COUNCIL OF AUSTRALASIAN TRIBUNALS • SOUTH AUSTRALIA

COAT SA News

News from the Tribunals of South Australia

Issue 16

Aug 2020

Convenor (SA): Barbie Johns • Secretary (SA): Chris Byron-Scott

COAT
COUNCIL OF AUSTRALASIAN TRIBUNALS

UPDATE FROM CONVENOR

Barbie Johns

Dear COAT members,

I am making some minor adjustments to the Convenor's report presented at the 2019 AGM due to the significant impact of the COVID 19 pandemic on COAT's plans for 2020.

We held our AGM on 22 November 2019 and the new committee was elected. The Committee members are:-

- Barbie Johns (Convenor)
- Peter Britten-Jones
- Kath McEvoy
- Joanna Richardson (Treasurer)
- Cath Lester
- Marten Kennedy
- Anne Lindsay
- Chris Byron-Scott (Secretary)

The AGM was well attended and His Honour the Chief Justice addressed the meeting about the future of courts and tribunals and how they might evolve taking into account developments such as the recent decision of the Supreme Court in Attorney-General for the State of South Australia v Raschke & Anor (20199) SASCFC 83.

Presentations

During 2019, COAT arranged the following presentations -

Upcoming Event

Presiding over Multi-disciplinary Panels in Tribunals

Thursday, 8 October 2020 @5:15pm

SACAT - Hearing Room 1, level 4, 100 Pirie Street

A seminar at SAET about the issues and challenges of using interpreters in a tribunal context. Members of the panel were Justice Steven Dolphin, Justice Judy Hughes, Judge Rauf Soulio and Kate Millar from the AAT.

A seminar at SACAT hosted by SACAT, the Australian Institute of Administrative Law and the Australian Association of Constitutional Lawyers concerning the High Court decision in Burns v Corbett and the Supreme Court of SA decision in A-G v Raschke. Presenters were Rebecca Ananian-Welsh from the University of Queensland, Mike Wait Crown Solicitor, Anna Olijnyk from Adelaide Uni and Stephen McDonald from Hanson Chambers.

In this Issue

Looking forward

The plans for 2020 were to be a series of 2 – 3 informal, round table forums. Due to the restrictions on gatherings, and the fact that our attention has been diverted to dealing with day to day issues arising from the pandemic, we have not convened any of those forums yet. However, we intend to deliver a PD session dealing with multi member panels on **Thursday, 8 October 2020 at 5:15pm**. This will be delivered in person at SACAT or by way of video link.

In addition, at our AGM in a date to be confirmed in November we are planning to have Dr Suzanne Le Mire, Professor of Law and Deputy Executive Dean of the Faculty of the Professions, to talk about the topic of ethics for decision-makers – we thought that the issue of ethics generally is likely to be fairly front of mind for COAT members at the moment given recent developments in the legal profession.

A vote of thanks

I would like to acknowledge the contribution of Don Smyth who has now resigned from the Committee due to a move interstate. Don was a valued member of the Committee being a reliable and conscientious committee member with an excellent sense of humour. We will miss him but of course, and wish him all the best for the future.

COAT Conference

As everyone is aware, the COAT conference was cancelled due to the pandemic however, we are hopeful it will be rescheduled to 2021 in Adelaide. We will provide you with more information about this when it is available.

Support for members

A reminder that our Committee is comprised of people with extensive experience in tribunal work – both as members and in administration. Sometimes it can be difficult to ask work colleagues for their guidance or support. Please feel free to approach any of the members of the COAT committee for guidance or support.

If you think that COAT should be doing something else for our membership, please l

Thanks for your continued support of COAT.

CATS, Courts and the Constitution: the place of super-tribunals in the national justice system

Please find below a hyper-link to an article written by Dr Rebecca Ananian-Welsh, Senior Lecturer at the University of Queensland School of Law.

In this article, Dr Ananian-Welsh commences by acknowledging the vast number of disputes dealt with by "super-tribunals" (which would otherwise have to be dealt with by the courts) and the quick, cheap and flexible manner in which those matters are dealt with.

She then poses the question:- and so what is the place of super-tribunals in the justice system and does it matter?

This leads to an analysis of recent and not so recent authorities on the vexed question of whether a super-tribunal is a court. This analysis requires some consideration of the different legislation in each state.

The author challenges the reader with her personal view early on, which is that state governments should take the approach of declaring their super-tribunals to be courts.

