COUNCIL OF AUSTRALASIAN TRIBUNALS • SOUTH AUSTRALIA

COAT SA News

News from the tribunals of South Australia

Issue 12

Farewell to Chesser House: AAT relocates in October

August 2016

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

COUNCIL OF AUSTRALASIAN TRIBUNALS

WELCOME FROM THE CONVENER

Kath McEvoy

Welcome to COAT-SA's first Newsletter for 2016. I hope you have all had a productive year so far!

The establishment of SACAT and SAET in South Australia , and the consolidation of the AAT with some other Commonwealth tribunals has seen as busy time on the tribunal front on the past 12 months or so, and these developments have inevitably meant change and challenges for tribunal members and users.

We have already had one presentation for our Chapter for this year – on 13 March Matthew Goode, Special Counsel with the Attorney General, gave a presentation on the recently enacted (but not yet proclaimed) SA Judicial Complaints legislation. We had a good attendance and some excellent discussion. There is a report on the presentation later in this Newsletter. We are planning a further presentation from the President of the Law Society of SA, David Caruso, for Wednesday 24 August (details later in the Newsletter).

COAT National has also been busy this year, and there is a more detailed report later in this Newsletter. The COAT National Conference was held in Hobart in June and was also well attended and addressed some vital matters for the tribunal community. The COAT national project on *Best Practice for Tribunal Appointments and Reappointments* is now complete and will be available shortly. COAT National continues to work on its on-line tribunal induction program, and these on-line modules are likely to be available to tribunals from early next year.

Please contact any of the committee over any matter you would like to have COAT-SA pursue, and consider also if you would like to take a more active role on COAT as a Committee member in the future! We will be calling for Committee members again toward the end of the year, with the election at the AGM. New members are always welcome, to bring new ideas and new energy to the Committee.

At the end of 2015 two active and longstanding members of COAT resigned from the COAT-SA Committee – Sue Raymond and Lin Gilfillan. Sue and Lin have for many years been absolute stalwarts of the COAT-SA Committee, and despite demanding roles in their respective tribunals and practice have given very generously of their time and ideas to COAT. I am very grateful to them both for their support and generosity to COAT-SA, and on behalf of you, thank them for it.

I hope you find this COAT-SA Newsletter informative and interesting, and thanks for your continued support of COAT! Best wishes for the remainder of 2016, and I look forward to seeing you at COAT functions throughout the year.

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COAT-SA PRESENTATIONS

Kath McEvoy

COAT-SA has already had one presentation this year: Matthew Goode, Special Counsel, Attorney General's Department, on the SA Judicial Complaints legislation, the *Judicial Conduct Commissioner Act 2015*.

Matthew gave an account of the background and antecedents to the legislation, with a brief history of how the issue of the accountability of judges had changed in recent times, in the context of the independence of the judiciary. He directed us to similar legislative management of complaints against the judiciary in the UK, ACT, NSW and in the Federal Court, and to proposals in Victoria and WA. In New Zealand such legislation was enacted in 2004 and formed the basis for the legislation enacted in SA.

The SA legislation applies to all judicial officers; that is, not to judicial bodies but to individuals. It is not relevant where they are carrying out judicial duties. Under the Act new powers are vested in the Heads of Jurisdiction, and the Judicial Conduct Panel, established by the Act, has the powers of a Royal Commission. The Act also amends the SA Constitution in relation to the removal of judges so that District Court judges can only be removed by an address to both Houses of Parliament, as is the case with Supreme Court judges

There was considerable discussion at the presentation concerning the scope and operation of the legislation and its ramifications for State tribunals.

Our second presentation for 2016 will be from David Caruso, President, Law Society of SA Inc., on Wednesday 24 August 2016, at the Law Society premises, level 10, 178 North Terrace Adelaide. David will speak about a number of areas of common interest to the law Society, tribunal members and users, including appointments and reappointments processes and practices; rules and proposals about preclusion periods for former tribunal members; representation before tribunals and standards of representation; and other related matters where the Law Society may be of support to tribunals and tribunal members and users. A flyer for this presentation is included in this Newsletter, and will also be sent out to each of you shortly. I hope to see many of you at the presentation.

If there are any topics which you would like to have for presentation or discussion, or any visitors who might be available to make a presentation to COAT-SA, please let a Committee member know. Further, if there is a better or more accessible, or preferable, format for presentations than 5.30 – 7.00pm, please let us know. We are keen to have presentations for the support and interest of our members, and want them to be at an accessible and convenient time to facilitate participation.

The half day Tribunal Independence Workshop in 2014 was very successful and well attended. We are considering a further Workshop with a similar format in the next

12 months. Two possible topics, either of which seem ripe for an extended consideration and discussion, are Ethics and Decision Makers, and ADR and Tribunals. Members of the Committee would welcome feedback as to which of these topics would be welcomed (or indeed, other possible topics); and more generally, if there would be support for such a format.

