

Convenor's Corner

Judge Kevin O'Connor AM
 President Administrative Decisions Tribunal

COAT is a voluntary organisation.

The immediate background to its creation in 2002 lies in work done by the Commonwealth Administrative Review Council which had the active support of the then Commonwealth Attorney General. COAT National has a number of State chapters and a New Zealand chapter.

Membership of the National body is restricted to Tribunals per se. On the other hand membership of State Chapters is broad-based and open to individuals supportive of the objects of COAT. The NSW Chapter, at last count, had about 150 members. Most of them are members, full-time or part-time, of tribunals, State or Commonwealth, based in NSW.

COAT's record of achievement to date is a good one. COAT National has been co-organiser and co-sponsor with the AIJA - now for a number of years - of the Annual Tribunals Conference. The umbrella body was responsible for the production of the COAT Practice Manual for Tribunals, first in paper form, now in electronic form and easily searchable. For that activity, the Standing Committee of Attorneys General provided support, by way of a grant of \$70,000. This is the only instance of COAT receiving direct financial support from government for its activities. It does receive indirect support out of tribunal budgets, as those budgets subsidise or meet the whole of the registration fees for COAT-run conferences.

At NSW level, the Chapter has organised an annual conference, again for many years. It has been a great success, with all places taken and an excellent array of speakers and sessions. For the last three years, the Chapter has presented the Whitmore Lecture given by a distinguished speaker as part of the Annual General Meeting.

Next year the Chapter will be sponsoring training sessions on Dealing with Unreasonable Behaviour in Tribunals. The training package has been finalised, and presenters engaged. You will receive more information about this next year.

During 2008, COAT National engaged Gary Byron, who will be well known to many of you, to review the structure and operation of COAT, with a view to making recommendations for the future development of COAT. COAT is seen as having reached about the maximum level of effort and effectiveness that can be expected of a voluntary organisation of this kind. Many of the key participants are heads or senior members of busy tribunals. COAT is a function, at the moment, of what can be achieved in the left-over time of many of these people, or can be parlayed off their work resources. The Byron report makes a number of recommendations as to future development. COAT National has appointed a steering committee to develop a further report for the next National Conference as to the core functions, structure, future funding and budget of COAT. COAT National has also adopted a number of the Byron report recommendations going to changes to the constitutional structure

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of COAT. They will become the subject of motions for amendment for the Annual Meeting of COAT which is held in conjunction with the National Conference.

The major event of the last few months for the NSW Chapter was the Whitmore Lecture, given by the Commonwealth Ombudsman, John McMillan. There was a good attendance for the event, and for the annual general meeting and the reception which followed.

Members of State tribunals may be affected by reform proposals being developed by the Attorney General in relation to discipline of tribunal members and other statutory office holders who have adjudicative functions. A paper was circulated in December 2008 inviting submissions. In November 2009 a further paper was circulated. It outlines the submissions received. The covering letter indicates that consideration is now being given to establishing the following minimum requirements be adopted all relevant agencies:

- Codes of conduct/performance standards
- Provisions in statutes/terms of engagement setting out the consequences of failure to meet standards of conduct/competence
- Mechanisms for making complaints about tribunal members and statutory appointees with an adjudicative role
- Publicly available information about how to make a complaint and complaints policies
- The collection of data regarding complaints, with such information being published in the agency's annual report

Comments have been invited on these matters.



The other activity of general interest to State tribunal members is the initiative being taken by the Attorney General in connection with ADR. A discussion paper (a 'blueprint for ADR') was issued in May 2009. There are now draft recommendations and reports, so far covering: pre-action protocols and standards (August 2009), ADR in government (September 2009). The principal theme of the ADR in government recommendations is to strengthen recognition and use of ADR as part of model litigant behaviour by government agencies. Many of you will be aware that there have been Court of Appeal decisions in the last year or so where government parties have been reprimanded for not behaving as model litigants.

