COUNCIL OF AUSTRALASIAN TRIBUNALS • SOUTH AUSTRALIA

COAT SA News

News from the Tribunals of South Australia

Issue 18

September 2022

IN THIS ISSUE:

COAT
COUNCIL OF AUSTRALASIAN TRIBUNALS
SOUTH AUSTRALIA

Convenor (SA): Barbie Johns • Secretary (SA): Elle Spyrou

UPDATE FROM CONVENOR

Barbie Johns

COVID and Beyond

Dear COAT SA Members

Recently, I very much enjoyed participating in the COAT NSW conference. I was an on-line participant, and while we are all a bit weary of on-line arrangements, nevertheless they are useful if you are otherwise unable to participate (which was my situation).

The theme of the conference was *Providing Justice for All*, and you will find some notes from the conference further in the newsletter.

There were a couple of sessions involving a discussion of the changes which have occurred in tribunals due to the impact of the COVID pandemic.

While tribunals are renowned for an approach of rolling up sleeves and doing what it takes to get the job done, I think now is a good time to pause and reflect on the likely long-term changes in our tribunal environment, as a result of the pandemic.

In the past, tribunals have offered hearing participation by diverse means, but the pandemic has meant a far greater reliance on the use of technology in hearings and has also resulted in a reasonably widespread practice of tribunal members conducting hearings remotely (from home). While this was a necessity at certain points during COVID, it appears that, generally speaking, tribunals have modified their hearing practices on a long-term basis.

The changes have clearly had some positive results – for example, giving greater accessibility to those who would not participate in hearings if they were required to attend in person and providing tribunal members with greater flexibility in their work. However, it is important to always bear in mind the objectives of a tribunal and also the impact of changes, for example:

- for members
    - managing technology can be stressful - what training and support has been provided to tribunal members?

    - is their equipment adequate?
    - have resources been realigned to provide adequate support to members using technology in hearings?
    - it is not so easy for a member on a single member panel to ‘debrief’ after a hearing and to keep abreast of recent decisions or changes in the law that may impact on their work – what is being done to assist members in that regard?
- for tribunal users:
    - have tribunals taken adequate steps to ensure that matters which are of general public interest continue to be conducted in a manner which is accessible to those who are interested?
    - what information is available on the website for tribunal users about the manner in which hearings are conducted?

- is there a support line for users if the technology does not work?

- for registry staff:
  - are there processes in place to identify which hearings might be suitable to be conducted by phone, which may require AVL and which hearings need to be conducted in person?
  - is there an awareness of the continued need for confidentiality?
  - have listing processes been modified according to the manner in which a hearing will be conducted (e.g., is extra time allowed for hearings in which multiple parties are attending by phone / AVL / a variety of means).

And so, while there are some obvious benefits in the increased use of a broader range of technology in tribunal hearings, it is important to continually monitor the impact of the changes on members, staff and users, to ensure that proper tribunal processes are not eroded.

COAT SA MEMBERSHIP

Please find the 2022-2023 COAT SA Membership Invoice **attached** to this Newsletter.

Please forward a copy of the completed invoice to Joanna Richardson, Treasurer, at joanna.richardson@sacat.sa.gov.au

COAT SA COMMITTEE

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Deputy President
SACAT

Brenton Illingworth
Senior Member
AAT

Kath McEvoy
Senior Member
SACAT

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Marten Kennedy
Senior Member
AAT

Anne Lindsay
Principal Registrar
SACAT

Elle Spyrou, Secretary
Legal Officer
SACAT

SAVE THE DATE

Cultural Safety Training

Wednesday 30 November 2022 at 2.00pm

Jennifer Newman, Member, NSW Civil and Administrative Tribunal and Panel

Location to be announced

to be followed by:

