



## Convenor's Corner

Welcome to the 7th edition of COATNEWS the newsletter of the New South Wales Chapter of COAT.

*One of the goals of COAT is to provide a forum for the exchange of information and opinions on the role of tribunals and their practices and procedures. We continue to see the evolution of new, multi-jurisdictional 'super' tribunals in a number of jurisdictions, and important developments in appointment practices.*

*I hope that you will find the following information and comments interesting. If you have any comments in reply, please send them by way of an email reply to COATNEWS.*

Judge Kevin O'Connor

## Tribunal merger developments

### The United Kingdom

In the UK the process of merging the nation's tribunals continues. The UK Parliament has passed the Tribunals, Courts and Enforcement Act 2007. The process of reform in the UK started with the establishment of the Leggatt Inquiry in May 2000. England and Wales had 70 administrative tribunals of which only 20 heard more than 500 cases per year, and many were defunct. The peak 20 tribunals heard about a million cases per year, and employed about 3,500 people.

The Leggatt Report recommended the creation of a tribunal system supported by a single Tribunals Service. The Report made numerous specific recommendations proposing the amalgamation of many tribunals, the creation of a first tier and upper tier tribunal hierarchy, the involvement in and leadership of the tribunal system by senior judges, appointment processes and tenure of tribunal members, and the creation to a substantial extent of a one-stop registry and procedural infrastructure. The key elements of the Leggatt Report have been adopted in the new Act.

With limited exceptions all tribunals in the UK are to be collapsed into the new structure, with two elements – a trial level tribunal and an appeal level tribunal. The tribunals to remain outside the new structure are the Asylum and Immigration Tribunal, the Employment Tribunals and the Employment Appeal Tribunals. But they are to share the common infrastructure provided by the Tribunals Service.

The trial level tribunal is called the First-tier Tribunal. The appeal level tribunal is called the Upper Tribunal. This type of structure is similar to the one found in the (small) Tribunal that I head – the ADT, and is not usual in tribunal arrangements in Australia. When visiting Australia in August 2000, Sir Andrew Leggatt (a retired Law Lord) held discussions with the ADT on how this kind of division of responsibility worked. He even sat in the back of one of our Appeal Panel hearings, involving a self-represented appellant putting a very weak case. It may be that this experience had some positive influence on the UK development!

## In this issue

Tribunal merger developments

New Appointment Practices:  
Commonwealth

Update From National Coat

Council of Australasian Tribunals NSW Chapter  
5th Annual Conference

Communication in the Court Room

The two tiers will each have a divisional structure, with the divisions to be called – rather quaintly – 'Chambers'. The overall head of the two tiers, an eminent judge, likely to be a member of the Court of Appeal – will be called the Senior President of Tribunals. He or she is to provide 'unified leadership to the tribunals judiciary'. There are to be Chamber Presidents and Deputy Chamber Presidents. Chambers 'may be constructed on either a function or geographic basis, or a combination of the two'.

A Chamber President will ordinarily be a judge of the High Court (broadly equivalent to the Supreme Court in our system).

The legal members of the two tiers are to have the title of Judge. There will be a system of assignment of members to one or more chambers. This is similar to the practice in a number of the Australian multi-jurisdictional tribunals.

There are provisions to enable the First-tier Tribunal and the Upper Tribunal to re-open their orders and decisions without the need for a full onward appeal. No decision of the First-tier Tribunal may be re-opened more than once. A decision not to afford an applicant a review of this kind is not judicially reviewable or appealable. I was glad to read that.

As I have said in various papers, I think the ADT Appeal Panel facility has worked quite well. It has enabled the ADT to fix 'in house' mistakes at first instance in a low cost, relatively accessible way. The UK provision is a further step along that path, allowing the First-tier Tribunal itself to revisit orders, and resolve any error or difficulty without any need for an appeal.

As to appeals to the Upper Tribunal, the primary rule is that appeals are on points of law only. But there will be some outright exclusions of appeal rights, and some appeal rights that are more expansive. There is a facility for referral of cases to the Court of Appeal.

There is to be some conferral of judicial review jurisdiction on the Upper Tribunal, to the extent permitted by the Lord Chief Justice. It can also undertake judicial review by way of transfer from the High Court or a Court of Session. The Upper Tribunal is declared a superior court of record, like the country's High Court.



One very practical reform, usually found missing in tribunal structures in Australia, is machinery for direct enforcement of Tribunal orders. A Tribunal order or award will be treated as directly enforceable without the need for intermediate steps. There will be a facility for entry of unpaid awards on the register of unpaid judgments, which may be searched by credit providers dealing with applications for credit.