I have not followed the Commonwealth developments so closely, but it is well known that the Commonwealth Attorney General has made several statements on the subject, most recently (November 2009) those in connection with the launch of the NADRAC report, The Resolve to Resolve: Embracing ADR to Improve Access to Justice in the Federal Jurisdiction, which makes 39 recommendations aimed at improving the ADR system. The Commonwealth AG raised the possibility of legislation imposing pre- and post-filing requirements requiring disputants, legal representatives, courts and tribunals to take genuine steps to resolve disputes, using ADR whenever appropriate.

Finally, I should take this public opportunity to compliment the State Chapter Committee for all its good work.

As I write, we are getting ready for next year's Annual Conference to be held on Friday 7 May 2010, again at the Menzies Wynyard.

We are pleased to tell you that the Hon Justice John Basten of the Court of Appeal has agreed to deliver the Keynote Address on the topic 'Jurisdiction and Powers of Tribunals: A Question of Statutory Construction'. We will try again next year to have a mixture of group, solo, light and heavy sessions! The Keynote Address looks like solo/heavy!

If anyone has suggestions as to possible elements of the program, perhaps contact our redoubtable secretary, Belinda Cassidy, in the first instance, and she will pass them on.

Two of our long-term committee members stepped down from the committee this year. I speak of Narelle Bell and Sue-Ellen Bullock. May I express, publicly, COAT NSW's appreciation for their service over several years. Narelle continues to be involved in organising the annual workshops delivered by Professor James Raymond, on the writing of decisions.

I wish all our members the compliments of the season.

Judge Kevin O'Connor, Convenor

Tribunal in focus: Motor Accidents Claims Assessment and Resolution Service

Belinda Cassidy Principal Claims Assessor

The Motor Accidents Authority of New South Wales was created in 1988 as part of the then Greiner Governments reforms of the third-party insurance scheme. Since then the MAA has had as its core function the licensing and regulation of the insurers currently selling third-party or Greenslip insurance (currently AAMI Limited, Allianz Insurance Limited, CIC.Allianz Insurance Limited, NRMA Insurance Limited, QBE Insurance (Australia) Limited, Zurich Insurance Limited). The MAA has also had involvement in road safety and injury prevention and has funded many projects in respect of rehabilitation and injury management.

In 1999 further reforms to the third-party scheme came into effect with the passage of the Motor Accidents Compensation Act and the Claims Assessment and Resolution Service (CARS) was created. CARS is a unit within the MAA and operates as a tribunal assessing compensation for persons injured in motor accidents if they cannot resolve their claim with the insurer.

CARS is made up of the Principal Claims Assessor and a small number of staff within the MAA. In addition there are 33 Claims Assessors (31 external part time and 2 internal full time) all of whom have been designated as such because of their expertise in handling motor accident claims and assessing common law damages. The Claims Assessors are paid on an events (and not per diem) basis.

All claims must proceed through CARS before court proceedings can be commenced although not all claims are assessed at CARS. Many complex claims are exempted from assessment and legal proceedings can be commenced immediately.

There are always two parties to a matter before CARS, the insurer and the claimant/injured person. Either party can lodge an application and bring a claim to CARS for assessment or exemption. The 'rules' of CARS are set out in Claims Assessment Guidelines and provide for the lodgement of a reply.

A claims assessor is allocated a claim to assess; the Claims Assessor holds a preliminary conference with representatives of both parties via telephone. The Claims Assessor case manages the claim until it is ready for assessment. Some matters are assessed on the papers but most are assessed after an assessment conference. CARS assessment hearings are designed to be quick and informal taking 2 – 3 hours on average to complete. The Claimant will usually be heard and medical and other evidence can be taken but it is rare. The Claims Assessor must issue a decision within 15 working days of the assessment conference and over 80% of decisions are issued on time.