COAT NATIONAL CONFERENCE 2016

HOBART 9 – 10 JUNE 2016:

Between CATs and Courts

Kath McEvoy

The COAT National Conference was held in Hobart in June 2016. It was attended by about 150 Tribunal members and other COAT members, and was regarded as very successful. The range of material addressed was broad and interesting. Topics ranged from dealing with complaints against tribunal members; the tensions in the expectations of tribunal members and their obligations to their tribunals; judicial fettering of tribunals; the role of community members on tribunals; disciplinary proceedings against lawyers in Courts and tribunals; the impact of the Victorian *Human Rights and Responsibilities Act* on tribunal decisions; and the role of reviewing courts in the supervising jurisdiction. There was also a discussion of the moves to establish at CAT in Tasmania.

In his opening remarks the COAT National Convener, Justice Duncan Kerr, spoke about the significant task of creating effective integrated bodies to undertake the diverse and extensive work of tribunals – not just as a matter of legislation in establishing the large generalist tribunals such as the AAT and CATs – but also in the creation of a new and common culture to operate within these generalist tribunals. He spoke of the importance of the formation, transmission and sharing of values, without creating invisible and exclusionary barriers. Justice Kerr suggested that COAT can enable both aspects: the development of values and their transmission, and also enabling tribunals and members to see broader issues across tribunals in Australia and New Zealand.

Anne Davroch, Principal Dispute Referee from New Zealand, spoke about the management of complaints against Tribunal members, and her talk very nicely complemented the presentation made earlier to the SA Chapter by Matthew Goode. Anne spoke about the importance of having a proper complaints policy within tribunals in order to maintain the integrity of the judicial/tribunal process as well as confidence in the judicial/tribunal process. Such a process is important to remind tribunal members of accountability issues, but must be both efficient and proportionate, and balance confidentiality and transparency. She discussed ways in which Heads of tribunals might manage complaints in order to both get to the bottom of significant and properly based complaints, but also manage the stress on tribunal members (and heads of tribunals) regardless of the nature or validity of the complaint. She emphasised that a good complaints process should be publicised, easily available, make clear how it is to be utilised, and subject to some form of triage system.

Another particularly interesting (and useful and entertaining) paper was presented by the Hon Alan Wilson, former President of QCAT. He discussed the quandary many tribunal members find themselves in: how to balance the expectations of economy and timeliness, procedural fairness and efficiency and prompt decision making, against the duty to provide a

fair hearing and give properly considered reasons.

Unlike courts, tribunals have legislatively imposed obligations of "justice, fairness, and expedition". Courts may well recognise that these matters are necessities for them, as they must be concerned not only with justice between the parties but also with the effective use of public money. These will be self-imposed concerns, not imposed by statute, and judges may well be able to be completely passive, leaving everything to counsel, and approach each judgment as an exercise in perfection. These are not luxuries available in tribunals. But will all hearings be fair and lead to a just outcome if they are always required to be done with efficiency and speed? Haste may well be inimical to the attainment of justice. Alan concluded – as do many tribunal members – that justice and fairness – that is, a fair hearing with a properly reasoned outcome – cannot be subsumed by speed and economy. He proceeded with suggestions of how to conduct this balance: compulsory conferences to identify issues and shape the hearing; focus the hearing on procedural fairness, forcing the parties to adhere to the issues identified at the preliminary process; and careful, focussed decision writing, with a consciousness of the differences between a tribunal and a court, so that the decision is not an exegesis on the law, but an application of settled principles of law to the particular matter.

Alan's paper (and other papers from the Conference) will be available on the COAT National website.

COAT NATIONAL REPORT

Kath McEvoy

COAT National has continued with two major projects this year. One is the extension of the tribunal independence project (see below), and the other is the development of online training resources to be available for COAT members.

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 which will assist with the design and implementation, including development of the required software. Content for the program will be developed by COAT, and a number of segments have been completed: Statutory Interpretation; conducting a hearing; and procedural fairness. It is expected this will be available in early 2017.

COAT National has been concerned about the proposal contained in the Uniform Bar Rules (operating in Victoria and NSW) concerning preclusion periods for former tribunal members appearing before their former tribunals. These Rules now propose a 5 year preclusion period to apply to former (court or) tribunal members preventing them from appearing before their former tribunals without any opportunity for remission: there is no provision for any discretion to alter the period of the preclusion. The previous position had applied only to barristers, and applied for 2 years only, with some opportunities for amendment in individual cases. The new proposed rules apply also to

former tribunal members working as solicitors.

COAT National has decided that the proposed 5 year preclusion period for former tribunal members to appear before their former tribunals is too long and disproportionate, especially in its application to part time and sessional tribunal members. The Convener has written to the Legal Services Council expressing COAT's concerns and proposals, that a maximum 2 year preclusion period was sufficient, with a discretion for reduction in particular cases. COAT appreciates that there would be particular difficulties in small jurisdictions where there are many part time and sessional members drawn from the profession, and it is of upmost importance that individual former tribunal members now practising as barristers or solicitors should not be damaged, and that the position of tribunals in recruiting members should also be taken into consideration.

