

COUNCIL OF AUSTRALASIAN TRIBUNALS • SOUTH AUSTRALIA

COAT SA News

News from
the Tribunals
of South
Australia

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

UPDATE FROM CONVENOR



Barbie Johns

Dear COAT members,

I suspect I speak for all of us in saying that I commenced 2021 with feelings of optimism and hope, and the thought that no matter what 2021 would hold, it had to be better than 2020 and the challenges and hardship caused by the COVID 19 pandemic would surely be largely addressed. Unfortunately, at this point it is clear that there is some way to go until we have achieved a more comfortable position in living with and managing the pandemic.

However, it is interesting to reflect on the response of tribunals and courts and to consider the possibilities that might lie ahead. It is trite to say that tribunals are intended to function in a manner which is quick, efficient, flexible and accessible (amongst other things). While at times those goals may feel onerous, they have probably led to tribunals being leaders in the use of technology. The pandemic has proven just how essential this is.

While the judicial system would generally be seen as agonisingly slow in making changes, that ponderous tendency has been a luxury denied by the requirements of the pandemic. The pandemic has necessitated the vast majority of tribunal and court hearings being conducted without parties or their representatives attending in person, and by

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some form of digital attendance instead. Commentators have noted that¹ (*see reference on last page*) the consequences that flow from this are good and bad: recent developments have opened up more possibilities such as on-line dispute resolution; on the other hand, the dilemma of maintaining open justice is problematic; there is also the issue of the “digital divide” – how to ensure access for those who may be disadvantaged and not have access through digital means. And a note of caution: while most of us would be aware of studies that show that decision-makers tend to be harsher when making a decision if they are tired and hungry; now there are studies showing that similarly, when decision-makers are conducting a hearing by electronic means, they are inclined to be tougher.

I also take this opportunity to remind you about mental health awareness – working in isolation during a lockdown can be challenging and sometimes removes our usual



support mechanisms. I noticed a recent article in The Advertiser, by Dr Tom Nehmy in which he referred to his work with people coping with lengthy lockdowns, and the positive outcomes for them if they were able to focus on things for which they could be grateful rather than on frustrations and limitations. I think this is a useful reminder to try to avoid becoming focused on the barriers to day to day life when in lockdown or just coping with the implications of the pandemic on a daily basis. For me, I felt that just getting through my hearings and getting my orders out was a pretty major achievement during lockdown and I was grateful for the help of staff in assisting me to do that. I should think many readers would feel the same way.



Exclusive Communication with one party only: when is it ok?

Judge Brian Gilchrist followed by panel presentation

- **Wednesday 25 August 2021**
- **At 5.15pm, SAET (or via Teams)**
- **Level 7, Riverside Centre
North Terrace ADELAIDE**
- **Light refreshments available from 5.00pm**

CONTACT US

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From the AAT

The following decisions of interest are extracted with permission from 'The Review'. 'The Review' is a monthly eNewsletter 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 AAT continued to receive thousands of applications for review in 2019-20 and, while remaining above average on the five-year trend line, total lodgements to the AAT fell by 10 per cent in that period. This is mostly attributable to a decrease in applications across all AAT divisions due to the effects of the COVID-19 pandemic.

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

Tutton and Tutton (Child support) [2021] AATA 464

TRIBUNAL: Senior Member R Ellis

The Administrative Appeals Tribunal (AAT) affirmed a decision under review by the Child Support Registrar (the Agency) to disallow the credit of payments made by one of the parents toward school books and fees.

Mr and Ms Tutton are the parents of two children and at the time of separation they entered into an agreement about the ongoing care of the children, including one which was school aged. The initial agreement provided for Mr Tutton to contribute \$900 towards child support and mortgage repayments. Both parents were to pay an equal share of educational expenses (including school fees,

uniforms, equipment and excursions/camps) and Mr Tutton was to have care of the children for between 7 and 10 nights per month.

Mr Tutton applied to the Agency to have amounts he had paid for education costs to be credited as non-agency payments under the Child Support (Registration and Collection) Act 1988 (the Act). This was based on his understanding that he only shared in the costs of educating the children while he continued to have some care of the children and, since he no longer had care of the children, he no longer needed to share the cost of educational expenses.