One of the most contentious parts of the assessment system is the status of assessments. If liability for the claim is in issue (who was at fault in causing the accident, contributory negligence and so on) either the insurer or the claimant can reject the assessment and the



claim then proceeds to court. If there is no issue about liability (and in about 90% of claims the insurer admits liability) only the claimant can reject the assessment. If the claimant accepts the assessment the insurer is bound to pay it and the CARS assessment is effectively binding on the insurer. Any court hearings are a hearing de novo and not an 'appeal' or review of the merits of the assessment. The Act also provides that the Court must send claims back to CARS for further assessment if there is significant new evidence introduced.

I have had the honour of being the Principal Claims Assessor almost continuously since CARS began on 5 October 1999. I believe the scheme of assessment works well and I have been lucky to work with many Claims Assessors all of whom are the most experienced and well respected person injury legal practitioners in this state.

Cases of interest Google in an Inquisitorial jurisdiction - *Weinstein v Medical Practitioners Board of Victoria* [2008] VSCA 193 (case note Joanne Muller)

The Medical Board of Victoria convened a panel to conduct a formal hearing of six complaints regarding Dr Weinstein. The head notes record:

In the course of the panel's hearing, it emerged that the panel had carried out a 'Google search' of a particular person whose expert opinion is relevant to one aspect of the allegations against Dr Weinstein. Following an unsuccessful attempt to have the panel disqualify itself on the ground of apprehended bias, application was made on behalf of Dr Weinstein for an order in the nature of prohibition, or an injunction, to prevent the panel from continuing with the formal hearing, and a declaration that the panel was disqualified from continuing with the formal hearing.

The application went before a single judge of the Supreme Court of Victoria (and was dismissed) and leave granted for an (unsuccessful) appeal to the Court of Appeal. The application arose from a question asked during the hearing by one of the panel members that indicated that a 'Google' search had been undertaken during an adjournment to ascertain the qualifications of medical practitioner (Dr Fernandes) mentioned in evidence.

The Court of Appeal said at paragraph 8: *At this stage, counsel assisting [the panel] intervened and said it would be useful 'for the sake of fairness' for Dr Weinstein's representatives to know what had been the subject of the Google search. The member then said 'His name'. Again at the suggestion of counsel assisting, the single web page viewed by the panel was later provided to Dr Weinstein's representatives. The page was headed 'Dr Des Fernandes, Plastic and Reconstructive Surgeon'.*

The entry contained details regarding the qualifications of Dr Fernandes. After this disclosure was made senior counsel for Dr Weinstein said that he was 'very troubled' by what had occurred and that he considered the panel should not have been making inquiries behind the scenes without apprising Dr Weinstein and her counsel (see paragraph 9). When the panel returned from the lunch adjournment the Chair said that the panel had noted senior counsel's concerns and had prepared 'an explanation' which was as follows:

The panel's Google search which was the subject of your concern only represented a reference into the qualifications and credentials of Des Fernandes which were uncertain to the panel up to that point. The search was limited to the web page, the single web page of which you now have a copy. It was noted and stated that Dr Fernandes' original training was in cardiothoracic surgery but it was further noted and stated on the web page that the website confirmed his latest specialisation in plastic surgery which reassured the panel. The information was offered openly and not withheld from counsel and given this the panel does not consider that Dr Weinstein's hearing has been subject to procedural unfairness or her right to natural justice otherwise compromised. <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/vic/VSCA/2008/193.html?query=qualifications%20and%20expert%20and%20google-fn4>

Counsel for Dr Weinstein submitted that the panel should recuse itself because it had made a ruling without allowing him to make a submission about whether the panel should disqualify itself.

On appeal it was argued on behalf of Dr Weinstein that the panel had infringed the bias rule by both making the Google search and by making the pre-emptive explanation statement. It was alleged that the panel had acted in such a way that a fair-minded lay observer with knowledge of the material objective facts might entertain a reasonable apprehension that they might not bring an impartial and unprejudiced mind to the resolution of the question in issue.

The Court of Appeal note that the panel is not bound by the rules of evidence but was bound by the rules of natural justice. The Board argued as the statute provided that the panel may 'inform itself in any way it thinks fit' authorised it to make its own independent enquiries so long as the results of those enquiries were provided to the practitioner and her representatives.