The provisions of the Constitutional Reform Act 2005, protecting the independence of the judiciary, are to be extended to cover tribunal legal members (i.e. tribunal judges). The transparent, substantially independent system for appointment of court judges introduced by that Act, will apply to tribunal judge appointments.

The new tribunals are 'intended to be adaptable institutions, able to take on any existing or new tribunal jurisdictions'. In the future, 'when Parliament decides to create a new appeal right or jurisdiction, it will not have to create a new tribunal to administer it'. As previously, many tribunal matters will be determined by multi-member panels, including expert or lay non-legal members. There is to be a list, which designates which tribunal judges may be members at both the first tier and upper tier levels.

There are detailed provisions relating to development of rules of procedure, the use of practice directions and mediation. There is provision for assessors.

There is a power to order costs, but it is expected that there will be flexibility and differences as between different parts of the tribunals in how costs powers are framed and exercised.

There is to be an oversight body called the Administrative Justice and Tribunals Council, replacing the Council on Tribunals, and with a wider role. Importantly, it will be concerned with ensuring that the relationships between courts, tribunals, ombudsmen and alternative dispute resolution routes satisfactorily reflect the needs of users.

The Administrative Justice and Tribunals Council ('AJTC') has commenced operation. Its quarterly newsletter, 'Adjust', provides an interesting account of current tribunal educational and other activities, and can be found on the web.

## Queensland

Six weeks ago, on 12 March 2008, the Premier of Queensland announced the Government's intention to establish a civil and administrative tribunal by the second half of 2009. An independent expert panel has been established to advise on the implementation of the decision. The terms of reference have been issued. The goal is to develop a structure which is 'independent, efficient (that is time, and cost efficient), expert (to ensure quality of decision-making across a range of different jurisdictions), accessible, flexible (to meet the needs of a range of stakeholders ranging from the most vulnerable in the community to businesses with complex contractual disputes), and able to adapt to future pressures including: a burgeoning building industry with related increased building disputes, housing affordability pressures with related increased tenancy disputes, global environmental concerns with increasing

environmental regulation, an ageing population, and continuing pressure in relation to child protection and the provision of services to vulnerable groups'.

A report is required by October 2008 on the necessary legislative amendments with a final report on operational requirements by March 2009.

It is thought that the most likely model will be the VCAT model, with the tribunal headed by a Supreme Court judge, and the Tribunal will form part of the Attorney General's portfolio.

## Victoria

There is a new President of VCAT, Justice Kevin Bell. He commenced his appointment on 31 March 2008 for two years. VCAT has operated for 10 years. Justice Bell is to undertake a major review of the Tribunal's operations, and report to the Government.

## Constitutional Complications in Australia

The simplicity and coherence of the UK changes is assisted by the absence of any entrenchment of the separation of judicial power from executive and legislative power in that country.

One of the difficulties for Australia in replicating exactly a model of this kind relates to whether State tribunals can be regarded as a 'court of a State' under the Commonwealth Constitution, and the implications that has for State tribunals if called on to consider Commonwealth law questions, exercise Federal jurisdiction or deal with matters where there is a Commonwealth party. Virtually no State tribunal in Australia, and especially the new multi-jurisdiction tribunals, could satisfy the test as to what is a 'court of State' recently articulated in the NSW Court of Appeal. (The Court of Appeal reversed two decisions of ADT Appeal Panels including a Panel that I headed).

The result is that a State tribunal may be left unable to apply the entirety of the law of the land to a dispute. Tribunal litigants who wish to raise a Federal law point may have to transfer the case to the ordinary court system or split the case with one part being referred to an ordinary court. This may be particularly disruptive where the State tribunal is the exclusive jurisdiction for the principal question raised by the proceedings. The costs implications of a situation like this are obvious. This state of affairs presents an opening to respondents to proceedings to frustrate their resolution by raising "Federal" points. For a recent review of the law and the practicalities, see Duncan Kerr SC MP, 'State Tribunals and Chapter 111 of the Australian Constitution', (2007) 31 Melb Uni LR 622.

