



## Convenor's Corner

I wish all members well for the festive season.

The NSW Chapter of COAT has had, I think, a productive year. We have now settled into a pattern that is set around two major public events – the annual conference held in May and the Whitmore Lecture and Annual General Meeting held in September. This year, again, we had a full house at the annual conference, with a number of outstanding speakers and topics of direct relevance to the work done in Tribunals. A date has been set for next year (22 May 2009) and I urge you to put this in your diary now.

The Whitmore Lecture on 17 September 2008 was well attended. An excellent address on the topic "The Tribunal Dilemma: Rigorous informality" was given by the President of the Commonwealth Administrative Appeals Tribunal, Justice Garry Downes. Justice Downes was able to bring to his presentation a close, personal experience of Harry Whitmore as a lecturer and mentor. As it was, Harry Whitmore had died only a few days before the event at the age of 84. A minute's silence was observed at the beginning of the Lecture. We have a commitment to deliver next year's lecture from the Commonwealth Ombudsman, John McMillan, who again like our first two occasional lecturers (Sir Anthony Mason and Justice Downes) is able to refer to a personal connection with Harry Whitmore, in John's case that of research assistant.

A third event has also been part of the calendar of COAT NSW in recent years – the workshops conducted by Professor Jim Raymond on Decision Writing. Two workshops were held in September. We must thank Gary Byron (now retired, formerly of the Workers Compensation Commission), Belinda Cassidy (Motor Accidents Claims Assessment & Resolution Service) and Narelle Bell (Commonwealth AAT) for the administrative load they have carried in helping to make the workshops such a success.

### Dealing with Unreasonable Behaviour

As foreshadowed in previous Newsletters, COAT NSW is undertaking a project to develop a training package for Tribunal members in communicating effectively with parties and others who behave unreasonably. We invited tenders. The successful tender was the team of Meredith Martin and Mary Ellen Burke. There is to be a second phase – the delivery of the package. A decision as to how and by whom the package will be delivered is yet to be made. We have written to all tribunal heads in New South Wales asking them for their assistance to and co-operation with the project team. We would expect to have the package finalised in the first part of 2009 with a view to the first training program using the package commencing mid- to late-2009.

### Annual Reports

It is annual report season again. I will provide a brief survey of some of them in the next Newsletter. The Annual Report for the Tribunal I head, the ADT, was tabled a few days ago. It marks the 10th Anniversary of the ADT (commenced 6 October 1998). It includes

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summary information in relation to the business with which it has dealt over the 10 years, and a nice set of colour photos!

### Your Chapter Sub-Committees

At the first meeting of the new Committee on 11 November, we formed the following sub-committees. Please contact anyone on these sub-committees if you have comments, queries or suggestions. We have included in the sub-committee structure some of our members who are not elected members of the Committee.

*Membership:* Belinda Cassidy, Kevin O'Connor, Joanne Muller

*Education and Training:* Nancy Hennessy, Suellen Bullock, Sue McIlhatton, Melanie Curtin, Marie Johns

*Annual Conference:* Robert Quickenden, Diane Robinson, Narelle Belle, Peter Clarke

*COAT Newsletter:* Belinda Cassidy, Diane Robinson, Sian Leathem

The first mentioned person is the convenor of the sub-committee.

### COAT National Training Activities

In November 2008 COAT National held a two day workshop in Melbourne on Leadership in Tribunals, with Justice Michael Barker, President, State Administrative Tribunal (WA) as the principal facilitator. The NSW attendees included Justice Brian Preston (L&E Court), Judge Greg Keating (WCC), Magistrate Nancy Hennessy (ADT), Kay Ransome, Nick Vrabac (CTTT), Diane Robinson, Malcolm Schyvens (Guardianship Tribunal), Bruce McCarthy (RRT). A conference of this kind was first held in New Zealand in December 2006.

COAT National is to hold a similar type of conference aimed at staff who work in Tribunal Registries in February 2009 in Melbourne. COAT National's Secretary, Doug Humphries (Registrar, AAT) is the contact. Information is available on the COAT web site.