Ms Tutton told the Tribunal it was not her understanding there was a link between care arrangements and payment of any education costs for the children. She claimed that Mr Tutton should pay his equal share of the education costs in addition to child support, despite the change to care.

After considering the circumstances, the Tribunal was satisfied that the payments made for school fees by Mr Tutton in 2020 should be refused as non-agency payments for the following reasons:

- Some of the payments made by Mr Tutton were paid before the child support liability was registered for collection by the Agency and the legislation did not allow those to be credited.
- The payments made while the child support was registered for collection by the Agency could not be credited under s71A of the Act as there was no mutual intention that those payments were in lieu of child support.

Those payments may have been able to be credited under s71C of the Act as prescribed non-agency payments, however because of the written agreement between the parties



about their separate liability for school fees, it was appropriate to refuse to credit the payments under section 71D of the Act.

1802556 (Refugee) [2020] AATA 4550

Tribunal: Member Silva

The Administrative Appeals Tribunal (AAT) set aside a decision by a delegate of the Minister for Immigration (the Department) and substituted a decision not to cancel the applicant's Subclass 866 (Protection) visa.

The applicant had arrived in Australia by boat in 2009 without documentation as an Irregular Maritime Arrival. He sought and was granted a protection visa in 2010 on the basis of claims that he was stateless and faced systemic persecution in Iran.

The applicant's protection visa was cancelled in 2018 because he was shown to have provided incorrect information in his application form and the seriousness of his non-compliance was deemed to outweigh circumstances in favour of non-cancellation. In response to the Department's Notice of Intention to Consider Cancellation, the applicant had admitted that he had misrepresented himself as being stateless rather than as being an Iranian citizen. After the Department cancelled his protection visa, he applied to the AAT for review of the decision.

The AAT heard from the applicant that, prior to arriving in Australia, he had chosen to rely on advice that he conceal his nationality in order to enhance his prospects of securing a protection visa. He conceded that the grounds for cancellation were made so the issue for the Tribunal was whether the visa should be cancelled.

The applicant had been joined by his wife and daughter in 2013. He provided evidence that they were a well-integrated family and that he contributed to his community in Australia. The family, who now reside together, later

welcomed a son who was born in Australia. The elder daughter was enrolled at university in Australia.

The AAT accepted the Department's concerns about the seriousness of the applicant's misrepresentations, and about his credibility and conduct. However, the Tribunal found that a primary consideration is the best interests of the son for the visa not to be cancelled and placed significant weight on this consideration. In exercising its discretion, the Tribunal also considered other factors that weighed in favour of not cancelling the visa, including that the applicant was employed, had a stable family life, and that there would have been significant negative consequences for his wife and daughter if the visa was cancelled.

Farrall and National Disability Insurance Agency [2020] AATA 5077

Tribunal: Deputy President S A Forgie

In May 2020, the National Disability Insurance Agency (the NDIA) informed the applicant that her plan had been approved. However, the applicant chose to have the plan reviewed as it did not include funding for the construction of an overhead shelter for an existing access ramp. Following a review of the initial plan, the NDIA found that they could not include construction of the shelter in the plan as this support did not relate to the participant's disability nor did it relate to her day-to-day living costs. Therefore, the NDIA informed the applicant that they would not review the plan to include the requested home modifications.

The applicant then applied for a review by the Administrative Appeals Tribunal (the Tribunal) where the Member considered two aspects: i) did the Tribunal have jurisdiction to review the decision not to undertake a review of a plan, and ii) whether or not the statement of participant supports was appropriate.

The Tribunal considered whether new information received between the time of the



making of the participant's plan and the request for review should have been included in the review and whether any relevant criteria had been overlooked.

The Tribunal found that it had jurisdiction to review the decision made by the NDIA.

PM loses bid to keep Covid Documents Secret

Article from The Advertiser 6 August 2021

Author: FRANCES VINALL



The Prime Minister's office has lost an attempt to keep the decision-making of national cabinet secret, as a powerful tribunal ruled it is not

protected by the same laws that protect cabinet decisions from public view.

South Australian independent senator Rex Patrick took the Department of Prime Minister and Cabinet to the Administrative Appeals Tribunal over its refusal to release information about national cabinet

– the body of state premiers and the Prime Minister, pictured, formed to handle the Covid-19 crisis.

On Thursday, the AAT ruled national cabinet is not protected by cabinet-in-confidence rules and ordered that public access be given to meeting minutes as well as other documents.

