

COATNEWS No 4 December 2006

Newsletter for members of the
Council of Australasian Tribunals New South Wales Chapter Incorporated
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Convenor's corner

In 2006 the NSW Chapter of COAT built upon our activities of the previous year. We hope that our program of events for the year, while modest, has been of benefit to all members.

This year's annual conference was the third organised by the NSW Chapter. A sub-committee comprising Gary Byron, Rod Parsons and Bob Quickenden worked tirelessly and efficiently to organise the event held at the Menzies Hotel. More than 100 people attended and heard presentations on a number of relevant topics including recent developments in natural justice, fact finding and oral decision-making. Feedback from those members who attended was very positive. Work has begun on next year's conference.

The Chapter has continued our association with Professor Jim Raymond, and two workshops on decision writing were conducted in September. Jim also gave a great presentation to Chapter members who attended the Annual General Meeting on 6 September at the Australian Museum. Jim will be running workshops again in 2007 and details are contained in this newsletter.

It is our intention to provide such training opportunities for members of the Chapter at a relatively low cost. Smaller tribunals, in particular, often find it difficult to provide continuing education for members. Another sub-committee comprising Judge Kevin O'Connor, Nancy Hennessy and Narelle Bell is examining other avenues through which we can provide assistance to members. A new program of events will be implemented in 2007, and details will be published in COATNEWS and via email.

Once again, I thank the members of the Committee for their work throughout the year. A particular vote of thanks goes to staff of the Workers Compensation Commission and the Motor Accidents Authority who have provided valuable administrative support.

The COAT NSW Chapter Committee wishes all members and their families a happy and safe Christmas and we look forward to see you at our events in 2007.

Kay Ransome
Convenor

Revolutionary writing

There is a quiet revolution underway in tribunal decision writing. Long, rambling texts are making way for concise, issues-based analyses that deal only with the relevant material and move swiftly to a logical and clear conclusion.

The big questions are stated boldly and clearly up front. Conclusions are reached by a direct path of transparent reasoning. The story behind the issues and the real people behind the story are acknowledged. Decisions are easy to read. They're enjoyable to read. They are even enjoyable to write!

Why? How?

Ask any one of the 29 tribunal members who attended Professor Jim Raymond's COAT decision writing workshops this year. Members from seven tribunals in NSW and beyond attended the two decision writing workshops organised by the NSW Chapter of COAT in September.

Professor Raymond's workshops provide invaluable guidance on how to best design, build and style a decision. Participants have the opportunity to apply new principles of decision writing during these interactive seminars and to benefit from discussion of revised drafts with Professor Raymond and fellow participants. The results are extraordinary. "Inspiring", "thought provoking" and "exceptionally useful" are only some of the comments made by participants in the workshops this year.

The demand for Professor Raymond's workshops outstripped supply just as it did last year and the year before when the NSW Chapter organised the first of these events for tribunal members. In fact, the demand is so great we have asked Professor Raymond to return next September to conduct two more workshops. The first will be held on Monday 11 and Tuesday 12, while the second will be scheduled for Thursday 13 and Friday 14. Be sure to secure your place when expressions of interest are invited.

Thanks again to our friends at the Judicial Commission for providing the facilities and accommodation for this very successful COAT initiative.

Narelle Bell
Committee Member

Diary note

- 11 May 2007 - COAT NSW Chapter Annual Conference. Further details will be provided over the next couple of months.
- Professor Jim Raymond decision-writing workshops Note expressions of interest will be invited early in the New Year.
 - o 10 & 11 September 2007 workshop 1
 - o 13 & 14 September 2007 workshop 2

COAT tribunal leadership conference

The Heads of Tribunals from around Australia and New Zealand regularly meet during the AIJA/COAT Annual Tribunals Conference and decided this year in Canberra, to hold a high-level two-day conference on "Tribunal Leadership", in New Zealand from 29 November to 1 December, to focus in greater depth on the various specific problems they regularly face.

Trish McConnell, an experienced tribunal head and the Convenor of the New Zealand Chapter of COAT, had attended a tribunal leadership course at the Judicial Studies Board in the UK, and offered to convene the conference in Rotorua, and about 20 senior tribunal identifies from each of Australia and New Zealand duly assembled on 29 November for 48 action-packed but enjoyable hours of presentations (both solo and in panels) from "outsiders" and insiders, plus lots of small group work and invaluable networking opportunities.

