
From: SACAT Governance
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OFFICIAL



**September 2024
Issue 23**

Convenor's Report

Dear everyone

You will have received various Bulletins from our very busy Secretary, since our last newsletter.

Some of you will have attended the seminar presented by Margaret Castles, on Tribunal members – Ethics in practice, last month. The seminar was well attended, and Margaret's skills as an educator were evident as the evening progressed with some lively discussion points. We are grateful to Margaret for specifically tailoring the session so that it focusses on the unique challenges faced by Tribunal members. Often, I think those challenges are not fully appreciated. Margaret has kindly provided power points from her presentation which have been made available to members.

You will find information below concerning our AGM, and also the all day seminar to be conducted at the end of November on the topic of Family Violence. I encourage you to attend both, if you are able to.

If you have any suggestions for our Committee, please do not hesitate to contact any of us. We would be very pleased to hear from you.

Barbie Johns

COAT SA Convenor

On behalf of the COAT SA committee

Membership Renewal 2024-2025

COAT SA members are invited to renew their membership ahead of the Annual General Meeting and Family Violence Training.

Please contact governance@sacat.sa.gov.au for information on how to renew your membership or join COAT SA for the 2024-2025 period.

Upcoming Events

COAT SA AGM and Drinks Function – 31 October 2024

The COAT SA chapter will be holding its Annual General Meeting on Thursday 31 October 2024 at 4:45pm. The meeting will be held at the South Australian Employment Tribunal at the Riverside Centre, followed by a drinks function.

Formal notice of the AGM will be provided by a separate email in early October.

Family Violence in the Courts – 29 November 2024

Registrations are now open for a seminar on family violence which is being run for COAT SA by the National Judicial College of Australia.

The seminar will run for an entire day and is free of charge for COAT SA Members.

You can complete an expression of interest for the seminar by clicking on the link below:

[Register your Expression of Interest](#)

Once you have registered your expression of interest, please email governance@sacat.sa.gov.au notifying COAT SA that you have done so.

There are a limited number of spaces available for this training so early registration is encouraged.

Resources for Tribunal Members

COAT SA Resources

Members are reminded that COAT SA maintains a suite of useful resources from its seminars (including speaking notes, papers and recordings).

Most recently, Margaret Castles (Adelaide University) presented to COAT SA on *Ethics for Decision Makers*.

A of the presentation slides are available to COAT SA Members – if you would like to access this resource, please email governance@sacat.sa.gov.au.

Legislative Update

Work Health and Safety (Review Recommendations) Amendment Act 2024

Following proclamation of the [Work Health and Safety \(Review Recommendations\) Amendment Act 2024](#), the jurisdiction of SAET has expanded. Amendments to the [Work Health and Safety Act 2012](#), and related amendments to the [Fair Work Act 1994](#), came into operation on **1 September 2024**.

This will give SAET, constituted as an industrial relations commission and not as a court of record, jurisdiction to hear disputes about WHS matters and incorporates review of compliance decisions made by an inspector. Where a dispute is lodged in these areas, SAET will have wide powers to deal with the

matter for prompt settlement of the dispute, including: by means of conciliation, mediation or arbitration; or by making a recommendation or expression of an opinion; or if there are reasonable grounds to believe that an offence has been committed under the Act, by referring a matter to the Regulator for potential investigation. The amendments also provide for proceedings to be brought against a person where there is a contravention of a WHS civil penalty provision arising where an order made for the purpose of arbitration is contravened.

SAET has updated its Rules to manage this new jurisdiction.

Statutes Amendment (South Australian Employment Tribunal) Bill 2024

The [Statutes Amendment \(South Australian Employment Tribunal\) Bill 2024](#) has passed both Houses of Parliament in August and is now awaiting proclamation.

The Bill amends the [Equal Opportunity Act 1984](#) so that employment-related discrimination and victimisation complaints will be heard at SAET rather than SACAT. Other amendments to the [Fair Work Act 1994](#), the [Magistrates Court Act 1991](#), the [Work Health and Safety Act 2012](#) and the [South Australian Employment Tribunal Act 2014](#) address technical and procedural issues to improve the efficiency of the Tribunal and the experience of litigants.

