October 2014 Issue 10

COAT SA News

News from the Tribunals of South Australia

From the Convenor

Welcome to COAT-SA's second Newsletter for 2014.

As we move into spring the Tribunal landscape across Australia is changing, ensuring an exciting and interesting time (each of those descriptions can of course equally be a curse as well as a promise)!

The Commonwealth Government is expected to introduce legislation for a Commonwealth "Super Tribunal" in November 2014. We reported on this proposal briefly in the previous Newsletter. While it is not yet clear what model this new tribunal will take, it is expected that there will be some "rationalisations" of most of the Commonwealth Tribunals, from the first level external review tribunals (such as the Social Security Appeals Tribunal) through to the AAT. Further on in this Newsletter you will find some further discussion of these proposals, and COAT will be interested to see the shape and operation of what is proposed, as well as how it will affect tribunal members. It is proposed that the new arrangements will be operating from 1 July 2015, so it is likely that plans will move fast.

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COAT
COUNCIL OF AUSTRALASIAN TRIBUNALS
SOUTH AUSTRALIA

From the Convenor *(continued)*

In South Australia, the SACAT is expected to be in operation by the end of October. Legislation to transfer jurisdiction from a number of existing tribunals, including the Guardianship Board, the Residential Tenancies Tribunal, and the Housing Appeal Panel (these are the jurisdictions planned to be the first transferred to SACAT) to SACAT has passed the House of Assembly and is expected in the Legislative Council in late September. Interviews have been held for appointments to Tribunal and Registry positions with SACAT. There is a "progress report" on SACAT in this Newsletter.

The final addition to the landscape is the announcement by the SA Government of the proposed establishment of the Employment Tribunal in SA, to operate from 1 July 2015, along the same model as the SACAT, incorporating the numerous employment related tribunals and bodies not within SACAT's jurisdiction. There is a report on this proposal later in this Newsletter.

All of these developments have occupied COAT (as well as, no doubt, many members) and the plans we had from meetings and presentations this year to date have not been possible to bring to fruition with so much in flux. They are however still planned in some form or another. COAT-SA is still keen to have an evening presentation with administrative officers of SACAT to provide some more details of the operational plans for SACAT and perhaps a tour of the SACAT premises at 100 Pirie Street. COAT-SA will also pursue plans to present another half-day session on ADR and tribunals: this too is awaiting some further clarification of both the Commonwealth and state tribunal plans, so we can incorporate their proposals and expectations into the presentations.

The COAT-SA AGM will be held on Wednesday 26 November at 5.30 pm. Separate notices will be sent out for the meeting with all relevant details, but this is to provide an advance notice, for two reasons.

The first is that we are privileged to have as the guest speaker at the AGM the Hon the Attorney General and Deputy Premier, the Hon. John Rau, and I hope that in this year of significant tribunal development many of you will attend to hear him speak to us, with the opportunity of discussion with him on a range of issues of interest to us.

The second reason is to urge you all to consider if you are interested and available to take up a position on the COAT-SA executive. These positions are determined at the AGM, and if you have an interest in COAT and issues of interest to tribunal members and users and would like to contribute at the executive level in COAT, please contact me or another member of the current executive to let us know. New ideas, new energy, and new blood are always welcome, and are always needed in all organisations so that they can thrive and continue to be useful and functioning!

We will also use the AGM as an opportunity for a small end of year (a busy and somewhat tiring one!) celebration for COAT-SA.

As always, please let me know if there are issues, topics or visitors you would like to have pursued by COAT-SA.

Kath McEvoy
Convener, COAT-SA

Commonwealth Tribunals Reform

An article appeared in the last newsletter relating to the announcement by the Commonwealth Attorney-General to the effect that from 1 July 2015 four Commonwealth merits review agencies will be amalgamated.

A group called 'the Tribunals Amalgamation Taskforce', which sits within the Attorney-General's Department, is co-ordinating the reform.

Planning is still underway for that to occur on 1 July 2015 and it is anticipated that legislation will be introduced by the end of 2014.

COAT will report further on this issue when there is more detail available about the structure and powers of the new body.

