

COUNCIL OF AUSTRALASIAN TRIBUNALS • SOUTH AUSTRALIA

COAT SA News

News from
the Tribunals
of South
Australia

Issue 15

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Convenor (SA): Barbie Johns • Secretary (SA): Marten Kennedy

UPDATE FROM CONVENOR



Barbie Johns

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

We held our AGM on 21 November 2018 where our new committee was elected and Clare Byrt and Rob Lawton left the committee. I would particularly like to thank them for their contributions to COAT.

Presentations

During 2018, COAT arranged for the following presentations:-

- Justice Judy Hughes – SACAT's expanding jurisdiction
- Professor Kathy Mack – The role of emotions in the decision making process
- The Honourable Attorney-General spoke at our AGM.

In April this year, SAET hosted a very successful presentation in a panel style format entitled "*Interpreters in a Tribunal context – Issues and challenges*", see page 13 for more detail.

We are all awaiting the outcome of the appeal to the Supreme Court in the matter of *Raschke v Firinauskas* with bated breath. Once that decision has been handed down, we will be arranging a presentation on the issue of tribunals and the exercise of federal diversity jurisdiction by Anna Olijnk and Stephen McDonald.

Ideally we would like to arrange one further presentation during the year in addition to a presentation at the AGM. At this stage other

possible topics for further presentations include

- participating on multi-disciplinary panels; and
- dealing with conflicts of interest – real and perceived.

If you have any suggestions for presentation topics you think would be useful to members, please let us know.

COAT Conference

Just a reminder that the annual COAT conference is in Melbourne on Thursday 6 June and Friday 7 June. Details of the programme can be found on the COAT website.

Membership

While COAT's bank balance is reasonably healthy, we can survive only with membership fees. If you are currently not a financial member I encourage you to join or re-join. The annual fee is modest (and is tax deductible!).

Support for Members

Our Committee is comprised of people with extensive experience in tribunal work – both as members and in administration. Sometimes it can be awkward to seek guidance from an immediate superior or colleague in your tribunal work.

If you find yourself in a sensitive situation and would benefit from some guidance, then you can approach any of us on a confidential basis and we will try to assist you.

FEEDBACK - If you think that COAT should be doing something else for our membership, please let us know.

Thanks for your continued support of COAT.



From the AAT



Marten Kennedy

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

COAT Members can subscribe to automatically receive 'The Review', in its entirety, via the [Administrative Appeals Tribunal website](#). 'The Review' contains links to the full decisions via Austlii.

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

Migration and Refugee Division

D Nguyen & T Hoang (Migration) [2019] AATA 293

Tribunal: Member Rania Skaros

The applicant was a partnership who operated a bakery. The applicant applied to the Department of Immigration and Border Protection (the Department) for approval of the nomination of a Baker for a subclass 457 visa. The Department refused to approve the nomination and the applicant applied to the AAT for a review of the decision.

Applicants seeking nomination approval must meet a list of requirements set out in the Migration Regulations 1994. The issue for the AAT in this review was whether the

requirement that the terms and conditions of employment of a nominee are no less favourable than those that are, or would be, provided to an equivalent Australian citizen worker was satisfied. The "terms and conditions of employment" included the salary the applicant would offer the nominee.

The applicant indicated in the nomination application that the nominee's base salary would be \$96,400 and over \$100,000 with the inclusion of superannuation. The evidence before the AAT was that an Australian citizen performing equivalent work at the same location would normally get an annual salary of \$52,000 and \$82,000.

The AAT was not satisfied that the nominee's earnings would be the amount proposed or that he would receive an annual salary at all. The AAT was not satisfied that the applicant had the financial capacity to pay the salary after reviewing the applicant's most recent financial report.

The AAT affirmed the department's decision to refuse the application finding the applicant did not meet the requirements for approval of the nomination.

1730528 (Refugee) [2019] AATA 157

Tribunal: Member Alison Murphy

The Department of Home Affairs (the Department) cancelled the applicant's Protection visa because it found that the applicant had provided incorrect information in her application for the visa. The applicant applied to the AAT for a review of this decision.

In her Protection visa application, the applicant claimed to fear that her life was in danger in Malaysia because her parents did not agree with her choice of partner and that she would



be physically and mentally tortured until death if she returned.