TRIBUNAL INDEPENDENCE IN APPOINTMENTS

A Best Practice Guide

Kath McEvoy

With special thanks to Anne Britton, COAT-NSW

In 2015 COAT National commenced a further project building on its (with the AIJA) earlier *Tribunal Independence* report, developing guidelines for tribunal appointment and reappointment. In that report, Professor Pam O'Connor identified "institutional independence" - including the processes used to determine tribunal appointment- as one of the key indicia of tribunal independence. COAT National engaged Professor O'Connor to develop this work further and to prepare model guidelines to apply to tribunal appointment and reappointment. The project was overseen by a Steering Committee, comprising senior members of the judiciary and tribunals: the Hon Justices David Thomas, Iain Ross, John Chaney, John Byrne, Michelle May and Duncan Kerr, and Kath McEvoy, Anne Britton and Linda Crebbin.

A draft set of principles and recommended legislative provisions as a background paper detailing various options to safeguard independence in the appointment and re-appointment process was distributed for comment in mid-2015, and heads of tribunals and members of COAT, as well as other legal practitioners and government oversight agencies, were invited to make submissions on the draft guidelines. Extensive and detailed submissions were received and informed the completion of the Guide, enhancing the credibility and value of the completed report and guidelines as indicative of broad acceptance and endorsement by the Tribunal community.

The Guide is presently being prepared for printing. It will be available on line at the COAT National website, and hard copies will also be available.

Extract from preface to Tribunal Independence in Appointments: A Best Practice Guide:

> *"The Council received a submission from a female tribunal member who was troubled by a stranger's remark. When she told the stranger that she was a member of multiple tribunals, he replied: 'you must be well-connected then'. The member expressed to the Council her disappointment that an 'otherwise well-informed person and someone who has "been around" government himself should have this view how one comes to be appointed to tribunals'. She reflected: "As things stand, I was not in a position to assure him that the current practice is one of consistent open appointment processes across tribunals'.*
>
> *The anecdote reminds us that public faith in our tribunals depends upon integrity in the*

appointments process. If a perception arises that members are appointed because of 'who they know', public trust in the integrity of tribunals will erode. This Guide is intended to inform, educate and raise awareness about appointment and reappointment processes for tribunal members. Based on research and consultation with stakeholders, the Guide proposes principles and best practice in appointments to ensure tribunal independence. The Council hopes that the Guide will assist ministers and tribunal Heads in developing processes for the appointment of tribunal members, and that governments will consider the Guide when establishing new tribunals, or when reviewing or amending tribunal legislation. The principles may assist in evaluating actual practices and legislative provisions, and in measuring progress towards excellence in appointment processes."

The Hon Justice Duncan Kerr, Chev LH, Chair, Council of Australasian Tribunals Inc

The Best Practice Guide: a summary

The Guide is intended to inform, educate and raise awareness about appointment and reappointment processes for tribunal members. Based on research and consultation with stakeholders, the Guide proposes principles and best practice in appointments to ensure tribunal independence. The Council hopes that the Guide will assist ministers and tribunal Heads in developing processes for the appointment of tribunal members, and that governments will consider the Guide when establishing new tribunals, or when reviewing or amending tribunal legislation.

The Guide contains 6 parts, which are summarised below:

Part A: Introduction

Tribunals play an essential role in our justice system by providing a timely and accessible dispute resolution at low cost. To maintain public confidence in their adjudication of disputes, the independence of tribunals must be assured, including in the processes for appointing members.

Part B: Merit-based appointments

Selection on the basis of merit is the surest way to appoint the best members and ensure the tribunal's independence. Merit means that the appointee possesses the knowledge, skills and personal attributes required to perform the duties of the position. Merit can be assessed against a competency framework, such as the Council's *Tribunal Competency Framework*; or by a set of assessment criteria derived from the member competencies framework.

Part C. Recruitment and assessment

To ensure tribunal independence and excellence, appointment processes should be open, merit-based and transparent. This means that recruitment is open to a wide range of applicants, and selection is based on an assessment of applicants' merit against publicly available criteria. The Guide sets out a best practice model with five stages: recruitment, assessment, selection, nomination and appointment. This part of the Guide also considers the options for reports by a panel such as a 'full report' including an assessment of all applicants in categories of 'not suitable', 'suitable' and 'highly suitable'. Other report formats discussed include a ranked shortlist of suitable applicants and a recommended appointments report.

Part D. Selection and nomination

Once the assessment panel makes its report, the Minister selects one candidate for each position and seeks Cabinet approval. Subject to good character, merit should be the dominant consideration in selection. Gender balance and diversity in the membership should be considered by the Minister in selecting among applicants of equal merit. Political considerations should be

excluded as discriminatory and irrelevant. The Guide notes that in most jurisdictions, documents such as a Cabinet handbook or guidelines specify matters to be considered, although these documents are not the same in all jurisdictions.