Commencement of the new ART

After nearly 50 years, the Administrative Appeals Tribunal (the AAT) will cease to exist at midnight on 13 October 2024, to be replaced by the Administrative Review Tribunal (the ART), commencing 14 October 2024. The AAT continues to operate as normal until 14 October 2024. Matters before the AAT that have not been finalised by that date will transition to the new ART.

In Adelaide, the AAT has welcomed a number of newly appointed members in preparation for the commencement of the ART. We welcome Members Elim Chan, Julie von Doussa, Sally Gooch, Fiona Brady, and Jennifer Lock in the most recent round of appointments.

As preparations continue for the commencement of the ART, key instruments have been drafted including the Administrative Review Tribunal Regulations

2024 (12 September 2024) and the Administrative Review Tribunal Rules 2024 (17 September 2024). Each instrument is now available on Austlii.

The Attorney-General has also announced his intention to assign four inaugural Jurisdictional Area Leaders pursuant to s 197 of the *Administrative Review Tribunal Act 2024*.

Congratulations to COAT SA Committee Member Kate Millar who has been assigned Jurisdictional Area Leader for Migration. You can read more about these assignments and appointments [here](#).

A special sitting of the AAT will be held on 11 October 2024 to mark its closure. A special sitting of the new ART to mark its commencement will take place on 14 October 2024.

Decisions of Interest

FTXB; Secretary, Department of Social Services and (Social services second review) [\[2024\] AATA 3021](#)

Justice Kyrou, President, Senior Member Kennedy, Senior Member Trotter

On 28 August 24, the President of the AAT and two senior members delivered an important decision concerning the method used to calculate entitlement to social security benefits prior to reforms to the *Social Security Act 1994* in 2020. The observations of the Tribunal have the potential to affect a very large number of historical social security overpayment cases.

Between 10 July 2014 and 24 June 2014, the respondent worked as a casual employee, without any fixed working days or hours, at a supermarket. He was paid weekly, but his weekly pay periods did not align with his youth allowance instalment periods as a particular weekly pay period could fall either wholly within one instalment period or across two instalment periods. The respondent mistakenly reported his net income instead of his gross income for most of the instalment periods.

Centrelink decided that the respondent had failed to report the correct amount of earnings during the period; had been overpaid youth allowance. An internal review officer affirmed the delegate's decision.

On 8 January 2024, the AAT on first review set aside the internal review decision and remitted the matter to Centrelink for reconsideration, rejecting Centrelink's submissions as to the correct approach to calculating debts when evidence of working hours could not be obtained. Centrelink applied to the Tribunal for a second review.

A critical step in determining whether the respondent owes a debt to the Commonwealth is the 'income test' in point 1067G-H1 of Module H in s 1067G of the *Social Security Act 1991* ('the Act'), which refers to point 1067G-H23 in s 1067G ('point H23'). Point H23 relevantly states that 'ordinary income is to be taken into account in the fortnight in which it is first **earned, derived or received**.'

Centrelink had calculated the entitlement by using the dates of receipt of income where the date income was 'earned' (in the sense of when the respondent had actually performed casual work) could not be identified.

The Tribunal set aside the internal review decision and the AAT First Review Decision and substituted a decision that the respondent owes a youth allowance debt of a different amount. The Tribunal calculated that amount by applying a different construction of point H23 than the construction Centrelink had used.

Using principles of statutory construction, the Tribunal concluded that for the purposes of point H23:

- the word 'first' has a temporal connotation in the sense that, if ordinary income is 'earned', 'derived' or 'received' in different fortnights, it must be taken into account in the fortnight in which the first of those events occurs.
- a person earns ordinary income when the person become legally entitled to it. The time that a person earns income may precede the time at which the person receives income or the timing of both events may coincide.
- a person receives ordinary income when they obtain beneficial ownership of the income, such as when the income is made available to them or to a third party at their direction and for their benefit.