Next year's joint AIJA/COAT National Tribunals Conference is to be held in Sydney on 4 and 5 June. There has been some criticism over the years of the standard and relevance of some of the papers and sessions presented at this Conference. I am on the planning committee and we are doing our best to address them. We received



in response to a call for papers for the 2009 conference some very interesting submissions. The draft program should issue to members early in the new year. The theme is likely to be 'Tribunal Craft: Being Fair, Being Quick, Being Inexpensive, Being Expert'. We have taken heed of suggestions made in feedback sheets from the 2008 conference. We are hoping to incorporate some specialist interest group streams into the conference program. The co-ordinator of the conference is Professor Greg Reinhardt of the AIJA, which is based in Melbourne.

### Merger Developments: Progress Report

On a theme which I canvassed in the last Newsletter and in various papers over the years – the creation and role of 'super tribunals' – there have been further developments in Queensland, the ACT and New Zealand.

Exposure draft legislation for the creation of the Queensland Civil and Administrative Tribunal (QCAT) is to be published in January 2009. The second stage report of the government's advisory panel was released in October 2008, and is available on the web site, [www.tribunalsreview.qld.gov.au](http://www.tribunalsreview.qld.gov.au). The declared start date is 1 December 2009. The Tribunal will have three divisions:

1. Human rights - dealing with discrimination, guardianship and child protection matters
2. Civil - resolving civil disputes between parties in a range of subject areas including disputes formerly dealt with by the Small Claims Tribunal
3. Administrative and disciplinary - dealing with appeals from a range of Government decisions and determining disciplinary matters in a range of occupations.

The Act establishing the ACT Civil and Administrative Tribunal passed in August 2008. I understand that ACAT (as it is to be known) will commence operation on 1 March 2009.

ACAT will have four divisions: Civil Disputes, Administrative Review, Occupational Discipline and a General Division. It consolidates the jurisdiction of 16 ACT tribunals including, in contrast to some of the configurations elsewhere, Guardianship, Mental Health and Residential Tenancies. The Occupational Discipline division is to include both professions (e.g. lawyers, doctors) and regulated occupations (motor vehicle dealers, taxi drivers).

In New Zealand the Ministry of Justice issued a Consultation Paper in July 2008 following on from the Law Reform Commission inquiry setting out the Government's Preferred Approach to Reform. Like all the major reports of recent years on this subject the influence of the UK's Leggatt Report (2001) is apparent, as is the positive perception of the performance of the first Antipodean 'super tribunal', the Victorian Civil and Administrative Tribunal. Under the NZ model, there is to be a Tribunals Service with three divisions – Inter-parties Disputes, Administrative Review and Occupational & Industry Regulation. As I understand it, existing tribunals will be co-located into these divisions rather than abolished, and there will be a Principal Judge for the Tribunals Service. This is closer to the

UK model than the preferred model in Australia. The future of these proposals is unclear following the recent change of government.

**Judge Kevin O'Connor**

**President, Administrative Decisions Tribunal Convenor, COAT**

### Report from National COAT

A very successful two day conference on tribunal leadership was held in Melbourne in late November. This was the second such conference, the first having been held in Rotorua, New Zealand in 2006.

The Melbourne conference was attended by about 40 tribunal heads and senior members with leadership responsibilities from around Australia and New Zealand. The conference was a mixture of plenary sessions and small group work in areas such as roles and responsibilities, leadership challenges, performance management and training.

The conference was a great opportunity for information sharing and demonstrated yet again the huge diversity in tribunals in Australasia.

A similar conference for tribunal registrars is to be held in Melbourne on 26-27 February. The aim of this conference is to provide an opportunity for tribunal managers and administrators to improve their effectiveness, share experiences and best practice.

Registration for the COAT Tribunal Registrars Leadership Conference closes on 6 February 2009. Further details are available on the COAT website.

Finally I would like to congratulate Doug Humphreys (Registrar AAT) upon his election as a Councillor of the Law Society of New South Wales for a three year period. Doug's responsibilities include being joint chair of the licensing committee, which deals with practising certificate matters; a member of the professional conduct committee for 2010 and the Chair of the Children's Law Specialist Accreditation Committee (this speciality is being offered in 2010).