After the applicant had been granted the Protection visa, the Department became aware of information that the applicant's parents had travelled to Australia and attended the applicant's wedding. Based on this information, the Department concluded the applicant had provided incorrect information in her Protection visa application about her relationship with her parents and cancelled the visa.

Before the AAT, the applicant maintained her claims for Protection were entirely true. She claimed that her father had not been invited to the wedding and that he had attended in order to blackmail her.

The AAT held very serious concerns about the credibility of the applicant's claims to fear serious harm from her father if she returned to Malaysia for multiple reasons. One main issue was the fact that the applicant initially gave evidence that none of her family members attended her wedding or were aware that she was married.

The AAT accepted that the applicant's father initially opposed her relationship but found that her father never attacked, harassed or beat the applicant and that he no longer opposed the relationship.

The AAT concluded that the applicant provided incorrect information in her visa application and that the visa was granted on the basis of the information. After taking into account relevant considerations, the AAT found that the visa should be cancelled. The AAT affirmed the decision.

Social Security and Child Support Division

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

Ashurst and Robertson (Child support) [2019] AATA 377

Tribunal: Member Fiona Hewson

Mrs Ashurst and Mr Robertson are the parents of a male child. Mr Robertson had been paying child support to Mrs Ashurst since August 2005 with payments being collected privately from May 2014.

In July 2018, Mrs Ashurst requested the Department of Human Services (the Department) to:

- 1. begin collecting the child support again; and*
- 2. collect unpaid amounts of child support from Mr Robertson.*

The Department accepted the application for collection from 3 July 2018 and the application to collect unpaid amounts during the period 2 June 2018 to 2 July 2018. Mr Robertson objected to the decisions. An objections officer in the Department decided to accept Mrs Ashurst's application for collection of child support, but was not satisfied that Mr Robertson owed unpaid amounts of child support.

Mrs Ashurst applied to the AAT for a review of the decision not to collect the unpaid amounts of child support.

Mrs Ashurst may seek unpaid amounts of child support that fell within the nine-month period before the date of her application. Mrs Ashurst asked for unpaid amounts to be collected during a period which did not exceed three months. If the AAT determined there were



unpaid amounts in this period, it must grant Mrs Ashurst's application.

The fundamental disagreement between the two parties was about payments made since May 2014. Mrs Ashurst claimed the payments were always made in arrears, while Mr Robertson claimed the payments were always made in advance.

The AAT found that the payments were made in arrears. The AAT based this finding on the evidence of private bank statements and Departmental payment records.

The AAT decided to set aside the decision under review and send the matter back to the Department for reconsideration on the basis that Mr Robertson owed arrears of child support for the period in question.

General Division

McLeod and Queensland Building and Construction Commission [2019] AATA 143

Tribunal: Senior Member Donald Davies

The applicant requested the Queensland Building and Construction Commission (QBCC) grant him a Queensland Building – Open Licence. At the time of the application, the applicant already held NSW and New Zealand building licenses. He requested the Queensland Licence on the basis of mutual recognition of his existing licenses.

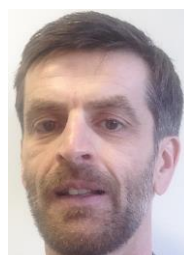
The QBCC granted the licence with the condition that building work other than domestic building work was restricted to supervisory services, management services and administration services. The applicant applied to the AAT for a review of this decision seeking a licence without conditions.

In general terms, an individual is entitled to registration for an occupation in a jurisdiction by mutual recognition if the occupation is equivalent to the occupation the existing licence was issued for. The primary issue for the AAT was whether the licenses were sufficiently equivalent. The test for equivalence relates to the activities to be carried out under each licence. The activities must be substantially the same.

The AAT compared the activities authorised to be carried out under each of the licenses to determine their equivalence. The AAT found that the NSW licence was equivalent to the proposed Queensland Licence but the New Zealand Licence was not.

The AAT varied the decision under review granting the applicant a Building – Open Licence Class Contractor Grade with the condition that building work other than some types of domestic building work, was restricted to supervisory services, management services and administration services.

FROM SAET



Don Smyth

New Deputy Presidents

The Governor has appointed two new judicial officers and proclaimed them Deputy Presidents of SAET.