**Judge Kevin O'Connor**  
Convenor



## New Appointment Practices Commonwealth

A welcome development at Commonwealth level is the announcement by the new Government of a more transparent and independent procedure for the making of appointments to Public Offices. They are being applied, as I write, to appointments to Commonwealth Tribunals and many other statutory appointments. The new arrangements are explained in a Press Release dated 5 February (02/2008) by the Special Minister of State, Senator Faulkner. Under the new arrangements, it is understood the relevant Minister will consider reappointments of existing members initially. Where it is determined that the position should be the subject of a full selection process, the position will be advertised, interviews held and recommendations made to the Minister on merit. For tribunals, the selection committee will normally consist of the Head of the Tribunal, a senior officer from the relevant department and a retired judicial/tribunal member. The process will be oversighted by the relevant department secretary and the Public Service Commissioner.

The process for judicial appointment remains unchanged.

The policy includes a requirement to advise a serving tribunal member, not less than four months before expiry of their existing appointment, whether they will be considered for reappointment. It is my view that an expectation of continuity should apply to renewals of legal and expert members of tribunals, with continuity ordinarily only being able to be refused on performance grounds.

**Judge Kevin O'Connor**  
Convenor

## Update From National COAT

As I mentioned in the last edition of COATNEWS, COAT is developing an on-line version of the Practice Manual to be made available to all member tribunals. The content of the Practice Manual has now been updated by Professor Andrew Clarke, Head of the Law School at Victoria University. A software provider has also been selected and we hope to launch the on-line version at the Tribunals Conference in June this year.

Further information about the 2008 Tribunals Conference, jointly sponsored by COAT and the Australian Institute of Judicial Administration (AIJA) can be found on the COAT website at [www.coat.gov.au](http://www.coat.gov.au). Further details and a link to the registration webpage are to be found under 'NOTE YOUR DIARY', elsewhere in this edition of COATNEWS. The theme for the Conference is Practical Assistance for Tribunal Members and Decision Makers. Prominent speakers include the Commonwealth Attorney-General, the Hon Robert McClelland and M. Patrick Frydman, President of the Administrative Court of Appeal of Versailles.

The (National) COAT Annual General Meeting will be held in conjunction with the Conference on Friday 6 June 2008. All members are welcome to attend the AGM.

The COAT website has been revamped to incorporate the new COAT logo. The logo was developed with the assistance of the NSW Chapter. The website contains information about COAT and has up-to-date news about what is happening in the various Chapters in Australia and New Zealand.

**Kay Ransome**  
Chairperson, COAT

## Note Your Diary

- COAT NSW Chapter 5th Annual Conference – Friday 23 May 2008 at the Menzies Sydney Hotel
- Australian Institute of Administrative Law NSW Chapter – 2008 Seminar Series. Thursday 22 May 2008; Thursday 26 June 2008, and Thursday 24 July 2008. The third in the series is presented in conjunction with the COAT NSW Chapter. Details of the seminars are set out below
- 11th Annual AIJA Tribunals Conference (in association with COAT) – Watermark Hotel, 3032 Surfers Paradise Boulevard, Surfers Paradise, Queensland, 5 – 6 June 2008 \*\*Please register as soon as possible – email [aija08@ammp.com.au](mailto:aija08@ammp.com.au) for details\*\*
- AIAL 2008 Administrative Law Forum "Practising Administrative Law", Thursday 7 and Friday 8 August 2008, Sofitel Melbourne, Victoria
- 2nd Whitmore Lecture & COAT NSW Chapter Annual General Meeting – Wednesday 17 September 2008, venue TBA (probably at the Australian Museum again, but this will be confirmed closer to the date)
- Professor James Raymond Decision writing Workshops – Monday and Tuesday 15 & 16 September 2008; Thursday and Friday 18 & 19 September 2008, at the Judicial Commission

## A Book Worth Reading

From time to time a book is published that seems to fit a niche that hitherto, may not have been so readily apparent. One such book is *Appellate Practice* by Graeme Blank and Hugh Selby.

The book is comprised of a series of essays by a variety of authors. However, the essays do not appear in total isolation one from the other. They are thoughtfully organised so that the subject matter of the book unfolds in an acceptable and orderly fashion. Topics covered are:

- "What is an Appeal" – Graeme Blank and Hugh Selby
- "Frequent Issues" – Graeme Blank and Hugh Selby
- "Notices and Grounds of Appeal" – His Honour Judge Sydney Tilmouth QC
- "Orders on Appeal" – His Honour Judge Brian Donovan QC
- "Appeal Papers" – Jennifer Hedge
- "Intervention" – Michael Sexton SC
- "Further Evidence on Appeal" – Ian Freckelton SC



"Written Submissions" – The Hon Justice Margaret McMurdo AC

"Oral Advocacy" – The Hon Justice James Douglas

"Making a Special Leave Application in the High Court"