Why is this necessary? To avoid the legal conundrum caused by the High Court's decision in Burns v Corbett. As she says, the effect of that decision is to prohibit state administrative bodies from being vested with or exercising judicial power with respect to federal matters. The practical consequence of this position is that disputes which involve parties from different states, which raise constitutional questions or otherwise fall within Section 75 or Section 76 of the Constitution, may only be determined by courts of the state, not state administrative tribunals.

The article goes on to consider the criteria/framework which might be applied to decide whether or not a state based civil tribunal might be a court. The author considers the nature of the power being exercised by the tribunal (an important consideration in the matter of Raschke). She also considers the impact of significant factors such as the independence, impartiality and composition of the tribunal (eg the manner in which tribunal members are appointed, re-appointed or may be removed); the ability to refer a question of law to a court; the enforcement of the tribunal's decisions and the power of contempt.

This article leaves the reader with the distinct impression that there are many unresolved issues in this area, and it is interesting to reflect on what might happen in the near future. For those of you who were fortunate enough to get a seat at the standing room only presentation by Dr Ananian-Welsh (and others) last year, you may well remember the high quality of her presentation. Dr Ananian-Welsh had agreed to speak at the 2020 COAT conference. Hopefully she will present for us again in the near future one way or another.

https://law.unimelb.edu.au/mulr/issues/forthcoming-issue

SUMMARY OF MERINGNAGE v INTERSTATE ENTERPRISES PTY LTD (2020) VSCA 30

This matter involved an application to VCAT under the Equal Opportunity Act by Mr Meringnage on the basis that he had been discriminated against on the ground of his race and nationality. In summary, the issues in this matter were –

- whether or not VCAT is a court of a state; and,
- if it is not, whether in any event it can exercise state judicial power to determine a suit against the Commonwealth of Australia.

These issues were determined by the Victorian Court of Appeal on referral from VCAT under Section 96 of the VCAT Act. The 3 questions for determination by the Court were–

1. Is VCAT a 'court of the State' within the meaning of Chapter III of the Constitution and so capable of exercising judicial power in relation to a matter in which the Commonwealth is a party; and

2. If the answer to Question 1 is No; would the grant of relief in the proceeding, pursuant to s 125 of the Equal Opportunity Act 2010

(Vic) involve the exercise of judicial power by the Tribunal?

3. In light of the answers to Questions 1 and 2, did the Tribunal have authority to decide the application against the Commonwealth?

The Court of Appeal answered those questions as follows.

1. VCAT is not a court of the state – the Court said that it is the aggregation of many features of VCAT which indicate that VCAT is not a court, in particular, the lack of security of tenure for the overwhelming proportion of VCAT members. Their Honours applied the decisions in Qantas Airways v Lustig (2015) 228 FCR 148 and Director of Housing v Sudi (2011) 33 VR 559. Characteristics which the Court considered were important included –

- the appointment of a majority of members on fixed term renewable terms;
- the high proportion of sessional members who are likely to undertake work outside VCAT;
- the qualifications required for members (ie not necessarily legal);
- the manner in which the remuneration for VCAT members is determined;
- the function of VCAT in its review function standing in the shoes of the administrative decision maker (supporting the view that VCAT is primarily to provide administrative oversight);
- the terms of Section 96 VCAT Act which explain that VCAT may only refer questions which are not inconsistent with previous Supreme Court decisions – that provision would not be required if VCAT had been within the court hierarchy.

This view is particularly interesting in comparison with SACAT as it could be argued that VCAT has more court-like features than SACAT – for example, VCAT's monetary orders can be enforced by filing a certified copy of the order in an appropriate court and VCAT has the power to make findings of contempt.

Answer to question 1: No

2. In this particular matter, the orders sought were in the nature of orders which would ordinarily be made by a court in legal proceedings – they were in the nature of prohibitory and mandatory injunctions. Parties at VCAT are able to obtain a binding, authoritative and curially enforceable decision independently of the consent of the person against whom a complaint has been brought (paragraph 105 – quoting from Burns v Corbett (2017) 316 FLR 448).

The Court held that the characteristics of the range and nature of the orders which can be made by VCAT, and the manner in which they can be enforced, means that the orders being sought in this matter involved the exercise of judicial power.

Answer to Question 2: Yes

3. This question comes down to whether the application involves a matter within ss 75 or 76 of the Commonwealth Constitution.