Annual General Meeting

Wednesday 30 November 2022 at 4.30pm

Location to be announced

FROM THE AAT

Contribution from the AAT Bulletin

In the period 1 July 2021 to 31 May 2022 the Administrative Appeals Tribunal (AAT) received 40,596 lodgements and finalised 38,067 matters across its nine divisions. The two 'high volume' divisions, the Migration and Refugee Division and the Social Services and Child Support Division, received 19,363 and 11,068 applications respectively. More detailed statistics including overall set-aside rates, median finalisation rates and on-hand figures can be accessed on the AAT website at: Statistics | Administrative Appeals Tribunal (aat.gov.au)

The AAT no longer publishes *The Review*, instead providing weekly headnotes and links to full text decision of interest in the *AAT Bulletin*. Anyone can subscribe to the *AAT Bulletin* at: Newsletter | Administrative Appeals Tribunal (aat.gov.au)

The AAT still prepares decision summaries for significant cases. Three cases are extracted below, demonstrating the diversity of the AAT's jurisdictions.

Emanuel Exports P/L; EMS Rural Exports P/L and Secretary, Dept of Agriculture Water & Environment (General) [2021] AATA 4393

Administrative Appeals Tribunal (Deputy President P Britten-Jones and Senior Member M Evans-Bonner), 26 November 2021

Emanuel Exports Pty Ltd (Emanuel Exports or the applicant) is a livestock exporter based in Western Australia. In August 2017,

during a voyage of the MV Awassi Express from Fremantle to Qatar, Kuwait and the United Arab Emirates, 2,400 of the 63,804 sheep being exported died from heat and exhaustion on board the sea vessel.

Following a formal complaint from the animal rights organisation Animals Australia, the First Assistant Secretary of the Department of Agriculture, Water and the Environment (the Secretary' or the respondent) issued a show cause notice to the applicant on 1 May 2018.

The Secretary subsequently suspended the applicant's livestock export licence on 22 June 2018 and cancelled the licence on 21 August 2018. The Secretary also suspended and later

cancelled the licence of EMS Rural Exports Pty Ltd, a wholly owned subsidiary of the applicant with close ties to Emanuel Exports. The primary reason for the cancellation of the licences was that the applicant had ceased to be a body corporate of integrity.

One of the main grounds for the above licence suspension, backed by expert evidence, was the misleading provision of Pen Air Turnover values (PAT scores) by Emanuel's then managing director, putting the livestock at increased risk of mortality from overcrowding, and hot and humid conditions aboard the vessel. The Secretary also relied on historical evidence where, in 2014, the then managing director had also incorrectly doubled the PAT scores.

Emanuel applied to the AAT for a review of the licence cancellations in September 2018.

The Tribunal considered whether the applicants had made sufficient changes to their systems to demonstrate that they were bodies corporate of integrity. The applicants submitted that they were bodies corporate of integrity because their managing director had resigned, and the company had set up new governance procedures to ensure compliance with the necessary regulations and to ensure animal welfare. The respondent submitted the Tribunal should affirm its original decision due to the seriousness of the historical events, the ongoing involvement of the previous managing director in the company's affairs and the failure of the companies to rehabilitate themselves.

The Tribunal found the evidence in favour of the applicant and determined that there was sufficient rehabilitation. The Tribunal set aside the reviewable decisions made by the Secretary and substituted new decisions. Emanuel Exports Pty Ltd and EMS Rural Exports Pty Ltd licence suspension ended effective 3 December 2021.

Soliman and National Disability Insurance Agency (NDIS) [2020] AATA 4478

Administrative Appeals Tribunal (Member L Bygrave), 9 November 2020

The AAT affirmed an internal review decision by the National Disability Insurance Agency (the Agency) that the applicant did not meet access criteria for the National Disability Insurance Scheme (the Scheme).

The applicant had originally applied to the Agency to access support for disabilities arising from lumbar and cervical spine, shoulder and arm conditions, and for persistent depression. The applicant also had a history of heart disease and was receiving treatment for cancer but both parties accepted these medical conditions were being appropriately treated through the health system. This meant they did not warrant consideration in this matter.

In deciding whether the applicant met the access criteria for the Scheme, the Tribunal needed to consider whether they met age and residence requirements, and disability or early intervention requirements.