– Tim Game SC

"Costs" – G E Dal Pont

"Appellate Reasons" – The Hon Justice Michael Kirby AC CMG

The Forward was written by The Hon Murray Gleeson AC, Chief Justice of the High Court of Australia. His Honour's opening remarks are as follows:

*"This work aims to provide legal practitioners with a useful collection of information, and some valuable guidance, on a number of topics relating to practice in appellate jurisdictions. Since a primary function of practitioners in all forms of litigation, including appeals, is to participate in the administration of justice by assisting the court, judges have a strong interest in the level of competence that lawyers bring to their work. Judges, therefore, welcome and encourage the development of lawyers' practical skills."*

His Honour's conclusion to the Forward highlights the point of my opening remarks. He states:

*"This book, which includes the contributions of a number of experienced authors on matters of importance to the appeal process, has a strong practical flavour. So far as I am aware, in the past there has not been a practice book that covered the range of topics it addresses, and I expect that practitioners will find it a timely and welcome addition to their resource materials."*

The challenge in providing some brief comments on this publication is determining where to start! The contributions are excellent; some are semi-conversational in style, and all are plainly written, practically useful, and most instructive. This book is, as they say, "a good read". The reader is left with the sense of satisfaction that is derived when you have just read something that is very useful and well beyond the pedestrian. The text is replete with such a rich variety of insights, suggestions, authoritative commentary and guidance, that one wonders why a publication such as this has never, apparently, emerged before. Hopefully, having excited the interest of COATNEWS readers, I think it is best to simply urge you to get hold of this publication and read it. I agree with Gleeson CJ that this text will be very useful for practitioners. It should be of great interest also, to lawyers and others who are tribunal members, whether engaged in appellate work or not. Unfortunately, the book is not inexpensive.

Graeme Blank is a Canberra barrister and teaches at the College of Law, Australian National University. Hugh Selby is a one time barrister now engaged in teaching and writing. His particular interests are advocacy, expert witnesses, and litigation issues.

[Blank, Graeme & Selby, Hugh, "Appellate Practice" (Annandale: The Federation Press, 2008)].

Gary Byron  
Deputy President, Workers Compensation Commission

## Council of Australasian Tribunals NSW Chapter 5th Annual Conference

The 4th Annual Conference in 2007 attracted a larger than expected response. Last minute steps had to be taken to reconfigure the seating arrangements so that everyone who wanted to attend could be accommodated. Undoubtedly, this was a direct result of the success of the 3rd Annual Conference in May 2006.

A similar situation appears to be developing this year, following the success of the 2007 Conference.

The 5th Annual Conference to be held on **Friday 23 May 2008** at the Menzies Sydney Hotel addresses the issue of managing difficult people and situations in tribunal hearings – a subject of great interest and concern to most if not all tribunal members. The Conference flyer and registration form have been distributed widely to members and to other individuals and organisations.

The Hon Justice Catherine Branson, Federal Court of Australia will deliver the keynote address. Other speakers include The Hon Justice Peter McClellan, Chief Judge at Common Law who will speak about assessing credibility, while Dr Grant Lester, Consultant Psychiatrist and Director of the Victorian Forensic Psychiatry Training Program will make a presentation on dealing with persistent complainants, difficult people and querulous litigants.

Feedback over the past two years has demonstrated a demand for more time to be devoted to audience participation and discussions. A panel comprising Ms Sue Bullock, Director NSW & ACT Social Security Appeals Tribunal, Ms Kay Ransome, Chairperson, Consumer Trader and Tenancy Tribunal, and Mr Jim Simpson, Presiding Member, Guardianship Tribunal, will be chaired by Ms Narelle Bell, Senior Member of the Administrative Appeals Tribunal & COAT NSW Chapter Committee member. This promises to be a lively, challenging and informative session.

Anyone who missed out on the Conference flyer and registration form, may obtain them by contacting either Belinda Cassidy, Secretary at [bcassidy@maa.nsw.gov.au](mailto:bcassidy@maa.nsw.gov.au) or me at [gary.byron@wcc.nsw.gov.au](mailto:gary.byron@wcc.nsw.gov.au)

Gary Byron  
Vice Convenor & Conference Sub-Committee Chairperson

## Communication in the Court Room

The article Communication in the Court Room by Magistrate Nancy Hennessy, Deputy President of the Administrative Decisions Tribunal, published in the last edition of COATNEWS, was well received. Just a reminder that tips on effective communication in the Court or Tribunal room can be found at [www.njca.com.au](http://www.njca.com.au)



## Australian Institute Of Administrative Law NSW Chapter – 2008 Seminar Series

The AIAL NSW Chapter presents its Seminar Series, annually.