Part E. Tenure, remuneration and reappointment

Members of tribunals are normally appointed for a fixed term of years and are eligible for reappointment. Independence requires that the member's tenure and rate of remuneration are secure for the term. Reappointment may be by way of application in an open competitive process. It is also consistent with best practice to reappoint on the Head's recommendation where the member's performance demonstrates that the member meets the assessment criteria.

Part F. Conclusion

The role of tribunals in adjudicating disputes demands that tribunals and their members are impartial and are seen to be so. Impartiality requires that they are free of improper influences and pressures to decide cases in a particular way. Some tribunals adjudicate cases in which the Executive is a party or has a policy interest. Tribunals may be called upon to decide questions which are politically sensitive for Ministers or government agencies.

AROUND THE JURISDICTIONS

AAT

Adelaide AAT Registry Statistics 2015- 2016

Cathy Cashen

As from 1 July 2015 The MRT- RRT, the SSAT and the AAT became an amalgamated Tribunal with the MRT RRT becoming the Migration Review Division (MRD), the SSAT becoming the Social Security and Child Support Division (SCSD) and the AAT becoming the General & Other Division (G&OD) of the new AAT.

The transition to a single AAT is continuing with physical amalgamation scheduled for mid-October 2016. Until that time at least, each division of the AAT retains aspects of previous management practices therefore making it difficult to gather comparative statistical data from each division. For example SA MRD applications continue to be predominately managed in Melbourne and MRD members also hear non SA matters.

The following data gives a very approximate overview of the changing landscape of the AAT in the first year of amalgamation 1 July 2015 to 30 June 2016.

The General & Other Division had 422 new SA applications (excluding linked or associated cases). In addition Adelaide has now taken over all GD lodgements arising in the NT.

Of the 422 lodgements 22 % related to workers compensation matters and approximately 50% related to the Department of Social Services matters in particular Disability Support pension applications.

During the year there were 407 finalisations and as at 30 June 2016 there were 301 current GD matters in the division.

The Social Services and Child Support Division dealt with 1651 applications with the vast majority (90%) relating to Centrelink matters followed by Child Support matters. The average life span of a SSCSD application is about 12 weeks.

In the Migration and Refugee Division there were 1269 matters constituted to Adelaide Member and a total of 1341 decisions recorded against Adelaide Members. The greatest number of decisions related to Partner Visas applications followed by Spousal and Permanent Business visa applications.

In summary it is very obvious that 2015 - 2016 marked the start of a greatly expanded AAT as the amalgamated Adelaide Tribunal "dealt with" some 3,348 lodgements and approximately the same number of finalisations.

SACAT

Update August 2016

Clare Byrt

BACKGROUND

In November 2013, Parliament passed the *South Australian Civil and Administrative Tribunal Act 2013*, which established the South Australian Civil & Administrative Tribunal (SACAT).

SACAT officially opened to the public on Monday 30 March 2015, undertaking functions of the former Residential Tenancies Tribunal, the former Guardianship Board and the former Housing Appeal Panel, in addition to land valuation objections under the *Valuation of Land Act 1971* and *Local Government Act 1999*.

An additional jurisdiction to review certain decisions of the Registrar General under the *Real Property Act 1886* was transferred on 27 April 2015.

Domestic Violence changes were made to the *Residential Tenancies Act 1995* on 10 December 2015. SACAT is now empowered to make decisions where an application is made by a tenant in situations of abuse.

More recently in April 2016, jurisdiction under the *Lobbyists Act 2015* was conferred on SACAT.

FUTURE JURISDICTION

The transfer of jurisdiction under the *Freedom of Information Act 1991, the First Home and Housing Construction Grants Act 2000* and the revised *Firearms Act 2015* is planned for the second half of 2016.

The work necessary for the commencement of these jurisdictions by SACAT is well underway. A member recruitment process has commenced; the online application process has been modified; consideration is being given to appropriate Rule changes; website information and related Fact Sheets to help our users understand the new applications and procedures are being drafted; and plans for appropriate stakeholder consultation and information are advanced.

Further there is currently a legislative program across a number of different ministerial portfolios that proposes to confer further jurisdictions on SACAT in relation to reviews of administrative decisions.

Part 7A of the *Dog and Cat Management (Miscellaneous) Amendment Act 2016* (which received assent on 14 July 2016) will confer review jurisdiction on SACAT in relation to a

range of relevant decisions by local councils or the Dog & Cat Management Board.

The new *Housing Improvement Act 2016* (which received assent on 4 August 2016) will give SACAT original jurisdiction in relation to resolving disputes over a range of claims for compensation; and the jurisdiction to deal with applications for termination of tenancy agreements and ejectment; bailiff enforcement and applications for exemption from the provisions of the Act (previously dealt with by the Magistrate's Court) as well as a review jurisdiction relating to decisions concerning housing improvement, demolition and rent control orders (previously the jurisdiction of the Administrative and Disciplinary Division of the District Court.

Decisions about the timing of the proclamation of these two Acts have not yet been finalised and will need to await the development of related regulations and agreement about other aspects of implementation.