The applicant met age and residence requirements, so the AAT needed to consider whether they had a disability, as defined, and, if so, met related requirements, such as whether the impairments were permanent and how they impacted the applicant's capacity to function.

After considering evidence from the applicant and medical and other specialists, the AAT was satisfied that the applicant's lumbar spine, cervical spine and shoulder impairments were not permanent. The AAT considered the applicant's impairment of persistent depressive disorder was permanent but that it did not result in substantially reduced functional activities requiring lifetime support under the Scheme.

The AAT did not find evidence that the applicant met early intervention requirements that would have otherwise enabled access to the Scheme.

MWWD and Commissioner of Taxation (Taxation) [2020] AATA 4169

Administrative Appeals Tribunal (Deputy President B McCabe), 16 October 2020

The Tribunal set aside the decision and decided, in substitution, that the party contracting with the applicant was not an employee in the period under review.

The applicant, in this case, is a company that provides repair and maintenance services to businesses operating a type of machinery. The applicant's head office was in Sydney, but it had service technicians operating from depots in different states. Some of the service technicians were employed by the applicant under conventional contracts of employment. Other technicians were described as independent contractors.

Andrew Smith (a pseudonym) was one of the applicant's service technicians who was described as an independent contractor. He operated out of the applicant's Melbourne depot in the period 30 September 2013 through to 30 September 2017.

The applicant did not make any superannuation contributions with respect to Mr Smith during the period in question. It says it was not obliged to do so because Mr Smith was not an employee during that period. Mr Smith asserted he was entitled to superannuation – although he acknowledged the applicant was not obliged to make superannuation contributions if he was, in fact, a genuine independent contractor.

The Commissioner of Taxation agreed with Mr Smith's take on the relationship. The Commissioner concluded Mr Smith was an 'employee' of the applicant within the meaning of section 12 of the *Superannuation Guarantee (Administration) Act 1992* (the Administration Act) notwithstanding the way the parties described themselves. The Commissioner assessed the applicant as being liable to pay a superannuation guarantee charge in respect of the superannuation contributions the applicant should have paid during the period.

To make a decision in this case, the Tribunal had to be satisfied that both parties intended to negotiate an independent contracting relationship and that they had succeeded in doing so.

The Tribunal heard evidence from both parties which showed that they both understood the differences between hiring someone as an independent contractor and hiring someone as an employee.

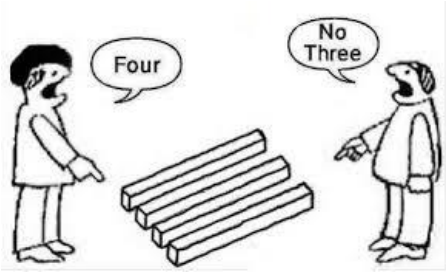
The contract between the parties was a key piece of evidence. The Tribunal took into account clauses regarding exclusivity, risk, and Mr Smith's right to take on other work, delegate and schedule his workday. It also considered how Mr Smith was paid for his services.

Mr Smith was, for the most part, being paid to complete discrete tasks. He also had the opportunity to earn additional amounts for completing other defined tasks.

These arrangements point to an independent contractor relationship because they sound less like a contract of service than a contract for the provision of defined service. On this basis, the Tribunal was satisfied that the parties each intended to negotiate an independent contracting relationship, and that they had succeeded in doing so. The decision was set aside.

SAET PUBLISHES NEW GUIDELINES FOR MEDIATION

Contribution from the SAET Newsletter



Following on from the new *South Australian Employment Tribunal Rules 2022*, coming into operation on 3 February 2022, the South Australian Employment Tribunal (SAET) issued new Practice Directions with effect from 13 July 2022.

Practice Direction 29 introduced the *SAET Guidelines for Mediation* (Guidelines), where mediation is ordered pursuant to section 46 of the *South Australian Employment Tribunal Act 2014* (SAET Act).