The respondent to the application argued that the Commonwealth is a party within the meaning of s 75(iii) and the EO Act should be interpreted so that VCAT does not have power to make decisions about complaints against the Commonwealth because VCAT is not a

court of a state. It was also submitted that this issue was resolved by Burns v Corbett, (ie,the purported conferral of jurisdiction on a state tribunal that is not a court of a state to decide, in the exercise of State judicial power, matters identified in s 75 or 76 of the Constitution was inconsistent under s 109 of the Constitution with s 39 of the Judiciary Act, and inoperative to that extent.)

Meringnage argued that this point had not been determined by Burns v Corbett, because of the approach in Gatsby (2018) 99 NSWLR 1 and applying that approach, there was no 'matter' in this proceeding.

The Court rejected the underlying assumption of Meringnage's argument that the forum chosen under a State statute for the resolution of a dispute, is decisive in determining whether or not the matter involves the exercise of federal jurisdiction. The Court also rejected the submission that unless a right, duty or liability is enforceable in a court, it does not involve the exercise of judicial power.

The Court held that the complaint raised in this matter required the exercise of judicial power against the Commonwealth. Therefore, it required VCAT to exercise judicial power in a 'matter' that engaged s 75. VCAT could only do this if it was a court of a state. Because the Court determined that VCAT was not a State court, it did not have jurisdiction to deal with the application.

Answer to question 3: No

REFLECTIONS ON THE IMPACT OF COVID 19 ON SACAT

SACAT's strategy during the COVID 19 pandemic, has been to proceed on a "business as usual" basis as far as possible, subject to taking appropriate measures to comply with government requirements and to ensure the safety and well-being of its staff, members and tribunal users.

In practical terms, SACAT has modified its procedures by–

- Conducting the vast majority of its hearings by phone – except where there are special reasons for hearings to be conducted in person;
- Where hearings are conducted in person, ensuring the hearing room has adequate space to meet social distancing requirements;
- Allowing additional hearing time for those matters conducted by phone;
- Requiring parties to lodge documents electronically;
- Removing computer terminals from the waiting area but providing the public with assistance to lodge an application by phone;
- Where appropriate - allowing Tribunal members to conduct hearings from home and allowing staff members to work from home.

The COVID- 19 Emergency Response Act

This legislation commenced operating in SA on 9 April 2020 and has had a significant impact on applications in the Housing area of SACAT but little impact on its operations in other areas.

In particular, Tribunal members have an overriding obligation to consider the need to avoid homelessness during the pandemic and must apply specific provisions which prevent eviction for rent/water debts if the Tribunal member is satisfied that the tenant is in financial hardship due to COVID 19. The COVID Act also provides SACAT with extremely broad powers during the pandemic.

Although application volumes in most areas of Housing have not increased during the pandemic, Tribunal members are adopting a different approach in many applications seeking eviction. Prior to the pandemic, almost invariably a final order (usually either for eviction or with a payment plan or other conditions) would be made after the first hearing. Now, it is common for a matter to be adjourned to allow an opportunity for parties' circumstances to become clearer and for parties to investigate all options available to them. A number of hearings may be conducted before a final order is made.

SACAT has provided assistance to its Housing users by placing a fact sheet on its website and also a series of Frequently Asked Questions about applications involving COVID 19. This information has been provide to all SACAT stakeholders and has been communicated generally to users through an e-news.

SACAT is also allowing additional hearing time for those matters in which COVID 19 has been identified as an issue because of the increased complexity of the hearings during COVID. Tribunal members will explain the requirements of the COVID Act during their hearing if it is relevant.

Conclusion

Due to the introduction of an electronic case management system at the commencement of SACAT, SACAT has been well placed to continue its operations during the pandemic. At the time of writing, SACAT's strategy has enabled it to dispose of applications in essentially the same time frames as those that applied prior to the pandemic and so the pandemic has not resulted in a backlog of work for SACAT.

Tribunal Responses to COVID-19 Pandemic

Anne Lindsay with Peter Britten- Jones

In the wake of the COVID-19 pandemic, Tribunals and Courts are needing to be adaptable. There have been some similarities and some differences in how Tribunals have approached the challenges of the COVID-19 epidemic around Australia and New Zealand.

In March COAT National provided two teleconference meetings for the heads of Tribunals to learn from each other about the strategies that were being put into place. SACAT, SAET and the SA Courts Administration Authority also engaged in teleconferences to share experiences.