**Kay Ransome**

**Chairperson, COAT (National)**

### Note Your Diary

- COAT Tribunals Registrars Leadership Conference, 26-27 February 2009, Melbourne
- Annual Conference – Friday 22 May 2009 at the Menzies Hotel Sydney
- 2009 COAT/AIJA Tribunals Conference, 4-5 June 2009, Sydney
- 3rd Whitmore Lecture & COAT NSW Chapter Annual General Meeting – Wednesday 16 September 2009 at the Australian Museum, College Street Sydney

In addition to these dates the Chapter will again sponsor Professor James Raymond's popular and successful decision writing seminars. The seminars will be held in September and/or early October 2009.



Dates will be advised soon. We are discussing with Professor Raymond the possibility of an advanced course for those who have already taken his introductory seminar and wish to take their writing skills to the next level. We welcome enquiries about the seminars and expressions of interest in or enthusiasm about an advanced seminar. These should be directed to Narelle Bell at [Narelle.Bell@aat.gov.au](mailto:Narelle.Bell@aat.gov.au).

## The NSW Guardianship Tribunal

The New South Wales Guardianship Tribunal exercises a protective jurisdiction for people with disabilities. Its purpose is to facilitate decision making for people who lack the capacity to make informed decisions and have no suitable informal assistance available to them. In most cases support from family and friends will be enough to help a person with a disability with decision making, however if informal arrangements break down or there is a legal barrier to decision making, the Tribunal can provide a legal solution as a last resort.

The Guardianship Tribunal has been safeguarding the rights and interests of some of the most vulnerable members of the New South Wales community for almost 20 years. In that time it has dealt with more than 40,000 applications. The Tribunal has its origins in the intellectual disability rights movement of the 1980s. When it began operations in 1989 the majority of the applications it received were about people with intellectual disability. Today, the ageing population is reflected in the Tribunal's client group statistics. Approximately 60% of applications are about people over the age of 65 and almost half the applications received are about people with dementia.

The Tribunal is an independent legal tribunal established under the Guardianship Act 1987. It also has jurisdiction under other legislation including the *Powers of Attorney Act 2003*.

### The Tribunal's jurisdiction

The majority of the orders made by the Tribunal are guardianship and financial management orders.

To make a guardianship order the Tribunal must be satisfied that:

- The person concerned has a disability that affects their capacity for personal decision making
- There is a current need for someone else to make personal decisions for them

To make a financial management order the Tribunal must be satisfied that:

- The person concerned is incapable of managing their finances
- There is a current need for someone else to manage their finances for them
- It is in the persons' best interests for an order to be made

Guardianship orders are made for limited periods of time and a guardian's decision making authority, or "functions", is determined by the needs of the individual person under guardianship. Not all

guardianship orders are the same. Some typical functions include accommodation, healthcare, medical and dental consent and services.

The Tribunal can appoint a private person usually a family member or friend, or the Public Guardian as a person's guardian. The Public Guardian is a statutory official who is appointed as the guardian of last resort.

Financial management orders are not time limited but the Tribunal may determine to review an order within a certain period. The Tribunal has considerable flexibility to make orders which suit the individual financial needs of the person with the disability.

The Tribunal can appoint either a private manager or a statutory official, the Protective Commissioner. A private manager is accountable to the Protective Commissioner and will receive directions as to the extent of their authority.

In addition to making guardianship and financial management orders, the Tribunal can also:

- Review the guardianship and financial management orders it makes
- Review enduring guardianship appointments
- Review enduring powers of attorney
- Provide consent to medical and dental treatment
- Approve a clinical trial as appropriate for the inclusion of people with disabilities
- Provide directions to guardians as to the exercise of their functions
- Recognise guardianship and financial management orders made under corresponding laws

### Tribunal members

The Tribunal has a full time President, Ms Diane Robinson and Deputy President, Mr Malcolm Schyvens and 84 part time Tribunal members.

In the majority of matters, the Tribunal is composed of three members, a legal member, a professional member and a community member. The legal member must be an Australian lawyer of at least 7 years' standing. The professional member must have experience in assessing or treating people with cognitive disabilities. The community member must have personal or professional experience with people with disabilities. The multi member, multi disciplinary system ensures that a breadth of experience and professional expertise is brought to bear in making decisions for people with disabilities.