Maxwell P (Neave and Weinberg JJA agreeing) said at paragraph 15:

The questions for resolution on the appeal are as follows:

- (a) was the panel's action in making its own inquiry into the credentials of Dr Fernandes outside the scope of the panel's powers and, if so, what is the consequence of that unauthorised step having been taken?
- (b) did the panel's conduct, in undertaking the Google search and subsequently, give rise to a reasonable apprehension of bias?

The Court noted for the purposes of 'determining the matter before it', the panel is authorised to 'inform itself in any way it thinks fit' subject always to the overriding obligation to accord procedural fairness.

Paragraph 30 includes the following comments:

By giving the panel power to inform itself 'in any way it thinks fit', Parliament has clearly differentiated the panel's conduct of a formal hearing from the judicial paradigm.

.....

the essence of inquisitorial adjudication lies in the active participation of an impartial investigator from the earliest stages of the proceedings. The investigator has primary responsibility for defining the issues and is able to supervise the gathering of evidence.

The Court of Appeal concluded at paragraph 36:

36 This complaint may be disposed of shortly. The notional 'fair-minded lay observer with knowledge of the objective facts' must be taken to understand both the character of the panel's function as investigator and the nature of the express power 'to inform itself' conferred by s 52(1)(c). Once those matters were understood, the putative observer would have no reason whatever to doubt the impartiality of the panel in acting as it did. The act of undertaking the Google search would be seen as an unexceptionable exercise of the panel's power. Indeed, the observer might well conclude that, since counsel for Dr Weinstein had raised the issue concerning Dr Fernandes, it was highly desirable that the panel should seek to resolve such uncertainty as remained after the cross-examination and, for that purpose, to exercise a power conferred on it for just such a purpose.

Cases of interest Reason Writing - Budd v Victims Compensation Corporation Fund [2009] NSWDC 35 (case note Matt Ladley)

Ms Budd was allegedly the victim of a physical assault by her former neighbour which exacerbated a psychological disorder, which she now claims is "severely disabling".

The matter was considered by a compensation assessor from the Victims Compensation Tribunal. The assessor dismissed the claim because there was a significant lack of evidence to support Ms Budd's claim.

Ms Budd then appealed the decision before the Tribunal. On review of the information in the appeal, which contained medical reports that were not available to the original assessor, the tribunal determined that on the balance of probabilities the incident described could have caused an exacerbation of her previous psychological condition.

However the tribunal rejected Ms Budd's claim for the loss of 5 teeth.

"There is no evidence that the appellant has in fact lost 5 teeth but assuming that to be the case then I reject that claim as there is no acceptable medical evidence of any causal link between the act of violence and the loss of teeth."

They went on to determine Ms Budd's claim that she now suffered from a chronic psychological or psychiatric disorder category 2 was not valid and that she had not suffered any compensable injury.

"The appellant has not established the compensable injury of a chronic psychological or psychiatric disorder category 2 that is severely disabling as a direct result of the act of violence or as the result of the acceleration, aggravation or exacerbation of an existing condition. The appellant told Dr Rodriguez of her condition in 1999 and thereafter as a result of conflicts with Centrelink. Whilst the appellants symptoms may have 'intensified' as a result of the neighbour's actions, the 'intensification' or exacerbation must lead to a compensable injury (clause 4 of schedule 1). The (Assessor) makes it quite clear that there is insufficient evidence to conclude that the alleged harassment and assault by the neighbour caused the appellant to suffer any significant psychological disorder or lifestyle disruption."

Ms Budd then appealed this decision to the New South Wales District Court on the grounds that the Tribunal had made errors of law by not providing sufficient reasons for their decision.

Ms Budd alleged that the tribunal had erred in failing to give sufficient reasons for holding that the act of violence did not cause a category 2 chronic psychological or psychiatric disorder.