Mr Stuart Cole has been appointed as a Magistrate and Deputy President of SAET. Mr Cole commenced on 3 April 2019.

Mr Anthony Rossi has been made a Judge of the District Court and Deputy President of



SAET. Mr Rossi formally commenced in his new role on 13 May 2019.

Both Mr Rossi and Mr Cole bring extensive expertise in workplace relations law and workers compensation. The two new Presidential members are advance replacements for Deputy President Magistrate Michael Ardlie and Deputy President Judge Peter Hannon who retire in August and November of this year respectively.

Commissioner Expressions of Interest

The Treasurer, Hon. Rob Lucas, MLC, has called for expressions of interest for the role of Commissioner at SAET. Expressions of interest closed on 30 April 2019.

CMS

Testing of the Tribunal's new electronic case management system (CMS) is continuing. Formal implementation of the new system is imminent. The new system will offer greatly enhanced case management functionality for both members and staff.

COAT Seminar

On Tuesday, 9 April 2019, SAET hosted a seminar on *"Interpreters in a Tribunal context – Issues and Challenges"*. Further details of the session are available on page 13.

Significant Decisions

The Supreme Court has handed down a number of recent decisions relevant to SAET's workers' compensation jurisdiction, in particular:

- *Return to Work Corporation of South Australia v Renfrey* [2019] SASCFC 26 (21 March 2019)



- *Return to Work Corporation of South Australia v Mitchell* [2019] SASCFC 34 (11 April 2019)

ADR at SAET



Anne Lindsay

The objectives of the South Australian Employment Tribunal (SAET) are found in Section 8 of the *South Australian Employment Tribunal Act 2014*. The objectives include a focus on the type of dispute resolution processes to be used at SAET.

The objectives identify in Section 8(c) that SAET is *"to ensure that applications are processed and resolved as quickly as possible while achieving a just outcome, including by resolving disputes through high quality processes and the use of mediation and alternative dispute resolution procedures wherever appropriate."* In addition, Section 8(g) encourages SAET *"to be flexible in the way in which the Tribunal conducts its business and to adjust its procedures to best fit the circumstances of a particular case or a particular jurisdiction."*

A variety of application types at SAET are well-suited to alternative dispute resolution models. The Workers Compensation Tribunal, SAET's predecessor for the resolution of workers' compensation disputes, developed a strong focus on conciliation as a result of legislative change in the late 1990s. Compulsory Conciliation became the primary



model for dispute resolution in that area. Specialist Conciliation Officers were employed and a large majority of disputes were resolved through the model. The Tribunal developed the skills of the conciliators to include training and accreditation through the National Mediation Accreditation Scheme (NMAS). The Conciliation model was a facilitative model that encouraged the Conciliator to facilitate the consideration of options for resolution and to encourage discussion about the strengths and weaknesses of the arguments before the Tribunal.

When SAET was created in 2015, (with Return to Work scheme matters as the sole jurisdiction) the compulsory conciliation model was given legislated parameters so that the conciliation process was confined to a 6 week time frame (with the possibility of extension when good reasons exist). The Tribunal members in the alternative dispute resolution (ADR) area were named Commissioners and inquisitorial powers were created indicating that the dispute resolution specialists were required to take a more hands-on approach to the dispute resolution process. In the first year of SAET the model was very successful. The restrained timelines have become more challenging during the period of increased litigation around the meaning of various aspects of the new Return to Work Act.

The jurisdiction of SAET was expanded in 2017. Commissioners with a strong background in conciliation joined the Tribunal. Such areas as Industrial disputes and Training and Skills applications maintained their focus on ADR.

Alternative dispute resolution processes were explored for many of the new application types also. Equal opportunity matters were

particularly well suited to a mediation model that allows the parties to tell their story and to be heard. The model adopted is much like the Resolution Institute's mediation training model and it helps the parties to identify a wide variety of options that may assist with resolution.

Conciliation has been introduced to applications that relate to Public Sector Grievances. Before a hearing takes place, the parties are encouraged to explore options for an agreed resolution. Historically, these sorts of matters were always resolved by hearing and determination. Now the majority of matters are resolved by discussion and agreement between the parties. Again the process of storytelling and feeling heard plays an important role in bringing resolution for these matters.