The Tribunal's staff are divided into 5 business units; Client Information Services, Coordination and Investigation, Hearing Services, Executive Unit and Business Services and are lead by the Tribunal's Registrar, Ms Amanda Curtin.



The Registrar also exercises a range of quasi judicial functions under the Act.

Decisions of the Guardianship Tribunal can be appealed to the Administrative Decisions Tribunal and the Supreme Court.

For more information about the Guardianship Tribunal please visit our website at [www.gt.nsw.gov.au](http://www.gt.nsw.gov.au) or contact the Tribunal on 9556 7600.

**Diane Robinson**  
President, Guardianship Tribunal (NSW)  
Vice-Convenor, COAT

## National Registration of Health Care Professionals – When? How? What impact will it have on ‘Tribunal Land’?

### Introduction

At its meeting on 26 March 2008 the Council of Australian Governments (COAG) signed an Intergovernmental Agreement (IGA) on the health workforce. The agreement provides for a single registration and accreditation system of health professionals to be established in Australia. The IGA will have an impact on all health disciplinary tribunals (HDT) in Australia i.e. those exercising protective jurisdiction in relation to disciplinary action taken against health professionals.

### Current arrangements

Currently each state and territory is responsible for the registration, accreditation and regulation of various health professions. This has resulted in there being, for example, eight registration boards within Australia responsible for the registration of dentists one in each state/territory.

Each state/territory registration board maintains its own Register of practitioners and conduct disciplinary matters in its own particular fashion. Most boards have their own system of accreditation. Although there are significant areas of commonality between them (e.g. they require a person to be of good character), there are also significant differences (e.g. the availability of the honorific title ‘Dr’ for chiropractors registered in all states except NSW). These individual state/territory boards currently work co-operatively in many respects. There is also a degree of co-operation with other jurisdictions such as New Zealand and the United Kingdom.

### The IGA

Initially the IGA set out to encompass nine health professions – medical practitioners; nurses and midwives; pharmacists; physiotherapists; psychologists; osteopaths; chiropractors; optometrists; and dentists (including dental hygienists, dental prosthetists and dental therapists). Provision was made for other professions to come under this system over time. It is not surprising that the profession of Podiatry was hot on the heels of the original group and has already joined them and will be the tenth profession

to be covered by the new system. Various commencement dates have been floated. Currently national registration is set for 1 July 2010.

The Rationale for the new system has been summarised on the National Health Workforce Taskforce as follows:

*The new arrangement will help health professionals move around the country more easily, reduce red tape, provide greater safeguards for the public and promote a more flexible, responsive and sustainable health workforce. For example, the new scheme will maintain a public national register for each health profession that will ensure that a professional who has been banned from practising in one place is unable to practise elsewhere in Australia.*

The part of the IGA of particular relevance to HDTs is paragraph 2 of Attachment A to the IGA, entitled ‘THE STRUCTURE AND FUNCTION OF THE SCHEME’ which provides (Emphasis added):

*2.1 The hearing of serious disciplinary matters (those which may result in suspension or cancellation of registration) will be undertaken by an entity external to the agency, which will also be responsible for the hearing of appeals against less serious disciplinary matters where internal review has not resolved the matter.*

*2.2 It will be the responsibility of each State and Territory to determine which entity in their particular jurisdiction (in accordance with national criteria agreed by AHMC) will be responsible for the hearing of these matters.*

*2.3 However, to ensure national consistency, the legislation to establish the national scheme will specify common processes, findings and determinations that can be made.*

*2.4 Access to the courts will be available as under current arrangements.*

### How is it intended that national registration will be achieved?

The process essentially requires the adoption of model legislation in each state/territory to replace current arrangements. Considerable consultation is being undertaken to achieve each aspect of the IGA. The Ministerial Statement issued by the Australian Health Ministers’ Conference on 4 September 2008 included the following:

*Ministers will use as their guiding principles in developing the legislation and the scheme that the safety of the public is paramount, that high quality health care must be protected and advanced and that governments should be accountable and processes transparent. The implementation arrangements and the new scheme itself are designed to ensure consultation on key matters.*

With respect to HDTs, consultation is focused on achieving the aims by specifying common processes, findings and determinations that can be made by a HDT. Given the diversity of the professions and



the current state/territory arrangements this is, has been and no doubt will continue to be an interesting process. There is a need for the new arrangements to 'fit into' the 'Super Tribunal' structures, a need for parity in the application of the model legislation, a need for the process to function with respect to both 'high population' jurisdictions and 'low population' jurisdictions.