Speaking recently to Michael Esposito, for the Law Society Bulletin August 2022 Edition, His Honour Justice Steven Dolphin, President of SAET, emphasised that the use of alternative dispute resolution (ADR) had been a feature of industrial disputes and workers compensation for decades and that SAET continued to embrace a pragmatic approach to the resolution of litigation before the Tribunal.

His Honour advised that conciliation conferences, which are compulsory pursuant to section 43 of the SAET Act 2014, take place before a Commissioner, who is not a judicial officer but a nationally accredited mediator, at the commencement of litigation with a strict statutory timeframe. These conferences are usually listed for 90 minutes. In the year 2021-2022, 66 percent of applications were resolved by Commissioners at conciliation level.

Where a matter does not resolve, his Honour said, a Commissioner will then refer the matter to a Presidential member for hearing and determination and will provide a written Assessment and Recommendations document to the parties. The Presidential members of the Tribunal take an active role in litigation and may conduct a settlement conference to further assist the parties to resolve their differences. Settlement conferences might include the Presidential member conducting private sessions – where the member will often give robust assessments of the strengths and weaknesses of parties' cases. His Honour emphasised that settlement conferences have a high rate of resolution and usually last for one to three hours. Of the 34 percent of applications that resolved before a Presidential member in 2021 to 2022, SAET produced 225 written judgments, meaning approximately 3.5 percent of the applications lodged in SAET run to judgment.

Pursuant to section 46 of the SAET Act, His Honour set out that traditional mediation was available for more complex, difficult cases such as workplace deaths and large and entrenched industrial disputes. Presidential members conduct the mediation, usually listed for a half to a full day and the new Mediation Guidelines apply to this process.

The purpose of the Guidelines, His Honour said, was to ensure that parties are aware of the process, the expectations on them, and so parties can prepare to participate effectively in mediation. The Guidelines emphasise that the purpose of mediation is to achieve a quick and cost-effective settlement, or at least refine or narrow the issues in dispute to avoid the stress and expense of proceeding to trial. The Guidelines note, that unlike conciliation conferences and settlement conferences, the Presidential member conducting the mediation is not tasked with expressing views as to the likely outcome if a matter proceeds to trial.

His Honour confirmed, that where a matter does not resolve through mediation, the mediator will not hear and determine the proceedings, unless all parties agree to his or her continued participation.

The new 2022 SAET Rules, Practice Directions and Guidelines can be found on the SAET website at: Legislation, rules, practice directions and guides (saet.sa.gov.au)

SACAT DECISIONS OF NOTE

Contribution from SACAT Member Support Officers & SACAT Intern, Jack, Briana and Anita

The South Australian Civil and Administrative Tribunal (SACAT) provides a summary of some recent decisions of interest below.

AQQ v Department for Child Protection [2022] SACAT 43

South Australian Civil and Administrative Tribunal (President J Hughes), 6 June 2022

AQQ (the applicant) sought a review of a decision of the Department for Child Protection (the respondent) that the applicant's five-year old daughter should be vaccinated against COVID.

The Chief Executive, Department for Child Protection (Chief Executive) is currently the guardian of the child and has the functions, rights, and obligations of that role as provided for by the *Children and Young People Safety Act 2017* (CYPS Act). In the purported exercise of those functions, rights and obligations, the Chief Executive's delegate determined that the child should be vaccinated against COVID.

The Department conducted an internal review which upheld the original decision to vaccinate the child. The applicant was dissatisfied with the internal review outcome and commenced review proceedings in SACAT.

Child's best interests

The applicant, in effect, asked the Tribunal to make a finding that the Department's decision to vaccinate the child, in accordance with its own policy which in turn was based on the South Australian and Australian Government's advice, was wrong ([39]).

The respondent submitted that it was Department policy to ensure that all children and young people under guardianship of the Chief Executive are immunised against COVID unless there is specific advice to the contrary in relation to a specific child from a health professional ([38]). This policy is based on SA Health COVID vaccination advice, which has adopted the advice of the Australian Technical Advisory Group on Immunisation recommending that all children aged five to 11 years receive vaccination against COVID ([38]).