Perhaps the most beneficial aspect of the ADR model in SAET is the ability for any matter to be referred for an ADR approach if conciliation or mediation is likely to be beneficial. In particular, the ability to join multiple applications from diverse employment areas into one matter has been very successful. The focus can be on identifying higher level solutions that draw from the differing

remedies in the different areas. Often that leads to moving past impediments that may arise in particular areas because of limitations on remedies.

Overall, the bringing together of employment related matters with an express focus on ADR when resolving disputes, has been beneficial for many application types. The benefits will continue to be explored through the referral of new areas that may not have previously been dealt with through an ADR model.



FROM SACAT

Anne Lindsay

I was delighted to join SACAT on 28 March 2019 as Principal Registrar.

Since then I have been meeting the tribunal members and staff, observing matters for various types of application across the Tribunal's jurisdiction and developing an understanding of the current registry and case management processes. I have been impressed by the commitment of staff and members to serving the public and participants at SACAT with equanimity and professionalism.

I will continue to be an active member of COAT and look forward to working with the committee in order to strengthen the ties between the South Australian Tribunals and COAT members in general.

SACAT Expansion



Chris
Byron-Scott

The Tribunal continues to receive a steady stream of administrative review jurisdictions and for the first time professional disciplinary jurisdictions.

The Statutes Amendment (SACAT No 2) Act 2017 was assented to on 28 November 2017. This Act conferred Stage 3 of the expansion plan upon the Tribunal. Stage 3 comprised of

48 new jurisdictions which were conferred upon SACAT across four separate dates from December 2017 to 1 October 2018.

Stage 3 expansion was formerly completed on 1 February 2019 when an amendment to our jurisdiction under the Land Agents Act 1984 was commenced.

Since July 2018 SACAT has received the following new jurisdictions:

Jurisdictions conferred on 1 July 2018

- Dog and Cat Management Act – review jurisdiction

Jurisdiction conferred on 2 July 2018

- Adoption Act 1988 – review jurisdiction
- Births, Deaths and Marriages Registration Act 1996 – original and review jurisdiction
- Land Acquisition Act 1969 – review jurisdiction
- Partnership Act 1891 - review jurisdiction
- Police Superannuation Act 1990 – original and review jurisdiction
- Southern State Superannuation Act 2009 – original and review jurisdiction
- Superannuation Act 1998 – original and review jurisdiction

Jurisdiction conferred on 1 October 2018

- Conveyancers Act 1994 – original (disciplinary) and review jurisdiction
- Electricity Act 1996 - review jurisdiction
- Essential Services Commission Act 2002 – review jurisdiction
- Gas Act 1997 – review jurisdiction
- Harbors and Navigation Act 1993 - review jurisdiction



- Land Agents Act 1994 - original (disciplinary) and review jurisdiction
- Land Valuers Act 1994 - original (disciplinary) and review jurisdiction
- Livestock Act 1997 - review jurisdiction
- Local Government Act 1999 - original (disciplinary) and review jurisdiction
- Mines and Works Inspection Act 1920 – review jurisdiction
- National Parks and Wildlife Act 1972 – review jurisdiction
- Pastoral Land Management and Conservation Act 1989 – review jurisdiction
- Supported Residential Facilities Act 1992 – Original and review jurisdiction
- Survey Act 1992 - original (disciplinary) and review jurisdiction
- Water Industry Act 2012 – review jurisdiction

Jurisdiction conferred on 22 October 2018

- Children and Young People (Safety) Act 2017 – review jurisdiction
- Births, Deaths and Marriages Registration Act 1996 – review jurisdiction

Jurisdiction conferred on 1 February 2019

- Land Agents Act 1994- additional review and disciplinary jurisdiction relating to property managers

Jurisdiction conferred on 1 April 2019

- Planning, Development and Infrastructure Act 2016 – review jurisdiction

Stage 4 Expansion

AGD Legislative Services have prepared the draft Statutes Amendment (SACAT No 3) Bill 2019 for limited public consultation. Stage 4 includes new jurisdiction under 30 Acts (listed below) and most notably includes work currently managed by SAET and the Health Practitioners Tribunal under the *Equal Opportunity Act 1984* and the *Health Practitioner Regulation National Law (South Australia) Act 2010* respectively.