The word 'it' in point H23 indicates that point H23 is dealing with a particular amount of ordinary income that is earned, derived, or received, and engages the definition of 'income amount' in s 8(1) of the Act.

Applying the meanings assigned to the words in point H23 as outlined above, the analysis required by point H23 in respect of each income amount of a person may be framed as follows: In which of the fortnights in which a person is paid youth allowance ('instalment periods') did they first:

- become legally entitled to the income amount, where the income amount is of a kind that can be described as being earned; or
- become legally entitled to the income amount, where the income amount is not of a kind that can be described as being earned but can be described as being derived; or
- receive the income amount?

In the present case, based on the respondent's evidence and his pay slips, the Tribunal concluded that he was paid wages every Thursday for work he performed for the previous Monday to Sunday period. Applying the above analysis, the Tribunal found that the respondent earned his weekly wages at the end of each Sunday.

The Tribunal did not accept Centrelink's argument that where there was no evidence as to when precisely income was earned, in the sense of rosters or time sheets, evidence of receipt of income could be substituted for the calculation. The Tribunal observed that it is unlikely that there will be any cases where a conclusion could be drawn as to when an income amount was received but not as to when it was earned or derived. A conclusion about when income was earned or derived may be reached by drawing inferences from the available evidence. Patterns of payments may support the drawing of inferences for the purposes of point H23. Oral evidence from an employee (or other person with whom they worked) about a workplace's practices and arrangements concerning rostering, timesheets and pay cycles may corroborate documentary records, or indeed be sufficient on its own to identify when an income amount was earned.

MGB Residential Care Pty Ltd v Eastern Health Authority Inc & Anor **[\[2024\] SASC 109](#)**

Judgment of the Honourable Justice McDonald

This decision deals with an application for judicial review of a SACAT decision to decline to grant an application to vacate a trial date and instead list the matter for a hearing on the issue of jurisdiction. Importantly, the Court considered the scope of the Tribunal's review jurisdiction under the SACAT Act.

The applicant sought review of a decision of the Eastern Health Authority to not renew its supported residential facility licence pursuant to s 34 of the SACAT Act. The respondent made written submissions that, in addition to the reasons provided by the decision-maker for non-renewal, the Tribunal should also have regard to the behaviour of the sole director of the applicant company in reviewing

the decision. This conduct was not included as one of the five grounds provided for the non-renewal decision.

The applicant subsequently made an application for a determination that the Tribunal's jurisdiction did not extend to reviewing the director's conduct and that the respondent's case should be confined to those matters relied upon by decision-maker in the decision under review. The Tribunal refused to make a preliminary ruling on that issue.

In their application to the Supreme Court, the applicant contended that the Tribunal committed a jurisdictional error when it refused to determine the question of jurisdiction in advance of the full hearing, because the applicant would be denied procedural fairness should the matter proceed to determination without resolution of this question. The applicant argued that s 34(5)(b) of the SACAT Act should be read down such that any further evidence or material admitted by the Tribunal must be limited to material that is relevant to the "factual substructure" underpinning the reasons provided by the decision-maker.

The Court disagreed with this interpretation on the basis that it required the insertion of limiting terms within the section that are not present. The Court considered that further evidence or material that supersedes the decision-maker could be admitted in a review hearing, and therefore it could not be said that the nature of the material must be confined to those matters identified by the original decision-maker. Lastly, the Court considered this interpretation accords with the objectives of the Tribunal to afford a broad discretion to provide flexibility in the decision-making process.

The Court also found that no procedural unfairness was created by the course of action proposed by the Tribunal because the process under section 34 SACAT Act is a merits review. This finding considered the already lengthy procedural history of the matter and that the applicant did not consider any other courses of action to address the perceived unfairness; e.g. an application for further time. The Court stated that the Tribunal's approach was pragmatic and sensible and met the main objectives of the Tribunal.

Consequently the Court did not grant the applicant the sought declaratory relief and dismissed the application.