The Attorney-General announced in May that the timing of the conferral of the remainder of jurisdictions planned for SACAT will be slowed for a period pending work being undertaken to refine aspects of the digital systems and resolve the workload issues so that the conferral of additional jurisdiction does not have any adverse impact on current operations. This work is progressing to ensure we will be ready for the additional jurisdictions as determined by government.

SACAT's First Year in Review - March 2015 to March 2016

The establishment of SACAT brought with it many changes and challenges including:

- the transition from a paper based working model to the new digital online application and case management systems
- dealing with inherited backlogs
- introducing new practices and procedures
- dealing with an additional workload as a result of greater accessibility and a greater focus on according procedural fairness
- inducting new members
- teaching users how to make online applications and make best use of SACAT's e-services, including learning how to assist less technically savvy users
- establishing and maintaining links with stakeholders and
- keeping up with the large day to day case load.

Despite these challenges SACAT has dealt with a very significant caseload. SACAT has met its objective of processing and resolving applications as quickly as possible whilst achieving a just outcome.

SACAT Year One Key Statistics

Applications

Over the first year of SACAT's operations, 14,840 applications were received. A breakdown of these applications by stream is as follows:

Application Received by Stream	No of Apps	Average Per Week
Administrative & Disciplinary	109	2
Community	4026	77
Housing & Civil	10705	205
Total	**14840**	**285**

In addition, SACAT also:

- conducted 1,762 mandatory reviews of existing orders under the *Guardianship & Administration Act 1993*
- processed 12,845 mental health treatment forms referred by the Chief Psychiatrist
- received and followed up 4043 referrals of residential bond disputes by the Commissioner for Consumer and Business Services (CBS).

The most common applications made to SACAT are:

- applications seeking **vacant possession** (5,911 applications or 40% of all applications received by SACAT)
- repayment of the **bond and orders for compensation** (2,983 applications or 20% of applications)
- **administration or guardianship orders** (1,370 applications or 9% of applications)
- **level 2 community treatment orders** under the *Mental Health Act 2009* (863 applications or 6% of applications).

Internal Reviews

Of the 14,840 applications received by SACAT, 343 have been subject to **internal review -** an internal review rate of **2.3%.**

Hearings and Conferences

In its first year of operations SACAT listed 19,548 hearings and conferences (or an average of 376 per week):

ADR is an important and growing feature of SACAT. Of the matters that were referred to a conference, approximately 80% were resolved without need for a full hearing.

Stream	Hearings	Conferences
Admin & Disciplinary	30	91
Community	4627	22
Housing & Civil	10080	3253
TOTAL	**14737**	**3366**

	Directions / Papers	Total	Average per week
Ad	24	145	3
Com	1245	5894	113
H&C	176	13509	260
TOTAL	**1445**	**19548**	**376**

Looking Ahead

In addition to undertaking our 'business as usual' tribunal workload the SACAT leadership and registry management teams have been developing and consolidating ideas and agreeing on priority actions for our future progression. Following our strategic planning process we have committed to a number of important activities over the coming year, many of which have already commenced.

These include:

- a continuing focus on Member training and development
- In May we held an all member training session with a focus on procedural aspects of the SACAT legislation and rules; Hearing Room Security procedures; Dealing with people with Mental Illness in the hearing context and an update on

practical skills in using the case management system.

- Introductory training was provided to our newly recruited sessional members which included aspects of Procedural Fairness as well as case management system training. Additional stream specific sessions were undertaken and a programme of induction commenced which enabled the newer members to sit with experienced members to learn hearing room craft through observation.
- A commitment to provide ongoing and regular training and development opportunities.
- Development of a Member appraisal scheme
- Preparing for our imminent and future additional jurisdictions including the provision of training for relevant members and staff
- Implementing ongoing improvements to the electronic online application form and the case management system to improve its operation and efficiency.
- Developing more appropriate performance measures for the diversity of our jurisdictions.
- Improving our reporting capabilities.
- Undertaking some pilot user feedback surveys
- Continuing to focus on stakeholder liaison and the provision of information both for our current and future jurisdictions
- Ongoing review and update of our website.

NEWS FLASH!

Significant SACAT decisions are now being published on Austlii and on BarNet Jade.

You will find us on the SA database on Austlii.

BarNet JADE (Judgments and Decisions Enhanced) is a free online service that collects recent decisions of selected Australian Courts and Tribunals into an enhanced database and once you register notifies you about important cases by email or RSS feed. See:

BarNet Jade - Find recent Australian legal decisions, judgments, case summaries for legal professionals (Judgments And Decisions Enhanced)

JACKSON v LEPP INVESTMENTS PTY LTD (2016) SASC 62

Barbie Johns

This matter involved an appeal from the Housing and Civil stream of SACAT to the Supreme Court. An appeal from a decision of SACAT lies to the Supreme Court of South Australia[1] but only with leave of the Supreme Court. The case contains a useful statement of principles relevant to an appeal from a tribunal.