SACAT will once again suggest that the implementation of stage 4 be split into 2 or more dates from 1 August 2019 onwards in order to lessen the impact on members, staff and the systems of the Tribunal.

SACAT Decisions of Interest



Claire Gray-Starcevic

Associate to President Hughes

***Blanc v Adelaide City Accommodation* [2019] SACAT 1 (9 January 2019)**

HOUSING & CIVIL - MEMBER FILES

This decision is of interest both for its consideration of a preliminary issue of whether or not a party had a reasonable excuse for non-attendance such as to enliven a right to s 85 review, and also its determination of a rooming house proprietor's right to compensation under an agreement of less than six months.



The determination of the preliminary issue highlights the difficulty in ensuring that a party who requires a translator properly receives and understands notices of hearing. Mr Blanc was served with an electronic notice of hearing. There was no doubt that Mr Blanc had received the notice, as he replied to the email requesting and in-person hearing or alternatively, a telephone hearing with a translator. The Tribunal replied to Mr Blanc stating that a translator had been booked and that he was to attend in person. Mr Blanc did not attend the hearing. On the s 85 application for review due to non-attendance, Mr Blanc submitted that he had not understood the word 'attend'. Member Files determined that a misunderstanding due to a translation error was a reasonable excuse for non-attendance.

The substantial issue concerned a proprietor's right to compensation where a rooming house agreement is for a period of less than 6 months. Mr Blanc had entered into a fixed agreement with the proprietor for 3 months. When Mr Blanc abandoned the room, the proprietor sought compensation for loss of rent. Mr Blanc argued that the proprietor was only entitled to compensation where the agreement was for 6 months or more, pursuant to s 105V(3) of the Residential Tenancies Act 1995 (the Act). Member Files explained that while a proprietor is not entitled to compensation for any loss resulting from the abandonment of a room where the agreement is for a period of less than 6 months, this does not exclude compensation under another provision of the Act or some other power of the Tribunal. The key is whether the Tribunal considers it 'appropriate' to do so.

Member Files determined that Mr Blanc had entered into a binding agreement and that by rescinding that agreement he had caused the

proprietor to miss out on expected rent. It was therefore appropriate for the proprietor to be compensated for loss of rent due to Mr Blanc's abandonment of the room.

UCC & PTT v Registrar of Births, Deaths and Marriages [2019] SACAT 3 (5 February 2019)

ADMINISTRATIVE & DISCIPLINARY – MEMBER FILES

This matter explores the scope of the Tribunal's jurisdiction to hear and determine change of name applications under the Births, Deaths and Marriages Registration Act 1996. It also reminds us of the difficulties facing those in our community who for whatever reason are either missing key identification documents or who hold documents with conflicting information.

The applicants immigrated to South Australia about four years ago. Their two sons were issued with travel documents to allow them to enter and live in South Australia, however the documents incorrectly recorded their sons' names. Significantly, the documents gave the sons surnames that were different from each other and also their parents. These documents are the only official Australian documents their sons have for identification purposes. The applicants attempted to apply to the Registrar of Births, Deaths and Marriages to have their sons' names changed on the documentation, however were referred to the Tribunal when the Registrar determined it could not consider their application due to the sons not having birth certificates.

The Tribunal's jurisdiction under the Births, Deaths and Marriages Registration Act 1996 is limited to ss 22, 25(2)(c) and 50. Section 22 gives the Tribunal jurisdiction to resolve a dispute between parents about a child's name.



Section 25(2)(c) empowers the Tribunal to approve an application by one parent to change a child's name (the consideration here is the child's best interests – see President Hughes's decision in [ZXN v TZW \[2018\] SACAT 52](#)). Section 50 gives the Tribunal a general power to review of a decision of the Registrar.

The Tribunal's specific jurisdiction under s 22 or s 25(2)(c) was not enlivened as there was no 'dispute' between the parents and the application was made jointly by both parents. Member Files found that the Tribunal's general review jurisdiction had not been enlivened as no reviewable decision had been made by the Registrar – rather, the Registrar had not made a decision and instead had referred the parents to the Tribunal. Member Files suggested the parents apply to Registrar for registration under s 13(4) and that if that application was refused, that may constitute a reviewable decision under s 50.