The Attorney-General's website allows individuals and organisations to submit feedback and sign up to receive email updates on the proposed changes through the following email address: tribunalsreform@ag.gov.au

Sue Raymond
Senior Member
MRT MMT

Developments in the Introduction of SACAT

1. Legislation

Last month a Bill to amend the SACAT Act was passed by the House of Assembly. The Bill makes a number of procedural and transitional amendments to the principal Act. For example, it amends the Freedom of Information Act so that the former process of appeals made to the District Court will be replaced with applications for review to SACAT.

In addition, reviews under Section 81 of the Mental Health Act of a community treatment order or an inpatient order made by a clinician will be dealt with by SACAT as an original determination rather than a decision under review.

The Bill also contains a number of amendments in relation to advance directives.

It is interesting to note from the Second Reading Speech of the Bill that the Bill was strongly supported by members of the Opposition; for example, the Hon I Evans (Member for Davenport) stated that "*the Opposition welcomes the establishment of SACAT…I really wish to encourage the government to consider going further with the SACAT bill, and what it can actually hear.*"

The Bill was introduced into the Legislative Council on Tuesday 16 September 2014. Deliberation on the Bill has been postponed for one month pending further consultation with the mental health sector.

In addition to the Bill to amend the principal legislation, work has commenced on drafting Rules and Practice Directions for SACAT.

2. Recruitment of members and key administrative staff to SACAT

On Thursday 4 September 2014 a number of appointments were made for sessional members of SACAT. We congratulate those who were successful in that recruitment process.

We understand that the interview process for executive senior members, full time members and part time members has been completed but the outcome of that process is unlikely to be known until much closer to the commencement of SACAT.

There are 5 Deputy Registrar positions on SACAT. Each of those persons reports to the Principal Registrar, Clare Byrt. Those positions were recently advertised - three of the positions effectively hold responsibility for a "stream" of work within SACAT and the other two positions will have a focus on Alternative Dispute Resolution. We understand that this recruitment process has not yet been finalised.

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3. Operational issues

The case management system

The project sought public tenders for the SACAT Case Management System and this resulted in a strong field of respondents. A preferred provider has been selected and work has begun in areas such as the transfer of data from current systems to the new system, work flow analysis, an electronic application form and a complete review of all documents to be generated from the system on a regular basis.

Technology

The SACAT Project Team has been working on issues such as video-conferencing facilities in various locations using access via the Courts

Administration Authority, TAFE SA and SA Health. In addition, a desktop-based video-conferencing solution is being explored for introduction and trial by SACAT.

Communications

There is now a SACAT web page. The Project Team has also developed a communications strategy with key stakeholders which is being implemented.

Barbara Johns
Presiding Member
Residential Tenancies Tribunal

Editor's post script: An article in the Advertiser of Monday 6 October 2014 by Political Reporter Sheradyn Holderhead attributes the Attorney-General to have said that the earliest SACAT (would be set up) would be March because of delays in State Parliament.

The Proposed SA Employment Tribunal

On 6 August 2014 the SA Employment Tribunal (SAET) Bill was introduced to State Parliament. The Bill establishes a new Tribunal to deal with rights and circumstances arising out of or in the course of employment, and will replace the existing Workers Compensation Tribunal and Industrial Court.

The model for the SAET proposed in the Bill resembles in some respects that of the SA Civil and Administrative Tribunal (SACAT). It will be headed by a President, have a number of Deputy Presidents, and require compulsory conciliation prior to any hearing being scheduled. The main objectives include promoting the "best principles of decision-making" - independence, natural justice and procedural fairness, high quality and consistency of decision-making, transparency and accountability, accessibility, timeliness, the use alternative dispute resolution, cost minimisation for applicants, straightforward language and procedures, informality and flexibility.

The Tribunal may be continued of a Full Bench (two or more presidential members), a single presidential member or a single conciliation officer. Applications must initially be referred for conciliation. In conducting conciliation, the conciliator must seek to identify the issues in dispute and narrow the range of the dispute, and explore the possibilities of resolving the dispute by agreement. If a settlement is not reached, the matter is referred for hearing, either by a conciliation officer "if not complex", or by a single presidential member. On hearing matters, the Tribunal is not bound by the rules of evidence and may inform itself as it thinks fit, but must act according to "equity, good conscience and the substantial merits of the case".