Held, dismissing the application for review, and affirming the original decision:

- The application was out of time and the applicant did not establish special circumstances sufficient to warrant an extension of time.
- The original decision was the correct or preferable decision.
- The Chief Executive is the guardian to the exclusion of all others and was under no obligation to justify its decision or provide the applicant with an opportunity to contribute to the decision-making process.

The determination to vaccinate the child against COVID is in the child's best interests.

Marchenko v South Australia Police [2022] SACAT 54

South Australian Civil and Administrative Tribunal (Senior Member K McEvoy), 10 June 2022

A complaint by Mikhail Marchenko (the applicant) was referred to SACAT by SAET, having initially referred to SAET in March 2018 by the Commissioner for Equal Opportunity.

The applicant asserted that he had been subjected to unlawful discrimination by the South Australia Police (SAPOL) on the grounds of race and disability pursuant to section 93 of the *Equal Opportunity Act 1984* (EO Act). In June 2016, the applicant contacted SAPOL because he felt threatened by his neighbour, who he alleged rushed at him and threatened him with violence and abuse. Two SAPOL officers attended in response and spoke to the applicant about his concerns and to the neighbour. The neighbour alleged that the applicant had thrown a rock at their motor vehicle, causing damage. As a result of the investigations, SAPOL charged the applicant with property damage.

The applicant asserted that SAPOL officers made discriminatory comments to him regarding his country of origin and his disability and, more broadly, that SAPOL failed to protect him from ongoing racist abuse and threats from his neighbour.

A claim would be established if, ([22]):

- discriminatory acts occurred;
- the discrimination was on the basis of one of the grounds prescribed in the EO Act, specifically race or disability; and
- the discrimination on that basis occurred in the course of offering the provision of services.

Held, dismissing the application for want of jurisdiction:

- SAPOL provided a 'service' under section 5(1) of the EO Act to the applicant by responding to his complaint; however, the applicant did not allege that any unlawful discriminatory conduct occurred during this period.
- Those 'services' only extend to actions undertaken during the initial investigation process. SAPOL does not provide services when individuals are arrested, charged or in custody,[1] nor during investigatory procedures and questioning of witnesses.[2] The Tribunal cannot exercise any jurisdiction in respect of the applicant's complaint as the complaint does not disclose any unlawful discrimination in association with the provision of any 'services' under the EO Act.
- These activities constituted general services to the public in order to protect the broader community, which is part of the exercise of a statutory duty to the South Australian people rather than a service within the meaning of the EO Act, ([52]). Thus, SAPOL's investigatory procedures and decision to charge the applicant with property damage could not constitute a service to which the EO Act applies, meaning that the complaint was unable to attract the Tribunal's jurisdiction.

[1] *Patrick v State of South Australia* (No 2) [2009] SAEOT 1.

[2] *Commissioner of Police v Mohammed* (2009) 262 ALR 519.

Shires v Valuer-General for South Australia [2022] SACAT 52

South Australian Civil and Administrative Tribunal (Senior Member J Rugless), 13 May 2022

This matter related to an interlocutory application filed by the Valuer-General (the respondent) to strike out an application for review made under the *Valuation of Land Act 1971*, pursuant to section 49 of the *South Australian Civil and Administrative Tribunal Act 2013* (SACAT Act) on the basis that the proceedings were conducted in a way that caused unnecessary disadvantage to the respondent.

The substantive proceedings related to an application for review filed by Ms Holly Shires (the applicant) of a decision (or decisions) of the Valuer-General. The applicant sought to increase the valuation of the capital value of subject property in question to $285,000. Ms Shires maintained a decision of the Valuer-General dated 31 August 2020 assessed the capital value of her property at $55,350.

The respondent identified two decisions made by the Valuer-General: (1) that the capital value of the entire property is $205,000 and, (2) that the value of each unit on the property is as follows: $55,350, $55,350, $55,350 and $38,950 with a combined total of $205,000.

