FREQUENTLY ASKED QUESTIONS ABOUT THE IMPACT OF THE DECISIONS OF BURNS v CORBETT AND RASCHKE v FIRINAUSKAS

What is the decision in Burns v Corbett about?

In April this year the High Court made a decision in the matter of *Burns v Corbett.*[1] The decision involved an appeal from the New South Wales Supreme Court to the High Court and the issue was whether or not NCAT (which is a similar tribunal to SACAT) could deal with a dispute involving one party who was resident in NSW and another party who was resident outside the state.

In summary, on the basis that NCAT was not a court, the High Court decided that certain provisions of the Commonwealth Constitution effectively mean that a dispute between persons resident in different states (or where one person is resident within a particular state and another person is resident outside the state), is a dispute which must be dealt with by a court as it involves the exercise of federal jurisdiction.

What does the decision in Raschke v Firinauskas mean for SACAT?

In the recent decision of *Raschke v Firinauskas* [2018] SACAT 19 the President of SACAT made it clear that:

- SACAT is not a court;
- When dealing with tenancy disputes SACAT is exercising judicial power;
- Therefore SACAT cannot deal with a dispute involving one party who is resident in SA and another party who is resident in another state as it does not have the power to do so.

It should be noted that it is clear from the decision that the parties to a tenancy dispute are the landlord and the tenant.

What situations can or can't be dealt with by SACAT?

Applying these decisions is not as straightforward as it might appear – the decision involves fine technicalities such as what is a "matter" within the definition of the relevant provisions in the Constitution, and what does "resident" mean. I also note that while in *Burns v Corbett*, it was accepted by all parties that NCAT was not a court, in the meantime there has been another decision within NCAT that NCAT is a court. That decision has been appealed but the outcome is not known as yet.

The following are some general guidelines:

1. SACAT can deal with applications in which one party is a corporation (*Australasian Temperance and General Mutual Life Assurance Society Ltd v Howe* (1922) 31 CLR 290)).
2. SACAT can deal with applications in which one party is resident overseas.
3. SACAT can deal with applications in which a landlord is resident in a territory.
4. Where one party is a resident of SA and the other is a resident of another state, even if the parties come to an agreed outcome, SACAT cannot make an enforceable order which embodies that agreed outcome.
5. The relevant time at which the issue of residency is critical is when the dispute arose – and so for example, if the dispute arose before one of the parties moved interstate then it is likely that SACAT can still deal with the dispute.

[1] *Burns v Corbett; Burns v Gaynor; Attorney General for New South Wales v Burns; Attorney General for New South Wales v Burns; New South Wales v Burns* (2018) 92 ALJR 423.

How do I know whether a party is a 'resident'?

This will be decided on a case by case basis and a party will need to be prepared either to make submissions to the Tribunal member about this issue, or they should have made arrangements for the relevant person to give evidence over the phone (eg: if the applicant is an agent on behalf of a landlord who lives interstate).

Questions that might be asked include:

- How long has the person lived interstate?
- Did the person move interstate for work and if so:
    - When was that?
    - Was that intended to be a long term or short term arrangement?
    - Does the person have an "end date" for the arrangement?
- Does the person intend to return to South Australia in the near future;
- Does the person rent a house interstate or has the landlord bought a house to live in interstate?
- Where is the person's car registered?
- What is the address shown on the driver's licence?
- Is the person on the electoral role interstate?

What happens if SACAT cannot deal with a tenancy dispute because one of the parties is resident interstate?

Unfortunately the position is not entirely clear due to section 24 *Residential Tenancies Act 1995* which provides that the Tribunal has exclusive jurisdiction to deal with tenancy disputes. The question is whether or not that section means that a court can deal with a tenancy dispute that the Tribunal cannot deal with.

What is being done to resolve this issue?

Last week the government introduced the *Statutes Amendment (SACAT Federal Diversity Jurisdiction) Bill 2018* into the House of Assembly. The second reading speech is available from the Parliamentary website (https://hansardpublic.parliament.sa.gov.au).

The Bill proposes to amend the *Magistrates Court Act 1991* and the *South Australian Civil and Administrative Tribunal Act 2013* to make it clear that:

a) the Magistrates Court can deal with tenancy disputes when SACAT cannot or may not be able to deal them because one of the parties is resident interstate;
b) the Magistrates Court can deal with these matters in the same informal manner with which they would have been dealt with in SACAT;
c) the applicant will not need to pay another application fee.

What happens where an application involving an interstate party has already been made to SACAT or dealt with by SACAT?

- *For an application that has been dealt with in a Tribunal hearing –*
    - and that application has been adjourned –
        - If the matter has not been resolved by an agreed outcome then there may need to be a further hearing (which can be by phone) for the application to be dismissed and the application fee to be refunded (and the applicant will need to make an application in the Magistrates Court);

        - If the matter has been resolved by an agreed outcome then the applicant may withdraw their application and seek reimbursement of the application fee (but this will only occur if the Tribunal has made a determination that one of the parties is resident interstate);

    - if the application was dismissed then the applicant should seek to have it dealt with in the Magistrates Court –
        - for non-urgent applications the parties may wish to wait for the amending legislation to be passed by Parliament;
        - for urgent applications the applicant should seek to proceed with the Magistrates Court process but it is unclear whether or not the Magistrates Court will accept these applications.

- *For an application that has not yet been dealt with in a Tribunal hearing* –

    - You should wait to receive the notice of hearing and you should also receive a brief covering letter which briefly explains the decision of the *Burns v Corbett* and that the Tribunal member will first need to make a determination as to whether or not the dispute can be dealt with in SACAT because the application suggests that one of the parties may be resident interstate;
    - If you are an agent, then you should inform the landlord about the potential issue and seek instructions so that you are able to inform the Tribunal member on the question of residency or you should ask the landlord to make themselves available (by phone) to give evidence to the Tribunal on that issue;
    - If you think SACAT may not be able to deal with your application because of this issue, then you should explore options of resolving the dispute by agreement and if that requires the release of the bond (and you and the tenant are present in the Tribunal), then the parties can sign the bond release form at the hearing.

What is SACAT doing?

SACAT:

- Has established a procedure for staff to identify matters in which the issue might arise as early as possible, and will notify the parties of the issue so that they can be prepared in the hearing;
- As far as possible will list these matters with experienced Tribunal members who will explain the issue and the options to parties and allow the parties an opportunity to discuss the form of order that is most appropriate in their situation;
- Is liaising closely with Tribunal users to keep them informed about developments concerning this issue and to take into account their views and concerns where that is possible and practical;
- Is liaising closely with other stakeholders (such as the Commissioner of Consumer and Business Services) to ensure there is an appropriate mechanism in place to deal with disputes involving an interstate party as soon as possible;
- Is working with the Magistrates Court to try to ensure as smooth a transition as possible (subject to the amending legislation being passed by Parliament);
- Will either reimburse an application fee in a matter which cannot be dealt with because one of the parties is interstate, or (longer term) will transfer the fee to the Magistrates Court so that the application can be dealt with there.

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