The matter involved a tenancy dispute. At the initial hearing SACAT made an order for vacant possession of the property on the basis of the tenant's rent arrears (although the application to SACAT had been made on the basis of the tenant's abusive behaviour to the agent and others). The order for possession was made to take effect at the expiry of 1 week from the Tribunal hearing.

The tenant applied for an internal review of that decision. On review, SACAT upheld the original decision. A consideration in the exercise of the Tribunal's discretion was expressed to be the unfairness to the landlord if an order for possession was not made.

The grounds of appeal were that the service of the original notice of breach was invalid, inadequate time had been permitted for the

[1] To a single Judge if not from a decision of a Presidential member, but to the Full Supreme Court if the Tribunal's decision was made by a Presidential member or a panel comprising a Presidential member

tenant to vacate and the tenant would face severe hardship if the tenant was required to vacate.

His Honour Justice Parker (sitting in his capacity as a single Judge of the Supreme Court) stated that the over-riding principle is the interests of justice, and subject to that the following principles should be applied in the determination of such a matter:-

(a) The appeal must be reasonably arguable (ie: is it reasonably arguable that SACAT erred in respect of any of the matters it was required to decide) and the subject matter of the appeal must be of sufficient substance to justify consideration;

(b) Because SACAT is a specialist tribunal with particular expertise in determining tenancy disputes, the Supreme Court must give substantial weight to its findings;

(c) In relation to a finding of fact (in a matter where leave to appeal has been granted), the Court would only overturn the Tribunal's decision after evaluating all the relevant evidence and making proper allowance for the advantage enjoyed by the expert Tribunal when it assessed the credibility and reliability of the witnesses. If the Court was satisfied that the finding was not consistent with uncontested evidence or incontrovertible facts, was glaringly improbably or was contrary to compelling inferences, the Court might depart from the finding of fact.[2]

(d) If the Court does grant leave for the appeal to proceed then the appeal proceeds by way of rehearing[3] but if the appeal raises an issue concerning the Tribunal's exercise of a discretion, the Court is not entitled to substitute its own decision unless an error is identified in the exercise of that discretion.

In relation to the issue of the validity of the notice of termination, Parker J referred to the fact that the Tribunal member had the benefit of taking evidence from witnesses and taking into account other evidence (emails) in forming a view about the notice. His Honour stated that there was no reason to consider it was reasonably arguable that the Tribunal member was wrong in this regard.

In relation to the question of the Tribunal's exercise of its discretion, His Honour referred to the principles in House v The King[4] that an error may arise either as a process error or an outcome error. In this matter His Honour considered that on internal review, the Tribunal member had taken into account the hardship to be caused to the tenant if he made an order for eviction, but had also taken into account the consequences for the landlord if such an order were not made. His Honour therefore concluded that the Tribunal had only taken into account those issues relevant to the exercise of its discretion and so there was no process error. His Honour considered whether or not there was an outcome error, but decided there was not and referred to the very substantial rent arrears and the tenant's behaviour in flouting her obligations under the tenancy agreement in this regard. His Honour noted that it is irrelevant that another person may have exercised that discretion differently, and concluded that the Tribunal's decision was within its reasonable discretion.

For these reasons His Honour found that neither ground of appeal was reasonably arguable and dismissed the appeal.

Parker J's general approach in *Lepp* was endorsed by the Full Supreme Court in *Pix v*

[2] *Fox v Percy* (2003) 214 CLR 118
[3] Rule 286 of the *Supreme Court Civil Rules*
[4] (1936) 55 CLR 499, see also *R v Lutze* (2014) 121 SASR 144

South Australian Housing Trust (2016) SASCFC 575 when His Honour Kourakis CJ stated:-

" This Court cannot substitute its evaluation of the relevant considerations for that of the Tribunal unless, having regard to the Tribunal's specialist knowledge and experience, this Court finds that the order ultimately made is manifestly unreasonable. An error of that kind is not arguable in this case.

The applicant has not demonstrated any arguable error of principle, denial of procedural fairness, other vitiating error, or manifest injustice. The application must therefore be dismissed."

SA EMPLOYMENT TRIBUNAL

The first 12 months

Jenny Russel

SAET commenced operations on 1 July 2015. In the first instance, the Tribunal assumed the jurisdictions previously exercised by the Workers Compensation Tribunal (WCT), which was dissolved on 3 March 2016. On that date, all proceedings still under way in the WCT were transferred into SAET. At that time also, the President of the WCT/SAET, Judge Bill Jennings, retired, and Judge Peter McCusker assumed the mantle as President of SAET.

As in the past, applicants may seek a review of a decision made about their claim, or if a decision has not been made and the applicant believes there is undue delay in making it, he or she may seek the Tribunal's assistance. Application numbers have remained quite high, averaging just over 400 per month. There is also a new provision enabling applicants who have some capacity for work but have not been provided with suitable employment by their pre-injury employer to seek such employment, and if the employer fails to provide it within a reasonable time, to apply to the Tribunal. The Tribunal must determine whether it is not unreasonable for the employer to provide certain specified employment, and may order the employer to provide that employment to the worker. Few such applications have yet been received by the Tribunal at this stage, and the interplay between the provision and what employers might consider to be their industrial rights, is yet to be adjudicated.

