

COATNEWS

No. 5 – August 2007

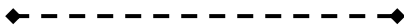
Newsletter for members of the Council of Australasian Tribunals

New South Wales Chapter Incorporated

ABN 49 543 198 346

Postal address: PO Box 268 Darlinghurst NSW 1300

CONVENOR'S CORNER



Welcome to the 5th edition of *COATNEWS*.

This year's COAT NSW Chapter Annual Conference, *The Quality of Administrative Justice*, was held at the Menzies Hotel on Friday 11 May. The organising committee of Rod Parsons, Bob Quickenden and Gary Byron worked hard to develop a program which was of great interest to all those who work in and around tribunals in NSW. The high calibre of the speakers, including Mr David Bennett AO QC, Commonwealth Solicitor General, The Hon Justice Keith Mason AC, President of the NSW Court of Appeal, His Honour Judge Kevin O'Connor AM, President of the NSW Administrative Decisions Tribunal, His Honour Judge John O'Meally AM RFD, President, NSW Dust Diseases Tribunal, and Associate Professor Pamela O'Connor, Director of Teaching, Faculty of Law, Monash University, guaranteed that the event was one not to be missed. Many participants rated the conference as the best yet!

Membership of the NSW Chapter of COAT is open to all persons with an interest in tribunals, both in the Commonwealth and the State of NSW. This edition of *COATNEWS* briefly profiles one of the best known of the Commonwealth tribunals, the Administrative Appeals Tribunal.

One of the great successes of the NSW Chapter has been the facilitation of the Professor James Raymond decision writing workshops, organised in conjunction with the Judicial Commission of NSW over the past few years. We have two more workshops coming up in September. The workshops are fully subscribed, but we will be pleased to hear from anyone who is interested in participating in one of the workshops next year.

This is my last *COATNEWS* as Convenor of the NSW Chapter. I have enjoyed working with my friends and colleagues on the NSW Chapter Committee over the past three years and I hope that we have been able to provide members with some worthwhile activities. A new Convenor will be elected at the Annual General Meeting on 19 September 2007.

The Committee is pleased to announce that COAT NSW Chapter will host the inaugural Whitmore Lecture, also on the 19 September 2007. Details appear in this edition of *COATNEWS*.

Kay Ransome

Convenor

FAREWELL KAY RANSOME

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Kay Ransome is a co-founder of the COAT NSW Chapter Inc. There is no doubt that her departure from the NSW Chapter Committee will prove to be a great loss. She has guided the Chapter's recent development as Convenor, and has been an enthusiastic driving force in the organisation, both at a State level and on the COAT National Committee. Kay was recently elected to the position of National President of the COAT. We are indebted to Kay for her hard work and commitment, and wish her well in her new position. The NSW Chapter Committee has pledged its active support to Kay in her new role.

As Kay has stated, a new State Convenor will be elected at the AGM to be held on 19 September 2007. In accordance with our Constitution, the State Convenor must be a Head of a State or Federal Tribunal, operating in NSW.

Gary Byron
Vice Convenor

THE WHITMORE LECTURE

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COAT NSW Chapter has decided to conduct an annual lecture, "The Whitmore Lecture" immediately before and in conjunction with, the Annual General Meeting. The lecture has been named in honour of Professor Harry Whitmore. The inaugural Whitmore Lecture will be delivered on 19 September 2007 at 5.30 pm, by Sir Anthony Mason AC KBE QC, former Chief Justice of the High Court of Australia.

Formal notice of the Whitmore Lecture and the Annual General Meeting will be circulated in the very near future.

Many will know of Harry Whitmore, but for those who do not, I would like to quote from a paper presented by Justice Garry Downes, former President of the COAT, and President of the Administrative Appeals Tribunal, to the New Zealand Chapter of the COAT, in Wellington, New Zealand on 7 October 2005. The title of his papers was, "Why Does Australia Have a General Review Tribunal?"

Justice Downes said:

I studied law at the University of Sydney. I was there between 1963 and 1966...