Conduct of review proceedings

Failure to identify decision under review

The Tribunal attempted to ascertain which decision the applicant sought to be reviewed, the value of the entire subject property, the individual occupancies, or both. The applicant failed to clarify this.

Failure to permit inspection of property

The respondent attempted to progress the matter by arranging an inspection pursuant to section 26 of the *Valuation of Land Act 1971*, Ms Shires refused access. The Tribunal found the applicant had been obstructive in this process which disadvantaged the respondent and the conduct of proceedings in SACAT ([39]).

Failure to attend directions hearings

The applicant was found to have caused disadvantage to the respondent and unnecessarily obstructed the conduct of the review proceedings by electing not to attend directions hearings in person or by telephone ([49]). The applicant said she was banned from appearing in SACAT and refused to attend any SACAT hearing. The applicant is no longer registered as a land agent and therefore she cannot appear before the Tribunal to represent landlords in the Housing and Civil List of the Tribunal.[3] However, she had been informed that she was not banned from appearing at SACAT to prosecute administrative reviews as a private citizen ([43]). Even so, she did not attend two directions hearings via telephone (despite being warned of potential consequences for non-attendance).

Held, granting the application to strike out the proceedings pursuant to section 49(2) of the SACAT Act on the grounds that the proceedings were conducted in a way that unnecessarily disadvantaged the respondent:

- The applicant deliberately failed to clarify issues and caused delay to Tribunal proceedings.
- The applicant deliberately incurred unnecessary expense and inconvenience to the respondent.

[3] See *Shires v Commissioner for Consumer Affairs* [2021] SACAT 79.

- There was continued dilatoriness by the applicant in prosecuting the matter sufficient to find that there is a want of prosecution, but, more so, the proceedings were conducted in such a way that they are causing significant disadvantage to the respondent.
- In the circumstances it was appropriate to strike out the application for review under section 49 of the SACAT Act.

2022 COAT NSW CONFERENCE REPORT

Contribution from Barbie Johns

The notes below are from presentations given at the recent COAT NSW conference.

Protecting the rights of older people[4]

Older people become invisible and voiceless. As we age, we become disconnected from the things that are important to us. We lose power and others around us assume that power. We need to bring voice and presence back to older people.

The highest risk group for older people is the 75 to 85 age bracket, when people become frail, start losing their cognitive abilities and lose their independence.

In order for older people to be able to participate in tribunal hearings equally, tribunal members will need to take positive steps to ensure that occurs. It is important for tribunal members to realise that there is a power imbalance when an older person attends a tribunal hearing – the older person will not be familiar with the forum; they are likely to be uncomfortable, nervous, intimidated, frightened even.

Issues for Tribunals to consider in making a tribunal hearing accessible for an older person

- Does your website have photographs of hearing rooms and the waiting area? Is there a video about what to expect?
- Do you obtain feedback from your tribunal users about their experience in a hearing?
- What steps has your tribunal taken to assist hearing impaired or visually impaired persons attending the tribunal?
- The best approach when dealing with older persons is to ensure they have an advocate – what does your tribunal do in this regard?
- What training has been provided to tribunal members to assist them in dealing with older persons or disabled persons.

Ethical issues for tribunal members[5]

Statutory immunity for Tribunal members

Singh v Charles [2022] NSWSC 743

This matter involved a claim by a tenant that Senior Member Charles of New South Wales Civil and Administrative Tribunal (NCAT) had committed fraud and misfeasance in public

[4] This session was presented by Robert Fitzgerald AM, NSW Ageing and Disability Commissioner.

[5] This session was presented by Garth Blake AM SC.

office by knowingly acting outside his jurisdiction and doing so in bad faith – by exercising power without legal authority. The matter dealt with by Senior Member Charles was a dispute under the *Residential Tenancies Act 2010* (NSW) involving a claim by the tenant that the landlords had breached the agreement by substantially increasing the rent without notice and invalidly purported to issue a termination notice.