Joneidy & Zolfaghari v Li [2019] SACAT 4 (11 February 2019)

HOUSING & CIVIL – MEMBER SCHROEDER

In this matter, prospective tenants Ms Joneidy and Mr Zolfahari paid a sum of \$860.00 to the agent of a property they were hoping to rent. This amount was paid after they had sent the agent their application and received a response email saying that they had been approved and that a deposit of \$860.00 needed to be paid 'within 24 hours to hold the property'. Shortly after the payment was made, the tenants discovered that they would not be able to enroll their children in the local school and as such, determined the tenancy was unsuitable for their needs.

The key question was whether or not a contract had been formed between the prospective tenants and landlord regarding a tenancy agreement. Acknowledging that tenancy agreements do not have to be in writing, and may be entered in breach of the s 48 disclosure requirements and still be valid, Member Schroeder nonetheless determined that no contract existed between the prospective tenants and landlord. He noted that entering into a residential tenancy agreement is a formal event that attracts specific procedures. Significantly, the specific terms of the tenancy agreement were not yet known to the prospective tenants and it is unlikely they considered themselves bound by the informal email and the payment of a deposit to secure the property.

Member Shroeder found that the deposit was refundable. It was a deposit to hold the property so that appropriate terms of a residential tenancy agreement could be reached between the parties. As an agreement had not be reached, the deposit should be refunded.

Ivka v City of Charles Sturt [2019] SACAT 5 (26 February 2019)

ADMINISTRATIVE & DISCIPLINARY – EXECUTIVE SENIOR MEMBER STEVENS

This matter concerned a 4-year old Australian Kelpie Cross called Roko and the car detailer he attacked in July last year. A delegate of the Council of the City of Charles Sturt (the Council) issued a Control (Menacing Dog) Order under s 50 and 51 of the Dog and Cat Management Act 1995 (the Act). Roko's owner, Mr Ivka, applied to the Tribunal for review of that order. ESM Stevens' decision in this matter outlines the differences in the criteria to be met for various



control orders under the Act, specifically focusing on the difference between a Control (Menacing Dog) and a Control (Nuisance Dog) Order. The primary factual consideration concerned the future risk of harm posed by Roko.

Orders that may be made under the Act are:

- A Destruction Order;
- A Control (Dangerous Dog) Order;
- A Control (Menacing Dog) Order;
- A Control (Nuisance Dog) Order;
- A Control (Barking Dog) Order

ESM Stevens noted that the characterisation of dogs in each order is based on a graduated scale of risk of danger, menace, or nuisance. He considered the proper interpretation of the word 'menacing' should be understood in the context of that graduated scale. Importantly, each order contains different precautions and obligations to be taken for the safety of the public. The different precautions inform the appropriate interpretation and therefore order to be made for any given dog, based on the specific behaviours they present that need to be controlled.

It was not disputed that Roko had bitten somebody and caused them serious injury. Evidence was presented by counsel for Mr Ivka that this was an isolated, one-off incident. They argued that the attack occurred in specific circumstances that would not reoccur, therefore making any future risk negligible. However, ESM Stevens considered that the future risk posed by Roko could not be described as remote or fanciful. The fact that Roko had bitten somebody, causing serious harm, was the strongest indicator of the risk he posed. Having determined the risk presented by Roko, ESM Stevens determined it was

appropriate to make the Control (Menacing Dog) Order. A lesser order, for example a Control (Nuisance Dog) Order would not be appropriate as the precautions required by that order are not primarily designed to protect against the risk that Roko poses.

Pett & Pett v Polglase [2019] SACAT 2 (17 January 2019)

ADMINISTRATIVE & DISCIPLINARY – INTERNAL REVIEW – PRESIDENT HUGHES

Whilst President Hughes' decision in *Pett & Pett v Polglase* is ultimately about the determination of a landlord's application for compensation at the end of a tenancy, it provides an insight into the difficulties self-represented litigants face with adducing submissions and evidence that are relevant and probative to the application on internal review.