### New South Wales

Serious disciplinary matters i.e. professional misconduct, questions of fitness to practice on the basis of impairment and/or by virtue of criminal conviction and questions of good character are all currently dealt with by the relevant tribunal in NSW. These tribunals are profession specific and have been created by a separate statute in relation to each of the health professions. In NSW these are the same 10 professions to be included by the IGA as listed above. Over the last 20 or so years, there has been a progression away from serious disciplinary matters being dealt with by way of processes such as inquiries by delegates of the Minister or by the relevant Board holding an inquiry, towards inquiries by these 'external' tribunals.

The first two professions to have a tribunal established in New South Wales were in medicine and nursing. This occurred more than 15 years ago. The most recent tribunal established was the Pharmacy Tribunal which commenced operation this year. NSW has ensured parity between the various tribunals by enacting what is essentially model legislation in the various acts that cover each profession. This has been supported in many instances by the appointment of the legal chairpersons and lay members from a small pool. Expertise required of these members extends to an understanding of protective jurisdictions, not just general tribunal experience.

Although the reason for the movement to external tribunals in NSW may have its genesis in the Chelmsford Inquiry, it has also achieved benchmarks of a truly developed and fair process by ensuring transparency, independence from the relevant board and, for the most part, has provided a balanced representative and independent tribunal membership. These structures have provided an effective and efficient process for dealing with serious matters of considerable public interest.

The professional members of each tribunal are, of course profession specific. They must come from a wide and independent pool and are essential to the proper operation of a profession related disciplinary tribunal. An understanding of the health system is also essential for all members of these tribunals. Without these basic tools and total independence from any organisation or professional agenda, these tribunals would not operate optimally.

If consideration of the rate of appeal from decisions of the Nurses and Midwives Tribunal of NSW and the Psychologists Tribunal of NSW are indicative, then the right structure and processes have been achieved in NSW.

NSW has currently in place structures that would satisfy the IGA agreement with respect to 'external tribunals'. NSW also has the process of appeals to a court in place as all current legislation

provides for appeals from decisions of the relevant tribunals to the Supreme Court of NSW.

### Other States/Territories

Some of the other states and territories already have (or will shortly have in the case of Queensland and the Australian Capital Territory) what is commonly known as a 'super tribunal' which will form the external tribunal for the purpose of the new arrangements. There are two states which do not have external tribunals for the majority of the health professions. Those states are currently considering how best to create new 'external tribunals'. They also face the difficulties associated with having extremely small 'populations' of health professionals to achieve the high standards the IGA obviously intends.

### Conclusion

All I can say at this stage is watch this space. I will keep you informed of the progress of National Registration in future editions of this newsletter

Joanne Muller

Chairperson:	Dental Tribunal NSW Psychologists Tribunal NSW Physiotherapists Tribunal NSW Optometrists Tribunal NSW Podiatrists Tribunal NSW Osteopaths Tribunal NSW
Deputy Chairperson:	Nurses and Midwives Tribunal NSW Chiropractors Tribunal NSW Pharmacy Tribunal NSW
Member	Medical Tribunal NSW

## Case Notes on bias in the courtroom

### Abraham as Tutor for Abraham v St Marks Orthodox Coptic College (No 4) [2008] NSWSC 1031 Rothman J

*Facts:* The plaintiff, Christopher Abraham, sustained brain injury when he was nine (9) years old, after falling from a Balustrade at St. Mark's Orthodox Coptic College. The Supreme Court proceedings were split so that liability was determined while the matter was still relatively fresh in witnesses' minds, but the assessment of damages was to be put off until a later time when the injuries and their effect were better understood.