On average during the first 12 months, 290 matters per month resolved in conciliation, which is a resolution rate of approximately 75%. Those matters not resolved proceed through preparation for hearing by a judicial officer, although many of these settle prior to the hearing through judicial conciliation. This is reflected in the figures for the first 12 months; a total of 341 matters were resolved at the judicial level, with only 35 written decisions being issued.

The most pleasing statistic from SAET's point of view, however, is that for the large majority of matters which resolved at conciliation, the average time taken from lodgement of the application until resolution, is 8.5 weeks. This is a significant reduction compared with timeframes in the WCT. Anecdotally, the experience of applicants is positive - there are fewer adjournments than in the WCT, and they get an outcome more quickly. This is a function of new mandated time frames, in both the legislation and the Tribunal's Rules, and the vigilance of conciliators in minimising delays, such as in obtaining evidence, during the conciliation process.

[5] Which involved an appeal from a decision of SACAT President the Honourable Justice Parker

CASE LAW UPDATES FOR TRIBUNAL MEMBERS

Thanks to COAT NSW for these summaries

High Court of Australia

These case summaries have been prepared by the High Court and are available at www.hcourt.gov.au

WEI v MINISTER FOR IMMIGRATION AND BORDER PROTECTION

[2015] HCA 51

Jurisdictional Error

The High Court unanimously held that a decision of a delegate of the Minister for Immigration and Border Protection ("the Minister") to cancel the plaintiff's student visa under s 116(1)(b) of the Migration Act 1958 (Cth) for failure to comply with a condition of his visa was affected by jurisdictional error.

The plaintiff, a citizen of the People's Republic of China, held a student visa. It was a condition of his visa that he be enrolled in a "registered course" provided by a "registered provider" under the Education Services for Overseas Students Act 2000 (Cth) ("the ESOS Act"). Section 19 of the ESOS Act requires registered providers to give information about student visa holders to the Secretary of the Department of Education and Training, including information confirming their enrolment. The information is stored on an electronic database known as "PRISMS" and can be accessed by officers of the Department of Immigration and Border Protection ("the Department").

Between June 2013 and June 2014, the plaintiff was enrolled in a registered course provided by a registered provider. However, confirmation of the plaintiff's enrolment was not recorded in PRISMS. On the basis of outdated information in PRISMS, officers of the Department formed the view in early 2014 that the plaintiff was not enrolled in a registered course. The officers formally complied with statutory requirements to notify the plaintiff that consideration was being given to cancelling his visa, but the plaintiff did not receive notice of that consideration. The plaintiff's visa was cancelled by a delegate of the Minister on 20 March 2014. The plaintiff discovered that his visa had been cancelled on 2 October 2014 and sought review of the cancellation decision in the Migration Review Tribunal. The Tribunal determined that it did not have jurisdiction to review the decision.

The plaintiff filed an application for an order to show cause in the original jurisdiction of the High Court, seeking writs of certiorari and prohibition to quash the decision of the delegate and to prevent the Minister from giving effect to the delegate's decision. The Court unanimously held that the delegate's decision to cancel the plaintiff's visa was affected by jurisdictional error. By majority, the Court held that the delegate's satisfaction that the plaintiff was in breach of a visa condition was formed by a process of fact-finding tainted by the registered provider's failure to perform its imperative statutory duty to upload onto PRISMS confirmation of the plaintiff's enrolment. The Court granted the relief sought by the plaintiff.

MINISTER FOR IMMIGRATION AND BORDER PROTECTION v WZARH & ANOR

[2015] HCA 40

Procedural fairness

The High Court unanimously dismissed an appeal from a decision of the Full Court of the

Federal Court of Australia. The High Court held that the first respondent was denied procedural fairness in the conduct of an Independent Merits Review ("IMR") of his Refugee Status Assessment ("RSA").

The first respondent is a Sri Lankan national of Tamil ethnicity. He entered Australia by boat in 2010, arriving at Christmas Island. In January 2011, he requested an RSA to determine whether he was a person to whom Australia owed protection obligations under the Refugees Convention. A delegate of the appellant made an adverse assessment of the first respondent's claim to refugee status. In May 2011, the first respondent requested an IMR of the adverse RSA. In January 2012, he was interviewed by an independent merits reviewer. At the interview, the reviewer told the first respondent that she would undertake a re-hearing of his claims and make a recommendation to the appellant as to whether the first respondent was a refugee.

The reviewer became unavailable to complete the IMR and a second reviewer assumed responsibility for its completion. The first respondent was not informed of the change in the identity of the reviewer. The second reviewer, the second respondent in this matter, did not conduct an interview with the first respondent, but based his decision on a consideration of certain materials, including the transcript and an audio recording of the first respondent's interview with the first reviewer. The second reviewer formed an adverse view of the first respondent's credibility, and did not accept that certain inconsistencies in the first respondent's account of his circumstances in Sri Lanka were due to memory lapse or confusion, or the effect of detention. The second reviewer recommended that the first respondent not be recognised as a person to whom Australia owed protection obligations.