The applicants in this matter were the tenants, Mr and Mrs Pett, against whom a compensation order of \$1500 had been made based on various claims for repairs identified by the landlord at the end of the tenancy. This amount had been awarded on a holistic basis in that the Tribunal had not broken the amount down into specific dollar amounts for each item of damage for which compensation was awarded. President Hughes found that the Tribunal Member had broadly accepted a report prepared by a builder and maintenance worker, Mr Dodd, which concluded a claim of \$1223 for repairs at the property. As the Tribunal Member had also made an award of \$200 for carpet repairs and \$250 for a hole in the wall, totaling a claim of \$1823, President Hughes observed that the Tribunal Member had accepted Mr Dodd's report and then made 'a generalised deduction from the claims made' to reach the award of \$1500. Despite the



holistic nature of the award, the applicants determined they only had to contest the three quantified awards specified in the order to succeed on internal review. President Hughes rejected this approach and found it was necessary to confront the Tribunal's acceptance of the other matters raised by the landlord which had been included in the 'holistic' award.

President Hughes confirmed that whilst it is helpful for the Tribunal to identify components of a total assessment where compensation is awarded to a party on the basis of loss or damage, it is nonetheless open to the Tribunal to make global or holistic awards that 'reflect what the Tribunal considers to be a fair award of compensation irrespective of whether it matches quoted rectification costs.' The President varied the decision by \$300.00, awarding the landlord \$1200 for compensation instead of \$1500. The tenants had also filed a counterclaim for compensation and costs as well as allegations of fraud against the landlord, all of which were dismissed. Importantly, President Hughes noted that claims for excessive rent pursuant to s 56 of the Residential Tenancies Act cannot be made after a tenancy has ended, as there can be no order fixing new rent prospectively.

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Newsletter Editor Chris Byron-Scott, COAT Committee Member – 30 May 2019

¹ Kourakis CJ at [53]



Supreme Court Decision on Appeal from SACAT

Claire Gray-Starcevic

The Public Advocate v C, B [2019] SASCF 58

Full Court: Kourakis CJ, Kelly and Hinton JJ

When it comes to the detention of a vulnerable person it is undoubtedly preferable, and consistent with the fundamental value the common law accords personal liberty, for the guardian to be required to make an application to the independent Tribunal pursuant to s 32, rather than to hope that a protected person, or a benevolent intervener, will be in a position to bring an application pursuant to s 30 for a variation or revocation of an unjustified detention order.¹

The key question to be determined by the Full Court in this matter is whether a guardian appointed under s 31 of the Guardianship and Administration Act 1993 (SA) (the Act) can use, or authorise the use of, force for the purpose of ensuring the proper medical treatment and day to day care of a protected person without applying for a Tribunal direction under s 32 of the Act. Kourakis CJ framed the central question of statutory construction as 'whether the Act, in conferring the powers set out in s 32, impliedly abrogates the general law powers of a guardian to detain, and use other force, when assuming responsibility for the affairs of a protected person.'² He concluded that it did.

This is the Public Advocate's appeal of a decision made by Stanley J, whereby his Honour determined that BC, a 95-year-old man with moderately severe dementia, was being

² At [50].



held unlawfully in the locked ward of a retirement village. The Tribunal had made the Public Advocate limited guardian of BC, with decision-making power in respect of accommodation. The Public Advocate did not 'special powers' under s 32 of the Act.

BC is a person without mental capacity for the purposes of s 29 of the Act. His accommodation at the Barossa Village is such that he lives in a ward where the door of the unit is locked and can only be opened by code or swipe pass, of which BC had neither. Stanley J determined that this accommodation arrangement amounted to detention, a factual finding that the Full Court upheld on appeal.

Kourakis CJ, with whom Kelly and Hinton JJ largely agreed, dismissed the appeal and upheld the decision of Stanley J. The Court concluded that guardianship orders made pursuant to s 29 of the Act do not give power to the guardian to authorise the detention of a protected person or to otherwise use force against the person or retrain their liberty. The Public Advocate did therefore not have the power to authorise the detention of BC in the locked ward at the Barossa Village.

Guardians appointed under s 29 can give consent to lawful accommodation or lifestyle arrangements without seeking s 32(1)(a) orders. However, if detention or any form of restraint is required to hold the protected person in that accommodation, the arrangement becomes unlawful unless authorised by the Tribunal under s 32. That order may only be sought with the purpose to protect the person against serious risk to their health or safety or the safety of others.