The Bill also contemplates compulsory conferences being an option during the hearing of the matter, and the member presiding at the conference is disqualified from hearing and determining the matter (should settlement not be reached), unless the parties agree on his or her continued participation. Parties may appear in person, by counsel or by other representative with the leave of the Tribunal, and appeals lie from a decision of a conciliator to a single presidential member; and on a question of law from a single presidential member to a Full Bench, and from a Full Bench to a Full Bench of the Supreme Court.

The Bill is in the House of Assembly as at the time of writing (24 September 2014) and it is likely there will be some amendments. The Minister responsible, the Hon. John Rau, has indicated his desire for a commencement date for the new Tribunal of 1 July 2015, in conjunction with new workers compensation legislation contained in a separate bill.

Jenny Russell and Anne Lindsay
Workers Compensation Tribunal

Sullivan v Civil Aviation Safety Authority [2014] FCAFC 93

Casenote

In July 2014 the Full Court of the Federal Court of Australia (Logan, Flick and Perry JJ) considered an appeal against a decision of the Federal Court in *Sullivan v Civil Aviation Authority* [2013] FCA 1362, which was the subject of a Casenote prepared by Kath McEvoy for our last Newsletter.

On appeal from the decision of the primary judge (Jagot J), the Full Court considered the applicability of the common law rules of evidence to administrative decision-making and decision-making by administrative tribunals.

As recorded in the previous Casenote, at first instance, Jagot J dismissed an appeal against a decision of the Administrative Appeals Tribunal affirming a decision of the Civil Aviation Safety Authority to cancel Mr Sullivan's commercial helicopter pilot licence. In affirming the decision of the Authority, the Tribunal concluded that Mr Sullivan was not a fit and proper person to hold a commercial pilot licence, as required by reg 269(1)(d) of the *Civil Aviation Regulations.* In so concluding, the Tribunal preferred the evidence of those witnesses who gave a different account from that of Mr Sullivan. Justice Jagot held that, when making its findings on material facts adverse to Mr Sullivan, the Tribunal was not bound by the rules of evidence, and that the civil standard of proof propounded in *Briginshaw v Briginshaw* (1938) 60 CLR 336 did not apply.

The *Briginshaw* principle, as articulated by Dixon J, is as follows:

'…But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect inferences…'

Mr Sullivan raised two broad issues to be resolved on appeal to the Full Court. The first issue was whether the Tribunal was bound to apply the standard of proof set out in *Briginshaw* when making its factual findings, and, if so, whether it had done so. The second was whether the primary judge had erred in holding that the Tribunal had complied with the rule in *Browne v Dunn* (1893) 6 R 67 in relation to certain evidence.

The Full Court considered the general proposition that the Tribunal is 'bound' to apply *Briginshaw* as flawed, being inconsistent with "the very charter entrusted to the Tribunal and the deliberate and detailed legislative scheme enacted by the Parliament for the discharge of its statutory functions of review."[1] In their joint judgment, Flick and Perry JJ observed that whether the Tribunal decides to apply or inform itself by reference to the common law rules of evidence is a matter that the legislature has left to the Tribunal itself to determine.[2]

They also observed that the "manner in which the Tribunal proceeds cannot … be pre-determined by any generally expressed "principle of law" which is applied to some indeterminate fact findings", which may be characterised as "grave or "serious"..."[1] Further, any attempt to confine the application of the *Briginshaw* principle to such findings would be an imprecise exercise, rife with difficulties of fact characterisation.[3]

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[1] At [108].
[2] At [116].
[3] At [116].
[4] At [108], [113].

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Accordingly, the Full Court held that even when making findings of fact that may have 'serious' or 'grave' consequences for a party, the Tribunal is free to consider the evidence and other material before it.[5]

However, the Full Court also emphasised that the Tribunal does not have "untrammelled power to make findings of fact free of all judicial scrutiny."[6] The procedural flexibility afforded to administrative tribunals freed from the rules of evidence does not remove the obligation to make findings of fact based upon logically probative material, in which the rules of evidence provide a guide.[7]