Administrative law was an optional subject. I was taught by Professor Harry Whitmore. He became the author of the text on Administrative Law originally written by Professor David Benjafield. During my time it was Friedman and Benjafield. It was last published in the 1980's under the editorship of Professor Stan Hotop who is now a Deputy President of the Australian Administrative Appeals Tribunal.

Professor Whitmore was a charismatic lecturer and he had a significant influence on me. It was through him that I developed my interest in what is now called public law – a kind of companion to Constitutional law.

In the early 1960's the United Kingdom Franks Committee Report was prominent. Professor Whitmore was influenced by it. It was an important background to his lectures. He was also influenced by the Scandinavian concept of an ombudsman.

These matters were given prominence in Professor Whitmore's thinking because of the ever-increasing influence of Government decision-making on citizens – whether it be taxation, social security and pensions or licences and permits. Government decision-making was coming to affect every citizen's everyday life. So extensive and pervasive had this decision-making become that some mechanism wider than judicial review began to

seem appropriate. It seemed necessary for decisions to be reviewed on their merits by someone independent of Government.

There is nothing new about independent tribunals, which review administrative decisions on their merits. They existed long before the 1960's. However, there were not so many of them. Australia had Taxation Boards of Review. The Australian states had tribunals reviewing decisions relating to land development. There were guardianship and mental health tribunals. However, the intervening years have seen ever increasing numbers of tribunals established in the United Kingdom, Canada and New Zealand. Australia was no exception. However, Australia adopted a new approach to the problem.

On 29 October 1968 the Australian Government established a committee, which became known as the Kerr Committee. The Chairman was Sir John Kerr. This was long before he became Governor-General. Sir Anthony Mason, subsequently Chief Justice of Australia, who was Solicitor-General at the time, was a member. Robert Ellicott QC, subsequently Solicitor-General, Attorney-General and also a Federal Court judge was also a member. The final member was Professor Whitmore ...

The Kerr Committee had been appointed to advise the Government about a proposal for a Commonwealth superior court to review administrative decisions. In the opening paragraphs of its Report the Committee explained that review of administrative decisions necessarily involved the notion of merits review. The Committee spent a large portion of its Report addressing that issue.

The result was, after another intervening report, that Australia adopted a completely new regime for administrative law. This was in the mid 1970's. The Administrative Appeals Tribunal was established. But that was just part of a large package. The establishment of the Federal Court of Australia was itself part of the scheme. Part of the jurisdiction of the Court came under the *Administrative Decisions (Judicial Review) Act 1975*, which codified the common law grounds of judicial review. Most importantly, that Act imposed a statutory obligation upon decision-makers to give written reasons for their decisions. Without reasons it was difficult to challenge decisions because there was usually nothing upon which to base a challenge. The legislative scheme also included the establishment of the Administrative Review Council, to advise the Government on all matters of administrative law, and the establishment of the office of Ombudsman.

By now I expect that you may see the hand of my old professor, Harry Whitmore behind all this. The Franks Committee had reminded him of the need for merits review. The Scandinavian office of Ombudsman had demonstrated to him the need for an independent office to scrutinise the process of decision-making, particularly at the mundane and ordinary level. He did not forget the need for regularisation of judicial review. The role of Sir Anthony Mason, one of Australia's greatest administrative lawyers, should not be underestimated, but to my mind the similarity between what I was taught at law school in the mid 1960's and the reforms which occurred in Australian in the mid 1970's is no coincidence.

The Administrative Appeals Tribunal will be 30 years old in July next year. It has had a distinguished history. A bi-partisan Senate Committee earlier this year said its reputation was "impeccable". The first President of the tribunal was Sir Gerard Brennan who ultimately became Chief Justice of Australia. He published a number of landmark decisions in the first years of the Tribunal's operation. They set the Tribunal on its path to success. They still guide its decision-making today.

The COAT NSW Chapter is delighted to announce the annual Whitmore Lecture. It is fitting indeed, that Sir Anthony Mason should present the inaugural Lecture on 19 September.

