member if the circumstance could be adequately addressed by an application for the Member's recusal. There are two advantages to this default approach. First, a refusal of a recusal application would be reviewable by the Federal Court of Australia or the Federal Circuit Court of Australia, whereas the exercise of the President's power under section 19D is unreviewable. Second, for a President to routinely determine whether or not to reconstitute the Tribunal would inevitably lead to member shopping and unnecessary delay.

Applying those principles to the case, President Kerr accepted that an integral part of a Tribunal Member's role is to put unfavourable matters to an applicant or to point out weaknesses in their case. Notwithstanding the particular applicant's fragile mental state, it would have remained the Senior Member's duty to test, even robustly, the applicant's case to determine the application before it according to law. It was acknowledged of course that nonetheless the Tribunal will do all that is reasonably open to it to mitigate the risk of reactivating the applicant's suicidal ideation.



In the circumstances, since it was open to the applicant to make a request for the Senior Member to recuse herself for reasons of apprehended bias, President Kerr refused to exercise his power under section 19D to reconstitute the Tribunal.

Upcoming Events

Second National COAT Tribunal Registrars and Administrators Conference

Adelaide, Friday 20 October 2017

A conference organising committee comprised of representatives from Tribunals across Australia has been established to plan and deliver the 2nd National COAT Tribunal Registrar's and Administrators conference to be held in Adelaide on Friday, 20 October 2017. There will also be a Master Class the evening before on Thursday 19 October 2017.

The Conference will be held at the Mayfair Hotel, King William St, Adelaide.

The theme of the Conference is "Tribunal Accessibility – Meeting Community Expectations".

Whilst the Conference Programme is not yet complete there are a range of speakers who have confirmed.

Justice Greg Garde (President of VCAT) has agreed to be the keynote speaker who will energise, motivate and inspire the audience with the challenge of reframing VCAT's vision of service through a spectrum of citizen centric service delivery. Justice Garde's presentation will be followed by a panel discussion on specific client-focused initiatives of the various Tribunals and the Framework for Court/Tribunal Excellence from Mike

Valance (Supreme Court Vic); VCAT; QCAT and the AAT.

There will be sessions on Diversity and Indigenous Clients including a discussion of the AAT's SA Social Security program of engaging with rural Indigenous service providers to promote appeal rights. There will be a session on SafeWards Victoria – showcasing a programme to improve the quality of interactions between staff and consumers in mental health settings as well as a session on Technology in Tribunals. The last session of the day will be an interactive presentation of online dispute resolution approaches from QCAT and the WA State Administrative Tribunal.

The Thursday evening Master Class presenter is Tania Sourdin who will be providing a forward looking presentation on the future of the law and new technologies including the use of Artificial Intelligence and some of her recent research on Judges, judging and robotics!

The committee is co-chaired by Clare Byrt, Principal Registrar of SACAT and Leah McLay, Principal Registrar of SAET. Other organising committee members are:

Anna Guthleben (SAET)
 Chris Byron-Scott (SACAT)
 Ian Phillips (AAT)(SA)
 Alicia Colley (Medical Panels Victoria)
 Jarrod Bryan (Tasmanian Department of Justice)
 Katrina Harry (VRB)
 Jane Probert (NSW State Insurance Regulatory Authority (SIRA))
 Zashalla Nicholson (Mental Health Tribunal (MHT) Victoria);
 Kerryn Negri (VCAT)
 Mary Shortland (QCAT)
 Mark Street (State Administrative Tribunal WA).



The aim is to keep conference costs to a minimum to encourage as many tribunal and court registrars and administrators as possible to come to Adelaide to network, discuss and share approaches on meeting the needs of our users and engaging our community. Watch this space for the final conference programme – coming soon.

SAVE THE DATE:

The Art of Good Hearing

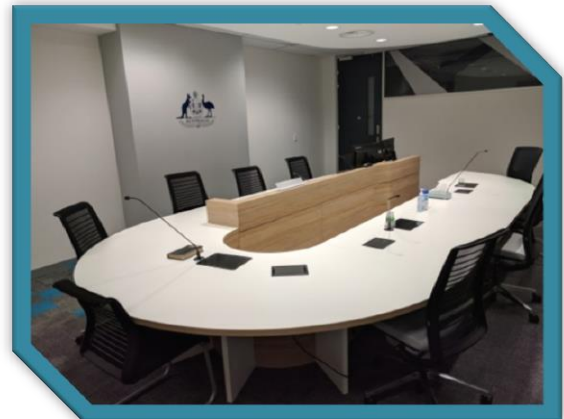
Seminar by DP Jan Redfern (AAT)
Rescheduled to 26 June 2017 – details to follow

Registrar and Executive Officer Biennial Conference 2017

Thursday evening (Masterclass) and
Friday 19/20 October 2017
Mayfair Hotel, King William Street, Adelaide
Other Details coming soon

Other News

AAT has Officially Relocated!



The AAT's new premises on King William St



ANNEXURE 1

Table One SACAT Jurisdiction List May 2017

Relevant legislation	SACAT cases	Date of Conferral
Advance Care Directives Act 2013	Advance Care Directives, Guardianship	29 March 2015
Community Housing Providers (National Law) (SA) Act 2013	Reviews of decisions made by a community housing provide, or the registration of housing providers	29 March 2015
Consent to Medical Treatment and Palliative Care Act 1995	Consent to medical treatment	29 March 2015
Controlled Substances Act 1984	Decisions relating to the issue or holding of a poppy cultivation licence or poppy processing licence	16 September 2016
First Home and Housing Construction Grants Act 2000	Reviews of the Treasurer's decisions on objections about first home owner grants, or housing construction grants or seniors housing grants	11 December 2016
Freedom of Information Act 1991	Reviews of freedom of information determinations; reviews of amendment of record determinations	11 December 2016
Guardianship and Administration Act 1993	Guardianship, administration, consent to medical treatment	29 March 2015
Housing Improvement Act 2016	Reviews of certain orders and notices issued by the Housing Improvement Branch.	3 April 2017
Lobbyists Act	Review decisions in relation to the registration of lobbyists	April 2016
Land Valuation Act	Land valuation reviews arising from the Adelaide City Council and Port Adelaide Enfield Council	29 March 2015

ANNEXURE 1

Table One SACAT Jurisdiction List May 2017

Relevant legislation	SACAT cases	Date of Conferral
Mental Health Act 2009	Protectionist jurisdiction arising under the Mental Health Act	29 March 2015
Real Property Act 1886	Reviews of certain decisions made by the Registrar-General	22 April 2015
Residential Tenancies Act 1995	Tenancy disputes up to the value of \$40,000	29 March 2015
Retirement Villages Act 1987	Tenancy disputes up to the value of \$40,000 arising from Retirement Villages	29 March 2015
Residential Parks Act 2007	Tenancy disputes up to the value of \$40,000 arising from Residential Parks	29 March 2015
South Australian Housing Trust Act 1995	Reviews of Housing SA decisions	29 March 2015
Valuation of Land Act 1971	Land valuation reviews from decisions of the Valuer-General	29 March 2015

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Newsletter Editor: COAT SA Secretary, Marten Kennedy, with gratefully acknowledged assistance from Mr Alexander Chan, Associate to DP Bean (AAT) for proof-reading and layout of this issue. Tuesday 30 May 2017