COAT National Report



Kath McEvoy

I have again been elected Secretary of COAT. Most of the COAT National activities for this year have been focussed on preparations for the COAT National Conference for 2019 – to be held in Melbourne on 6 and 7 June. The Conference website, with all the Conference details and the program, can be found at <https://www.coatconference.com.au/>. The Conference theme is *Communicating Justice: Tribunals in the Community*, and the Conference program looks very inspiring and interesting. Note also as an additional drawcard, the dinner speaker is Brian Dawe, of Clarke and Dawe fame!

COAT National has however also been preparing and developing other programs for members' professional assistance and development. These include the Online Members' Induction Program, which is to be offered again later this year; a two day Decision Writing Course; and a COAT Survey of members' training needs.

This last is a new development and it is hoped that it will be rolled out (within Tribunals rather than directly from COAT) later this year. The survey is through a questionnaire directing tribunal members' attention to professional development needs in the context of the Framework for Tribunal Excellence which provides a guide to the abilities and qualities required by tribunal members (the full text of the Excellence Framework can be found at [here](#)) and so focussing on training and



development needs that can support the criteria for excellence: these include knowledge and technical skills, including technical knowledge and commitment to high standards; fair treatment, including the rules of procedural fairness and the demonstration of courtesy and patience; communication skills, including self-discipline, dealing with interpreters and managing communication difficulties; the conduct of hearings, including “on the papers’ reviews and determinations, and the provision of oral reasons; dispute resolution including application of ADR techniques; efficiency including case management skills; professionalism and integrity, including management of health and wellbeing; and leadership and management, including responsibility, imagination, and commitment to efficient administration. It is expected the survey will be provided in electronic form, and supplemented in some cases by telephone and face to face discussions. It will provide tribunal members with an opportunity to identify the areas in which they consider professional development would be of greatest assistance, and the most effective and convenient forms, and COAT will be able to use that information in tailoring support programs to offer to members in the future.

COAT National is also currently engaged in updating the COAT Practice Manual. This is presently available online for all tribunal members [via this link](#), although the hard copy version is now unavailable, and is an enormously valuable resource. It is expected that the updated Manual will be in place by the end of this year, and will be available on line and in hard copy.

Please note that the COAT National web address has changed: it is now <https://coat.asn.au/>. You will find lots of information on this website, including resources and publications, and also positions vacant.

Interpreters in a Tribunal context: Issues and Challenges



On Tuesday 9 April 2019 SAET hosted a session on this topic for COAT. The session was well attended, and the panel, comprising President Justice Steven Dolphin, Justice Judy Hughes, Judge Rauf Soulio, and Kate Millar, provided attendees with some valuable insights into the legal principles underlying matters involving an interpreter and useful practical guidance on some of the difficulties encountered in these matters.

Panel members presented in an informal and engaging manner which triggered some good discussion in the room (and subsequently).

Topics addressed by the panel included:

- the importance of explaining the role of the interpreter to parties and their representatives;
- how to determine whether an interpreter is required;
- practical issues such as the extent of extra time needed when a party has an interpreter;



- issues in relation to “informal” interpreters such as family members;
- challenges around the use of interpreters in the court context, particularly with regard to criminal matters;
- the hearing rule and interpreters;
- the standard of interpreting required in a tribunal setting;
- addressing complaints about the interpreter/standard of interpreting; and
- Interpreters and people with cognitive disabilities/mental illness.

There was discussion of the challenges facing interpreters and the importance of ensuring appropriate working conditions for interpreters working in tribunals and courts. The provision of adequate breaks was highlighted as being of particular importance. There was discussion also of the question of briefing the interpreter in advance of a hearing. The discussion highlighted some of the challenges in working with interpreters in a tribunal context and provided an opportunity to draw on panel members’ experience in addressing those challenges.

COAT is very grateful to the panel for their time and effort in participating in the session and also very grateful to SAET for hosting the session.

We have annexed 3 articles which may be useful to members in relation to this topic:-

- Justice Dolphin’s notes for use at the commencement of a hearing involving an interpreter;
- Annexure 4 – the four-part test for determining need for an interpreter (i.e. annexure to the publication *Working with Interpreters in Courts and Tribunals* – refer to www.naati.com.au)
- Guidelines for Magistrates and Judges on working with Interpreters in Court



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