Belinda Cassidy
Secretary

A GLIMPSE OF THE ADMINISTRATIVE APPEALS TRIBUNAL

On 29 October 1968 the Australian Government established the Kerr Committee to advise the Government about a proposal for a Commonwealth superior court to review administrative decisions. The Kerr Committee recommended that an independent Tribunal be established. 1 July 1976 saw the establishment of the Administrative Appeals Tribunal, an independent Tribunal whose sole function is to review executive decisions of the Government. The Tribunal was to review administrative decisions made by Australian Governments ministers, officials, authorities and other tribunals. The Tribunal was established by the *Administrative Appeals Tribunal Act 1975*.

One of the most important roles of the Tribunal is to provide an informal and quick review of administrative decisions. This is achieved through merits review – an important aspect for society as it permits an opportunity to challenge government decisions affecting citizen's interests. The Tribunal decides, on the facts before it, whether the correct or preferable decision has been made.

The Tribunal has jurisdiction conferred on it by over 400 acts of parliament. The bulk jurisdictions in the Tribunal are compensation, social security, veteran's affairs and taxation matters. The broad jurisdiction extends to cover such areas as immigration, aviation, broadcasting licences and the *Water Efficiency Labelling and Standards Act 2005* and many more.

A President, Deputy President, Senior Member and Members comprise the majority of the membership of the Tribunal. The President must be a superior Court Judge. The Tribunal's major strength is in its diversity. Members of the Tribunal have backgrounds in other areas such as medical, pharmacological, military and accountancy. Hearings may be comprised of one, two or three members, usually a combination of legal and expert members in more specialised matters.

Narelle Bell
Committee Member & Senior Member of the AAT

STATE TRIBUNALS BANNED FROM DECIDING CONSTITUTIONAL ISSUES

Until recently, judges had no problem with a State tribunal deciding constitutional issues when determining disputes under anti-discrimination legislation. For example, in *Dao & Anor v Australian Postal Commission* (1984) EOC 92-107, the Equal Opportunity Tribunal (as it then was) decided that it had jurisdiction to decide whether there was an inconsistency within s 109 of the Constitution, between state and federal anti-discrimination laws. The Court of Appeal or the High Court did not question that conclusion on appeal.

The position was reversed by the Court of Appeal in *Attorney General v 2UE Sydney Pty Ltd & Ors* [2006] NSWCA 349. In that case 2UE argued that the homosexual vilification provisions of the *Anti-Discrimination Act 1977* were either invalid or should be read down because they contravened the Constitutional immunity for political free speech. The NSW Attorney General intervened arguing that the Administrative Decisions Tribunal did not have jurisdiction to hear or determine a question arising under the Commonwealth Constitution because it was not "a Court of a State" within the *Judiciary Act 1903*, s 39. The Court of Appeal (Spigelman CJ, Hodgson and Ipp JJA agreeing) followed an earlier decision (*Trust Company of Australia Ltd (t/as Stockland Property Management) v Skiwing Pty Ltd (t/as Café Tiffany's)* [2006] NSWCA 185), and found that the ADT had no jurisdiction to determine whether the homosexual vilification provisions were invalid or should be read down. The Court also decided that the ADT was not competent to consider the question as a question of law relating to its jurisdiction.

In the 2UE case the Court of Appeal characterised every Division of the ADT and the Appeal Panel, as an administrative body with statutory powers, the exercise of which have legal consequences. It does not matter that some of the Divisions of the ADT conduct merits reviews of government decisions while others, such as the equal opportunity and retail leases divisions, exercise original jurisdiction. The Court of Appeal's characterisation of the ADT is at odds with the fact that the Federal Court and the Federal Magistrates Court decide discrimination cases under federal legislation and there is no suggestion that they are administrative bodies when exercising that jurisdiction.

While both Federal and many State tribunals exercise judicial power, the Court of Appeal has held that the ADT (despite being a judicial body at least when exercising original jurisdiction) is not empowered to exercise the judicial power of the Commonwealth. Consequently, if a constitutional question arises, it appears that the Appeal Panel of the ADT would have to refer that question to the Supreme Court for determination. Duncan Kerr presented a paper at the recent Gilbert and Tobin Constitutional Law Conference in which he criticised the Court of Appeal decisions in the *Skiwing* and *2UE* cases. It may be that we have not heard the last of this issue, although it would take a decision of the High Court to finally determine the point.