Justice Logan further considered that where a conclusion may have "grave consequences for a party to review or even third parties, it ought not lightly to be reached".[8] He affirmed the reasoning of Jagot J, holding that such factors intrude on what the Tribunal should regard as probative in the making of a reasonable decision.[9] If the quality of material supporting a particular conclusion of the Tribunal is slender or there is a body of compelling contradictory material, that conclusion might be found to be unreasonable on appeal.[10]

Despite this, the Full Court held that the proposition that the Tribunal was 'bound' to apply the general principle of law expressed in *Briginshaw* was an impermissible attempt to impose curial principles upon administrative decision-making processes. It need only be apparent from the reasons given that the decision-maker is aware that any conclusions carrying grave consequences ought not lightly to be made.[11] However, whilst the Tribunal is not 'bound by the rules of evidence', it is bound in carrying out its review function to proceed in a manner which is 'fair, just, informal and quick' and to ensure a party has a 'reasonable opportunity'[12] to present their case. Subject to those composite legislative requirements, the Tribunal has discretion as to its procedure.

For similar reasons, the Full Court also concluded that the Tribunal was not "universally – or even generally" required to apply the rule in *Browne v Dunn* in the conduct of its hearings.[13]

The appeal was dismissed with costs.

Katherine Bean
Deputy President
Administrative Appeals Tribunal

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[5] At [120].
[6] At [119].
[7] At [11], [97].
[8] At [8].
[9] At [8].
[10] At [11].
[11] At [16].
[12] *Administrative Appeals Tribunal Act 1975* (Cth) s 39.
[13] At [46], [159].

COAT National Conference 2014 - Auckland

The COAT National Conference was held in Auckland New Zealand in June 2014. The Conference was very successful, with interesting papers and good attendance of over 120 registrants, including representatives from all Australian jurisdictions as well as from throughout New Zealand. The theme of the Conference was *Tribunals in Transition: Sessional to Professional.* This was a particularly apposite theme given the state of flux of many tribunals in both Australia and New Zealand. I understand that some of the papers from the Conference will be available soon on the COAT National website.

There were papers presented on broad themes of tribunal values and the place of tribunals in the justice system - (it is enviable to listen to a discussion of the operation of tribunals and the justice system without the complexities of Chapter III !), as well as papers focussed on particular tribunal issues and how to manage them. These included the role of "expert" tribunal members and how members should use their discipline expertise; how tribunals make findings of fact; dealing with experts; and the development of new models of tribunals or dispute resolution bodies with dispute resolution formalised in corporate semi-public organisations. Concurrent sessions looked more closely at some aspects of alternative dispute resolution and its use by tribunals, and in particular what models of ADR can be usefully and effectively adopted in and by tribunals, especially considering therapeutic jurisprudence, restorative justice, and the "shadow of the law" issue and its particular resonance for tribunals.

Two final papers (perhaps unfortunately on at the same time) looked at issues that concern us all acutely: how to evaluate parties' perceptions of tribunals, and assess what it is that parties want from tribunals (other than the obvious); and the appraisal and mentoring of tribunal members.

The keynote address was presented by Professor John Burrows, a former NZ Law Reform Commissioner and eminent legal academic, author and practitioner. John spoke about the characteristics of "a good tribunal that does justice", and these are worthy of repeating and reflecting upon.

His eight principles are that such a tribunal must be **accessible**, in terms of cost, ease of application, availability of information in terms of operation and expectation, and for physical access; appear, as well as be, **independent,** which entails appointments on merit, following an interview, proper budget arrangements, and tenure of 3-5 years; **quality membership,** trained, appraised and supported; **proper tribunal procedures**, with rules, but user friendly and flexible ones, preserving informality, but ensuring that informality does not extend to substance; be able to act with **speed and efficiency**, but balancing this need with the complexity of matter, with justice and what the case needs; **consistency**, to establish both a good consistent process as well as some system of "precedent"; a **right of appeal**, even if restricted; and be **effective**, with a capacity to issue orders that are enforceable.