The tenant claimed that because Senior Member Charles acted in bad faith – having knowingly acted outside his jurisdiction, he was not entitled to the statutory immunity under the *Civil and Administrative Tribunal Act 2013* (NSW) (NCAT Act). Schedule 2, Clause 4 of the NCAT Act provides that:[6]

> A member has, in the exercise of functions performed as a member, the same protection and immunities as a Judge of the Supreme Court.

The applicant's claim appeared to be based on a submission that Senior Member Charles exercised power without legal authority. After analysing the submissions of the applicant, Garling J concluded that the claim concerned the manner in which Senior Member Charles exercised his powers as a tribunal member, but Garling J stated that as the subject matter of the original application fell within the jurisdiction of NCAT, NCAT had the power to make the orders made by Senior Member Charles in dealing with the matter, and Senior Member Charles' conduct was in the exercise of his functions and jurisdiction as a member of NCAT, then the claim must fail.

Dealing with allegations of bias

The decision of *Collier v Country Women's Association of NSW*[7] dealt with an application for recusal on the grounds of bias. Justice Gleeson restated the well accepted[8] general principles in relation to bias and in particular:[9]

> The test for recusal is whether a fair-minded lay person, with knowledge of the matters relied upon by Mrs Collier, might reasonably consider that the judicial officer might not carry out his judicial functions with an impartial and unprejudiced mind.

The allegations of bias partly referred to procedural processes. Justice Gleeson also referred to the obligation of a judicial officer to proceed with a hearing and determine a matter:[10]

> Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour

The recent decision of *Dunstan v Orr*[11] also referred to claims about bias on the basis of various case management decisions in the conduct of the proceeding. Justice Wigney found no grounds of bias to be made out and referred to the decision in *Doggett v Commonwealth Bank of Australia*[12] concerning case management 'type' issues:[13]

> Claims of apprehended bias arise not infrequently, as they have in this appeal, in respect of interlocutory proceedings. The usual position in relation to interlocutory proceedings is that an apprehension of bias is not per se manifested by an unfavourable finding. That is because often there will be instances prior to a final decision where a judge will require steps to be taken or not taken which disappoint one

[6] Section 79 of the SACAT Act is essentially the same.
[7] [2018] NSWCA 36 ('*Collier*').
[8] *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337.
[9] *Collier* (n 8) [23]-[25].
[10] Ibid [45]; *Re JRL; Ex parte CJL*(1986) 161 CLR 342, 352 (Mason J).
[11] [2022] FCA 1006.
[12] [2019] FCAFC 19
[13] Ibid [71].

> side or another in a proceeding. It is inherent in the interlocutory process that such preliminary decisions are made. Unfavourable findings, in such circumstances, are not to be taken by a fair-minded person as an expression that the judge has other than an impartial and unprejudiced mind in relation to the substantive proceeding. …

Justice Wigney said that in relation to claims of actual bias in terms of pre-judgement, the question is whether the decision-maker has reached a conclusion in respect of a case which is incapable of alteration, whatever evidence or arguments may subsequently be presented.[14]

Procedural fairness in dealing with unrepresented litigants

In the recent decision of the Supreme Court of New South Wales in *Zhang v Zhang*,[15] Meek J referred to three fundamental principles[16]of procedural fairness when dealing with unrepresented litigants:

1. A court is obliged to give sufficient information as to the practice and procedure of the court to ensure that there is a fair trial for both parties.

2. The court's duty is not solely to the unrepresented litigant, but it is to ensure a fair trial for all parties.

3. The duty to assist an unrepresented litigant does not extend to advising the litigant as to how his or her rights should be exercised.

Justice Meek also stated that:[17]

1. How much information is provided to a litigant will depend upon the circumstances of each case.

2. It is not the function of the court to conduct the case on the litigant's behalf.

3. It is a matter for a litigant (here Jing) to choose for herself the extent to which she availed herself of or participated in the court's procedures as explained.