Most participants also brought and displayed relevant resource materials from their tribunals for the interest and information of all other participants, and the organizers have undertaken to distribute these materials and the conference presentations for general use.

Presentations of particular interest included one on leadership by medical expert Mark O'Brien of the Cognitive Institute and one on personality types by psychologist Sue Blair.

Trish and her Chapter committee, ably assisted by several willing Australians, and supported by the NZ Ministry of Justice, deserve a most sincere vote of thanks and congratulations for an exceptional effort.

"Leadership" is a broader concept than "management" and "administration", and the many and varied needs of tribunal leaders (whether Judges or otherwise) were addressed during the conference – there were sessions directed to ways of influencing others; liaising with stakeholders, the media and the political environment; the useful differences among members and staff; appointment/reappointment issues; performance and peer review processes; mentoring, education and training of members and staff; member remuneration, and addressing the personal needs of members.

All participants had to face up to some very confronting questions about what they found most challenging about themselves and their responsibilities. Much of this was done by clever use of hypothetical fact situations, which unfailingly stimulated immensely useful dialogue among those present. We each committed to work on at least three "action items" in our respective workplaces and to "compare notes" on our progress with at least one other participant in three months time.

I am confident COAT will see merit in a similar gathering in Australia before long.

Justice Terry Sheahan AO
President, Workers Compensation Commission

What tribunals do: health professions disciplinary tribunals in NSW

Registration is required to practise as a medical practitioner, dentist, nurse, midwife, psychologist, physiotherapist, optometrist, chiropractor, podiatrist, pharmacist or dental technician in New South Wales. Each of these professions has an Act creating a Tribunal. The Acts also create Boards that undertake the registration process (and numerous other functions).

The Tribunals are separate from and independent of the Boards. The primary role of each Tribunal is to adjudicate on allegations of professional misconduct, which, if proven, could warrant suspension or de-registration of the practitioner, and to act as an appeal body on decisions made by the lower level disciplinary bodies including the relevant Boards.

Only the Tribunal has the power to suspend or de-register a practitioner if satisfied the practitioner is not competent to practise, is guilty of professional misconduct, has been convicted of an offence (either in or outside of New South Wales) and the circumstances of the offence render the person unfit in the public interest, to practise or if the practitioner is found to be not of good character.

In NSW each of these Tribunals are separate and distinct from one another. This contrasts with the position in Victoria and Western Australia where they come under the 'super tribunal' umbrella of VCAT and SAT respectively, or the New Zealand posi-

Contributions

Contributions for publication in COATNEWS are most welcome. We are grateful to the contributors to this edition, who have provided a range of interesting topics and information that will be useful to members.

We wish all members and their families, a happy and safe Christmas and New Year.

Kay Ransome, Belinda Cassidy, Gary Byron
COATNEWS Sub-Committee

tion where the one tribunal, the Health Practitioners Disciplinary Tribunal, hears and determines disciplinary proceedings relating to all registered health practitioners.

The 'oldest' of the New South Wales Tribunals have been operating for over 14 years. The youngest has not yet had the Chairperson appointed. Each of the Tribunals is constituted in a similar fashion. At each inquiry the Tribunal is constituted by four members - a Chairperson (or Deputy Chairperson), two members of the relevant profession and a lay member. The Chairperson is either a Judge of the District Court (Medical Tribunal) or a legal practitioner of at least 7 years standing, who must be appointed by the Governor. Each Tribunal has a number of Deputy Chairpersons. A list of professional members is maintained by each Board and the Minister for Health approves a list of lay members. Once a matter is referred to the Tribunal the Chairperson of the tribunal elects either to chair the matter or to refer the matter to one of the deputy Chairpersons. The three other Tribunal members are appointed by the Board to sit on a particular Tribunal.

None of the Tribunals is bound by the rules of evidence, may inform itself of any matter in such manner as it thinks fit, has the power to award costs, may determine the procedure to be followed, issue a summons to secure the production of documents or the attendance of a witness or lay its own complaint.

The Health Care Complaints Commission is the usual complainant in the matters brought before the Tribunals. It is represented by an in-house legal practitioner or by counsel. The practitioner (called the Respondent) is legally represented in about 60% of matters.