The strategies adopted by SACAT have been outlined above. In addition, SACAT issued practice directions to enable hearings to be by telephone and video and not public hearings as usually required. A further practice

direction was issued directing that documents should be submitted electronically.

SAET issued similar directions and also moved to telephone and video hearings and conciliation conferences in March. The conciliation team and registry have worked with two teams rotating working in the office or working from home. Some hearings needed to be adjourned during the transition to telephone hearings but the majority of matters have been by telephone since March. In June there was some restoration of face to face attendance at the discretion of the Member.

The flexibility inherently designed for Tribunals creates a different environment from the complex needs of the Courts in South Australia and there was some need to adjourn more matters in the Courts to accommodate some of those challenges. Jury trials were suspended for a period of time and adaptations were needed to address matters where there were legal requirements for in person attendance.

SACAT and SAET have online case management systems and the Courts Administration Authority introduced its electronic case management system in the Civil Jurisdiction in May. It has been apparent during the COVID-19 epidemic that the use of paper files makes it difficult to manage hearings and conferences away from a Tribunal or Court. Around Australia, the Tribunals that are paper based have needed to adjourn more matters.

The AAT was also able to move to the use of telephone and video hearings and conferences following the acceleration of the pandemic in Australia. The AAT chose to use MS Teams as the forum for video hearings. It also introduced a suite of 'special measures' Practice Directions across various jurisdictions and was able to manage online registry functions to assist the public. The AAT has continued to require persons to attend by video or phone but is introducing some in person attendance in registries except Melbourne as restrictions ease.

As Victoria has had significant lock down requirements for most of the period since March, VCAT has been heavily affected by the pandemic. VCAT is currently closed to any in person attendance and is conducting matters that can be conducted by telephone and video.

Both VCAT and SACAT have observed an improvement in attendance in housing matters as a result of using telephone hearings and that hearings are also taking longer by telephone. QCAT are doing almost all matters by telephone. The SAT is conducting the majority of matters by telephone or video with some in person attendance when directed by a member. NCAT has been conducting all stages of its hearings by phone, audio visual link or on the papers since 30 March 2020 and these arrangements are intended to continue until December 2020. NTCAT cancelled or deferred the majority of matters during the early phases of the pandemic but reintroduced in person attendance in June as well as relisting matters that had been adjourned.

In New Zealand there have also been similar responses to the hearing of matters during the COVID-19 emergency. In the Tenancy Tribunal there are a series of responses depending on directions from the Department

of Health. If COVID restrictions are at Level 3 or Level 4 anywhere in New Zealand, in person hearings are to be adjourned. Where possible, teleconferences are convened to progress hearings. If this is not possible, matters are rescheduled to a date in future. In the Human Rights Review Tribunal at the present services continue in full operation within the limits imposed by the Level 2 and Level 3 health and safety requirements. In the Accident Compensation Appeals Tribunal hearings were cancelled during Level 2 and Level 3 but have been restored to in person hearings during level 1 restrictions.

In summary, those Tribunals that already had electronic case management and some experience using telephone and video hearings and conferences adapted more easily when the COVID-19 emergency affected the ability of the public to physically attend the Tribunal premises. There will be much to learn from the changes that have taken place and we will continue to share information about those changes.

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

SACAT Expansion

Chris Byron-Scott

Stage 4 jurisdiction was conferred in accordance with the Statutes Amendment (SACAT) Act 2019 which was assented to on 11 July 2019.

It included a series of new administrative review and disciplinary jurisdictions, most notably the work previously 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.

The lists of Acts which conferred a stage 4 jurisdictions upon SACAT is set out below:

1. Air Transport (Route Licensing - Passenger Services) Act 2002
2. Architectural Practice Act 2009
3. Births, Deaths and Marriages Registration Act 1996
4. Boxing and Martial Arts Act 2000
5. Building Work Contractors Act 1995
6. Controlled Substances (Pesticides) Regulations 2017
7. Controlled Substances Act 1984
8. Dangerous Substances (Dangerous Goods Transport) Regulations 2008
9. Dangerous Substances Act 1979
10. Electoral Act 1985
11. Equal Opportunity Act 1984
12. Employment Agents Registration Act 1993
13. Gene Technology Act 2001
14. Hairdressers Act 1988
15. Health and Community Services Complaints Act 2004
16. Health Care Act 2008

17. Health Practitioner Regulation National Law (South Australia) Act 2010
18. Motor Vehicle Accidents (Lifetime Support Scheme) Act 2013
19. Motor Vehicles Act 1959
20. Passenger Transport Act 1994
21. Plumbers, Gas Fitters and Electricians Act 1995
22. Research Involving Human Embryos Act 2003
23. Second-Hand Vehicle Dealers Act 1995
24. South Australian Public Health Act 2011
25. State Lotteries Act 1966
26. Tattooing Industry Control Act 2015
27. Training and Skills Development Act 2008
28. Veterinary Practice Act 2003.