Nancy Hennessy
Committee Member & Deputy President, Administrative Decisions Tribunal

AUSTRALIAN INSTITUTE OF ADMINISTRATIVE LAW NSW CHAPTER

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The third and final seminar of the AIAL NSW Chapter's 2007 Seminar Series was presented in conjunction with the COAT NSW Chapter at the premises of Minter Ellison Lawyers on Thursday 26 July 2007. The speaker was Duncan Kerr SC MP and the commentator was Nye Perram SC. Duncan Kerr's topic was "Recent Appellate Decisions Affecting Tribunals". The presentation was well focussed, topical and of great interest to tribunal members and others having dealings with tribunals in NSW and elsewhere.

This AIAL Seminar Series continues to provide valuable and informative topics of interest for tribunals and their members.

Hopefully the NSW Chapters of AIAL and COAT will continue to build a productive and useful relationship in order to provide information and services to their constituencies, which to a great extent, overlap.

Magistrate Gabriel Fleming, formerly Deputy President of the Workers Compensation Commission, and her former colleague, Gary Byron, Deputy President of the Workers Compensation Commission, continue to provide the valuable link between the two organisations.

FAREWELL TO A FOUNDING FATHER ◆

It is no secret that the Hon Justice Terry Sheahan AO is about to return to his substantive position as a Judge of the Land and Environment Court, after 5½ years as President of the Workers Compensation Commission. Justice Sheahan was one of a number of interested persons who founded the Council of Australasian Tribunals and was instrumental, as part of a small group, in setting up the COAT NSW Chapter, under the chairmanship of Nick O'Neill, former President of the Guardianship Tribunal.

The NSW Chapter has become the largest and most active Chapter of the COAT. Justice Sheahan has been one of COAT's strongest supporters both at national and state level, and has played a significant role in a number of its achievements to date. He has ensured that COAT has had a good deal of practical support from the Workers Compensation Commission and has encouraged other Tribunal Heads to provide similar, practical support.

Before returning to the Land and Environment Court Justice Sheahan will celebrate a significant birthday, and one day later, he will "tie the knot" with Jenni Hardy. The couple will then depart for France to attend the Rugby World Cup. (In case you are wondering how a man can persuade his new wife to spend her honeymoon watching football, Jenni is a Rugby "tragic" and her son Gareth plays for the Western Force in the Rugby Super Fourteen competition).

COAT NSW Chapter is most grateful for the enthusiastic support and encouragement given to it by Justice Sheahan. We wish him well in the future.

Gary Byron
Vice Convenor

COAT NSW CHAPTER COMMITTEE – CURRENT MEMBERSHIP



Kay Ransome

Chairperson Consumer Trader and Tenancy Tribunal – Convenor

Gary Byron

Deputy President Workers Compensation Commission – Vice Convenor

Belinda Cassidy

Principal Claims Assessor, Claims Assessment and Resolution Service – Secretary and Public Officer

Bruce MacCarthy

Senior Member Refugee Review Tribunal & Migration Review Tribunal – Treasurer

Narelle Bell

Senior Member Administrative Appeals Tribunal

Magistrate Nancy Hennessy

Deputy President Administrative Decisions Tribunal

Judge Kevin O'Connor AM

President Administrative Decisions Tribunal

Rodney Parsons

Deputy Registrar (Legal) Workers Compensation Commission

Robert Quickenden

Barrister and Assessor, Claims Assessment and Resolution Service

Annual Conference Sub-committee

Rodney Parsons
Bob Quickenden
Gary Byron

COATNEWS Sub-committee

Kay Ransome
Belinda Cassidy
Gary Byron

Education & Training Sub-committee

Judge Kevin O'Connor
Nancy Hennessy
Narelle Bell

Membership

Belinda Cassidy

Professor James Raymond Decision-writing Workshops Facilitator

Gary Byron

Australian Institute of Administrative Law NSW Chapter Liaison

Gary Byron