Appeals may be made from decisions of a Tribunal, to the Supreme Court.

Joanne Muller

Chairperson:

Dental Tribunal

Psychologists Tribunal

Physiotherapists Tribunal

Optometrists Tribunal

Committee of Review (*Health Services Act 1997*)

Deputy Chairperson:

Chiropractors Tribunal

Podiatrists Tribunal

Nurses and Midwives Tribunal

Review of "Procedure and Evidence in court substitute Tribunals" (2006) 28 Australian Bar Review, by Professor Neil Rees

A "court substitute tribunal" is a tribunal in a State or Territory, or Division of a tribunal, which exercises judicial power.

This article will come in handy when you are stumped about whether you have discretion to ignore the rule in *Browne v Dunn* or whether acting in accordance with "equity and good conscience and the substantial merits of the case" means that you can bend procedural rules. Professor Rees, a full-time academic and part-time tribunal member, comprehensively examines the meaning of provisions giving court substitute tribunals evidentiary freedom and procedural flexibility. Keep this article under the bench and whip it out when a curly procedural or evidentiary question comes your way.

But don't expect a definitive answer in every case. While procedural fairness is your "guiding star" many of the statutory directives given to tribunals are imprecise. Professor Rees makes the point that the lack of detailed statutory guidance in relation to the manner in which tribunal proceedings should be conducted, means that tribunal members are not making consistent rulings even when governed by the same procedural or evidentiary rules. That leads him to suggest that in NSW and Queensland, which have adopted uniform rules of civil procedure, a truncated version of those rules should be applied in court substitute tribunals. This suggestion is well worth considering despite the fact that it is contrary to the conventional view that the absence of detailed rules makes tribunals quicker, cheaper and fairer than courts.

Courts and tribunals are sometimes regarded as being in competition with one another. That competition can be healthy if we borrow worthwhile initiatives from one another. Because courts and tribunals operate in the same market place, Professor Rees urges us to consider their merger in much the same way that the common law and equity courts came together in

the nineteenth century. He says that would allow complex civil disputes to be resolved by applying sophisticated procedural and evidentiary rules, which are not necessary in straight-forward cases heard by tribunals.

While the idea of merging courts and tribunals is about as realistic as abolishing the States, Professor Rees has opened the debate on this issue. Where that debate goes from here will largely depend on the views of tribunal leaders, judges and ultimately, politicians.

Nancy Hennessy
Committee Member.

Over the last few years the timeliness of RRT reviews has substantially improved. The average time taken to finalise all RRT cases during 2005-06 was 97 days (compared with 143 days in 2004-05). Since the introduction of a 90 day time limit in the Migration Act 1958 in December 2005 for the conduct of RRT reviews, the average time taken to determine an RRT review application has been progressively reducing and is currently 82 days.

Amanda McDonald
Acting Senior Member Refugee Review Tribunal and Migration Review Tribunal

RRT since the Nais case

As indicated in the last edition of COATNEWS, the High Court in *NAIS v Minister for Immigration & Multicultural & Indigenous Affairs [2005] HCA 77* held that significant delay in the RRT's decision making gave rise to jurisdictional error in the form of a breach of procedural fairness. It is noteworthy that this sort of delay is a thing of the distant past as far as the RRT is concerned.

The COAT NSW Chapter Committee

Convenor:	Kay Ransome, Chairperson, Consumer Trader and Tenancy Tribunal
Vice Convenor:	Gary Byron, Deputy President, Workers Compensation Commission
Secretary & Public Officer:	Belinda Cassidy, Principal Claims Assessor, Motor Accidents Claims Assessment and Resolution Service
Treasurer:	Bruce MacCarthy, Senior Member, Refugee Review Tribunal and Migration Review Tribunal
Committee Members:	Narelle Bell, Senior Member, Administrative Appeals Tribunal; Magistrate Nancy Hennessy, Deputy President, Administrative Decisions Tribunal; Robert Quickenden, Barrister and Assessor, Claims Assessment and Resolution Service; Judge Kevin O'Connor AM, President, Administrative Decisions Tribunal, and Rodney Parsons, Deputy Registrar, Workers Compensation Commission.