The Department of Prime Minister and Cabinet had refused a Freedom of Information request for access to national cabinet documents, but the AAT overruled

that decision and ordered they be handed over.

Senator Patrick said the Prime Minister had failed to block scrutiny of national cabinet decision-making on Australia's Covid-19 response.

"This is a decisive win for transparency and accountability," he said. "This is another political, legal and administrative shambles produced by a prime minister making things up as he went along."

"The decision of Justice (Richard) White is absolutely scathing of the government."

A government spokesman said that it would review the decision, but "will not let it impact the important work national cabinet is doing".

"The Prime Minister ... discloses the discussions and decisions of national cabinet after every meeting," he said.

Justice White gave the department the opportunity to argue for a temporary stay of the order while it considers whether it will appeal to the Federal Court.

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



From SAET

SEARCH FUTURE HEARINGS



Business Services Support Team (left to right) Sadi Abdullah, Abdullah Farooki, Damon Toivonen (Manager) and Peter Kinne

On 10 June, the South Australian Employment Tribunal (SAET) went live with functionality on its website that enables people to search for details of conferences and hearings that are scheduled in the future.

The webpage went live following months of collaborative work with SAET's case management system vendor and web developer, DTF ICT Services and whole-of-government ICT. The involvement of everyone has maximised the user experience and ensured SAET's data would remain secure.

Prior to this functionality, each afternoon, SAET would publish the details of the conferences and hearings scheduled for the next day only.

The Hon Justice Steven Dolphin, President of



SAET, said *"This level of accessibility is pretty leading edge in a court and tribunal setting. Essentially we are just making information, which is public information, easily accessible. We have already had some great feedback from tribunal users and our staff are looking forward to a reduction in the enquires about upcoming listings."*

The new [Future hearings](#) page now enables you to search for hearings and conferences scheduled in the future. You can define your search by case number, date range, party name, representative organisation and more. The search results reflect up-to-the-second information from the SAET's case management system.



COAT National Online conference a success!

*Contribution from The Hon Justice Judy Hughes,
President SACAT*



With some trepidation, the COAT conference-organising committee arranged the COAT annual conference in an online format in June 2021, in recognition of the impossibility of hosting a face-to-face conference in light of the COVID pandemic.

An online conference is a different experience from a face-to-face one; it cannot provide the invaluable opportunities for fascinating discussions about our experiences in common working in tribunals, and it does not offer the luxury of a period of time that a participant can focus solely on their professional development without the distractions of home and work. However, the advantages of an online conference include that it is accessible from a convenience and cost perspective, and attracts the participation of a wider range of interesting speakers and presenters.

Sessions included curly topics such as dealing with objections from represented and self-represented parties, doing justice in a digital environment, and apprehended bias. There was a mix of lecture-style presentations and workshops, and participants were encouraged to engage with sessions through the chat mechanisms we have become more familiar with over the last 12 months.

Looking at the results of the survey of those who participated, the 2021 online conference

was a great success, harnessing the advantages to ensure that double the usual number of participants were able to attend, and enabling us to hear from such luminaries as Lady Hale, former president of the Supreme Court of the United Kingdom, and Hon Michael Kirby AC CMG, former puisne justice of the High Court of Australia. Participants who were surveyed rated the conference highly by reference to the quality of speakers, the professionalism of the production, and ease of participation. Well over half of participants rated the quality of speakers as “very good” (the highest rating) and approximately 99% of participants rated the quality of speakers as very good or good (the two highest options), with the remaining 1% describing them as “satisfactory”.



COAT Executive, of which I am a member, will now start considering next year’s conference with a view to ensuring that however it is offered, it provides the opportunity for those who work in tribunals to have access to excellent professional development in topics that are tailored to our particular work.



Around the traps – some issues of interest from various interstate tribunals

Contribution from Anais Stephens and Billy Fay, Member Support, SACAT

NTCAT

Nursing & Midwifery Board of Australia v Finau [2021] NTCAT 1 (5 January 2021)

- Question of whether NTCAT has jurisdiction where a respondent has not been served with the initiating application in Australia.