The defendant denied this allegation but made no formal submissions.

Goldring DCJ began by quoting Meagher JA in Beale's case, at p 443, where he said "it follows that the reasons need not necessarily be lengthy or elaborate".

He went on to say that it is clear that the tribunal had considered the psychological reports before it and had made reference to them. He continued to say:

"In my view, what the Tribunal did in this case does not run counter to any of the principles established in that case/ the reasoning process of the Tribunal was clear. Those cases also establish that while, in many cases, a failure to give reasons may constitute an error of law, it does not necessarily do so in every case. In this case, I find there was no failure to give reasons, either in respect of the application for leave to adduce further evidence in relation to the loss of teeth, or in relation to the existence, or causation, or severity of the psychological disorder."

Finally he concluded that it is clear from the reasons the Tribunal was not satisfied with the evidence before it and it is also clear what that evidence was. The onus lay with the claimant to produce medical evidence which supported her claim and in this case the evidence produced was not sufficient.

"It is, in my view, sufficient for the Tribunal to say that the evidence before it did not satisfy it of the matters which the Act requires be established. It is not necessary for it to spell out in detail the reasons why the evidence does not so satisfy it. I therefore refuse leave to appeal, and if leave had been granted, I would dismiss the appeal."



Other Activities and Information

Unreasonable Conduct Project

The education and training subcommittee has commissioned a training package entitled "Dealing with Unreasonable Behaviour in Tribunals". The subcommittee is in the process of drafting a contract to enable the training package to be delivered to Tribunal Members. We are confident that this training will be extremely useful to Tribunal Members and are hopeful that it will be available in the first half of next year.

NSW Law Society Specialist Accreditation in Government Law

The Law Society of NSW has announced its intention to create a new subject for specialist accreditation namely Administrative Law. A working party has been established to set the curriculum and decide on the appropriate mode or modes of assessment. It is hoped this work will be completed by September 2010 with a view that accreditation will be offered in this new area in 2011. The Working party is chaired by Doug Humphreys Law Society Councillor and Registrar of the Administrative Appeals Tribunal. COAT Committee members Sian Leatham and Belinda Cassidy are also on the Working Party

New Committee

At the Annual General Meeting of the Chapter (held in conjunction with the Whitmore lecture) the following persons were elected to the Committee:

Judge Kevin O'Connor	Convenor
Diane Robinson	Vice-Convenor
Bruce MacCarthy	Treasurer
Belinda Cassidy	Secretary
Committee	Sian Leatham, Sue Crossdale, Joanne Muller, Magistrate Nancy Hennessy, Robert Quickenden

The following sub-committees were formed at the first meeting of the new Committee held on 11 November 2009:

Membership	Belinda Cassidy (chair), Sue Crossdale and Joanne Muller
Education and training	Magistrate Nancy Hennessy (chair), Sue McIlhattan, Suellen Bullock, Marie Johns and Melanie Curtin

COAT News	Diane Robinson (chair), Robert Quickenden and Belinda Cassidy
Annual Conference	Kevin O'Connor (chair), Robert Quickenden, Sue Crossdale

New Members

The following new members were elected at the recent Committee meeting.

Kim Holwell (CTTT)
Melanie Curtin (WCC)
Marie Johns (WCC)
Donald Child (Medico WCC/MAA)
Kay Ransome (CTTT)
Deborah Moore (WCC)
John Fegan (Mediator)
Inga Rozenauers (Mediator)
Terry Sheahan (L & E Court)
Sharimi Fernandez (College of Law)
Pam Madafiglio (AIAL)
Jennifer Scott (WCC)

The Chapter welcomes all new members – and would like to welcome more!

Dates for your Diary

7 May 2010	COAT NSW Annual Conference
9-10 June 2010	AIJA Tribunals Conference Brisbane
30 June 2010	COAT NSW Chapter membership renewal due
22-23 July 2010	AIAL National Administrative Law Forum
15 September 2010	Whitmore Lecture