*Case Progression:* On 24 October 2006, the Court determined liability. The plaintiff's father gave evidence that when he dropped his son at the College, the gate was open and his son walked through it into the College. This was contradictory to the evidence of the former Deputy Principal of the College who said that the pedestrian gate was, or should have been, closed. All witnesses,

except for the Deputy Principal stated that students would play ball games on the grassed area of the College.

The College submitted that because the plaintiff's father had a direct or indirect interest in the proceedings, he should not be believed. The Court rejected this submission on the basis that there was no reason to accept it.

Rothman J thought that the Deputy Principal's view was coloured by what he thought was happening, and what should have happened based on the instructions that were given to both students and teachers. On the other hand, Rothman J stated the following in relation to the credit of the plaintiff's father:

*The most significant witness in the proceedings, and the cross-defendant, is the father, Mr Boshra Abraham. His manner and demeanour displayed a remarkable integrity. He gave the impression that great effort was taken to ensure as accurate an answer as possible. It also became clear that he was a person with an extraordinary regard for authority and the importance of complying strictly with the law and directions. He also expected others to behave in like manner. I accept his evidence without qualification. [paragraph 47 of the liability judgment].*

Damages were to be determined on 30 June 2008, however on 6 June 2008 that date was vacated as the plaintiff's injuries still had not stabilised (although the plaintiff was now 17). Also on 6 June, the College made an application for Rothman J to recuse himself from further hearing of the matter on the basis of apprehended bias.

In Rothman J's words, the College alleged that as a result of the judgment in the liability proceedings, "there is an apprehension of pre-judgment of an issue that may arise. Strictly, this is more like actual than apprehended bias".

*In other words, there is no suggestion, as I understand it, of any apprehension of bias (partiality) that gave rise to the statement in the liability judgment. There is an apprehension that, to the extent that the credit of Mr Abraham is an issue in the assessment of damage, I would, to be consistent with my earlier statement (or to find consistently with my earlier view), consider Mr Abraham to be truthful [at paragraph 21]*

*Principles:* Rothman J quoted Livesey v New South Wales Bar Association [1983] HCA 17; saying that

*The general principle is that a judge should not hear a case if, in all the circumstances, the parties, or the public if properly informed of the procedure and circumstances, might entertain a reasonable apprehension that the judge might not bring an impartial or unprejudiced mind to the resolution of the issues to be heard and determined [at paragraph 14].*

Rothman J also noted the following general principles:

- Ensuring independent assessment and impartiality, both in fact and appearance, is the reason that rules on bias and apprehended bias exist *ANI v Spedley* (1992) 26 MSWLR 411 at 418
- Due to their experience and training, Judges are capable of

examining the case with a detached mind *Re The Queen and His Honour Judge Leckie; Ex parte Felman* (1977) 52 ALJR 155 at 160.

- Judges should not be quick to acquiesce to applications for disqualifications as it may allow litigants to effectively influence the choice of judge in their own cause *Re JRL; Ex parte CJL* (1986) 161 CLR 342 at 352;
- Judges should resist being driven from their courts by the conduct or assertion of parties, including assertions of actual or imputed bias: see *Raybos Australia Pty Ltd v Tectran Corporation Pty Ltd [No 4]* (1986) 6 NSWLR 674 at 689;
- Preliminary views expressed by Judges, although expressed with vigour, should not necessitate disqualification *Galea v Galea* (1990) 19 NSWLR 263 at 278f.

Rothman J referred to the High Court case of *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63 at 345 where Gleeson CJ, McHugh, Gummow and Hayne JJ listed the requirements for an application of apprehended bias:

*Its application requires two steps. First, it requires the identification of what it is said might lead a judge (or juror) to decide a case other than on its legal and factual merits. The second step is no less important. There must be an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits. The bare assertion that a judge (or juror) has an 'interest' in litigation, or an interest in a party to it, will be of no assistance until the nature of the interest, and the asserted connection with the possibility of departure from impartial decision making, is articulated. Only then can the reasonableness of the asserted apprehension of bias be assessed [at paragraph 21].*

*Findings:* Rothman J stated that any evidence of the plaintiff's father that would be adduced in the assessment for damages proceedings would be unlikely to be a central or determining issue and that "any challenge to it will concern the objectivity and reliability of his opinion and perception, not the truth or falsity of the existence of provable facts".