John spoke in favour of a single coordinated tribunal, such as a SACAT: he saw the primary advantages of such a system as enabling appropriate and effective leadership, and the ability for tribunals to have a proper and effective voice in the justice system through such an overarching body. Such a voice enables a better opportunity to address the principal challenge to the achievement of his eight principles, that of resources. The other **challenges** he identified are familiar but important ones: how to address the **delays** which come with the success of the Tribunal sector – increased applications, more difficult matters, increased jurisdiction without more resources; the demands to triage or filter matters proceeding to hearing through an **ADR or mediation** process, without the recognition that such processes are equally demanding, time consuming and expensive if done properly – and if not done well can deny rights to parties; the need for **rules** to preserve natural justice and "modified informality", as well as to ensure consistency and coherence, but such as to take into account and address the special needs of specific jurisdictions; and how to address **criticism**.

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This paper was a really terrific keynote: it set the tone and focus for the rest of the Conference and gave all attending a great deal of food for thought, with universal application to our own tribunals.

The Conference included a Heads of Tribunals meeting which included reports from a variety of tribunals on challenges and achievements for the past 12 months. The reports presented some very similar themes: in particular those relating to anxieties about appointments, and the difficulties and stresses faced by professional staff as well as tribunal members caused for many tribunals by uncertainties about appointments, funding and future developments.

The final report from the Conference will be made to COAT National late this year, but it is understood that the Conference at least broke even in financial terms and was well received by participants. This gives COAT a good base to build on for its future national conferences. This is an important consideration as COAT's conferences are now run solo: in the past they have been in conjunction with the AIJA, so it is promising to see there is a sufficient base of interest from tribunal members alone to sustain an active, interesting, and financial viable Conference, attractive across the board to a wide variety of tribunals and their members.

It is proposed that the National Conference in 2015 will be held in Melbourne, with the 2016 Conference in either Adelaide or Perth. It would be good to showcase Adelaide and its active tribunal members, so if there are thoughts about whether this would be a welcome idea, and any theme for the Conference should we host it here, please let us know!

Kath McEvoy
Convenor
COAT SA

COAT National Report

COAT National's AGM was held at the National Conference. The Hon Justice Duncan Kerr, President of the AAT, was elected as Chair. The other members of the Executive can be found at:

http://www.coat.gov.au/about/executive.html.

The details of the AGM can also be found on the COAT website at:

http://www.coat.gov.au/publications/annual-general-meeting.html

It was decided that COAT National would acquire the rights to publish the report commissioned from Associate Professor Pam O'Connor on Tribunal Independence on its website, and the report is available to download from the website at:

http://www.coat.gov.au/images/downloads/tas/Tribunal%20Independence.pdf

COAT National also purchased 100 hard copies of the Report and decided to send copies to selected government bodies, Ministers and others with an interest or influence in tribunal matters, appointments and independence. In SA we sent hard copies of the report to the Attorney General; the Chief Justice; the Premier; the Ombudsman; the SA Parliamentary Library and the libraries of each of the three Law Schools; the SA Law Reform Institute; the SA Public Sector Commissioner; the Attorney General's Department; the Crown Solicitor's Office; the Law Society of SA; and the President of SACAT.

COAT Planning Day

Barbara Johns attended the COAT planning day on behalf of the SA Chapter of COAT on 11 September 2014. The meeting was chaired by the President of the Administrative Appeals Tribunal, Justice Kerr. Highlights from the meeting are as follows:

- A subcommittee was established to commence arrangements for the 2015 conference in Melbourne;
- There was discussion about whether Pam O'Connor should be approached to take her report on tribunal independence to a second stage involving a practical framework for the application of the principles discussed in her report;
- The chapters will be reviewing website content to ensure the COAT website remains up to date;
- A conference will be held in Queensland on 21 to 22 May 2015 entitled 'Technology for Justice'. COAT is tying to ensure at least one session is focussed on tribunals;
- There was discussion regarding holding a conference for registrars in late 2015; and
- There was discussion regarding COAT supporting research in to the impact of the creation of 'Super Tribunals through the amalgamation of smaller tribunals and the efficacy of the trend.

Summary prepared by editor from report to COAT SA Committee by Barbara Johns

Forthcoming Events

14 October 2014 at 4.45pm	Committee Meeting, AAT (preparations for AGM)
26 November 2014	Annual General Meeting – Guest Speaker Deputy Premier the Hon. John Rau. AGM Notices and further detail to follow soon.
4 to 5 June 2015	COAT National Conference – Melbourne

Forthcoming COAT-SA events and presentations will be notified by email to members and friends