4. The parties to the proceedings have a responsibility to use the court time in a manner to ensure that a fair hearing of the matter occurs within the allotted time, and to focus on the real issues in dispute.

The decision of the Queensland Civil and Administrative Tribunal (QCAT) in the matter of *Van Zyl v Rentstar*[18] dealt with an appeal by a tenant on grounds that at first instance, the Tribunal had demonstrated bias and a denial of procedural fairness.

The tenant had made two applications to the Tribunal, an application seeking to be released from the tenancy and an application for compensation. If QCAT ruled in the tenant's favour and terminated the tenancy, then the tenant would not be liable to compensate the landlord for break lease costs.

The landlord lodged a notice disputing the application. The tribunal member assumed the landlord had lodged their own application and made some observations about the evidence required in an application for compensation in a break lease matter, noting a landlord's obligation to mitigate their loss. The tribunal member then discovered that the landlord had not actually lodged their own application.

The tenant claimed that the member's comments unfairly assisted the landlord and demonstrated bias.

On appeal, leave was granted but the application was dismissed. The Tribunal considered the obligation under section 29(1)

[14] Ibid [79].
[15] [2022] NSWSC 924, [178] ('*Zhang*').
[16] Ibid [178].
[17] *Zhang* (n 13)[180].
[18] [2021] QCATA 120 ('*Van Zyl*').

of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld,)[19] for the Tribunal to take all reasonable steps to ensure that the parties understand the practices and procedures of the Tribunal, the nature of assertions made in the proceeding and the legal implications of the assertions.

The Tribunal had to decide whether the member's comments in the original hearing demonstrated bias, partiality or were a denial of procedural fairness. The Tribunal concluded that the tenant had not established any of those grounds.

Vicarious Trauma[20]

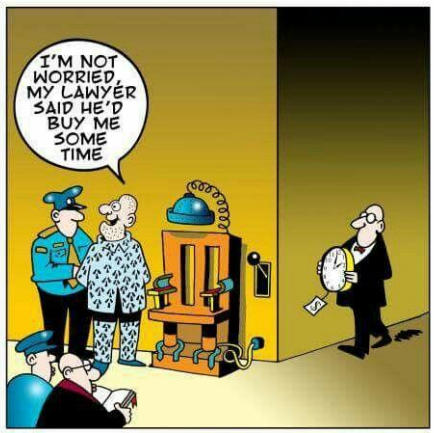
The decision of Justice Dixon in *Kozarov v Victoria*[21] dealt with an application by a solicitor seeking compensation from her employer (the State of Victoria) for workplace psychiatric injury arising from her role in prosecuting sexual offences, and in particular her involvement with a high volume of child sexual assault cases.

Her Honour found that the primary question in the appeal was whether Victoria's failure to provide the plaintiff with a safe system of work caused the exacerbation and prolongation of her PTSD and subsequent development of major depression disorder. She found that it did and awarded compensation of $435,000.

Her Honour referred to the decision in *The Age v YZ*[22] in which The Age newspaper was held to have breached its duty of care to a journalist employee because:

- The nature of psychiatric injury was foreseeable in light of the nature of the employee's work.
- The employer was on notice about the risk of PTSD for journalists and the signs of impaired mental health shown by the journalist.
- The employer failed to have in place a suite of measures to protect the journalist from foreseeable psychiatric injury – their approach of informal peer support along with optional training courses about trauma exposure was insufficient.
- The employer should have:
    - trained managers and staff on the relationship between trauma and psychiatric injury;
    - ensured that peers were properly trained to provide support;
    - provided immediate access to the Employee Assistance Program when needed;
    - addressed a culture which repressed speaking up about psychological symptoms;
    - considered rotating the journalist to other work;
    - considered not putting the journalist on court duties when she expressed reluctance to do that work.

Thank You for Reading!



[19] Similar to s 43 of the SACAT Act.
[20] This session was presented by Rachel Clements, Centre for Corporate Health and Resilia.
[21] [2020] VSC 78.
[22] [2019] VSCA 313.