His Honour commented that the positive finding of credit of the plaintiff's father was made impartially on the evidence, part way through the proceeding, and thus a fair minded observer would be unlikely to think that further evidence in the proceedings, given by the same witness would not be judged impartially.

Therefore, while Rothman J noted that there was no "'necessity' or 'extraordinary or special circumstances' requiring him to sit", he rejected the application for disqualification.

### **Hamod v State of New South Wales (No 11) [2008] NSWSC 967 – Harrison J**

*Facts:* The plaintiffs made an oral application to the court for Harrison J to disqualify himself from hearing the matter further on the basis of apprehended bias. To support their claim, the plaintiffs submitted that His Honour had determined a number of interlocutory matters against them during the course of the case;



had done the plaintiffs 'a considerable disservice' by hearing an application over three days when His Honour had stated early in the proceedings that the application was "doomed to fail"; and had unfairly terminated the cross-examination of the plaintiffs' former solicitor.

*General Principles relating to bias:* In considering the law as it relates to apprehended bias, Harrison J stated that a judge should not hear a case if it may be reasonably apprehended by a lay observer that the proceedings would not be resolved by an impartial judicial mind [*Vakautu v Kelly* [1989] HCA 44]. However, His Honour stated that the criteria of "reasonable apprehension" should not be reduced to mere consideration of whether it would be better for someone else to hear the matter and that in order for a judge to disqualify himself or herself from the proceedings, the applicant must "firmly establish" a reasonable apprehension of bias [at paragraph 2].

Harrison J cited examples in *Re JRL; Ex Parte CJL* [1986] HCA 39 of what could or could not constitute reasonable apprehension;

*The "reasonable apprehension" criterion means that neither an expectation about the way the judge is likely to decide the case, nor an express allegation of bias, is necessarily sufficient to generate a reasonable apprehension of partiality [at paragraph 2]*

His Honour went on to add that a 'judge ought not to disqualify himself or herself except for a proper reason' [*Raybos Australia Pty Ltd v Tectran Corporation Pty Ltd* (1986) 6 NSWLR 272].

Harrison J highlighted the "obvious artificiality in the procedure", which was that "the party challenging [his] suitability for continuing the proceedings is subject to a decision from the very person whose independence and impartiality he seeks to impugn". [at paragraph 8].

*Decision:* In relation to the plaintiffs' assertions that His Honour had made numerous interlocutory findings against them, which demonstrated a lack of impartiality, Harrison J said that "an adverse decision is not of itself any support, viewed objectively, for the proposition that the decision maker has not brought an independent mind to the decision" [paragraph 9].

When addressing the plaintiff's submission that he had done a disservice to the plaintiff, His Honour noted that having reviewed the transcript and his reasons for judgment, there was no reference made to the application being doomed from the start and that the way the application was heard 'would in all likelihood satisfy the concerns of the impartial lay observer' [at paragraph 11].

Harrison J reminded the plaintiff that the termination of the cross examination of the plaintiffs' former solicitor occurred because His Honour was not of the view that the line of questioning undertaken by the plaintiffs had any relevance to the issues [at paragraph 12].

Finally, Harrison J noted that for much of the proceedings the plaintiffs had been unrepresented by counsel or a solicitor and that "an impartial observer would have seen considerable latitude extended to the plaintiffs in many respects". [at paragraph 17].

His Honour therefore dismissed the plaintiff's application stating

that 'the hypothetical fair minded lay observer' would not have thought that he had not brought, or would not bring, an impartial mind to resolve the case.

**Stephanie Cameron**

**For Belinda Cassidy**

**Principal Claims Assessor, Claims Assessment & Resolution  
Service Secretary, COAT**

## Salute to Gary Byron

Gary Byron recently retired from his position as Deputy President of the Workers Compensation Commission and as most of you know he did not seek re-election to the COAT NSW Chapter Committee. Gary has been a member of the Committee since its inception first as Secretary and later as Vice-Convenor. A retirement function was held for him on 14 November 2008 which was attended by a who's who of COAT not to mention the Courts, Tribunals, Politicians and other luminaries. Below is an extract from Justice Terry Sheahan's notes. Justice Sheahan was the founding President of the Workers Compensation Commission.