Chlanda v Northern Territory of Australia; Hendry v Northern Territory of Australia [2021] NTCAT 2 (8 January 2021)

- Question of whether NCAT has jurisdiction to deal with a complaint concerning a decision not to provide someone with a Home Improvement Scheme voucher (COVID-19 stimulus program). No statute conferring jurisdiction on NCAT, so NCAT doesn't have jurisdiction as it doesn't have any general merits review jurisdiction in respect of government decisions.

Interesting due to COVID facts.

- “It must also be remembered, however, that the decisions about which they complain were made by the respondent in the administration of a hastily conceived scheme involving a substantial commitment of government funds to address urgently an unfolding and unprecedented health and economic crisis. It would be unrealistic to expect that such a scheme would not involve some

outcomes that, in hindsight, seem arbitrary or unfair.”

QCAT

Hannah v Leer [2021] QCATA 18

- Considers provision of natural justice to an appellant and admitting fresh evidence in light of Tribunal's mandate to deal with matters quickly.

VCAT

Appanna v Medical Board of Australia (Review and Regulation) [2021] VCAT 277 (26 March 2021)

- Considers the ability of a suspended health practitioner to practice overseas – practitioner split their practice between Aus and NZ.

WASAT

PG [2021] WASAT 81

- Guardianship matter dealing with conflicting medical reports and conflicting lay evidence as to PP's capacity.

SACAT Decisions of Note

Watkins v Commissioner for Corporate Affairs [2021] SACAT 10 (4 January 2021)

Senior Member McEvoy

The recent SACAT decision of Watkins v Commissioner for Corporate Affairs discussed the 'faith' of the Church of the Flying Spaghetti Monster, known as 'Pastafarianism' and was covered by multiple news outlets around the world. ([Pastafarians cry foul after Church of the Flying Spaghetti Monster fails to](#)



[win formal recognition in Australia — RT World News](#); [Church of the Flying Spaghetti Monster loses bid for legal recognition as incorporated entity - ABC News](#)).

This matter involved an application to SACAT by Ms Tanya Watkins seeking review of a decision of the Corporate Affairs Commission to reject an application to incorporate the Church of the Flying Spaghetti Monster Australia. The decision under review was made on the basis that the Church of the Flying Spaghetti Monster Australia was not formed for a religious, educational, charitable or benevolent purpose under s 18(1)(a) of the Associations Incorporation Act 1985 (SA).

The applicant argued that Pastafarianism's status as a religion was a matter of the belief of its adherents and not a matter for the Commissioner to decide. Further, the applicant rejected the Commission's view that Pastafarianism is a parody of established religions and their texts. The applicant also submitted that the proposed incorporated association fulfilled the legislative criteria of both a charitable and educational association. The applicant outlined the existing charitable engagements of the proposed incorporated association and cited in particular clause 3 of the proposed incorporated association's constitution which outlines its objects and purposes as follows:

3.1 To promote Pastafariansim

3.2 To promote education in respect to Pastafarianism, including but not limited to educating the public as to the nature, beliefs and values of Pastafarianism

3.3 To formalise and organise the community of Pastafarians in Australia

3.4 To provide relief to diseased, disabled, sick, infirm, incurable, poor, destitute, helpless or unemployed persons, or the dependents of any such persons

3.5 To support and promote the ideals of freedom and equality generally; and

3.6 Any objects consistent with the above objects as the committee may determine from time to time

Ms Watkins referred to the definition provided by the High Court in the Scientology Case that a religion involves belief in a supernatural being, thing or principle; and acceptance and observance of canons of conduct in order to give effect to that belief. Ms Watkins further submitted that she herself personally believed in the truth of the teachings of Pastafarianism and that the humorous elements of Pastafarian teaching and texts do not exist to mock other religions, but to promote religious literacy amongst adherents.

The respondent submitted that Pastafarianism was a religious parody and its central text was a direct mockery of established religions, noting a 2016 decision of the District Court of Nebraska in which Pastafarianism was considered a religious parody. The respondent submitted that more than a belief system was required to demonstrate a religion, again with reference to the Scientology Case, and that the proposed incorporated association did not satisfy these criteria. It was argued that the educational or charitable activities of the proposed association were incidental and did not constitute purposes for which the association was formed.