The first seminar this year, *Federal Government Freedom of Information Reform* is presented in conjunction with the Administrative Law Section of the NSW Bar Association.

Date: Thursday 22 May 2008.

Time: 5.30 pm – 6.30 pm

Speaker: The Hon Robert McClelland MP, Attorney General.

The second seminar is *Administrative Law: musings from the Bench*:

Date: Thursday 26 June 2008.

Time: 5.30 pm – 6.30 pm

Speakers: The Hon Justice Basten, NSW Court of Appeal & The Hon Justice Preston, Chief Judge, Land and Environment Court.

The third seminar, *Recent Developments in the Administrative Appeals Tribunal*, is presented in conjunction with the Council of Australasian Tribunals NSW Chapter.

Date: Thursday 24 July 2008.

Time: 5.30 pm – 6.30 pm

Speaker: Professor John McMillan, Commonwealth Ombudsman  
Commentator: Mark Robinson, Barrister-at-Law.

The venue for all seminars is:

Minter Ellison Lawyers

Level 19

Aurora Place

88 Phillip Street

SYDNEY

Refreshments will be served at the conclusion of the seminars.

Cost: Each seminar - \$20 per person. Seminar series (all three) - \$45 per person.

MCLE points apply.

**Please photocopy and use the following registration form**

### Registration for 2008 Seminar Series

First Name:

Surname:

Organisation:

Address:

Post code:

DX:

Email:

Work Phone No.

Name(s) of any additional guests and the date(s) on which they will attend:

**I/We would like to attend**

(please indicate number of tickets below):

All three seminars

Federal Government Freedom of Information  
22 May 2008.

Administrative Law: Musings from the Bench  
26 June 2008.

Recent developments in the Administrative Appeals  
Tribunal 24 July 2008.

Please send the completed registration form with cheque enclosed, made payable to 'AIAL NSW Chapter', to:

AIAL NSW Chapter

C/- P A Madafiglio

Minter Ellison

DX 117 SYDNEY

GPO Box 521 SYDNEY NSW 2001

Tel: (02) 9921 4038 Fax: (02) 9921 8123



## Professor James Raymond Decision Writing Workshops 2008

As outlined in the last edition of COATNEWS, the COAT NSW Chapter has been co-ordinating decision writing workshops presented by Professor Jim Raymond, for a number of years. Professor Raymond requires no introduction to judges, magistrates and tribunal members in Australia. His methods are recognized and embraced in many countries, and he has quietly revolutionised the way in which judicial judgments and tribunal decisions are written.

The impact of Professor Raymond's teaching is immediate and dramatic. No tribunal member who is required to produce well written decisions can afford to forego the opportunity to participate in one of these Workshops.

Professor Raymond will conduct two workshops in 2008, for the COAT NSW Chapter. The dates set aside for the workshops are 15 & 16 September and 18 & 19 September 2008. The venue as usual, will be the Judicial Commission of NSW.

Applications have been invited, with COAT NSW Chapter members being given first preference. The Workshops will be advertised more widely in May 2008. Any member or other person who wishes to register is invited to do so by contacting me as soon as possible by email at [gary.byron@wcc.nsw.gov.au](mailto:gary.byron@wcc.nsw.gov.au) The workshops each consist of 14 places, so the maximum number that can be accommodated is 28 participants. We have half of that number, already. If you are interested I urge you to register now!

**Gary Byron**  
Vice Convenor

## Coat NSW Chapter Committee Current Membership

Judge Kevin O'Connor AM, President, Administrative Decisions 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  
Suellen Bullock, Director (NSW & ACT), Social Security Appeals Tribunal  
Magistrate Nancy Hennessy, Deputy President Administrative Decisions Tribunal  
Robert Quickenden, Barrister and part-time Assessor, Claims Assessment and Resolution Service  
Diane Robinson, President, Guardianship Tribunal

### Annual Conference Sub-committee

Narelle Bell  
Bob Quickenden  
Gary Byron

### COATNEWS Sub-committee

Suellen Bullock  
Belinda Cassidy  
Gary Byron

### Education & Training Sub-committee

Judge Kevin O'Connor  
Nancy Hennessy  
Diane Robinson

### Membership Matters and Inquiries

Belinda Cassidy

### Professor James Raymond Decision-writing Workshops Facilitator

Gary Byron

Australian Institute of Administrative Law NSW Chapter Liaison  
Gary Byron