*Tonight we gather in large numbers to salute Gary Byron as he leaves full-time work in the public sector after just under 50 years continuous service.*

*And we all know that "service" is very much the operative word in Gary's case.*

*On behalf of our organising committee – Greg Keating, Trevor Haines, Dave Lennon, Gabriel Fleming, Melanie Curtin, Marie Johns, and myself – I welcome you all here and thank you for joining us.*

*The Committee has worked well to make tonight an enjoyable success, but we especially thank:*

- (1) Gary's partner Kay Cox,*
- (2) Alison Lee from the WCC Presidential Unit, and*
- (3) Angie and the staff of Sky Phoenix for their special assistance.*

*Our formalities will be brief.*

*After a few acknowledgements and apologies I will ask three special people to speak briefly on our behalf, that legendary legal bureaucrat, Trevor Haines, the doyen of the nation's court administrators, Richard Foster, and Mark Byron one of Gary's four high-achieving sons.*

*We can then drink to Gary's health and happiness.*

*After Gary responds I'll hand him a package containing a handsome David Jones "gift card", to which you have all contributed substantially.*

*In terms of acknowledgements, while you are all distinguished guests – distinguished mainly by your association with Gary – I want to especially welcome:*



- The Minister for Health, who in an earlier portfolio established the WCC – Hon John Della Bosca MLC
- The Hon Justice Michael Kirby of the High Court of Australia
- The Hon retired Justice Neil Buckley from Queensland, and retired South Australian District Court Judge Brian Greaves, who have both come to Sydney for this occasion. I hope I have identified all who have come so far, but we thank all who have travelled.

I also welcome three former NSW Cabinet Ministers

- Hon John Hannaford
- Hon Ron Mulock
- Hon Ron Dyer

Ron Dyer, another former Minister, Peter Anderson and Gary all worked on Ron Mulock's personal staff in the 70's and Gary was John Hannaford's department head in the 1990's.

We have received many apologies, and a few of the "big names" who took that trouble should be mentioned – Murray Gleeson, Trevor Olsson, Cathy Branson, John Clarke, Garry Downes, Graham Henson, Peter Anderson, Jim Staunton, and Bill Robinson.

A few people who can't be with us sent Gary or the Committee particularly special messages of goodwill, apart from their apologies, and I think it only fitting that I should quickly read a couple:

- David Malcolm, former Chief Justice of WA
- Helen Walker, inaugural Registrar of the WCC
- Dennis Mahoney, former President of the NSW Court of Appeal and the AIJA

No doubt each of you has something special you'd like to say, or would like to hear said to Gary this evening, so Anne, Mark, Melanie and Marie are in charge of a Tribute Book. Please make sure you write your message in that book before you leave this evening.

Let me say how honoured I am to "MC" this event.

Gary's and my paths have crossed, and almost crossed, many times over the last 30 years, but when I look back over all the remarkable people I have encountered and worked with, and the treasured friendships and experiences I have enjoyed:

- (1) Gary Byron,
- (2) our time together in major public sector reform at the WCC 2001–2007, and
- (3) the personal bond of friendship it engendered between us, will figure very prominently.

He was the perfect deputy, colleague, and buddy.

Gary, I salute:

- (1) what you have done in your lifetime,
- (2) the lustre you have added to our nation's public life, and some of its great institutions, by the way you have done it, and
- (3) the wonderful human being that all that service has made of you.

Mate, you are a "one off".

## COAT NSW Chapter Committee Current Membership

Convenor	Judge Kevin O'Connor AM, President, Administrative Decisions Tribunal
Vice Convenor	Diane Robinson, President, Guardianship Tribunal
Secretary	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 member	Narelle Bell, Senior Member, Administrative Appeals Tribunal
Committee member	Suellen Bullock, Director (NSW & ACT), Social Security Appeals Tribunal
Committee member	Magistrate Nancy Hennessy, Deputy president Administrative Decisions Tribunal
Committee member	Robert Quickenden, Barrister and part-time Assessor, Motor Accidents Claims Assessment and Resolution Service
Committee member	Sian Leatham, Registrar, Workers Compensation Commissions