The first respondent applied to the Federal Circuit Court of Australia for judicial review of the decision of the second reviewer, arguing that the second reviewer's failure to conduct an interview meant that he was denied procedural fairness. The primary judge dismissed the application. The first respondent appealed successfully to the Full Court of the Federal Court, a majority of which found that the first respondent had a legitimate expectation that the person by whom he had been interviewed would be the person to complete the IMR, and which found that, notwithstanding the change in identity of the reviewer, he was unfairly denied an opportunity to make submissions as to how the IMR should proceed.

By grant of special leave, the appellant appealed to the High Court. The High Court unanimously held that the first respondent was denied procedural fairness. The Court held that procedural fairness required that the first respondent be informed that the IMR process had changed so that he would have an opportunity to be heard on the question of how the IMR should proceed. The appeal was dismissed with costs.

Administrative Appeals Tribunal

Walker and Military Rehabilitation and Compensation Commission (Compensation)

[2016] AATA 179 (24 March 2016)

RECUSAL APPLICATION – whether involvement in previous case prejudiced decision maker – whether refusal to issue summons is indicative of bias

Background

Captain Walker made a claim against the Military Rehabilitation and Compensation Commission in respect of injuries sustained in junior recruit training. A self-represented applicant, Captain Walker asked the Tribunal to summons a number of documents and records. In particular, he sought information about another junior recruit who was said to be in the base hospital at the time.

Senior Member McCabe of the Tribunal refused to issue the summons on the basis that it was unclear how the material would assist. Nonetheless, he directed the respondent to investigate whether the Department of Defence held any reports that might shed light on Captain Walker's claims.

The applicant had also appeared before Senior Member McCabe of the Tribunal on other occasions, specifically, in relation to an application for review of decisions made by the Australian Federal Police and Customs under the Freedom of Information Act 1982 (Cth). Captain Walker was successful in relation to some claims and unsuccessful in relation to others.

In the proceedings, Captain Walker asked Senior Member McCabe to recuse himself, on the basis of apprehended bias. Relevantly, there were two grounds:

- the possibility that Senior Member McCabe might be prejudiced against him as a consequence of hearing evidence and reading documents relating to him in the FOI case; and
- his failure to summons documents in the proceedings.

Tribunal's consideration:

Senior Member McCabe set out the test to be applied in *Ebner and Official Trustee in Bankruptcy* [2000] HCA 63; (2000) 205 CLR 337. In that case, Gleeson CJ and McHugh, Gummow and Hayne JJ explained (at [6]):

> *a judge is disqualified if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide.*

Their Honours went on to say the test required two steps (at [8]):

First, it requires the identification of what it is said might lead a judge (or juror) to decide a case other than on its legal and factual merits. The second step is no less important. There must be an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits.

Senior Member McCabe then went on to consider the two grounds put forward by the applicant. In relation to the first ground, involvement in previous case, Senior Member McCabe considered:

> *…Even if it were accepted that exposure to those documents in other proceedings might raise a question of bias in subsequent proceedings, it is impossible to see how that exposure would actually have the effect of causing me to decide this case otherwise than on the merits in circumstances where I cannot remember the content of any of the documents in question. Any fair-minded observer would realise a Tribunal member decides dozens and dozens of cases every year. Such a member is unlikely to remember the details of documents provided to him in a case occurring six or seven years earlier. I mean no disrespect when I say the details of Mr Walker's FOI case were just not that memorable. There is no logical connection between seeing the*

documents and making decisions in these proceedings.

In relation to the second ground, refusal to issue summons, Senior Member McCabe considered:

…Captain Walker says the fact I have declined to issue summonses at his request is indicative of bias. He is wrong. The mere fact I have not acceded to his requests in an interlocutory process would not give the fair-minded observer any basis or suspecting I would not decide the case on the merits, even if the observer in question knew I had previously been exposed to other documents. Captain Walker has not pointed to anything improper that has been said or done which would indicate the case is not going to be decided on the merits; he just disagrees with the rulings I have made so far. That is not enough to establish apprehended bias, and it does nothing to confirm his claim that I am prejudiced against him after reading documents years ago that are no longer remembered.

Conclusion

Senior Member McCabe declined to recuse himself from the proceedings.

COMING UP

David Caruso

President, Law Society of South Australia

Wednesday 24 August 2016
Law Society of South Australia Level 10, 178 North Terrace Adelaide.

RSVP: bronwyn.bills@aat.gov.au

SAVE THE DATE:

The Hon. Justice Duncan Kerr

President, Administrative Appeals Tribunal

Thursday 27 October 2016
Details coming soon

Annual General Meeting and

The Hon. Justice Greg Parker

President, SACAT

Wednesday 16 November 2016
SACAT, Pirie Street

Details coming soon