The implications of Burns v Corbett in tribunal proceedings against interstate residents

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If you are considering filing an application in the South Australian Civil and Administrative Tribunal (SACAT) against an inter-state resident, or if you are a not a resident of the State in which you wish to bring a proceeding, you should seek advice regarding the implications of the recent High Court decision in *Burns v Corbett*.[1]

An issue arises as to whether the tribunal is exercising judicial power over a matter in making a decision on your proceeding.

WHAT IS THE ISSUE?

In April, the High Court decided that the New South Wales Civil and Administrative Tribunal (NCAT) did not have jurisdiction to decide a proceeding between a resident of New South Wales, a resident of Queensland and a resident of Victoria.

The High Court decision related to two complaints of anti-discriminatory statements made against Mr Burns, a resident of NSW, by Ms Corbett, a resident of Victoria and by Mr Gaynor, a resident of Queensland. The High Court considered that as NCAT was not a Chapter III court, and not a State court invested with Federal jurisdiction, it did not have jurisdiction.

Whether or not a tribunal has jurisdiction will turn on findings of fact as to where the parties are resident.

The principle is limited to natural persons. However, it must be applied outside the anti-discrimination context. It is common for proceedings in the SACAT to include natural persons as parties. Advisors and clients should be aware that it cannot be assumed that the SACAT will have jurisdiction over a matter where there are non-South Australian residents as parties.

Accordingly, the new Attorney-General, the Hon V A Chapman, has introduced a bill to amend the jurisdiction of SACAT by *Statutes Amendment (SACAT Federal Diversity Jurisdiction) Bill 2018* (SA). This provides for matters where SACAT does not have jurisdiction to be referred to the Magistrates Court.

HOW HAS THE HIGH COURT'S DECISION BEEN APPLIED?

In South Australia, *Raschke v Firinauskas*[2] involved an application for vacant possession by the landlord who was an interstate resident. The Tribunal considered that it did not have jurisdiction to decide a dispute between landlords and tenants where one party is an interstate resident.

In construing the exercise of jurisdiction as judicial rather than administrative, SACAT considered "the nature of the task of the Tribunal is to supervise the compliance of the parties with the terms of their agreement and make orders that largely mimic the remedies that flow from the enforcement of the agreement as if it were the subject of a contractual dispute in a court".[3]

SACAT[4] has made a statement regarding the limits of what they can and cannot decide. They are able to decide:

- applications in which one party is resident overseas;
- applications in which a landlord is resident in a territory.

Of significance:

- only natural persons may be residents - that is, corporations cannot be residents;
- a person's state of residence is determined at the date a proceeding commences, not at the date of the conduct that led to the dispute or claim.

It should be expected that when SACAT is exercising original jurisdiction, this issue may be raised if a non-SA resident is a party. This is because an exercise of original jurisdiction may be considered to be a "matter" and an exercise of judicial power.

If one of the parties to such a proceeding is a resident of a State other than SA, then the adjudication of the matter may involve an exercise of Federal judicial power. SACAT can exercise State judicial power but not Federal judicial power.

WHAT ARE THE NEXT STEPS?

At the time of publication, SACAT has issued a statement on the potential ramifications of the High Court decision. It would be prudent to seek legal advice on this issue if you have any doubts about the implications for you or your clients. **B**

Endnotes

1 [2018] HCA 15
2 [2018] SACAT 19
3 At [27]
4 SACAT, 'Frequently asked questions about the impact of the decisions in *Burns v Corbett* and *Raschke v Firinauskas*' 15 June 2018