Badea v Department of Human Services – Central Assessment Unit
[\[2024\] SACAT 37](#)

President Hughes

This decision answers two questions of law referred to a Presidential Member of SACAT regarding the exclusion of evidence on the basis of unfairness to the applicant.

The applicant sought to review a decision of the CAU to issue him with a prohibition notice under the [Child Safety \(Prohibition Persons\) Act 2016](#). This decision was made on the basis that the applicant posed an unacceptable risk to children, relying on charges of aggravated assault brought against the applicant that were dismissed, and two findings of guilt made by a court for dishonesty offences. In the course of the review application, the respondent filed with the Tribunal documents in relation to the dismissed aggravated assault charges including affidavits from the complainant, her grandmother and police officers. The applicant objected to the Tribunal's receipt of this material unless the witnesses were made available for cross-examination at the review hearing.

The President of the Tribunal found that it was not within the Tribunal's discretion to exclude, or not rely upon, assessable information on the basis that it would be unfair to the applicant. The Tribunal's obligation is to afford the applicant sufficient opportunity to respond to assessable information but it does not require an opportunity to cross-examine witnesses on whose statements the decision was made. The President further stated that the circumstances in which evidence can be excluded is wholly dictated by the obligation to afford procedural fairness.

Rebbeck v Housing SA [\[2024\] SASCA 86](#)

Judgment of the Honourable Acting Chief Justice Livesey (ex tempore)

This decision deals with an application to the Supreme Court for leave to appeal against an order made by SACAT requiring vacant possession of a tenanted property.

The tenant had previously sought review of the South Australian Housing Trust's decision to not extend the tenancy with SACAT, and internal review where this initial review was unsuccessful. The Tribunal affirmed the respondent's decision and as such, SAHA obtained an order for vacant possession on the basis that the fixed term tenancy agreement had expired. The tenant sought an internal review of the vacant possession order on the basis that he had 'done nothing wrong', the decision was made on the basis of incorrect information, he was not given notice of the original order, and it failed to account for his difficult personal circumstances. The Deputy President found on internal review that the order for vacant possession should be made but granted the tenant access to the property to remove his goods.

The Court found that the applicant had not identified an arguable error in the Tribunal's decision on internal review, and that the orders sought by the applicant could not be granted by the Court. The Court discussed their role in relation to unrepresented litigants and stated that while the Court must endeavour to afford a fair hearing and give an applicant assistance with legal issues to avoid misunderstanding and unfairness, this assistance cannot extend to advising the litigant or compromising the Court's neutrality.

KGS v GMS [\[2024\] SASCA 85](#)

Judgment of the Honourable Acting Chief Justice Livesey (ex tempore)

In a similar vein, in *KGS v GMS*, the Honourable Acting Chief Justice Livesey, decision in delivering an ex tempore decision refusing leave to appeal from a decision of SACAT, where SACAT's decision was to refuse permission to pursue an application for review because the applicant had failed to provide any evidence in support of her application. His Honour noted the extensive information that had been provided to the applicant, and supported the Tribunal's approach, stating that while it was necessary to provide unrepresented parties with assistance, the Court cannot conduct the case for the litigant.

Job Opportunities

Expressions of interest for Ordinary Members of the Queensland Civil and Administrative Tribunal

QCAT is currently calling for expressions of interest for five full-time Ordinary Member positions. Expressions of interest close by COB on 18 October 2024.

Further information about this opportunity is available on the QCAT website [here](#).

Expressions of interest for Presidential Member of the ACT Civil and Administrative Tribunal

The Attorney-General of the ACT is currently inviting expressions of interest for appointment to the position of Presidential Member of ACAT. Expressions of interest close on 21 October 2024.

Further information about this opportunity is available [here](#).



Your COAT SA Committee

Barbara Johns (Convenor); Anne Lindsay (Vice-Convenor); Peter Kassapidis (Treasurer); Elle Spyrou (Secretary); Brenton Illingworth; Marten Kennedy; Kath McEvoy; Jodie Carrel; Kate Millar

Something to share?

Do you have something to share across COAT SA? Let us know for the next newsletter at governance@sacat.sa.gov.au