The Tribunal found, with reference to the indicia defined in the Scientology Case, that the Pastafarian text can only be read as parody and satire and that Pastafarianism does not fulfil the objective considerations required to establish a religious purpose under the legislation. Moreover, the Tribunal found there to be no evidence of systematic teaching and learning processes, nor of any structured, consistent, and broad-based charitable activities undertaken by the association that fulfil the legislative criteria regarding an educational or charitable association.

Court of Appeal

Calabro v Beaudoin [2021] SASCA 63 (23 June 2021)

In the recent decision of *Calabro v Beaudoin* [2021] SASCA 63, the Supreme Court of Appeal ruled on the construction of section 5(1)(c) of the Residential Tenancies Act 1995 (SA) (the Act) which excludes from the operation of the Act ‘an agreement genuinely entered into for the purpose of conferring on a person a right to occupy premises for a holiday’.

Background

The appellant (Mr Calabro – the proprietor) and the respondent (Mr Beaudoin – the resident) had been parties to a rooming house agreement which was terminated. Mr Calabro made an application to SACAT on 19 March 2020 asserting that Mr Beaudoin had abandoned the premises and was in breach of his obligations under the agreement. In response, Mr Beaudoin contended that he

had been unlawfully evicted from his room, and further, that Mr Calabro had caused damage to one of his personal belongings during the eviction process. The Tribunal Member found that the agreement had not been lawfully terminated but awarded compensation in favour of Mr Beaudoin.

Subsequently, Mr Calabro applied for an internal review of the Tribunal’s decision. President Hughes refused to grant leave for Mr Calabro to proceed with the review on the basis that the fresh evidence he intended to adduce was “entirely inconsistent with his sworn evidence on the first occasion”. President Hughes held that it would be an abuse of Tribunal process for Mr Calabro to be permitted to re-run his case using evidence which was entirely contradictory to that which he had relied upon at the original hearing. The application for review was dismissed accordingly.

The Appeal

Mr Calabro lodged an appeal against the Tribunal’s decision within the Supreme Court. He submitted that the Tribunal lacked jurisdiction to hear the matter in the first instance by virtue of section 5(1)(c) of the Act (the holiday exclusion) and the High Court’s ruling in *Burns v Corbett* (2018) 265 CLR 304 that State tribunals cannot exercise judicial power with respect to the matters listed in sections 75 and 76 of the Australian Constitution.

The Court invited the Attorney-General to intervene in the proceeding to make submissions with respect to the holiday exclusion. In *Re Glynn; ex parte Royle & Ors* [2003] WASCA 122, the Full Court of the Supreme Court considered an equivalent



provision in the Residential Tenancies Act 1987 (WA). Consistent with the Full Court's descriptive account of the holiday exclusion in that case, section 5(1)(c) necessitates an inquiry of:

- the objective intention of the parties at the time they entered into the agreement;
- the dominant or principal purpose of the agreement, as any mixed purpose would mean that the exclusion did not apply; and
- the subjective intention of the parties.

The rooming house agreement was for a period of 6 months. Thus, the onus was on Mr Calabro to displace the presumption in section 5(1b) of the Act that 'an agreement conferring a right to occupy premises for a fixed term of 60 days or longer is to be taken, in the absence of proof to the contrary, not to be an agreement referred to in subsection (1)(c)'. Among other things, Mr Calabro relied on the existence of Mr Beaudoin's Work and Holiday visa to displace the presumption. The Court considered that, at best, the visa was equivocal in its relevance to the parties' purpose of entry into the agreement.

Mr Calabro submitted that the principles established in *Burns v Corbett* precluded SACAT from exercising jurisdiction over the matter. The Court acknowledged that Mr Beaudoin was in fact a citizen of the United States of America, but on no view was he a resident of another State within the meaning of section 75(iv) of the Constitution.

The Court dismissed the application for leave to appeal and held:

1. The matters identified by Mr Calabro did not overcome the assumption about the duration of a holiday raised by section 5(1b) of the Act.
2. Mr Beaudoin was not a resident of another State within the meaning of section 75(iv) of the Constitution and thus, the diversity jurisdiction was not enlivened.
3. The interests of justice did not support Mr Calabro being granted an opportunity to present a case on entirely different factual and evidentiary grounds to those upon which he relied at first instance.



¹ Joe McIntyre, Anna Olijnyk and Kieran Pender, 'Courts and COVID-19: Challenges and Opportunities in Australia' on AUSPUBLAW (4 may 2020)