Administrative Appeal Tribunal Decisions of Interest

Peter Britten-Jones

Decisions Summaries (June -July 2020)

Jacobs and Minister for Immigration and Border Protection (Migration) [2020] AATA 1524 (27 May 2020)

Tribunal: Deputy President S Boyle

The AAT set aside a decision of a delegate of the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (the Department) not to revoke the mandatory cancellation of the applicant's temporary visa.

The AAT substituted its decision that the cancellation be revoked, finding the applicant was unlikely to engage in further criminal conduct.

The applicant's visa was cancelled on character grounds because of his substantial criminal record. This was a mandatory cancellation by the Department after the applicant was sentenced to 20 months in prison for possession of a prohibited drug with intent to sell and supply. That was the applicant's only prison sentence.

When a person has requested revocation of the cancellation of the visa and that request has been refused, they can seek a merits review in the AAT of the decision not to exercise the discretion to revoke the cancellation.

The AAT is required to consider the matters set out in Ministerial Direction no. 79 (the Ministerial Direction) which include protection of the Australian community from criminal or other serious conduct, the best interests of minor children in Australia and the expectations of the Australian community (primary considerations). The Tribunal must also consider other factors, such as our international non-refoulement obligation and the strength, nature and length of a person's ties to Australia (other considerations).

The applicant arrived in Australia in 2011 as a 20-year-old. He had, except for a brief period before his serious offending in 2018, not engaged in any serious criminal behaviour and had been employed and, based on the statements of support provided by those with whom he worked, was a reliable and valued worker. Although he committed a serious crime, the sentencing judge and the parole board both expressed the view he had good prospects for rehabilitation and was unlikely to reoffend.

When assessing the threat the applicant posed to the Australian community, the AAT found the likelihood he would reoffend as low, which was not an unacceptable risk. This weighed in favour of revoking the cancelling

of the visa. Taking into account all of the factors that must be considered under the Ministerial Direction, while none was particularly strong, the considerations in favour of the exercise of the discretion to revoke the cancellation outweighed those against.

Mailau and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs(Migration) [2020] AATA 1506 (7 May 2020)

Tribunal: Deputy President G Humphries AO and Member W Frost

The AAT affirmed a decision of the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (the Department) not to revoke the mandatory cancellation of the applicant's resident return visa. He was found to not be of good character.
The applicant's visa was cancelled on character grounds because of his substantial criminal record.[1] This was a mandatory cancellation by the Department after the applicant was sentenced to two years and six months in prison for attempting to obtain $50,000 from a member of the community by intimidation and the threating use of a weapon.[2]
When a person does not pass the character test, they can seek a merits review in the AAT where we have the discretion to revoke the cancellation if there is another reason for doing so.[3]
The AAT is required to consider the protection of the Australian community from criminal or other serious conduct, the best interests of minor children in Australia and the expectations of the Australian community.
The Tribunal must also consider other factors, such as our international non-refoulement obligation and the strength, nature and length of a person's ties to Australia.
The applicant arrived in Australia in 1981 as a six-year-old. He had a long history of criminal offending here, which showed a trend of increasing seriousness and he posed a risk to the community. Although the applicant's ties to his four Australian children were a strong countervailing consideration, the Tribunal found the risk of further violent offending was too great to tip the balance in his favour.

Read the full decision
[1] Migration Act 1958 (Cth), s 501(3A).
[2] Migration Act, s 501(7). A substantial criminal record is defined as a term of imprisonment of 12 months or more.
[3] Ministerial Direction no. 79—visa refusal and cancellation under s 501 and revocation of a mandatory cancellation of a visa under 501CA, made under the Migration Act, s 499.

Mailau and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs(Migration) [2020] AATA 1506 (7 May 2020)

Tribunal: Deputy President G Humphries AO and Member W Frost

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COAT SA COMMITTEE

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